IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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STATE OF ARIZONA, ex rel. MICHAEL G. RANKIN, City Attorney for the City of Tucson, Petitioner, v. HON. EDGAR ACUÑA, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and ANGELA KOPERSKI, Real Party in Interest.	2 CA-SA 2011-0079 DEPARTMENT B <u>DECISION ORDER</u>

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20111059001

JURISDICTION ACCEPTED; RELIEF GRANTED

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¶1 In this special action, petitioner State of Arizona challenges the respondent judge's reversal of real party in interest Angela Koperski's convictions after a jury trial in Tucson City Court for driving under the influence of an intoxicant (DUI) and driving with an alcohol concentration (AC) of .08 or more.[1] The state argues the respondent judge erred in concluding the city court erroneously had admitted at trial quality assurance reports or records (QARs) relating to the Intoxilyzer 8000, the device that was used to determine Koperski's AC, thereby violating her confrontation rights based on the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527 (2009), and *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011).

¶2 We accept jurisdiction of this special action for the following reasons. First, the state has no remedy by appeal. *See* Ariz. R. P. Spec. Actions 1(a) (special action jurisdiction appropriate when no equally plain, speedy, or adequate remedy by appeal exists); *see also* A.R.S. § 22-375 (limiting appeals from superior court judgments on appeal from justice of peace or "police court" to cases involving "validity of a tax, impost, assessment, toll, municipal fine or statute"); *Roubos v. Miller*, 213 Ariz. 36, ¶¶ 2-3, 138 P.3d 735, 736 (App. 2006) (accepting special action jurisdiction of city court case appealed to superior court because no statutory right to appeal exists). Consequently, the

[1]Although the respondent judge referred to "conviction" in the singular, the record we have been provided, which includes the compact disc of the digitally recorded trial and the commitment order, establishes Koperski was convicted of two DUI-related offenses. In her notice of appeal, Koperski stated she was appealing from the judgment. We therefore presume that she appealed both convictions and that the respondent judge's reversal of the city court's judgment also related to both convictions.

state has "no other means of obtaining justice on the issue raised." *State ex rel. Romley v. Hutt*, 195 Ariz. 256, ¶ 5, 987 P.2d 218, 221 (App. 1999). Second, it is particularly appropriate to accept special action jurisdiction when the issue raised is solely a question of law. *See O'Brien v. Escher*, 204 Ariz. 459, ¶ 3, 65 P.3d 107, 108 (App. 2003). The application of the Confrontation Clause and principles announced in *Crawford* and its progeny is a question of law. *See Bohsancurt v. Eisenberg*, 212 Ariz. 182, ¶ 6, 129 P.3d 471, 473 (App. 2006). Because the respondent judge erred in interpreting and applying the law, he thereby abused his discretion, and we grant relief. *See* Ariz. R. P. Spec. Actions 3(c) (abuse of discretion among bases for granting special action relief); *see also Potter v. Vanderpool*, 225 Ariz. 495, ¶ 14, 240 P.3d 1257, 1262 (App. 2010) (court abuses discretion by committing legal error).

¶3 During his investigation of Koperski for suspicion of driving while intoxicated, Tucson police officer Sean Cleary administered a breath test to determine her AC, using the Intoxilyzer 8000. On the morning of trial, Koperski filed a motion in limine seeking to preclude the state from introducing QARs performed on that Intoxilyzer. Koperski contended the reports were inadmissible hearsay and their admission would violate her confrontation rights because they were testimonial in nature and the state did not intend to call the officer who had conducted the tests and prepared the reports. The city court judge denied the motion, concluding that if the state provided the proper foundation, the documents were admissible under the public-records exception to the hearsay rule.

¶4 At trial, Officer Cleary testified that, although he was qualified to conduct monthly and quarterly checks of Intoxilyzers to ensure they are operating properly and accurately, Tucson Police Department (TPD) criminalists had conducted these tests. Cleary identified two self-authenticated QARs relating to the Intoxilyzer that he had used to determine Koperski's AC; one report related to testing conducted in October 2007 by officer Terry Gallegos and the other to November 2007 testing conducted by Clare Conley. Over Koperski's objection, the city court judge admitted the reports as self-authenticated documents. After the state rested, Koperski called Gallegos as a witness. She testified about her qualifications as a criminalist in the area of alcohol intoxication and quality assurance. She stated she checks TPD's Intoxilyzers regularly, confirming she performed the tests reflected in the October 2007 QAR and explaining each of the tests she had conducted on that particular machine, consistent with testing protocol. Over Koperski's objection that Gallegos was not the person who had tested the machine in November 2007 and prepared the November 2007 QAR, the city court permitted Gallegos to testify during cross-examination by the state about the October and November tests and to opine that the machine had been functioning properly during the period covered by both of them. Although the city court had previously ruled the exhibits would be admitted as public records, at this juncture the court stated the exhibits were admissible as business records.

¶5 The jury found Koperski guilty of DUI and driving with an AC of .08 or more, and Koperski appealed to the superior court. The respondent judge reversed the convictions, concluding the city court had erred by admitting the QARs and had violated

Koperski's confrontation rights under the Sixth Amendment. The respondent relied on *Crawford* and the Supreme Court's refinement of that decision in *Melendez-Diaz* and *Bullcoming*. However, the respondent did not consider this court's decision in *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471 (App. 2006). Our decision in *Bohsancurt* not only survives but is reinforced by *Melendez-Diaz* and *Bullcoming*, and is dispositive of the issues raised in this special action.

¶6 In *Bohsancurt*, the respondent trial judge had ruled before the defendant's DUI trial that the state would not be permitted to introduce QARs for the Intoxilyzer that had been used to determine the defendant's AC unless the defendant was given the "opportunity to confront and cross-examine the author of the records." 212 Ariz. 182, ¶¶ 1, 3-4, 129 P.3d at 472-73. We found the records had been prepared in the ordinary course of business in compliance with certain regulations. *Id*. ¶¶ 13, 21. We reasoned that, although QARs may be used to provide foundation for the admission of a particular individual's breath test results in a DUI prosecution, *see* A.R.S. § 28-1323(A)(5), they are not prepared in anticipation of the prosecution of a specific individual; indeed, they are prepared regardless of whether the machine is ever used or any individual is ever arrested based on its use. *Id*. ¶¶ 13, 18-23, 27, 29, 31. Thus, we held "QARs are not testimonial under *Crawford*" and may be admitted at trial as business records, Ariz. R. Evid. 803(6), "even though the QA specialist who prepared them is not present in court or subject to cross-examination." *Id*. ¶ 35. We also concluded that QARs are not only business records, but also qualify as public records and are admissible under Rule 803(8)

"[b]ecause the QA specialists who calibrate the Intoxilyzers and record the results are not investigating a particular criminal matter when they perform that function . . . ." *Id.* ¶ 41.

¶7 About three years after we decided *Bohsancurt*, the Supreme Court held in *Melendez-Diaz* that a forensic laboratory affidavit, identifying as cocaine a substance found near where the defendant had been sitting in a police car, was testimonial as contemplated by *Crawford*. ___ U.S. at ___, 129 S. Ct. at 2531-32. The Court concluded that, because there had been no testimony from a witness who was competent to assure the statements in the report were true, such as the author of the report who had conducted the test, the defendant's confrontation rights had been violated. *Id.* at ___, 129 S. Ct. at 2532, 2542. The Court reached a similar conclusion in *Bullcoming* with respect to the admission of blood-test results establishing the defendant's AC because the analyst who testified at trial was not the individual who had tested the defendant's blood sample and certified the report; the analyst who testified "had neither participated in nor observed the test on [the defendant's] blood sample." ___ U.S. at ___, 131 S. Ct. at 2709, 2717. The Court held "surrogate testimony of that order" violates a defendant's rights under the Confrontation Clause. ___ U.S. at ___, 131 S. Ct. at 2710. The Court added that an accused has the "right . . . to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*

¶8 In both cases, the Supreme Court emphasized that the evidence at issue was testimonial as contemplated in *Crawford* because it related to and was introduced against a particular defendant. *See Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2716-17;

Melendez-Diaz, ___ U.S. at ___, 129 S. Ct. at 2532. As we explained above, this was the gravamen of our conclusion in *Bohsancurt* that QARs are not testimonial evidence but business records and public records, admissible as recognized exceptions to the hearsay rule. 212 Ariz. 182, ¶ 41, 129 P.3d at 482.

¶9 There clearly was no error with respect to the admission of the October 2007 QAR, given that Koperski called Gallegos, the officer who had prepared it, to testify about the documents that had already been admitted. With respect to the November 2007 QAR, the respondent judge erred by finding Koperski's confrontation rights had been violated by the city court's denial of Koperski's motion in limine and admission of that QAR over her objection. The respondent reversed Koperski's conviction on this issue alone and found it unnecessary to address the other challenges she had raised on appeal from her convictions. We therefore reverse those portions of the respondent's ruling that relate to and are inconsistent with this decision order and remand this matter to the respondent for further proceedings.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

Judges Espinosa and Kelly concurring.