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

IAN SHERWOOD,
Petitioner,

CASE NO.: 2008-CA-2423
WRIT NO.: 08-07

vs.

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,
Donna Petty, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Damaris E. Reynolds, Assistant General Counsel,
for Respondent.

Before POWELL, THORPE, JOHNSON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Ian Sherwood 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 his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to section 322.2615, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On November 24, 2007, at approximately 3:44 a.m., Officer Stanley of the Orlando Police Department responded to a traffic stop conducted by Officer Feliberty. Officer Feliberty observed a vehicle driving without headlights and upon pulling the vehicle over, he identified Petitioner as the driver of the vehicle. Petitioner's speech and movements were slow and he admitted to consuming three or four beers. Upon arriving at the scene, Officer Stanley observed the odor of alcohol on Petitioner's breath. Petitioner refused to perform field sobriety exercises. Petitioner was arrested within the limits of the City of Orlando and transported to the Orange County testing facility located outside the limits of the City of Orlando. Petitioner initially refused to submit to a breath-alcohol test but later agreed to provide samples. However, Petitioner failed to follow the breath test technician's instructions and Petitioner's two partial samples were deemed a refusal. The Department suspended Petitioner's driving privileges and Petitioner requested and was granted a formal review hearing pursuant to section 322.2615, Florida Statutes.

On January 4, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on three grounds: (1) lack of probable cause to believe that Petitioner was under the influence of alcohol to the extent his normal faculties were impaired; (2) improper implied consent warning because Officer Stanley could not recall the exact language of the implied consent warning that he read to Petitioner; and (3) Officer Stanley lacked authority to conduct an investigation or request a breath test at the breath test center because it was outside his territorial jurisdiction. That same day, the hearing officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under

the influence or alcoholic beverages or chemical or controlled substances; that Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer; and that Petitioner was told that if he refused to submit to such test his 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. Petitioner timely seeks certiorari review by this Court.

The court's review of an administrative agency decision is governed by a three-part standard or 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, 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).

Petitioner argues that the hearing officer erred in denying his motion to invalidate the suspension based on Officer Stanley being outside his territorial jurisdiction and not in fresh pursuit when he requested the breath test.[1] Petitioner also argues that the evidence of the refusal should have been excluded and the suspension invalidated because the implied consent warnings read to Petitioner were improper.[2]

We reject both arguments. As to Petitioner's first argument, the Court notes that the cases relied upon by Petitioner are criminal cases which apply the exclusionary rule based upon the federal and state constitutions and case law, not administrative proceedings. We agree with

[1] Petitioner relies upon the following cases in support of his argument: *Phoenix v. State*, 455 So. 2d 1024 (Fla. 1984); *State v. Sills*, 852 So. 2d 390 (Fla. 4th DCA 2003); *State v. Shipman*, 370 So. 2d 1195 (Fla. 4th DCA 1974); *Collins v. State*, 143 So. 2d 700 (Fla. 2d DCA 1962).

[2] At the hearing, Petitioner's attorney argued that there was no basis to request a blood or urine test. In the petition, Petitioner again argues that "Officer Stanley lacked the authority to request that the Petitioner submit to a blood test." However, there is no evidence in the record whatsoever that Officer Stanley insisted that Petitioner submit only to a blood test. The evidence is that Officer Stanley read the types of tests in the alternative– breath, urine *or* blood test.

the Department that the exclusionary rule should not be applied to administrative license suspension cases. *Cf. Valdez v. Dep't of Revenue,* 622 So. 2d 62 (Fla. 1st DCA 1993)(exclusionary rule did not apply in administrative proceeding to challenge tax assessment); *State v. Scarlet,* 800 So. 2d 220, 221 (Fla. 2001)(affirming the Third District's decision stating that the exclusionary rule is incompatible with the traditional, administrative procedures of parole revocation); *Dep't of Highway Safety & Motor Vehicles v. Grapski,* 696 So. 2d 950 (Fla. 4th DCA 1997)(the suspension of a license is an administrative remedy not a punishment); s*ee also Nevers v. State, Dep't of Administration,* 123 P.3d 958 (Alaska 2005)(holding that the exclusionary rule is inapplicable to search and seizure violations in administrative driver's license proceedings).

In the instant case, Petitioner's arrest was lawful and Officer Stanley was simply following statutorily authorized procedures when seeking Petitioner's consent to a breath test. The issue of whether the request and refusal was outside Officer Stanley's jurisdiction, it seems to us, is legally immaterial in the administrative proceeding. Consequently, we conclude that the hearing officer did not depart from the essential requirements of the law in denying the motion and refusing to exclude the evidence obtained at the breath test center.

As to Petitioner's second argument, the record shows that Officer Stanley read the implied consent warnings verbatim from a form that was provided at the breath test center. Officer Stanley could not recall from memory what he actually said to Petitioner, and without comparing the two documents could not say that the warnings in the form were the same as those in the breath test refusal affidavit which he authored. The affidavit was admitted into evidence and states in pertinent part: "I did request said person [Sherwood] 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." The form from the breath test center does not appear in the record. Officer Stanley's arrest affidavit reads in pertinent part:

> Upon arrival at the DUI testing center, the suspect was read implied consent at approximately 0329 hours to which he stated he would consent to a sample of his breath. However, after several attempts during which he would not follow the directions of the DUI technician, it was determined that the suspect was refusing to provide a sample of his breath at approximately 0344 hours. The suspect did provide two partial samples of .118 and .108.

Petitioner did not testify. There was no evidence, testimonial or documentary, that a urine or blood test was specifically requested. Consequently, we conclude that there was substantial competent evidence to support the hearing officer's decision to sustain the license suspension.[3]

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

DONE AND ORDERED at Orlando, Florida this __3___day _____February_____, 2010.

_____/S/_____
ROM W. POWELL
Senior Judge

_____/S/_____
JANET C. THORPE
Circuit Judge

_____/S/_____
ANTHONY H. JOHNSON
Circuit Judge

[3] *See Dep't of Highway Safety & Motor Vehicles v. Perry*, 751 So. 2d 1277 (Fla. 5th DCA 2000)(holding that the DHSMV's refusal affidavit form, when properly executed and admitted into evidence, is evidence that the implied consent warnings were given and when an arrest report generally states that the implied consent warnings were given, the warnings are standard instructions which can be identified by simple reference); *Wheeler v. Dep't of Highway Safety & Motor Vehicles*, Case No. O7-036 AP, (Fla. 11th Cir. Ct. Feb. 6, 2007)(clarifying on rehearing that the reading of an implied consent form does not automatically act as an illegal demand for a blood test where no blood test has been requested by the officer).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 3 day of February, 2010, to the following: **William R. Ponall, Esquire**, 1150 Louisiana Avenue, Suite 1, Post Office Box 2728, Winter Park, Florida 32790 and **Damaris E. Reynolds, Esquire,** Assistant General Counsel, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, Florida 33454-0609.

/S/
Judicial Assistant