FILED BY CLERK
SEP 14 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KRISTA G. BINNIE, Plaintiff/Appellant, v. HONORABLE GEORGE A. DUNSCOMB, Respondent Magistrate Judge/Appellee, ORO VALLEY PROSECUTOR'S OFFICE, Real Party in Interest/Appellee.	2 CA-CV 2011-0023 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20100816

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Krista Binnie appeals the superior court's denial of special action relief in her driving under the influence (DUI) case originating in Oro Valley Magistrate Court. She contends her blood test results should have been suppressed because of the manner in which her blood was taken by the Oro Valley Police Department. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 We consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the lower court's ruling. *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995). Although the only relevant facts are those related to the blood draw, by way of background, we include the following. One evening in April 2009, Binnie was observed driving "erratically" by another motorist, who called 9-1-1 to report her. A nearby officer with the Oro Valley Police Department saw Binnie drive by, momentarily swerving off the road as she did so. After he began following, she abruptly pulled into a driveway. The officer approached her and asked if she lived at the residence, to which she responded, "Don't f[***] with me." He noticed she had a strong odor of intoxicants coming from her mouth, a fixed gaze, slow responses, slurred speech, and red, watery, bloodshot eyes. Binnie was arrested and brought to the police station.

¶3 After an officer read Binnie the implied consent law, she refused to have her blood drawn, and the officer obtained a warrant. In the meantime, Binnie repeatedly kicked the holding cell door with such force that she had to be restrained so she would

not hurt herself. She also was "yelling and screaming profanities" at the officers. After being served with the warrant, Binnie again refused to consent and continued to argue with the officers. She requested a breath test, but was informed Oro Valley was not equipped for breath tests, only blood tests. She then demanded that the blood be drawn from her hand instead of her arm. Despite her insistence and resistance, the blood was drawn from her arm; although officers attempted to calm and distract her during the procedure, three of them ultimately restrained her. The draw was successfully completed on the first attempt, and there were no complications.

¶4 Before trial, Binnie moved to suppress the test results, arguing the draw had been unreasonable because she has "needle phobia." At the ensuing suppression hearing, Officer Morris, a qualified phlebotomist who had performed the blood draw, explained that, based on his training and experience, taking blood from the hand is disfavored because the veins there are smaller and more likely to move and collapse, and drawing from the hand is usually much more painful and subject to more complications than drawing from the arm. Although he had received training about needle phobia, he did not recall Binnie saying she was afraid of needles, only that she wanted the blood to be taken from her hand instead of her arm.

¶5 Joseph Citron, an ophthalmologist from Georgia, testified Binnie has needle phobia, which he described as an anxiety disorder involving the avoidance or adverse response to sharp objects piercing the body, which can cause illness and possibly death. He stated that the primary management approach for people with needle phobia is

to calm them down and explain the procedure, and that certain equipment should be on hand in case the person has a cardiac arrest. He conceded a person who indicates he or she does not like needles is not necessarily needle phobic and also agreed it is generally more difficult and painful to draw blood from the hand than from the arm. He opined that Binnie's experience may make it more traumatic for her to have blood drawn in the future.

¶6 After the hearing and after reviewing an audio recording of the events before and during the blood draw,[1] the magistrate court denied Binnie's motion, explaining that her distress at having blood drawn from her arm, but not her hand, was inconsistent with having a phobia: "Phobia implies fear of that thing in all situations, not just specific uses." It further found Binnie had "never clearly articulate[d] to the officers that she [wa]s afraid," and for the blood draw to have been unreasonable, the officers needed "some reason to believe that it was an issue of fear and not merely just not wanting to have blood drawn from her arm." Finally, the court noted Binnie's conduct "was that of . . . a very intoxicated person who appeared to have significant difficulties understanding what was being said to her." It concluded, "Given the information available to the officers at the time, the blood draw was not unreasonable."

¶7 Binnie thereafter filed a special action petition in superior court, which accepted jurisdiction but denied relief. In its decision, the court explained that even assuming Binnie had a phobia, "the officers dealt with the issue in an appropriate manner

[1]The audio recording was not included in the record on appeal to this court.

by explaining the procedure to [Binnie], by reassuring [her,] and by communicating with her." The court further determined there was no evidence Binnie had suffered any trauma as a result of the blood draw, the draw itself was "reasonable in its manner and in its method," and although Binnie might have requested the blood be taken from her hand instead of her arm, there had been no Fourth Amendment violation in taking it from her arm. In addition, the court explained Binnie did not have the right to select a breath test or to be taken to a hospital for the blood draw. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See also* Ariz. R. P. Spec. Actions 8(a).

Discussion

¶8 "If the superior court accepts jurisdiction and determines the merits of a special-action petition, we review whether the court abused its discretion by its grant or denial of relief." *Ottaway v. Smith*, 210 Ariz. 490, ¶ 5, 113 P.3d 1247, 1249 (App. 2005). "Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001).

Fourth Amendment

¶9 Binnie first contends both the magistrate court and superior court incorrectly determined the blood draw was reasonable under the Fourth Amendment given "the circumstances presented in this case, where [she] was needle-phobic, presented alternatives to the police, and where the police pressed forward with a forced

blood draw" from her arm. The Fourth Amendment guarantee against unreasonable searches and seizures is violated when a defendant's blood is drawn in an unreasonable manner. *See State v. May*, 210 Ariz. 452, ¶¶ 5-6, 112 P.3d 39, 41 (App. 2005). Whether a blood draw violates the Fourth Amendment requires consideration of "'whether the means and procedures employed in taking [a suspect's] blood respected relevant Fourth Amendment standards of reasonableness.'" *State v. Noceo*, 223 Ariz. 222, ¶ 8, 221 P.3d 1036, 1039 (App. 2009), *quoting Schmerber v. California*, 384 U.S. 757, 768 (1966) (alteration in *Noceo*).[2]

¶10 Relying on federal Ninth Circuit authority, Binnie argues "when the State forces [needle-phobic] suspects arrested for DUI to submit to blood tests for determining their alcohol levels, even though they requested or consented to undergo alternative tests, this violates the Fourth Amendment's reasonable search requirement[,] especially when alternatives were actually available." But circuit court decisions are not binding on this court, even with respect to federal constitutional rights. *See State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007). Furthermore, it is clear under Arizona law that a suspect is not entitled to select which test is administered. *See Schade v. Dep't of Transp.*, 175 Ariz. 460, 462-63, 857 P.2d 1314, 1316-17 (App. 1993). And Binnie fails to cite to any authority, nor are we aware of any, which would hold a blood draw

[2]Although Binnie also invokes article II, § 8 of the Arizona Constitution, she does not argue that its protections are more extensive than those afforded by the Fourth Amendment; indeed, she provides no separate argument or authority with respect to article II. We therefore confine our analysis to her Fourth Amendment argument. *See State v. Nunez*, 167 Ariz. 272, 274 n.2, 806 P.2d 861, 863 n.2 (1991).

unreasonable because the officer did not comply with a defendant's wishes to have blood drawn from a more difficult area of the body prone to complications.

¶11 Binnie further contends the officers' conduct in restraining her to obtain her blood made the draw unreasonable. But the Fourth Amendment does not "preclude the use of reasonable force to overcome [a] defendant's resistance to the execution of a warrant for the extraction of blood." *State v. Clary*, 196 Ariz. 610, ¶ 2, 2 P.3d 1255, 1256 (App. 2000). In that case, this court upheld a blood draw as objectively reasonable under the Fourth Amendment even though the defendant had to be restrained on the floor by several officers while his blood was drawn. *Id.* ¶¶ 6, 37-38. Binnie argues *Clary* is distinguishable because there the defendant "actively refused to consent" and "nothing in that case . . . indicate[s] special circumstances such as a fear of needles, needle phobia, or medical concerns." We disagree. Binnie also actively resisted the blood draw, which necessitated the restraint, and in fact had to be handcuffed afterwards because she stood up and was "swinging her arms" at the officers. Thus, as in *Clary*, the restraint here was reasonable because Binnie's "active resistance . . . to frustrate the withdrawal of [her] blood exposed the officers and phlebotomist to the obvious dangers of an inadvertent needle stick or uncontained blood." *Id.* ¶ 37. Moreover, to the extent Binnie did have a phobia, in addition to restraining her, the officers also attempted to calm her down and distract her during the blood draw, techniques her medical expert testified should be employed with a needle-phobic person. Accordingly, because this blood draw was

reasonable under the circumstances, we conclude the superior court did not abuse its discretion in denying Binnie's special-action petition.

Fourteenth Amendment

¶12 Binnie next argues the blood draw nevertheless should have been suppressed because it violated her right to substantive due process under the Fourteenth Amendment. Although not mentioned below or by either party, we need not reach this argument under the rule set forth in *Graham v. Connor*, 490 U.S. 386 (1989), which held that certain substantive due process claims are precluded if the same claims could be decided under an "explicit textual source of constitutional protection" rather than under the "generalized notion of 'substantive due process.'" *Id.* at 395; *see also Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 238, 877 P.2d 806, 811 (1994) (setting forth rule from *Graham*). *Graham* specifically held that a "claim that law enforcement officials used excessive force in the course of making an arrest . . . or other 'seizure' of his person" is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard . . . rather than under a substantive due process standard." *Id.* at 388. Therefore, because we have already affirmed the blood draw under the Fourth Amendment, we need not address the same claim under a substantive due process standard. *See id.*[3]

[3]Even were we to consider Binnie's substantive due process argument on its merits, we would still affirm the superior court's decision. "In order to show a substantive due process violation, the abuse of governmental power must be one that 'shocks the conscience.'" *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 46, 81 P.3d 1016, 1028 (App. 2003), *quoting United Artists Theatre Circuit, Inc. v. Twp. of*

Disposition

¶13 For the foregoing reasons, the superior court's denial of special action relief is affirmed.

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

CONCURRING:

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

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

Warrington, 316 F.3d 392, 401 (3d Cir. 2003). We see nothing that shocks the conscience here, nor has Binnie provided us with any authority indicating otherwise.