FILED BY CLERK
MAR 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES D. BARD, Plaintiff/Appellant, v. ARIZONA DEPARTMENT OF TRANSPORTATION, Defendant/Appellee.	2 CA-CV 2011-0149 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20109585

Honorable Stephen C. Villarreal, Judge

AFFIRMED

The Law Office of James M. Wadleigh, P.L.L.C.
By James M. Wadleigh
Tucson
Attorney for Plaintiff/Appellant

Thomas C. Horne, Arizona Attorney General
By Misty D. Guille
Phoenix
Attorneys for Defendant/Appellee

V Á S Q U E Z, Presiding Judge.

¶1 Charles Bard appeals from the superior court's judgment affirming an administrative law judge's (ALJ's) order suspending his driver license pursuant to A.R.S. § 28-1321, Arizona's implied consent law. On appeal, Bard argues the suspension was improper because he recanted his initial refusal to consent to a blood draw. For the reasons set forth below, we affirm.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining the ALJ's decision. *Hosea v. City of Phx. Fire Pension Bd.*, 224 Ariz. 245, ¶ 10, 229 P.3d 257, 260 (App. 2010). On August 18, 2010, Pima County Sheriff's Deputy Jonathan Rupp stopped Bard for a traffic violation and ultimately arrested him for driving under the influence of intoxicants (DUI). After Rupp read Bard the implied consent admonitions required by statute and asked if he would submit to a blood draw, Bard refused. Rupp explained the consequences of Bard's refusal and again asked him to submit to testing. Bard responded, "No, I don't want to." Rupp then transported Bard to the Pima County Adult Detention Center and obtained a warrant, and another deputy performed the blood draw. Rupp served Bard with an order suspending his license for twelve months.

¶3 Bard requested an administrative hearing before the Arizona Department of Transportation (ADOT) to challenge his license suspension. At the hearing on October 7, 2010, the ALJ considered, among other issues, whether Bard had recanted and consented to the blood draw. Bard testified he had asked Rupp if he could take a breath test instead of a blood test and the deputy replied he could not. Bard also testified that while sitting in the patrol car, before the warrant for the blood draw had been requested, he asked

whether "[he] could change [his] mind on the taking [of] the blood test and [Rupp] said, 'No, it's too late.'" Rupp testified he did not recall Bard asking the question but stated he would take Bard's word for the exchange having occurred. Bard also testified another Pima County Sheriff's deputy, the phlebotomist who was called to conduct the blood draw, later asked Bard if he would consent to the test. According to Bard, he answered, "Well [Deputy Rupp] just told me that I couldn't do it, so I guess I can't change my mind," and the deputy walked away. Based on the testimony presented at the hearing, the ALJ concluded, in addition to other required statutory findings, that "there was neither [an] unequivocal recantation nor any express agreement to submit to testing."[1] The ALJ thus affirmed the order of suspension.

¶4 Bard timely appealed to the superior court pursuant to A.R.S. § 12-905. The court affirmed the ALJ's ruling, finding it "was supported by substantial evidence in the record, and the ALJ exercised his discretion reasonably and with 'due consideration.'" This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-913 and 12-2101.[2]

---

[1]Bard does not challenge the ALJ's additional findings that: the deputy had reasonable grounds to believe Bard had been driving or in actual physical control of a vehicle while under the influence of an intoxicant, he was placed under arrest, and he initially refused to submit to blood testing after he had been advised of the consequences of a refusal. *See* A.R.S. § 28-1321(K)(1)-(4).

[2]ADOT suggests Bard's notice of appeal from the superior court's signed minute entry was premature, but that we nonetheless have jurisdiction because ADOT has not been prejudiced, and the court, at ADOT's request, subsequently entered a judgment that included an order lifting the stay "pending the final resolution" of that appeal. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). To the extent Bard's notice of appeal was premature, we agree the court's subsequent judgment

Standard of Review

¶5 "When reviewing an ALJ's decision under the implied consent law, the superior court is limited to determining whether the ALJ's decision was 'arbitrary, capricious, or an abuse of discretion.'" *Caretto v. Ariz. Dep't of Transp.*, 192 Ariz. 297, ¶ 7, 965 P.2d 31, 34 (App. 1998), *quoting Edwards v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 176 Ariz. 137, 140, 859 P.2d 760, 763 (App. 1993). "In turn, we review the superior court's decision 'to determine whether the record contains evidence to support the judgment.'" *Caretto*, 192 Ariz. 297, ¶ 7, 965 P.2d at 34, *quoting Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990).

Discussion

¶6 On appeal, Bard maintains the suspension of his driver license was improper because he recanted his refusal to consent to the blood draw. Under Arizona's implied consent law, a person arrested for DUI "gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content." A.R.S. § 28-1321(A). If the person refuses the test, then his or her license is suspended for twelve months. § 28-1321(B); *see also Carrillo v. Houser*, 224 Ariz. 463, ¶ 18, 232 P.3d 1245, 1248 (2010). "A failure to expressly agree to the test or successfully complete the test is deemed a refusal." § 28-1321(B). Our supreme court has stated "expressly" means "'in direct or unmistakable

---

clarifying that the stay was no longer in effect was "merely ministerial" and does not affect our jurisdiction. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006).

terms' and not merely implied or left to inference." *Carrillo*, 224 Ariz. 463, ¶ 19, 232 P.3d at 1248, *quoting In re Estelle's Estate*, 122 Ariz. 109, 113, 593 P.2d 663, 667 (1979). In other words, an individual "must unequivocally manifest assent to the testing by words or conduct." *Carrillo*, 224 Ariz. 463, ¶ 19, 232 P.3d at 1249.

¶7 Here, Bard does not dispute that he refused to submit to a blood draw. But, relying on *Gaunt v. Motor Vehicle Div.*, 136 Ariz. 424, 427, 666 P.2d 524, 527 (App. 1983), he contends his later "words and conduct show a man who wanted to take the test" and thus constituted a recantation. In *Gaunt*, this court held that a person who first refused a breath test could recant the refusal and avoid license suspension under the implied consent statute if he or she was still in custody at the time of the recantation. *Id.* at 428, 666 P.2d at 528. The court further stated that a subsequent consent should be honored except "where (1) it would result in substantial inconvenience or expense to the police; or (2) the testing equipment is not readily available; or (3) the test results would not be accurate."[3] *Id.*

¶8 Bard contends "[n]o magic words are required, just conduct that would lead a reasonable officer to determine that the motorist has a willingness to submit to the test." *See id*. at 427-28, 666 P.2d at 527-28. Although we agree with this proposition generally, we disagree that in this case Bard's words and conduct were sufficient to constitute a recantation and consent to a blood draw. As the ALJ found, "[Bard] merely asked if he

[3]Because we conclude the ALJ did not abuse his discretion in finding Bard did not recant his refusal and substantial evidence supported that finding, we do not address whether he met his burden of proof regarding these factors. *See Noland v. Ariz. Dep't of Transp*., 151 Ariz. 466, 468, 728 P.2d 685, 687 (App. 1986).

could change his mind. He did not affirmatively state that he *had* changed his mind nor did he affirmatively state that he would submit to testing." Thus, the ALJ concluded correctly that *Gaunt* was not applicable because in this case, "there was neither [an] unequivocal recantation nor an[] express agreement to submit to testing." *See Carrillo*, 224 Ariz. 463, ¶ 19, 232 P.3d at 1249 ("[T]o satisfy the statutory requirement, the arrestee must unequivocally manifest assent to the testing by words or conduct.").

¶9 Bard nevertheless argues that once the deputy stated he could not change his mind, "there was nothing else for [him] to do." He maintains the deputy's response "ended [his] pursuit to take the chemical test and effectively prevented him from doing so." At the administrative hearing, Deputy Rupp essentially testified that once an individual refuses to consent to the test and an officer is required to request a warrant, the individual cannot recant. Rupp simply was mistaken. *See Koller v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 195 Ariz. 343, ¶ 15, 988 P.2d 128, 131 (App. 1999) (holding "a driver cannot prevent a license revocation by recanting his refusal . . . after a search warrant for a blood sample is issued"). However, the record shows Bard actually was given another opportunity to consent to the blood draw and failed to do so. Bard testified that after being transported to the detention center another deputy, the phlebotomist who eventually performed the blood draw, approached Bard and asked if he would give his consent.[4] Rather than expressly agreeing to the test, Bard replied, "Well

[4]We reject as speculation Bard's argument that the deputy asked this question to determine if a restraint chair would be necessary to complete the blood draw. *See Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, ¶ 7, 48 P.3d 505, 507 (factual findings for ALJ).

[Deputy Rupp] just told me that I couldn't do it, so I guess I can't change my mind." We therefore conclude the record supports the ALJ's findings and the superior court's judgment.

Disposition

¶10 For the reasons set forth above, the superior court's judgment is affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge