Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000029-001 DT 04/10/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA SETH W PETERSON

v.

CHAD DAVID GREWE (001) JESSE SQUIER

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–751–TR–2011–006936.

Defendant-Appellant Chad David Grewe (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the officer failed to advise him of the right to arrange for his own additional (independent) blood test. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 18, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2), and driving under the extreme influence, A.R.S. § 28–1382(A)(1). On July 26, 2011, Defendant filed a Motion To Dismiss alleging the officer failed to advise him of the right to arrange for his own additional (independent) blood test.

At the hearing on Defendant's motion, Detective Sean Twitchell testified he was operating a sobriety checkpoint on North Scottsdale Road, stopping all southbound traffic. (R.T. of Oct. 5, 2011, at 4–5.) At 1:25 a.m. on March 18, Defendant pulled into Detective Twitchell's position. (*Id*. at 5, 11.) At 1:30 a.m., Detective Twitchell contacted Defendant and asked him if he had anything to drink that evening, and Defendant said he had a couple of drinks. (*Id*. at 6.) Detective Twitchell could smell the odor of alcohol on Defendant's breath, and saw he had watery and bloodshot eyes, so at 1:35 a.m., Detective Twitchell placed him under arrest. (*Id*. at 6–7, 12, 16.) At 1:40 a.m., Detective Twitchell read to Defendant the Implied Consent/Admin Per Se Admonition, and Defendant agreed to take a blood test. (*Id*. at 6, 7, 12, 15.) At 1:45 a.m., Defendant's blood was taken, and at 2:00 a.m., he was told the police had taken a second tube of his blood and that second sample would be available for him to test. (*Id*. at 8, 9, 14.) No one told Defendant of the right to arrange for an additional blood test. (*Id*. at 9, 14.) At 2:30 a.m., Defendant was released to a taxicab. (*Id*. at 12–13.) Detective Twitchell testified Defendant never asked to talk to an attorney, and never asked to take an additional blood test. (*Id*. at 9, 13.)

After the testimony, the attorneys made their argument to the trial court. (R.T. of Oct. 5, 2011, at 17, 19, 22.) The trial court found case law did not require a suspect be told of the right to an additional blood test, and therefore denied Defendant's Motion To Dismiss. (*Id*. at 25–26.) Defendant then submitted the matter on the record. (*Id*. at 27.) That included a stipulation that Defendant's BAC was over 0.150 at the time of the blood draw. The Scottsdale Police Department Crime Laboratory Report showed Defendant has a BAC of 0.195. The trial court found Defendant guilty of all three DUI charges. (*Id*. at 30.) The trial court then imposed sentence. (*Id*. at 31–32.) On that same date, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT CORRECTLY FIND THE LAW DID NOT REQUIRE THE OFFICERS TO ADVISE DEFENDANT OF THE RIGHT TO ARRANGE FOR AN ADDITIONAL BLOOD TEST.

Defendant contends the officers were required to advise him of the right to arrange for an additional blood test, and thus the trial court abused its discretion in denying his motion to dismiss. The Arizona statute provides as follows:

> The person tested [pursuant to § 28–1321] shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

§ 28–1388(C). Numerous cases have held, when the police choose to invoke the implied consent statute and thus take a sample of the suspect's blood, the police are not required to inform the suspect of the right to arrange for an additional blood test:

> We have consistently held that police are not obliged to inform DUI suspects of their right to independent testing. *See, e.g., Miller*; *Ramos*; *White*.

State v. Superior Court (Norris), 179 Ariz. 343, 345, 878 P.2d 1381, 1383 (Ct. App. 1994).

> Defendant also argues that the trial court should have dismissed the charge against him because the officers did not advise him of his right to an independent blood alcohol test. We conclude that the officers were not required to inform defendant of his right to an independent test under the circumstances of this case.

State v. Vannoy, 177 Ariz. 206, 209, 866 P.2d 874, 877 (Ct. App. 1993).

> [D]ue process does not require that a suspect be advised of his right to an independent test where the state has invoked the implied consent law.

State v. Miller, 161 Ariz. 468, 470, 778 P.2d 1364, 1366 (Ct. App. 1989).

> Defendant's next argument is that the police were required to inform defendant of his right to an independent blood test. We disagree. This court has recently held that there is no such requirement.

State v. White, 155 Ariz. 452, 455, 747 P.2d 613, 616 (Ct. App. 1987).

> Ramos was not advised of his right to obtain an independent test. The statute, however, contains no requirement that such advice be given.

State v. Ramos, 155 Ariz. 153, 155, 745 P.2d 601, 603 (Ct. App. 1987). In the present case, the officers invoked the implied consent statute and took a sample of Defendant's blood. The officers therefore were not required to inform Defendant of the right to arrange for an additional blood test.

For authority, Defendant cites *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986); and *State v. Olquin*, 216 Ariz. 250, 165 P.3d 228 (Ct. App. 2007). In *Montano*, the court held as follows:

> While the state normally has no obligation to aid a suspect in gathering potentially exculpatory evidence, the unique evidentiary circumstances attendant to DWI arrests justify a narrow exception. The Due Process clause of the Arizona Constitution guarantees to DWI suspects "a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available." Where, as here, the only objective evidence is inherently evanescent, is virtually dispositive of guilt or innocence, and collecting the evidence places only a slight burden upon the state, due process requires that a suspect be informed of his right to gather the evidence prior to its dissipation.
>
> Our decision that DWI suspects must be informed of their right to an independent chemical alcohol test at their own expense *when the state chooses not to invoke the implied consent statute* is a logical step in the evolution of DWI cases. As an examination of the relevant case law reveals, the tenor of our past decisions has been that suspects must be afforded meaningful access to objective scientific evidence of sobriety.

Montano, 149 Ariz. at 389, 719 P.2d at 275 (emphasis added). As noted in the emphasized portion of the quote above, the requirement of advising a suspect of the right to obtain an independent test arises only when "the state chooses not to invoke the implied consent statute." This unique result represents an exception to the general rule and has been consistently limited to its facts in subsequent cases. *Norris*, 179 Ariz. at 345, 878 P.2d at 1383 ("*Montano*, however, involved a unique situation where the arresting officers did not have access to a breathalyzer and did not invoke implied consent."); *Vannoy*, 177 Ariz. at 209, 866 P.2d at 877 ("In *Montano*, the court held that when the state charges a person with driving under the influence of alcohol (DUI), but chooses not to ask the person to submit to a blood alcohol test in accordance with the implied consent law, it must inform the person of his right to obtain an independent test."); *Miller*, 161 Ariz. at 470, 778 P.2d at 1366 ("We agree with Division One that *Montano* is limited to its partic-

ular facts, and that due process does not require that a suspect be advised of his right to an independent test where the state has invoked the implied consent law."); *Ramos*, 155 Ariz. at 155, 745 P.2d at 603 ("Absent the unique conditions in *Montano* no Arizona court has ever held that a DWI suspect must be told of his right to an independent test."). Because the state chooses to invoke the implied consent statute, *Montano* does not apply.

Defendant cites *State v. Olquin*, 216 Ariz. 250, 165 P.3d 228 (Ct. App. 2007), where the defendant was given a breath test on an Intoxilyzer. The defendant spoke only Spanish, so the officer had defendant read departmental forms with the *Miranda* warnings, the Admin Per Se/ Implied Consent Affidavit, and the independent blood alcohol advisory printed in Spanish. On appeal, the defendant contended he was not properly advised because he could not read Spanish, and thus contended the officer should have given him the warnings and advisories orally. The court held the trial court properly denied the defendant's motion to suppress because the defendant never made any claim with the officer that he was unable to read. *Olquin* at ¶¶ 12–16.

In *Olquin*, the court did state, "Due process requires the police inform a DUI suspect of the right to obtain an independent blood alcohol test," and cited to *Montano*. *Olquin* at ¶ 11. This Court finds that language is not controlling for three reasons. First, the court did not address the fact *Montano* said "DWI suspects must be informed of their right to an independent chemical alcohol test at their own expense when the state chooses not to invoke the implied consent statute." Second, because the issue in *Olquin* was whether the advisories could be in writing or had to be oral, any discussion about due process requiring certain advisories would be dicta. And third, *Olquin* was a breath test case while the present case is a blood test case, and the Arizona Supreme Court has stated, "We believe that legitimate distinctions exist between breath testing and blood testing and, therefore, that the rule for breath testing cases need not be extended to blood testing cases." *State v. Kemp*, 168 Ariz. 334, 336, 813 P.2d 315, 317 (1991).

III. CONCLUSION.

Based on the foregoing, this Court concludes the officers were not required to advise Defendant of the right to arrange for an additional blood test, thus the trial court correctly denied Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT