IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA12-2499
DIVISION: 55

BARBARA L. FRIEND,
Petitioner,

vs.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Barbara Friend seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the hearing officer of the Bureau of Administrative Review, Florida Department of Highway Safety and Motor Vehicles ("DHSMV") entered on November 21, 2012. The decision of the hearing officer affirmed the order of suspension of the driving privilege of Petitioner. This Court, having considered the briefs of the parties, as well as their oral arguments, finds as follows:

Statement of Case

Petitioner was arrested for driving under the influence of alcohol or drugs on December 18, 2011 by Sgt. Robert Lindsay of the St. Johns County Sheriff's Office. Petitioner's driving privilege was immediately suspended pursuant to section 322.2615(1), Florida Statutes, due to her refusal to submit to a breath test, and a notice of suspension was issued to the Petitioner. As permitted by section 322.2615(6), Florida Statutes, Petitioner requested a formal review of her driver's license suspension. A formal review hearing was held on November 16, 2012, by a hearing officer employed by the DHSMV. At the hearing, counsel for Petitioner sought to

invalidate the administrative suspension of Petitioner's driver's license and presented argument to the hearing officer. On November 21, 2012, the hearing officer issued an order affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.

Jurisdiction

Pursuant to sections 322.2615(13) and 322.31, Florida Statutes, Petitioner seeks review of the hearing officer's order affirming the suspension of her driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Fla. R. App. P.

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't. of Highway Safety and Motor Vehicles v. Trimble*, 821 So.2d 1084, 1085 (Fla. 1st DCA 2002). The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Id.* The Court's certiorari review power does not allow the Court to direct the lower tribunal to take any action, but rather is limited to the Court quashing the order being reviewed. *See Tynan v. Dep't of Highway Safety and Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005).

Analysis

Petitioner claims that the hearing officer's determination that the breath test refusal in this case was lawfully obtained is not supported by competent substantial evidence and does not comport with the essential requirements of law. Petitioner's argument focuses on the timing of the request that she submit to a breath test in relation to the time of her arrest, and whether there

was competent substantial evidence upon which the hearing officer could determine that the request that Petitioner submit to a breath test occurred subsequent to her arrest.

Section 316.1932, Florida Statutes provides:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has 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 ... The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests....

Fla. Stat. § 316.1932(1)(a)1.a.

Section 316.1932 and Florida case law require that a lawful arrest for driving or being in actual physical control of a motor vehicle while under the influence of alcoholic beverages *precede* administration of a breath test. *See Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304, 305-06 (Fla. 5th DCA 2008)("thus, a lawful arrest must precede the administration of the breath test"). *See also, Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011); *Dep't of Highway Safety and Motor Vehicles v. Whitley*, 846 So. 2d 1163 (Fla. 5th DCA 2003). If a driver refuses a breath test after a lawful arrest and the reading of the Implied Consent Warning by the requesting officer, the individual's driver's license may be suspended for a period of one year in the case of a first refusal. Fla. Stat. § 316.1932(1)(a)1.a.

In this case, the Respondent does not dispute that the law requires that the request to submit to a breath test must follow a lawful arrest; rather, the main issue is whether there was competent substantial evidence for the hearing officer to find that Petitioner was arrested prior to being requested to submit to a breath test and being read the Implied Consent Warning. A proper determination of this issue is imperative because Florida law does not provide for the suspension of an individual's driving privilege for refusal to submit to a breath test prior to a lawful arrest.

Petitioner argues that though some of the documents submitted to the hearing officer are contradictory and do not establish whether her arrest occurred prior to the request that she submit to a breath test, Sgt. Lindsey's testimony before the hearing officer provides clarification of the chronology of events in this case in a manner contrary to the hearing officer's findings.

In *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, the Third District Court of Appeal examined the meaning of competent substantial evidence stating,

> competent evidence is evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.' Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred.

857 So.2d 202, 204 (Fla. 3d DCA 2003)(quoting *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957)). In *Trimble*, the First District Court of Appeal recognized that "the substantial evidence rule is not satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent inferences." 821 So.2d at 1087 (quoting *Fla. Rate Conference v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So.2d 601, 607 (Fla. 1959)).

The exhibits admitted into evidence at the hearing below were: (1) Florida DUI Uniform Traffic Citation and Notice of Suspension, citation number 9381-XBK, (2) St. Johns County Sheriff's Office Probable Cause Affidavit, (3) Affidavit of Refusal to Submit to Breath, Urine, or

Blood Test (hereinafter "Refusal Affidavit"), (4) Traffic Warning Citation, 017719-WN, (5) St. Johns County Sheriff's Office Offense Report, (6) Impound of a Motor Vehicle form, and (7) a transcript of the driver's record. The hearing officer also heard testimony from Sgt. Lindsey.

The Probable Cause Affidavit indicates that Petitioner was arrested at 10:21 p.m. The Refusal Affidavit indicates that the time of arrest was 10:22 p.m. and that St. Johns County Deputy Timothy Robertson requested Petitioner to submit to a breath test and read the Implied Consent Warning at 10:22 p.m. The Offense Report indicates that the Implied Consent Warning was given at 10:22 p.m. The narrative in the Offense Report completed by Sgt. Lindsey states,

> Dep. Tim Robertson, who observed the tasks read implied consent to Mrs. Friend, who refused to submit to the breath test. I arrested Mrs. Friend and transported her to the St. Johns County Jail.

The documentary evidence support inconsistent inferences pertaining to the sequence of the Implied Consent Warning, the refusal to submit to a breath test, and the arrest. One inference, drawn from the Probable Cause Affidavit and Refusal Affidavit, is that Petitioner was arrested at 10:21 p.m. and given her Implied Consent Warning and refused the breath test a minute later. However, Sgt. Lindsay's Offense Report creates the inference that the Petitioner was read her Implied Consent Warning and refused the breath test prior to her arrest.

In three cases cited by the Petitioner, each of the courts determined that an officer's affidavit or narrative relaying the sequence of events was sufficient to clear up any discrepancy in the documents submitted to the hearing officer and the hearing officer did not depart from the essential requirements of the law in relying on such affidavit or narrative as competent substantial evidence that the request for a breath test occurred at the appropriate time. *See Soles v. Dep't. of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Cir. Ct. Sept. 22, 2008); *Jones v. Dep't. of Highway Safety and Motor Vehicles*, 3 Fla. L. Weekly

Supp. 534c (Fla. 7th Cir. Ct. Jan. 26, 1995); *Butler v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 543a (Fla. 13th Cir. Ct. Feb. 11, 2013). As in *Soles, Jones*, and *Butler*, Sgt. Lindsey's narrative contains a statement of the sequence of events that occurred on December 18, 2011; however, unlike those cases, the hearing officer's finding is not supported by the sequence of events provided by Sgt. Lindsey.

In *Trimble, supra.,* the DHSMV sought second tier certiorari review of a circuit court's order quashing a hearing officer's order upholding a driver's license suspension, where the documents demonstrated a conflict regarding whether that Petitioner was given Implied Consent Warnings before or after her refusal to submit to a breath test. The circuit court's conclusion that there was not competent substantial evidence to support the hearing officer's findings, based on conflicts in the documents, was upheld by the District Court of Appeal since the documentary evidence gave equal support to inconsistent inferences. In the instant case, the documentary evidence likewise gives equal support to inconsistent inferences. While the hearing officer, as the finder of fact, could resolve that conflict, Sgt. Lindsay's testimony at the hearing did so in a manner inconsistent with the hearing officer's findings.

At the hearing below, Sgt. Lindsay testified as follows:

> Q: Okay. Most police officers that I know, especially sergeants, write these in chronological order. Is that the way you wrote your report?
> A: I try to, yes. Uh-huh.
> Q: Okay. Would you look and see, if you would, and see if there's anything on either of—the written report—either the Offense Report or the Arrest and Booking Report that is not in chronological order.
> A: Do you have a specific question you want to ask me because I—do you have a specific question you want to ask about the report? I'll answer the question. I read the report. It seems fine to me.
> Q: No. I'm just—I'm asking you about the chronology.
> A: Yeah. It appea—it appears to be fine to me, the chronology. I don't know what else to say to that.
> Q: Well. I'm saying, if you're saying you wrote it chronologically then—
> A: I believe I did, yes.

Q: Okay
A: I certainly try to.

While the documentary evidence creates a conflict regarding the sequence in which Petitioner was given her Implied Consent Warning and refused the breath test, in relation to her arrest, Sgt. Lindsay's testimony at the hearing resolves the conflict in manner consistent with Petitioner having been given her Implied Consent Warning and refusing the breath test *prior* to her arrest. This Court finds there was not competent substantial evidence upon which the hearing officer could find that the arrest occurred prior to the request that Petitioner submit to a breath test and the reading of the Implied Consent Warning. Accordingly, it is:

ORDERED AND ADJUDGED that:

The Petition for Writ of Certiorari is hereby GRANTED and the Order rendered November 21, 2012, affirming the suspension of Petitioner's driving privilege is hereby QUASHED.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this 17th day of July, 2013.

HOWARD M. MALTZ
Circuit Judge

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