

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

**XIA XIANG SHI,**

**CASE NO.: 2013-CA-010413-O**

Petitioner,

**WRIT NO.: 13-69**

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,  
Isabel Gibson, Hearing Officer.

Kendell K. Ali, Esquire, for Petitioner.

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

BEFORE J. RODRIGUEZ, SHEA, and LATIMORE, J.J.

PER CURIAM.

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

Petitioner, Xia Xiang Shi (“Shi”) 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 from the testimony, the ICJIS Arrest Affidavit, Statement, and other related documents presented at the formal review hearing on July 3, the facts are summarized as follows: On June 4, 2013, at approximately 2:30 a.m., Officer Umid Rakhimov and Officer Michael Favorit, Jr. with the Orlando Police Department were traveling northbound on Garland Avenue. As they approached the intersection at South Street passing the green light they observed a vehicle, later identified as being driven by Shi, traveling eastbound at a high rate of speed, running the red light, and invading their lane of travel. Officer Rakhimov testified that he had to swerve westbound on South Street to avoid a collision with Shi's vehicle. Also, Officer Favorit testified that as they passed the intersection he observed that the light was red for Shi and that he heard the patrol vehicle's tires screech when Officer Rakhimov swerved to avoid a collision with Shi's vehicle.

Based on his observations, Officer Rakhimov then initiated the traffic stop and Shi's vehicle stopped at the railroad crossing. Upon making contact with Shi, Officer Rakhimov observed that Shi had red, bloodshot, and watery eyes and smelled of alcohol impurities coming from his breath. Based on his observations, Officer Rakhimov suspected that Shi was under the influence of alcohol and then contacted Officer Gerald Hutto to conduct the DUI investigation.

When Officer Hutto arrived on the scene Officer Rakhimov and Officer Favorit informed him of the reason for the stop and their observations and contact with Shi. Officer Hutto testified that when he arrived at the scene the train was still passing and the traffic was stopped in both directions. When Officer Hutto made contact with Shi he observed him sitting in the driver's seat and that he had glassy and red eyes. Officer Hutto also detected an odor of

alcoholic beverages emanating from Shi's breath as he spoke. Believing that Shi may be impaired coupled with his driving pattern, Officer Hutto asked Shi to exit the vehicle and to speak with him further. When Shi exited the vehicle Officer Hutto observed that he was unsteady on his feet and had an orbital sway while walking. Shi also admitted that he consumed alcoholic beverages prior to driving. Officer Hutto informed Shi about the reason for the stop. When asked medical questions, Shi informed the officer that he did not have medical injuries that would prevent him from performing the field sobriety exercises and that he was taking hydroxy-cut, vitamins, and protein shakes that would not impair him. When requested, Shi agreed to submit to the field sobriety exercises and performed the exercises poorly by not following instructions.

At that point, Shi was placed under arrest for DUI and transported to the DUI center. At the DUI center, Shi was observed for the 20 minute period, read the Implied Consent Warning, and requested to submit to the breath test. Shi then requested to consult with an attorney. In response, Officer Hutto read him the decision from the Third District Court of Appeal finding that there is no right to speak with a lawyer.<sup>1</sup> Shi refused to submit to the breath test and his privilege to operate a motor vehicle was suspended. In addition to DUI, Shi was cited for a violation of a traffic control device.

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<sup>1</sup> Although the name of the case for the Third District Court of Appeal decision referred to in Officer Hutto's Arrest Affidavit is not cited in the record, this Court notes the case, *State v. Hoch*, 500 So. 2d 597 (Fla. 3d DCA 1986) (holding that a person has no Sixth Amendment right-to-counsel before being required to submit to a breath test and the results of such test are physical evidence and not testimonial; thus, a suspect has no Fifth Amendment right to consult with an attorney prior to deciding whether to submit to the 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-alcohol 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. (2013).

### *Arguments*

Shi argues that the Hearing Officer frustrated his attempt to cross-examine Officer Rakhimov, Officer Favorit, and Officer Hutto thereby departing from the essential requirements of law by depriving his right to due process of law. Conversely, the Department

argues that Shi was afforded administrative due process, the administrative review adhered to the essential requirements of section 322.2615, Florida Statutes, and the Hearing Officer's Order affirming Shi's license suspension is supported by competent substantial evidence. The Department also argues that remand for a new hearing is the only proper remedy if this Court finds any error in the administrative hearing that was held.

### *Analysis*

#### *Shi's Argument addressing the Cross-Examination of Officer Rakhimov*

Shi's argument first addresses the cross-examination of Officer Rakhimov at the formal review hearing on July 3, 2013. When Shi's counsel questioned Officer Rakhimov about Shi's driving pattern and the environment surrounding his driving, the Hearing Officer interjected and ordered the officer not to answer certain questions as not being relevant and then released the officer from the subpoena. Shi claims that had he been given the opportunity to cross-examine Officer Rakhimov further, he would have elicited testimony as to the timing of the officer's observations, the totality of the circumstances surrounding the incident, the duration in which the citation was purportedly issued, and further observations made of him. In the Hearing Officer's Order she addresses the motion to invalidate the suspension based on this argument and denied the motion stating: "Counsel was advised on the relevance of the questions asked to the witness. Counsel spent a considerable amount of time on one witness with irrelevant questions. In addition, counsel was advised on the time limitations of the hearing several times."

From review of the transcript of the hearing, Shi's counsel cross-examined Officer Rakhimov at length about the events and his observations leading up the traffic stop including his observations of Shi's driving pattern, the intersection where the incident occurred, the

officer's driving speed, the officer's actions in avoiding the collision, information about the railroad tracks area, and the distance between the railroad tracks and the subject intersection. The questioning then progressed to the events and the officer's observations after the traffic stop was made. During the cross-examination, the officer stated that Shi told him that he was coming from 180, a local club. The questioning progressed further and when asked more questions about whether it was a busy night, when do the clubs let out, and how long he has been downtown, the Hearing Officer told the officer not to answer the questions as they were not in the scope of review. Shi's counsel responded that the questioning went to the officer's credibility. The Hearing Officer then released the officer from the subpoena and the cross-examination of Officer Rakhimov ended.

Pursuant to section 322.2615(6)(b), Florida Statutes (2013), a hearing officer has the authority to perform certain functions at the formal review hearing including examining witnesses, taking testimony, receiving relevant evidence, and regulating the course and conduct of the hearing. Further, a hearing officer as the finder of fact has discretion as to determining the relevance of the evidence including the testimony presented. From review of the hearing transcript, as the hearing progressed the Hearing Officer did inform Shi's counsel about the hearing time remaining. Also, from review of the cross-examination of Officer Rakhimov, Shi was provided ample opportunity to question the officer at length as to his observations and events leading to the stop and DUI investigation. Further, even if the Hearing Officer erred by stopping the cross-examination, such error would be harmless because the information Shi's counsel was unable to elicit from Officer Rakhimov, he was able instead, to elicit from Officer Favorit's testimony. Specifically, during the cross-examination of Officer Favorit, the colloquy addressed the downtown area, the bars, the time

the bars and clubs let out, crowd enforcement, the intersection, the slow night, whether the roadway was slow or busy, and the roadway's speed limit.

***Shi's Argument addressing the Cross-Examination of Officer Favorit***

Next, Shi argues that the Hearing Officer erred by pointing out certain statements and evidence to Officer Favorit to facilitate his answers during cross-examination. From what this Court can discern from the hearing transcript, Shi's argument derives from a portion of the cross-examination of Officer Favorit when the following colloquy ensued:

Shi's counsel: Okay. And how long had you been on duty that night?

Officer Favorit: What time was it?

Shi's counsel: I don't know. That might be a measurement. Are you able to do that?

Hearing Officer: That's out of line. Don't answer that.

Shi's counsel: What? I'm sorry, are you pointing it out for the officer?

Hearing Officer: Yeah.

Shi's counsel: You, the impartial hearing officer, are pointing this information out on the evidence for the officer?

Hearing Officer: Yes.

Shi's counsel: Okay.

Hearing Officer: It's also listed over here.

Shi's counsel: You are pointing to it one more time as well as circling the exhibit; is that correct?

Hearing Officer: Yes.

Shi's counsel: Okay.

At that point, the colloquy progressed to questions about how long Officer Favorit's shift was. It appears from the record that the Hearing Officer was pointing to the exhibit and circling the time in order to assist the witness to testify as to time of the event. This "pointing and circling" practice is not one that a neutral and impartial hearing officer should employ. Thus, this Court finds that the Hearing Officer's action as to the cross-examination of Officer Favorit was improper.

*Shi's Argument addressing the Cross-Examination of Officer Hutto*

Lastly, Shi argues that the Hearing Officer erred by not providing him an opportunity to finish his cross-examination of Officer Hutto. From review of the hearing transcript, Shi's counsel cross-examined Officer Hutto at length. However, during the portion of the cross-examination when Shi's counsel was questioning Officer Hutto about Shi's performance of the field sobriety exercises, the Hearing Officer interjected and informed Shi's counsel that he had ran out of time as the allotted one hour for the hearing had expired and there was someone else scheduled for hearing after Shi's hearing. Shi's counsel then objected for the record. The Hearing Officer then informed Shi's counsel that his choices were to make his motions quickly or request a continuance and that the subpoena would be kept open for Officer Hutto to come back to testify further. Ultimately, at the end of the hearing, the Hearing Officer stated that she would allow for the hearing to be continued to July 19, 2013 within the permit period and leave the subpoena in effect for Officer Hutto, providing that counsel file a motion to continue.

On July 5, 2013, Shi's counsel filed a motion to continue. Oddly, also on July 5, 2013, the Hearing Officer called counsel's office stating that her supervisor told her that she cannot continue the hearing for further cross-examination of Officer Hutto and that a hearing



would be held on July 8, 2013 to only hear Shi's arguments. This phone call was followed up with a faxed copy of the new hearing date sent by the Hearing Officer. According, at the hearing on July 8, 2013, only Shi's arguments were heard and the Hearing Officer did not state anything as to the reasons why she was not allowed to have Officer Hutto testify further. Also, there is nothing else in the record to clarify this change in plans.

This Court finds that because Officer Hutto was the officer who conducted the DUI investigation, made the arrest, and was with Shi at the DUI center, Shi should be provided the opportunity to cross-examine Officer Hutto further. Thus, due to this evidentiary error it is necessary that this case be remanded for a new hearing for further cross-examination of Officer Hutto. *Lillyman v. Dep't of Highway Safety and Motor Vehicles*, 645 So. 2d 113, 114 (Fla. 5th DCA 1994)(holding that the hearing officer erred by limiting the cross-examination of the arresting officer and also holding that remand for another administrative hearing was the proper remedy when there has been an evidentiary error by the Department in an administrative hearing).

### ***Conclusion***

In conclusion, this Court finds that the Hearing Officer, by interjecting herself into the proceedings in the questioning of Officer Hutto, cast a pall of bias over the entire proceeding and, notwithstanding that the issues as to the cross-examination of the other officers, Officer Rakhimov and Officer Favorit were less severe, this Court finds that in the interest of due process and Shi's entitlement to a fair hearing, that remand for a new hearing including all witnesses *de novo* is warranted. Further, this Court suggests that to avoid the appearance of impropriety in this case, the new hearing on remand should be assigned to a different hearing officer.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Xia Xiang Shi's Petition for Writ of Certiorari is **GRANTED**; the Hearing Officer's Final Order of License suspension is **QUASHED**; and this case is **REMANDED** for further proceedings consistent with this opinion.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, on this 13th day of March, 2014.

/S/ \_\_\_\_\_  
**JOSE R. RODRIGUEZ**  
**Presiding Circuit Judge**

SHEA and LATIMORE, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **Kendell K. Ali, Esquire**, Jaeger & Blankner, 217 E. Ivanhoe Blvd., N., Orlando, Florida 32804 and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, FL 32857, on this 14th day of March, 2014.

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