Filed 12/19/25 Kinney v. Department of Motor Vehicles CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ANSEL DUNCAN KINNEY, Plaintiff and Appellant, v. DEPARTMENT OF MOTOR VEHICLES et al., Defendants and Respondents.	F088642 (Super. Ct. No. BCV-22-102933) **OPINION**

APPEAL from an order of the Superior Court of Kern County. Bernard C. Barmann, Judge.

Middlebrook & Associates, Richard O. Middlebrook and Gabrielle Burnett for Plaintiff and Appellant.

Rob Bonta, Attorney General, Chris A. Knudsen, Assistant Attorney General, Gabrielle H. Brumbach and Arang Chun, Deputy Attorneys General, for Defendants and Respondents.

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This appeal involves the driver's license suspension of appellant Ansel Duncan Kinney following an administrative per se (APS) hearing. An administrative hearing officer (AHO) for respondent Department of Motor Vehicles (DMV) concluded that suspension was appropriate because Kinney had refused to voluntarily submit to a chemical test to determine his blood-alcohol content (BAC). The AHO's decision was subsequently upheld by the Kern County Superior Court. In this appeal, Kinney contends that: (1) the trial court erred by finding that Kinney waived his due process challenge to the APS hearing; (2) his due process rights were violated because the AHO acted as an advocate for the DMV and the adjudicator; (3) the APS hearing was invalid because it was conducted pursuant to void regulations; and (4) the court erred by concluding that there was no officer-induced confusion that would have rendered his refusal to consent to a blood test unknowing or involuntary. We affirm.[1]

APS SYSTEM

In California, if a driver refuses to submit to chemical tests that determine BAC, the DMV is required to suspend the driver's license. (Veh. Code,[2] §§ 13353, subds. (a), (d), 23152; *Espinoza v. Shiomoto* (2017) 10 Cal.App.5th 85, 99 (*Espinoza*).) However, drivers have a right to an APS hearing in order to challenge the suspension. (§ 13558, subd. (a); *Hall v. Superior Court* (2016) 3 Cal.App.5th 792, 804 (*Hall*).) At the APS hearing, an AHO must determine whether: (1) the arresting officer had reasonable cause to believe the driver was driving under the influence (DUI); (2) the driver was lawfully arrested; (3) the driver was properly advised of the consequences of failing to submit to or complete a BAC chemical test; and (4) the driver refused to submit to, or complete, the

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1 Kinney requests that we take judicial notice of various documents and dockets from other courts. Because these documents are not sufficiently necessary, helpful, or relevant to the resolution of this appeal, we deny Kinney's request for judicial notice. (*Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186, 194, fn. 1 (*Knudsen*).)

2 Unless otherwise noted, all further statutory references are to the Vehicle Code.

BAC chemical test. (*Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1131 (*Troppman*); *Clarke v. Gordon* (2024) 104 Cal.App.5th 1267, 1271, fn. 2 (*Clarke*); *Hall, supra,* at p. 804.) The Legislature crafted the APS laws to address the time lag that often occurs between an arrest and a conviction for driving while intoxicated or with a prohibited BAC. (*MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 155.) As a result, APS hearings are intended to be expedited (*Lake v. Reed* (1997) 16 Cal.4th 448, 455, fn. 2 (*Lake*)), and the rules governing the admissibility of evidence are relaxed (*MacDonald, supra,* at p. 159). The DMV bears the burden of demonstrating all facts necessary to support a suspension. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536; *Burge v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 384, 388.)

PROCEDURAL BACKGROUND

On April 10, 2022, Kinney was arrested for violation of sections 23152, subdivision (a) (driving under the influence of alcohol), 23152, subdivision (b) (driving with a BAC of 0.08 percent or more), and 20002, subdivision (a) (failing to stop at the scene of an accident).

On September 29, 2022, a telephonic APS hearing was conducted pursuant to section 13558.

On September 30, 2022, the AHO found that Kinney had been lawfully arrested, had been properly admonished about the consequences of failing to consent to a chemical test, and had refused to consent to a BAC chemical test. As a result, the suspension of Kinney's license was upheld.

On November 2, 2022, Kinney filed an administrative writ of mandate with the Kern Superior Court to challenge the suspension determination.

On March 20, 2024, the trial court denied the writ.

On September 13, 2024, Kinney filed a notice of appeal.

FACTUAL BACKGROUND

The Arrest

On April 9, 2022, at 11:52 p.m., California Highway Patrol Officers Guzman and Torres were in Napa County when they were dispatched to investigate a traffic accident, specifically a car hitting a parked car and then driving away. After speaking with a witness, the officers went to a nearby residence. The officers made contact with Kinney, who admitted to bumping into the parked car, but he believed that there had been no damage. As they spoke, the officers could smell a strong odor of alcohol coming from Kinney's person and breath. The officers also noticed that Kinney had red, watery eyes, slurred and thick speech, and an unsteady gait. When asked about alcohol consumption, Kinney admitted to having two glasses of wine and a glass of whiskey prior to driving and one shot of whiskey after the accident. Based on Kinney's responses and the officers' observations, the officers arrested Kinney at around 1:01 a.m. on April 10, 2022, for DUI in violation of section 23152, subdivision (a).

The officers' patrol car was equipped with a mobile video audio recording system (MVARS). Although the MVARS did not capture any relevant video, it did capture an audio recording of the officers' interaction with Kinney. As acknowledged by Kinney's counsel during oral argument before the trial court, the MVARS recording generally reflects in relevant part that Kinney was belligerent, used profanity, and was not very cooperative.[3] With respect to consenting to a BAC chemical test, the MVARS recording captured the officers' three attempts to explain the implied consent laws or to obtain a blood or breath sample from Kinney.

The first attempt occurred shortly after Kinney was placed under arrest. Guzman read Kinney an implied consent advisement that apparently was prepared by the Napa

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3 For example, after the officers handcuffed Kinney, he protested to being handcuffed, called the officers "f*****s" and "jerks" who "don't do real s***," and insulted the officers' demeanor and how the officers performed their job.

County District Attorney's Office. Specifically, Guzman told Kinney: "All right. I got to read you something, okay? I'm required by state law—or sorry. You are required by state law to submit to a chemical test to determine the alcohol content of your blood. If you refuse or fail to complete the test, I will apply for a search warrant and your license may be suspended. If the judge issues the warrant, I will take a sample of your blood even if you do not consent. Do you agree to take a breath or blood test." Kinney responded, "No."

After Kinney responded "No" to Guzman, Torres then attempted to explain Kinney's options. Torres told Kinney that Kinney should work with the officers, to which Kinney told him to "shut the f*** up." Torres said that he was trying to explain the different options, to which Kinney began to ask that the handcuffs be removed. Guzman asked Kinney to do him a favor and listen because he was trying to help. Kinney responded, "No it isn't. Nothing you are going to do is going to help me." Torres then tried to explain: "So you have a couple of options here. You have the option to do one of those tests. If you do one of those tests, um, I can approve you being cited and released tonight." Kinney responded, "No, no, that's not going to happen." Torres continued, "If you don't—if you don't want to, that's okay. That's your choice. Okay? I'm just laying out the options that you have. The other option is, if you don't want to do it under your own volition, then we'll have to talk to a judge. Okay?" Kinney responded, "Yeah." Torres continued, "And once we talk to a judge, then there's no, uh, way you're going to stay here tonight. You're going to go with us tonight." Kinney responded, "Yeah," and asked if it would take four hours and then he would be released. Torres and Guzman said that Kinney would not be immediately released, he would be taken to jail, and that the process would take a minimum of four hours. Torres continued: "It's your choice right now. If you want to do one of the tests, you can do that, and I—we can work with you and—cite and release you." Kinney interrupted Torres and said, "You guys aren't working with me. F*** you!" Torres said, "If you don't—okay. If you don't,

then we'll have to go with the other route, okay?" Kinney responded affirmatively and said, "Let's go down there for four hours. F*** you guys and I'm going to sue everybody."

Finally, about a minute later, Guzman read the chemical test admonition on the DMV's DUI arrest investigation report form (DS 367). Guzman told Kinney that the DS 367 admonition was for Kinney's benefit, to which Kinney replied, "F*** you." Guzman then read Kinney the following: "You are required by state law to complete a chemical test to determine the alcohol or drug content of your blood. Because I believe you are under the influence of alcohol, you have a choice of taking a breath or blood test.… If you refuse to submit to or fail to complete a chemical test, your driving privileges will be administratively suspended for one year …." Kinney interrupted Guzman and complained about the handcuffs hurting him and stated, "I am not submitting to anything." Guzman asked Kinney to let him finish, and Kinney said, "No, F*** you guys." Guzman read that Kinney did not have a right to an attorney with respect to a chemical test, to which Kinney stated that he wanted an attorney. Guzman continued in part, "[r]efusal or failure to complete a breath or urine test will result in a fine [and] mandatory imprisonment if you are convicted of [DUI].… Will you take a breath test?" Kinney responded that he wanted an attorney. Guzman then asked, "Will you take a blood test?" Kinney responded, "No." The MVARS recording does not show that Kinney asked a question or requested clarification about his rights, obligations, or any of the advisements or statements that the officers had given or told him.

After Kinney refused to take a blood or breath test, the officers took Kinney to the hospital to obtain medical clearance and then to the police station to procure a warrant to take a blood sample. At 3:57 a.m., a blood sample was taken from Kinney pursuant to the warrant.

The APS Hearing

On September 29, 2022, a telephonic APS hearing was held. The AHO explained that there were four issues for the hearing: did the officers have reasonable cause to believe that Kinney was DUI, was Kinney lawfully arrested, was Kinney advised that if he refused to take a chemical test or failed to complete a chemical test that his license will be suspended, and whether Kinney refused to take or failed to complete a chemical test when asked by law enforcement. After explaining the issues to be adjudicated, the AHO asked if an opening statement would be made. Kinney's counsel declined to make an opening statement. The AHO then identified and marked seven exhibits: Guzman's sworn statement, a Napa County criminal justice arrest/detention complaint form, the sworn DS 367 form, a traffic collision report, copies of the citation and Kinney's driver's license, the MVARS recording, and Kinney's DMV driving record. The AHO asked for objections, and Kinney's counsel had none. The AHO then swore in Kinney to give testimony, and Kinney's counsel began his direct examination.

1. Kinney's Direct Testimony

Kinney testified in part that he had been a civil attorney for 37 years, but was not familiar with criminal law. Kinney explained that he was driving to his friend's house when he realized he had gone too far. Kinney attempted to make a three-point turn when he tapped the bumper of a parked car. Kinney completed the turn and travelled 500 yards to his friend's house. About an hour later, Guzman and Torres were in the driveway of his friend's house. Kinney acknowledged hitting the parked car, but believed he had not done damage. Kinney also admitted to drinking before he came to his friend's house and admitted to having a shot of whiskey when he arrived. Kinney declined to perform any field sobriety tests.

After he was arrested, Kinney was handcuffed and placed in the back of the officers' patrol car. Kinney acknowledged that Guzman read him something about BAC tests, but Kinney could not remember much of what Guzman said. However, after

Guzman finished, Kinney recalled that Torres got in the car. Kinney believed that what Torres told him was "the noteworthy event." Kinney testified that Torres explained to him that he had a couple of options, either Kinney could take a breath or blood test and be cited and released or they could go to a judge and get a warrant for a blood test. There was nothing in either Guzman's admonition or Torres's statement that mentioned Kinney's license would be suspended "in regards to those options." Based on Torres's statements, Kinney did not believe that Torres was trying to help him, but did believe that he was going to be given a blood test. Kinney testified that he had heard blood tests were more reliable and that he wanted to have a blood test. Because he believed that a blood test was going to happen, Kinney just "sort of shutdown."

Kinney then testified that Guzman read him a second admonition (from the DS 367 form). Although Kinney could hear Guzman reading, Kinney was more focused on pain from his handcuffs and being cramped in the backseat of the patrol car. Kinney's memory was fuzzy about what Guzman was saying and he did not recall any distinctions between blood tests and breath tests. However, Kinney testified that what Torres said to him was very clear, so he focused on what Torres had said. Kinney explained that he was resigned to the fact that he would be getting a blood test and that they would be getting a warrant for that test.

Kinney testified that he did not understand "at all" that his refusal to take a BAC test without a warrant would be deemed a "'refusal.'" Kinney explained that he believed that his confusion as to the consequences of not consenting to a test was based on Torres stating that they would get a blood sample through a warrant anyway and that there was no downside to Kinney. Kinney testified that if the officers had particularly told him about the consequences of a refusal and that obtaining a warrant constituted a refusal, he would have consented because he wanted to take a blood test instead of a breath test. However, based on the different admonitions and Torres's statements, Kinney was confused.

2. AHO's Questions to Kinney

When Kinney's counsel finished the questioning, the AHO stated that she had "a few clarification questions." After the AHO asked Kinney if he had reviewed the MVARS recording and Kinney confirmed that he had done so, the AHO asked if the recording showed that ~~he~~ Kinney was admonished or not admonished. Kinney stated that the recording showed what he had described during his testimony. As Kinney was giving an answer that touched on what had happened with the officers, the admonitions, and why the video aspect of the MVARS recording did not show anything of value, the AHO interrupted Kinney and said:

> "Okay. You're repeating the same things, Mr. Kinney. The answer is a yes or a no. If—if you don't think you're admonished per the video because we can forget[,] the video probably does not forget. The MVARS [recording] does not always capture the event because of the location. But in this case, you could hear the audio. If you viewed it, if you feel like it was exactly like what you're saying, say, no. Because essentially what you said, correct me if I'm wrong, is I was not advised properly to put it in a summary, correct?"

Kinney responded that he was not sure if he would agree that he was properly admonished because there was confusion from what the officers had told him, but that the recording did have the sequence of events he described. The AHO asked if Kinney remembered Guzman reading him an admonition and whether Kinney had reviewed any documents from Guzman. Kinney responded that he did not review any documents from the officers, but that Guzman read an admonition. The AHO then asked whether the officers had inquired about Kinney drinking both before and after the accident and how Kinney had responded to them.[4]

The AHO and Kinney then had the following exchange:

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[4] Kinney had earlier testified that when he arrived at his friend's house, he fell on the sloped gravel driveway and went inside to clean up. The AHO explained that she asked about postaccident alcohol consumption because she did not hear him explain when he had consumed alcohol at the friend's house.

"[AHO]: [D]o you remember the officer asking you will you submit to a breath test? [¶] … [¶]

"MR. KINNEY: Only after the admonition was read. [¶] … [¶]

"[AHO]: … Did he also ask you will you submit to a blood test?

"MR. KINNEY: You know, I can't—I think it was just referred to a as [a] chemical test, but I can't be certain. I don't think it was directly stated like that. I'm not sure, though.

"[AHO]: Okay. So, are you saying he asked if you—will you submit to a chemical test?

"MR. KINNEY: I think that's what he said, yes.

"[AHO]: Is it shown on the … video? Is it—can you hear it on the video?

"MR. KINNEY: I think, what I heard on the video was will you take—will you take a breath test, and I said, no. And will you take a blood test, and I said no.

"[AHO]: Okay. That is—

"MR. KINNEY: And—

"[AHO]: That's perfect because I'm seeing those statements on the back of the DS-367, which is a sworn statement of the officer. Okay. You also are not denying that you were the driver who got into a fender bender accident, correct.

"MR. KINNEY: That's correct. And I just want to— [¶] … [¶]

"[AHO]: I don't—I don't care if you stayed in the place or you left the place. The … accident is only a probable cause. Okay. All right.

"MR. KINNEY: Okay. Well, but the only thing I just want to say is that I did contact … the resort … and told them, you know, if [you] want to prosecute me, go ahead. And they declined to say that there was no damage to the vehicle.

"[AHO]: Was it a parked vehicle or a moving vehicle.

"MR. KINNEY: Parked.

"AHO: Okay. That's fine. All right. Thank you. I don't have any further questions. I just wanted clarification. It took longer than I anticipated."

3. Additional Examination by Kinney's Counsel

Kinney's counsel asked Kinney about what his impressions were when he told Guzman that he would not submit to a blood test. Kinney explained:

"I mean … I was confused, frankly, because at that point in time because I was under the impression that I was going to have to be subject to a blood test. And so when he was asking me, that was like what I—I should have said something like, well, what do you mean? You told me I was going to have a blood test. But I didn't have the presence of mind at that point in time. As I said, it was late, I was in pain. And I had already sort of written off everything that they were saying to me at that point in time after Officer Torres told me that I was going to go be—go down and have this blood test by virtue of a warrant."

The AHO had no further questions.

4. End of Hearing Statement

Kinney's counsel gave a closing statement in which he argued that the officers' statements were confusing, and that Kinney had not knowingly refused to take a blood test. As part of the closing, Kinney's counsel asked the AHO whether the AHO had had the opportunity to view the MVARS recording. The AHO responded that she was "going to." The record indicates that Kinney's counsel may have then interrupted the AHO and directed her to a specific point within the MVARS recording.[5] Defense counsel then

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[5] The extent of the AHO's familiarity with the MVARS recording is unclear from the record. The AHO's response to defense counsel's question strongly indicates that she had not seen the video, which is clearly how defense counsel understood the response. However, while the AHO was questioning Kinney, and while there was considerable cross-talk occurring, Kinney confirmed that an officer had read an informed consent admonishment. The AHO then said: "Very good. Okay. I wasn't there. You were there. And I— [¶] Mr. Kinney: I know. [¶] … —quickly have kind of snipped the video. I will look in it—in the—recent—to it very carefully; however, it does not give me the chance. Did the officer ask you how many drinks you consumed before you started driving?" This exchange suggests that the AHO had "snipped" a portion of the MVAR's video during the hearing, but was unable to actually review the snippet.

described some points he thought that the video would reflect and noted that the AHO could view the video herself.

The AHO's Decision

On September 30, 2022, the AHO issued a written decision that suspended Kinney's license for one year. The AHO determined that: the officers had reasonable cause to believe that Kinney had driven under the influence, Kinney was lawfully arrested, Kinney was told that his license would be suspended if he refused to complete a chemical test, and Kinney refused or failed to complete a chemical test after a request from the officers. In part, the AHO found that the MVARS recording demonstrated that Kinney was clearly admonished, Kinney showed no signs of confusion, and Kinney unequivocally refused to comply.

Trial Court Proceedings and Decision

On November 2, 2022, Kinney filed a petition for an administrative writ of mandate through which he sought to set aside the suspension of his license. After a hearing, a decision was issued on March 20, 2024. With respect to due process, the trial court found that the issue was forfeited because Kinney made no objection at the APS hearing. As to Kinney's refusal to voluntarily submit to a BAC test, the court found that the weight of the evidence demonstrated that Kinney was properly admonished regarding the consequences of refusing a BAC test, Kinney was uncooperative, there was no indication that Kinney was confused or reasonably could have been confused, and the warrant was issued only after Kinney refused to submit to any BAC test.

I. Due Process

A. Parties' Arguments

Kinney argues in part that his due process rights were violated when the AHO acted as an advocate and adjudicator. Kinney argues that the AHO acted as an advocate by introducing documents into evidence, choosing what documents to introduce, and then deciding the matter based on those documents. Kinney also argues that the AHO acted as

an advocate by aggressively cross-examining him. Kinney argues that none of the questions asked by the AHO were designed to be helpful to him, and some of the questions were irrelevant to the issues being decided.

The DMV contends in part that Kinney's due process rights were not violated. The DMV argues the record demonstrates that the AHO properly gathered and developed evidence through the introduction of routine exhibits. The DMV also argues that the AHO's questions were neutral, clarifying questions and were made because the AHO had difficulty understanding or following Kinney's testimony and because Kinney admittedly had a "'fuzzy'" memory at times.[6]

B. Legal Standard

Challenges to the procedural fairness of an administrative hearing present a question of law that is reviewed de novo on appeal. (*Romane v. Department of Motor Vehicles* (2025) 110 Cal.App.5th 1002, 1016, review granted Aug. 13, 2025, S291093 (*Romane*); *Knudsen, supra,* 101 Cal.App.5th at p. 210.) An irreducible minimum of the federal and California constitutional rights to due process is that an impartial adjudicator must preside over a hearing. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*); *Knudsen, supra,* at pp. 197–198.) The requirement of an impartial adjudicator is violated if the adjudicator is actually biased or operates under a constitutionally intolerable probability of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737; *Knudsen, supra,* at p. 198.) A violation of the due process right to an impartial adjudicator is a structural error that is not subject to a harm analysis. (*Clarke, supra,* 104 Cal.App.5th at p. 1277; *Knudsen, supra,* at p. 206.)

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6 The DMV also argues Kinney forfeited his due process argument by failing to object at the APS hearing. Assuming the DMV is correct, we exercise our discretion and consider Kinney's challenge because the question involves only undisputed facts in the record and raises a pure question of law. (*Knudsen, supra,* 101 Cal.App.5th at p. 196.)

Combining the roles of adjudicator and advocate into a single person is a violation of the due process right to an impartial adjudicator because it creates a constitutionally intolerable probability of bias. (*Kazelka v. Department of Motor Vehicles* (2025) 109 Cal.App.5th 1239, 1255 (*Kazelka*); *Knudsen, supra,* 101 Cal.App.5th at p. 199; *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517, 532 (*CDLA*).) Whether an AHO at an APS hearing unconstitutionally acted as an advocate is determined by examining the record, hearing transcripts, and the AHO's decision to see if the AHO engaged in advocacy. (*Romane, supra,* 110 Cal.App.5th at p. 1020, review granted; *Kazelka, supra,* at p. 1255; *Clarke, supra,* 104 Cal.App.5th at p. 1275; *Knudsen, supra,* at pp. 206–207.) If the record shows that the AHO engaged in advocacy, then due process is violated, and the driver is entitled to a new APS hearing before an impartial AHO. (*Clarke, supra*, at p. 1275; *Knudsen, supra*, at pp. 193, 212–213.)

C. Analysis

1. Introduction of Evidence

Kinney argues that the act of choosing what records to introduce, admitting those records, and then deciding the matter based on those chosen records constitutes advocacy. We disagree.

Without violating the due process right to an impartial adjudicator, an agency may permit a single person to act as both an adjudicator and as a collector and developer of evidence in the same proceeding. (*Today's Fresh Start, supra,* 57 Cal.4th at p. 220; *Romane, supra,* 110 Cal.App.5th at pp. 1014–1015, review granted; *Kazelka, supra,* 109 Cal.App.5th at p. 1255; *Knudsen, supra,* 101 Cal.App.5th at p. 199; *CDLA, supra,* 77 Cal.App.5th at p. 533, fn. 5.) Further, a prima facie case that is sufficient to suspend a driver's license may be established through the admission of documents such as sworn and unsworn police reports. (See *Lake, supra,* 16 Cal.4th at pp. 451–452; *Romane, supra,* at pp. 1016–1018, review granted; *Gerwig v. Gordon* (2021) 61 Cal.App.5th 59,

65–66; *Delgado v. Department of Motor Vehicles* (2020) 50 Cal.App.5th 572, 577.) This is because when a driver is arrested for DUI, law enforcement officers are required to forward a sworn report to the DMV that includes the facts and circumstances of the arrest. (§ 13380; *Romane, supra,* at pp. 1016–1017, review gramted.) As a result, most APS hearings are resolved through sworn and unsworn police records.[7] (*Lake, supra*, at pp. 451–452; *Romane, supra,* pp. 1016–1018, review granted; *Gerwig, supra*, at pp. 65–66.)

Given the routine and accepted practice of admitting police records at APS hearings, as well as the fact that law enforcement is obligated to forward a sworn record to the DMV, the introduction and admission of these records would not involve independent investigatory work; nor would it involve some form of pre-hearing assessment in which multiple documents are examined in order to find and admit only the most damning evidence against the driver. Rather, the introduction and admission of routine police records is a minimal act of evidence collection that amounts to no more than moving law enforcement's forwarded records from the DMV's file into the record of the APS hearing. Therefore, when an AHO in an APS hearing introduces and admits "the documents that law enforcement duly forward[] to the DMV, which are routinely admitted into evidence at APS hearings, the [AHO] is merely collecting and developing evidence, not advocating for the DMV." (*Romane, supra,* 110 Cal.App.5th at p. 1018, review granted.)

In this case, the AHO introduced largely routine records, which does not constitute advocacy. (*Romane, supra*, 110 Cal.App.5th at p. 1018, review granted.) At oral argument, however, Kinney's counsel argued that the MVARS recording was subpoenaed and was not a routine record. Assuming that an MVARS recording is not a

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[7] The DMV is also statutorily required to consider at an APS hearing its official records pertaining to the driver. (§ 14104.7.)

routine record, we cannot conclude that the AHO's introduction of the MVARS recording was an act of advocacy. The MVARS recording is a type of police record that is created in the regular course of police business. An MVARS recording is different from a paper record generated by a police officer because it captures the sights and sounds of a police-citizen encounter in real time and in a purely objective and unfiltered manner. As an unfiltered and objective recording, an MVARS recording has the benefit of being neutral and not per se supporting either a license suspension or a reversal of a suspension. Given the nature of an MVARS recording, we believe that the DMV obtaining an MVARS recording, and an AHO introducing that recording at an APS hearing, is a relatively minor yet highly desirable act of evidence gathering and development.[8] Therefore, the fact that the AHO introduced not only the records that are typically introduced at an APS hearing, but also the MVARS recording, does not demonstrate impermissible acts of advocacy. (*Romane, supra*, at p. 1018, review granted; cf. *Knudsen, supra*, 101 Cal.App.5th at pp. 206–207 [explaining that because an AHO may collect and develop evidence, and because a prima facie case for license revocation is often established through the submission of documents, "scenarios can easily be envisioned in which the [AHO] adjudicates without actually acting as an advocate"].)

2. Acts of Advocacy

In *Knudsen*, our court concluded that an AHO had acted as an advocate and, thus, violated the driver's due process right to an impartial adjudicator. (*Knudsen, supra*, 101 Cal.App.5th at pp. 207, 210–213.) Specifically, we detected mischaracterizations of and attempts to change important testimony, questions that were inconsistent with developing or clarifying testimony, and a clear error of law that benefited the DMV. (*Id.* at p. 212.)

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8 We note that although AHO Belata admitted the MVARS recording, she was not the person who subpoenaed and obtained it. The record reflects that DMV employee Montgomery issued the subpoena and obtained the MVARS recording.

After reviewing the evidence, transcript, and APS decision in this case, we do not detect conduct that is sufficiently similar to the AHO's conduct in *Knudsen*.

Here, there are no clear errors of law apparent from the AHO's decision,[9] let alone an error that benefits only the DMV. Further, the transcript does not reflect that the AHO was attempting to change Kinney's testimony, and neither the transcript nor the APS decision shows that the AHO mischaracterized Kinney's testimony or any of the admitted evidence. That is, the AHO accurately characterized the hearing testimony and the admitted evidence. Finally, we are satisfied that the AHO's examination of Kinney was a legitimate attempt to either clarify testimony or develop evidence. (Cf. *People v. Carlucci* (1979) 23 Cal.3d 249, 256 (*Carlucci*) [recognizing that a judge has the ability to participate in the questioning of a witness "'whenever [the judge] believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause'"]; *Knudsen, supra*, 101 Cal.App.5th at p. 207 [recognizing that an administrative law judge may act as an adjudicator and a collector and developer of evidence].) The AHO's questions all touched on topics raised by Kinney's testimony or the admitted evidence, and none of the questions clearly undermined Kinney's testimony. The AHO generally explained why she asked the questions that she did, and the reasons given were related to clarifying Kinney's testimony or developing evidence.

It is true that Kinney did not offer testimony during his direct examination regarding the MVARS recording, and the AHO did ask questions about that recording. Nevertheless, the MVARS recording had previously been admitted into evidence without

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9 Kinney suggests that the AHO improperly failed to find officer-induced confusion. However, as explained below, the record does not support the conclusion that Kinney's refusal to consent to a chemical test was the result of officer-induced confusion. Therefore, the AHO did not make any clear errors of law.

objection and the record strongly indicates that the AHO had yet to meaningfully review the recording. The AHO only asked a small number of questions related to the MVARS recording. The AHO did not attempt to expressly impeach Kinney with any specific aspect of the recording, did not question Kinney about any specific inconsistencies between the recording and Kinney's testimony, and did not describe any particular exchange in the interaction between Kinney and the officers. Rather, the AHO asked a few open-ended questions about the recording after Kinney confirmed that he had viewed the recording. Particularly considering that the AHO was unable to hear everything Kinney said during the telephonic hearing, that Kinney admitted to having reviewed the MVARS recording, and that Kinney admitted that his memory was "'fuzzy'" about parts of the admonitions/encounter, it appears that the AHO's questions simply attempted to get Kinney's view about certain aspects of the recording and whether Kinney believed that certain aspects of the encounter were accurately captured by the MVARS recording. Given the obvious importance of the MVARS recording, as well as the nature of the AHO's questions, although a close call, we cannot conclude that the AHO's questions regarding the MVARS recording were acts of advocacy that went impermissibly beyond the AHO's role as a gatherer and developer of evidence. (Cf. *Carlucci*, *supra*, 23 Cal.3d at pp. 255–256.)

We acknowledge that while Kinney was answering the AHO, the AHO cut off Kinney one time as he was giving a lengthy answer that was becoming increasingly nonresponsive.[10] However, the AHO also gave Kinney the opportunity to address anything about the MVARS recording that he might have found inaccurate or that he wished to explain, highlight, or clarify. The AHO never cut off Kinney's answers during direct or redirect testimony, never cut off Kinney's counsel, and did not cut off Kinney at

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10 We note the record reflects a number of instances in which there was cross talk and interruptions, but that appears to be an unfortunate consequence of the telephonic hearing.

any other time as she was asking him questions. We cannot conclude that one instance of stopping an increasingly nonresponsive answer and redirecting Kinney to the question that was actually asked demonstrates either bias or advocacy.

We agree with Kinney that the AHO asked some questions that were not clearly relevant to deciding the four mandatory APS issues. For example, whether the car that Kinney hit was parked or moving is not relevant to determining whether reasonable cause existed for a DUI arrest, whether a proper admonition regarding implied consent was given, or whether Kinney refused to consent to a BAC test. (Cf. *Hall, supra*, 3 Cal.App.5th at p. 804 [identifying the four issues to be determined during an APS hearing involving a license suspension for violation of the implied consent law].) Nevertheless, we fail to see any significance to the fact that the AHO asked a small number of irrelevant questions. The irrelevant questions were all related to or involved subjects that were included within Kinney's direct testimony. Considering the telephonic nature of the hearing, which involved significant cross-talk, there is nothing improper about seeking clarification about any subject that Kinney raised in his direct testimony. Moreover, the information elicited from the irrelevant questions was itself irrelevant and not prejudicial because it does not appear that the irrelevant information formed the basis of any of the AHO's findings on the four APS issues. Finally, the AHO did not point out any inconsistencies related to the irrelevant questions and Kinney's direct testimony, nor does it appear that the AHO attempted to impeach Kinney with any irrelevant question. Therefore, without more, simply because the AHO asked some irrelevant questions does not mean that the AHO engaged in advocacy.

In sum, Kinney's hearing was not sufficiently similar to the APS hearing in *Knudsen* for us to conclude that the AHO acted as an advocate. Unlike in *Knudsen*, there were no mischaracterizations of evidence, attempts to change testimony, or obvious legal and factual errors. Instead, as discussed above, the questions posed by the AHO were attempts to clarify testimony or develop evidence and, thus, were not acts of advocacy.

(Cf. *Carlucci, supra*, 23 Cal.3d at pp. 255–256; *Knudsen, supra*, 101 Cal.App.5th at p. 207.) Because the record does not reflect that the AHO acted as both an adjudicator and advocate, Kinney's due process right to an impartial adjudicator was not violated. (*Knudsen, supra*, at pp. 193, 207.)

II. Jurisdiction to Conduct APS Hearing

A. Parties' Arguments

Kinney argues that the APS hearing was void because it was conducted pursuant to either invalid underground regulations that were not passed in conformity with the Administrative Procedure Act (APA)[11] or regulations that had been invalidated by *CDLA*. Kinney argues that there is no evidence that the DMV properly adopted a new regulation between the time that *CDLA* invalidated the old regulations and the time that new regulations were adopted on July 1, 2024.

The DMV argues that there were no underground regulations being applied at the APS hearing. Further, the DMV argues that whether a violation of *CDLA* occurred is determined by examining the record, not the regulations. Because the record demonstrates that the AHO did not act as an advocate, *CDLA* was not violated.

B. Legal Standard

Pertaining to the statutes that govern APS hearings, Vehicle Code section 14112, subdivision (b) (section 14112(b)) provides that: "Subdivision (a) of Section 11425.30 of the Government Code does not apply to a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to this division." In turn, Government Code section 11425.30, subdivision (a)(1), which is part of the APA, provides in relevant part that a "person may not serve as a presiding officer in an adjudicative proceeding … [if t]he person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." In *CDLA*, the Second Appellate District concluded that

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[11] The APA is codified in Government Code section 11340 et seq.

section 14112(b) was "unconstitutional *to the extent* it permits the DMV to combine the *advocacy and adjudicatory* roles in a single APS hearing officer." (*CDLA, supra*, 77 Cal.App.5th at p. 533, italics added, fn. omitted.) Additionally, section 1651 provides that, if the DMV follows the procedures outlined for adopting regulations under the APA, the director of the DMV "may adopt and enforce rules and regulations as may be necessary to carry out the provisions of [the Vehicle C]ode relating to the [DMV]." (*Ibid.*) "[A]gency regulations improperly adopted outside the APA procedures are void as underground regulations." (*West Coast University, Inc. v. Board of Registered Nursing* (2022) 82 Cal.App.5th 624, 643; see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572–573.)

C. Analysis

Kinney does not argue that any of the DMV's APS-related rules and regulations were adopted in violation of the APA either prior to *CDLA* or after July 1, 2024. Instead, his argument focuses on the time between *CDLA*'s conclusion that section 14112(b) was unconstitutional and July 1, 2024, when the DMV adopted new regulations in response to *CDLA*. Kinney appears to argue that because no regulations were adopted in this timeframe, all APS hearings must have been performed pursuant to void underground regulations. Assuming without deciding that *CDLA* effectively invalidated the entirety of section 14112(b), as well as all corresponding APS-related rules and regulations, we are not persuaded by Kinney's arguments.

CDLA did not invalidate all rules and regulations relating to APS hearings. *CDLA* was limited to invalidating rules and regulations that permitted an individual to act in the dual roles of adjudicator and advocate because there would be a constitutionally intolerable risk of bias. (*CDLA, supra*, 77 Cal.App.5th at p. 532; see *Knudsen, supra*, 101 Cal.App.5th at p. 207.) Therefore, all other APS-related rules and regulations that did not involve such dual roles are unaffected by *CDLA*. Further, with respect to the roles of an AHO, when *CDLA* invalidated Vehicle Code section 14112(b), Government

Code section 11425.30 remained in place and automatically operated to fill any regulatory gap that existed from the time of the *CDLA* decision to the time that new regulations were adopted on July 1, 2024. Through *CDLA* and Government Code section 11425.30, an AHO was prohibited from acting in certain specified dual roles. As explained above, Kinney has not demonstrated that the AHO acted in a dual capacity that violated *CDLA*. Given the validity of the regulations unaffected by *CDLA*, the application of Government Code section 11425.30, and the injunction of *CDLA*, there is no basis for concluding that Kinney's hearing was conducted pursuant to invalid regulations. Therefore, Kinney has failed to show that his APS hearing was invalid due to the DMV's application of void regulations.

III. Sufficiency of the Evidence to Revoke Kinney's License

A. Parties' Arguments

Kinney argues that he did not refuse to take a BAC test because the officers' statements confused him. Kinney argues that Guzman's first admonition was legally invalid and led him to believe the officers would go to a judge to obtain a search warrant. Kinney argues that Torres did not say that Kinney's license would be suspended if Kinney refused a BAC test and instead said that the only difference between submitting to a test and getting a warrant involved whether Kinney would be released after being cited. Kinney argues that he believed that it would be okay if he chose to go with the officers to get a warrant. Although Guzman did read the DS 367 form admonition, neither that admonition nor the officers themselves clarified the consequences of refusing to submit to a BAC test in light of Guzman's prior admonition and Torres's statements.

The DMV argues in part that substantial evidence supports the findings that Kinney was properly admonished regarding implied consent and refused to consent to a BAC test. The DMV argues that Kinney was asked whether he would take a blood test or a breath test and he responded "No." The DMV also argues that the admonition from the

DS 367 form read by Guzman was a clear and proper admonition, and there was nothing to suggest that Kinney was in any way confused.

B. Legal Standards

1. Review of Petition for Writ of Mandate

In ruling on a petition for a writ of mandate following an order of license suspension, trial courts are to exercise their independent judgment and determine """whether the weight of the evidence supported the administrative decision."""" (*Lake, supra,* 16 Cal.4th at p. 456; accord, *Kazelka, supra,* 109 Cal.App.5th at p. 1247.) On appeal, appellate courts review the record in order to determine whether the trial court's findings are supported by substantial evidence. (*Lake, supra,* at p. 457; *Kazelka, supra,* at p. 1247.) As part of the substantial evidence review, courts resolve all evidentiary conflicts and draw all reasonable inferences in favor of the trial court's decision. (*Lake, supra,* at p. 457; *Freitas v. Shiomoto* (2016) 3 Cal.App.5th 294, 300.) However, issues raised in the appeal that involve pure questions of law are reviewed de novo. (*Freitas, supra,* at p. 300; *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1233.)

2. Implied Consent and Officer-induced Confusion

Under the implied consent law of California, anyone who drives a motor vehicle and is arrested for DUI is deemed to have consented to the performance of a breath or blood test to determine their BAC. (§ 23612, subd. (a)(1)(A); *Troppman, supra,* 40 Cal.4th at pp. 1129–1130; *Romane, supra,* 110 Cal.App.5th at p. 1008, review granted.) The implied consent law provides for noncriminal sanctions, such as the suspension of a driver's license, for a driver's refusal to submit to a BAC test after being arrested for DUI. (*Clarke, supra,* 104 Cal.App.5th at p. 1271, fn. 2; *Hall, supra,* 3 Cal.App.5th at p. 802; see *Troppman, supra,* at pp. 1129–1130.)

A person arrested for DUI must be told that his failure to submit to or complete a BAC test will result in a fine, mandatory imprisonment upon conviction of DUI, and the suspension or revocation of that person's driver's license. (§ 23612, subd. (a)(1)(D);

Hall, supra, 3 Cal.App.5th at pp. 802–803.) If the police give a misleading admonition, or fail to advise the person that his driving privilege will be suspended or revoked if he refuses to submit to or complete a BAC test, then the person's driver's license cannot be suspended despite the person's failure to submit to or complete a BAC test. (*Decker v. Department of Motor Vehicles* (1972) 6 Cal.3d 903, 906 (*Decker*) [reversing a license suspension when the driver was told that a refusal to take a BAC test "'could'" result in the suspension of his license because the admonition given "misrepresented the legal significance of a refusal to take a chemical test by implying that the [DMV] might decide not to suspend [the driver's] license in spite of his refusal" (fn. omitted)]; *Hall, supra*, at p. 803; see *Munro v. Department of Motor Vehicles* (2018) 21 Cal.App.5th 41, 47 (*Munro*) ["Courts have consistently required relatively strict compliance with the duty to admonish suspected drunk drivers about the consequences of refusing chemical testing."]; *Daly v. Department of Motor Vehicles* (1986) 187 Cal.App.3d 257, 261 (*Daly*) ["Proper warning of the consequences of [BAC testing] refusal is an element essential to the suspension of a driver's license."].) However, "[w]hen police give an incomplete admonition about the consequences of refusing [a BAC test], the law limits the permissible sanction to the extent of actual notice." (*Elmore v. Gordon* (2021) 73 Cal.App.5th 520, 523; see *Daly, supra*, at p. 262 [reducing a one-year suspension to a six-month suspension where officers admonished the driver that a refusal to consent would result in a six-month suspension].) Further, if a police officer corrects a prior misleading or incomplete admonition regarding the consequences of refusing to take a BAC test, courts will generally find substantial compliance by the police officer and uphold a license suspension. (*Munro, supra*, at p. 47, quoting *Ormonde v. Department of Motor Vehicles* (1981) 117 Cal.App.3d 889, 892–893 (*Ormonde*); *Smith v. Department of Motor Vehicles* (1969) 1 Cal.App.3d 499, 502–503 (*Smith*); and *Janusch v. Department of Motor Vehicles* (1969) 276 Cal.App.2d 193, 194, 197 (*Janusch*).)

California courts have recognized that a refusal to submit to a BAC test may be excused if the refusal was due to confusing or misleading statements by the officer. (*Blitzstein v. Department of Motor Vehicles* (1988) 199 Cal.App.3d 138, 141 (*Blitzstein*); *Joyce v. Department of Motor Vehicles* (1979) 90 Cal.App.3d 539, 543; *McDonnell v. Department of Motor Vehicles* (1975) 45 Cal.App.3d 653, 658.) The officer bears the burden of giving a proper and comprehensible warning to the driver regarding the consequences of refusing to consent to a BAC test. (*Thompson v. Department of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363.) However, an officer is not required to persist in his attempts to admonish an uncooperative driver until the driver is ready to listen to the officer. (*Eilinger v. Department of Motor Vehicles* (1983) 143 Cal.App.3d 748, 752 (*Eilinger*); *Morphew v. Department of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743 (*Morphew*).) Further, an adequate admonition will not be negated simply because the driver is too intoxicated to understand. (*Smith, supra,* 1 Cal.App.3d at p. 505; see *Eilinger, supra,* at pp. 751–752.) In determining whether a driver's refusal to consent to a BAC test is the result of confusion, courts should consider the words and conduct of the officer (*Joyce, supra,* at p. 543), and the "'"fair meaning to be given [the driver's] response to the demand he [or she] submit to a [BAC] test"'"; the crucial factor is not the arrestee's state of mind (*Espinoza, supra,* 10 Cal.App.5th at p. 104; accord, *Cahall v. Department of Motor Vehicles* (1971) 16 Cal.App.3d 491, 497 (*Cahall*)). In light of the statements of the police officer (*Joyce, supra,* at p. 543), "'[w]hen there is no evidence of confusion, and where apparent confusion is not demonstrated and is not apparent to the arresting office, no further clarification on the part of the arresting officer is required.'" (*Hughey v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 752, 762 (*Hughey*), quoting *Cahall, supra,* at p. 497; see *Blitzstein, supra,* at p. 142.) Whether a driver's conduct amounted to a refusal, or whether a refusal was the result of officer-induced confusion, are questions of fact. (*Blitzstein, supra,* at p. 141; *Cahall, supra,* at p. 497.)

C. Analysis

Of the four mandatory findings made by the AHO, only two are at issue: whether Kinney was properly admonished regarding a refusal to consent to a BAC test and whether Kinney refused to consent to a BAC test. The AHO and the trial court answered both questions affirmatively. We conclude that substantial evidence supports the court's findings.[12]

With respect to a refusal, the MVARS recording, the DS 367 form, and Kinney's own testimony demonstrate that Kinney refused to submit to any BAC test. Under the chemical test admonition section of Guzman's sworn DS 367 form, there are boxes for the "Driver's Response." By the boxes for "Will you take a Breath Test?" and "Will you take a Blood Test?," "No" is written for both tests. Further, the MVARS recording clearly records Guzman separately asking Kinney whether Kinney would submit to a breath test and whether Kinney would submit to a blood test. Kinney can be heard answering "No" to the blood test and that he wanted a lawyer (despite being told one would not be available). Finally, Kinney admitted at the APS hearing that he told Guzman that he would not submit to either a blood or breath test. These three pieces of evidence constitute substantial evidence that Kinney refused to consent or submit to either a blood test or a breath test.

With respect to a proper admonition, we agree with Kinney that Guzman's first admonition from the Napa County District Attorney's office is fatally defective. The Napa admonition states that a refusal to submit to or complete a BAC test will result in the officers applying for a warrant and "may" result in the suspension of a driver's

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12 Kinney contends that because the facts are undisputed, our review of his contentions should be de novo. However, whether the appropriate standard of review is de novo or substantial evidence, the result will not change—under both standards we would conclude that Kinney was properly admonished, refused to submit to a BAC test, and that the doctrine of officer-induced confusion does not apply to this case. Because the result will not change, we follow the established substantial evidence standard set by *Lake* for reviewing the trial court's findings. (*Lake, supra,* 16 Cal.4th at p. 456.)

license. This admonition does not comply with the mandatory statutory obligation to inform a driver that his refusal to submit to a BAC "will result" in the suspension of his license (§ 23612, subd. (a)(1)(D)), and it implies a degree of discretion that the DMV does not possess (*Decker, supra*, 6 Cal.3d at pp. 905–906). Such admonitions do not adequately inform a driver of the consequences of failing to submit to a BAC test. (*Ibid.*)

Assuming that Torres's conversation with Kinney can be classified as an "admonition," it suffers from a more fundamental flaw in that it does not mention a suspension at all. Rather, the consequence described by Torres was that Kinney would not be released on-scene and instead would be taken to the police station, a warrant would be obtained, and then a blood sample would be collected. Because no statutory consequence of any kind was identified by Torres, his "admonition" was invalid. (§ 23612, subd. (a)(1)(D); *Daly, supra*, 187 Cal.App.3d at p. 262.)

After Torres spoke with Kinney, Guzman gave a third and final admonition. Guzman read the admonition that was printed on the back of the DS 367 form. The DS 367 form admonition clearly and plainly told Kinney that his license would be suspended if he did not submit to either a blood test or a breath test. Kinney does not contend that the DS 367 form's admonition was itself inadequate or that it was insufficiently specific. Case law recognizes that when an incorrect admonition is given, but then a correct admonition is subsequently given, there will be substantial compliance with the duty to admonish a driver regarding implied consent and the consequences of refusing to take a BAC test. (*Munro, supra*, 21 Cal.App.5th at p. 47; *Ormonde, supra*, 117 Cal.App.3d at pp. 892–893; *Janusch, supra*, 276 Cal.App.2d at pp. 194, 197.) Because the DS 367 form's admonition properly apprised Kinney of the consequences of refusing to submit to a BAC test, Guzman clarified and corrected the deficiencies of the prior admonitions. (*Munro, supra*, at p. 47; *Ormonde, supra*, at pp. 892–893; *Janusch, supra*, at pp. 194, 197). Therefore, the DS 367 form's admonition and the MVARS recording of Guzman giving the DS 367 form admonition to Kinney constitute substantial

evidence that Kinney was properly admonished about the consequences of refusing to submit to a BAC test.

Kinney contends that officer-induced confusion tainted the officers' admonitions and negated his refusal. Specifically, Kinney argues that the record shows that he was confused because of the multiple inadequate statements and admonitions given to him by the officers. We disagree.

Kinney focuses on Torres's statements and argues that he complied with what Torres said. However, the MVARS recording shows that Torres was talking to Kinney about options in terms of whether Kinney would be cited and released. Torres told Kinney that Kinney could either submit to a BAC test and then be allowed to go back to his friend's house, or Kinney could refuse and be taken away and a warrant would be obtained from a judge. There is nothing inaccurate about Torres's statements in relationship to how the encounter between Kinney and the officers could end. Further, after being interrupted, sworn at, and told that he (Kinney) would not take any tests, when Torres told Kinney that Kinney could choose which course to follow and that Kinney's choice would be "okay," Torres was not purporting to say that there would be no legal consequences or suspensions. Rather, Torres was clearly telling Kinney that Kinney was free to make a choice between taking a BAC test voluntarily or making the officers obtain a warrant; either option was fine with the officers. Even considering Guzman's first invalid admonition, it is not reasonable to conclude that Torres meant or obviously implied that there would be no legal consequences that would follow from choosing to not voluntarily submit to a BAC test.

Additionally, Kinney testified that after Torres spoke to him, he just "shutdown." Guzman then gave Kinney the proper DS 367 form's implied consent admonition. Kinney was clearly listening to that admonition because, when Guzman read that Kinney could not consult with an attorney, Kinney demanded an attorney multiple times. Thus, instead of attempting to clarify any confusion that he may have had regarding the legal

consequences of not submitting to a BAC test, Kinney decided to defiantly request an attorney as soon as he was told he had no right to one. To the extent that Kinney had "shutdown" or had decided he was not going to cooperate or closely listen, that behavior does not place any additional obligations on the officers as it was not incumbent on them to wait until Kinney decided to pay attention or to stop being "shutdown." (*Eilinger, supra,* 143 Cal.App.3d at p. 752; *Morphew, supra,* 137 Cal.App.3d at p. 743.)

Finally, the MVARS recording does not suggest that Kinney was in any way confused. Kinney did not sound confused, never asked questions regarding BAC testing or about the consequences of not taking a BAC test, and never asked questions or sought clarification regarding any of the officers' attempts to get a voluntary breath or blood sample from him. We are aware of no evidence or testimony that either could or should have put the officers on notice that Kinney was somehow confused by the multiple admonitions. (*Hughey, supra,* 235 Cal.App.3d at p. 762; *Cahall, supra,* 16 Cal.App.3d at p. 497; see *Blitzstein, supra,* 199 Cal.App.3d at p. 142.)

In sum, substantial evidence supports the trial court's finding that Kinney was properly admonished about the consequences of failing to submit to a BAC test and that he nevertheless refused to submit. Kinney has failed to adequately show that his refusal to submit to a BAC test was due to officer-induced confusion.

DISPOSITION

The trial court's order denying Kinney's petition for writ of mandate is affirmed. DMV is entitled to its costs on appeal.

MEEHAN, J.

WE CONCUR:

HILL, P. J.

DESANTOS, J.