

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

ANA MANCINI,
Petitioner,

**CASE NO.: 2011-CA- 8974-O
WRIT NO.: 11-60**

v.

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

Respondent.

Petition for Writ of Certiorari.

William R. Ponall, Esquire and
Warren W. Lindsey, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel
for Respondent.

BEFORE O’KANE, WHITEHEAD, ARNOLD, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Ana Mancini (“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 suspension of her driver’s license. 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 Fact

As gathered from the hearing officer's findings, the arrest affidavit, testimony, the video, and other related documents provided at the formal review hearing, the facts were as follows: On May 18, 2011 at 3:30 a.m., the Orange County Sheriff's Office received a "man down" call in reference to an unconscious driver in the drive-thru of Steak 'n' Shake. Window employee Witness O'Neill stated that the female driver, later identified as Petitioner, placed an order but failed to move to the pick-up window. Witness O'Neill yelled at Petitioner to get her attention, but there was no response. Two to three minutes passed before the vehicle behind Petitioner's vehicle began honking due to the blocked drive-thru lane. Witness O'Neill then called 911 at which point Petitioner awoke, moved to the pick-up window, and stated "Sorry, I'm too drunk to understand".

Deputy Stephen Williams arrived first on the scene. Dispatch had advised him that Petitioner was having a medical issue while in the drive-thru lane. Upon arrival he observed the window employee point at Petitioner's vehicle which was still in the drive-thru lane. Petitioner's vehicle then accelerated failing to stop at the stop sign before traveling onto Semoran Boulevard. Deputy Williams observed the vehicle cross all three lanes before turning north. The vehicle then straddled the solid white divider line for the two inside lanes. Deputy Williams observed the vehicle stop for a red light at a 30 degree angle across the lane divide with its front tires on the stop bar. The vehicle kept inching forward and once the light was green the vehicle hesitated before continuing on. Deputy Williams then conducted a traffic stop. He asked Petitioner if she was okay and she replied "yes". Petitioner handed Deputy Williams her license and he asked her if she

needed help. She replied asking him if he needed her license and registration, although she had already given him her license. Deputy Williams then issued Petitioner a citation for failing to stop at the stop sign.

Deputy Robert Lockman then responded to the “man-down” call and made contact with Petitioner. He asked her to exit the vehicle to ensure she was okay. Petitioner stumbled, caught herself on the door, and dropped her phone. Petitioner told Deputy Lockman that she was not having a medical emergency. She said she had been downtown celebrating a friend’s birthday. Deputy Lockman observed that she swayed while standing and he could smell the distinct odor of alcoholic impurities.

Based on his observations, training, and experience, Deputy Lockman believed that Petitioner was driving while her normal faculties were impaired. He asked her to consent to perform the field sobriety exercises and she agreed to do so. Petitioner admitted that she consumed two drinks and one shot. She swayed side to side during the HGN. She had difficulty keeping her balance while the instructions for the walk and turn were given and she stepped from position twice. She failed to touch heel to toe on every step and raised her arms for balance. While performing the one leg stand, she swayed, raised her arms for balance, hopped to maintain her balance, and put her foot down twice.

At the conclusion of the exercises Deputy Lockman placed Petitioner under arrest for DUI and placed her in the patrol car. Once the paperwork was done, Deputy Lockman reentered the patrol car and smelled the distinct and obvious odor of an alcoholic beverage within the car. Petitioner was transported to the Orange County Breath Testing Center where the 20 minute observation was conducted. Deputy Lockman then read the implied

consent warnings to Petitioner and she agreed to provide two samples of her breath. The breath test results were .119 and .121. (*See analysis and findings portion of this order that addresses the video recording of the colloquy that transpired at the Breath Testing Center.*) Deputy Lockman issued Petitioner a notice of license suspension for driving with an unlawful alcohol level.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on June 15, 2011. On June 20, 2011, the hearing officer entered a written order denying Petitioner's motion and sustaining her driver's license suspension. Petitioner now seeks certiorari review of this order.

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).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In cases where the individual's license is suspended for an unlawful breath-alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2011).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's decision to sustain her license suspension was a departure from the essential requirements of the law because she submitted to a breath test after being misadvised of the consequences of doing so. Therefore, Petitioner argues that her decision to submit to the breath test was not voluntary.

Conversely, the Department argues that the hearing officer properly sustained the suspension of Petitioner's driver's license where there was competent and substantial evidence to support her decision. Also, the Department argues that because Petitioner voluntarily agreed to submit to a breath test, it is immaterial as to when the implied consent was read, how it was read or if it was ever read at all. Therefore, the Department claims that the analysis does not begin with having to show that consent was freely and voluntarily given. Since consent is implied, or in other words presumed, the real question is whether Petitioner did anything to withdraw such consent, which, the Department argues, in the instant case there was not evidence thereof. In other words, it is not a matter of "informed consent" but implied consent."

Court's Analysis and Findings

At the formal review hearing Petitioner moved to invalidate her license suspension based on the DVD video recorded at the Orange County Sheriff's Office Breath Testing

Center as evidence that she was misadvised as to the consequences of submitting to the breath test. Accordingly, the video was entered into evidence and the portion of the video relevant to Petitioner's motion was reviewed by the hearing officer. Based on the review of the video, the hearing officer on page four and five of her order denied the motion and stated:

I have reviewed all record evidence and find that Ms. Mancini already knew the consequences of taking the breath test and was informed by the Deputy as to what the consequences were of refusing to submit to the breath test. The Breath video clearly shows that the Implied Consent Warnings were read. Ms. Mancini asked if she has to blow into something. She is advised by BTO Denson that the deputy is asking her if she will take a breath test or not. Ms. Mancini then states "and if I deny, I'm not saying here, but if I pass, or if I take the test and fail it's six months, but if I pass it, then what happens?" Deputy Lockman advises her that "It's up to the Judge's discretion". I find that he [sic] continued conversation provided no misinformation to Ms. Mancini.

In certiorari review, this Court cannot reweigh the evidence considered by the hearing officer nor determine whether or not the hearing officer made the right 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 et al., 794 So. 2d 1270, 1276 (Fla. 2001); *see also Dep't of Highway Safety & Motor Vehicles v. Marshall*, 848 So. 2d 482 (Fla. 5th DCA 2003) (where the Fifth District Court of Appeal ruled that the circuit court misapplied the law by reweighing evidence on the issue of whether the driver was misled and confused as to her right to speak with an attorney prior to submitting to the breath test and where there was evidence that supported the administrative determination

that the driver was properly informed of the penalties for refusal before refusing to submit to the breath test).

In the instant case, the hearing officer's decision was supported by Deputy Lockman's arrest affidavit and testimony, Deputy Williams' incident report, the testimony from breath test operator Travis Denson, the breath alcohol test affidavit, the agency inspection report, and the video. Also, Petitioner did not appear and testify at the formal review hearing and did not provide any additional documents (other than the authenticity letter for the video) to rebut the record evidence.

In addition, the implied consent law only requires that the licensee be informed of the consequences of refusing to submit to the breath test, not of the consequences of taking the test. *Patel v. Dep't of Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly Supp. 395a (Fla. 13th Cir. Ct. March 13, 2009). This Court has reviewed the video and the transcript from the formal review hearing and finds that the hearing officer, in her order, provided a sufficient account of the relevant portions of the colloquy between Petitioner, Deputy Lockman, and the breath test operator, Travis Denson. In the video it is clear that Deputy Lockman read Petitioner the implied consent warning correctly including the consequences of refusing to submit to the breath test. Further, the information he provided to Petitioner about the consequences of submitting to the breath test was not coercive nor did it include false promises, unlike the cases Petitioner cites, where the defendants were told that they could obtain hardship licenses if they submitted to the breath test.

Therefore, the hearing officer's findings from the evidence including the video were reasonable and this Court will not depart from them. "It suffices to say that it is well settled that 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 there from except for the most cogent reasons and unless clearly erroneous." *Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585, 587 (Fla. 1968).

Accordingly, this Court finds that Petitioner was provided due process of law and the hearing officer's decision to sustain Petitioner's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 7th day of February, 2012.

/S/

JULIE H. O'KANE
Circuit Court Judge

/S/

REGINALD K. WHITEHEAD
Circuit Court Judge

/S/

C. JEFFERY ARNOLD
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 **William R. Ponall, Esquire and Warren W. Lindsey, Esquire**, Kirkconnell, Lindsey, Snure and Ponall, P.A., P.O. Box 2728, Winter Park, Florida 32790 and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 8th day of February, 2012.

/S/
Judicial Assistant