Online Reference: FLWSUPP 3006WILD

Licensing -- Driver's license -- Suspension -- Refusal to submit to breath test -- Implied consent warning -- Despite discrepancies in documents regarding times of arrest and of reading of implied consent warning, hearing officer's finding that licensee was arrested prior to reading of warning was supported by competent substantial evidence in narrative portion of arrest affidavit relating sequence of events

BRANDON TYLER WILDS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2021 31476 CICI, Division 32. July 11, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR

WRIT OF CERTIORARI

(MARY G. JOLLEY, J.) THIS CAUSE came before this Court on a Petition for a Writ of Certiorari (Dckt. No. 2) filed on November 15, 2021 by Brandon Tyler Wilds ("Petitioner"). The court, having reviewed the Petition and attached Exhibits, the Response filed by the Florida Department of Highway Safety and Motor Vehicles (Dckt. No. 15)("the Department"), and being otherwise fully advised in the premises, finds as follows:

Statement of the Case

Petitioner was arrested on July 29, 2021 for driving under the influence of alcohol or drugs. The sworn Arrest Affidavit provides that Petitioner was requested to submit to a breath test to determine his alcohol content. Petitioner refused and was then read the Implied Consent Warning, which he advised he understood and maintained his refusal. (Dckt. No. 2 at 21-22). The officer completed a sworn Affidavit of Refusal to Submit to Breath and/or Urine Test. (Dckt. No. 2 at 30). Petitioner's driving privileges were suspended as a result.

Petitioner timely requested an administrative hearing on the suspension of his driver's license. The administrative hearing was held on October 6, 2021. (Dckt. No. 6).

On October 15, 2021, the hearing officer entered his Findings of Fact, Conclusions of Law, and Decision, upholding the suspension of Petitioner's driver's license. The hearing officer found that the arresting officer had probable cause to conclude that Petitioner was driving or in actual control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances. The hearing officer further determined, based upon the documentary evidence, that Petitioner refused to submit to any such test after being requested to do so and was advised that if he refused to submit his driver's license would be suspended. (Dckt. No. 2 at 2627). In doing so, the hearing officer found there was sufficient evidence to establish that the breath test request and Implied Consent warning were incidental or after Petitioner's lawful arrest. . (Dckt. No. 2 at 12).

Specifically addressing Petitioner's argument under the implied consent law that there wass no competent substantial evidence which demonstrated that the request for a breath test occurred after Petitioner's arrest, the hearing officer found:

> . . . [T]he Charging Affidavit (DDL3) states that Petitioner was placed under arrest for the offense of DUI (8:14 pm) and then was requested to submit to a lawful test of his breath to which he refused. Petitioner was read Implied Consent from a department issued Implied Consent Card, advised he understood, and continued to refuse. Further, the Affidavit of Refusal (DDL5) states that Petitioner was read Complied Consent at 8:15pm and this is substantiated by the Implied Consent Warning form (DDL5). I find that [the] arrest time of 9:46pm within [the] DDL5 to be a clerical error. Lastly, I find the evidence to be reconcilable and can be deemed sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached. I further find that there is not a hopeless conflict within the record based on the charging affidavit (DDL3) account and the balance of the documents within the record.

Dckt. No. 2 at 12.

The instant petition for a writ of certiorari was timely filed. An order to show cause was entered and a response was filed in accordance therewith. No reply was filed. This review follows.

Statement of the Facts

The following documentary evidence was before the hearing officer as no testimony was offered.

On July 29, 2021, at approximately 2000 hours (8:00pm), Daytona Beach Shores Department of Public Safety Officer Molly Billue was conducting routine traffic patrol when she saw a person operating a golf cart and unable to maintain its lane. *See* Dckt. No. 2 at 21. Officer Billue proceeded to follow the golf cart and observed it traveling from the left southbound lane into the right southbound lane and then straddling the broken white line while there was traffic on the roadway. *Id.* Officer Billue further witnessed the golf cart travel into the turn lane and proceed through a red light at the intersection of South Atlantic Avenue and Moore Avenue. Officer Billue immediately activated the patrol car lights and sirens, and conducted a traffic stop. *Id.* Upon contact with Petitioner, the driver of the golf cart, Officer Billue observed him to have bloodshot, watery eyes, slurred speech, and the odor of alcoholic beverages emanating from his person. *Id.*

Officer Billue approached Petitioner, explained the reason for the stop, and requested his driver's license and registration. Petitioner was asked if he had been drinking, to which he replied, “A little bit.” *Id.* at 21-22. Both Officer Billue and her partner, Officer Epling, observed a cup in the cup holder of the golf cart that contained a small amount of beer. *Id.* at 22. Petitioner was asked to step out of the golf cart and Officer Billue observed Petitioner walk with an unsteady gait toward the front of the patrol car. Officer Billue advised Petitioner she believed him to be too impaired by drugs and/or alcohol to safely operate a motor vehicle. *Id.*

She asked Petitioner to perform Standardized Field Sobriety Exercises, which he refused, and he was subsequently placed under arrest for the offense of DUI. Officer Billue requested Petitioner to submit to a lawful test of his breath for determining its alcohol content, which he refused. *Id.* Officer Billue read Petitioner the Implied Consent Warning from her departmental issued Implied Consent card. Petitioner advised he understood and continued to refuse. *Id.* He was then transported to the Daytona Beach Shores Department of Public Safety (“DBSDPS”) police station for processing.

While at the police station, Officer Billue read Petitioner his constitutional rights pursuant to *Miranda*[1] and Petitioner expressed his understanding of said rights. *Id.* Petitioner waived his rights and answered questions from the DBSDPS's Alcohol Influence Report. Officer Billue asked Petitioner if he had been drinking and he advised, “Slightly, yes.” The officer asked how much he had to drink and he advised he had a “few beers” and “not too much, 2 or 3 beers.” *Id.*

The following exhibits were admitted into evidence, including: (i) DDL1 -- Florida DUI Uniform Traffic Citation (A34H9ME); (ii) DDL2 -- Florida Uniform Traffic Citation (AE6HD4E); (iii) DDL3 -- Arrest Affidavit; (iv) DDL4 -- Daytona Beach Shores Department of Public Safety (DBSDPS) DUI Report; (v) DDL5 -- DBSDPS Implied Consent Warning Form; (vi) DDL6 -- Affidavit of Refusal to Submit to Breath and/or Urine Test; (vii) DDL7 -- DBSDPS Your Rights Form; and (viii) DDL8 -- Alcohol Influence Report.

RULING

This Court has jurisdiction to consider this Petition pursuant to sections 322.2615(13) and 322.31 of the Florida Statutes (2021) and Florida Rule of Appellate Procedure 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

The first factor, procedural due process, "requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (internal citations omitted). The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the lower tribunal applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a]. The third factor focuses on whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Service Commission,* 380 So.2d 1028, 1031 (Fla. 1980).

"Evidence contrary to the agency's decision is outside the scope of the inquiry [during first tier certiorari review], for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence." *Dusseau,* 794 So. 2d at 1275. In other words, the Court must take care not to reweigh the evidence or substitute its judgment for the findings of the Department Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [petitioner's] driver's license should have been suspended").

Petitioner attacks the third prong for review, contending that no competent substantial evidence supports the suspension of his driver's license based upon his refusal to submit to a lawful request for his breath. Specifically, he argues that the evidence fails to demonstrate the request for a breath test occurred after his arrest as required by section 316.1932 of the Florida Statutes (2021), commonly referred to as the "implied consent law."

To be admissible under the implied consent law, a request for a breath test must be incident to a lawful arrest. *State v. Barrett,* 508 So. 2d 361 (Fla. 5th DCA), *rev. denied,* 511 So. 2d 299 (Fla. 1987). Specifically, the suspect must be "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, chemical substances, or controlled substances." *See* section 316.1932(1)(a), Fla. Stat. (2021). Otherwise stated, the arrest must precede the breath test. *Dept. of Hwy. Safety and Motor Veh. v. Whitley,* 846 So. 2d 1163, 1167 (Fla. 5th DCA) [28 Fla. L. Weekly D1090a], *rev. denied,* 858 So. 2d 333 (Fla. 2003).

Petitioner contends that the time entries on the Affidavit of Refusal to Submit to Breath and/or Urine Test ("Refusal Affidavit") prove Officer Billue requested he submit to a breath test prior to him being arrested. (Dckt. No. 2 at 24). Specifically, the Refusal Affidavit reflects that Officer Billue requested Petitioner submit to a breath test at 8:15 p.m. and that Petitioner was arrested at 9:46 p.m. While Petitioner acknowledges that the Arrest Affidavit narrative states he was advised of Implied Consent after his arrest, he contends that without definitive times for each action, one must draw an inference from these documents to determine the correct sequence of events. Petitioner contends that the common sense inference to be drawn is that the single time entry for his arrest on the Refusal Affidavit was the actual time of his arrest.

The hearing officer found to the contrary, finding that a single inconsistent time entry on the Refusal Affidavit was insufficient to overcome the more specific written narrative in the Arrest Affidavit that fully explained the correct sequence of events. He further found that the evidence was reconcilable that Petitioner's arrest occurred before his refusal.

The competent substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record, which as a whole supports the findings. *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citations and quotations omitted). In *Labuda v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 208a (Fla. 7th Cir. Ct. May 22, 2012), this Court held that even though there

were time discrepancies in the documents regarding the times of arrest and a reading of the implied consent warning, a hearing officer's finding is supported by competent substantial evidence when the narrative portion of the probable cause affidavit relates the sequence of events. Similarly, in *Feeley v. State Dep't. of Highway Safety & Motor Vehicles,* 29 Fla. L. Weekly Supp. 57b (Fla. 5th Cir. Ct. Mar. 16, 2021) (citing *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488 (1951)), the court found:

> The hearing officer in the instant matter based a decision on the Arrest Affidavit that stated that the arresting Deputy first arrested the Defendant and then later requested the Defendant submit to a breath test. For this Court to call the Arrest Affidavit into question by comparing it to additional case documents would be to wrongly reweigh the evidence at this state of review. There was competent substantial evidence to support the hearing officer's findings of facts and decision.

Id.

Here, a plain reading of the documents before the hearing officer below supports his finding that they were not hopelessly in conflict, and instead support the most logical chronological conclusion given the narrative in the Arrest Affidavit. With that, Petitioner has failed to demonstrate entitlement to relief on the basis that the finding below was unsupported by competent substantial evidence. *See Labuda,* 20 Fla. L. Weekly Supp. at 208a (competent substantial evidence supported hearing officer's findings based upon documentary evidence and in particular "in the case of Mr. Labuda, the narrative section of the probable cause affidavit makes the sequence of events clear"); *Soles v. Dep't. of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Cir. Ct. Sept. 22, 2008) (rejecting argument that arrest documents in the record were "replete with conflicts, inconsistencies and unanswered questions," where hearing officer had the guidance of a sworn statement made by the arresting officer which was competent substantial evidence of a refusal to submit to breath test following a lawful arrest); and *Jones v. Department of Highway Safety and Motor Vehicles,* 3 Fla. Weekly Supp. 534c (Fla. 7th Jud. Cir. January 26, 1995)(despite contradictory time entry in refusal affidavit, hearing officer's determination that the Implied Consent Warning was read to Petitioner after he was arrested based on the chronology set for in Arrest Affidavit was competent substantial evidence to support findings and errant time entry on refusal affidavit was a clerical error).

WHEREFORE, based upon the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DENIED**.

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

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