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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

DANIEL PAUL RUIZ,
Petitioner,

vs.

PIMA COUNTY SUPERIOR COURT,
AND THE HONORABLE JANE
EIKLEBERRY, a Judge thereof,
Respondent,
and

THE STATE OF ARIZONA,
BARBARA LAWALL, PIMA
COUNTY ATTORNEY

Real Party in Interest.

Court of Appeals Case Number

2 CA-SA 2011-0002

(Pima County Superior Court Cause
Number CR2010-3475-001)

(Pima County Consolidated Justice
Court Case No. TR09-069932)

PETITION FOR SPECIAL ACTION

APPENDIX

EXHIBIT A

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IN THE PIMA COUNTY JUSTICE COURT

STATE OF ARIZONA)
)
VS)
) No. TR09069932
DANIEL RUIZ)
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)
)
)

Tucson, Arizona
July 7, 2010
8:13 a.m.

BEFORE THE HONORABLE PAUL SIMON

TRANSCRIPT OF PROCEEDINGS

Motion to Suppress

Proceedings recorded by electronic sound recording;
transcript produced by AVTranz.

FRANCESCA ST. JOHN
Transcriptionist

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APPEARANCES

July 7, 2010

Justice: Paul Simon

For the State:

Joseph P. McCleer

Witnesses:

David Ball

For the Defendant:

Michael J. Bloom

Witnesses:

None

Also Appearing:

Daniel Ruiz

Tucson, Arizona

July 7, 2010

(The Honorable Paul Simon Presiding)

MOTION TO SUPPRESS:

THE COURT: And we're on the record. This is the case of State of Arizona versus Daniel Paul Ruiz, time set for jury trial and a preliminary hearing on a Defense motion. Counsel are present, and Mr. Ruiz is present. And would the attorneys please state their appearances.

MR. MCCLEER: Joseph McCleer for the State.

MR. BLOOM: Mike Bloom for Mr. Ruiz. He is present.

We are ready to proceed, Your Honor.

THE COURT: We have a Miranda issue.

MR. BLOOM: We never resolved it. It's been pending. It was never ruled upon, and we never took testimony.

THE COURT: Okay. Very good. Okay. So State's ready to proceed on that issue?

MR. MCCLEER: State is ready to proceed.

THE COURT: Okay. Call your witness, please.

MR. MCCLEER: State calls Officer Ball.

THE COURT: And please raise your right hand.

DAVID BALL, STATE'S WITNESS, SWORN

THE COURT: Thank you, Officer. Have a seat there.
Do we have water?

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1 THE CLERK: Someone is getting it. Yes, Your Honor.
2 THE COURT: Okay, great. Boy, how do you like that?
3 It's just like TV.
4 MR. BLOOM: I beg your pardon?
5 THE COURT: I said it was just like TV.
6 MR. BLOOM: What?
7 THE COURT: Fast action. Let's get that set up
8 first before we continue. We'll go ahead and get it all set
9 up. Do we have cups on the table?
10 THE CLERK: Yes.
11 THE COURT: We do, okay.
12 THE CLERK: We have cups down on the bottom.
13 THE COURT: Right. I know she likes it down there.
14 Okay, Mr. McCleer.
15 DIRECT EXAMINATION
16 BY MR. MCCLEER:
17 Q Could you please introduce yourself.
18 A My name is David Ball. I work for the Arizona
19 Department of Public Safety as a patrol officer.
20 Q How long have you been with DPS?
21 A Two years.
22 Q Did you have any police experience prior to that?
23 A Yes, I do.
24 Q What was that?
25 A I worked in the Coconino County Jail for two years

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1 as a detention officer. And then after that, I worked for
2 about four and a half years for the Flagstaff Police
3 Department.

4 Q Could you describe the training that you've had,
5 particularly in the area of Miranda warnings.

6 A In the basic police academy that I attended, which
7 was the ALEA Academy in Phoenix, we're taught about Miranda
8 and its application in interrogating suspects of crimes.

9 THE COURT: And for purposes of the hearing, feel
10 free to lead your witness, you know, right up to the point
11 that's relevant in the case, I think.

12 BY MR. MCCLEER:

13 Q Were you on duty on October 11th, 2009, approximately
14 9:45 p.m.?

15 A Yes.

16 Q And shortly -- about that time or shortly after, did
17 you make an arrest?

18 A Yes, I did.

19 Q Where was that, first of all?

20 A This was on just south of State Route 86 on Camino
21 Verde.

22 Q Is that in Pima County?

23 A Yes, it is.

24 Q Who was the person you arrested?

25 A Daniel Ruiz.

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1 Q And what was he arrested for?

2 A DUI to the slightest degree.

3 Q Do you recall about what time the arrest took place?

4 A At approximately 2206 hours, I believe.

5 Q Did at any point after or before the arrest, did you
6 read Mr. Ruiz Miranda warnings?

7 A Mr. Ruiz was read Miranda warnings at approximately
8 2336 hours.

9 Q 2336?

10 A Yes.

11 Q Where was this? Where was he when Miranda were read
12 to him?

13 A At the Tucson DPS station.

14 Q Did you read him the warnings?

15 A Yes, I did.

16 Q Did you do it from memory or from off a printed
17 sheet?

18 A I carry a card with me in my pocket, and I read it
19 verbatim from the card.

20 Q Just for the record, can you read -- read for the
21 Court and for the record what you read to Mr. Ruiz from the
22 card.

23 A Sure.

24 "You have the right to remain silent. Anything
25 you say can and will be used against you in a court

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1 of law. You have the right to the presence of an
2 attorney to assist you prior to questioning and to
3 be with you during questioning, if you so desire.
4 If you cannot afford an attorney, you have the right
5 to have an attorney appointed for you prior to
6 questioning. Do you understand these rights?"

7 Q Is that how you read them to Mr. Ruiz that evening?

8 A Yes, it is.

9 Q Did he indicate that he understood --

10 A Yes.

11 Q -- what you read to him?

12 A Yes, he did.

13 Q After he made that indication, did you ask him any
14 questions?

15 A Yes, I did.

16 Q Did he answer those questions?

17 A Yes, he did.

18 Q What were these questions pertaining to?

19 A They were pertaining to the vehicle, what he ate,
20 what he drank that day, where he was coming from, where he
21 was going to, current weight, about any physical
22 disabilities, any medications or drugs taken in the last 24
23 hours.

24 Q While you're asking him these questions, what was
25 the set up of the interview like in the room?

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1 A We were in a small -- it's the prisoner holding room
2 where we do our DUI investigations. There's a couple of
3 holding cells there, real small cells. There's a table.
4 It's approximately the size of this table here. Maybe three
5 feet by five or six feet.

6 Mr. Ruiz was sitting to the -- my right at the end
7 of the table, and then I was sitting in front of him.

8 Q Did Mr. Ruiz freely answer your questions?

9 A Yes.

10 Q At any point did he say he did not want to answer a
11 question or wanted to stop talking?

12 A No.

13 Q Prior to reading him Miranda, did you ask him any of
14 those -- any questions pertaining to the incident?

15 A The only question that was read prior to Miranda was
16 about implied consent, but there was no interrogation prior
17 to Miranda.

18 MR. BLOOM: Object to that, calls for a conclusion.

19 THE COURT: Calls for a conclusion?

20 MR. BLOOM: As to the term interrogation.

21 THE COURT: I think we'll leave that to cross.

22 MR. MCCLEER: That's all I have, Your Honor.

23 THE COURT: Okay. Cross.

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CROSS-EXAMINATION

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BY MR. BLOOM:

Q Officer Ball, this incident occurred back on October 11th of last year?

A Yes.

Q And you were on patrol?

A Yes.

Q Alone in your vehicle?

A Yes.

Q And you were on State Route 86?

A Yes, I was.

Q And for those of us that are not highway patrolmen that's Ajo Way?

A Yes.

Q And you were on the far west side?

A Yes.

Q Camino Verde, this incident occurred in the vicinity of the intersection of State Route 86 and Camino Verde?

A Yes.

Q That's what, approximately ten miles west of Tucson?

A Tucson's about milepost 70. This is milepost 164. About six miles.

Q West of the westernmost boundary of Tucson?

A Correct.

Q Okay. Desert area?

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1 A Yes.

2 Q Okay. You stopped the vehicle in which Mr. Ruiz was
3 driving at 9:45 p.m.?

4 A Yes.

5 Q And you did an investigation on the side of the
6 road, on the side of Camino Verde just south of State Route
7 86?

8 A Yes.

9 Q And you stopped him at 9:45, yes?

10 A Yes.

11 Q And the arrest occurred at 10:06?

12 A I believe. Without referring to my report, the
13 exact time of the arrest was around there.

14 Q Do you need your report to get the exact time?

15 A Yeah, that would be great.

16 Q Okay.

17 THE COURT: That was his prior testimony. He's
18 already so testified 10:06.

19 MR. BLOOM: That's fine.

20 BY MR. BLOOM:

21 Q Did you read Mr. Ruiz his Miranda rights when you
22 placed him under arrest?

23 A No.

24 Q Did you handcuff Mr. Ruiz?

25 A Yes, I did.

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1 Q And did you place him in the back of the police --
2 your cruiser?

3 A Yes.

4 Q And you then transported him to the DPS station on
5 Irvington and Tucson Boulevard?

6 A Yes.

7 Q And it took 20 minutes to get there?

8 A Yes, it did.

9 Q And then there was a period of time when other
10 things were going on?

11 A Yes.

12 Q And ultimately blood was drawn?

13 A Yes.

14 Q And it wasn't until 11:36 or one hour and 30 minutes
15 after Mr. Ruiz was formally placed under arrest that you read
16 him his Miranda rights?

17 A Yes.

18 Q Now, from the time that he was out in the field,
19 when you were out in the field with him, it was obvious to
20 you that he didn't want to answer your questions, wasn't it?

21 A There -- there was a -- there was a time, yes,
22 during the traffic stop that I noted in my report that it
23 appeared to me he did not want to answer questions at that
24 time.

25 Q Okay.

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1 A This was prior to my investigation.

2 Q But you asked him questions anyway?

3 A Yes.

4 Q And when you placed him under arrest, you then asked
5 him if the woman in the car would come to pick him up?

6 A Yes.

7 Q That was before you read Miranda?

8 A Yes.

9 Q And he responded to that?

10 A Yeah, he did.

11 Q Then he's in the back of the car, and you were
12 transporting him to the station, yes?

13 A Yes.

14 Q Many people make comments, conversation before or on
15 the way to a substation?

16 A Sometimes that happens.

17 Q Certainly not unusual?

18 A Correct.

19 Q People are curious about what's going to happen to
20 them?

21 A Sometimes.

22 Q They can be curious about are they going to be
23 released or go to jail?

24 A Yes.

25 Q All sorts of issues. So it's certainly not unknown

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1 to you that the very process of being in the backseat of a
2 police cruiser being transported can kind of cause somebody
3 to make conversation?

4 A That's correct.

5 Q And you knew that?

6 A I knew that.

7 Q You could have read him his Miranda rights in the
8 field?

9 A Yes, I could have.

10 Q You made a conscious decision not to?

11 A Yes.

12 Q And Mr. Ruiz, in fact, made statements in the
13 backseat of the cruiser?

14 A Yes, he did.

15 Q Or comments?

16 A Yes, he did.

17 Q He was not happy about being arrested. That was
18 your impression, right?

19 A Yes, it was my impression.

20 Q And we've talked about this at length?

21 A Yes.

22 Q By the way, he was never physically combative with
23 you or anything like that?

24 A No.

25 Q But he just wasn't happy about what was going on,

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1 fair statement?

2 A He -- he appeared very happy that night.

3 Q Well, let's put it this way.

4 A So his demeanor was -- was such that, yes, I knew he
5 wasn't happy, but he was acting happy.

6 Q Making light of the situation?

7 A Apparently.

8 Q You read him the implied consent law?

9 A Yes, I did.

10 Q And, again, that was before you read him Miranda?

11 A Yes.

12 Q And after you read him implied consent, you ask him
13 will you submit to the specified tests?

14 A Yes, I do.

15 Q Okay. And it wasn't until an hour and a half later
16 after everything -- after the warrant was obtained and so on
17 that you finally then read him his Miranda rights and asked
18 him questions?

19 A That is correct.

20 MR. BLOOM: If I can have just a moment, Your Honor,
21 I'm just about done.

22 THE COURT: Yes.

23 BY MR. BLOOM:

24 Q It was, in fact, clear to you out in the field that
25 he didn't want to answer your questions, so clear that you

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1 put that in your report?

2 A It was clear that he didn't want to -- I noted in my
3 report that it appeared to me, due to the chuckling and the
4 rolling of the eyes, that he did not want to answer questions
5 about his travel plans, the questions that I go through
6 during a normal traffic stop that I ask everybody. That is
7 what it appeared to me, he did not want to answer.

8 Q Let me ask you this: You pulled him over at 9:45.
9 From that moment on, was he free to leave?

10 A No.

11 Q And you got him out of the car, and it's immediately
12 more than a routine traffic stop?

13 A Yes, it was.

14 Q You started immediately into a DUI investigation?

15 A Yes.

16 Q In fact, the reason for the stop was registration?

17 A Correct.

18 Q And when you approached the vehicle, the passenger
19 gave you a registration that showed the vehicle was validly
20 registered?

21 A Yes.

22 Q You then asked the driver, Mr. Ruiz, to get out of
23 the car?

24 A Yes, I did.

25 Q It was clear from that moment on it wasn't a traffic

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1 stop anymore; it was a DUI investigation?

2 A Yes.

3 Q You certainly asked him a number of questions during
4 the DUI investigation?

5 A Yes, I did.

6 Q He wasn't free to leave at that time?

7 A No.

8 MR. BLOOM: That's all I have, Judge.

9 THE COURT: Redirect?

10 REDIRECT EXAMINATION

11 BY MR. MCCLEER:

12 Q At any point before or after you read Mr. Ruiz his
13 Miranda warnings, did he state that he did not want to talk
14 to you?

15 A No.

16 Q At any point did he state that he did not want to
17 answer your questions?

18 A No.

19 Q The comments that we referred to in the back of your
20 police cruiser and heading to the station, were any of those
21 in response to questions by you?

22 A No.

23 MR. MCCLEER: That's all I have.

24 MR. BLOOM: Well, I have one.

25 ///

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1 RE CROSS-EXAMINATION

2 BY MR. BLOOM:

3 Q Just to clarify, you did ask him if the woman in the
4 car could come to the station and pick him up?5 A Yes. I'm sorry. The one question before we left
6 for the station, I asked if the woman, the registered owner
7 of the truck, would -- if it would be okay with Mr. Ruiz if
8 he picked -- if she picked him up in approximately an hour.

9 Q And that provoked a response from Mr. Ruiz?

10 A Yes, it did.

11 Q No question that was -- that was an answer in
12 response to your question?

13 A Yes.

14 Q And it was before you read Miranda?

15 A Yes.

16 Q And after he was under arrest?

17 A Yes.

18 MR. BLOOM: That's all.

19 THE COURT: Was there any request for an attorney?

20 THE WITNESS: Yes, there was, Your Honor.

21 THE COURT: Post-arrest?

22 THE WITNESS: Yes.

23 THE COURT: Before or after you asked the standard
24 litany of questions that follow an arrest for DUI?

25 THE WITNESS: It was -- it was before -- it was

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1 after I read the Admin Per Se.

2 THE COURT: All right.

3 THE WITNESS: I read Admin Per Se, and then I did
4 the interview after the blood draw.

5 THE COURT: Okay. Mr. McCleer asked you if you
6 asked a series of questions after giving the Miranda warning.
7 Was there a request for an attorney --

8 THE WITNESS: Prior.

9 THE COURT: -- before that?

10 THE WITNESS: Yes.

11 THE COURT: Or after?

12 THE WITNESS: Before.

13 THE COURT: Was it honored?

14 THE WITNESS: Yes, it was.

15 THE COURT: How did you -- how'd you do that?

16 THE WITNESS: He refused the -- the initial blood
17 draw and asked to speak to an attorney. So then I left the
18 room. This prisoner office, it has a -- about an eight-by-
19 eight-inch window, and I closed the door for his privacy and
20 then just keep visual contact with him.

21 At one point during the interview, he got up out of
22 the chair, came to the door. I opened it. He asked me -- he
23 was on his cell phone. He asked me if I was asking him to
24 submit to a blood draw. I replied yes. Closed the door
25 again.

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1 He went and sat down. Spoke for a few more
2 minutes. This took approximately six to eight minutes, he
3 was on the phone with whomever, and then got up and came back
4 and told me he was -- he was through.

5 THE COURT: Was it then that you did the Q and A,
6 where were you -- where were you going?

7 THE WITNESS: It wasn't then. It was -- it was
8 after that. I'm not -- I don't recall. That was prior to
9 the blood draw. If I could refer to my report, I could give
10 you a better time.

11 THE COURT: Yeah, clear it up for me.

12 THE WITNESS: From when the attorney was contacted
13 to when the interview took place?

14 THE COURT: Yeah.

15 THE WITNESS: If that's what you'd like to know.

16 THE COURT: Well, I'm trying to nail down -- you
17 have the request for the attorney, and then you had a series
18 of questions?

19 THE WITNESS: Correct.

20 THE COURT: The typical questions that are asked
21 post-arrest. I want to know in which order those came in.

22 THE WITNESS: Okay. The -- transported him to the
23 station. Immediately read Admin Per Se. He refused and
24 asked to speak to a lawyer. That happened immediately. He,
25 again, after speaking to his attorney or whoever -- whomever

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1 he spoke to, again, refused the blood draw.

2 I then drafted a warrant. Got the warrant. We did
3 the blood draw, and then I did the questioning. I did the
4 questionnaire.

5 THE COURT: Did you go back to the -- did you ask
6 him again whether he would agree to answer questions? Or,
7 you know, since he had asked for an attorney and now you're
8 getting into a series of questions, so did you do anything to
9 clarify on that point or no?

10 THE WITNESS: That's when I read Miranda.

11 THE COURT: That's when Miranda was.

12 THE WITNESS: Yes. I read Miranda --

13 THE COURT: Okay.

14 THE WITNESS: -- exactly -- the exact same time --

15 THE COURT: Okay.

16 THE WITNESS: -- that I started the interview.

17 THE COURT: All right. I got it. I got it. Now, I
18 just asked some questions, any additional questions from the
19 State?

20 MR. MCCLEER: No, Your Honor.

21 THE COURT: Mr. Bloom?

22 MR. BLOOM: No.

23 THE COURT: Okay. Thank you, Officer. You can step
24 down.

25 THE WITNESS: Okay.

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1 THE COURT: Okay. Does that cover evidence from the
2 State?

3 MR. MCCLEER: Yes. State rests.

4 THE COURT: Any evidence from Defense?

5 MR. BLOOM: No.

6 THE COURT: Okay. Would you clarify before you
7 argue which statements are you looking to suppress?

8 MR. BLOOM: Well, first of all, I think everything
9 from the time -- first, it's more than a routine traffic stop
10 because he was pulled over for a registration that turned out
11 to be valid. From that moment on, it's more than a routine
12 traffic stop under Berghuis, and Miranda should have come
13 into play.

14 But, certainly, there's a point out in the field
15 when he's handcuffed and told he's under arrest. He's then
16 asked a direct question, will the girlfriend -- will the
17 woman in the car come get you? He responds to that. That
18 should not come in.

19 He allegedly makes statements in the backseat of the
20 car. They should not come in. There's a claimed refusal.
21 And, again, all of these statements are made before he is
22 read Miranda.

23 I don't know why -- I've never had a case where
24 implied consent is invoked before Miranda is read because
25 Miranda is -- if implied consent isn't a question, I don't

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1 know what is.

2 In this particular case, the testimony is that he
3 was allowed to make a phone call. We don't know if, in fact,
4 he got through to a lawyer or not. The officer testified it
5 was clear to the officer in the field that he didn't want to
6 answer questions.

7 I think all of those statements should be
8 suppressed, and in this case in a circumstance where he's
9 requested the right to consult with counsel and there never
10 was a waiver of that explicit right.

11 I understand the recent Supreme Court case says if
12 you're read your Miranda rights and then you answer
13 questions, that's a valid waiver, and you are allowed one on
14 those facts. In that case there had not been a request to
15 consult with counsel prior to that. I think that's a
16 distinguishing fact.

17 THE COURT: Mr. McCleer?

18 MR. MCCLEER: Defendant made no explicit request or
19 he at no point said he did not want to talk to the officer.
20 At no point said he did not want to answer his questions
21 before or after Miranda.

22 The arrest did not occur until the officer placed
23 him under arrest. Prior to that, it was still an
24 investigatory stop. If we were to call every DUI
25 investigation an arrest, then we would never bring any case

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1 to trial because they would all be tossed out on probable
2 cause, for the most part. This was still an investigatory
3 stop. At that point he's just doing a regular DUI
4 investigation.

5 The Miranda was not required until after arrest and
6 prior to any questioning, and it has to be certain types of
7 questioning here, not just any type of question. And will
8 someone be able to pick you up at the station is not
9 eliciting an incriminating answer. That is just a simple
10 question.

11 And the State has no intention of even bringing it
12 up in trial; however, it's still not an incriminating
13 statement, and if the State wanted to bring it up in a trial,
14 it should be admissible. Any statement made not in response
15 to a question were freely made by the Defendant sitting in
16 the back of the car, and there needed not be any Miranda to
17 have any just statements blurted out by the Defendant.

18 THE COURT: Well, let's focus on that for a moment.
19 Does the State intend to offer any statements made by Mr.
20 Ruiz while in the patrol car?

21 MR. MCCLEER: I don't know yet.

22 THE COURT: So maybe?

23 MR. MCCLEER: Maybe.

24 THE COURT: Is there anything in particular that he
25 may have said that you feel that might come out?

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1 MR. MCCLEER: As of right now I -- I wasn't planning
2 on. I'm going to talk with the officer one more time before
3 I put him on really quick just to see if there is. I don't
4 believe so, but I believe the door should be open because any
5 statement he made was not in response to a question, was just
6 him saying what's on his mind.

7 THE COURT: Just to digress for a second, Mr. Bloom,
8 I've read your motion in limine. Are any of the statements
9 that are mentioned in there germane to the backseat comments?

10 MR. BLOOM: Your Honor, I'll have to pull my motion
11 in limine. The insurance cancelations and something -- no, I
12 mean, really, I don't think the State's going to even try and
13 get into that.

14 THE COURT: Okay.

15 MR. BLOOM: That didn't have anything to do with Mr.
16 Ruiz. The (indiscernible) drugs was a flippant comment that
17 was made after Miranda. That's much later, and the smoking
18 bud was made much later. Those statements were made after he
19 was allegedly read Miranda.

20 THE COURT: All right. So then we'll come back to
21 those.

22 MR. BLOOM: Yeah.

23 THE COURT: All right. So how about then the post-
24 arrest, post-Miranda Q and A following the invocation of the
25 right to counsel?

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1 MR. MCCLEER: Yeah. Well, the officer explained how
2 he read Miranda right off his card. He asked the Defendant
3 whether he understood. Defendant indicated that he did
4 understand, and then any questions made after that point,
5 which is voluntary, is, therefore, admissible.

6 It's implied waiver. If there's not -- does not
7 need to be an explicit waiver of Miranda according to the
8 latest Supreme Court case, Berghuis v. Thompkins. It's just
9 as long as they were read, it's been understood, and there
10 was no coercion.

11 And here we have -- the officer testified they were
12 sitting at a table, no evidence of coercion. Therefore, all
13 the Q and A -- the answers to the Q and A that the officer in
14 relation to the case should be admissible.

15 THE COURT: The State did not establish that there
16 was a waiver in fact.

17 MR. MCCLEER: That's correct. And according to the
18 Supreme Court, we don't need to have an explicit waiver. We
19 just have to have him -- make sure he understands, and that
20 any question after that was not coerced.

21 THE COURT: Even where there's an invocation of the
22 right to counsel prior to the Miranda?

23 MR. MCCLEER: Well, right to counsel was honored
24 here. This was the right to remain silent that we're
25 speaking here. The right to counsel, the officer gave him

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1 the phone, gave him the room, gave him several minutes to
2 call the attorney.

3 That's giving him the chance to speak to an attorney
4 that was honored there as opposed -- that when it comes to
5 the right to remain silent, the Defendant has to explicitly
6 state, "I want to remain silent" or some variation of that.

7 Any sort of just remaining silent, according to the
8 facts in the latest Supreme Court case where after Miranda
9 was read the Defendant remained silent for several hours
10 after Miranda and being continually asked questions till he
11 finally answered the question, at no point did he actually
12 say, "I want to remain silent." And the Supreme Court ruled
13 that he never invoked his right.

14 THE COURT: Are you referring to the recent Supreme
15 Court case?

16 MR. MCCLEER: Yes, I am, Your Honor.

17 THE COURT: Which I have not read, but I've heard
18 about the sum and substance.

19 MR. MCCLEER: I do have a copy for you.

20 THE COURT: Doesn't it most specifically hold that
21 the individual who is in custody under arrest must indicate
22 in some fashion that they wish to invoke their right
23 following Miranda rather than the circumstance that we have
24 here, which would be the actual specific invocation of the
25 right to counsel? Aren't the facts distinguishable?

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1 MR. MCCLEER: I really don't see them that
2 distinguishable, and I do believe --

3 THE COURT: That the defendant invoked -- and what's
4 the case name again?

5 MR. MCCLEER: Referring to -- I'm going to try to
6 spell the last name. Berghuis, B-E-R-G-H-U-I-S, v.
7 Thompkins.

8 THE COURT: Did the defendant invoke --

9 MR. MCCLEER: No, Defendant did not invoke his right
10 to remain silent. He just remained silent in the face of
11 constant of questioning over the course of several hours.
12 Supreme Court held that that was not invocation of his right
13 to remain silent.

14 THE COURT: Okay. What are the statements that were
15 made by Mr. Ruiz, just so I have the flavor, in that Q and A
16 per the State's evidence?

17 MR. MCCLEER: You want to know the specific?

18 MR. BLOOM: Just the standard.

19 THE COURT: Yeah, what he said.

20 MR. MCCLEER: Were you operating the vehicle; yes.
21 Does your vehicle have any mechanical defects; yes, tranny.
22 Do you feel any effects of the alcohol, drugs when stopped;
23 no. Length of time you were driving before stopped; 20, 25
24 minutes. Where were you coming from; Pumpkin Patch. Where
25 are you going to; the house. Where have you been drinking;

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1 at the house. Type; beer. Amount; four beers. Time you
2 started; between 5:00 and 6:00 p.m. Time you stopped; about
3 8:15.

4 Have you had anything to drink in the hour before
5 stopped -- before being stopped or asked to being stopped
6 here; no. Are you under the care of a physician; no.
7 Allergies; did not answer. Physical disabilities; yes, left
8 leg, bullet. Diabetic; no. When did you eat last; 5:00
9 o'clock. What; steak. How much; nine ounces.

10 Current weight; 175. What time is it now; 11:43.
11 What date is it; October 11th, 2009. Are you sick or injured;
12 no. Medication or drugs within the last 24 hours; yes.
13 Type; weed. Hours of sleep last night --

14 THE COURT: What was that last one?

15 MR. BLOOM: Weed.

16 MR. MCCLEER: Weed.

17 THE COURT: Weed?

18 MR. MCCLEER: Yes. Hours of sleep last night; four.
19 Are you tired; no. Those are all the questions.

20 THE COURT: Okay. So the State's -- just to make
21 sure I've got it, the State's position is that wherein this
22 case, Mr. Ruiz specifically invoked his right to counsel, was
23 then read Miranda with no waiver specifically coming or
24 acknowledgement by Mr. Ruiz of his right to counsel or to
25 remain silent, followed by an interrogation, it's Q and A,

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1 that that would not be a Miranda violation?

2 MR. MCCLEER: That is not a Miranda violation. That
3 is the State's position, and we believe that the United
4 States Supreme Court backs us up.

5 THE COURT: Any further argument?

6 MR. MCCLEER: Not at this time, no.

7 THE COURT: Mr. Bloom?

8 MR. BLOOM: Judge, I think it's clear. Well, this
9 is not controlled by Berghuis, at least that's how I thought
10 you pronounced it. In this case you've got, first of all, I
11 think, at a minimum, anything that he says subsequent to the
12 arrest at 10:06 and before Miranda at 11:36 has to be
13 considered.

14 I think there's no valid waiver here because you've
15 got an explicit assertion of your rights. I don't think you
16 can have a waiver, you know, at that point just because he
17 answers questions after an explicit assertion.

18 I think you look back on all of those cases, Edwards
19 and those cases that say if you have an assertion and then
20 you keep questioning somebody and then eventually they talk,
21 that's not a valid waiver.

22 THE COURT: Then once the conversation recommences,
23 it's initiated by the defendant.

24 MR. BLOOM: That's what I think.

25 THE COURT: Yeah. Okay. With regard to the

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1 backseat comments and the refusal, I find no Miranda
2 violation. I would take a different position than the State
3 on the post-invocation of right to counsel post-Miranda, lack
4 of waiver, Q and A interrogation at the DPS station. I would
5 find a Miranda violation in that circumstance.

6 I do believe, even given the most current Supreme
7 Court decision, that there must be some waiver specific and
8 unequivocal following a specific invocation of right to
9 counsel. So the Miranda motion as to the post-arrest DPS
10 substation location, Q and A, those statements, then will be
11 suppressed.

12 MR. BLOOM: May I also ask the Court about the
13 statement, "Will your girlfriend come to" -- or, "Will the
14 woman in the car, whoever that is, come to the station?" I
15 think that's a --

16 THE COURT: I find no violation on that.

17 MR. BLOOM: Okay.

18 THE COURT: Okay. Let's go off the record.

19 (OFF THE RECORD AT 8:43 A.M.)

20 THE CLERK: We're back on the record.

21 THE COURT: You want to be on the record or off the
22 record?

23 MR. MCCLEER: We can go on the record.

24 THE COURT: Okay. We're on the record. Everybody's
25 here. Mr. McCleer, any update?

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1 MR. MCCLEER: Yes, Your Honor. State has decided
2 for the explicit purposes of appealing the Court's ruling
3 today, we'd like to dismiss for the purposes of appeal.

4 THE COURT: Mr. Bloom?

5 MR. BLOOM: Well, in other circumstances I would say
6 it's improper to dismiss the morning of trial, but, quite
7 frankly, this came up the way it came up, and I don't know
8 that I could take that position with it. So the Court will
9 do whatever it takes.

10 THE COURT: Yeah, you know, I guess in certain
11 circumstances, depending on the size of the case and what you
12 have, a special action is a possibility, but hardly, hardly
13 here.

14 MR. BLOOM: To be candid, this just kind of came up.
15 I don't think it's anybody's fault. It's just the way that
16 the cards fell in this particular case. So the Court will do
17 what's best.

18 THE COURT: Well, the only way that the State can
19 pursue that remedy is by way of dismissal without prejudice,
20 and given the Defense position, and that's a reasonable
21 position I think that you're -- that you're taking.

22 MR. BLOOM: I guess if I should take ten seconds and
23 ask my client if he wants to -- wants me to withdraw this
24 issue just for purposes of going forward today? I'll do that
25 if you want to, if you want to give me ten seconds, but --

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1 THE COURT: I'm surprised to even hear you say that.

2 MR. BLOOM: I mean, I can. I'm going to advise him
3 not to. I'm just thinking that if I had --

4 THE COURT: Go ahead. Now, you might be getting
5 picked up. You got a mike right there, so --

6 MR. BLOOM: Your Honor, we'll stick with the ruling,
7 but I do think that I'm obliged whenever that happens. I'm
8 big on consulting with my clients.

9 THE COURT: Just decided to ask, did you talk about
10 a non-trial resolution?

11 MR. MCCLEER: Not before I came to that decision.

12 THE COURT: Did you want to cover that base, too?

13 MR. MCCLEER: No, not today, because I think this --
14 this issue being such a new case is -- is proper for our
15 appeal. Just for clarification, there are certain issues.

16 THE COURT: No quarrel from the Court on that point.
17 All right. State's motion to dismiss without prejudice is
18 granted. We'll go off the record.

19 (OFF THE RECORD AT 9:05 A.M.)

20 THE COURT: I should have done that already. Okay.
21 We have just gone back on the record to address the
22 28-1381(2) charge. Given the Court's previous ruling, the
23 State does not intend to appeal that suppression of the blood
24 result?

25 MR. MCCLEER: No, no, we do not intend to appeal

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1 that.

2 THE COURT: All right. So do you wish to make a
3 motion then as to that charge?

4 MR. MCCLEER: As to that charge and that charge
5 alone, we would move to dismiss with prejudice.

6 THE COURT: So ordered. Now we go off the record
7 again.

8 (PROCEEDINGS CONCLUDED AT 9:07 A.M.)

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1 STATE OF ARIZONA)
2) SS:
3 County of Pima)

4 I, Fransesca St. John, Transcriber, do hereby certify
5 that I have listened to the digital recording of the
6 foregoing; further that the foregoing transcript pages
7 1 - 33, were reduced to typewritten form from the digital
8 recording of the proceedings held July 7, 2010, in the Pima
9 County Justice Court, in the matter of State of Arizona v.
10 Daniel Ruiz; and that the foregoing is an accurate record of
11 the proceedings as above transcribed in this matter on the
12 date set forth.

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14 
15 _____
16 Fransesca St. John

17 DATED this 16th day of July, 2010.
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EXHIBIT B

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JANE L EIKLEBERRY
JUDGE

CASE NO. CR20103475-001

COURT REPORTER: Gail Vinson
Courtroom - 572

DATE: November 01, 2010

STATE OF ARIZONA
Appellant

Amy S Ruskin, Esq. and Joseph McCleer, Esq.

VS.

DANIEL PAUL RUIZ
Appellee

Michael J Bloom, Esq.

MINUTE ENTRY

HEARING RE ORAL ARGUMENT:

Appellee present, out of custody.

Ms. Ruskin argues to the Court.

Mr. Bloom argues in response.

THE COURT FINDS as follows:

1. That the Appellee never asked for a lawyer to be present while he was being questioned.
2. That the Appellee asked to speak to a lawyer, presumably by telephone, which it appears that he did.
3. That the Appellee was allowed to use a private room and had a private telephone conversation. He interrupted the conversation at one point to exit the room and ask the police if they were asking for a blood test.
4. Upon being told that the police were asking for a blood test the Appellee went back into the private room and completed the telephone call.
5. Although the Appellee asked to speak to a lawyer, he was allowed to speak to a lawyer by telephone.
6. The Appellee never asked that a lawyer be present while being questioned.
7. The Appellee was provided with his *Miranda* rights and he acknowledged that he understood them.
8. The Appellee answered questions and therefore he waived his right to remain silent by his conduct under *Tapia*.
9. The Appellee never asserted his right to remain silent.

Diana Luna
Deputy Clerk

MINUTE ENTRY

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Date: November 01, 2010

Case No.: CR20103475-001

10. There was no unambiguous assertion of his right to counsel.

Accordingly,

THE COURT FINDS that the Trial Court's decision to suppress the Appellee's statements was an abuse of discretion.

IT IS ORDERED that the Trial Court is reversed and this matter is remanded back to Pima County Consolidated Justice Court for proceedings consistent with this opinion.

cc: Joseph McCleer, Esq.
Michael J Bloom, Esq.
Clerk of Court - Exhibits (Remand Desk)
Pima County Consolidated Justice Courts-Appeals (Case/Docket#CR2010-3475001)
Pretrial Services
Pima County Consolidated Justice Courts - Hon. Paul Scott Simon

Diana Luna
Deputy Clerk