SUMMARY
July 18, 2024

2024COA75

No. 23CA0809, *People v. Spencer* — Vehicles and Traffic — Alcohol and Drug Offenses — Expressed Consent for the Taking of Blood, Breath, Urine, or Saliva — Extraordinary Circumstances

The express consent statute, section 42-4-1301.1, C.R.S. 2023, requires a driver to choose between and submit to either a blood or breath alcohol test when demanded by a police officer who has probable cause to believe the driver is intoxicated.

A division of the court of appeals holds that when a medical professional attempts to draw blood from the suspect for ten minutes but is unsuccessful in locating a vein, law enforcement's failure to provide the chosen blood test constitutes "extraordinary circumstances" that excuse the duty to provide the test. § 42-4-1301.1(2)(a.5). Neither the Colorado Supreme Court's decision in *People v. Null*, 233 P.3d 670 (Colo. 2010), nor the language of the

express consent statute requires the prosecution in such circumstances to prove that subsequent attempts to draw blood would have been unsuccessful.

COLORADO COURT OF APPEALS **2024COA75**

Court of Appeals No. 23CA0809
Gilpin County District Court No. 22CR87
Honorable Todd L. Vriesman, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Craig Williams Spencer,

Defendant-Appellee.

RULING DISAPPROVED

Division I
Opinion by JUDGE BERGER*
Welling and Schock, JJ., concur

Announced July 18, 2024

Alexis King, District Attorney, Kevin E. McReynolds, Senior Appellate Deputy District Attorney, Golden, Colorado, for Plaintiff-Appellant

Anderson & Carnahan, Stephen S. Anderson, Colorado Springs, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 In this felony driving under the influence (DUI) case, the prosecution appeals the district court's suppression of a breath alcohol test taken by defendant, Craig Williams Spencer. Although double jeopardy principles prohibit a retrial on the felony DUI charge,[1] we have statutory jurisdiction to review the district court's rulings. We disapprove the district court's application and extension of the supreme court's decision in *People v. Null*, 233 P.3d 670, 678 (Colo. 2010), as well as the district court's ultimate ruling suppressing the breath test results.

I. Relevant Facts and Procedural History

¶ 2 Spencer was pulled over for driving without license plates and was arrested for driving while intoxicated. Trooper Hernandez, the arresting officer, advised Spencer under the express consent statute, § 42-4-1301.1, C.R.S. 2023. That statute requires a driver to choose between and submit to either a blood or breath alcohol test when demanded by an officer who has probable cause to

[1] Because jeopardy has attached and Spencer cannot be retried, our opinion serves only to approve or disapprove the district court's challenged rulings. *People v. Moore*, 226 P.3d 1076, 1092 (Colo. App. 2009).

believe the driver is intoxicated. *See* § 42-4-1301.1(2)(a)(I); *Null*, 233 P.3d at 678. Spencer chose a blood test.

¶ 3 As was standard procedure for the Gilpin County Police Department, Trooper Hernandez requested a Gilpin County ambulance to meet him and Spencer at the jail. Medical personnel did so, but they were unable to draw Spencer's blood because they couldn't find a suitable vein. Trooper Hernandez testified, without contradiction, to the following facts:

> [T]here were two paramedics or what I'll call medical personnel because I'm not exactly sure of their title; there were two medical personnel in the ambulance. They both attempted to find veins that they could draw blood out of Mr. Spencer's arms and they weren't successful in finding a vein in order to draw the vials of blood.

Trooper Hernandez also testified that the medical personnel tried to draw blood for about ten minutes.

¶ 4 Trooper Hernandez then told Spencer that he had to submit to a breath test or suffer the consequences of a refusal to submit to a test. Spencer then agreed to submit to a breath test, which showed a blood alcohol content of .089, which is in excess of the statutory limit of .08.

¶ 5 The prosecutor charged Spencer with one count of felony DUI (fourth or subsequent offense), § 42-4-1301(1)(a), C.R.S. 2023, and one count of license plates improperly attached, § 42-3-202(2)(a), C.R.S. 2023. Spencer moved to either suppress the results of the breath test or dismiss the charges, arguing that Trooper Hernandez had violated the express consent statute by requiring Spencer to undergo a breath test in lieu of his chosen blood test. The district court granted Spencer's motion and suppressed evidence of the breath test.

¶ 6 A jury ultimately convicted Spencer of felony driving while ability impaired (fourth or subsequent offense) (DWAI) — a lesser included offense of felony DUI. It also found Spencer guilty of a license plate violation. The district court sentenced him accordingly.

II. Appellate Jurisdiction

¶ 7 We must first determine whether we have jurisdiction to review the district court's rulings in view of Spencer's conviction of felony DWAI (and his corresponding acquittal of felony DUI).

A. Legal Authority

¶ 8 "Public prosecutors in this jurisdiction are granted uncommonly broad authority to appeal decisions of trial courts in criminal cases upon questions of law" under section 16-12-102(1), C.R.S. 2023. *People v. Gabriesheski*, 262 P.3d 653, 656 (Colo. 2011). But prosecutorial appeals under section 16-12-102(1) are "necessarily limited to questions of law only." *People in Interest of N.D.O.*, 2021 COA 100, ¶ 29 (quoting *People v. Martinez*, 22 P.3d 915, 919 (Colo. 2001)).

¶ 9 "A determination of the proper legal standard and application of that standard to particular facts [are] question[s] of law." *People v. Richardson*, 58 P.3d 1039, 1048 (Colo. App. 2002). Thus, a district court's evidentiary ruling may be appealable under section 16-12-102(1) "if the trial court made its ruling based on an assertedly erroneous interpretation of the law." *People v. Welsh*, 176 P.3d 781, 791-92 (Colo. App. 2007) (a trial court's evidentiary ruling was reviewable because it "admitted the evidence after hearing extensive argument regarding the controlling legal standard and based on its view that the evidence was admissible under that standard"). Further, "[w]hen the controlling facts are undisputed,

. . . the legal effect of those facts constitutes a question of law." *Turbyne v. People*, 151 P.3d 563, 572 (Colo. 2007).

B. Analysis

¶ 10 In finding a violation of the express consent statute, the district court concluded that "the People did not fulfill their burden to show there were extraordinary circumstances to excuse the violation based on the Supreme Court precedent regarding its interpretation of this statute and the People's burden at today's hearing." The court further explained its decision in its oral rulings:

> I don't know why the medical personnel have not come in to testify as to some specific medical condition here. That *People v. Null* case clearly states that it is the obligation and the burden of the prosecution to provide evidence as to the extraordinary circumstances here. I understand that there were repeated attempts for drawing blood from the defendant. I don't know if we are talking about arms. I don't know if we [are] talking about wrists. I don't know if we were talking hands. I don't know how many times they tried.
>
> I don't know the qualifications although I don't think that's critical but I don't know the qualifications of the personnel. I don't know their training. And like I said, I don't know the specific methods and techniques used by them and what the situation was — whether they

could only draw a little bit, none, or what the situation was at all.

The only factual finding that this Court can make is that several attempts at blood draws were apparently unsuccessful. I shouldn't even say several attempt [sic]. . . . I don't know if there was one attempt with one person watching and one person attempting or one attempt by each person. I just don't know and the Court is unable to determine the reasons why the blood draw could not be completed. I don't know anything more than that and it's the burden of the People to explain what that is so says *People v. Null*.

Specifically, the People have the burden to show that extraordinary or nonroutine circumstances prevented medical personnel from responding to law enforcement's request for blood draw. In this case, I modify it to say the prosecution in this case presents no evidence as to why a blood draw couldn't be performed. In the *Null* case, it was why they couldn't respond. In this case, why they couldn't withdraw or draw that blood.

. . . .

All I know is that the prosecution failed to establish that these unsuccessful attempts are extraordinary circumstances to relieve law enforcement from the obligation to do something else during that time frame. I'm not going to speculate as to what they should have done instead — whether there was another station nearby; whether there was further information or whatever. I would have like [sic] to have heard from the medical personnel or get me those medical records to understand that. *No*

> *medical testimony, however, was presented to show that any further attempts at the blood draw would have been unsuccessful in support of the trooper's decision to cease additional efforts.* Therefore, based upon that, I'm going to suppress the breath test.

(Emphasis added.)

¶ 11 In challenging the district court's determination that the law enforcement officer violated the express consent statute, the prosecution argues that "[t]he court misapplied Colorado law by imposing a stricter standard for extraordinary circumstances than was defined by our Supreme Court," which "would defeat the legislative intent of the Express Consent statute." This argument raises a question of law reviewable under section 16-12-102(1) because it involves the district court's "determination of the proper legal standard and application of that standard to particular facts." *Richardson*, 58 P.3d at 1048. We therefore have jurisdiction to review the court's ruling.

¶ 12 In addition, because the facts relevant to whether suppression was proper are undisputed,[2] we also have jurisdiction to review the court's ultimate ruling suppressing the breath test results. *See Turbyne*, 151 P.3d at 572.[3]

III. Merits

¶ 13 As noted, the prosecution contends that the district court misapplied Colorado law by imposing a stricter standard for "extraordinary circumstances" than was established by the supreme court, and that such an interpretation "would defeat the legislative intent" of the express consent statute. We agree.

A. Standard of Review

¶ 14 We review questions of statutory interpretation de novo. *People v. Burdette*, 2024 COA 38, ¶ 46. "Our primary purpose is to ascertain and give effect to the General Assembly's intent, giving the

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[2] Although some facts may have been disputed or unclear — including what, exactly, the medical personnel tried before concluding their efforts and whether Trooper Hernandez tried contacting other nearby ambulance service stations — based on our determination of the proper legal standard, the facts relevant to whether suppression was proper are not in dispute.

[3] Because we disapprove the district court's ruling, we do not address the prosecution's alternative argument that suppression of the test results was, in any event, an improper remedy.

selected words their plain and ordinary meaning." *Id.* "In doing so, we give consistent, harmonious, and sensible effect to all of [the statute's] parts . . . ." *People v. Tafoya*, 2019 CO 13, ¶ 17. If a statute is ambiguous, then "we may rely on other factors, such as legislative history, prior law, the consequences of a given construction of the statute, and the end to be achieved by the statute, to determine its meaning." *People v. Apodaca*, 58 P.3d 1126, 1130 (Colo. App. 2002); *see* § 2-4-203, C.R.S. 2023.

¶ 15 We likewise review a district court's interpretation of Colorado case law de novo. *Whiteaker v. People*, 2024 CO 25, ¶ 9; *Lindauer v. Williams Prod. RMT Co.*, 2016 COA 39, ¶ 19; *United States v. McCray*, 563 F. App'x 705, 707 (11th Cir. 2014) (the applicability of a judicial opinion to a particular case is a "pure question of law").

B. Legal Authority

¶ 16 The express consent statute, section 42-4-1301.1, requires a driver to take a chemical alcohol test when a police officer requests such a test and has probable cause to believe the driver is intoxicated. § 42-4-1301.1(2)(a)(I); *see Null*, 233 P.3d at 678.[4] The

[4] If the driver refuses testing altogether, his license may be revoked for at least one year. § 42-2-126(2)(h), (3)(c)(I), C.R.S. 2023.

statute authorizes a driver to choose between a blood or breath test. Once that choice is made, the driver must cooperate with the police officer to provide the blood or breath sample within two hours. § 42-4-1301.1(2)(a)(I); *Turbyne*, 151 P.3d at 569. Usually, law enforcement personnel's failure to provide a driver with the chemical test of his choice violates the express consent statute. *See Null*, 233 P.3d at 682.

¶ 17 However, the statute contains exceptions. *See Brodak v. Visconti*, 165 P.3d 896, 898 (Colo. App. 2007). As pertinent here, the statutory "extraordinary circumstances" exception excuses law enforcement personnel's failure to provide a driver with his chosen test when "circumstances beyond the control of, and not created by, the law enforcement officer . . . or authority with whom the officer is employed" "prevent the completion of the test elected by the [driver] within the two-hour time period." § 42-4-1301.1(2)(a.5)(I), (IV)(A).[5]

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[5] The General Assembly added the "extraordinary circumstances" exception to the express consent statute in 2007. *See* Ch. 261, sec. 1, § 42-4-1301.1, 2007 Colo. Sess. Laws 1023. This statutory exception directly incorporates language from the supreme court's decisions in *Riley v. People*, 104 P.3d 218 (Colo. 2004), and *Turbyne v. People*, 151 P.3d 563 (Colo. 2007). *See People v. Null*, 233 P.3d 670, 679-80 (Colo. 2010) (noting that *Riley* and *Turbyne* "initially developed the extraordinary circumstances exception").

¶ 18 The statute contains an illustrative list of circumstances that fall within that definition: "'Extraordinary circumstances' includes, but shall not be limited to, weather-related delays, high call volume affecting medical personnel, power outages, malfunctioning breath test equipment, and other circumstances that preclude the timely collection and testing of a blood or breath sample by a qualified person in accordance with law." § 42-4-1301.1(2)(a.5)(IV)(B).

¶ 19 By contrast, "inconvenience, a busy workload on the part of the law enforcement officer or law enforcement authority, minor delay that does not compromise the two-hour test period . . . , or routine circumstances that are subject to the control of the law enforcement officer or law enforcement authority" are not extraordinary circumstances. § 42-4-1301.1(2)(a.5)(IV)(C).

¶ 20 The prosecution has the burden to demonstrate extraordinary circumstances. *Null*, 233 P.3d at 680.

¶ 21 In *Null*, 233 P.3d at 673, the supreme court interpreted the express consent statute to require that, in a situation in which medical personnel fail to respond to police dispatch's request for a blood draw, the prosecution must "show that extraordinary or non-routine circumstances prevented medical personnel from

responding" to that request.[6] *Id.* The court explained that, while the statute defines "extraordinary circumstances" as those outside the control of the "law enforcement officer . . . [or] authority," § 42-4-1301.1(2)(a.5)(IV)(A), law enforcement "has control over the protocols that it develops to provide a driver with his or her chosen test. If those protocols fail routinely or under routine circumstances, then that failure cannot be excused as extraordinary," *Null*, 233 P.3d at 680.

¶ 22 Thus, after *Null*, the prosecution must establish that extraordinary circumstances excused law enforcement personnel's failure to provide a driver with a blood draw when medical personnel failed to respond to dispatch's request. To meet this burden, the prosecution must present evidence of the reason that medical personnel refused to respond, including "whether such refusals were themselves routine or unusual." *Id.* at 681. The

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[6] In *Null*, 233 P.3d at 673, the supreme court characterized the situation as a "refusal" by the "ambulance service . . . to come to the jail to perform the test." No such refusal occurred in this case. Because it is unnecessary for us to do so, we do not further address whether there is any legal difference in this context between a "refusal" as opposed to a simple failure to perform the requested test.

court must then determine whether the proffered reason was "extraordinary or non-routine" (e.g., bad weather or high call volumes) as opposed to "ordinary" (e.g., inconvenience or a busy workload). *Id.* at 673, 679.

C. Analysis

¶ 23 The district court erred by substantially extending the holding of *Null*. Here, medical personnel *did* respond to dispatch's request, and the prosecution *did* present evidence to explain why the responders were unable to complete the draw: As noted above, Trooper Hernandez testified that they "weren't successful in finding a vein in order to draw the vials of blood." The district court erroneously concluded that the prosecution was also required to "show that any further attempts at the blood draw would have been unsuccessful in support of the trooper's decision to cease additional

efforts" to establish extraordinary circumstances.[7] Neither the statute nor *Null* imposes such a requirement.

¶ 24 The statute provides that if extraordinary circumstances — defined as circumstances "beyond the control of, and not created by," the law enforcement officer or authority — "*prevent* the completion of the test elected by the person within the two-hour time period," the exception applies and the driver must take the alternative test. § 42-4-1301.1(2)(a.5)(I), (IV) (emphasis added). A circumstance that "prevents" the timely completion of a blood test in a particular situation doesn't necessarily have to render it impossible to complete the test using other methods, providers, or equipment. *See Burdette*, ¶ 46 (in construing statutory language, we "giv[e] the selected words their plain and ordinary meaning").

¶ 25 Nor do the statute's illustrative examples of extraordinary circumstances — "weather-related delays, high call volume affecting

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[7] The court's written order said that it was "[b]ased on the findings and conclusions stated on the record at today's hearing." Because the court's oral ruling thoroughly explains — and doesn't conflict with — its written order, we may properly consider the court's oral ruling. *See People in Interest of S.R.N.J-S.*, 2020 COA 12, ¶ 16; *People v. Skufca*, 141 P.3d 876, 884 (Colo. App. 2005), *rev'd*, 176 P.3d 83 (Colo. 2008).

medical personnel, power outages, [and] malfunctioning breath test equipment" — imply that a showing of impossibility is required for the exception to apply. § 42-4-1301.1(2)(a.5)(IV)(B).

¶ 26 Even if the statute were ambiguous (which it is not), and we were then justified in considering circumstances outside of the plain language of the statute, the result would be the same. "The primary purpose of the express consent statute is to facilitate cooperation between citizens and police officers in the enforcement of highway safety." *Turbyne*, 151 P.3d at 569. The statute also aims to "obtain scientific evidence of the amount of alcohol in the bloodstream in order to curb drunk driving through prosecution for that offense." *Id.* (quoting *Zahtila v. Motor Vehicle Div.*, 39 Colo. App. 8, 10, 560 P.2d 847, 849 (1977)).

¶ 27 In achieving those ends, "[t]he mutual obligations created by the statute" go both ways: they "allow a driver to obtain a chemical test for exculpatory purposes and the police to obtain a test to inculpate the driver." *Id.* The district court's interpretation unduly and inappropriately upsets this carefully crafted balance.

¶ 28 Moreover, requiring the prosecution to prove that later attempts at a blood draw would have failed imposes a burden on

the prosecution that is nearly impossible to meet: How many pokes would be sufficient to meet such an evidentiary bar? How many paramedics must attempt to draw blood? Must they attempt to draw blood from all potential entry points in a driver's body before it is deemed medically infeasible to complete the draw?

¶ 29 Having clarified the appropriate evidentiary standard, we conclude as a matter of law that the facts confronting Trooper Hernandez constituted an "extraordinary or non-routine" circumstance within the scope of the statutory exception. *See Null*, 233 P.3d at 673. The medical personnel's inability to find a suitable vein was neither "created by" nor within the control of law enforcement. § 42-4-1301.1(2)(a.5)(IV)(A); *see People v. Young*, 2024 COA 1, ¶ 32. It didn't result from mere "inconvenience" or "a busy workload" on the part of law enforcement or medical personnel: Trooper Hernandez followed the standard departmental procedure of requesting a blood draw from the Gilpin County Ambulance Authority, and medical personnel responded and attempted to draw Spencer's blood for about ten minutes. *See* § 42-4-1301.1(2)(a.5)(IV)(C); *Null*, 233 P.3d at 679. Nor does this situation involve police protocols that "fail routinely or under

routine circumstances." *Null*, 233 P.3d at 680. Indeed, Trooper Hernandez testified that medical personnel's failure to locate a vein for a blood draw "rarely ever happens."

¶ 30 By imposing a requirement that the prosecution prove that future attempts at a blood draw would have been unsuccessful, the district court improperly extended the prosecution's evidentiary burden beyond that required by the express consent statute and *Null*. Applying that holding and based on the undisputed relevant facts, this situation constituted an extraordinary circumstance excusing law enforcement's failure to complete a blood test.

IV. Disposition

¶ 31 The district court's rulings are disapproved.

JUDGE WELLING and JUDGE SCHOCK concur.