IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

DONALD MCALLISTER,

Petitioner,

v.

CASE NO.: 2006-CA-2677-O
WRIT NO.: 06-99

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES,

Respondent.
_____/

Petition for Writ of Certiorari
From the Florida Department of
Highway Safety and Motor Vehicles,
Tanya Middlebrooks, Hearing Officer.

Michael J. Snure, Esquire, and
William R. Ponall, Esquire,
for Petitioner.

Damaris E. Reynolds, Esquire,
for Respondent.

Before GRINCEWICZ, T. TURNER, and FLEMING, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Donald McAllister ("McAllister") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the "Department") "Final Order of License Suspension," sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes, for driving a motor vehicle with an unlawful breath-alcohol

level in violation of section 316.193, Florida Statutes. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

On January 29, 2006, Officer Robert Owen, of the Winter Park Police Department, responded to a motor vehicle crash. Upon arrival, Officer Owen found a motor vehicle crashed into a tree and three men standing next to the vehicle, whom he identified as McAllister, Jesse Mobe ("Mobe"), and Justin Ingram ("Ingram"). Another officer conducted a vehicle crash investigation and determined that there were no other vehicles involved in the accident. Officer Owen then informed McAllister, Mobe, and Ingram that he was initiating a DUI investigation.

Officer Owen detected a strong odor of alcoholic beverages on McAllister's breath, and he observed that McAllister's eyes were red and glassy, his eyelids looked heavy, and he exhibited a continuous orbital sway and slurred speech. Officer Owen separated McAllister from the other two men because the vehicle was registered to McAllister's father. Officer Owen read McAllister "his Constitutional Rights from a rights card," and then he questioned McAllister.[1] McAllister stated that he had been drinking beer and liquor and was driving his father's car when he crashed it into a tree. Furthermore, Mobe and Ingram gave sworn statements that McAllister was driving the vehicle and they were passengers.

McAllister agreed to perform field sobriety exercises, and he performed poorly. Officer Owen arrested McAllister and transported him to the Winter Park Police station where he submitted to a breath test. Officer Owen observed McAllister for a period longer than twenty minutes prior to the test, and the test rendered results of .178 and .174 breath-alcohol content. Therefore, the Department suspended McAllister's driving privilege.

[1] See Petition for Writ of Certiorari, Exhibit DDL-3 at page 2.

Pursuant to section 322.2615, Florida Statutes, McAllister requested a formal review of his license suspension. On February 28, 2006, Hearing Officer Tanya Middlebrooks held a formal review at which McAllister did not appear but was represented by counsel. McAllister moved to strike his alleged statements to Officer Owen, based on the accident report privilege, because the evidence did not establish that Officer Owen read Miranda warnings to McAllister. McAllister also moved to strike the alleged statements of Mobe and Ingram, based on the accident report privilege, because there is no evidence indicating that Officer Owen read Miranda warnings to Mobe or Ingram. Finally, McAllister moved to invalidate his license suspension, based on the previous two motions, because, if they were granted, there would be no competent substantial evidence that Officer Owen had probable cause to believe that McAllister was driving or in actual physical control of a motor vehicle. The hearing officer reserved ruling on all of McAllister's motions. On March 3, 2006, the hearing officer entered her final order, in which she granted McAllister's motion to strike the statements of Mobe and Ingram but denied his other two motions, and therefore, she sustained the suspension of McAllister's driver's license.[2]

Discussion of Law

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of the law were observed; and 3) whether the decision was supported by competent substantial evidence. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001)

[2] McAllister also moved to strike the breath test result affidavit because it did not indicate a start time for the observation period and there was no indication that the person who signed it had authority to administer an oath as a notary or law enforcement officer. Furthermore, based on that motion to strike, McAllister moved to invalidate his license suspension due to a lack of sworn evidence that law enforcement officials complied with the twenty-minute observation requirement and that McAllister had an unlawful blood-alcohol level. However, it appears that the hearing officer never ruled on these motions, as she reserved ruling during the hearing and did not address them in her order. Nonetheless, McAllister does not address these motions in his petition, and therefore they are not relevant to this Court's present certiorari review.

(citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where an individual's license is suspended for driving with an unlawful blood-alcohol level or breath-alcohol level in violation of section 316.193, Florida Statutes, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2005). The hearing officer's scope of review is limited to the following issues:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
> 2. Whether the person was placed under lawful arrest for a violation of [section] 316.193.
> 3. Whether the person had an unlawful blood-alcohol level or breath-alcohol level as provided in [section] 316.193.

§ 322.2615(7)(a), Fla. Stat. (2005).

In his petition, McAllister argues that the hearing officer's decision was not supported by competent substantial evidence that the arresting officer had probable cause to believe that McAllister was driving or in actual physical control of a motor vehicle. Within that argument, McAllister actually forwards two sub-arguments. First, the hearing officer departed from the essential requirements of the law by denying McAllister's motion to strike his statements to Officer Owen. Second, if the hearing officer had properly stricken McAllister's statements, then there would have been no competent substantial evidence that Officer Owen had probable cause to believe that McAllister was driving or in actual physical control of a motor vehicle. In response, the Department asserts that due process was accorded, the hearing officer followed the

essential requirements of the law, and her decision was supported by competent substantial evidence. In the alternative, the Department argues that the hearing officer reached the correct conclusion for the wrong reasons, and therefore her decision should be upheld under the "tipsy coachman" doctrine.

McAllister correctly asserts that any statement made to a law enforcement officer for the purpose of completing an accident report is not admissible as evidence against the speaker unless the officer first gave the speaker Miranda warnings and informed him that he is the subject of a criminal investigation. See State v. Marshall, 695 So. 2d 686, 686 (Fla. 1997); see also Dep't of Highway Safety & Motor Vehicles v. Perry, 702 So. 2d 294, 295-96 (Fla. 5th DCA 1997) (holding that the accident report privilege applies to administrative proceedings). McAllister argues that the record lacks the evidence necessary to establish that Officer Owen read Miranda warnings to McAllister, and therefore the hearing officer departed from the essential requirements of the law when she denied his motion to strike his statements.

The hearing officer found that Officer Owen informed McAllister "that a DUI investigation was being conducted" and read McAllister "his constitutional rights" before McAllister admitted that he was driving the vehicle at the time of the crash.[3] Furthermore, the hearing officer denied McAllister's motion to strike his statements pursuant to the accident report privilege. From those facts one can reasonably deduce that the hearing officer indirectly found that the constitutional rights read by Officer Owen to McAllister were Miranda warnings. Therefore, the correct standard of review to apply is whether the record contains competent substantial evidence to support the finding that Officer Owen read Miranda warnings to McAllister before he made the inculpatory statements.

In the Charging Affidavit, Officer Owen stated that he "read McAllister his

[3] See Petition for Writ of Certiorari, Exhibit A at page 1.

Constitutional Rights from a rights card and questioned him."[4] Subsequently, according to the Charging Affidavit, McAllister admitted that he had been drinking alcohol and was driving the vehicle when he crashed it into a tree. Therefore, the question we must answer is whether testimony that an officer read "constitutional rights from a rights card" consists of competent substantial evidence that he read Miranda warnings.

This Court is not aware of, nor could we find, any case law establishing whether evidence of the reading of "constitutional rights" or "a rights card" constitutes competent substantial evidence of the reading of Miranda warnings. Furthermore, the only authority provided by McAllister is irrelevant. McAllister asserts that courts have been particularly stringent in requiring that police read correct and complete Miranda warnings, citing Dendy v. State, 896 So. 2d 800 (Fla. 4th DCA 2005). However, in Dendy, the court reviewed the Miranda rights card used in that case and determined that it was constitutionally deficient. Id. at 803. It did not address whether testimony of the reading of "constitutional rights" or "a rights card" constitutes competent substantial evidence of the reading of Miranda warnings. In addition, we further distinguish Dendy from the instant matter in that the hearing officer below did not have the benefit of reviewing the "rights card" to determine whether it contained appropriate Miranda warnings.

In the absence of binding precedent that is so directly on point as to remove all doubt of the sure and definite resolution to the present issue, we review the long-established definition of the "competent substantial evidence" standard. "Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be *reasonably inferred*." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (emphasis added). In employing the word "competent" to modify the word "substantial," the Supreme Court of Florida

[4] See Petition for Writ of Certiorari, Exhibit DDL-3 at page 2.

has held that the evidence relied upon to sustain the ultimate finding in an administrative proceeding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to *support* the conclusion reached. Id.

The record evidence establishes that Officer Owen "read McAllister his Constitutional Rights from a rights card."[5] McAllister does not challenge or attempt to rebut this evidence. Rather, McAllister argues that this testimony does not establish that Officer Owen read Miranda warnings to McAllister. In doing so, McAllister incorrectly requires the evidence to *establish* the fact at issue, thus seeking to employ a more stringent standard of review than the law requires. The competent substantial evidence standard does not require that the evidence establish *the fact at issue*. Rather, the appropriate standard of review requires that the evidence establish *a substantial basis of fact* from which *the fact at issue* can be *reasonably inferred*, and that a reasonable mind would accept it as adequate to *support* the conclusion reached.

Officer Owen's testimony in his Charging Affidavit regarding the reading of constitutional rights from a rights card is both relevant and material to the question of whether Officer Owen read Miranda warnings to McAllister. Miranda warnings consist of an advisory of constitutional rights that, absent a suspect's voluntary and intelligent waiver of these rights, must be read to a suspect prior to any in-custody police questioning, if the suspect's statements are to be admissible as evidence against him or her. See Miranda v. Arizona, 384 U.S. 436 (1966). Miranda warnings are required to be read to suspects before custodial interrogations, and they are commonly read from "Miranda cards." There are no other constitutional rights that are required to be read, or are even commonly read, to suspects before custodial interrogations. Therefore, Officer Owen's statement that he read constitutional rights to McAllister from a rights card constitutes a substantial basis of fact from which one can reasonably infer that Officer

[5] See Petition for Writ of Certiorari, Exhibit DDL-3 at page 2.

Owen read Miranda warnings to McAllister before questioning him, and we find that a reasonable mind would accept this evidence as adequate to support the conclusion reached.

McAllister's argument that Officer Owen's testimony does not specify which constitutional rights he read to McAllister—and therefore he could have read any constitution rights, not necessarily proper Miranda rights—does not avail. If McAllister wished to demonstrate that the constitutional rights read by Officer Owen did not constitute proper Miranda rights, it was his burden to call witnesses, including the arresting officer, in order to rebut the evidence. See Dep't of Highway Safety & Motor Vehicles v. Stewart, 625 So. 2d 123, 124 (Fla. 5th DCA 1993). McAllister could have requested a subpoena duces tecum, requiring Officer Owen to appear with his "rights card," but he chose not to do so. See § 322.2615(2), (6)(b), Fla. Stat. 2005; Fla. Admin. Code R. 15A-6.012(1).[6]

We find that the record in the instant matter contains competent substantial evidence that Officer Owen read Miranda warnings to McAllister before McAllister made his inculpatory statements. Thus, the hearing officer did not depart from the essential requirements of the law when she denied McAllister's motion to strike his statements pursuant to the accident report privilege. Therefore, the hearing officer's decision was supported by competent substantial evidence that the arresting officer had probable cause to believe that McAllister was driving a motor vehicle in this state while under the influence of alcoholic beverages. In light of this conclusion, we find it unnecessary to address the Department's alternative argument regarding the "tipsy coachman" doctrine.

[6] Likewise, McAllister's reliance on Officer Owen's failure to check the box marked "Yes" on the Charging Affidavit, indicating that he read Miranda warnings, as evidence that he failed to read Miranda warnings to McAllister does not avail. Officer Owen did not check the box marked "No," either. Therefore, Officer Owen's lack of response to that inquiry does not contradict his affirmative statement that he read constitutional rights from a rights card to McAllister. Furthermore, when applying the competent substantial evidence standard of review, "the circuit court's task is to review the record for evidence that *supports* the agency's decision, not that *rebuts* it—for the court cannot reweigh evidence." G.B.V. Int'l, 787 So. 2d at 846 (emphasis in original).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___25th_____ day of _____March_____, 2011.

___/S/_____
DONALD E. GRINCEWICZ
Circuit Judge

_/S/_____
THOMAS W. TURNER
Circuit Judge

_/S/_____
JEFFREY M. FLEMING
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Michael J. Snure, Esq., and William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **Damaris E. Reynolds, Esq., Department of Highway Safety and Motor Vehicles – Legal Office,** Post Office Box 540609, Orlando, Florida 33454-0609 on the ____25th_____ day of _____March_____, 2011.

_/S/_____
Judicial Assistant