

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

**STANLEY ELLIS,**

**CASE NO.: 2013-CA-000592-O  
WRIT NO.: 13-4**

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES, BUREAU OF DRIVER  
IMPROVEMENT,**

Respondent.

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

Matthews R. Bark, Esquire,  
for Petitioner.

Richard M. Coln, Assistant General Counsel,  
for Respondent.

BEFORE MURPHY, APTE, and THORPE, J.J.

PER CURIAM.

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

Petitioner, Stanley Ellis (“Ellis”) 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 his 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 of fact from the record evidence presented at the formal review hearing on December 13, 2012, the facts are summarized as follows: On November 11, 2012, at approximately 1:20 a.m., Officer Boyadjiev with the Ocoee Police Department responded to assist Sergeant Bousquet with a traffic stop. Sergeant Bousquet stated that he had been stopped by a driver and passenger who informed him that the vehicle in front of them was driving all over the road and driving on the wrong side of the road. Sergeant Bousquet stated that he caught up to the subject vehicle and observed it travel north in the southbound lane of Ocoee Apopka Road for approximately 100 feet before switching to the right lane. Sergeant Bousquet observed that after another 100 feet, the vehicle switched back, traveling north in the southbound lane. The vehicle then drove straight toward another vehicle that was turning left onto Ocoee Apopka Road. The other driver then came to a stop to avoid a head-on crash and the subject vehicle darted into the right lane.

At that point, Sergeant Bousquet conducted a traffic stop and the driver was identified as Ellis. Sergeant Bousquet stated that Ellis appeared confused and unstable. Ellis also mumbled and held out his wallet; this same thing happened three more times. Further, Sergeant Bousquet stated that Ellis' speech was slurred and his eyes were glassy and bloodshot.

Officer Boyadjiev then met with Ellis and asked him to exit his vehicle. Officer Boyadjiev observed that Ellis had difficulty exiting the vehicle, had an orbital sway of 4-5 inches, his eyes were bloodshot and glassy, and he smelled the strong odor of an alcoholic beverage coming from Ellis. Officer Boyadjiev also observed that Ellis spoke with slurred speech and repeated his questions before answering them. When asked for his license, Ellis fumbled in his wallet and said they took it, but he did not say who they were.

The Miranda rights were then read and Ellis agreed to talk and perform the field sobriety exercises. Ellis initially stated he had 6 drinks, then 4, then 2. During the exercises, Ellis performed poorly, had difficulty maintaining his balance, and was unable to complete the exercises as instructed. Ellis also stated that he had dinner in Mount Dora and was headed home to Apopka, but he did not know how he ended up in Ocoee.

Ellis was then placed under arrest for DUI and transported to the DUI Center where the 20 minute observation was conducted and the Implied Consent Warnings were read. A breath test was requested. Ellis failed to provide two valid breath samples because he did not follow instructions as he kept blowing through his nose and not through his mouth. During the first cycle no sample was provided. During the second cycle Ellis blew registering volume not met (0.227). Ellis' actions were deemed a refusal and Officer Boyadjiev issued Ellis a notice of license suspension for refusing to submit to the breath test.

### ***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. 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. (2012).

### *Arguments*

In the Petition, Ellis argues: 1) There is not competent substantial evidence in the record to support the Hearing Officer's ruling that his actions were deemed a refusal based on his failure to provide two valid samples collected within 15 minutes of each other producing results within .020g/210L," and thus, the Hearing Officer failed to observe the essential elements of the law; 2) The Hearing Officer failed to provide him due process and failed to observe the essential requirements of law when she failed to rule on the motion raised by his counsel that he recanted his refusal to take the breath test; and 3) The Hearing Officer failed to observe the essential requirements of law when she failed to apply the law as set forth in *Larmer v. Dep't of Highway Safety & Motor Vehicles*, 522 So. 2d 941 (Fla. 4th DCA 1988) and *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692 (Fla. 5th DCA 1994).

Conversely, the Department argues that Ellis was afforded due process, the Hearing Officer followed the essential requirements of the law, and competent substantial evidence in the record supported the Hearing Officer's decision. Specifically, the Department argues that: 1) Ellis' argument that he did not refuse to submit to breath testing because he was not given 15

minutes in which to provide two samples, is without merit because his failure to follow the officer's instructions and to provide two valid breath samples was properly construed as a refusal and 2) Ellis' argument that he recanted his refusal is without merit because it is made in an effort to have this Court improperly reweigh evidence and to reach a different conclusion from the Hearing Officer's conclusion.

### *Analysis*

First, this Court addresses Ellis' argument that the Hearing Officer did not follow the essential requirements of the law when ruling that Ellis' actions constituted a refusal of the breath test due to his failure to provide two valid samples collected within 15 minutes that was not supported by competent substantial evidence. At the formal review hearing, Ellis' counsel moved to invalidate the license suspension arguing that Ellis was not given a full 15 minutes to provide his breath samples. In support of this argument Ellis' counsel provided the Breath Test Center DVD (DE #1) and the Breath Test Operator Course Manual (DE #2). Ellis did not appear and testify at the hearing. Upon review of the DVD and manual, the testimony from the breath test operator, Jimmy Burke, and the other record evidence, the Hearing Officer in her Order denied the motion finding:

DE#2, page 17, Objective 4.1, provided by counsel, describes what is needed for an approved breath test. I find nowhere in the document where it indicates the subject of the breath test is to be given 15 minutes to provide 2 valid breath samples. DE#2, page 25, Refusal to Submit to Breath Test, 4.6 describes refusal criteria and a section called "what if's". After a careful review of the record evidence, BTO Jimmy Burke's testimony and the DVD, I find that Ellis was deemed a refusal based on his failure to provide 2 valid samples collected within 15 minutes of each other producing results within 0.020g/210L. Ellis provided no breath on his first try before the instrument timed out. On his second try Ellis did not give an adequate sample; his was VNM (0.227). It is obvious from the DVD that Ellis was read the Implied Consent Warnings, he was provided with instructions before and during the test, he was advised that the test was timed, he was advised of the consequences of the refusal, and he made no effort to provide two valid samples. BTO Burke states on the video that during the first attempt

Ellis was blowing all of his air out onto Burke's hand and he was breathing in and out of his nose; he made no effort to provide a breath sample. On the second attempt, Ellis again fails to follow instruction; he does not form a tight seal on the mouthpiece and continues to breathe in and out of his nose. For a brief second you hear the tone, but Ellis stops. Ellis is told to keep the tone going and keep blowing, but he does not. After the instrument times out again, Officer Boyadjiev calls the refusal. I find that based on Ellis' actions the refusal was called and the refusal is valid.

This Court finds that Rule 11D-8.002(12), Florida Administrative Code, is applicable to this case as it defines an approved breath alcohol test as follows:

Approved Breath Alcohol Test - a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

From the plain meaning of Rule 11D-8.002(12), this Court concurs with the Hearing Officer and the Department in its Response, that there is no requirement that a person submitting to a breath test be given 15 minutes before a refusal may be called. The time frame only pertains to the requirement that a minimum of 2 breath-alcohol samples be taken within 15 minutes of each other. Further, the testimony provided by the breath test operator, Jimmy Burke, confirmed that the Rule did not provide that Ellis had 15 minutes to take the test. *Calabro v. State*, 995 So. 2d 307, 314 (Fla. 2008) (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla.1984) and explaining that courts must first examine the actual words used in the statute or rule to determine the plain meaning of those words and assuming that the plain meaning of the words used can be determined, courts are bound to apply that plain meaning to resolve legal disputes that involve the application of the statute or rule); *State v. D.C.*, 114 So. 3d 440, 441-442 (Fla. 5th DCA 2013) (also citing *Holly v. Auld* and explaining that when the statutory language is clear and

unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; thus, the statute must be given its plain and obvious meaning). Accordingly, in the instant case, the Hearing Officer properly followed the essential requirements of the law i.e. the applicable statutes and the Florida Administrative Code, specifically Rule 11D-8.002(12), and her findings were supported by competent substantial evidence including the Arrest Affidavit, Incident Report, Breath Alcohol Test Affidavit, Refusal Affidavit, Breath Test Center DVD, and the testimony from the breath test operator, Jimmy Burke.

Next, this Court addresses Ellis' argument that the Hearing Officer failed to provide him due process and failed to observe the essential requirements of law when she failed to rule on the motion raised at the hearing by his counsel that he recanted his refusal to take the breath test. This argument is based on Ellis' statement "Do I get another chance?" that he made at the DUI Center. In support of this argument, Ellis' counsel provided the case, *Larmer v. Dep't of Highway Safety & Motor Vehicles*, 522 So. 2d 941, 944 (Fla. 4th DCA 1988) (holding that the defendant, could, after refusing to take breathalyzer test, rescind that decision and avoid a penalty for the refusal, where the retraction of the initial refusal came moments after the refusal and while he was continuously in the presence of police officer and no inconvenience would result by permitting him immediately thereafter to take the test).

In the instant case, the Hearing Officer also denied this motion finding:

Giving Ellis a third opportunity to provide a breath sample would not have mattered; his first sample was NSP — No Sample Provided, his second sample was VNM— Volume Not Met 0.227. If he had been provided with the opportunity to take a third sample it would still not have been a valid test based on the definition provided above. Based on a review of the DVD, and the reasons listed above in the first ruling, I find that Ellis did not follow instructions and by his actions he refused to provide two valid breath samples.

As the Department in its Response correctly argues, that unlike in *Larmer*, Ellis' statement can be subject to several interpretations. For example, instead of a recantation, Ellis' statement could have been a question as to whether or not the testing was complete. Thus, interpreting Ellis' statement involves a question of fact and it was the duty and privilege of the Hearing Officer as the finder of fact to determine whether or not Ellis' statement was a valid recantation. *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d at 695 (explaining that the hearing officer was in the best position to evaluate the evidence and the witness and to make the determination about the nature of Satter's rescission; also distinguishing *Larmer* and holding that the driver's attempted rescission of her initial refusal to submit to the blood-alcohol test was equivocal, and therefore, driver's license was properly suspended).

Further, contrary to Ellis' argument, this Court finds that the Hearing Officer did review Ellis' statement and determined that Ellis' did not validly recant his refusal as revealed in the Hearing Officer's findings stated above, specifically that Ellis did not follow instructions and by his actions he refused to provide two valid breath samples. Therefore, as with the other argument, the Hearing Officer's findings as to this argument also followed the essential requirements of the law and was supported by competent substantial evidence including the facts revealed in the Arrest Affidavit, Incident report, Breath Alcohol Test Affidavit, Refusal Affidavit, Breath Test Center DVD, and the testimony from the breath test operator, Jimmy Burke. *Dep't of Highway Safety & Motor Vehicles v. Dean*, 662 So. 2d 371, 372-373 (Fla. 5th DCA 1995) (holding that as the finder of fact, the hearing officer had competent evidence of the refusal notwithstanding Dean's testimony that he had recanted and the hearing officer was not obliged to accept the licensee's testimonial claim of consent in the face of the officer's sworn report that consent had been refused).



***Conclusion***

Based on the foregoing, this Court finds that Ellis was provided due process and the Hearing Officer's decision to sustain his license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence. Because the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decision, this Court's review cannot go further to reweigh the evidence presented and as long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this 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, Stanley Ellis' Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, on this 22nd day of May, 2014.

/S/  
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**ALAN S. APTE**  
**Circuit Judge**

THORPE, J., concurs.

MURPHY, J., dissents with opinion.

MURPHY, J., dissenting.

The Hearing Officer erred as a matter of law in determining that the driver's conduct constituted a refusal instead of a recantation. While it is true that the driver's comments are subject to several interpretations, the Department has the burden of proof at the administrative

hearings, and that proof has to be based upon facts known to exist, not speculation or guesses. The officer could have very clearly cleared up any confusion by asking the driver what he meant. Secondly, the Hearing Officer erred as a matter of law in concluding that a third attempt to provide a sample is meaningless because had the third sample been a sufficient sample, a fourth sample could have been obtained and had that sample been within 15 minutes of the third sample, the driver would have submitted a valid breath sample. Therefore, I respectfully dissent.

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Matthews R. Bark, Esquire**, Richardson & Bark, PLLC, 126 East Jefferson Street, Orlando, Florida 32801 and **Richard M. Coln, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles-Legal Office, P.O. Box 570066, Orlando, Florida 32857, on this 22nd day of May, 2014.

/S/  
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Judicial Assistant