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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DANIEL N. DAUGHERTY, Appellant, v. COUNTY OF LOS ANGELES DMV LICENSING OPERATIONS, Respondent.	B267802 (Los Angeles County Super. Ct. No. BS151006)

APPEAL from an order of the Superior Court of Los Angeles County. Joanne O'Donnell, Judge. Affirmed.

Daniel N. Daugherty, in pro. per., for Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Chris A. Knudsen, Assistant Attorney General, Kenneth C. Jones and Jaclyn V. Younger, Deputy Attorneys General, for Respondent.

Appellant Daniel N. Daugherty appeals from a September 9, 2015 order of the superior court denying his petition for writ of mandamus and upholding the suspension of his driver's license by the Department of Motor Vehicles (DMV). We affirm.

BACKGROUND

On May 3, 2014, at approximately 6:00 p.m., Appellant, who was riding a motorcycle or motorized scooter, was injured in a traffic collision. Officer Arbuckle of the Pasadena Police Department was dispatched to investigate the collision. Upon his arrival on the scene, Arbuckle observed Appellant lying on his back in the middle of the intersection, being attended to by another officer and paramedics. Arbuckle observed that Appellant had scratches and abrasions on both of his arms and the back of his head, and when Appellant stood up he "almost lost his balance." Another officer tending to Appellant told Arbuckle that Appellant was "possibly under the influence of alcohol." Paramedics advised Appellant that he needed to go to the hospital, which he refused. Appellant was then handcuffed to a gurney and transported to Huntington Memorial Hospital. His motorized scooter was impounded and transported to an impound lot. The admission form from the hospital states that Appellant was brought to the hospital "in custody by police."

Appellant admitted to "drinking some alcohol today," but was "conversational and coherent." At 7:20 p.m., Arbuckle again made contact with Appellant, who was lying in bed in the emergency room. Arbuckle testified that Appellant smelled of alcohol, slurred his words, and had bloodshot eyes. Arbuckle asked Appellant preliminary screening questions from the Pasadena Police DUI Evaluation and Arrest Report. Arbuckle

administered a Standardized Field Sobriety Test (FST) requiring him to estimate 30 seconds in his head, and observed Appellant's eye movements for Horizontal Gaze Hystagmus. Appellant refused to perform additional FST's. Believing Appellant to be under the influence of alcohol, Arbuckle read Appellant the DMV's Chemical Test Admonition and asked Appellant to provide a blood or breath sample. Appellant refused, saying "I'm not doing none of them" and informed Arbuckle that he did not want to submit to further tests and did not care whether his license would be suspended. Arbuckle issued a misdemeanor citation to Appellant, with a court date of July 3, 2014.[1] Arbuckle also confiscated Appellant's driver's license and issued an Administrative Per Se Suspension/Revocation Order.

On June 17, 2014, a DMV hearing officer conducted an administrative hearing with respect to the suspension of Appellant's driver's license. The hearing officer found that all four elements required pursuant to Vehicle Code section 23612 were supported by the evidence, and the suspension of Appellant's driving privileges was re-imposed effective August 6, 2014 to August 5, 2015.[2] The decision was filed on July 28, 2014.

On August 5, 2014, Appellant filed a request for departmental review. The departmental review was completed and the decision of the hearing officer was affirmed on August 15,

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[1] Appellant pleaded no contest to this charge in an unrelated proceeding. His reply brief seeks review of this conviction as well, but that proceeding is not before this Court.

[2] Unless otherwise specified, all further statutory references are to the Vehicle Code.

2014.[3] Appellant filed a petition for writ of mandamus challenging that decision on September 10, 2014.

The superior court denied the petition on September 9, 2015, concluding that the petition was untimely, but also addressing the merits and determining that the writ would not issue even if the petition had been timely filed. This appeal followed.

DISCUSSION

Statute of Limitations

We review the superior court's application of the statute of limitations de novo, because it is based on its application of the relevant statutes to undisputed facts. (*Moles v. Gourley* (2003) 112 Cal.App.4th 1049, 1054.)

Section 13559, subdivision (a) provides for review of a DMV hearing officer's decision by a court "within 30 days of the issuance of the notice of determination of the department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle after the hearing pursuant to Section 13558." Four days are added for notice by mail. (§ 23.) The decision of the hearing officer, issued on July 28, 2014, states that Appellant is "entitled to a departmental review of this

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[3] Respondent's brief states that Appellant did not file a request for departmental review, and the superior court's order denying the petition does not reflect that Appellant filed a request for departmental review. Appellant's petition for review, however, states that it requests review of "DMV Notice of Decision, Departmental Review, 08/15/14," and includes as an exhibit a copy of the Departmental Review Notice of Decision issued on August 15, 2014. Respondent acknowledges that Appellant's petition is timely, and abandons its argument that the statute of limitations bars Appellant's petition.

decision," which was required to have been filed within 15 days of the effective date of the decision. The notice also states that Appellant "may also request a court review of this action by contacting the superior court in your county of residence within 34 days from the date shown below."

The superior court based its conclusion that the petition was untimely on the date of the hearing officer's decision and did not address that Appellant filed a request for departmental review on August 5, 2014. The departmental review resulted in a notice of decision affirming the hearing officer's decision, which was served by mail on August 15, 2014. His writ petition, therefore, was required to have been, and was, filed within 90 days of that date. (§ 14401; *Johanson v. Department of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1215.)

Accordingly, the superior court erroneously denied Appellant's petition as untimely. The superior court, however, also addressed the merits of Appellant's contentions.

Merits of Hearing Officer Decision

We review the merits of the superior court's ruling "'to determine whether the trial court's findings are supported by substantial evidence.' [Citation.] "'We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings.'"" (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.)

A person who drives a motor vehicle is "deemed to have given his or her consent to chemical testing of his or her blood or

breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153." (§ 23612, subd. (a)(1)(A).) Appellant makes three arguments in challenging the hearing officer's decision upholding the suspension of his driving privileges: that he was not lawfully arrested at the scene of the accident, such that he was not subject to the implied consent requirement; that the officers were required to have taken him before a magistrate judge, pursuant to section 40302, subdivision (d); and that California's implied consent law was invalidated by the United States Supreme Court's recent decision in *Birchfield v. North Dakota* (2016) 579 U.S. ___ [136 S.Ct. 2160]. We address these in turn.

A. Lawful Arrest

Appellant argues that he was not the subject of a "lawful arrest" at 7:42 p.m., when he refused the chemical test, and that only the officer's stated time of arrest of 8:00 p.m. applies. As such, he argues that he was not the subject of a lawful arrest when he refused to consent to a blood test. The hearing officer's findings of fact, however, include that Appellant "was arrested at the scene of the collision: he was handcuffed to a gurney and transported to a hospital for evaluation at 6:12 p.m." Appellant does not dispute that he refused to cooperate and was handcuffed to the gurney, and provides no legal support for his assertion that he was not the subject of a lawful arrest prior to receiving the Chemical Test Admonition. He argues that his "transitional handcuffing" to the gurney did not constitute an arrest.

"An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest

and detention." (Pen. Code, § 835.) "The essential elements of an arrest are: (1) taking a person into custody; (2) actual restraint of the person or his submission to custody." (*People v. Hatcher* (1969) 2 Cal.App.3d 71, 75.) Handcuffing "is a distinguishing feature of a formal arrest." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404-1405.) The facts before the hearing officer support the conclusion, therefore, that Appellant was lawfully arrested at the time he was handcuffed to the gurney and taken, against his wishes, to the hospital.

B. Appearance Before Magistrate

Appellant next argues that if he was lawfully arrested, section 40302, subdivision (d) required that he be "taken without unnecessary delay before a magistrate." Subdivision (d) applies this requirement to a person "charged with violating Section 23152." (§ 40302, subd. (d).) This provision, however, applies to a custodial arrest. Appellant was issued a citation, which he acknowledged by signing, and permitted to leave the hospital. "A citee subject to custody under section 40302 is already under arrest; the decision whether to cite and release the citee or bring him before a magistrate is a discretionary function akin to the decision to prosecute. It is an administrative matter unrelated to the policy choice made by the Legislature, i.e., that certain conduct should be prohibited." (*People v. Monroe* (1993) 12 Cal.App.4th 1174, 1192.) Had Appellant been taken into custody, the provisions of section 40302 would have applied, but Arbuckle retained the discretion, in the alternative, to cite Appellant and release him. (*Ibid.*)

C. Validity of Implied Consent Requirement

Finally, Appellant argues that a recent United States Supreme Court case, *Birchfield v. North Dakota*, *supra*, 136 S.Ct.

2160, concluded that implied consent statutes are unconstitutional to the extent they require an individual suspected of driving under the influence to provide a blood sample without a warrant. To the contrary, however, the case specifically distinguished the impact of implied consent statutes on civil penalties, including suspension of driving privileges, stating "[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. [Citations.] Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." (*Id.* at p. 2185.) At issue in this appeal is only the suspension of Appellant's driving privileges. As such, *Birchfield* does not apply.

DISPOSITION

The superior court's order denying Appellant's petition for writ of administrative mandamus is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.