

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,) No. CR-20-0118-PR
)
Appellant,) Court of Appeals No.
) 2 CA-CR 2019-0068
v.)
) Pima County Superior Court No.
PAUL LARRY GASBARRI,) CR-2018-0687
)
Appellee.)
_____)

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLEE

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INTRODUCTION

State v. Gasbarri, 248 Ariz. 619 (App. 2020) (“Opinion”) creates a legal unicorn: a motion that is legally sufficient, such that it cannot be struck, and that is also insufficient, such that a court cannot grant it when uncontested. Rule 1.9, Ariz. R. Crim. P., expressly gives courts discretion to deem uncontested motions as “submitted on the record.” Here, the Defense filed a motion to suppress, the State failed to respond, and the trial court deemed the motion submitted on the record. After confirming the law supported granting relief based on the uncontested allegations, the court granted the motion. Relying on Rule 16.2, the Court of Appeals held this was error, thereby creating an anomaly: a motion that, if properly pled, uncontested, submitted on the record, and supported by law, cannot be granted.

Arizona Attorneys for Criminal Justice (“AACJ”) urges this Court to accept review of the Opinion for several critical reasons. The case raises a purely legal issue—interpreting a newly amended rule of procedure—which this Court has not yet addressed. But more importantly, the Opinion (1) represents the culmination of inconsistent language used in case law to define procedural burdens essential to the orderly functioning of the courts; and (2) fails to resolve an important legal issue explicitly identified and ruled on by the trial court, thereby leaving the state of the law in a worse position than before. For these reasons, if this Court does not grant review, it should still depublish the Opinion to ameliorate this chaos.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Appellee Gasbarri because the issues presented concern the ability of AACJ members to litigate suppression motions. Until the Opinion in this case, criminal defense lawyers could rely upon a trial judge to grant an uncontested motion of any kind, including a motion to suppress evidence. The Opinion, however, injects chaos into criminal practice, because it demands the production of evidence to support a motion that the Arizona Rules of Criminal Procedure provide no opportunity to obtain. Even while it criticizes prosecutors who fail to file responses, it rewards such prosecutors by tying the hands of the trial judge who is best suited to determine the appropriate remedy. As an organization that provides education to its members, AACJ also has a strong interest in ensuring that pleading procedures are clear, logical, understandable, and consistent.

ARGUMENTS

I. This Court should expressly adopt a unifying theory for defining the phrase “prima facie case” based on the constitutional presumptions at play in motions to suppress.

A. Arizona’s rules of procedure allocate four distinct procedural burdens, including the burden of production, which embodies constitutional and common law presumptions.

Through the Arizona Criminal Rules of Procedure, this Court has allocated four procedural burdens: the burdens (1) to raise an issue, (2) to respond, (3) of production, and (4) of persuasion. The first burden—to raise an issue—is essentially a notice-or-waiver requirement. Rule 16.1(c) places the onus on an interested party to raise an issue in motion practice, and Rule 1.9(a) describes what that motion must include: a statement of “facts, arguments, and authorities.”

Rule 1.9 also creates the second burden: to respond with opposing theories and allegations. Although Rule 1.9(b) does not mandate one, if the opposing party chooses not to respond, the rule gives fair warning that the court may consider the unchallenged motion as “submitted on the record.” *See State v. Brita*, 158 Ariz. 121, 124 (1988); *cf.* Ariz. R. Civ. P. 7.1 (mandating response but giving courts discretion).

In addition to these first two pleadings requirements, the rules also allocate the burden of proof, which can be broken down into two parts: the burdens of production and persuasion. The burden of persuasion is the easiest to conceptualize. Just as the proponent of evidence always has the burden to show admissibility, *see*

State v. Haskie, 242 Ariz. 582, 586 ¶ 16 (2017), Rule 16.2(b)(1) places the ultimate burden of persuasion on the State to show “the lawfulness in all respects of the acquisition of [its] evidence.”

The last burden to address—the burden of production—is the hardest to nail down. A burden of production is the modern “procedural device” used to address the presumptions developed in constitutional and common law. *State v. Grilz*, 136 Ariz. 450, 455 (1983); *see State v. Nihiser*, 191 Ariz. 199, 203 (App. 1997). If a presumption operates in the absence of any evidence, the burden of production is what is required to dispel that presumption. For example, a defendant is presumed to be sane and therefore bears the burden of production to raise the issue of insanity. *Grilz*, 136 Ariz. at 455; *see also State v. Rosthenhausler*, 147 Ariz. 486, 492 (App. 1985). In other contexts, a presumption might only be triggered when some evidence is presented. *Nihiser*, 191 Ariz. at 203 (presumptions based on fact); *see State v. Paleo*, 200 Ariz. 42, 43-44 ¶ 6 (2001). There is no unifying rule as to whether a burden of production should be held by the same party that holds the burden of persuasion or not. But in some circumstances, allocating the burden of production to the State may be prudent or even constitutionally required, so as to avoid relieving the State of constitutionally imposed presumptions. *See State v. Holle*, 240 Ariz. 300, 307 ¶ 35 (2016); *State v. Hocker*, 113 Ariz. 450, 455 n.1 (1976), *overruled on other grounds by State v. Jarzab*, 123 Ariz. 308 (1979).

B. Constitutional presumptions provide a unifying theory for when “prima facie case” means a burden of raising an issue or burden of production.

As noted above, Rule 16.2(b)(1) places the ultimate burden of persuasion on the State to prove the lawful providence of its evidence. This allocation fits neatly within the applicable constitutional presumptions. If the State seeks to introduce a confession, it bears the burden of showing voluntariness. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164 (1990) (confessions presumed involuntary). If the State seeks to search or seize evidence for a prosecution, it often must demonstrate probable cause to a magistrate first. U.S. Const. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .”). And if the State fails to do so, it must show the search or seizure fell into one of the narrowly defined exceptions to the warrant requirement. *State v. Gant*, 216 Ariz. 1, 3 ¶ 8 (2007) (warrantless search “presumed” unreasonable).

Prior to our modern Rules of Criminal Procedure, only the State’s burden of persuasion existed in this context. The State always had the burden to show the lawful providence of its evidence, and the defendant could not waive. *See State v. Kananen*, 97 Ariz. 233, 239-40 (1965). After *Kananen*, the Criminal Rules of Procedure allocated additional, lesser burdens. Now, a defendant can waive a suppression issue by failing to raise or sufficiently plead the issue pursuant to Rules 16.1 and 1.9. *See State v. Alvarado*, 121 Ariz. 485, 487 (1979); *State v. Wilson*, 164 Ariz. 406, 407 (App. 1990). Likewise, the State can waive by failing to properly

respond. *See Brita*, 158 Ariz. at 124.¹ The crux of the issue at hand in this case, however, is whether the Rules also provide a burden of production, and if so, when.

The difficulty in resolving this issue stems from the courts' imprecise use of the terms "burden of going forward" and "prima facie case." Some cases treat these terms as burden-to-raise-the-issue requirements. *Ryan v. Sup. Ct.*, 121 Ariz. 385, 387 (1979); *Hocker*, 113 Ariz. at 455 n.1; *State v. Peterson*, 228 Ariz. 405, 408 ¶ 9, 409 ¶ 12, 410 ¶ 17 (App. 2011); *State v. Fimbres*, 152 Ariz. 440, 442 (App. 1986) (confession). Others refer to the terms as burden-of-production requirements. *State v. Hyde*, 186 Ariz. 252, 266 (1996); *State v. Dean*, 241 Ariz. 387, 389 ¶¶ 5, 7, 393 ¶ 25 (App. 2017); *Fimbres*, 152 Ariz. at 442 (warrantless search); *State v. Raboy*, 24 Ariz. App. 586, 590 (1975).

The Court of Appeals in *Fimbres* proposed a unifying theory to explain when a "prima facie case" did, or did not, require evidence from the defendant—a theory that this Court referenced in *Hyde*. *Fimbres* reasons that, if a constitutional presumption of inadmissibility in the absence of evidence exists, then the defendant need only raise the issue and the State holds the burden to respond and produce. 152 Ariz. at 442. But if "[n]o such presumption exists" regarding the evidence to be

¹ The efficiency considerations here are simple. A "burden to raise an issue" and a "burden to respond" require the parties to identify the issues actually disputed, thereby relieving the parties and courts of the kind of inefficiencies demonstrated by *Kananen*, 97 Ariz. at 239-40. *See State v. Rutledge*, 205 Ariz. 7, 13 ¶ 30 (2003); *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482 (1986).

suppressed, the defendant bears a burden of production. *Id.*; *see also Hyde*, 186 Ariz. at 268-72 (discussing “warrant/no warrant dichotomy” and noting evidence seized pursuant to warrant presumptively lawful). The problem with *Fimbres*, however, is that misapplied its unifying theory. While it correctly recognizes that confessions are presumptively involuntary, it inexplicably states that “[n]o such presumption exists with reference to the search and seizure of physical evidence.” *Fimbres*, 152 Ariz. at 442. *Contra Katz v. United States*, 389 U.S. 347, 357 (1967); *Kentucky v. King*, 563 U.S. 452, 459 (2011); *Gant*, 216 Ariz. at 3 ¶ 8.

Despite this lapse in *Fimbres*, its unifying theory of presumptions accounts for nearly all the confusion surrounding Rule 16.2, the “burden of going forward,” and the “prima facie case.” When the evidence sought to be suppressed is presumptively inadmissible, cases treat the prima-facie-case requirement as a burden to raise the issue. *Ryan*, 121 Ariz. at 387 (confession); *Hocker*, 113 Ariz. at 455 n.1 (warrantless seizure); *Peterson*, 228 Ariz. at 408 ¶ 9, 410 ¶ 17 (*Miranda* and voluntariness); *Fimbres*, 152 Ariz. at 442 (confession); *accord Gant*, 216 Ariz. at 3 ¶ 8; *contra* Opinion n.6. But when the evidence to be suppressed is not presumptively inadmissible—namely, when the State obtained a warrant—the defendant must satisfy a burden of production. *Hyde*, 186 Ariz. at 266; *Raboy*, 24 Ariz. App. at 590; *see Dean*, 241 Ariz. at 393 ¶ 25 (facial challenge to warrant); *accord Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Only two cases fall outside of this unifying theory: *Fimbres*, to the extent it inexplicably concludes there are no presumptions that apply to physical evidence, and (arguably) *Rodriguez v. Arellano*, 194 Ariz. 211 (App. 1999). But even *Rodriguez* holds that pleading without evidence is sufficient to satisfy the burden to raise the issue of a warrantless search or seizure. *Id.* at 212 n.1. And, to the extent that *Rodriguez* implies that defendants must present “evidence” of the absence of a warrant to satisfy a burden of production, that topic was neither contested nor at issue. *Id.* at 214 ¶ 8. The State “conced[ed]” no warrant existed and, instead, argued that defendants must present evidence to “disprove the potential applicability of any possible exception the State might later invoke.” *Id.* at 212 ¶ 3, 214 ¶ 10.

In 2017, the Task Force on the Arizona Rules of Criminal Procedure proposed amendments to Rule 16.2, which drove home the point that “evidence” is not always required. The Task Force recommended replacing the phrase “come forward with evidence of specific circumstances which establish a prima facie case,” which the Court previously interpreted as a burden of production when challenging a warrant. *Hyde*, 186 Ariz. at 266. This Court adopted the recommendation, and Rule 16.2 now uses the phrase, “alleges specific circumstances and establishes a prima facie case.” This language still requires defendants to present a “prima facie case,” but it also recognizes that, depending on what constitutional presumptions are at play, “prima facie case” does not require always the production of “evidence.”

C. Though it concludes the amendment to Rule 16.2 was not substantive, the Opinion applies Rule 16.2 in a manner inconsistent with the prior version of Rule 16.2, the cases interpreting it, and the unifying theory proposed by *Fimbres*.

The Opinion concludes that the amendment to Rule 16.2 made no substantive changes. COA ¶ 9. That may be true. The new version of Rule 16.2 requires an allegation of “specific circumstances” and the establishment of a “prima facie case.” Under the former rule, the defendant always had a burden to raise the issue (*i.e.*, to make allegations) and to show a “prima facie case.” But what a “prima facie case” meant always depended on what presumptions were at play. To challenge evidence seized pursuant to warrant, a prima facie case meant a burden of production. *See Hyde*, 186 Ariz. at 266; *Raboy*, 24 Ariz. App. at 590. And when challenging the voluntariness of a confession, the waiver of *Miranda* rights, or a warrantless search and seizure, a prima facie case was demonstrated through allegations asserting an underlying presumption of inadmissibility. *See Ryan*, 121 Ariz. at 387; *Hocker*, 113 Ariz. at 455 n.1; *Peterson*, 228 Ariz. at 408 ¶ 9, 410 ¶ 17. Thus, the new phrase “establish a prima facie case” provides a graceful flexibility that accounts for all the various constitutional presumptions revolving around suppression issues.

The Court of Appeals, however, held that “establish” must mean the production of evidence, despite the removal of the word “evidence” from Rule 16.2. Opinion ¶ 10; *contra In re Victoria K.*, 198 Ariz. 527, 532 ¶ 25 (App. 2000) (changed language implies change in rule’s meaning). The lower court adopted this

interpretation because it feared that, without evidence, “allege[] specific circumstances” and “establish[] a prima facie case” might mean the same thing. *Id.* But its interpretation destroys the flexibility embodied in the rule and overturns precedent. *See Ryan*, 121 Ariz. at 387; *see also Peterson*, 228 Ariz. at 408 ¶ 9, 410 ¶ 17; *Fimbres*, 152 Ariz. at 442. If Rule 16.2 always requires evidence from the defendant, so as to distinguish “establish[] a prima facie case” from “allege[] specific circumstances,” then the amendment to Rule 16.2 effectively overturns this Court’s previous holding that no evidence is required when moving to suppress a confession—a result the Task Force did not intend.

This Court should accept review to properly interpret Rule 16.2 and save the flexibility envisioned by its drafters. In so doing, this Court can resolve the apparent internal inconsistency in *Fimbres*, which implies that warrantless search and seizures are not presumptively unreasonable, and finally clarify what the courts mean when they say “burden of going forward” and “prima facie case.”

II. The Opinion fails to address the narrow issue explicitly identified and ruled on by the trial court—the meaning of “submitted on the record”—and therefore will generate absurd results.

In a narrow sense, the underlying case should have only addressed the meaning of Rule 1.9(b). The trial court here explicitly questioned the meaning of “submitted on the record.” But the Court of Appeals did not interpret “submitted on the record” and instead only stated what the term does not mean while interpreting

Rule 16.2. Opinion ¶ 18. Worse, the Court of Appeals violated the principle of party presentation by resolving the case on an issue never raised by the State, a practice the U.S. Supreme Court recently criticized in a unanimous opinion. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). In failing to pursue the issue that was actually litigated in the trial court and raised on appeal by the parties, the Opinion renders the term “submitted on the record” potentially superfluous.

In this case, Gasbarri satisfied the burden to raise an issue by filing a proper motion to suppress evidence seized without a warrant. *Rodriguez*, 194 Ariz. at 212 n.1. The State failed to satisfy the second burden, to respond, *see* Ariz. R. Crim. P. 1.9(b). The Court of Appeals held that, as a matter of law, the trial court could not treat that failure as an affirmative concession. Opinion ¶¶ 15, 17. In turn, according to the Opinion, the trial court could not grant the motion outright, unless the defendant had also preemptively satisfied the third burden, a burden of production.² Opinion ¶ 18; *contra State v. Navarro*, 241 Ariz. 19, 20 ¶ 2 & n.1 (App. 2016). But the Opinion gives no further explanation of how a court should proceed instead.

If the burden to respond and “submitted on the record” mean anything, then the State’s failure to respond must have some effect. *See Brenda D. v. DCS*, 243 Ariz. 437, 443 ¶ 20 (2018). But an alternative procedure is not clear. *Cf.* Ariz. R.

² The Opinion does not explain why a court should presume the State’s intentions based on a defendant’s action or inaction.

Civ. P. 55 (limiting scope of contested issues in post-default sum-uncertain hearing). If an evidentiary hearing is still required, can the State raise new legal argument at that hearing? *See Brita*, 158 Ariz. at 124. Can the State present its own evidence? Can the State even cross-examine the defendant's witnesses?

The Opinion also raises numerous questions for the effective practitioner. If defendants should be attaching evidence to their motions challenging warrantless seizures, then the Court should say so, because Rules 1.9, 16.1, and 16.2 do not. And the suggestion that "evidence" required at the motion stage must be sworn, *see* Opinion ¶ 11, contradicts Criminal Rule 15 which severely restricts the opportunity to obtain depositions and seldom provides opportunities for obtaining evidence under oath during the discovery process. Ariz. R. Crim. P. 15.1, 15.3(a), (d). Moreover, the Opinion implies defendants are required to subpoena witnesses to satisfy their burden of production, after the State has failed to respond to a motion to suppress. If that is the case, the Court should say so clearly, because it runs counter to common practice in Arizona. Instead, the Opinion is written from the perspective of civil practice, not criminal practice. The Court of Appeals likely did not consider the financial impact on the taxpayers of requiring so much sworn testimony to be taken prior to a criminal trial.

The Court of Appeals clearly stated its discontent with the manner in which the trial prosecutor conducted this case and suggested that other sanctions against

the State might be appropriate. Opinion at n.11 (discussing trial court's inherent power to sanction attorneys for misconduct). But given the Opinion's result and reasoning, the only lesson that any competent prosecutor could possibly learn from it is that filing a responsive pleading serves no purpose but to limit the State's factual and legal positions at the upcoming evidentiary hearing to which the State will be entitled no matter what. Prosecutors could not be professionally disciplined for failing to file a responsive pleading because they have a clear defense: they are following binding law from the Arizona Court of Appeals. It is apparent that the Court of Appeals did not intend that result, which is all the more reason why the result is so absurd. *See State v. Estrada*, 201 Ariz. 247, 254 ¶ 14 (2001) ("A 'result is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.'") (quoting *Perini Land Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992)).

In the context of this case, the only sensible way to construe and harmonize Rules 1.9, 16.1, and 16.2 is to permit a trial court to find that a party that does not timely raise an issue with the court waives the issue. Of course, a trial court is not required to rule in favor of the moving party; as Rule 1.9 plainly states, the court has discretion to find the motion "submitted on the record." By divesting trial judges of such discretion, however, the Court of Appeals has read into the rule language that

does not exist that prohibits application of Rule 1.9 to suppression motions. *See Gonzales v. Nguyen*, 243 Ariz. 531, 534 ¶ 13 (2018) (disavowing prior cases that interpreted rule to include additional requirements beyond those in the rule’s plain language).

CONCLUSION

AACJ asks this Court to grant review of Gasbarri’s petition to address these important issues and to define “submitted on the record” as that term is used in Rule 1.9.

RESPECTFULLY SUBMITTED this 20th day of July, 2020.

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