

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

KAREN BREAKELL,

Petitioner,

vs.

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

Respondent.

WRIT NO.: 09-60

Case No.: 2009-CA-026334-O

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Division of Driver Licenses
Donna Petty, Hearing Officer.

William R. Ponall, Esq.,
for Petitioner.

Kimberly A. Gibbs, Esq.,
for Respondent.

Before Thomas Smith, Blackwell and Thorpe, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

I. NATURE OF THE CASE

Petitioner, Karen Breakell (“Petitioner” or “Breakell”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’

(“Respondent” or “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-alcohol test. (Pet. Cert 1.) This Court has jurisdiction. §§ 322.2615, 322.31, Fla. Stat. (2009); Fla. R. App. P. 9.030(c)(3); 9.100. We dispense with oral argument.

Petitioner contends that the Hearing Officer’s decision affirming the suspension of her driving privileges was not supported by competent substantial evidence. We disagree and deny the petition.

II. FACTS

Officer Fairbanks of the Winter Park Police Department observed Petitioner driving erratically, stopped her and asked her to perform tests to determine if she was impaired. Based on the results of these tests, as well as his observation of Petitioner’s condition, Fairbanks took Breakell into custody and brought her to the police station where she was asked to take a Breathalyzer test. Breakell was arrested for DUI and issued three citations including one for refusing to take a breath examination.

Breakell’s driving privileges were suspended pursuant to section 322.2615, Florida Statutes. She then requested a formal hearing pursuant to that same statute and chapter 15A-6, Florida Administrative Code. A hearing was held before Hearing Officer Donna Petty (“the Hearing Officer”) at which the following documents were admitted into evidence:

- DDL # 01- Florida DUI Uniform Traffic Citation #0483-XDQ
- DDL # 02- Florida Uniform Traffic Citation #6256-FWC;
6255-FWC; and 6257-FWC
- DDL # 03- Division of Driver Licenses Uncertified Transcript of
Driver Record
- DDL # 04- Winter Park Police Department Charging Affidavit
- DDL # 05- Alcohol Influence Report
- DDL # 06- Implied Consent Warning

DDL # 07- Breath Alcohol Test Affidavit
DDL # 08- Affidavit of Refusal

The Charging Affidavit recited that Breakell “indicated” a refusal to take the breath test by requesting a lawyer and “spontaneously” stating that “[y]ou know I’m not going to take that test.” (Pet. Cert. Ex. DDL-4, p.7 of 9.) When Officer Fairbanks advised Petitioner of the consequences of a refusal, he asked her if she still refused to take it to which she replied by “repeatedly” requesting a lawyer. (Id.)

The Alcohol Influence Report does not contain any space for Breathalyzer information but does indicate that Breakell was “cooperative.” (Pet. Cert. Ex. DDL-5.) The Implied Consent Warning contains two boxes, marked “yes” and “no” respectively, for recording the response of a “defendant” to the question of whether he or she will submit to a breath test. The question is asked twice. The first time this question is asked, the “no” box is checked indicating that Breakell refused the Breathalyzer. (Pet. Cert. Ex. DDL-6.) The form records as negative Petitioner’s response the second time a question is asked. The second question is “Do you still refuse to submit to this test knowing your driving privilege will be suspended for a period of (1) year?” (Id.)

The Breath Alcohol Test Affidavit contains no results and, next to an asterisk, recites that “Subject Test Refused.” (Pet. Cert. Ex. DDL-7.)

The Affidavit of Refusal to Submit to Breath, Urine or Blood Test is a form which appears to have been signed by Officer Fairbanks and states that he requested Breakell to take a breath- alcohol test and she refused. (Pet. Cert. Ex. DDL-8.)

At the hearing, Officer Fairbanks, the arresting officer, testified at some length about the events of the evening when he stopped and arrested Petitioner. He reviewed the documents which were in evidence and stated under oath that those he had executed were true and correct.

At the time of these events, Officer Fairbanks had been a member of the Winter Park Police Department for approximately one and one-half years. Prior to that, he had been a police officer in Fresno, California, for more than seven years and had also worked as a State Department police advisor in Iraq for about one year.

The Department made no appearance at the hearing.

III. STANDARD OF REVIEW

Our review is “limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008).

IV. PARTIES’ ARGUMENTS

Breakell argues that the Alcohol Incident Report presents an unexplained evidentiary discrepancy because it indicates that she did not persist in her refusal to submit to a Breathalyzer test when asked a second time whether she would take it. Petitioner contends that the Department’s failure to explain this lone discrepancy means that “[t]he evidence before the hearing officer failed to establish that the Petitioner refused to submit to a breath test.” (Pet. Cert. 5.)

The negative answer to the second question included on the Implied Consent Warning provided the hearing officer with evidence that the Petitioner did not actually refuse to submit to a breath test in this case. In absence of sworn testimony explaining

why that evidence was in conflict with the Affidavit of Refusal, and which of the documents was actually true and correct, the hearing officer lacked the authority to conclude that the discrepancy in question was the result of a clerical error.

(Pet. Cert. 9.)

In support of this argument, petitioner relies primarily upon *Department of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). She also notes several of this Court's decisions applying *Trimble* in which certiorari relief was granted due to unexplained inconsistencies in documentary evidence.

The Department responds that the documents in evidence, with the one exception relied up on by Petitioner, all state that Breakell refused the breath test. As a result, the Department contends that a preponderance of the evidence supports the Hearing Officer's decision and for this Court to find otherwise would be an impermissible re-weighing of the evidence.

V. DISCUSSION

The issue here, as framed by the Petitioner, is whether or not the Hearing Officer's decision was based upon competent substantial evidence. Our analysis begins, therefore, with an understanding of that term. In *Trimble*, the case upon which Petitioner principally relies, the First District Court of Appeal quoted the Florida Supreme Court's explanation in *Florida Rate Conference v. Florida Railroad and Public Utilities Commission*, 108 So. 2d 601 (Fla. 1959): "Although the terms 'substantial evidence' or 'competent substantial evidence' have been variously defined, past judicial interpretation indicates that an order which bases an essential finding or conclusion *solely* on unreliable evidence should be held insufficient." *Dep't of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d at 1086 (*quoting Fla. Rate Conference v. Fla. R. R. and Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)) (emphasis

added). The *Trimble* Court observed that “Florida courts have long recognized that verdicts or findings must be based on something more than mere probabilities, guesses, whims or caprices but rather on evidence in the record that supports a reasonable foundation for the conclusion reached.” *Dep’t of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d at 1087.

In order to assess whether the Hearing Officer’s conclusion was supported by competent, substantial evidence, we must be mindful of the applicable burden of proof. In a formal review conducted under section 322.2615, “the hearing officer must determine by a preponderance of the evidence whether sufficient cause exists to sustain the suspension.” *Dep’t. of Highway Safety and Motor Vehicles v. Prue*, 701 So.2d 637, 638 (Fla. 2d DCA 1997).

We agree with the Department that the cases relied upon by Petitioner are distinguishable so as to be of no assistance to her. The *Trimble* Court affirmed a lower court decision which found the documentary evidence to be “hopelessly in conflict.” *Dep’t of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d at 1086. In *Trimble*, when or whether a consent warning was given was a “critical determination.” *Id.* at 1087. On this issue, the Affidavit of Refusal was internally inconsistent, a Breathalyzer printout was wholly inconsistent with the Affidavit of Refusal and the Alcohol Influence Report differed from them both. Thus, in *Trimble*, there were no two pieces of consistent documentary evidence on a “critical” issue in the case. Here, by contrast, the documents supporting the finding of a refusal are entirely consistent but for a single discrepancy. “[I]t was the hearing officer’s duty to resolve this conflict.” *Dep’t of Safety & Motor Vehicles v. Marshall*, 848 So.2d 482, 486 n.5 (Fla. 5th DCA 2003). We cannot second-guess the finding of the Hearing Officer which was supported by at least a preponderance of the documentary evidence.

The cases from this Court upon which Petitioner relies are, like *Trimble*, unavailing.

In *Jackson v. Department of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp 532a (9th Cir. Ct. March 19, 2007), this Court reversed a Final Order of Suspension sustaining the administrative suspension of Jackson's driving privileges. In *Jackson*, the Charging Affidavit indicated an arrest date of July 6, 2005, at 2:11 a.m., while the Refusal Affidavit recited that the arrest was one month later, August 6, 2005, at 2:28 a.m., and that the refusal took place on August 6, 2008 at 3:19 a.m., three years after the date set forth in the Refusal Affidavit. This Court held that "[b]ecause there was no sworn testimony explaining the discrepancy, the hearing officer's decision was not supported by competent substantial evidence." *Id.* at 3.

This Court reversed a Final Order of Suspension in another refusal case, *Stoll-Powers v. Department of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 677a (9th Cir. Ct. Jan. 17, 2006). In *Stoll-Powers*, discrepancies in the documentary evidence -which was the only evidence presented by the Department- consisted of an Affidavit of Refusal which was internally inconsistent reciting an arrest date of April 5, 2005, but also indicating that the driver's refusal to take a breath test occurred one month prior on March 5, 2005. This was the "only evidence that specifically state[d] the time at which the Petitioner was read the implied consent warning." *Id.* at 4. This Court concluded that because of this discrepancy, unexplained by the Department, the hearing officers's decision was not supported by competent substantial evidence.

Finally, Petitioner relies upon *Hogan v. Department of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 529a (9th Cir. Ct. Oct. 31, 2005). In *Hogan*, the first page of the Charging Affidavit referred to an arrest date of October 24, 2003. The next page indicated that the date of arrest was October 25, 2003. There was no reference to any arrest date on the

third page of the Charging Affidavit. Each page, however, contained a jurat dated October 24, 2003. All of the other documents entered into evidence at the administrative hearing - a Traffic Citation, a Breath Test Result Affidavit, an Intoxilyzer Print Card and a Refusal Affidavit - said that the date of arrest was October 25, 2003. Once again, this Court reversed the decision of the hearing officer and held that there was not substantial credible evidence of a refusal to take a breath test where multiple inconsistencies among several pieces of documentary evidence were not explained by sworn testimony.

Neither *Trimble* nor any case from this Court suggests that a single inconsistency found in a single document serves to negate the unanimity of all the other documentary evidence. Here, the Traffic Citation, Implied Consent Warning, Breath Control Test Affidavit and Refusal Affidavit all indicate that Breakell refused to take a breath test. In addition, the Charging Affidavit notes Petitioner's own words in unequivocally voicing her refusal: "You know I'm not going to take that test." (Pet. Cert. Ex. DDL-4., p. 7 of 9). The Implied Consent Warning likewise reports that Breakell refused to take the Breathalyzer. (Pet. Cert. Ex. DDL-6.) As Petitioner correctly notes, this form also indicates "NO" as Breakell's response to the question "Do you still refuse to submit to the test knowing your driving privilege will be suspended for a period of (1) year?" (Id.) Petitioner contends the Department is "asking the Court to assume" that this single answer which is inconsistent with all other indications that she refused the breath test is a "clerical error." (Pet'r. Reply 2.) Breakell misconstrues the Department's argument. The Department does not ask us to assume anything. Rather, it contends that we should not reweigh the evidence but instead evaluate whether the Hearing Officer based her finding of Breakell's refusal solely upon evidence which, taken as a whole, is unreliable. We find that she

did not and accordingly deny the petition for certiorari. In closing, we note that this Court has never held, nor does *Trimble*, that the Department must “clear up any discrepancies in the documentation before the hearing officer” as Petitioner contends. (Id.) Instead, the Department must only explain inconsistencies in documentary evidence when those discrepancies “give[] equal support to inconsistent inferences.” *Trimble v. Dep’t of Highway Safety & Motor Vehicles*, 821 So. 2d at 1087. If it fails to do so, such evidence, standing alone, is not competent substantial evidence as will support a finding that a Breathalyzer test was refused. Such is not the case here. The lone conflict in the documentary evidence in this case does not negate the substantial evidence of Breakell’s refusal. Therefore, there was no need for the Department to clarify anything. The Hearing Officer’s decision is not based solely upon mere whims, probabilities, guesses or caprices. Instead, at the least, the record evidence supports a reasonable foundation for the Hearing Officer’s conclusion that Breakell refused to submit to the breath test. Therefore, the Hearing Officer’s decision is supported by competent substantial evidence.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari of Karen Breakell be and hereby is **DENIED**, and the Hearing Officer’s Final Order of License Suspension be and hereby is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the
__26__ day of _____ January _____, 2011.

_____/S/_____
ALICE L. BLACKWELL
Circuit Court Judge

_____/S/_____
THOMAS B. SMITH
Circuit Court Judge

_____/S/_____
JANET C. THORPE
Circuit Court 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: 1) **William R. Ponall, Esquire**, KIRKCONNELL, LINDSAY, SNURE, YATES & PONALL, P.O. Box 2728, Winter Park, Florida 32790-2728; and 2) **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Office of the General Counsel, P.O. Box 570066, Orlando, Florida 32857 on the 26th day of January, 2011.

/S/
JUDICIAL ASSISTANT