



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



JOSE CARRILLO v. HON. ROBERT HOUSER, et al.,
CV-09-0285-PR

PARTIES: *Petitioner:* Phoenix City Prosecutor's Office.
Respondent: Jose Carrillo.

FACTS: Jose Carrillo appealed his misdemeanor DUI convictions on the ground that the city trial court erroneously denied his motion to suppress the results of blood testing for blood alcohol content (or BAC). Carrillo argued that BAC evidence should have been suppressed because the police violated his rights under the Fourth Amendment of the U.S. Constitution by drawing his blood without his express consent, and for other reasons.

On appeal, Judge Houser of the Maricopa County Superior Court reviewed the evidence in a light most favorable to upholding the decision of the trial court and affirmed. He wrote in his ruling that taking blood is a search subject to the Fourth Amendment, but consent is an exception to its warrant requirement. He said that the Arizona Supreme Court has held that Arizona's "Implied Consent Law," A.R.S. § 28-1321, does not violate the Fourth Amendment. Pursuant to the Arizona statute and by exercising his privilege to drive in this state, Carrillo had already given his consent to testing for BAC. Before the Implied Consent Law is applicable in a criminal prosecution, police must have probable cause to arrest for DUI. In this case, police knew a parked vehicle had been sideswiped, the condition of Carrillo's vehicle was consistent with having been in a collision, a gouge mark running from his car to the other car was consistent with having been made by a damaged wheel exposed on his car, Carrillo stumbled when he exited his car, his eyes were bloodshot and watery, police detected an odor of alcohol emanating from him, and he was unable to participate in a breath test because he was vomiting. Because police had probable cause to arrest Carrillo for DUI, the judge concluded that the blood draw was properly administered on the basis of the Implied Consent Law, and Carrillo's Fourth Amendment rights were not violated. Judge Houser also said Carrillo gave his actual consent to the blood test, analyzing that:

Here, the officers testified that they attempted to explain to Defendant in Spanish and with gestures that they wanted to draw his blood. They further testified that Defendant held out his arm and remained cooperative throughout the completion of the test. The officers did not use force, coercion or pressure to obtain Defendant's cooperation. Moreover, Defendant never indicated through words or actions that he objected to the test. Defendant, on the other hand, testified that the officers "got [him] by the arm and then they started drawing the blood." It is for the trier of fact to determine the credibility of witnesses and the weight to be given to the evidence. Viewing the evidence in a light most favorable to upholding the trial court's ruling, Defendant's actual consent to the test was established by clear and positive evidence of unequivocal conduct.

The court of appeals by a two-one majority granted a petition for special action, reversed, and remanded. The majority analyzed that A.R.S. § 28-1321(A) eliminates a driver's unfettered right to refuse to submit to BAC testing, but it does not affect the individual's *power* to refuse. And, if the driver does refuse, the statute subjects the person to automatic civil sanctions. The court interpreted subsections (B) and (D) of the statute to work together to implement testing: it said subsection (B) means that after police ask a driver to take a BAC test, the driver may either "expressly agree" or "refuse," then under subsection (D) if the suspect does not "expressly agree," no test shall be given except pursuant to a search warrant (or a medical purposes exception, which does not apply here). The court observed that during a DUI arrest "the request for consent may be difficult or impossible to communicate and the response (if any) may be ambiguous," but that the Legislature prescribed a "straightforward solution" – that is, it provided that failure to expressly agree is deemed a refusal and it made clear that a failure to refuse is not an agreement. In this case, the majority found, the trial court applied an incorrect legal standard by finding Carrillo's non-refusal constituted agreement, so reversal was required. It also found that the trial court had not decided whether Carrillo had voluntarily and expressly consented to the warrantless blood draw. With respect to the superior court's conclusion that Carrillo also expressly consented to the blood draw through his conduct, the majority said the evidence might support such a finding, but the trial court did not make it, and the superior court on appeal could not recast the trial court's conclusion that Carrillo did not refuse the test as a finding that he unequivocally consented. The majority remanded for that factual determination.

Judge Irvine agreed with the majority "that Arizona's Implied Consent Statute does not authorize the police to draw blood from a person arrested for DUI without either the person's consent or a search warrant," and he similarly rejected the State's argument "that Carrillo's consent to the blood draw can be implied as a matter of law," but he would find no error based on the presence of evidence that can be interpreted as showing Carrillo's actual consent. He said the trial court's failure to make an express finding when denying a motion to suppress is not an abuse of discretion. And he did not read the trial court's ruling as applying the wrong legal standard or agree that the superior court made a finding of fact when the trial court did not. He would have denied special action relief because Judge Houser's ruling was supported by the trial court record.

ISSUE: "Courts are to construe statutes so that all words are given meaning and none are rendered void. Here, the court of appeals, focusing on a portion of Arizona's Implied Consent Law, determined that officers must obtain *express* consent for chemical testing from motorists arrested for DUI. That interpretation nullifies two provisions of the statute that *imply* consent to testing when an impaired motorist operates a vehicle. Did the court correctly interpret the statute?"

DEFINITIONS: Much the same as the version in effect when Carrillo was arrested in December 2006, Arizona's current version of the "Implied Consent Law," A.R.S. § 28-1321, states in relevant part:

A. A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter . . . while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. The test or tests chosen by the law enforcement agency shall be administered at the direction of a law enforcement officer having reasonable grounds to believe that the person was driving or in actual physical control of a motor vehicle in this state . . . :

1. While under the influence of intoxicating liquor or drugs.

...

B. After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended . . . unless the violator expressly agrees to submit to and successfully completes the test or tests. A failure to expressly agree to the test or successfully complete the test is deemed a refusal. The violator shall also be informed [of certain suspension and reinstatement conditions regarding their driver's license following testing].

C. A person who is dead, unconscious or otherwise in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent provided by subsection A of this section and the test or tests may be administered, subject to [certain statutory requirements].

D. If a person under arrest refuses to submit to the test designated by the law enforcement agency as provided in subsection A of this section:

1. The test shall not be given, except as provided in section 28-1388, subsection E [the "medical draw" provision], or pursuant to a search warrant.

2. The law enforcement officer directing the administration of the test shall [file a certified report documenting the refusal and require surrender and immediate suspension of the driver's license].

...

Some Arizona cases discussing the application of A.R.S. § 13-1321 include:

Campbell v. Superior Court, 106 Ariz. 543, 479 P.2d 685 (1971).

Sherrill v. Dept of Transportation, 165 Ariz. 495, 498, 799 P.2d 836, 839 (1990).

Ricard v. Arizona Dept. of Transp., 187 Ariz. 633, 636, 931 P.2d 1143, 1146 (App. 1997).

Mack v. Cruikshank, 196 Ariz. 541, 545, ¶11, 2 P.3d 100, 104 (App. 1999), *rev. denied* (2000).

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