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

KAREN PERSIS,

Petitioner,

v.

CASE NO.: 2008-CA-23903-O
Writ No.: 08-52

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.

Damaris E. Reynolds, Esquire,
for Respondent.

BEFORE ADAMS, O' KANE, and MCDONALD, JJ.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Karen Persis ("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 refusal to submit to a breath, blood, or urine test. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On July 11, 2008, at approximately 2:30 a.m., Officer Ospina and Officer Cronin of the Orlando Police Department were dispatched to the intersection of Bumby Avenue and South Street in response to a traffic accident between a Volkswagen and a Semi-truck. Upon arrival, Officer Cronin conducted the traffic crash investigation and determined that the driver of the

Volkswagen, the Petitioner, was at fault as she stated that she had ran a red light. The driver of the Semi-truck indicated to Officer Cronin that the Petitioner had exited the Volkswagen. Officer Cronin explained the traffic report to the Petitioner and noticed the smell of alcohol coming from her. Following the explanation of the traffic report, Officer Ospina conducted the DUI investigation. Officer Ospina noticed the smell of alcohol on her breath, slurred speech, glassy and slightly watery eyes, and unsteady balance. When asked whether she had anything to drink, the Petitioner replied, "a couple of drinks downtown [a] few hours ago." Additionally the Petitioner indicated that she had taken medication during the day to combat a cold.

Officer Ospina then asked the Petitioner to submit to field sobriety exercises and she consented. After performing the exercises, Officer Ospina determined that the Petitioner had been operating her vehicle under the influence of alcohol. Petitioner was subsequently arrested and transported to the Orange County DUI Center where the Petitioner refused the breath test. Following the suspension of her license for failure to submit to a lawful breath test, Petitioner requested a formal review hearing pursuant to Florida Statute 322.2615. The hearing occurred on August 8, 2008, and on August 14, 2008, the Hearing Officer issued her "Findings of Fact, Conclusions of Law and Decision," denying Petitioner's motions and sustaining the suspension of her driver's license for one year.

"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 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 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. (2008).

Petitioner argues that: 1) There existed no competent evidence in the record that would establish that the Petitioner was driving or in actual physical control of an automobile; and 2) the Petitioner was improperly coerced into submitting to field sobriety exercises. Conversely, the Department argues that the Hearing Officer properly sustained the license suspension of the Petitioner where competent and substantial evidence existed to support the Hearing Officer's decision, the essential requirements of law were met, and the Petitioner was afforded procedural due process.

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. Jan. 17, 2008); *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 1084 (Fla. 10th Cir. Ct. Sept. 18, 2007); *Horne v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 442a (Fla. 13th Cir. Ct. Mar. 20, 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 Ospina'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 accident report and the Officer's observations contain enough information for the hearing officer to determine that Officer Ospina had probable cause to believe that the 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 Ospina include: the smell of alcohol on the Petitioner, her unsteady balance, slurred speech, glassy and watery eyes. The Petitioner's own admission that she ran a red light and the identification given by the driver of the vehicle the Petitioner struck, 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.

The 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 the 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. Mar. 20, 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 (including the Petitioner's statements), and in following with the changes set out by the Legislature, did not depart from the essential requirements of law.

Finally, the Petitioner argues that Officer Ospina improperly and illegally coerced her into performing the field sobriety exercises. At the hearing the Petitioner argued that the arresting officer illegally coerced her into performing the field sobriety exercises by misrepresenting the purpose of those exercises. In the accident report, Officer Ospina noted that

he asked the Petitioner if "she would submit to field sobriety exercises to test her level of impairment and if she was able to safely operate a motor vehicle." She agreed and performed the exercises. The Petitioner argues that because the Officer indicated he was asking her to submit to testing to determine whether she could safely operate a motor vehicle, and not to determine whether she would be placed under arrest, the Officer illegally coerced the Petitioner into submitting to the exercises. The Petitioner cites numerous cases in support of this theory, all of which have much stronger language and other evidence of coercion. While it is true that an officer cannot misinform an individual about his or her rights, an officer also has no duty to inform an individual that field sobriety tests are voluntary, that the individual has a right to refuse, the consequences of a refusal, or the consequences of failure. *State v. Holowicki*, 15 Fla. L. Weekly Supp. 792a, (Fla. 17th Cir. Ct. May 19, 2008) *citing State v. Johnson*, 814 So. 2d 390 (Fla. 2002). Without more than this statement, this Court finds that the hearing officer correctly denied the motion to invalidate the suspension based on illegally coerced field sobriety exercises.

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _29th___ day of ____Sept_____, 2009.

_/S/_____

GAIL A. ADAMS
Circuit Court Judge

___/S/_____
JULIE H. O'KANE
Circuit Court Judge

_/S/_____
ROGER J. MCDONALD
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 **Damaris E. Reynolds, Esq.,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454, on this _29th_____ day of ____Sept_____, 2009.

_/S/_____
Judicial Assistant