

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

**CASE NO.: 2009-CA-031817
WRIT NO.: 09-39**

SEAN JENNINGS,
Petitioner,

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,
Donna Petty, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

James K. Fisher, Assistant General Counsel,
for Respondent.

Before KOMANSKI, STRICKLAND, and LEBLANC, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Sean Jennings (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 his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On July 25, 2009, Lieutenant Biles of the Winter Park Police Department conducted a traffic stop on a vehicle that was speeding, travelling without illuminated taillights, and failing to maintain a single lane. Upon making contact with the driver, identified as Petitioner, Lieutenant Biles observed that Petitioner's eyes were bloodshot and watery and his speech was slurred. Lieutenant Biles also observed a beer can in the center console inside the vehicle next to Petitioner. Upon arriving at the scene of the stop, Officer Deltoro of the Winter Park Police Department also made contact with the driver, identified as Petitioner, and observed that his eyes were red and watery and his speech was slurred. Officer Deltoro also observed an odor of alcohol emitting from Petitioner's breath. Based on Petitioner's performance on the field sobriety exercises, Officer Deltoro arrested Petitioner and transported him to the breath testing facility. After being read the implied consent warning, Petitioner agreed to submit to a breath-alcohol test but was deemed to have refused to submit to a breath-alcohol test after twice failing to provide a valid sample.¹ As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On August 31, 2009, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on two grounds: (1) unlawful detention and (2) lack of competent substantial evidence that the arrest preceded the implied consent warning and refusal to submit to a breath test. On September 8, 2009, 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

¹ Florida Administrative Code Rule 11D-8.002(12) provides that "[r]efusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test."

vehicle while under the influence of 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.

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, 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 cases 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, amend, or invalidate 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 18 months.

§ 322.2615(7)(b), Fla. Stat. (2007).

The only issue raised in the instant petition is whether the hearing officer's decision to sustain the suspension is supported by competent, substantial evidence that Petitioner refused to submit to the breath-alcohol test *after* he was placed under arrest. The refusal affidavit indicates that Petitioner was arrested at 2:46 a.m. on July 25, 2009. However, the refusal affidavit also indicates that Petitioner was read the implied consent warning and refused to submit to a breath-alcohol test at the same time, 2:46 a.m. on July 25, 2009. Petitioner asserts that the hearing officer was not free to conclude that discrepancies in the record were the result of clerical error. Petitioner further asserts that when the Department relies solely on documentary evidence containing inconsistencies, those inconsistencies must be explained by sworn testimony pursuant to *Department of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). The Department, however, argues that the instant case is distinguishable from *Trimble* because the hearing officer's determination is supported by other reliable evidence in the record, not just the refusal affidavit.

This Court finds that *Trimble* is distinguishable from the instant case.² In *Trimble*, the circuit court found that the Department's documentary evidence, which was the only evidence submitted to prove the case, was legally insufficient to constitute competent, substantial evidence on the implied consent warning issue because there were unexplained inconsistencies in the

² In addition to the difference with the documentary evidence, the Court notes that the issue addressed in *Trimble* is whether the driver was given an implied consent warning prior to her refusal, not whether the driver's refusal occurred *after* the arrest.

documents. 821 So. 2d at 1086. The refusal affidavit stated that Trimble was arrested on September 27, 2000, at 11:40 p.m. *Id.* It further stated that Trimble was requested to submit to the breath test on September 27, 2000, at 12:45 a.m. *Id.* Also, a printout from the breathalyzer machine indicated that a refusal occurred on September 27, 2000, at 12:47 a.m. *Id.* Based on that evidence, the First District agreed with the circuit court's finding that the documentary evidence gave equal support to inconsistent inferences; therefore, the hearing officer's conclusion that Trimble was given a consent warning prior to refusal was not supported by competent, substantial evidence. *Id.* at 1087.

In the instant case, the following documentary evidence was before the hearing officer: (1) DDL-1 Florida DUI Uniform Traffic Citation; (2) DDL-2 Uncertified Transcript of Driver Records; (3) DDL-3 Charging Affidavit; (4) DDL-4 Alcohol Influence Report; (5) DDL-5 Implied Consent Warning; (6) DDL-6 Breath Alcohol Test Affidavit; and (7) DDL-7 Affidavit of Refusal. The traffic citation lists the stop time as 12:19 a.m. and the charging affidavit lists the arrest time as 12:43 a.m. The charging affidavit further states that the twenty-minute observation period at the Winter Park Police Department started at 2:15 a.m. The alcohol influence report states that the stop time was 12:19 a.m. and the arrest time was 12:51 a.m. The implied consent warning form lists the refusal time as 2:45 a.m. The breath alcohol test affidavit also states that the observation period started at 2:15 a.m. and that the refusal occurred at 2:45

a.m. Unlike *Trimble*, the documentary evidence before the hearing officer did not give equal support to inconsistent inferences.

Based on the foregoing, the Court finds that there is competent, substantial evidence in the record to support the hearing officer's finding that Petitioner refused to submit to the breath-alcohol test after he was placed under arrest and after he was read the implied consent warning.

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

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
__29__ day of _____November_____, 2010.

_____/S/_____
WALTER KOMANSKI
Circuit Judge

_____/S/_____
STAN STRICKLAND
Circuit Judge

_____/S/_____
BOB LEBLANC
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, Esquire**, Post Office Box 2728, Winter Park, Florida 32790 and **James K. Fisher, Assistant General Counsel**, DHSMV, Post Office Box 570066, Orlando, FL 32857, on the __29__ day of _____November_____, 2010.

_____/S/_____
Judicial Assistant