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

HEATHER MOORE, CASE NO.: 2016-AP-10

Petitioner,

vs.

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

Respondent.

_____/

Petition for Writ of Certiorari Jurisdiction from the Department of Highway Safety and Motor Vehicles,
L. Danforth, Hearing Officer.

Matthew J. Olszewski, Esquire, for Petitioner.

John V. McCarthy, Esquire, Acting General Counsel, and Jason Helfant, Esquire, Senior Assistant General Counsel, for Respondent.

Before WEISS, TENNIS, and SHEPARD, JJ.

PER CURIAM.

Petitioner Heather Moore ("Moore") seeks certiorari review of her driver's license suspension for refusing to submit to a lawful breath test pursuant to section 316.193, Florida Statutes. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c)(3); § 322.31, Fla. Stat. (2016); § 322.2615, Fla. Stat. (2016).

On January 14, 2016, at approximately 1:50 a.m., Kissimmee Police Officer Forney ("Forney") observed Moore in the driver's seat of a running vehicle which was hung up on a construction barrier, with one end of the vehicle off the ground. He further observed that Moore was texting on her phone at the time. When Forney asked what happened, she responded, "people

are stupid," and "well, my boyfriend's stupid, it's his fault." After she refused to perform the sobriety exercises, she was arrested for Driving Under the Influence and issued a Uniform Traffic Citation for careless driving and a Notice of Suspension for refusing to submit to a breath, blood, or urine test pursuant to section 322.2615, Florida Statutes. Forney also executed an Affidavit of Refusal to Submit to Breath, Urine, or Blood Test, a DUI Charging Affidavit indicating Moore was informed of the Implied Consent Warning, and a DUI Administrative Suspension Form.

Moore requested a formal review of the license suspension pursuant to section 322.2615(1)(b)(3), Florida Statutes (2013). At the February 16, 2016 hearing, several documents were admitted into evidence, including: Florida DUI Uniform Traffic Citation 3453-XFF; Florida DUI Uniform Traffic Citation A1UKWUP; Refusal Affidavit; Breath Alcohol Test Affidavit; Agency Inspection Report; and the Kissimmee Police Department DUI Charging Affidavit.

Forney testified that when he came into contact with Moore, her vehicle was caught on a barrier and a tow truck was needed to remove it. He further testified he did not know exactly where she was coming from but assumed Moore was attempting to make a u-turn on John Young Parkway when she was caught on the barrier. After Moore exited the vehicle and began speaking to Forney, he noticed the odor of alcohol. When he asked her to perform the sobriety exercises, she refused, he arrested her and issued a Notice of Suspension for refusal to submit to the breath, blood, or urine tests.

Although Moore did not testify, call any witnesses, or introduce any evidence at the hearing, her counsel ("counsel") argued Moore never admitted she was driving or was in actual control of the vehicle; the vehicle was not operable; and during her conversation with Forney, she explained that the crash was her boyfriend's fault. Counsel also argued the refusal affidavit was improperly notarized.

On February 25, 2016, the hearing officer issued her Findings of Fact, Conclusions of Law and Decision sustaining the suspension of Moore's driver's license.

In a certiorari proceeding, the circuit court 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).

Because Moore's license was suspended for failure to submit to the breath, blood, or urine test, the hearing officer had to determine whether the following elements were 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. (2016). *See also Dep't of Highway Safety & Motor Vehicles v. Swegheimer*, 847 So. 2d 545, 546 (Fla. 5th DCA 2003) (scope of circuit court's review is limited to determining whether agency accorded procedural due process and observed the essential requirements of the law, and whether administrative findings and judgment were supported by competent substantial evidence).

A formal review hearing "may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test."

§ 322.2615(11), Fla. Stat. (2016). *See also Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, 516–17 (Fla. 5th DCA 2006) (issues in hearing on refusal to submit to breath test could be resolved based on the documents submitted therein); *Dep't of Highway Safety & Motor Vehicles v. Stewart*, 625 So. 2d 123, 124 (Fla. 5th DCA 1993) (burden of proof in hearing on refusal to take blood alcohol test was by preponderance of the evidence and submission of law enforcement officer's written report to hearing officer is enough to sustain burden; accordingly, "This places on the suspendee the burden to call all witnesses, including the arresting officer, in order to rebut the state's *prima facie* case."); *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994) (determination by preponderance of evidence that arresting officer had probable cause to arrest Satter, she was lawfully arrested, she refused to submit to a blood-alcohol test, and she was informed her license would be suspended if she refused the test, could be "made without witnesses testifying on behalf of DHSMV . . . If these elements are present, the hearing officer must sustain the suspension.").

However, any evidence "contrary to the agency's decision is outside the scope of the inquiry . . . 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. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001). *See also Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30, 32 (Fla. 1st DCA 1997) (circuit court must review agency order under standard of competent substantial evidence and is prohibited from weighing or reweighing evidence); *Miami-Dade Cty. v. Reyes*, 772 So. 2d 24, 28 (Fla. 3d DCA 2000) (circuit court cannot "re-weigh or re-evaluate the evidence presented at the administrative hearing or substitute its judgment for that of the agency.").

Moore argues the hearing officer departed from the essential requirements of law in sustaining her license suspension because the record is devoid of any competent evidence showing

she was driving and/or in actual physical control of an operable vehicle, and that she was impaired at the time. Specifically, she argues neither Forney's testimony nor the Charging Affidavit indicated anyone observed her driving or in control of an operable vehicle and the "only evidence of anything" was Forney's testimony that he observed her sitting in the driver's seat of a running vehicle lodged on a barrier. Moore contends she never admitted she was driving the vehicle before it became inoperable and both Forney and the hearing officer ignored her statement about her boyfriend, even though there was no evidence to the contrary. She also contends Forney's assumption that she drove the vehicle to this particular location "is based on literally no evidence in the records;" the statutory implied consent contained in section 316.1932(1)(a), Florida Statutes, does not apply because the vehicle was inoperable; and, it was not her burden to explain how she wound up on the barrier. Moore did not address her alleged refusal to submit to the breath test.

The Department of Highway Safety and Motor Vehicles, Division of Driver's Licenses ("Department") alleges counsel's argument was not evidence and Forney's affidavits, which were admitted into evidence, constituted competent substantial evidence to support a determination that Moore was driving a motor vehicle and/or in control of one in violation of section 316.193, Florida Statutes.

Because Moore did not challenge her refusal to submit to the breath test during the formal hearing, the hearing officer's inquiry was limited to whether Forney had probable cause to believe Moore was driving and/or in actual physical control of a vehicle while under the influence of alcoholic beverages and whether he read the Implied Consent Warning to her.

§ 322.2615(7)(b), Fla. Stat. (2016).

The inquiry of this Court, then, is limited to whether the hearing officer's findings of probable cause and proper execution of the Implied Consent Warning were supported by competent substantial evidence. *Smith,* 687 So. 2d at 33. Probable cause exists "where the facts

and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) (citation omitted). "That an intoxicated defendant has operated a vehicle on a public street is often proved only by circumstantial evidence." *State v. Boynton,* 556 So. 2d 428, 430 (Fla. 4th DCA 1989). *See also Griffin v. State,* 457 So. 2d 1070, 1071 (Fla. 2d DCA 1984) (sufficient circumstantial evidence existed to show defendant had operated vehicle on public street where he was found intoxicated in driver's seat of car sitting stationary in traffic lane with engine stopped and keys in ignition).

Additionally, it is not the State's burden to prove that a vehicle "is capable of operation as an element of the offense of being in actual physical control of a vehicle while being intoxicated." *Jones v. State,* 510 So. 2d 1147, 1148 (Fla. 1st DCA 1987). Instead, "operability is a factor to be considered when deciding whether a person was in actual physical control of a vehicle." *Id*. at 1149. *See also Fieselman v. State,* 537 So. 2d 603, 607 (Fla. 3d DCA 1988)
(evidence that keys are in vehicle's ignition is merely a factor to be considered in the determination of driving/being in control of an operable vehicle; however, such evidence does not inexorably lead to conclusion that defendant was in actual physical control).

In the instant case, the hearing officer found that on January 14, 2016, Forney observed a vehicle lodged on a two-foot construction barrier. The front tires of the vehicle were airborne while the rear tires rested on the ground, and Forney observed Moore seated in the driver's seat of the running vehicle. When Forney made contact with Moore and asked her how the vehicle came to rest on the barrier, she stated, "people are stupid" and "my boyfriend is stupid. It's his fault." Forney noticed Moore's eyes were watery, glassy, and bloodshot, her breath had an odor of the

impurities of alcohol, and she exhibited a swaying/weaving motion. When Forney asked her to submit to a series of Field Sobriety Exercises, she refused. After she was placed under arrest and the Implied Consent Warning was read to her, she refused to provide two valid breath samples and thus was placed under lawful arrest.

The hearing officer further found that: even though the vehicle was lodged on a barrier wall and no longer operable, it was operable at the time of the crash and Moore provided no other explanation as to how she became stuck on the barrier. Additionally, Forney was sworn in at the beginning of the hearing and testified Moore was read the Implied Consent Warning and refused to submit to a breath test; and the Charging Affidavit indicated the Implied Consent Warning was read and Moore refused to provide a breath sample. Accordingly, there was competent substantial evidence to support a finding that Moore refused to submit to a lawful breath test.

The foregoing circumstantial evidence excludes any reasonable hypothesis that Moore was not driving and/or in actual physical control of the vehicle. *Lukas v. State,* 627 So. 2d 123 (Fla. 5th DCA 1993) (where only proof of guilt is circumstantial, conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence). Forney observed Moore sitting in the driver's seat of a running vehicle which was obviously operable prior to the time it ended up on a barrier and no other individuals were found at the scene or in the immediate area who could have been driving the vehicle at the time of the crash. *See e.g., Silva*, 206 at 554 (facts and circumstances would lead reasonable man to believe respondent was driving motorcycle found lying on road shoulder next to him); *Boynton,* 556 So. 2d at 428 (evidence supported conviction for DUI despite claim that vehicle was inoperable, where it was stuck in ditch with defendant in driver's seat when police arrived and there was no evidence that anyone other than defendant was near scene or had been driving); *Baltrus v. State,* 571 So. 2d 75, 76 (Fla. 4th DCA

1990) (defendant's upright position behind wheel, as opposed to lying down in front seat of car, is important part of calculus in determining actual physical control of vehicle).

Based on the foregoing, the Court finds the hearing officer's order sustaining Moore's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Moore's Petition for Writ of Certiorari Jurisdiction is **DENIED.**

DONE AND ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on the 27th day of December 2016.

/S/
KEVIN B. WEISS
Presiding Circuit Judge

TENNIS AND SHEPARD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Order was furnished to **Jason Helfant, Esquire, Senior Assistant General Counsel**, Department of Highway Safety and Motor Vehicles – Legal Department, P. O. Box 540609, Lake Worth, Florida 33454-0609 at jasonhelfant@flhsmv.gov; and **Matthew J. Olszewski, Esquire, Counsel for Petitioner**, 200 E. Robinson Street, Suite 1150, Orlando, Florida 32801 at matt@flduigroup.com on the 27th day of December 2016.

/S/
Judicial Assistant