

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DANIEL HERNANDEZ, *Appellant*.

No. 1 CA-CR 14-0259
FILED 6-30-2015

Appeal from the Superior Court in Maricopa County
No. CR2013-419488-001 DT
The Honorable Brian D. Kaiser, Judge
The Honorable Phemonia L. Miller, Judge Pro Tem

AFFIRMED

COUNSEL

Arizona Attorney General, Phoenix
By Robert A. Walsh
Counsel for Appellee

Maricopa County Public Defender, Phoenix
By Peg Green
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kenton D. Jones joined.

T H O M P S O N, Judge:

¶1 Daniel Hernandez (defendant) appeals from his convictions and sentences on two counts of aggravated driving while under the influence of intoxicating liquor, class four felonies. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Around 11 p.m. on May 1, 2013, Phoenix police officer Charles Price was on patrol in West Phoenix when he observed defendant's speeding vehicle and pulled him over. The officer asked defendant for his driver's license, registration, and proof of insurance. Defendant told the officer that his license was suspended and that he did not have insurance. Defendant's speech was slurred, he was unstable on his feet, and his eyes were red and watery. The officer arrested defendant. He requested defendant to submit to a blood draw, but defendant refused to do so and the officer transported defendant to a police station. The officer then authored a search warrant and submitted it to a superior court judge for approval. The judge approved the warrant, and the officer, who was trained and certified as a phlebotomist, drew defendant's blood. Defendant's blood tested as containing a .182 BAC.

¶3 The state charged defendant with two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, class 4 felonies. Defendant filed a motion to suppress his blood alcohol results, and, after an evidentiary hearing, the trial court denied the motion to suppress.

¶4 After a jury trial, defendant was found guilty as charged. The trial court found that defendant had two prior felony convictions for aggravated DUI. The court sentenced defendant to two concurrent, mitigated eight year prison terms, with credit for 231 days of presentence incarceration. Defendant timely appealed. We have jurisdiction pursuant

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to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶5 Defendant argues on appeal that the trial court erred in denying his motion to suppress because 1) the officer executed the warrant for his blood draw at night although the warrant issued by the court was a daytime warrant, and 2) because the affidavit for search warrant was signed by the judge rather than the officer. The state argues, and the trial court agreed, that the officer's mistakes in checking the box marked "daytime" search warrant rather than the box marked "nighttime" search warrant, and the fact that the affidavit for search warrant was signed by the judge and not the officer, were technical mistakes which did not justify suppression of defendant's blood alcohol results. We agree.

¶6 We review the trial court's ruling on a motion to suppress for clear and manifest error, and consider the evidence presented at the suppression hearing in the light most favorable to upholding the ruling. *State v. Walker*, 215 Ariz. 91, 94, ¶ 16, 158 P.3d 220, 223 (App. 2007) (citations omitted). Defendant was arrested at approximately 11 p.m. The warrant was issued at 11:57 p.m. (*Id.*). The officer served the warrant at 12:06 a.m., less than ten minutes after its issuance.

¶7 Defendant cites A.R.S. § 13-3917 (2010), which provides that in the absence of a direction from the judicial officer, a warrant may not be served at night, it may only be served during the day.¹ However, we interpret affidavits for search warrants "in a common sense and realistic manner." *State v. Torrez*, 112 Ariz. 525, 530, 544 P.2d 207, 212 (1975) (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965) ("the resolution of doubtful or marginal [warrant affidavits] should be largely determined by the preference to be accorded to warrants.")). See also *Yuma County Attorney v. Superior Court*, 109 Ariz. 471, 472-73, 512 P.2d 14, 15-16 (1973) (judge's failure to sign warrant as required by statute did not invalidate it because "technical error does not invalidate a warrant under our state constitution nor under our case law.") (citations omitted). Moreover, A.R.S. § 13-3925(A) (2010) provides that "[a]ny evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of [Chapter

¹ The statute defines night as "the period from ten p.m. to six-thirty a.m.," and requires a showing of "good cause" for a nighttime warrant. *Id.*

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39 (including A.R.S. § 13-3917)] except as required by the United States Constitution and the constitution of this state.”

¶8 Here, to be effective, the warrant necessarily had to be served at night, because alcohol levels dissipate with the passage of time. The affidavit for search warrant indicated that 1) the officer observed defendant speeding in excess of 90 miles per hour and weaving around other vehicles at approximately 10:55 p.m., 2) when the officer contacted defendant he had a very strong odor of alcohol coming from his person, 3) his speech was slurred, 4) he was unstable on his feet, and 5) he was antagonistic. Because there was good cause to issue the warrant at night and the mistakes in the affidavit and warrant were merely technical, we affirm the trial court’s decision denying the motion to suppress.

CONCLUSION

¶9 For the foregoing reasons, defendant’s convictions and sentences are affirmed.



Ruth A. Willingham · Clerk of the Court
FILED : ama