

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

**ALICIA WORLEY,**

Petitioner,

**CASE NO.: 2011-CA-17246-O**

**Writ No.: 11-113**

v.

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

Respondent.

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Petition for Writ of Certiorari from the Florida  
Department of Highway Safety and Motor Vehicles,  
Ronald Barnes, Hearing Officer.

William R. Ponall, Esquire,  
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,  
for Respondent.

BEFORE WHITEHEAD, ARNOLD, HIGBEE, J.J.

PER CURIAM.

**FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, Alicia Worley (“Worley”), 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 suspension of her driver’s license for refusing to submit to a breath test. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

### *Findings of Facts*

As gathered from the hearing officer's findings of fact including the testimony, Arrest Affidavit, and other documents provided at the formal review hearing held on October 18, 2011 and continued on November 18, 2011, the facts were as follows: On September 16, 2011 at approximately 2:45 a.m., Officer Jose Varela with the Orlando Police Department while on patrol was approaching the intersection of S. Bumby Avenue and E. South Street directly behind the vehicle driven by Worley. When the light turned green at the intersection, Officer Varela observed the vehicle proceed forward through the intersection on the striped line. As the vehicle approached S. Bumby and E. Anderson Street, it made an eastbound turn and stayed in the far left lane. When the vehicle reached the onramp of SR 408 at Lake Underhill, the vehicle swayed inside the lane over seven times from side to side and at one point hugged the right striped lines for over twenty feet. As soon as the vehicle began to enter the onramp, the driving pattern continued for over one hundred feet. Officer Varela then conducted a traffic stop of the vehicle.

When Officer Varela made contact with Worley he immediately smelled the strong odor of impurities of an alcoholic beverage. There was also a passenger in the vehicle. Officer Varela then requested Worley's driver license and vehicle documents. Upon providing the officer with her license and an expired insurance card, Worley then sat and stared at the officer for approximately fifteen seconds until he again requested her vehicle registration. Worley admitted to consuming one drink prior to driving. Worley was then requested to exit her vehicle. As she stood, the officer observed that her eyes were extremely bloodshot and glassy and she was swaying slightly from side to side. Also, Worley was wearing a bar entry wristband. Officer Varela then conducted the horizontal gaze nystagmus ("HGN") test and observed that Worley did not exhibit smooth pursuit and that her eyes jumped at the onset of forty-five degrees.

Worley was then requested to perform the field sobriety exercises and refused to perform them. Officer Varela then informed Worley that if she refused to comply with the field sobriety exercises he would go on his prior observations. Worley still refused to perform the exercises and was then arrested and transported to the DUI Testing Center. At the DUI Center, Worley was read the Implied Consent Warning and was requested to submit to a breath test. Worley refused to submit to the breath test and her driver's license was suspended.

### *Standard of Review*

“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). “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 a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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. (2011).

### *Arguments*

In the Petition for Writ of Certiorari, Worley argues that the hearing officer's decision to sustain her license suspension was not supported by competent substantial evidence because: 1) the Arrest Affidavit failed to establish that Officer Varela had the necessary probable cause or reasonable suspicion of DUI to support a lawful traffic stop; 2) the evidence failed to establish that she was impaired by alcohol thus, Officer Varela did not have the probable cause necessary to lawfully arrest her for DUI; and 3) the documents considered by the hearing officer were in conflict as to the date of her arrest and alleged refusal to submit to a breath test.

Conversely, the Department argues that competent substantial evidence in the record supports the hearing officer's decision sustaining Worley's license suspension and that a single inconsistency found in a single document does not negate the unanimity of all the other documentary evidence.

### *Analysis*

#### *Argument I – The Traffic Stop*

Worley argues that the Arrest Affidavit failed to establish that Officer Varela had the necessary probable cause or reasonable suspicion of DUI to support a lawful traffic stop of her vehicle. Specifically, Worley argues that a vehicle weaving within its lane or temporarily leaving its lane of travel does not constitute a violation of section 316.089(1), Florida Statutes, nor does this driving pattern provide support for a lawful traffic stop unless the driving pattern affects other traffic on the roadway. Therefore, she argues that in the instant case, while the

Arrest Affidavit indicates that Officer Varela observed her vehicle weave within its lane and drive on a striped lane marker temporarily, there was no indication in the Affidavit that her driving pattern affected any traffic that was present. Thus, she concludes that the stop was not lawful based on her driving pattern.

Section 316.089(1), Florida Statutes (2011), requires that whenever any roadway has been divided into two or more clearly marked lanes for traffic a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. Officer Varela's observations of Worley's erratic driving pattern consisted of her vehicle: 1) proceeding through an intersection on the striped line; 2) when reaching the onramp of SR 408 swaying inside the lane over seven times from side to side; 3) at one point hugging the right striped lines for over twenty feet; and 4) upon entering the onramp, the driving pattern continued for over one hundred feet.

Accordingly, Officer Varela's observations of Worley's erratic driving pattern provided competent substantial evidence for the hearing officer to find that Officer Varela was justified in initiating the traffic stop having reasonable suspicion that Worley's erratic driving pattern sufficiently constituted a violation for failure to maintain driving in a single lane. Further, "the construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight, and the court generally will not depart therefrom except for the most cogent reasons and unless clearly erroneous." *Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585, 587 (Fla. 1968).

Additionally, Worley argues that the Arrest Affidavit failed to include any indication that Officer Varela believed that she was sick, injured, or impaired prior to making the traffic stop. Thus, she claims that in the absence of any such indication, the hearing officer could not properly

conclude that the traffic stop was based on a reasonable suspicion of DUI. Further, she argues that even if Officer Varela did indicate that he believed that she was impaired, the limited facts included in the Arrest Affidavit fail to establish that her driving pattern was atypical or that Officer Varela exercised reasonable caution against misinterpretation. Thus, she concludes that the facts were insufficient to establish the necessary reasonable suspicion of DUI.

These same arguments were heard at the formal review hearing and the hearing officer ruled that Worley's driving pattern constituted a basis for reasonable suspicion on the part of the officer that justified the traffic stop. Further, he found that in spite of the officer's non-articulation of his concerns, a reasonable person would consider this driving pattern sufficiently erratic to merit a brief investigatory stop.

This Court concurs with the hearing officer's ruling and finds that Officer Varela's observations of Worley's erratic driving pattern provided competent substantial evidence to support the hearing officer's finding that Officer Varela had an objectively reasonable basis to stop Worley's vehicle to determine if she was ill, tired or driving under the influence of intoxicating substances. Therefore, notwithstanding whether Worley committed a traffic infraction, her driving pattern does not have to rise to the level of a traffic infraction to justify the stop. "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992); *See Ndow v. State of Florida*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (holding that if a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and

no citation is issued and in determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances).

***Argument II – Lack of Probable Cause for Worley’s Arrest***

Worley argues that Officer Varela did not have the probable cause necessary to lawfully arrest her for DUI because the evidence failed to establish that she was impaired by alcohol. From review of the Arrest Affidavit, Officer Varela’s observations of Worley included: 1) her erratic driving pattern; 2) the strong odor of the impurities of an alcoholic beverage when Officer Varela made contact with her; 3) her difficulty with retrieving her vehicle registration document; 4) her admission to consuming one drink prior to driving; 5) her extremely bloodshot and glassy eyes; 6) swaying slightly from side to side after exiting her vehicle; 7) wearing a bar entry wristband; and 8) her lack of smooth pursuit and her eyes jumping at the onset of forty-five degrees during the HGN test.

At the formal review hearing, Worley’s counsel moved to invalidate the suspension based on insufficient signs of impairment to justify the arrest arguing that the officer did not specify where the odor of alcohol was coming from and no field sobriety exercises were performed. Thus, he argues that the general smell of alcohol, bloodshot and glassy eyes, and a sway while standing were insufficient signs of impairment. The hearing officer denied this motion finding that the totality of the officer’s observations, including Worley’s driving pattern, her difficulty producing her documents, and her physical signs of impairment were sufficient to justify her arrest.

Specifically in her Petition, Worley makes several arguments claiming that the evidence failed to establish that she was impaired by alcohol and this Court addresses each argument as follows:

1. Worley argues that the Arrest Affidavit indicated that Officer Varela observed the odor of alcohol as he approached her, not that the odor was emanating from her breath. Thus, she claims that Officer Varela's observation is equally consistent with the possibility that the odor of alcohol was emanating from the passenger in her vehicle. This Court finds that it was in the scope of review for the hearing officer as the finder of fact, not this Court, to weigh the evidence as to the odor of alcohol in making his findings.

2. Worley argues that Officer Varela did not observe her driving recklessly. This Court finds that it was reasonable for the hearing officer as the finder of fact to find that Worley's driving pattern as observed by Officer Varela was erratic/restless.

3. Worley argues that there was no evidence in the record indicating that her speech was slurred or her face was flushed and Officer Varela testified that Worley had no problems speaking. From review of the transcript from the formal review hearing, Worley misstates Officer Varela's testimony pertaining to her speech. Officer Varela did not state that Worley had no problems speaking. Instead, he stated that Worley spoke loud enough and in a fashion that he could understand what she was saying. However, notwithstanding the issue as to Worley's speech or that the Officer Varela's noted observations lacked that Worley's face was flushed, this Court finds that the totality of her signs of impairment as documented by Officer Varela provided competent substantial evidence for the hearing officer to conclude that she was impaired.

4. Worley argues that the evidence was extremely limited that she had problems with balance as Officer Varela did not note any problems with her walking or exiting the vehicle, but simply noted that he observed her swaying slightly after she exited her vehicle. Again, this Court finds that it was in the scope of review for the hearing officer as the finder of fact, not this



Court, to weigh the evidence pertaining to her swaying and the totality of her signs of impairment as documented by Officer Varela provided competent substantial evidence for the hearing officer to conclude that she was impaired.

5. Worley argues that although the Arrest Affidavit indicated that she had bloodshot eyes and admitted to having one drink and these factors could be evidence of impairment, these factors are also consistent with an individual being tired. Again, this Court finds that it was in the scope of review for the hearing officer as the finder of fact, not this Court, to weigh this evidence in making his findings.

6. Worley argues that her alleged refusal to perform field sobriety exercises should not have been considered by the hearing officer in determining whether there was probable cause for her arrest because she was not told that there would be an adverse consequence for her refusal to perform the exercises. This Court concurs with Worley that an individual's refusal to perform field sobriety exercises should not be considered by a hearing officer unless there is evidence that the law enforcement officer advised the individual that there would be an adverse consequence for that refusal. *Smart v. Department of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 867a (Fla. 9th Cir. Ct. 2006). However, Officer Varela did advise Worley that if she refused to do the exercises, he would go on his prior observations. Thus, the hearing officer as the finder of fact was in the best position to determine whether Officer Varela sufficiently advised Worley of the consequences of her refusal to perform the exercises. Further, notwithstanding whether Officer Varela sufficiently advised Worley of the consequences, the hearing officer's decision to sustain her license suspension was based upon the totality of Officer Varela's observations. Lastly, even if the hearing officer erred in considering Worley's refusal to submit to the exercises, the error was harmless due to the several signs of impairment that

provided competent substantial evidence in support of the hearing officer's decision to sustain Worley's license suspension. *Id.*

7. Worley argues that the facts in the Arrest Affidavit concerning the HGN test results should not have been considered by the hearing officer unless there is evidence that the law enforcement officer administering and interpreting the results of the exercise is an expert witness qualified to do so and no such evidence was presented in this case. At the formal review hearing, Worley's counsel argued this issue when moving to invalidate the license suspension and the hearing officer denied the motion. The record is silent as to whether Officer Varela was qualified to conduct the HGN test. Accordingly, the hearing officer may have erred by not striking the HGN test results. However, the error was harmless due to the several other signs of impairment that provided competent substantial evidence in support of the hearing officer's decision to sustain Worley's license suspension.

### ***Argument III - Discrepancies in the Evidence***

Worley argues that there was an unexplained discrepancy concerning the date when the alleged events occurred and when she was arrested for DUI. She makes this claim because the date of March 16, 2011, instead of September 16, 2011, is stated in the beginning portion of the narrative in the Arrest Affidavit. She concludes that there was no testimony to clarify this discrepancy therefore, competent substantial evidence was lacking in support of the hearing officer's decision to sustain her license suspension.

At the hearing, Worley's counsel moved to invalidate the suspension based on this discrepancy. The hearing officer denied this motion finding that the discrepancy was a harmless scrivener's error because the only time that the date of March 16, 2011 was stated in the Arrest

Packet was once in the body of the narrative and the date of September 16, 2011 was consistently stated in on every other document in the packet, including in the header of the Arrest Affidavit.

This Court concurs with the hearing officer's ruling and finds as follows: From review of the documents in the record, the March 16, 2011 date is only stated once. The date of September 16, 2011 is stated several times in the Arrest Affidavit including as the document date, arrest date, and booking date in the top portion of the first page before the narrative; at the top of page two before the narrative; and in both notary portions at the bottom of both pages of the Arrest Affidavit. In addition, the September 16, 2011 date is stated in the DUI Citation and throughout the Affidavit of Refusal to Submit to Breath Test.

Further, the hearing officer's responsibility as the finder of fact is to resolve any conflicts in the evidence and determine by a preponderance of the evidence that sufficient evidence exists to sustain a license suspension. Accordingly, the hearing officer was privileged to assign greater weight to the date of arrest listed in the remainder of the Arrest Affidavit and the remaining record documents and to determine that the discrepancy in the Arrest Affidavit did not rebut the competent substantial evidence demonstrating September 16, 2011 as the date when Worley was stopped, detained, arrested, read the implied consent warnings, and refused to submit to the breath test.

In support of her argument, Worley relies on the case, *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). However, *Trimble* is distinguishable from the case at hand. In *Trimble*, a sworn statement relating the sequence of events was lacking and the documents admitted as evidence presented a "hopeless conflict" because they equally supported two inconsistent conclusions as to the time when the motorist refused to take the

breath test. Thus, in *Trimble*, competent substantial evidence was lacking to support the hearing officer's finding that the warning had preceded the refusal.

This Court also concurs with the Department in their Response that a single inconsistency found in a single document does not negate the unanimity of all the other documentary evidence and, unlike in *Trimble*, in the instant case the March 16, 2011 date stated in the Arrest Affidavit was the only inconsistency. *Breakell v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 445a (Fla. 9th Cir. Ct. 2011) (holding that neither *Trimble* nor any other case from this Court suggests that a single inconsistency found in a single document serves to negate the unanimity of all other documentary evidence).

Lastly, as the Department correctly points out, although Worley claims it was error to affirm her license suspension without sworn testimony explaining the inconsistency, the Department must only explain inconsistencies in documentary evidence when those discrepancies give equal support to inconsistent inferences. *Id.* Accordingly, there was no need for the Department to explain the inconsistency as it did not give equal support to inconsistent inferences.

### ***Conclusion***

Based on the foregoing, procedural due process was followed, the hearing officer followed the essential requirements of the law, and there was competent substantial evidence to support the hearing officer's findings and decision. "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Alicia Worley's Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 26th day of April, 2013.

/S/ \_\_\_\_\_  
**REGINALD K. WHITEHEAD**  
Circuit Judge

/S/ \_\_\_\_\_  
**C. JEFFREY ARNOLD**  
Circuit Judge

/S/ \_\_\_\_\_  
**HEATHER L. HIGBEE**  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **William R. Ponall**, Snure & Ponall, P.A., P.O. Box 2728, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 [kingibbs@flhsmv.gov](mailto:kingibbs@flhsmv.gov) on this 26th day of April, 2013.

/S/ \_\_\_\_\_  
Judicial Assistant