DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner, v. THE HONORABLE MYRA HARRIS, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Commissioner, HRACH SHILGEVORKYAN, Real Party in Interest.	No. 1 CA-SA 12-0211 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. LC2011-100433-001DT

The Honorable Myra Harris, Commissioner

JURISDICTION ACCEPTED; RELIEF GRANTED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Andrea L. Kever, Deputy County Attorney
Attorneys for Petitioner

Kimerer & Derrick, P.C. Phoenix
By Michael Alarid, III
Attorneys for Real Party in Interest

B R O W N, Judge

¶1 In this special action, the State challenges the superior court's order affirming the Arcadia Justice Court's decision granting Defendant's motion to dismiss for insufficiency of the State's complaint under Arizona Rule of Criminal Procedure 16.6(b). For the following reasons, we disagree that the complaint was insufficient.

BACKGROUND

¶2 On December 11, 2010, Hrach Shilgevorkyan ("Defendant") was pulled over by Deputy Powe of the Maricopa County Sheriff's Office. Powe noticed Defendant had slurred speech, bloodshot eyes, and a flushed face. Defendant admitted to smoking "weed" but did not specify when that occurred. Powe then took Defendant to the command post for processing and eventually Defendant agreed to submit to a blood test, which revealed a concentration of 8ng/ml of Carboxy-Tetrahydrocannabinol ("Carboxy-THC").

¶3 Powe filed an Arizona Traffic Ticket and Complaint[1] in the justice court, charging Defendant with two counts of driving

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[1] We take judicial notice of the complaint, which is part of the superior court's record. *See City of Phoenix v. Superior*

under the influence, in violation of Arizona Revised Statutes ("A.R.S.") section 28-1381 (2012). Count B alleged that Defendant had violated § 28-1381(A)(3) based on "Drugs."[2] Defendant moved to dismiss the complaint, asserting it would be impossible for him to be found guilty under § 28-1381(A)(3) because Hydroxy-Tetrahydrocannabinol ("Hydroxy-THC"), *the* metabolite of marijuana, was not found in his blood. The state opposed the motion, asserting that Carboxy-THC is also a metabolite of marijuana and thus falls within the scope of § 28-1381(A)(3). After an evidentiary hearing in which the State presented expert testimony as to the differences between Hydroxy-THC and Carboxy-THC, the court granted Defendant's motion to dismiss. The State appealed to the superior court.[3]

Court In & For Maricopa County, 110 Ariz. 155, 157, 515 P.2d 1175, 1177 (1973).

[2] Count A alleged Defendant drove while impaired to the slightest degree in violation of § 28-1381(A)(1). The State dismissed Count A prior to the appeal. Regarding Count B, § 28-1381(A)(3) provides that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances: (3) While there is any drug defined in section 13-3401 or *its metabolite* in the person's body." (Emphasis added.)

[3] Prior to appealing to the superior court, the State filed a motion for reconsideration. For the first time, the State brought *State v. Phillips*, 178 Ariz. 368, 873 P.2d 706 (App. 1994) and *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601 (App. 1998) to the justice court's attention. In light of these authorities, the judge stated, "I would have reversed myself on the merits once I heard the appellate court cases that involved carboxy. I think I made a mistake on this." However, the judge

¶4 After submission of briefs, the superior court affirmed the dismissal of Count B, concluding the justice court did not err. The court determined the statute was ambiguous because there was "significant argument about whether the term 'metabolite' is singular or plural." The court recognized it was permitted to interpret the singular form in the plural to overcome the ambiguity, but declined to do so. Instead, the court reasoned that the State had not shown "the legislature necessarily intended to include all possible derivatives of drugs—particularly inactive end products that no longer affect an individual."

¶5 The court then turned more specifically to Carboxy-THC and found it was a metabolite of marijuana. Finding that the legislature did not intend to include Carboxy-THC within the term "its metabolite," the court relied on the State's expert, who testified Carboxy-THC was not psychoactive and could take up to four weeks to completely evacuate the body. Additionally, the court rejected the State's reliance on *State v. Hammonds* and *State v. Phillips* and focused on the inactive nature of Carboxy-THC. The court therefore concluded that the "the legislature did not intend for the term metabolite to include more than the

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declined to reconsider, finding there was no longer jurisdiction because of the State's appeal to the superior court.

single active metabolite—[H]ydroxy THC." The State then filed its petition for special action to this court.

SPECIAL ACTION JURISDICTION

¶6 Special action review seeks extraordinary relief and is therefore highly discretionary. *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4, 35 P.3d 82, 84 (App. 2001). Because this case involves a pure question of law, and it appears the State has no adequate remedy by appeal, in the exercise of our discretion we accept jurisdiction.[4] *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 165-66, ¶¶ 8-9, 83 P.3d 1103, 1106-07 (App. 2004); Ariz. R.P. Spec. Act. 1(a) (2012).

DISCUSSION

¶7 Arizona Rule of Criminal Procedure 16.6(b) requires that a complaint be dismissed if, on a motion by a defendant, the court finds that the charging document is insufficient as a matter of law. Ariz. R. Crim. P. 16.6(b). Our supreme court has held that "[i]f a defendant can admit to all the allegations

[4] Defendant argues the State has an equally plain, speedy, and adequate remedy by appeal under A.R.S. § 12-2101(A)(1). It does not appear, however, that we would have appellate jurisdiction over the superior court's order in this case. *See* A.R.S. § 22-375(B) ("[T]here shall be no appeal from the judgment of the superior court given in an action appealed from a justice of the peace or a police court."). In any event, because we have elected to accept jurisdiction under our discretionary authority, we need not address Defendant's contention.

charged in the [complaint] and still not have committed a crime, then the [complaint] is insufficient as a matter of law." *Mejak v. Granville*, 212 Ariz. 555, 556, ¶ 4, 136 P.3d 874, 875 (2006).

¶8 Here, it is undisputed that Carboxy-THC is a metabolite of marijuana and was the only metabolite found in Defendant's blood. Defendant's sole contention is that he can admit to all the allegations in the State's complaint for Count B and still not be convicted because Carboxy-THC is not included in the phrase "its metabolite" found in A.R.S. § 28-1381(A)(3). We disagree.

¶9 Our legislature has determined that it is unlawful for a person to drive a vehicle while there is any drug, as defined in A.R.S. § 13-3401, or "its metabolite" in the person's body. A.R.S. § 28-1381(A)(3). This statutory prohibition "was enacted as part of Arizona's comprehensive law regulating drivers under the influence of intoxicating liquor or drugs ("DUI") and designed to protect the public by reducing the terrible toll of life and limb on our roads." *State v. Phillips*, 178 Ariz. 368, 371, 873 P.2d 706, 709 (App. 1994) (internal quotations omitted). To effectuate this legislative intent, this court has broadly construed A.R.S. § 28-1381(A)(3) and upheld it against several constitutional challenges.

¶10 In *Phillips*, the defendant challenged the facial validity of A.R.S. § 28-692(A)(3) (1994) (now A.R.S. § 28-

1381(A)(3)), arguing it was unconstitutionally vague and overbroad. 178 Ariz. at 370, 873 P.2d at 708. We disagreed and noted the legislature intended to create a "per se prohibition" and a "flat ban on driving with *any* proscribed drugs in one's system." *Id*. at 372, 873 P.2d at 710 (emphasis added). This flat ban extended to all substances, whether capable of causing impairment or not. As a result, we concluded that the statute "precisely defines, in unequivocal terms, the type of behavior prohibited[.]" *Id*. at 371, 873 P.2d at 709. The defendant also argued the statute could not withstand any level of scrutiny under the equal protection clause. *Id*. We rejected that argument as well, concluding the "legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle." *Id*. at 372, 873 P.2d at 710. To buttress our conclusion, we emphasized the "compelling legitimate interest" the state has to protect the public from impaired driving because the "potential for lethal consequences is too great." *Id*. It was thus reasonable for the legislature to create this statutory flat ban. *Id*. Based on this interpretation of the statute, we upheld the constitutionality of § 28-692(A)(3). *Id*.

¶11 Similarly, in *State v. Hammonds*, 192 Ariz. 528, 530, ¶ 6, 968 P.2d 601, 603 (App. 1998), we were presented with another constitutional challenge to A.R.S. § 28-692(A)(3). In

that case, the defendant displayed symptoms of intoxication and was arrested for DUI. *Id*. at ¶ 2. After tests revealed low alcohol concentrations, the arresting officers suspected drug use and asked the defendant to provide a urine sample, which he did. *Id*. at ¶¶ 3-4. The sample revealed the presence of Carboxy-THC as well as metabolites of the prescription drug, Soma. *Id*. at ¶ 4. The State charged the defendant with two counts of DUI. *Id*. at ¶ 5. As relevant here, Count 2 was premised on driving with a drug or its metabolite in the body. *Id.* A jury acquitted the defendant of Count 1, driving while impaired, but convicted him on Count 2. *Id*. at ¶ 6. He appealed, arguing the statute violated the equal protection clause. *Id*.

¶12 Using the rational basis test, we held the statute did not violate the equal protection clause. *Id*. at 533, ¶ 17, 968 P.2d at 606. We reiterated our court's broad statement in *Phillips* that the "statute created a flat ban on driving with any proscribed substance in the body, whether capable of causing impairment or not." *Id*. at 531, ¶ 9, 968 P.2d at 604. We also found other "cogent reasons" for broadly interpreting the ban on drug use while driving. *Id*. at ¶ 10. For example, we noted, based on the expert's testimony, that metabolic rates differ from drug to drug and that the "presence of an illicit drug's metabolite [whether active or inactive] establishes the

possibility of the presence of the active, impairing component of the drug." *Id*. This fact, we concluded, "justifies the legislature banning entirely the right to drive" with any metabolite present. *Id*. at ¶ 11. Moreover, in affirming Hammonds' conviction on Count 2, we found it was irrelevant to determine precisely which metabolite evidence the jury relied on to convict Hammonds because, regardless, the "conviction [under the statute was] sustainable for the marijuana metabolite," Carboxy-THC. *Id*. at 530 n.2, ¶ 6, 873 P.2d at 603 n.2.

¶13 Although these cases do not directly interpret the phrase "its metabolite," they stand for the proposition that § 28-1381(A)(3) must be interpreted broadly to appropriately effectuate the purpose and legislative intent underpinning the statutory language. We follow this established precedent and hold that § 28-1381(A)(3)'s provision prohibiting driving with a proscribed drug or "its metabolite" includes the metabolite Carboxy-THC.

¶14 Our holding is consistent with A.R.S. § 1-214(B) (2012), which allows us to interpret "[w]ords in the singular number [to] include the plural" in order to effectuate legislative intent. *Estate of McGill ex rel. McGill v. Albrecht*, 203 Ariz. 525, 529, ¶ 11, 57 P.3d 384, 388 (2002) (explaining that § 1-214(B) is "a permissive statute" and allows us to interpret the singular as the plural "when such an

interpretation will enable us to carry out legislative intent."). Defendant has not cited, nor has our research revealed, any authority suggesting the legislature intended that § 28-1381(A)(3) be construed only in "the singular number." *See* A.R.S. § 1-214(B). We therefore conclude the superior court erred as a matter of law in concluding Carboxy-THC was not included in the phrase "its metabolite."

CONCLUSION

¶15 For the foregoing reasons, we reverse the superior court's order dismissing Count B of the State's complaint and remand to the superior court for further proceedings.

/s/
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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
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ANDREW W. GOULD, Judge

/s/
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DONN KESSLER, Judge