

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

CAITLIN CLARK,

Petitioner,

v.

CASE NO.: 2009-CA-19417-O
WRIT NO.: 09-19

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

Respondent.

**ORDER GRANTING IN PART PETITIONER'S MOTION
FOR CLARIFICATION AND REHEARING**

THIS MATTER came before the Court for consideration of the Petitioner's "Motion for Clarification and Rehearing," filed on July 1, 2010. The Court has reviewed the motion and the court file and has been otherwise fully advised in the premises.

On rehearing, Clark asks the Court to reconsider its decision to remand this case in light of recent decisions issued by this Court, in which the Court quashed administrative orders and invalidated license suspensions without remanding, based on due process violations. We deny Clark's request, and we choose to follow the rule of law articulated by the Fifth District Court of Appeal in Lillyman v. Dep't of Highway Safety & Motor Vehicles, 645 So. 2d 113 (Fla. 5th DCA 1994).

In the alternative, Clark asks the Court to address the merits of the first two arguments in her petition for writ of certiorari because her success on either of those arguments would entitle her to an invalidation of her license suspension, without remand. We grant Clark's request, but in

doing so, we reach the same result as our opinion issued on June 15, 2010. Nonetheless, we supplement our previous opinion with the following analysis:

Facts

On March 1, 2009, Sergeant Elwood Furnas (Sergeant Furnas), of the University of Central Florida Police Department, observed a vehicle stopped in the roadway, and the driver seemed to be “slumped over.” As he approached the vehicle from the rear, it “suddenly took off,” turning into a parking lot and parking outside of the marked lines. Sergeant Furnas pulled up next to the vehicle, rolled down his window, and asked the driver, through her open window, whether she was “alright.” As she answered, Sergeant Furnas noticed that her speech was slurred and her eyes were bloodshot and glassy. As he exited his vehicle and approached the driver’s window, he detected the distinct odor of alcohol impurities coming from the driver’s breath. Therefore, he called Officer Christopher Holt (Officer Holt) to conduct a DUI investigation.

Upon arriving, Officer Holt identified the driver as Clark by her Florida Drivers License. Officer Holt also noticed the strong odor of alcohol impurities coming from Clark’s breath, and he noticed that she used the car to steady herself as she walked. Additionally, Clark admitted to drinking “three shots” earlier in the evening. After Clark performed poorly on field sobriety exercises, Officer Holt arrested her for DUI and transported her to the Orange County DUI Testing Center.

At the testing center, Breath Test Operator Brown (“BTO Brown”) conducted the twenty-minute observation of Clark, and Officer Holt read implied consent warnings to Clark. Clark submitted to a breath-alcohol test, which resulted in breath-alcohol levels of .158 and .155. Therefore, the Department suspended her driving privilege.

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) (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 the first argument in her petition for writ of certiorari, Clark argued that the hearing officer's decision is not supported by competent substantial evidence that Clark was lawfully seized and detained for purposes of a DUI investigation. In her second argument, Clark argued that the hearing officer's decision is not supported by competent substantial evidence that the breath test was conducted in substantial compliance with applicable administrative rules.

Lawfully Seized and Detained

"[E]very encounter between law enforcement and a citizen does not automatically constitute a seizure in the constitutional context," and a consensual encounter does not invoke constitutional safeguards. G.M. v. State, 19 So. 3d 973, 977 (Fla. 2009). "Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." Id. (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)). When an officer pulls up to a parked car and makes contact with the driver while the driver is sitting in the front seat of her car, these facts, by themselves, would support a finding of a consensual encounter. Dep't of Highway Safety & Motor Vehicles v. Luttrell, 983

So. 2d 1215, 1217 (Fla. 5th DCA 2008).

There is no evidence in the record that Sergeant Furnas used his patrol car's emergency lights or that he in any other way ordered, or even requested, that Clark stop her vehicle. Of her own volition and without coercion, Clark stopped her vehicle in the parking lot. Sergeant Furnas then pulled up beside her vehicle and, from within his vehicle, asked whether she was alright. After noticing that Clark's eyes were bloodshot and glassy and her speech was slurred, Sergeant Furnas exited his vehicle and approached Clark's parked vehicle. It was then, through Clark's already-opened window, that Sergeant Furnas detected the odor of alcohol impurities on Clark's breath. Up to this point, there is no evidence in the record that Sergeant Furnas used physical force or show of authority to compel Clark to stop, exit her vehicle, or answer his questions. Therefore, we conclude that up to that point, the encounter was consensual.

However, once Sergeant Furnas initiated a DUI investigation, called Officer Holt to the scene, and determined that Clark was not free to leave, a seizure had occurred. Nonetheless, given Sergeant Furnas's pre-seizure observations of Clark's erratic driving, bloodshot and glassy eyes, slurred speech, and odor of alcohol on her breath, we find that Sergeant Furnas had probable cause. See State, Dep't of Highway Safety & Motor Vehicles v. Whitley, 846 So. 2d 1163, 1165-1166 (Fla. 5th DCA 2003); State v. Kliphouse, 771 So. 2d 16, 22 (Fla. 4th DCA 2000). Therefore, we find that there is competent substantial evidence that Clark was lawfully seized and detained.

Breath Test Conducted in Substantial Compliance with Administrative Rules

As we stated in our Final Order, issued on June 15, 2010, the State submitted affidavits claiming that the Intoxilyzer 8000 instrument and the methods used to test Clark's breath-alcohol level complied with Florida Administrative Code Rule 11D-8. These affidavits constituted

presumptive proof of compliance, and they are sufficient to satisfy the “competent substantial evidence” standard. Therefore, Clark’s argument on this point fails.

However, Clark’s counsel attempted to rebut the presumption by questioning Inspector Skipper concerning the micron bands used in the Intoxilyzer instrument. When the hearing officer failed to require Inspector Skipper to answer the question and prevented Clark’s counsel from further asking such questions, she denied Clark her right to due process. Therefore, we ordered that this case be remanded, to give Clark the opportunity to rebut the presumption.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petitioner’s “Motion for Clarification and Rehearing” is **GRANTED IN PART** and the case is **REMANDED** for further proceedings consistent with this opinion and the Court’s “Final Order Granting Petition for Writ of Certiorari,” issued on June 15, 2010.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___17th___ day of ___August_____, 2010.

/S/
MAURA T. SMITH
Circuit Judge

/S/
DONALD E. GRINCEWICZ
Circuit Judge

/S/
JULIE H. O’KANE
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: **William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **James Fisher, Esq., Department of Highway Safety and Motor Vehicles**, 133 South Semoran Boulevard, Suite A, Orlando, Florida 32807 on the ____17th____ day of __August_____, 2010.

/S/ _____
Judicial Assistant