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

MATTHEW SLOTT APPELLATE CASE NO: 2015-CA-5396-O

Petitioner,
vs.

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles

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Jason Helfant, Esq.
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Attorney for Respondent

Before TYNAN, TRAVER, JORDAN, JJ.

PER CURIAM.

Matthew Slott ("Petitioner") seeks certiorari review of an Order entered by the Department of Highway Safety and Motor Vehicles ("Department") sustaining his driver license suspension for driving with an unlawful blood-alcohol level. We have jurisdiction. *See* § 26.012(1), Fla. Stat. (2018); Fla. R. App. P. 9.030(c)(3). For the reasons discussed herein, we deny the instant Petition.

BACKGROUND

Following the Petitioner's arrest for driving under the influence, he requested a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes

(2018). The formal review hearing was held for that purpose on May 11, 2015, and the Department hearing officer who presided over the case made the following findings of fact in a written Order:

> On April 4, 2015, at approximately 2:04 a.m., Officer S. Chandler and Officer A. Santana were dispatched to West Colonial Drive and North Garland Avenue in reference to a crash where a black Chevrolet Tahoe, bearing Florida tag number CWQ C532, had struck a cement light pole and came to rest at the railroad tracks.
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> Officer Santana completed a crash investigation and began to engage in conversation with the driver later identified as Matthew Edward Slott. Officer Santana believed the Petitioner was impaired based on his demeanor, an orbital sway, his unsteadiness, his glassy eyes, and the odor of the impurities of alcohol coming from his mouth. Officer Santana conduced a criminal DUI investigation. He informed the Petitioner of his *Miranda* rights. The Petitioner admitted consuming 5 cocktails prior to crashing his Tahoe and that he had been at Venue 578, downtown. When asked, on a scale of zero (sober) to ten (passed out drunk), where would be rate himself, the Petitioner said 3.
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> Upon completion of Field Sobriety Exercises, Horizontal Gaze Nystagmus, the Walk and Turn, and the One Leg Stand, the Petitioner was placed under arrest for DUI and transported to the Breath Alcohol Testing Facility where he was read the Implied Consent Warning, observed for twenty minutes, and consented to the breath test. The results were: 0.169 at 3:51 a.m. and 0.185 at 3:54 a.m. Based on the foregoing, the Petitioner was placed under lawful arrest for driving under the influence and his driving privileges were suspended.

At the hearing, the arrest affidavit completed by Officer Andy Tran was the only document which included any factual recitation of what occurred prior to the Petitioner being arrested for DUI – none of the officers were present to testify. The arrest affidavit set forth the following:

> On 4/4/2015, at approximately 0204 hours, Officer S. Chandler 19189 and I, Officer A. Tran responded to West Colonial Drive and N Garland Avenue in reference to a crash. (2015-137191). There was a black SUV Chevrolet Tahoe bearing FL tag#CWQC52 which appeared to have struck a cement light pole with the front passenger side of the vehicle and came to a rest of [sic] the railroad tracks. During my investigation I determined that the driver of the vehicle which crash was Matthew Slott, identified by his FL drivers license.
>
> During my crash investigation I observed signs of impairment from Slott. He stood with an orbital sway, stumbled towards me to engage in conversation, his eyes were glassy, and I could smell the impurities of alcohol coming from Slott's breath.

During the crash investigation, Officer Chandler gave [sic] an Orlando Police crash card and a Johnson's Wrecker business card. I asked Slott if he received those cards to which he replied no. I walked Slott back over to Officer Chandler where he stated he had provided him with the cards. He had to dig in his pockets looking for the cards. He found the cards in his wallet where he had apparently placed them. Slotts vehicle needed to be towed so I asked him for his keys. He removed the keys to the vehicle from his front right pocket. I pushed the unlock button to ensure that the keys matched the vehicle. Slott was issued a UTC #A1J6LAP for failure to maintain a single lane.

I completed my crash investigation and began to engage in conversation with Slott again. I advised Slott that I would not [sic] be conducting a criminal DUI investigation. I informed Slott of the *Miranda* warning from my department issued *Miranda* card. He provided the following post-*Miranda* testimony:

I asked Slott:
Are you wearing contacts? Yes.
Are you sick or injured? No.
Are you diabetic or epileptic? No.
Have you ever had a head injury? No.
On a scale of 0-10, 0 being sober and 10 being passed out drunk, where would you rate yourself? 3.
Do you have any illnesses or health problems that I need to know about? No, I'm in perfect health.
How many drinks did you have? 5 cocktails.
Where were you before you crashed the Tahoe? Venue 578, downtown.

While I spoke with Slott, he leaned against a hand rail to maintain his balance.
I gave Slott instructions to check for HGN. Slott stated he understood the instructions and did not have any questions. During the exercises I noticed the following:

1. Equal tracking and pupil size but lack of smooth pursuit.
2. An onset of nystagmus prior 45 degrees.
3. Nystagmus at maximum deviation.
4. Had difficulty following stimulus with eyes.

I next gave instructions for the walk and turn exercise. Slott understood the instructions and did not have any questions. During the exercise I observed the following:

1. Lost his balance in the starting position.
2. Raised his arms laterally while stepping for steps 1,2,3.
3. Did not touch heel to toe on most of the steps.
4. Stepped off the line on steps 3,4,6,7,9.
5. Stepped off the line of [sic] steps 2,3,5 on the return steps.

> I next gave instructions for the one leg stand. Slott understood the instructions and did not have any questions. During the exercise, I observed the following:
>
> 1. He raised his hands for counts 1001-1008.
> 2. He did not raise his foot approximately 6 inches off the ground. It almost hovered over the ground.
> 3. He lost his balance twice.
> 4. He had an orbital sway.
> 5. He did not look at the elevated foot.
> 6. He counted to 1015 at 30 seconds.
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> Based on my observation, I placed Slott under arrest for DUI. I transported Slott to the DUI testing center where I read [him] the implied consent warning after the observation period. Slott agreed to the breath test and provided two samples of 0.169 at 0351 hours and 0.185 at 0354 hours. Slott was issued a DUI citation #9034-XFE. Slott was transported to BRC without incident.

Additionally, Brett Coleman, a Breath Tech Operator employed by the Orange County Sheriff's Office, testified that he administered a breath test to the Petitioner and observed the Petitioner for twenty minutes at the Breath Alcohol Testing Facility. The following documents were also entered into evidence at the hearing: Florida DUI Uniform Traffic Citation #9034-XFE, Petitioner's Florida Driver's License, Uncertified Copy of Petitioner's Driving Record, Orlando Police Department Witness Form, Breath Alcohol Test Affidavit dated April 4, 2015, and Agency Inspection Report or Intoxilyzer #80-001255, dated March 20, 2015. The Petitioner moved to invalidate his license suspension, arguing that the documentary evidence before the Department hearing officer failed to establish that there was probable cause to believe that he was driving or in actual physical control of a motor vehicle. The Department hearing officer reserved ruling.

On May 13, 2015, the hearing officer issued an Order, wherein she determined by a preponderance of the evidence that sufficient cause existed to sustain the Petitioner's driver's license suspension. The Petitioner seeks timely review of the hearing officer's Order.

STANDARD OF REVIEW

On first-tier certiorari review of agency action, a circuit court must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001). This Court may not reweigh the evidence or substitute its judgment for that of the agency, for it is the Department hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Dep't of Highway Safety and Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989) (citation omitted). Instead, this Court's function is to review the record to determine whether the decision is supported by competent substantial evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'r*, 794 So. 2d 1270, 1273-75 (Fla. 2001); *see also Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093-94 (Fla. 2003). Competent substantial evidence is defined as such relevant evidence as a reasonable person would accept as adequate to support the findings and decision made. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

The Florida Supreme Court has recently emphasized the "close review" a circuit court must conduct in reviewing the Department's decision to sustain a license suspension for DUI, as compared to first-tier review of other administrative hearings: "[a] court conducting section 322.2615 first-tier certiorari review faces constitutional questions that do not normally arise in other administrative review settings," in that the court must conduct "a Fourth Amendment analysis of whether there was reasonable suspicion to stop the vehicle or probable cause to believe that the driver was in physical control of the vehicle while under the influence of alcohol." *Wiggins v. Dep't of Highway Safety and Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017). As such,

probable cause sufficient to justify an arrest 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 and Motor Vehicles v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995) (quoting *City of Jacksonville v. Alexander*, 487 So. 2d 1144, 1146 (Fla. 1st DCA 1986). Furthermore, "the facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which conviction must be based." *Id.* (quoting *State v. Riehl*, 504 So. 2d 798, 800 (Fla. 2d DCA 1987). Instead, probable cause is a conclusion drawn from reasonable inferences drawn from an arrestee's actions that support the officer's conclusion. *State v. Cote*, 547 So. 2d 993, 995 (Fla. 4th DCA 1989).

STAUTORY BACKGROUND

Section 322.2615 provides for the suspension of one's driving privilege for DUI. Specifically, the statute authorizes a law enforcement officer to suspend one's driving privilege when that person is driving or in physical control of a vehicle and has a blood or breath alcohol level of .08 or higher. Alternatively, a law enforcement officer may also suspend the driving privilege of one who refuses to submit to a urine, breath, or blood-alcohol test. § 322.2615(1)(a), Fla. Stat. (2018). If the driver refuses to perform a lawfully requested urine, breath, or blood test, the officer must notify the driver that his or her license will be suspended for a year, or eighteen months if the driver has previously had his or her license suspended for failure to submit to such tests. § 322.2615(1)(b)1.a. Section 322.2615 is to be read *in pari materia* with section 316.1932, *Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1076 (Fla. 2011), as revised on denial of rehearing (Nov. 10, 2011), a statute which provides that the requested

sobriety tests "must be incidental to a lawful arrest" and that the officer must have "reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages." § 316.1932(1)(a)1.a., Fla. Stat. (2018). Once the license is suspended, the driver may request review by the Department through an administrative hearing before the Department within ten days after issuance of the notice of suspension. § 322.2615(1)(b) 3. The statute further provides that the review hearing will essentially function as a trial before the Department:

> Such formal review hearing shall be held before a hearing officer designated by the department, and the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents [submitted for review], regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension.

§ 322.2615(6)(b).

During a formal review hearing for license suspension for driving with an unlawful blood-alcohol level or breath-alcohol level of .08 or higher, the hearing officer is limited to the following issues, which must be established by a preponderance of the evidence[1]:

> 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; and
>
> 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). The hearing officer's authorization to determine the "lawfulness of the stop" is built into the provision of the essential element of whether probable cause existed. *Wiggins*, 209

[1] "Proof by a preponderance of the evidence means proof which leads the Hearing Officer to find that the existence of a contested fact is more probable than its nonexistence." *Smith v. State*, 753 So. 2d 703, 704 (Fla. 5th DCA 2000) (citations omitted).

So. 3d at 1167 (citation omitted). Finally, the hearing officer's decision may be reviewed by an Article V judge or judges in a circuit court by a writ of certiorari. § 322.2615(13).

DISCUSSION

The single contention presented in the instant Petition is that the hearing officer's decision to sustain the Petitioner's license suspension was not supported by competent substantial evidence to support a finding of probable cause that the Petitioner was driving or in actual physical control of a motor vehicle. For the reasons explained below, we find that there was competent substantial evidence to support the hearing officer's decision to sustain the suspension of the Petitioner's driving privilege; thus, the hearing officer's decision was in accordance with the essential requirements of law.

The Petitioner argues that the documentary evidence, specifically the arrest affidavit, failed to provide any factual support that he was driving or in actual physical or control of the motor vehicle at the time of the crash and how Officer Andy Tran came to that conclusion because it only tells the reader **when** Officer Andy Tran discovered that the Petitioner was driving or in physical control of the vehicle, but fails to set forth **how** Officer Andy Tran determined that the Petitioner was driving or in physical control of the vehicle. He argues that there is no evidence in the affidavit that Officer Andy Tran or any other officer ever observed the Petitioner driving or inside the vehicle involved in the crash. He cites to the case of *Skinner v. State*, 31 So. 3d 940, 942-44 (Fla. 1st DCA 2010) for the proposition that an officer's observation of an individual near a motor vehicle that was recently involved in a traffic crash, without more, is insufficient to establish reasonable suspicion or probable cause to believe that the individual was driving the vehicle. As such, he asserts that the Department hearing officer's decision is not supported by competent

substantial evidence that there was probable cause to believe that he was driving or in actual physical control of the vehicle.

The Department asserts that the record evidence, specifically the arrest affidavit, provided competent substantial evidence to support the hearing officer's conclusions that the arrest was lawful. It argues that the facts and circumstances surrounding the incident, as outlined in the arrest affidavit, would lead a reasonable man to believe that the Petitioner was operating the vehicle while impaired. Importantly, it contends that probable cause to arrest the Petitioner for DUI was established because Officer Andy Tran personally conducted the traffic crash investigation. Thus, it asserts that the hearing officer satisfied all procedural due process requirements and observed the essential requirements of law throughout the administrative process because she based the individual findings and final determination to sustain the Petitioner's suspension on competent substantial evidence.

A DUI is a misdemeanor offense under Florida law. *See* Sections 316.193(2)(a), 775.08(2), 901.15(1), Fla. Stat. (2018). Generally, a law enforcement officer may only make a warrantless misdemeanor arrest when the officer has actually witnessed commission of the offense. *See* Section 901.15, Florida Statutes (2018). Pursuant to section 316.645, Florida Statutes (2018), however, a "police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash." Thus, a warrantless arrest at the scene of a traffic accident for misdemeanor DUI is the exception to the general statutory requirement that an officer can only make a warrantless misdemeanor arrest if the offense is committed in his presence. *See State v. Hemmerly*, 723 So. 2d 324, 325 (Fla. 5th

DCA 1999) (a police officer is authorized to arrest when based on his or her personal investigation at the scene of a traffic crash, the officer has reasonable and probable grounds to believe that a driver has committed the misdemeanor crime of DUI).

Probable cause for an arrest may be based on circumstantial evidence and common sense inferences coupled with the general knowledge and experience of the officer. *See Dep't of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) ("Generally, probable cause sufficient to justify an arrest 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 offence has been committed."). The State may satisfy its burden to prove the lawfulness of a DUI arrest by a preponderance of the evidence by simply submitting the arresting officer's written report, as was done in the instant case. *See Dep't of Highway Safety & Motor Vehicles v. Dean*, 662 So. 2d 371, 372-73 (Fla. 5th DCA 1995) ("By statute, [determination of whether a preponderance of the evidence supports probable cause for an arrest] may be made based on the written documents and reports generated by law enforcement.").

We have previously held that "[w]hile it is permissible that a review hearing can be conducted on documentary evidence alone, the documentary evidence nevertheless must make it clear how the arresting officer arrived at his or her conclusions supporting probable cause, rather than merely reciting conclusions without reciting factual support for the conclusions." *Roberts v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 27a (Fla. 9th Cir. Ct. 2005), *cert. denied*, 938 So. 2d 513 (Fla. 5th DCA 2006). We find that the arrest affidavit here was more than adequate to support the hearing officer's findings. The uncontested record shows that the Petitioner was involved in a single car crash in which the Petitioner's Chevrolet Tahoe struck a

cement light pole and then came to rest on the railroad tracks. There is no evidence that the Petitioner had a passenger or that there were any other people at the scene who could have driven the Petitioner's vehicle. The record sets forth that Officer Andy Tran personally investigated the crash and determined that the Petitioner was the driver of the crashed vehicle. The arrest affidavit states that the Petitioner had the keys to the crashed vehicle in his front right pocket, which Officer Andy Tran used to unlock the vehicle. The Petitioner also voluntarily stated post-*Miranda* that he had consumed five cocktails and his impairment level was at a 3 out of 10. Additionally, Officer Andy Tran asked the Petitioner where he was before he crashed the Tahoe, to which the Petitioner stated that he was at Venue 578 in downtown. This statement alone provided Officer Andy Tran with probable cause to place the Petitioner behind the wheel because he admitted in his answer that he crashed the Tahoe. As such, there was record evidence establishing that the Petitioner had been in actual physical control of the motor vehicle at the time of the crash. Importantly, the Petitioner exhibited various indicia of impairment, as outlined above in the arrest affidavit. The instant Petition does not allege that these indicators of impairment were not supported by competent substantial evidence, nor was there any possibility that this record evidence could be stricken from consideration. We find that the facts and circumstances surrounding the crash would lead a reasonable man to believe that the Petitioner was driving the crashed vehicle while under the influence of alcohol.[2]

Our prior decision in *Perry-Ellis v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 942a (Fla. 9th Cir. Ct. 2006) provides guidance as it also involved a traffic crash that did not occur in the presence of law enforcement officers. There, we held that the officer's

[2] We reiterate that "[p]robable cause sufficient to justify an arrest exists where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Sosnowski v. State*, 245 So. 3d 885, 888 (Fla. 1st DCA 2018) (citation omitted).

investigation, including his personal observations of Perry-Ellis after the accident where she exhibited slurred speech, unsteady gait, and an inability to perform the field sobriety exercises, constituted competent substantial evidence to find that she was driving the vehicle while under the influence. Moreover, no other person was present at the scene with Perry-Ellis with actual or physical authority over the vehicle that was involved in the crash. Thus, we held that even without Perry-Ellis' admission, the reasonable inferences from the facts and circumstances of the case were sufficient to place her in apparent control of her vehicle.[3] *See also State v. Benyei*, 508 So. 2d 1258, 1259 (Fla. 5th DCA 1987) (holding that, although the vehicle may have been inoperable at the time the officer arrived at the scene, the circumstantial evidence was sufficient for the jury to find that the defendant was driving while intoxicated when her car went off the highway onto a median).

The arrest affidavit in the instant case provided ample factual support for Officer Andy Tran's probable cause determination. This Court's review of the record indicates that the hearing officer's decision to sustain the suspension of the Petitioner's driving privilege is supported by competent substantial evidence and was in accordance with the essential requirements of law.

[3] *See also Dep't of Highway Safety and Motor Vehicles v. Silva*, 806 So. 2d 551, 554 (Fla. 2d DCA 2002) (circumstances surrounding the accident together with the officer's observations provided ample probable cause for the driver's DUI arrest); *Reis v. Dep't of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 382a (Fla. 9th Cir. Ct. 2013) (holding that the hearing officer's determination that there was probable cause for DUI investigation was supported by evidence that the crash was caused by driving into a concrete wall, the officers' observations that the petitioner had an orbital sway, slurred speech, odor of alcohol, and glassy eyes, and the petitioner's poor performance on the field sobriety exercises coupled with noted indicators of impairment provided probable cause for arrest and request for breath test); *White v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 469a (Fla. 9th Cir. Ct. 2013) (holding that a witness's statement identifying the petitioner as the driver at time of the crash and the officer's testimony that there were no other persons involved in the crash and that the crashed vehicle was registered and insured under the petitioner's name constituted competent substantial evidence that the petitioner was driving the vehicle when it crashed. Additionally, evidence that the petitioner staggered and stumbled, had difficulty retrieving documents and answering simple questions, had slurred speech, was unable to stand or walk on own, and had an odor of alcohol were competent evidence that the petitioner was under the influence of alcohol); *Morgan v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 96g (Fla. 9th Cir. Ct. 2012) (holding that competent substantial evidence supported the hearing officer's determination that the arresting trooper had probable cause to believe the petitioner was in actual physical control of vehicle where the witness to the crash described the petitioner as the driver of the SUV involved in the crash and reported that the petitioner had been taken to the hospital, the SUV was registered to the petitioner, the trooper found the petitioner at the hospital with injuries, there was no evidence that the petitioner was at the hospital for any reason other than injuries from the crash, and there was no evidence that the petitioner was a passenger rather than the driver of the SUV).

Where competent substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency's determination. *Cohen v. Sch. Bd. of Dade Cnty.*, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). The hearing officer, as the trier of fact, was responsible for resolving any conflicts in the evidence and was free to weigh and reject any testimony, as long as that decision was based on competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Wiggen*, 152 So. 3d 773, 776 (Fla. 5th DCA 2014). It is not this Court's task to reweigh evidence presented to the hearing officer, evaluate the pros and cons of conflicting evidence, and reach a conclusion different from that of the agency. *Id*. Accordingly, the Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Orlando, Orange County, Florida this _____day of June, 2019.

/S/_____
GREG A. TYNAN
Presiding Circuit Judge

TRAVER and JORDAN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order has been furnished to **William R. Ponall, Esq.**, Attorney for Petitioner, **Snure & Ponall, P.A.**, 425 W. New England Ave., Ste. 200, Winter Park, Florida 32789; and **Jason Helfant, Esq.**, Attorney for Respondent, **Office of the General Counsel, Department of Highway Safety and Motor Vehicles**, P.O. Box 540609, Lake Worth, Florida 33454, this _____ day of June, 2019.

/S/_____
Judicial Assistant