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NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)
(1); Ariz. R. Crim. P. 31.19(e).
Court of Appeals of Arizona, Division 2.

THE STATE OF ARIZONA, Appellee,
v.
PATRICIA SANCHEZ, Appellant.

No. 2 CA-CR 2017-0222
|
Filed August 31, 2018

Appeal from the Superior Court in Santa Cruz County

No. CR16197

The Honorable Anna M. Montoya-Paez, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General, Joseph T. Maziarz, Chief Counsel, By Diane Leigh Hunt, Assistant Attorney General, Tucson, Counsel for Appellee

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Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom concurred and Judge Brearcliffe concurred in part and dissented in part.

MEMORANDUM DECISION

STARING, Presiding Judge:

***1 ¶1** Patricia Sanchez appeals from her conviction for driving while under the influence of alcohol (DUI). Sanchez argues the trial court erred by denying her motion to suppress all evidence because she was arrested without probable cause, by failing to suppress blood-draw evidence because probable cause did not exist for issuance of the search warrant, and by placing her on probation despite the fact her pretrial incarceration exceeded the maximum sentence that could be imposed for the offense resulting in her conviction. For the reasons that follow, we affirm Sanchez's conviction but vacate her sentence of probation and remand the matter for resentencing.

Factual and Procedural Background

¶2 On July 2, 2016, two brothers drove with their two-year-old cousin to a pharmacy in Nogales, Arizona. Tragically, the child broke free of his cousin's hand in the parking lot, and was struck and killed by a truck driven by Sanchez.

¶3 At a hearing on Sanchez's motion to suppress evidence, Nogales police sergeant Mario Rodriguez testified concerning his investigation of the accident. Upon arrival, Rodriguez learned that the child had been killed and that Sanchez had been driving the truck that struck him. When Rodriguez knelt next to Sanchez, who was distraught and kneeling, he noticed a "strong, pungent odor" of alcohol coming from her breath and asked her if she had been drinking. Sanchez answered that she "drank two cans" earlier in the day. Rodriguez also observed that Sanchez's eyes were watery and her face was "flushed," but he could not determine if that was due to her distraught state or because of impairment. Officers then arrested Sanchez.

¶4 At the suppression hearing, Nogales police detective Jose Bermudez testified that he administered the Horizontal Gaze Nystagmus Test (HGN) to Sanchez at the police station. During the test, he noted two cues of alcohol impairment—nystagmus at maximum deviation and lack of smooth pursuit in both eyes. Bermudez did not administer any other field sobriety tests because of Sanchez's "emotional state" and out of concern for her safety.

¶5 Bermudez also prepared the paperwork needed for a search warrant permitting officers to obtain a blood draw from Sanchez and to search her truck. He filled out a telephonic warrant worksheet form called the "Nogales Police Department Telephonic Search Warrant Worksheet" in anticipation of speaking to a judge by telephone. When another officer contacted the on-call judge, a city court magistrate, she told him that she was

near the court and could take the warrant application in person. Bermudez testified he typically creates an affidavit when applying for a warrant in person, rather than using a worksheet, which he uses for warrants sought by telephone. However, when Bermudez learned that the magistrate would take the warrant application in person, he had already completed the worksheet and estimated it would take him another thirty minutes or so to draft an affidavit. He was concerned that the additional thirty-minute delay would result in the warrant not being executed, and the blood sample not being drawn, until beyond two hours from the time of accident. According to Bermudez, Arizona law requires blood draws to be within two hours of the "driving behavior" because of the body's elimination of alcohol over time. Bermudez testified that, had he prepared an affidavit rather than simply the worksheet, he would have changed only the format and not any of the substance presented.

***2** **¶6** The magistrate met with Bermudez in the courtroom and, under oath, Bermudez went over the worksheet and warrant form with her. Bermudez presented the worksheet to the magistrate "[t]o let her know all of the information that [he] had ... as well as the probable cause for the search warrant." Beyond the information in the worksheet, Bermudez conveyed his observations that Sanchez had a "flushed face and bloodshot, watery eyes" to the magistrate. None of the discussion between Bermudez and the magistrate was audio recorded or otherwise transcribed.

¶7 The magistrate proceeded to issue the search warrant, signing the "Standard Arizona Duplicate Original Search Warrant" form Bermudez had created along with the worksheet. A duplicate original search warrant form is typically signed by the applicant officer on behalf of the judge when the judge issues a warrant by phone. *See* A.R.S. § 13-3915(D). The warrant here is part of a sequentially numbered seven-page document, the first five pages of which is the worksheet. The warrant begins, "To any peace officer in the State of Arizona: Proof by affidavit having been this day made before me by: Detective Jose Bermudez[,] I am satisfied that there is probable cause to believe that ...." Both the magistrate and Bermudez signed the final page of the warrant.

¶8 Pursuant to the search warrant, a blood sample was drawn from Sanchez at a local hospital. Analysis of the sample revealed a blood-alcohol concentration of .209 percent. While at the hospital with Sanchez, Bermudez realized the search warrant contained the wrong license plate number for Sanchez's truck. Bermudez then contacted the issuing magistrate, met with her again in person and, after being placed under oath, both he and the magistrate initialed the warrant by the corrected license plate number.

¶9 At the suppression hearing, Sanchez argued the officers lacked probable cause for her arrest and that the warrant lacked probable cause, due to the lack of a supporting affidavit. She argued Bermudez's failure to record the statements made to the issuing magistrate in the absence of an affidavit was a violation of law. The trial court denied the motion to suppress, concluding there was sufficient probable cause stated in the warrant application even without considering any unrecorded statements made by Bermudez to the issuing magistrate. The court also concluded no constitutional violation resulted from the lack of an audio recording. The court also ruled there was sufficient probable cause for Sanchez's arrest.

¶10 After a jury trial, Sanchez was acquitted on a manslaughter charge resulting from the child's death, but convicted of DUI, a class-one misdemeanor. At sentencing, Sanchez asked for a jail sentence rather than probation because she had served 312 days before sentencing, a period exceeding the statutory maximum sentence for the crime. Notwithstanding her request, the court suspended sentencing and placed her on an eighteen-month term of probation. The sentencing order states, "IT IS ORDERED, suspending the imposition of sentence and placing the defendant on Unsupervised Probation for a period of eighteen (18) months, commencing June 19, 2017." This appeal followed, and we have jurisdiction under A.R.S §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Probable Cause to Arrest

¶11 On appeal, Sanchez argues the trial court erred when it denied her motion to suppress all evidence obtained after her arrest because there was no probable cause for the arrest. "We review the denial of a motion to suppress evidence for an abuse of discretion." *State v. Brown*, 233 Ariz. 153, ¶ 4 (App. 2013); *see also State v. Crowley*, 202 Ariz. 80, ¶ 7 (App. 2002) ("We will not disturb a trial court's ruling on a motion to suppress evidence absent a clear abuse of discretion."). And, in doing so, "we consider

only the evidence presented at the [suppression] hearing, which we view in the light most favorable to upholding the trial court's order." *State v. Carlson*, 228 Ariz. 343, ¶ 2 (App. 2011). However, while we defer to the court's determination of facts and witness credibility, we review *de novo* its legal conclusions. *Id.* "Whether an illegal arrest occurred is a mixed question of fact and law." *State v. Blackmore*, 186 Ariz. 630, 632 (1996).

***3** **¶12** "A police officer has probable cause [to arrest] when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Moran*, 232 Ariz. 528, ¶ 10 (App. 2013) (quoting *State v. Hoskins*, 199 Ariz. 127, ¶ 30 (2000), *vacated in part on other grounds*, 204 Ariz. 572, ¶ 8 (2003)). "Probable cause is something less than the proof needed to convict and something more than suspicions." *State v. Aleman*, 210 Ariz. 232, ¶ 15 (App. 2005) (quoting *State v. Howard*, 163 Ariz. 47, 50 (App. 1989)). In the DUI context, "probable cause does not require law enforcement 'to show that the operator was in fact under the influence'; '[o]nly the probability and not a prima facie showing of intoxication is the standard for probable cause.' " *Id.* (alteration in *Aleman*) (quoting *Smith v. Ariz. Dep't of Transp.*, 146 Ariz. 430, 432 (App. 1985)).

¶13 Before Sanchez's arrest, Rodriguez concluded it was probable that she was "impaired to the slightest degree" due to the influence of "intoxicating liquor." A.R.S. § 28-1381(A)(1). Sanchez, while driving in a parking lot, hit a child who died as a result. Rodriguez noted the odor of alcohol coming from Sanchez, which he characterized as "strong" and "pungent." Sanchez admitted to drinking two cans of beer. Additionally, Rodriguez noted Sanchez's hysterical behavior and that her face was "flushed" and her eyes were bloodshot. The circumstances, as a whole, could cause a reasonable person to believe Sanchez was impaired to the slightest degree and that she had committed a crime. *See Howard*, 163 Ariz. at 49-50 (probable cause existed for blood draw where defendant rear-ended another car and smelled of alcohol); *Moran*, 232 Ariz. 528, ¶ 11 (probable cause existed for arrest where defendant smelled of intoxicants, was confused about basic information, and performed poorly on HGN). We thus find no abuse of discretion in the trial court's denial of the motion to suppress on this basis.

Search Warrant

¶14 Sanchez also claims the trial court erred in failing to suppress evidence obtained pursuant to the search warrant because the warrant was unsupported by an affidavit and therefore unsupported by probable cause. She asserts that, because Bermudez did not prepare an affidavit to support the search warrant, and because his conversation with the issuing magistrate while applying for the search warrant was not recorded or transcribed, it was fatally defective.

¶15 "In reviewing the trial court's decision, we are mindful that its 'task [wa]s to determine whether the totality of the circumstances indicates a substantial basis for the magistrate's decision' to issue a warrant." *Crowley*, 202 Ariz. 80, ¶ 7 (alteration in original) (quoting *State v. Hyde*, 186 Ariz. 252, 272 (1996)). Such review must grant deference to a magistrate's decision. *Id.* "A reviewing court must presume a search warrant is valid; it is the defendant's burden to prove otherwise." *Id.* "In applying the law pertaining to search warrants, Arizona courts have reasoned that warrants are to be given a common sense reading, [so] that they will not be defeated by a hypertechnical interpretation." *State v. Rodgers*, 134 Ariz. 296, 300 (App. 1982).

¶16 Arizona law limits the bases on which evidence obtained pursuant to a search warrant may be suppressed:

> A. Any evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of this chapter except as required by the United States Constitution and the constitution of this state.
>
> B. If a party in a criminal proceeding seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.
>
> ***4** C. The trial court shall not suppress evidence that is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.

A.R.S. § 13-3925(A)–(C). The first question we answer is whether, as Sanchez claims, any defect in the warrant exists. If so, we then consider whether it rose to the level of a constitutional violation. And, if such is the case, we must then determine if the executing officer nonetheless acted in good faith. Notably, if we find no defect in the warrant then we need not reach the remaining questions. *See generally United States v. Leon*, 468 U.S. 897, 922 (1984) (reaching the question of good faith after invalidating warrant on Fourth Amendment grounds).

¶17 The requirements for a search warrant application are found in A.R.S. § 13-3914, which states:

> A. Before issuing a warrant, the magistrate may examine on oath the person or persons seeking the warrant, and any witnesses produced, and must take his affidavit, or their affidavits, in writing and cause the affidavit to be subscribed by the party or parties making the affidavit. Before issuing the warrant, the magistrate may also examine any other sworn affidavit submitted to him which sets forth facts tending to establish probable cause for the issuance of the warrant.
>
> B. The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist.
>
> C. In lieu of, or in addition to, a written affidavit, or affidavits, as provided in subsection A, the magistrate may take an oral statement under oath which shall be recorded on tape, wire or other comparable method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication. This statement is deemed to be an affidavit for the purposes of issuance of a search warrant. If a recording of the sworn statement is made, the statement shall be transcribed at the request of the court or either party and certified by the magistrate and filed with the court.

"An 'affidavit' is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true." *In re Wetzel*, 143 Ariz. 35, 43 (1984); *see also* Black's Law Dictionary (10th ed. 2014) (an affidavit is "[a] voluntary declaration of facts written down and sworn to by a declarant, usu[ally] before an officer authorized to administer oaths"). [1]

¶18 Sanchez primarily relies on *State v. Boniface*, 26 Ariz. App. 118 (1976), and *State v. Moody*, 208 Ariz. 424 (2004), for the proposition that the absence of any recording here, as required by § 13-3914(C), invalidates the warrant in light of the lack of an affidavit required by § 13-3914(A). In *Boniface*, a police officer attempted to execute a residential search warrant when he realized the warrant had the incorrect address. 26 Ariz. App. at 119. The officer then called the magistrate who had issued the warrant, explained the mistake, and obtained permission to change the address on the existing warrant. *Id.* That call with the magistrate was not recorded, and the magistrate had not placed the officer under oath in taking the amendment. *Id.* at 121. The officer then executed the amended warrant on the defendant's home, which was located at yet a different address, not listed on either the original warrant or the warrant as amended. *Id.* at 119. At the suppression hearing, the state argued that even though the proper street address was not on the face of the warrant, the officer had given the physical description of the home to the judge over the phone, and that this was sufficient. *Id.* at 120. Our supreme court acknowledged that, even when the street address on a warrant is incorrect, a physical description provided in the warrant might suffice. *Id.* The court, however, noted that the physical description of the home was only given to the magistrate over the phone, the phone call was not recorded, and, because it was not recorded, the only identification of the home in the warrant was the incorrect street address. Therefore, the warrant lacked constitutional "particularity." *Id.* at 119-20.

***5 ¶19** In *Moody*, the supreme court addressed the validity of a telephonic search warrant that the defendant challenged because the warrant application call was not recorded in full. 208 Ariz. 424, n.7. The court concluded the warrant was valid:

> Although the transcript of the recorded affidavit supporting the warrant shows that the recording cut off the court's order authorizing the warrant, the tape contains the affiant detective's oath, her description of the facts of the case, the substantial evidence linking Moody to the crime, Moody's name, and a complete list of physical evidence requested. Arizona's

> statute governing telephonic search warrants, A.R.S. § 13-3914(C) (1989), requires only that the affiant's statement of facts that establish the grounds for the warrant be recorded.

Id. Under the facts here, neither *Boniface* nor *Moody* require suppression.

¶20 Even before the enactment of § 13-3925, our courts had held that the failure to comply fully with the statutory warrant requirements did not invalidate a search warrant when there was substantial compliance with the statutory scheme. *See State v. Hadd*, 127 Ariz. 270, 275 (App. 1980). In *Hadd*, a police officer sought and obtained a telephonic search warrant; however, no original search warrant was ever prepared or signed by the magistrate (although a duplicate was filed), the magistrate failed to certify the transcription of the recorded telephone conversation, and the officer neglected to include citations in his duplicate warrant and failed to enter the exact time of the execution of the warrant, all in violation of various statutory provisions. *Id.* at 273-74. We nonetheless refused to require suppression. *Id.* at 275. Likewise, the United States Supreme Court noted "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officer[ ] w[as] dishonest or reckless in preparing the[ ] affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926. [2]

¶21 Here, the combined worksheet and warrant document begins with Bermudez's request to be sworn in ("Judge Mayra Galindo, this is Jose Bermudez, of the Nogales Police Department. Will you swear me in please?"). The testimony at the suppression hearing is that, in fact, the magistrate did place Bermudez under oath. The worksheet also states, "I am calling for a telephonic search warrant and have just, probable and reasonable cause to believe ...." The worksheet then states the detective's probable cause for the warrant, identifies the subject of the warrant, the location to be searched, the evidence to be seized, the crime of which the subject is accused, and the applying officer's name and experience. On the last page of the combined seven-page document, at the end of the warrant, Bermudez signed his name. Importantly, at the outset of the warrant, the issuing magistrate states that she received the information in support of the warrant "by affidavit."

¶22 Here, each formality of an affidavit required by § 13-3914 is present in the seven-page combined worksheet and warrant document when considered as a whole. The only formality normally present in an affidavit missing from this seven-page document is the language reflecting the oath—the language that "the affiant vouches that what is stated is true." *See Wetzel*, 143 Ariz. at 35, 43. As stated in *Moody*, however, with respect to a wholly oral application for warrant by telephone, "Arizona's statute governing telephonic search warrants, A.R.S. § 13-3914(C) (1989), requires only that the affiant's statement of facts that establish the grounds for the warrant be recorded." 208 Ariz. 424, n.7; *see also* A.R.S. § 13-3914(B) ("The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist."). We do not conclude that the absence of the language memorializing the oath invalidates the worksheet and warrant as an affidavit here. *See State v. Ault*, 150 Ariz. 459, 467 (1986) ("Doubtful or marginal affidavits should be considered in light of the preference of validity accorded search warrants.").

***6 ¶23** Because the warrant issued by the magistrate was supported by a written affidavit as required by § 13-3914(A), the oral statements made by Bermudez to the issuing magistrate need not be recorded or transcribed. It is only when an oral statement supporting a warrant is taken "in lieu of" an affidavit in writing that any such statement must be recorded. § 13-3914(C). Consequently, the failure to record the discussion between Bermudez and the issuing magistrate here did not violate the law and did not justify invalidation of the warrant and suppression. *See Ault*, 150 Ariz. at 466-67 ("Search warrants are presumed to be correct and should not be invalidated by a hypertechnical interpretation when a magistrate had probable cause to issue the warrant."). Under all the circumstances, we find no error in the trial court's refusal to suppress evidence for the alleged lack of an affidavit or audio recording.

¶24 To the extent that Sanchez is also asserting that the warrant was unsupported by probable cause generally, we do not agree. "[A] judicial determination of probable cause for issuing a search warrant will be upheld if there was a substantial basis for the magistrate's finding."

Rodgers, 134 Ariz. at 300. Considering only the probable cause statement in the worksheet, and, as the trial court did, ignoring any additional facts solely conveyed to the issuing magistrate orally, the warrant affidavit evinces probable cause: Sanchez was driving a truck that struck and fatally injured a child, Sanchez admitted that "she had two beers," a police officer noted "a[n] odor of intoxicants emanating from her breath and person," and during the administration of the HGN test, Bermudez observed "a lack of smooth pursuit" in both eyes and "nystagmus at maximum deviation in both eyes." These facts are enough to establish probable cause.[3] *See Howard*, 163 Ariz. at 49-50 (probable cause existed for blood draw where defendant rear-ended another car and smelled of alcohol); *Moran*, 232 Ariz. 528, ¶ 11 (probable cause existed for arrest where defendant smelled of intoxicants, was confused about basic information, and performed poorly on HGN).

Sentencing

¶25 Finally, Sanchez argues the trial court erred when it imposed an eighteen-month term of unsupervised probation for her misdemeanor DUI conviction. In doing so, the court found Sanchez was "eligible for probation," that "probation should include incarceration ... as a term and condition[ ]," and ordered that Sanchez "be incarcerated" in the county jail for ten days. It then credited her for the 312 days she had spent in jail since her arrest. Sanchez bases her argument on the undisputed fact that the 312 days she had already served exceed the maximum jail sentence of six months permissible for her DUI conviction, as well as on the fact that she rejected probation. *See* A.R.S. § 13-707(A)(1) (six months maximum sentence for class one misdemeanor). The state does not oppose Sanchez's assertion of error, and, indeed, affirmatively agrees that remand for sentencing is proper given that Sanchez "timely declined the suspension of sentence *and* she is entitled to time served on that sentence."[4]

***7 ¶26** "We review a trial court's imposition of conditions of probation for an abuse of discretion and generally will not reverse its imposition of conditions unless the terms 'violate fundamental rights or bear no reasonable relationship whatever to the purpose of probation over incarceration.' " *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, ¶ 10 (App. 2014) (quoting *State v. Turner*, 142 Ariz. 138, 144 (App. 1984)); *see also State v. Smith*, 112 Ariz. 416, 419 (1975) (Purpose of probation is to provide "a sentencing alternative which a court may use in its sound judicial discretion when the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment.").[5] "A court abuses its discretion when it makes an error of law." *Reed-Kaliher*, 235 Ariz. 361, ¶ 10. And, we review a court's interpretation of a statute de novo. *State v. Chandler*, 244 Ariz. 336, ¶ 3 (App. 2017).

¶27 The power of a court to impose probation "is not inherent, but is derived from statute, and therefore may be granted only in accordance with statutory authorization." *State v. Woodruff*, 196 Ariz. 359, ¶ 8 (App. 2000); *see also Smith*, 112 Ariz. at 419 ("Probation is a matter of legislative grace."). The statutory authorization for probation is contained in A.R.S. § 13-901(A), which provides:

> If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and, if so, shall without delay place the person on intensive probation supervision ... or supervised or unsupervised probation on such terms and conditions as the law requires and the court deems appropriate.

¶28 When interpreting a statute, we begin with the plain text, which is "the best and most reliable index of a statute's meaning." *State v. Christian*, 205 Ariz. 64, ¶ 6 (2003); *see also State v. Pledger*, 236 Ariz. 469, ¶ 8 (App. 2015) (plain language of statute is "best indicator of the drafter's intent"). When the plain meaning of the text is clear, legislative intent is readily discernable, and we need not resort to other methods of interpretation. *Christian*, 205 Ariz. 64, ¶ 6.

¶29 Consistent with these standards, in *State v. Everhart*, 169 Ariz. 404, 406 (App. 1991), *as supplemented on reconsideration* (June 27, 1991), citing § 13-901(A), we modified the defendant's sentence, vacating an order of lifetime probation the trial court had imposed in addition to the maximum prison sentence for the crime of attempted child molestation. We concluded: "[I]n

the ordinary situation, a trial court may order that a convicted defendant be placed on probation if authorized in lieu of imposing a prison term; probation may not be ordered on the same offense in addition to a term of imprisonment." *Id.* We also concluded that, "[u]pon violation of the conditions of probation, the trial court may revoke probation and then impose a sentence on the original conviction as authorized by the applicable statutes." *Id.*

¶30 In this instance, we conclude that because, while awaiting trial, Sanchez was incarcerated for a period of time exceeding the maximum possible sentence for the offense of which she was ultimately convicted, she effectively served her term of imprisonment and is not eligible for probation under § 13-901(A).[6] We find nothing unclear or ambiguous about the meaning of "eligible" as used in § 13-901(A), and use its ordinary meaning of "qualified or entitled to be chosen." *American Heritage Dictionary* 579 (5th ed. 2011).

***8 ¶31** Because Sanchez has already served a period of incarceration longer than the maximum permitted for her DUI conviction, there is no possibility of any term of imprisonment, including one imposable upon revocation. Indeed, although the trial court found Sanchez eligible for probation, it credited her with the 312 days already served after imposing a jail term as a condition of probation —implicitly acknowledging that Sanchez had served a term of incarceration while awaiting trial and sentencing. The effect of the court's order of probation is to force Sanchez into circumstances closely analogous to those in *Everhart*—that of being required to serve a period of probation after incarceration for more than the maximum permissible time.

Disposition

¶32 We affirm Sanchez's conviction but vacate her sentence of probation and remand the matter for sentencing proceedings consistent with this decision.

BREARCLIFFE, Judge, concurring in part and dissenting in part:

¶33 I concur in the decision in all respects but for its reversal of the trial court on sentencing. I would affirm the trial court in full.

¶34 Sanchez argues that the trial court erred when it imposed probation because she had been in jail for 312 days since her arrest, a period exceeding the statutory maximum jail sentence permissible for her DUI conviction. *See* A.R.S. § 13-707(A) (six months maximum sentence of imprisonment for class one misdemeanor). The state agrees that a remand for sentencing is proper given that Sanchez "timely declined the suspension of sentence and she is entitled to time served on that sentence." Notwithstanding the state's concession, before we vacate a sentence, we must conclude that the trial court either erred as a matter of law or abused its discretion. *See State v. Grier*, 146 Ariz. 511, 515 (1985) ("If a sentence is within statutory limits, it will not be modified or reduced unless, from the circumstances, it clearly appears the sentence was an abuse of discretion."). We do not find error by the parties' mutual agreement. *State v. Solis*, 236 Ariz. 242, ¶ 23 (App. 2014) (appellate court is not bound by state's concession of error).

¶35 The majority concludes that the trial court abused its discretion by erring as a matter of law based on the majority's application of *State v. Everhart*, 169 Ariz. 404, 406 (App. 1991), *as supplemented on reconsideration* (June 27, 1991), by analogy. It also does so by conflating Sanchez's practical eligibility for incarceration with her legal eligibility for probation. The majority's application of *Everhart* by analogy is a misapplication and its conclusion that Sanchez is ineligible for probation as a matter of law is error.

¶36 In *Everhart*, the defendant pleaded guilty to a single crime after which he was sentenced to the maximum sentence of fifteen years in prison. 169 Ariz. at 405. The trial court also imposed lifetime probation to follow his release from prison. *Id.* Everhart was sentenced under A.R.S. § 13-604.01 that then governed dangerous crimes against children. *Id.* at 406. That statute then read:

> If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the

> person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

1987 Ariz. Sess. Laws, ch. 307, § 4.

¶37 On appeal, Everhart argued that the imposition of lifetime probation was unlawful because he was to serve the maximum sentence available. *Id.* at 406. He argued that, because no unexpired term of imprisonment will remain to be served, the addition of lifetime probation to follow his imprisonment was unconstitutional. *Id.* Our court agreed with Everhart that the trial court wrongfully imposed probation, but for a different reason. *Id.* The court first had to construe the term "probation" as used in the statute, and gave it its ordinary meaning. *Id.* The court recognized that "[p]robation is the suspension of sentencing" and "in the ordinary situation, a trial court may order that a convicted defendant be placed on probation if authorized in lieu of imposing a prison term; probation may not be ordered on the same offense in addition to a term of imprisonment." *Id.* Thus, it held that § 13-604.01 authorized "probation in lieu of, and not in addition to, the imposition of sentence on one offense," and thus the trial court erred when it imposed lifetime probation on Everhart "*in addition* to the sentence of imprisonment." *Id.* (emphasis added).

***9 ¶38** Here, if a court revokes her probation and sentences her, Sanchez will receive credit against any jail term for the 312 days served before trial. *See* A.R.S. § 13-712(B) ("All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment."). However, Sanchez, unlike the defendant in *Everhart*, has not yet been sentenced. *See State v. Harris*, 122 Ariz. 593, 594 (App. 1979) ("Probation is not a sentence, but rather a feature of the suspension of imposition of the sentence."). When a court, as here, suspends a sentence, "it retains jurisdiction over that individual's punishment until the probationary term is completed or a prison sentence subsequently imposed." *State v. Holguin*, 177 Ariz. 589, 591 (App. 1993). Because Sanchez has not yet been sentenced, she has not yet received a prison sentence to be followed by a term of probation and thus *Everhart* has no application.

¶39 Additionally, because the court suspended imposition of sentence, the time she spent in jail awaiting trial is not, yet, time served as part of a sentence. *See State v. Pena*, 140 Ariz. 545, 548 (App. 1983) ("[A] sentence cannot commence before it is imposed. The credit for time served awaiting sentence does not change the statutory time designated for commencement of sentence. It simply shortens the time necessary to complete it."); *see also* A.R.S. § 13-712(A) ("A sentence of imprisonment commences when sentence is imposed if the defendant is in custody."). Thus, there is yet no sentence against which to credit Sanchez's pretrial time served.

¶40 The only question our court should be determining is whether Sanchez was eligible for probation. She was. The majority, not citing to any applicable authority whatever, concludes that, because Sanchez is not eligible to serve any term of incarceration (upon any potential revocation of probation and imposition of sentence), she is *ipso facto* not eligible for probation. That is simply incorrect. Whether a defendant is eligible for probation is determined by the statute governing the crime of which the defendant was convicted. "The power of a court to grant probation is not inherent, but is derived from statute, and therefore may be granted only in accordance with statutory authorization." *State v. Woodruff*, 196 Ariz. 359, ¶ 8 (App. 2000). Here, Sanchez was convicted of driving under the influence of alcohol under A.R.S. § 28-1381(A), a class one misdemeanor. *See* A.R.S. § 28-1381(C). The sentencing for class one misdemeanors generally is controlled by A.R.S. § 13-707(A)(1)—allowing for a sentence of incarceration of six months—and probation for Sanchez's DUI conviction is governed by A.R.S. § 13-902(B)(1)—allowing for probation of up to five years.

¶41 "If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and ... place the person on ... probation on such terms and conditions as the law requires and the court deems appropriate." A.R.S. § 13-901. "The power to suspend the imposition of sentence is entrusted solely to the discretion of the trial court." *State v. Oliver*, 9 Ariz. App. 364, 367 (1969). This discretion is broad. *See Varela v. Merrill*, 51 Ariz. 64, 76 (1937) ("There are no rules prescribed as to when this discretion shall be exercised ...." "[I]t would be almost impossible to present a case which would justify this court in finding that the trial court had abused its discretion

in regard to whether sentence should be suspended or not."). Nowhere was the trial court's discretion to suspend sentence and place Sanchez on probation limited by statute. Because Sanchez was eligible for probation, the law permitted the trial court to suspend the imposition of sentence and place her on probation.

***10 ¶42** I acknowledge that the application of the plain and unambiguous probation statutes brings about an odd result here, in that the enforcement of probation lacks "teeth." Sanchez could violate her probation, have it revoked, and be sentenced to time-served; but that is the result our statutory scheme leaves us. *Cf. State v. Burns*, 231 Ariz. 564, ¶ 10 (App. 2013) (noting the "curious outcome" when a defendant who is not entitled to reject his lifetime probation may "achieve the same result by committing a felony to which the mandatory revocation [is a] requirement"). We certainly should not declare that the trial court made a legal error on such thin gruel as the majority's analogy to *Everhart*. Sanchez was legally eligible for probation, and the trial court therefore did not err as a matter of law or abuse its broad discretion. I respectfully dissent from the majority's conclusion that it did.

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Footnotes

1 In "some circumstances" even an unsigned statement may be accepted as an affidavit. *See Wetzel*, 143 Ariz. at 43.

2 Sanchez does not argue that the issuing magistrate was not "neutral and detached."

3 To the extent that Sanchez is challenging the amended warrant correcting the license plate number, we note that the original warrant, notwithstanding the wrong license plate, contained a sufficiently particular description of the truck to be searched: a "Gold Ford F150" pick-up, the correct Vehicle Identification Number (VIN), and the registered owner's name and address. *See Ault*, 150 Ariz. at 466 ("The description in a search warrant must be of sufficient particularity to enable a searching officer to ascertain the place to be searched.").

4 As part of our consideration of this matter, we ordered supplemental briefing on "whether the imposition of probation in this case resulted in [Sanchez] receiving multiple punishments for the same offense in violation of the constitutional prohibition against double jeopardy." In its supplemental brief, the state "agrees with Sanchez that her term of probation violated Arizona law but disagrees that a double-jeopardy violation otherwise occurred." Our disposition of this matter does not require us to resolve whether double jeopardy applies.

5 "[P]robation is not a sentence, but rather a feature of the suspension of imposition of sentence." *State v. Risher*, 117 Ariz. 587, 588 (1978).

6 Probation is "a form of punishment." *State v. Montgomery*, 115 Ariz. 583, 584 (1977); *see also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, 'is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.' " (quoting G. Killinger, H. Kerper, & P. Cromwell, *Probation and Parole in the Criminal Justice System* 14 (1976))).