IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ELIZABETH MEADE TIERNEY, *Petitioner/Appellant*,

v.

ARIZONA DEPARTMENT OF TRANSPORTATION, *Respondent/Appellee*.

No. 1 CA-CV 17-0724
FILED 10-30-2018

Appeal from the Superior Court in Maricopa County
No. LC2016-000515-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

Mitchell, Stein, Carey, Chapman, PC, Phoenix
By Flynn Patrick Carey, Emma H. Isakson
Counsel for Petitioner/Appellant

Arizona Attorney General's Office, Phoenix
By Leslie A. Coulson
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Elizabeth Tierney appeals from the superior court's ruling affirming the decision of the Arizona Department of Transportation ("ADOT") to suspend her driver's license for 12 months. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Phoenix-area police officers stopped Tierney on suspicion of driving under the influence ("DUI"). Tierney had red, watery eyes, her speech was slurred, she smelled of alcohol, and she showed cues of intoxication on several field sobriety tests.

¶3 The officers arrested Tierney and transported her to the police station. There, an officer read to her directly from ADOT's standard "Admin Per Se/Implied Consent" form (1) asking Tierney if she consented to testing to determine her blood alcohol concentration, and (2) informing her that if she did not expressly consent, her driver's license would be suspended for 12 months. Tierney's first response to the officer's request for consent to the testing was "shouldn't I have a lawyer?"; when the officer asked for a yes-or-no response, Tierney stated "No." As the officer continued to read the admonitions, Tierney repeatedly said she was scared, indicated she needed an attorney to help her decide whether to consent, and declined to consent. Finally, the officer told Tierney that any additional delay would be deemed a refusal, and Tierney again said "No." Officers then placed Tierney in a holding cell with a telephone book and told her that she would be given an opportunity to call an attorney once she decided on one.

¶4 The officers then applied for and received a warrant to draw Tierney's blood. Soon thereafter, after speaking with an attorney, Tierney agreed to the blood draw, but the officers notified Tierney that her consent was too late because they already had a warrant. The officer then served

Tierney with an order of suspension of her driver's license for refusing to consent to the blood draw.

¶5 Tierney contested the order of suspension, which prompted an administrative review proceeding before an administrative law judge in ADOT's executive hearing office. ADOT upheld the suspension, and Tierney appealed that decision to the superior court. The superior court affirmed.

¶6 Tierney timely appealed the superior court's judgment, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-913. *See Svendsen v. Ariz. Dep't of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014).

DISCUSSION

I. Standard of Review.

¶7 On judicial review of ADOT's decision, the superior court must affirm unless the decision "is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E). The court defers to ADOT's factual findings if supported by substantial evidence. *See Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436, ¶ 11 (App. 2009). On appeal, we are not bound by the superior court's assessment, but rather review the administrative record independently to determine whether the record supports the administrative decision. *See Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 322, ¶ 10 (App. 2017). We review issues of law de novo. *Id.* at 323, ¶ 10.

II. Implied Consent Law.

¶8 Arizona's implied consent law provides that any person licensed to drive a car in the state has thereby agreed to submit to chemical testing if arrested on suspicion of driving under the influence:

> A person who operates a motor vehicle in this state 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 if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter [Driving Under the Influence, A.R.S. tit. 28, ch. 4] . . . while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs.

A.R.S. § 28-1321(A).

¶9 A motorist can refuse to submit to testing, but the law provides ramifications for such a refusal: a 12-month suspension of the motorist's driver's license. A.R.S. § 28-1321(B); *see also Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, 334, ¶ 19 (App. 2002). By statute, "[a] failure to expressly agree to the test . . . is deemed a refusal." A.R.S. § 28-1321(B). And a motorist will be deemed to have refused to consent to an officer's request for testing if the motorist's conduct is such that "a reasonable person in the officer's position would be justified in believing that [the] motorist was capable of refusal and manifested an unwillingness to submit to the test." *Campbell v. Superior Court*, 106 Ariz. 542, 553 (1971).

A. Right to Counsel.

¶10 Tierney asserts that she had a right to consult with counsel before deciding whether to submit to the blood draw, and that the superior court thus erred by affirming ADOT's conclusion that she refused to submit to testing.

¶11 Tierney's argument is foreclosed by Arizona Supreme Court precedent. In *Campbell v. Superior Court*, the court squarely held that "[i]t is the opinion of this court that respondent was not entitled to the assistance of counsel in deciding whether or not to submit to the breathalyzer test." 106 Ariz. at 550. Relying on one of several cases cited in a footnote in *Campbell*, Tierney argues that *Campbell* has been misinterpreted and only stands for the proposition that a person cannot demand an attorney's physical presence (as opposed to a right to confer with counsel). *See id.* at 550 n.7. But that footnote simply provides examples of cases from other jurisdictions supporting the proposition that "[s]ome courts have held that no right to counsel exists because suspension proceedings under the Implied Consent Law are civil in nature." *Id.* The footnote did not limit *Campbell*'s holding as Tierney suggests.

¶12 Moreover, the Arizona Supreme Court clarified any possible ambiguity in *Campbell*'s holding in two companion cases decided several years after *Campbell*: a criminal DUI prosecution, *Kunzler v. Superior Court* ("*Kunzler I*"), 154 Ariz. 568 (1987), and an accompanying civil driver's license revocation, *Kunzler v. Miller* ("*Kunzler II*"), 154 Ariz. 570 (1987). In these two cases stemming from the same underlying events and decided on the same day, the court reemphasized that the accused has a right to counsel *in a criminal case* (provided the exercise of that right does not disrupt the investigation), while also clarifying that "[t]hat rule does not apply in civil

cases considering the revocation of a person's driver's license." *Kunzler I*, 154 Ariz. at 570; *Kunzler II*, 154 Ariz. at 571. Tierney suggests that *Kunzler I* expressed "dissatisfaction" with *Campbell*'s holding. But that characterization ignores that the core holding of both *Kunzler I* and *Kunzler II* drew a distinction between criminal cases (in which the right to counsel applies) and civil license suspension/revocation cases (in which it does not). *See Kunzler I*, 154 Ariz. at 570; *Kunzler II*, 154 Ariz. at 571; *see also State v. Juarez*, 161 Ariz. 76, 80 (1989) (noting *Campbell*'s holding that there is no right to assistance of counsel in deciding whether to submit to chemical testing in civil license suspension proceedings, but again clarifying that "[w]e do not believe, however, that *Campbell* applies to this case which is a criminal matter").

¶13 Tierney similarly argues that *Tornabene*, on which both ADOT and the superior court relied, does not restrict the right to confer with counsel before deciding whether to submit to testing, but rather only stands for the proposition that counsel's physical presence is not required. But in *Tornabene*, this court again noted that "our supreme court has consistently rejected the proposition that a motorist who faces civil license suspension is entitled to assistance of counsel in deciding whether to submit to chemical breath testing" and reaffirmed that "a license suspension hearing . . . is a civil proceeding and, as such, [the motorist] had no constitutionally-protected right to consult with her attorney about taking the test." 203 Ariz. at 337, ¶ 32. Although this court further discussed that the motorist had no right to the *presence* of an attorney during testing (given the motorist's request for counsel's presence in that case), that conclusion was a necessary consequence of the principle that motorists facing civil license suspension proceedings have no right even to *consult* with counsel about whether to submit to testing. *Id.* at ¶ 33. Tierney's attempt to distinguish *Tornabene* is thus unavailing.

¶14 Because Tierney had no right to consult with counsel regarding whether to submit to a blood draw in the context of this civil license suspension proceeding, the superior court did not err by affirming ADOT's conclusion that Tierney's request for counsel did not insulate her from a finding that she had improperly refused to submit to the requested blood draw.

B. Evidence of Tierney's Refusal.

¶15 Tierney further argues that she never refused to consent to the blood draw and instead simply requested to consult with counsel before making a decision. She asserts that it was the officer's unwillingness to

allow her to speak with an attorney that caused any delay in her providing express consent or refusal.

¶16 Tierney asserts that under *State v. Stanley*, her requests to consult with counsel did not constitute refusal unless "there [was] something more, such as an interference with the investigation brought on by delay in being able to obtain counsel or conclude conversations with counsel." 217 Ariz. 253, 256, ¶ 13 (App. 2007). But *Stanley* arose in the criminal context, in which the arrestee had a right to consult with counsel unless it interfered with the investigation; in that context, the mere fact that the arrestee requested counsel would not be deemed a refusal to submit to testing. *Id.* at ¶¶ 12–13. As explained above, however, that right does not apply in the context of a civil license suspension, and absent a right to counsel, a request for counsel does not insulate the motorist from the repercussions of refusing the test. *See Kunzler II*, 154 Ariz. at 571. Accordingly, neither the superior court nor ADOT erred by considering Tierney's questions about counsel as evidence of her "failure to expressly agree to the test." *See* A.R.S. § 28-1321(B).

¶17 Moreover, Tierney not only failed to expressly consent to testing, she expressly refused testing several times when the officer read her the admin per se admonitions. When the officer asked for a yes-or-no answer regarding willingness to submit to the blood draw, Tierney said "No." After the officer explained the ramifications of refusal and told her that any further delay would be deemed a refusal, Tierney again responded "No." Tierney did not indicate a willingness to take the test and, to the contrary, even stated that "I'm not going to test for you guys." Accordingly, substantial evidence supports the finding that Tierney refused the test.

CONCLUSION

¶18 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA