IN THE CIRCUITCOURT FOR THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

LACEY MOORE,

Petitioner,

v.

CASE NO.: 2007-CA-0528-O
Writ No.: 07-07

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

Respondent.
_____/

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE ROCHE, KOMANSKI, LATIMORE, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Lacey Moore ("Petitioner") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of her driver's license for refusing to submit to the breath-alcohol test. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On November 25, 2006, Petitioner was involved in an accident with another vehicle. Lieutenant Johnson, of the Maitland Police Department, witnessed the vehicle crash and observed that Petitioner was the driver. Officer Misir, the arresting officer, then arrived at the scene and approached Petitioner, who was standing outside of her vehicle. Officer Misir observed that her eyes were red and glassy, that she had a strong odor of an alcoholic beverage, that her speech was slurred, and that she stumbled as she walked. Petitioner also indicated to Officer Misir that she was coming from a club in downtown Orlando. Officer Misir advised her that he was beginning a DUI investigation and asked Petitioner to submit to field sobriety exercises. Petitioner performed poorly on the exercises and was placed under arrest. Officer Misir then transported Petitioner to the breath testing facility where she refused the breath test.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on December 21, 2006. At the hearing, Petitioner moved to set aside the suspension arguing that the evidence against Petitioner did not include sworn testimony from the accident witness, that the accident report privilege barred consideration of statements made by any individuals involved in the accident, that there was no competent evidence that Petitioner was the driver of the vehicle, and that the rule of completeness entitles an adversary party to a complete statement if a portion of the statement is relied upon by the proponent of the statement. On December 22, 2006, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of her driver's license.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and

judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver's license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

> 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 whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2006).

Petitioner argues that the hearing officer improperly considered sworn statements made by a driver involved in the car accident in violation of the accident report privilege and that the order was not supported by competent substantial evidence. Conversely, Respondent argues that the hearing officer's order conformed to the essential requirements of the law and was supported by competent substantial evidence.

In considering the first argument, this Court must take note of the statutory changes to Florida Statutes, section 322.2615, which abrogated the accident report privilege set forth in

section 316.066(7). As numerous other circuit courts have noted, the relevant statutory language states: "Notwithstanding s. 316.066(7), the crash report shall be considered by the hearing officer." See *Cram v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 304a (Fla. 6th Cir. Ct. 2008); *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 1084 (Fla. 10th Cir. Ct. 2007); *Horne v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 442a (Fla. 13th Cir. Ct. 2008). The court in *Horne* noted that the statutory change now mirrors Rule 15A-6.013(6), Florida Administrative Code, which allows the admission of any relevant evidence provided it is timely filed. *Horne*, 15 Fla. Law Weekly Supp. 442a. Thus, it is clear to this Court that the information contained within the accident report is certainly admissible and was properly relied upon by the hearing officer. Additionally, Officer Misir's own observations of the Petitioner's physical appearance and behavior are not barred by any privilege or statutory provision, and were also properly considered by the hearing officer. *See State v. Cino*, 931 So. 2d 164, 167 (Fla. 5th DCA 2006).

"Probable cause for a DUI arrest must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *State v. Possati*, 866 So. 2d 737, 740-41 (Fla. 3d DCA 2004) *citing State v. Kliphouse*, 771 So.2d 16, 22 (Fla. 4th DCA 2000); *see also* § 316.193(1)(a), Fla. Stat. (2001). The charging affidavit and the Officer's observations contain enough information for the hearing officer to determine that Officer Misir had probable cause to believe that Petitioner was in actual physical control of a motor vehicle while under the influence of alcohol. The factors in the probable cause determination made by Officer Misir include: the smell of alcohol on Petitioner, her unsteady balance, her slurred speech, and her glassy and watery eyes. Additionally, Petitioner admitted that she was on her way home from a downtown club. These factors and her

subsequent failure of the field sobriety exercises all contributed to the Officer's probable cause determination. The Court finds that these facts and circumstances, taken together, support the hearing officer's finding of probable cause.

Petitioner's reply brief argues that the statutory amendments to section 322.2615(2), that allow the hearing officer to consider the crash reports, should be construed to apply solely to the crash "report" and not to any "statements" made by Petitioner that may be included in those reports. The court in *Horne* similarly dealt with a petitioner's argument that the accident report was privileged and use of petitioner's statements contained within constituted inadmissible hearsay. 15 Fla. L. Weekly Supp. 442a (Fla. 13th Cir. Ct. 2008). As previously mentioned, the relevant part of the statutory amendment states: "*Notwithstanding* section 316.066(7), the crash report shall be considered by the hearing officer." *Id*. (emphasis added). Following their analysis of the specific language the Legislature used in the amendments, the court determined that "a hearing officer may consider hearsay statements despite any limitations under section 316.066(7)." *Id*. The hearing officer in the instant case likewise properly considered the entirety of the accident report, and in following with the changes set out by the Legislature, did not depart from the essential requirements of law.

Next, Petitioner argues that there is no competent substantial evidence that Petitioner was the driver of a vehicle. Conversely, Respondent argues that there was competent substantial evidence to support the hearing officer's determination that Petitioner was the driver.

It is neither the function nor the prerogative of the circuit court to reweigh evidence and make findings when it undertakes a review of a decision of an administrative forum. *State of Florida, Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20 (Fla. 5th DCA 1989). The appeal provided in the statute specifically states that it "shall not be construed to

provide de novo appeal." § 322.2615(13), Florida Statutes (2006). In reviewing an administrative action, the circuit court is prohibited from weighing or reweighing the evidence presented to the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30 (Fla. 1st DCA 1997).

Specifically, Petitioner argues that Officer Misir's charging affidavit is vague and doesn't show that Petitioner was the driver of the motor vehicle involved in the accident. The Court agrees that the charging affidavit was not well written; however, the Court finds that there was sufficient evidence to establish that Petitioner was the driver of the vehicle. In the final order, the hearing officer agreed that the charging affidavit could have been written in "a more proper fashion," regardless, the hearing officer found that the information contained within the report "more than supported the suspension against the Petitioner."

The evidence supporting the Department's contention that Petitioner was the driver of the vehicle included: 1) that Officer Misir was told by Lieutenant Johnson that he had witnessed a crash; 2) that Officer Misir arrived at the scene and observed a Toyota SUV with rear end damage and a red Mazda with front end damage; 3) that the driver of the SUV told Officer Misir that she was struck from behind by a red vehicle that tried to leave the scene and then stalled; 4) that the driver of the SUV gave a detailed physical description of the driver of the red Mazda; and 5) that Officer Misir then contacted the driver of the red vehicle that the witness described above, who was also standing beside the red vehicle. The hearing officer reviewed this evidence and found that it was sufficient to establish that Petitioner was the driver of the vehicle. The Court cannot, on appeal, reweigh and resolve conflicts in evidence that were presented to and resolved by the hearing officer below. Thus, the court finds that there was

competent substantial evidence to support the hearing officer's finding that Petitioner was the driver of a vehicle.

Last, Petitioner argues that the hearing officer violated the rule of completeness by allowing the introduction of a sworn statement without the statement being presented for review by Petitioner. Specifically, Petitioner argues that the hearing officer relied on Officer Misir's charging affidavit which indicated that he received a sworn statement from a witness, Chelsea Niemi. The hearing officer relied on the synopsis in the report and refused to produce the actual sworn written statement. Thus, argues Petitioner, the license suspension should be set aside.

The Court finds that even if the hearing officer violated the rule of completeness by not requiring the Respondent to produce the entire sworn statement, there is still no evidence that the suspension was improper. The purpose of the rule of completeness is to avoid the potential for creating misleading impressions by taking statements out of context. § 90.108(1), Fla. Stat. (2006). The fairness determination, for purposes of the rule of completeness, falls within the discretion of the trial judge. *Schreiber v. State*, 973 So. 2d 1265 (Fla. 2d DCA 2008).

The charging affidavit indicates that Officer Misir quoted directly from the sworn statements of the witness. Additionally, the hearing officer, who was in the best position to make the determination, did not find that failure to admit the entire sworn statement was unfair to Petitioner. Most importantly, Petitioner fails to cite a single case for the proposition that a violation of the evidentiary rule of completeness warrants setting aside the license suspension. Nor does Petitioner argue that her due process rights were violated or that the hearing officer departed from the essential requirements of the law as a result of the alleged violation. As such, the Court finds that the license suspension was not improper.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Moore's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this __23rd__ day of _____October_____, 2009.

___/S/_____
RENEE A. ROCHE
Circuit Court Judge

__/S/_____
WALTER KOMANSKI
Circuit Court Judge

__/S/_____
ALICIA L. LATIMORE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Stuart I. Hyman, Esq.,** Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803**;** and to **Jason Helfant, Esq.,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler St., Miami, FL 33135, on this __23rd____ day of ___October_____, 2009.

____/S/_____
Judicial Assistant