IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LARRY NEIL MCCOWN, JR., *Plaintiff/Appellant*,

v.

ARIZONA DEPARTMENT OF TRANSPORTATION, *Defendant/Appellee*.

No. 1 CA-CV 17-0726
FILED 9-11-2018

Appeal from the Superior Court in Maricopa County
No. LC2017-000071-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

APPEARANCES

Larry Neil McCown, Jr., Scottsdale
Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Michael Rassas
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Randall M. Howe joined.

M O R S E, Judge:

¶1 Larry Neil McCown Jr. ("McCown") appeals the Arizona Department of Transportation's (the "Department") order of suspension of his driver's license. McCown maintains that the suspension violates the double jeopardy clause of the Fifth Amendment to the United States Constitution because the suspension arises from reckless driving conduct for which he was previously criminally convicted and punished. For the following reasons, we affirm the Department's decision and order of suspension.

FACTS AND PROCEDURAL HISTORY

¶2 Pursuant to Arizona Revised Statutes ("A.R.S.") section 28-3306 and Arizona Administrative Code ("A.A.C.") R17-4-404, the Department suspended McCown's driving privileges for twelve months based upon his accumulation of twenty-four driver points between July 24, 2013, and July 4, 2016. *See* A.A.C. R17-4-404(E)(1)(d). During that timeframe, McCown committed seven traffic offenses for which he was held responsible. *See id.*; *see also* A.A.C. R17-4-404, tbl.1.

¶3 McCown requested a hearing before an administrative law judge ("ALJ"). During the hearing, McCown confirmed the accuracy of his driving record and testified that his driving privileges had previously been suspended after his conviction for the eight-point reckless driving offense, which was included in the cumulative twenty-four-points that formed the basis for the Department's administrative suspension order. Finding evidence of the requisite points assessed against McCown and the corresponding order of suspension appropriate, the ALJ affirmed the Department's order of suspension. *Id.*

¶4 On review, the superior court upheld the decision and order of suspension and found that the Department's action was supported by substantial evidence, and was not contrary to law, arbitrary or capricious, or an abuse of discretion. The superior court also held that double jeopardy protections were inapplicable to the administrative suspension because the suspension was based upon the accumulation of twenty-four points in a thirty-six-month period and not simply because McCown was previously convicted of reckless driving.

DISCUSSION

I. JURISDICTION

¶5 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

II. STANDARD OF REVIEW

¶6 The Fifth Amendment to the United States Constitution protects a criminal defendant from multiple prosecutions and punishments for the same offense after acquittal or conviction.[1] *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27 (2002); *Taylor v. Sherrill*, 169 Ariz. 335, 339 (1991). We review de novo whether double jeopardy protections apply. *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10 (App. 2006). We view the evidence in the light most favorable to sustaining the administrative law judge's findings of fact, and we will affirm the decision if it is supported by substantial evidence. *Potter v. Ariz. Dep't of Transp.*, 204 Ariz. 73, 76, ¶ 8 (App. 2002).

III. DOUBLE JEOPARDY

¶7 McCown argues that his Fifth Amendment protection against double jeopardy was violated because he has "endured a criminal proceeding" and "multiple administrative hearings . . . and subsequent punishments" based upon his "single criminal offense of reckless driving, committed on [July 24, 2013]." Specifically, McCown claims that because double jeopardy attached to the criminal reckless driving prosecution for which he was convicted and punished, the Department's subsequent administrative action was barred, as the underlying driver-point calculation included the eight-point reckless driving offense. The State argues that McCown's protection against double jeopardy is inapplicable and thus has not been violated.

¶8 We note at the outset, as McCown contends, that separate actions were brought against McCown—a criminal prosecution later followed by the administrative action at issue—both of which involved, to differing degrees, McCown's July 2013 criminal reckless driving conduct. *See Marzolf v. Superior Court*, 185 Ariz. 144, 147 (App. 1995) (concluding that

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[1] Because McCown argues only that his federal double jeopardy protections were violated, we do not address those protections under Article 2, Section 10, of the Arizona Constitution. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011).

an administrative action and a criminal prosecution involving the same conduct involved different proceedings where the actions were separately initiated, tried, and resolved). Contrary to McCown's claims, however, we find that the Department's action was not a prosecution for double jeopardy purposes. *See Taylor*, 169 Ariz. at 342 (concluding that "proceedings involving civil traffic violations are civil in nature . . . are not prosecutions at which jeopardy can 'attach'"); *see also State v. Nichols*, 169 Ariz. 409, 411 (App. 1991) (noting that "administrative proceedings generally are not prosecutions, notwithstanding the fact that the administrative proceeding may even result in a loss of liberty").

¶9 The record shows that the administrative suspension order was expressly civil and predicated upon McCown's accumulation of excessive driver points pursuant to A.R.S. § 28-3306 and A.A.C. R17-4-404. *See Taylor*, 169 Ariz. at 341 (noting that we first inquire whether the legislature expressly or impliedly indicated a civil or criminal label for a proceeding) (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)). Specifically, the Department ordered the suspension under A.R.S. § 28-3306 and A.A.C. R17-4-404 after McCown accumulated twenty-four driver points within a thirty-six-month period. *See also* A.A.C. R17-4-404(A).

¶10 Having found that the Department's administrative proceeding is a nominally civil action, we turn to the purpose and effect of the suspensions of McCown's driving privileges. *See Taylor*, 169 Ariz. at 341 (noting that we must determine whether a civil statutory scheme is overridden by its punitive purpose or effect); *see also Ward*, 448 U.S. at 248-49 (noting that where the legislature has indicated its intent to establish a civil sanction, we must determine whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention"); *State ex rel. Goddard v. Gravano*, 210 Ariz. 101, 105, ¶ 12 (App. 2005) (noting relevant considerations of the inquiry, including whether a sanction has been historically regarded as punishment, requires a finding of scienter, applies to criminal conduct, or appears excessive given its purpose). Essentially McCown claims that, because the Department's administrative suspension order followed his earlier suspension for criminal reckless driving, the Department's order was thus excessive under the "Arizona Driver Point System" and punitive in nature.

¶11 McCown has not, however, established that the Department's order was criminally punitive. *See Hudson v. United States*, 522 U.S. 93, 100 (1997) (finding civil sanctions non-punitive where the evidence did not show by the "clearest proof" required that the sanctions were so punitive as to render them criminal punishment (quoting *Ward*, 448 U.S. at 249)). While

McCown's driving privileges were previously suspended upon his conviction for the July 2013 criminal reckless driving offense, only that suspension constituted a criminal sanction for McCown's reckless driving offense within the meaning of double jeopardy. *See State v. Cook*, 185 Ariz. 358, 359 (App. 1995) (noting that the federal double jeopardy clause bars a second punishment for the same offense, as determined by the same-elements test).

¶12 An administrative suspension order pursuant to A.R.S. § 28-3306 and A.A.C. R17-4-404 is imposed for public traffic safety reasons upon a finding that the driver has violated traffic regulations with such frequency as to indicate a disrespect for traffic laws and a disregard for the safety of others while driving. *See* A.R.S. § 28-121 (providing that the Department's regulation of driver licenses to include the suspension order authorized under § 28-3306 is a sanction provided expressly for "a civil traffic violation unless the statute defining the violation provides for a different classification"). McCown's driving record, which included seven moving violations in a 36-month period, including one violation while his license was suspended, supports the ALJ's conclusions that McCown showed "a blatant and constant disregard for traffic safety." *See Marzolf*, 185 Ariz. at 150 (noting that an administrative license suspension is rationally related to the remedial goal of increasing safety).

¶13 Moreover, nothing in the record suggests, much less demonstrates by "the clearest proof," that the suspension order is punitive. *See State v. Henry*, 224 Ariz. 164, 167, ¶ 9 (App. 2010) (noting that we next must inquire whether a law intended to be non-punitive constitutes a punishment in fact, as shown by its purpose or effect) (quoting *Ward*, 448 U.S. at 248-49). The order cannot be characterized as an impermissibly-excessive additional punishment for McCown's reckless driving, as the sanction for accumulating excessive points is distinct from reckless driving. *See* A.A.C. R-17-4-404(A), (E), and tbl.1; *see also Hernandez v. Superior Court*, 179 Ariz. 515, 520 (App. 1994) (noting that the federal double jeopardy bar does not prohibit multiple punishments for the same conduct where each charged offense is distinct); *Ariz. Dep't of Pub. Safety v. Superior Court*, 190 Ariz. 490, 497 (App. 1997) (noting that the determination of whether a sanction is punitive is not viewed from an offender's perspective). To the contrary, the "revocation of a privilege voluntarily granted" is "characteristically free of the punitive criminal element." *Hudson*, 522 U.S. at 104, (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). As this court has noted, an administrative sanction rarely constitutes a punishment within the meaning of double jeopardy. *Taylor*, 169 Ariz. at 343; *see also Gravano*, 210 Ariz. at 104, ¶ 9 ("[T]he United States Supreme Court has long

recognized" that the double jeopardy clause "does not prohibit the imposition of additional sanctions that could 'in common parlance,' be described as punishment." (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943))).

¶14 The fact that some conduct underlying the order may also be criminal, as McCown claims is the case here, is insufficient to render the order punitive. *See Ariz. Dep't of Pub. Safety*, 190 Ariz. at 497 (noting that a sanction is not rendered punitive because it is related to a criminal activity); *see also State v. Price*, 218 Ariz. 311, 313, ¶ 5 (App. 2008) (noting that we analyze the elements of offenses, not the facts of the case).

¶15 McCown cites *United States v. Halper*, 490 U.S. 435, 448-49 (1989), abrogated by *Hudson*, 522 U.S. 93, to support his assertion that the Department's order exceeds its remedial character and is "thus fairly characterize[d] . . . as punishment." However, a civil penalty would never withstand the federal double jeopardy scrutiny were it required to be solely remedial. *Gravano*, 210 Ariz. at 105, ¶ 15 (citing *Hudson*, 522 U.S. at 102). The mere presence of a traditional aim of punishment does not transform a civil sanction into a criminal punishment. *See Hudson*, 522 U.S. at 94; *see also Ariz. Dep't of Pub. Safety*, 190 Ariz. at 497 (noting that deterrence may serve a civil goal); *Brodsky v. State*, 218 Ariz. 508, 511-12, ¶ 11 (App. 2008) (concluding that the administrative impoundment of a vehicle, relating to an underlying offense of driving under the influence, did not require any showing of the driver's state of mind and was non-punitive); *Mullet v. Miller*, 168 Ariz. 594, 596 (App. 1991) ("Even where the administrative proceeding has resulted in the loss of liberty, courts have recognized the distinction between administrative and criminal proceedings, rejecting double jeopardy arguments."). In sum, we do not find evidence of the "clearest proof" that the Department's suspension sanction constitutes a punishment. *See Ward*, 448 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). On this record, we conclude therefore that the Department's order of suspension did not implicate or violate McCown's federal double jeopardy protections.

¶16 We also note that the Department's action was not based upon the "same" offense for which McCown was criminally prosecuted and convicted. McCown committed two distinct offenses: (1) reckless driving pursuant to A.R.S. § 28-693(A) (requiring a showing of "reckless disregard for the safety of persons or property") and (2) excessive point accumulation pursuant to A.R.S. § 28-3306 and A.A.C. R-17-4-404 (requiring a showing of an accumulation of twenty-four driver points or more within a thirty-six-month period). Although reckless driving constitutes a traffic violation for

which eight driver points are assessed, A.A.C. R17-4-404, tbl.1, the Department need not prove a reckless driving offense, or any particular traffic offense, to order an administrative driver license suspension for the accumulation of excessive points under A.R.S. § 28-3306 and A.A.C. R-17-4-404(E). *See State v. Siddle*, 202 Ariz. 512, 516, ¶ 10 (App. 2002) (noting that separate statutory provisions constitute the same offense only where they are comprised of the same elements). Because the two proceedings were based upon separate offenses, any double jeopardy bar is inapplicable to the latter. *See Cook*, 185 Ariz. at 363 (concluding that the federal double jeopardy clause did not bar a proposed prosecution of an offense determined to be distinct from another offense under the same-elements test).

CONCLUSION

¶17 For the abovementioned reasons, we affirm the Department's decision and order of suspension.

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