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

DEBRA MOREFIELD,

Petitioner,

CASE NO.: 2007-CA-0014710-O
WRIT NO.: 07-65

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

_____/

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

Stuart J. Hyman, Esquire,
For Petitioner.

Heather Rose Cramer, Assistant General Counsel,
For Respondent

Before DAVIS, BLACKWELL, T. SMITH, J.J.

PER CURIAM.

FINAL ORDER ON PETITION FOR WRIT OF CERTIORARI

Petitioner Debra Morefield (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (Department) Final Order of License Suspension, sustaining the suspension of her driver's license pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath test. This Court has jurisdiction

pursuant to sections 322.2615(13) and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c).

At approximately 11:10 p.m., on September 10, 2007, Officer Robinson of the Winter Park Police Department observed a white sports utility vehicle being followed at an unsafe distance by a silver vehicle without operating headlights. The driver of the white sports utility vehicle pulled beside the patrol vehicle, which was parked in the parking lot at 840 South Denning Drive, and advised Officer Robinson that he should "take a look at that lady [driving the silver vehicle] because something is really wrong with her or she's very drunk." (Appendix C.) Before the white sports utility vehicle left the scene, the silver vehicle pulled into the parking lot behind it. Officer Robinson exited his vehicle, approached the driver, and asked for her license, registration, and proof of insurance.

Upon making contact with the driver, Petitioner Debra Morefield, Officer Robinson smelled a strong odor of an alcoholic beverage coming from inside the vehicle. Additionally, Officer Robinson observed that Petitioner's eyes were bloodshot and her speech was slurred. At this point, Officer Robinson completed a citation for operating a motor vehicle without the use of headlights and asked Officer Davison of the Winter Park Police Department to respond to the scene.

Upon approaching Petitioner, Officer Davison detected a strong odor of an alcoholic beverage on Petitioner's breath and observed that her eyes bloodshot and her speech was slurred. When asked if she had anything to drink, Petitioner said "no."

Next, Officer Davison requested Petitioner to submit to field sobriety exercises and she consented. Officer Davison administered the following exercises: Horizontal Gaze Nystagmus, walk and turn, and one-leg stand. While completing the walk and turn exercise, Petitioner fell

off the line three times and failed to touch heel to toe. After Officer Davison twice explained the one-leg stand exercise, Petitioner still failed to count properly and was unable to complete the exercise without placing her foot down every three seconds and raising her arms approximately ninety degrees. Consequently, Officer Davison placed Petitioner under arrest and transported her to the DUI center where she was observed for twenty minutes. Following this initial observation period, Officer Davison realized that the breath test instrument had not been activated so he provided Petitioner an opportunity to use the restroom, which she declined despite her earlier request, and he started another twenty minute observation period. After the second observation period, Officer Davison read the implied consent warning and asked Petition to provide breath samples but she became belligerent and tried to leave the intoxilyzer area. Officer Davison then entered a refusal and terminated the breath test.

Pursuant to section 322.2615, Florida Statutes, Petitioner requested a formal review of her license suspension. On October 4, 2007, Hearing Officer Linda Labbe held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the suspension on five grounds: (1) that Officer Robinson failed to appear at the review hearing; (2) that Officer Davison did not have probable cause to believe that Petitioner was under the influence of alcohol; (3) that there was no willful refusal because Petitioner gave no verbal answer and Officer Davison aborted the breath test prematurely; (4) that there is nothing in the record to support an eighteen month suspension; and (5) that the implied consent warning read to Petitioner was improper. On October 5, 2007, the hearing officer entered an order denying

Petitioner's motions and sustaining the suspension of Petitioner's driver's license for eighteen months.[1]

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. City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (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 the individual's license is suspended for refusal to submit to a breath, blood, or urine test, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension." §322.2615(7), Fla. Stat. (2007). The hearing officer's scope of review is limited to the following issues:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical 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 eighteen months.

§322.2615(7)(b), Fla. Stat. (2007).

[1] The Charging Affidavit states that Petitioner had "previously refused to submit to a breath test on 6-21-1996 and was informed by way of the Implied Consent Warning that refusal to submit to a breath test again would result in a separate criminal charge."

At issue in the instant case is whether the hearing officer's decision to sustain Petitioner's driver's license suspension was supported by competent substantial evidence. Petitioner argues that she was read an improper implied consent warning and that there was no willful refusal to submit to a breath test because Officer Davison prematurely aborted the breath test. Petitioner also argues that the record lacks competent substantial evidence to support the suspension of her driver's license for eighteen months.

Alternatively, the Department maintains that the record does not demonstrate that Officer Davison either improperly advised Petitioner of the implied consent statute or requested Petitioner to submit to a urine or blood test. The Department further contends that the hearing officer's findings regarding Petitioner's willful refusal to submit to a breath test and an eighteen month suspension are supported by competent substantial evidence.

Implied Consent Warning

Petitioner argues that the record below establishes that she was read an improper implied consent warning which included a request to submit to a more invasive test but because Officer Davison lacked authority to request her to submit to a urine or blood test, her alleged refusal was not unlawful and cannot support the hearing officer's determination to suspend her driver's license. Dept. of Highway Safety & Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007). On the other hand, the Department contends that the record clearly demonstrates that Officer Davison only requested Petitioner to submit to a breath test and Petitioner was accurately informed of the penalties for refusal to submit to such test upon a proper reading of the implied consent warning.

Petitioner asserts that the instant case is controlled by the Fourth District Court of Appeal's decision in Clark, wherein the appellate court held that a driver's license was improperly suspended because the individual was improperly informed that a suspension would result from a refusal to submit to a breath, blood, or urine test. 974 So. 2d at 418. The Court specifically noted that based upon the implied consent warning given in that case, the error in the warning may have misled the driver into thinking that she would have to submit to a more invasive test than was authorized by the statute. Id.

Florida's implied consent law permits the withdrawal of a blood sample from a DUI suspect under limited circumstances: (1) when there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence and the person appears for treatment at a hospital, clinic, or other medical facility, and the administration of a breath or urine test is impractical or impossible; or (2) when there is probable cause to believe the person was driving or in actual physical control of a motor vehicle and has caused death or serious bodily injury to a human being. §§316.1932(1)(c); 316.1933(1), Fla. Stat. (2007). Florida's implied consent law also permits the use of urine tests when there is reasonable cause to believe a person was driving or in actual physical control of a motor vehicle while under the influence of chemical substances or controlled substances. §316.1932(1)(b), Fla. Stat. (2007).

Petitioner is correct in her assertion that like in Clark, neither of the circumstances permitting a blood or urine test is present in the instant case; however, there was no testimony or evidence presented which indicates that Officer Davison requested anything beyond the breath test. The Charging Affidavit states that Petitioner was asked "to provide breath samples" and was read the implied consent warning but "continued to refuse to provide a breath sample." At

the review hearing, Officer Davison testified that Petitioner "would not submit to giving me a breath test . . . she would provide no breath samples." Additionally, Petitioner's argument regarding the preprinted Affidavit of Refusal is unpersuasive. The Affidavit of Refusal states that "said person [was requested] to submit to a breath, urine, *or* blood test to determine the content of alcohol in his or her blood or breath or the presence of chemical or controlled substances therein." (emphasis added).

Contrary to Petitioner's assertion, the hearing officer's decision sustaining Petitioner's driver's license suspension was supported by competent, substantial evidence as the record is void of evidence establishing that Petitioner was requested to submit to testing beyond a breath test.

Willful Refusal to Submit to Breath Test

Petitioner asserts that there was no competent substantial evidence in the record below to establish that Petitioner willfully refused to submit to a breath test. Petitioner argues that not only did Officer Davison fail to provide her an adequate opportunity to provide a breath sample but Officer Davison also improperly construed her actions to be a refusal to submit to a breath test. Petitioner further argues that because the Intoxilyzer 8000 allows three minutes to provide a breath sample, Officer Davison should have waited the full three minutes before entering a refusal. In the alternative, it is the Department's position that Officer Davison properly entered a refusal because Petitioner's actions clearly demonstrated that she had no intention of taking the requested breath test.

The record contains competent substantial evidence to support the hearing officer's determination that Petitioner willfully refused to submit to the breath test. For example, the Charging Affidavit states that Petitioner became belligerent and tried to walk away from the

intoxilyzer area when Officer Davison asked for breath samples and she tried shout down Officer Davison while he read the implied consent warning. Additionally, Officer Davison testified that he did not give Petitioner the opportunity to provide a breath sample for the full three minutes because she gave no indication that she was going to provide a breath sample and when read the implied consent warning, Petitioner refused to provide an answer or a breath sample. Moreover, Petitioner's refusal to provide a breath sample is further documented by the Breath Alcohol Test Affidavit, signed by Officer Davison, the breath test operator, and the Affidavit of Refusal to Submit to Breath, Urine or Blood Test, also signed by Officer Davison.

Suspension Period

Petitioner asserts that at most her driver's license should be suspended for a period of one year because the hearing officer's suspension of Petitioner's driver's license for a period of eighteen months is not supported by competent substantial evidence of a prior refusal. Alternatively, the Department contends that the charging affidavit alone provides competent substantial evidence to support the hearing officer's determination to sustain Petitioner's driver's license for a period of eighteen months.

Section 322.2615(8)(a), Florida Statutes (2007), provides that based upon the hearing officer's determination, the department shall sustain the suspension of a person's driving privilege for a period of one year for a first refusal, or for a period of eighteen months if the person's driving privilege has been previously suspended as a result of a refusal to submit to a lawful breath, blood, or urine test.

In the instant case, the Charging Affidavit states that "[t]he driver has previously refused to submit to a breath test on 6-21-1996 and was informed by the way of the Implied Consent Warning that refusal to submit to a breath test again would result in a separate criminal charge."

In Carder v. Department of Highway Safety and Motor Vehicles, 15 Fla. L. Weekly Supp. 547a (Fla. 9th Cir. Ct. Sept. 4, 2007), this Court, in its appellate capacity, held that there was not competent substantial evidence to support the hearing officer's determination that it was the driver's second refusal because no driving record establishing a prior refusal had been admitted or introduced into evidence at the hearing. See also Roddy v. Dept. of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 13a (Fla. 9th Cir. Ct. Aug. 3, 2007).

Likewise, Petitioner's driving record was neither admitted nor introduced into evidence. The only record evidence of a prior refusal was Officer Davison's statement in the Charging Affidavit. Accordingly, the hearing officer's suspension of Petitioner's driver's license for eighteen months is inappropriate because the record lacks competent substantial evidence of a prior refusal.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED** as to the implied consent warning and willful refusal issues and **GRANTED** as to the suspension period issue**.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___10__ day of ____October_____, 2008.

__/S/_____
JENIFER M. DAVIS
Circuit Judge

__/S/_____
ALICE L. BLACKWELL
Circuit Judge

__/S/_____
THOMAS B. SMITH
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: **Stuart I. Hyman, Esquire,** 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, 6801 Lake Worth Road, #320, Lake Worth, Florida 33467 on the ___13_____ day of _October_____, 2008.

_/S/_____
Judicial Assistant