

2019 ADVANCED DUI TRIAL ADVOCACY

September 9 - 12, 2019
Phoenix, Arizona



DISCOVERY FOR DUI CASES

Presented by:

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ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. SEAN E BREARCLIFFE

CASE NO. C20170184

DATE: April 21, 2017

STATE OF ARIZONA
Plaintiff,

vs.

PAUL SIMON
Defendant

RAVI KUMAR TOLETY
Real Party in Interest

UNDER ADVISEMENT RULING

By this Special Action, the State is asking this Court to vacate a disclosure order by the Trial Court issued by its granting of the "Defendant's Demand for Disclosure Related to Blood Alcohol Testing" (hereafter "Motion") The Court's Order, dated November 3, 2016, granting the Motion compelled the State to disclose to the Defendant all individual chromatograms from the "run" that included the Defendant's – that is, some 78 duplicate chromatograms (of 39 subjects) analyzed during the same day that Defendant's was analyzed. The State argues that the Defendant failed to show substantial need for the information.

The relevant disclosure Rule is 15.1:

Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

Ariz. R. Crim. P. 15.1

In such a disclosure dispute, the state has no equally plain, speedy, or adequate remedy by appeal, and therefore special action is appropriate. *State v. Bernini*, 222 Ariz. 607, 609 (App. 2009). "Although the sufficiency of a showing of substantial need may vary from case to case, a court's application of the relevant standard is a legal issue, and questions of law are appropriately reviewed by special action. And, '[a]lthough a

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UNDER ADVISEMENT RULING

trial court is in the best position to rule on discovery requests, it ‘abuses its discretion when it misapplies the law or predicates its decision upon irrational bases.’” *Id.*, at 610–11 (internal citations omitted).

The Trial Court did not hold an evidentiary hearing on the Motion, but instead proceeded by avowal of counsel; neither party demanded an evidentiary hearing.

The Defendant argued that because the State’s laboratory examines the entirety of the “run” – that is, the results of each sample tested contemporaneously with the Defendant’s – to “quality control” the tests to determine the “validity of the run,” that the Defendant must be given access to the same information. This is to, for want of a better phrase, check the lab’s work. The Defendant made a sufficient showing that it cannot obtain the substantial equivalent of the information, but it is also self-evident. The defense, even if it could obtain the samples of the other 38 subjects tested in the run, it could not re-create the environment of the run. Nonetheless, the defense did not proffer, and the Trial Court did not demand, evidence that the “validity” of the entire run is of any relevance to the accuracy of the Defendant’s chromatogram. Even if, in an examination of the entire run of blood analyses, it were determined that the quality control criteria of the crime lab was not met as to the entire run, there was no argument, evidence, or expert opinion (or even avowal) that it would make any difference as to the accuracy of the Defendant’s chromatogram.

Nowhere in the Defendant’s presentation to the Court did the Defendant assert that the State’s criminalist relied on the “validity” of the entire run in evaluating the accuracy of the Defendant’s chromatogram. Indeed, the State’s avowal, appeared to indicate the opposite (“[W]hen the expert is creating the report for the Defendant’s case, they do look at the controls and the calibrators in the Defendant’s specific chromatograms. They’re not looking at the other chromatograms of the other 78 vials that were tested.” Appendix at p. 21.) The Defendant argues that the quality control of the crime lab relies on the entire run, but nowhere shows that whether or not the quality control standards are met is relevant to the reliability of a given sample.

Before the trial court should order the disclosure of the entirety of the blood run, the Defendant should come forward with either: (1) testimony from the State’s criminalist that the reliability of the entire run is relevant to his expert opinion as to the reliability of the Defendant’s chromatogram; or (2) independent expert testimony that failure of the run as a whole to meet quality control standards of the crime lab affects the reliability of the individual chromatograms. Absent one or the other, or something equivalent, the Defendant has failed to demonstrate the relevance of the run results, and, absent relevance, there can be no showing of substantial need. *See State v. Fields*, 196 Ariz. 580, 582-583 (App. 1999)(“Information is not discoverable unless it could lead to admissible evidence or would be admissible itself.” . . . “[I]n the absence of any showing of need or any actual dispute as to the correctness of the test results, the defendants' motion to inspect the Crime Lab can only be viewed as an attempted “fishing expedition,” which the rules do not permit.”)

For the foregoing reasons, this Court accepts jurisdiction of this Special Action, and grants review.

IT IS ORDERED that the trial court's November 3, 2016, Order granting the Defendant's Demand for Disclosure is reversed.

IT IS FURTHER ORDERED that this matter is remanded to the trial court for further proceedings in accord with this order.

Lynne Booth

Judicial Administrative Assistant

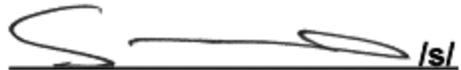
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IT IS FURTHER ORDERED that the Stay in this matter issued by this Court is lifted.


HON. SEAN E. BREARCLIFFE
(ID: 33e4440e-cf1c-483a-833f-1ee2669ab98f)

cc: Hon. Paul S. Simon
Nicolette Kneup, Esq.
Ryan T Bleau, Esq.
Pima County Consolidated Justice Courts-Appeals (Case/Docket#CR15-516212-DU)

Lynne Booth
Judicial Administrative Assistant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2009-000765-001 DT

05/17/2010

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
T. Melius
Deputy

STATE OF ARIZONA

ANDREW M DAVIDSON

v.

MELISSA SUE HARRIGAN (001)

W CLIFFORD GIRARD JR.

REMAND DESK-LCA-CCC
TEMPE CITY COURT

RECORD APPEAL RULE / REMAND

Lower Court Case Number 08-132014-3.

Defendant-Appellant Melissa Sue Harrigan (Defendant) was convicted in Tempe Municipal Court of driving under the influence. Defendant contends the trial court erred in denying her motion to have the State disclose information stored in the memory of the Intoxilyzer 8000 machine. For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On July 6, 2008, at approximately 1:55 a.m., Officer Evans saw a vehicle driving south at a high rate of speed. He saw the vehicle drive over the median and into the oncoming lane, collide with an oncoming car, continue to travel south, strike the curb, and come to a stop. Defendant was the driver of the vehicle. When Officer Evans contacted Defendant, he saw she had bloodshot, watery eyes, and that she appeared stuporous. Officer Evans arrested Defendant and cited her for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, § 28-1382(A); failure to avoid a collision, § 28-701(A); failure to drive on the right side of the road, § 28-701(A); driving across a median, § 28-731; driving on a suspended license, § 28-3473(C); and no proof of insurance, § 28-4135(B). Officer Evans transported her to the Tempe DUI van where he gave her a breath test on an Intoxilyzer 8000 machine. Defendant was advised of her right to an independent test, and was cited and released approximately 20 minutes after completion of the breath testing.

Defendant filed a Motion for Production of Intox Data From Machine Memory, asking the trial court to order the State to produce information stored in the memory of the Intoxilyzer 8000 machine used to test her. On December 1, 2008, the trial court held an evidentiary hearing, at which time Mark Stoltman testified for Defendant and Jeffrey Kendall testified for the State. The trial court took the matter under advisement, and denied the motion the next day.

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The parties then agree to submit the matter on a stipulated record, which included a stipulation that Defendant had BAC readings of 0.313 and 0.294. The trial court found Defendant guilty of the DUI charges and responsible various civil traffic offenses. In March 5, 2009, 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 ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO ORDER DISCOVERY OF INFORMATION STORED IN THE MEMORY OF THE INTOXILYZER 8000 MACHINE.

Defendant contends the trial court abused its discretion in denying her motion to order discovery of information stored in the memory of the Intoxilyzer 8000 machine used to test Defendant. This Court reviews a trial court's denial of a discovery motion for an abuse of discretion, deferring to the trial court's factual and credibility determinations, but reviewing *de novo* the trial court's legal conclusions and any due process claims. *State v. O'Dell*, 202 Ariz. 453, 46 P.3d 1074, ¶ 8 (Ct. App. 2002). Defendant notes the trial court denied her motion without any written explanation. Although the trial court's denial of Defendant's motion included no specific findings, this Court presumes that the trial court was aware of the relevant law and applied it correctly in arriving at its ruling, thus this Court may affirm the trial court's ruling on any basis supported by the record. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 81 (2004).

A. *Did the trial court abuse its discretion in concluding Defendant did not have a due process right to disclosure of the requested material.*

In Defendant's Motion for Production of Intox Data From Machine Memory, she contended she had a due process right to the disclosure of the information contained in the memory of the Intoxilyzer 8000 machine used to test her. There is no general federal constitutional right to discovery in a criminal case; the Due Process Clause of the federal Constitution imposes on the state only the obligation to disclose exculpatory evidence that is material on the issue of guilt or punishment, and the obligation not to take any affirmative action that interferes with the defendant's right to gather exculpatory evidence. *State v. Tucker*, 157 Ariz. 433, 438, 759 P.2d 579, 584 (1988) ("There is no general federal constitutional right to discovery in a criminal case. As a general principle, the due process clause has 'little to say' regarding the amount of discovery which the parties in a criminal trial must be afforded. However, the constitution does impose on the prosecutor a due process obligation to disclose exculpatory evidence that is material on the issue of guilt or punishment."); *State v. Connor*, 215 Ariz. 553, 161 P.3d 596, ¶21 (Ct. App. 2007) ("Because the state is obliged by the constitution, case law, and the rules of criminal procedure to provide the defense with all exculpatory and other specified information in its possession, the defendant has no general right to pre-trial discovery in a criminal case."); *State ex rel. Thomas v. Foreman (Phillips)*, 211 Ariz. 153, 118 P.3d 1117, ¶ 16 (Ct. App. 2005) ("[T]here is no general constitutional right to pretrial discovery in a criminal case 'and *Brady* did not create one.'"); *Canion v. Cole*, 208 Ariz. 133, 91 P.3d 355, ¶ 14 (Ct. App. 2004) ("A defendant in a criminal

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case has no general constitutional right to discovery, but disclosure of certain evidence is required as necessary to safeguard the defendant's due process."); *Calderon-Palomino v. Nichols*, 201 Ariz. 419, 36 P.3d 767, ¶ 10 (Ct. App. 2001) ("And, as [defendant] concedes, he has no fundamental constitutional right to pretrial discovery in a criminal case."); *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 33 P.3d 1166, ¶ 21 (Ct. App. 2001) ("It is well-established that there is neither a federal nor a state constitutional right to pretrial discovery."); *State ex rel. Romley v. Hutt (Treen)*, 195 Ariz. 256, 987 P.2d 218, ¶ 7 (Ct. App. 1999) ("The right to confront witnesses at trial 'does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'"); *State v. O'Neil (James)*, 172 Ariz. 180, 182, 836 P.2d 393, 395 (Ct. App. 1991) ("It is well-established that there is neither a federal nor a state constitutional right to pretrial discovery."). In *O'Dell*, the court rejected the defendant's contention that the state's failure to preserve the data in the memory of the intoxilyzer machine violated any due process right of the defendant:

The trial court found that the ADAMS data showed the intoxilyzer results were unreliable in particular tests, but made no findings with regard to O'Dell's test. And because Flaxmayer made no attempt to connect any of the intoxilyzer errors he discussed to O'Dell's case, his testimony would not support a finding of unreliability with regard to O'Dell. Further, the record is devoid of evidence that any paper records or maintenance logs were not preserved or that operators had misinterpreted any events with regard to O'Dell. Additionally, according to Flaxmayer's testimony, any errors that reasonably could have affected the accuracy of O'Dell's test would have been reported on his test card or indicated somewhere in the paper record. Essentially, Flaxmayer's testimony consisted largely of generalities and was, at times, speculative, as evinced by the fact he could not cite one example in which the concurrent calibration checks on a test were within standard and the test had been inaccurate. Accordingly, his testimony was insufficient for the trial court to find that the lost ADAMS data was exculpatory under *Youngblood*.

O'Dell at ¶ 20. Similarly, in the present case, the State had disclosed the 90-day and 31-day maintenance records and the paper records for the machine in question. The prosecutor advised the trial court that those records would have shown if that machine had any errors in reading breath samples. Defendant's expert, Mark Stoltman, testified that the requested data would be helpful, but that he did not need that data in order to render an opinion about Defendant's test results. He further testified that, even if the requested data for the particular machine used to test Defendant showed there had been some problems with tests given to others, he could not say that those problems would have called into question Defendant's test results. This Court therefore concludes the trial court did not abuse its discretion in finding that Defendant did not have a due process right to the information stored in the memory of the Intoxilyzer 8000 machine.

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B. *Did the trial court abuse its discretion in concluding Rule 15.1 did not require disclosure of the requested material.*

In Defendant's Motion for Production of Intox Data From Machine Memory, she contended Rule 15.1 of the Arizona Rules of Criminal Procedure required production of the information contained in the memory of the Intoxilyzer 8000 machine used to test her. Rule 15.1(g) provides that the trial court may order disclosure of material or information upon a "showing that the defendant has a substantial need in the preparation of the defendant's case for material or information" As noted above, Defendant's expert testified that the requested material would be helpful, but that he did not need that material in order to render an opinion about the accuracy of Defendant's test readings. This Court therefore concludes the trial court did not abuse its discretion in finding Defendant had failed to show a "substantial need" for the requested information.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in finding that neither the due process clause nor Rule 15 required the disclosure of the information stored in the memory of the Intoxilyzer 8000 machine. The trial court therefore correctly denied Defendant's Motion for Production of Intox Data From Machine Memory.

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

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

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

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

051720101455

1 NAME
2 BAR#
3 ADDRESS
4 Telephone:
5 Email:
6 Attorney for Plaintiff

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF

9 THE STATE OF ARIZONA,) Case No.:
10 Plaintiff,) STATE'S SUPPLEMENTAL DISCLOSURE
11 vs.)
12 Defendant) Hon.

13 The State of Arizona hereby supplements its Rule 15.1 Notice of Witnesses and Evidence.

14 1. The State may call the following additional witnesses:

- 15 • Ronald Skwartz
- 16 • Erin Boone
- 17 • Robert Stevenson
- 18 • Herlinda Graham
- 19 • David Flores
- 20 • Sheila Azuttillo

21 The aforementioned are all forensic scientists with the Arizona Department of Public Safety
22 Crime Lab. Which of the above witnesses will be available for trial remains to be determined.
23 Whichever is available will testify on the following subjects:

- 24 1. The effects of alcohol on the human body
- 25 2. Signs and symptoms of alcohol impairment
- 26 3. Field sobriety tests and HGN
- 27 4. Function, quality assurance and reliability of the Intoxilyzer 8000
- 28 5. Ethanol absorption, elimination and metabolism by the human body
6. Periodic maintenance for the Intoxilyzer 8000
7. Instrument DPS Approval
8. Consensus in scientific community regarding impairment for persons with a
blood/breath alcohol content of .08 or above
9. Drink calculations

1 This list may not include rebuttal evidence because the State has no way of knowing what
2 rebuttal evidence may be needed until the defense cross-examines its witnesses and puts on its own
3 case.

4 The State believes it has complied with the requirements of Criminal Procedure Rule
5 15.1(b)(4)(C). If defense counsel believes anything is missing or that this notice is insufficient, the
6 State requests counsel to notify the State so the matter may be resolved as required by 16A ARS
7 Rule 15.7(a).

8 Submitted _____, 2019.

9
10 BY _____

11
12 ORIGINAL and COPIES of the foregoing filed and
13 COPIES of the foregoing made available
14 this ____ day of _____, 2019:

15 The Clerk of the Court

16 The Honorable

17 Attorney for Defendant

18
19
20
21 By _____

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