

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000331-001 DT

12/02/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

BARBARA V HULSE

JOHN D PARKER II

v.

ARIZONA DEPARTMENT OF
TRANSPORTATION MOTOR VEHICLE
DIVISION (001)
JOHN S HALIKOWSKI (001)
STACEY K STANTON (001)

LESLIE A COULSON

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Plaintiff/Appellant Barbara V. Hulse (Hulse) asks this Court to review the Findings of Fact, Conclusions of Law, Decision and Order, dated March 4, 2011, and the Order Denying Re-hearing and Order Affirming Suspension, mailed April 19, 2011, affirming the suspension of Hulse's driver's license by the Arizona Department of Transportation (AzDOT). For the following reasons, this Court affirms the Orders issued by AzDOT.

I. FACTUAL BACKGROUND.

On December 19, 2010, Hulse was arrested for driving under the influence. She was transported to the DUI task force command station where she was asked to submit to a BAC test, but she ultimately refused. The officer then served her with an Order of Suspension.

Hulse challenged the Order of Suspension, and on February 18, 2011, the Administrative Law Judge (ALJ) held a hearing. Officer Wood testified he stopped Hulse on December 19, 2010, because he saw the vehicle she was driving weaving and traveling over the posted speed limit. (R.T. of Feb. 18, 2011, at 1-2.) When he approached Hulse's vehicle, he smelled a strong odor of alcohol. (*Id.* at 3.) Hulse was slow to retrieve the necessary documents from her wallet and had a lack of eye contact. (*Id.*) When Hulse left the vehicle, Officer Wood continued to smell the odor of alcohol. (*Id.*) When asked, Hulse said she had one glass of wine with dinner. (*Id.*) Officer Wood administered the HGN test, and saw six cues showing intoxication. (*Id.* at 3-4.)

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Hulse showed six of the eight cues on the walk-and-turn test, and three cues on the one-leg-stand test. (*Id.* at 5.) As a result, Officer Wood arrested her for DUI and took her to the DUI Task Force Command Station. (*Id.*)

At the Command Station, Officer Wood read to Hulse the Admin Per Se admonition and asked her to take a breath test. (R.T. of Feb. 18, 2011, at 5–6.) Initially she said she would, but then said she would not take the test, saying her friends had told her not to take such tests. (*Id.* at 6.) Officer Wood read her the second paragraph about further delays, and she still said she would not take the test. (*Id.*) Officer Wood wrote in quotes, “I refuse to take the test” at the line that reads “I refuse all tests,” and she signed the form next to the line that reads, “No, I will not submit to your tests.” (*Id.*) Officer Wood said Hulse was “adamant that she had been told not to do them.” (*Id.*) Officer Wood said Hulse never requested an attorney. (*Id.* at 6, 8.)

As a result of Hulse’s refusal, Officer Wood obtained a search warrant for the blood draw. (R.T. of Feb. 18, 2011, at 7.) At no time prior to the serving of the search warrant did Hulse recant her refusal to take the test. (*Id.*) Before the blood draw, Officer Wood asked her again if she would submit to the test voluntarily, and she still refused. (*Id.* at 6–7.) After Hulse’s refusal, Officer served an Order of Suspension on her. (*Id.* at 7.) On cross-examination, Hulse’s attorney asked Officer Wood if he had pointed to four other persons in the room and told Hulse they would hold her down if she refused, and Officer said, no, no one would have said that. (*Id.* at 8.)

Hulse testified that, once they arrived at the Command Station, she asked for an attorney, told Officer Wood her cell phone had died, and asked to use the telephone. (R.T. of Feb. 18, 2011, at 9.) She said Officer Wood said she could not do so at that time. (*Id.*) She testified as follows about the discussion about the BAC test:

PETITIONER: I said, “What are my options” and he said, “You have none, you need to take this” and I said I want to talk to my attorney. Then he said, “You see those four guys over there, those big guys? They are going to hold you down and we are going to take your blood and you have no choice.”

COUNSEL: That’s not how your blood was taken, though. Correct?

PETITIONER: No.

COUNSEL: What ultimately ended up happening?

PETITIONER: That I was scared. I was in handcuffs and they took me over and took my blood in a very unclean location.

COUNSEL: Now, do you know if it was pursuant to a search warrant? Do you know anything about that?

PETITIONER: Yes, it was and I asked several times that I need to talk to my attorney and have access to a phone. Officer Wood said repeatedly, “No, you do not get access to the phone, now you need to go take the test.”

COUNSEL: And you let Officer Wood know that your cell phone had died?

PETITIONER: Yes, multiple times.

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COUNSEL: When you were sitting in that area before you went into the larger vehicle with the other women, was there a telephone in that station room?

PETITIONER: There were telephones outside of the room that I was in, that I was handcuffed and put at a table, yes.

COUNSEL: Now, after you refused to submit to the test, did Officer Wood tell you that if the test results came in at a certain level and you were actually in physical control of your car that your license would be suspended for a certain period of time? Did you have that discussion?

PETITIONER: Yes.

(R.T. of Feb. 18, 2011, at 10.) The ALJ took the matter under advisement. (*Id.* at 12.)

On March 4, 2011, The ALJ issued his Findings of Fact, Conclusions of Law, Decision and Order, and concluded the following: (1) Officer Wood had reasonable grounds to stop for Hulse for DUI; (2) Officer Wood arrested Hulse for DUI; (3) Officer Wood offered a BAC test to Hulse, and she refused; and (4) Officer Wood advised Hulse of the consequences of that refusal. For Hulse's contention she was denied the right to counsel, the ALJ concluded Hulse did not have the right to an attorney, and that, when Hulse asked to speak to an attorney, Officer Wood advised her she was not entitled to further delay for any reason in taking the test. The ALJ therefore affirmed the suspension.

On March 24, 2011, Hulse's attorney filed a Motion for Rehearing contending Hulse did have the right to an attorney. The Assistant Chief Administrative Law Judge denied that motion in an Order that shows it was mailed April 19, 2011. On May 13, 2011, Hulse's attorney filed a Complaint for Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

II. GENERAL STANDARDS FOR REVIEW:

The Arizona statutory authority and case law define the scope of administrative review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

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Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

A trial court may not function as a “super agency” and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm’n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984). The reviewing court must view the evidence in a light most favorable to upholding the agency’s decision and affirm that decision if it is supported by any reasonable interpretation of the record. *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998). While the reviewing court is not bound by the agency’s conclusions of law or statutory interpretations, an agency’s interpretation of statutes or regulations that it implements is entitled to great weight. *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

III. ISSUES.

A. *Was Hulse denied her right to consult with an attorney.*

Hulse contends she had the right to consult with an attorney, and thus the officer denied her right to consult with an attorney. The Arizona Supreme Court has said the following:

We have reemphasized this day in the companion criminal case, *Kunzler v. Pima County Superior Court*, that a person always has a right to consult an attorney in a criminal DWI case as long as this request does not interfere with an ongoing investigation. In other words, a person may request and receive the assistance of an attorney when it will not interfere with the police investigation. That rule does not apply in civil cases considering the revocation of a person’s driver’s license. In those civil cases, we have stated: “It 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.” *Campbell v. Superior Court*.

Kunzler v. Miller, 154 Ariz. 570, 744 P.2d 671 (1987) (citations omitted). The Arizona Court of Appeals has said the following:

We first note 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. In criminal DUI proceedings, however, a qualified right to counsel has been established. As noted above, a license suspension hearing under § 28–1321(K) is a civil proceeding and, as such, Tornabene had no constitutionally-protected right to consult with her attorney about taking the test.

Tornabene v. Bonine, 203 Ariz. 326, 54 P.3d 355, ¶ 32 (Ct. App. 2002) (citations omitted). The Arizona courts have thus held Hulse had not right to the assistance of counsel in this license-revocation proceeding.

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Hulse contends, however, she has a constitutional right to counsel under the Sixth Amendment to the United States Constitution and Article 2, Section 24, of the Arizona Constitution, as is recognized by Rule 6.1(a) of the Arizona Rules of Criminal Procedure. These rights are stated as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [*sic*].

U.S. CONST. amend 6 (emphasis added).

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

ARIZ. CONST. art. 2, § 24 (emphasis added).

A defendant shall be entitled to be represented by counsel *in any criminal proceeding* The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. (emphasis added). Thus, by the vary language of these provisions, the right to counsel is limited to a criminal proceeding. Because the license-revocation proceeding is a civil proceeding, the above constitutional and rule provisions do not apply.

Hulse cites for authority *State v. Stanley*, 217 Ariz. 253, 172 P.3d 848 (Ct. App. 2007). That case stated the following:

Defendant argues that the request to speak to an attorney, standing alone, does not constitute a "failure to expressly agree" that can be deemed a refusal. We agree. Arizona Rule of *Criminal Procedure* 6.1(a) grants defendants the "right to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody." The Arizona Supreme Court has made it clear that "in a *criminal* DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation." The Arizona Supreme Court has also determined that this right under Rule 6.1 is constitu-

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tionally protected in this setting: “We cannot imagine many cases where this would be a disruption of the procedures followed by the police in preparing to administer a breath test to a driver. Informing the driver that he may not call his attorney before taking the test misstates the law and violates the driver’s right to counsel under the sixth amendment of the United States Constitution and article 2, section 24 of the Arizona Constitution.”

Stanley at ¶ 12 (emphasis added), citing *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), and *Kunzler v. Superior Ct.* 154 Ariz. 568, 744 P.2d 669 (1987). *Stanley* thus applies in a criminal proceeding, and has no applicability in this civil proceeding for a revocation of Hulse’s driver’s license.

B. *Was Hulse’s refusal to submit to the BAC test voluntary.*

Hulse contends her refusal to submit to the BAC test was not voluntary. Hulse first contends Officer Wood misinformed her of her right to consult with an attorney. The record does not support this contention. Hulse first refused to take the BAC because her friends had told her not to take the test. When Hulse said she wanted to talk to her attorney first before taking the test, Officer read her the admonition and told her she did not have a right to speak to an attorney and did not have the right to delay the proceedings. To the extent Hulse claims she was mis-informed because she claims she did have the right to speak to an attorney, Hulse is incorrect for the reasons stated in Section A above.

Hulse next claims her refusal was involuntary because she contends Officer Wood told her, if she continued to refuse to take the test, four other officers would “hold her down” and draw her blood. (Opening Brief at 6, ll. 21–23.) Hulse acknowledged, however, “That’s not how [her] blood was taken.” (R.T. of Feb. 18, 2011, at 10, ll 5–6.) This argument might have some logic if her claim were that she *consented* to the test but her *consent* was involuntary under the following sequence: (1) She refused to take the test; (2) Officer Wood told her four officers would hold her down if she continued to refuse; and so (3) she *consented* to take the test; thus (4) her *consent* was involuntary. But Hulse did not consent and thus make no claim some *consent* was involuntary. She instead claims her *refusal* was involuntary, which would require this progression of logic: (1) She refused to take the test; (2) Officer Wood told her four officers would hold her down if she continued to refuse; (3) at that point, she was going to *consent* to the test, but because of the possibility of being held down by four police officers, she continued to *refuse* to take the test; thus (4) her *refusal* was involuntary. The record thus does not support Hulse’s claim of involuntariness.

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IV. CONCLUSION.

Based on the foregoing, this Court concludes the record supports the suspension of Hulse's driver's license. This Court further determines there is no just reason to delay entry of judgment.

IT IS THEREFORE ORDERED affirming the Orders issued by AzDOT suspending Hulse's driver's license.

IT IS FURTHER ORDERED remanding this matter to Arizona Department of Transportation.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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