

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502017CA001438XXXXMB

MATTHEW MITCHELL,
Petitioner,

v.

THE STATE OF FLORIDA
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

Opinion filed: **SEP 15 2017**

Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety & Motor Vehicles.

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PER CURIAM.

Petitioner seeks review of an order sustaining the suspension of his driver license for refusal to submit to a breath alcohol test. At a formal review hearing, Petitioner argued that the evidence of the sequence of events leading up to Petitioner's refusal was in conflict; specifically, the time he was arrested in relation to the time he refused to submit to a breath test. Petitioner argued that the evidence was so in conflict that there was no competent, substantial evidence to support a finding that he refused to submit incident to his arrest. The hearing officer disagreed and sustained Petitioner's driver license suspension. This Petition followed.

A person may appeal any decision of the DHSMV sustaining a suspension of his or her driver license by a petition for writ of certiorari to the circuit court in the county wherein such person resides, or wherein a formal or informal review was conducted pursuant to section 322.31, Florida Statutes. § 322.2615, Fla. Stat. (2016). In reviewing a petition, the circuit court determines whether the hearing officer (1) afforded petitioner due process, (2) observed the essential elements of law, and (3) supported his or her findings with competent substantial evidence. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Competent, substantial evidence has been defined as evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *See Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)).

A hearing officer cannot make a critical determination supported only by evidence that gives equal support to inconsistent inferences. *Trimble*, 821 So. 2d at 1087. In circumstances where conflicting documents support two differing reasonable inferences, the arbitrary choice of one document over another does not meet the competent, substantial evidence test. *Dep't of Highway Safety & Motor Vehicles v. Colling*, 178 So. 3d 2, 4 (Fla. 5th DCA 2014) (finding that although a scrivener's error had occurred, the hearing officer erred in choosing to believe one document over the other); *see also Papper v. Dep't of Highway Safety & Motor Vehicles*, Fla. L. Weekly. Supp. 813a (Fla. 15th Cir. Ct. Jan. 28, 2016) (holding that the hearing officer lacked competent, substantial evidence necessary to support her decision in the face of conflicting documents as to when petitioner was arrested); *Smith v. Dep't of Highway Safety & Motor Vehicles*, 24 Fla. Weekly Supp. 12a (Fla. 7th Cir. Ct. March 9, 2016) (finding that petitioner could not have been arrested and read the implied consent at the same time, as the Refusal Affidavit

stated, thus there was a lack of competent, substantial evidence necessary to support the hearing officer's finding).

A request for a breath test must occur after a lawful arrest. *See Dep't of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163, 1167 (Fla. 5th DCA 2003) (holding that the breath test was incidental to a lawful arrest because it was administered well after the driver was lawfully arrested); *see also Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011) (holding that a driver license cannot be lawfully suspended unless the request to take the breath test and the refusal are incident to a lawful arrest). In this case, the Notice to Appear and the DUI Testing Facility Information Sheet both state that Petitioner was arrested at 8:16 p.m., and the Probable Cause Affidavit states that Petitioner refused to submit to a breath test at 9:17 p.m. However, the Refusal Affidavit states that Petitioner was arrested *and* refused to submit to a breath test at 9:17 p.m. The citations issued to Petitioner also conflict, because it is unclear whether Petitioner was observed driving at 7:59 p.m., as reflected by the DUI citation, or at 10:10 and 10:11 p.m., as reflected by the traffic citations.

We find that the evidence is hopelessly in conflict as to whether the breath test was requested after Petitioner was arrested. There was no sworn testimony explaining that the conflicts in the evidence are scrivener's errors or otherwise clarifying the timeline of events, therefore the hearing officer arbitrarily chose to believe certain documents over others. Thus, there was a lack of competent, substantial evidence to support the hearing officer's finding that Petitioner refused to submit to a breath test incident to a lawful arrest. Accordingly, the Petition for Writ of Certiorari is GRANTED and the order sustaining Petitioner's license suspension is QUASHED.

SMALL, OFTEDAL, AND SASSER, JJ., concur.

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Motor Vehicles

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

Petition filed: February 4, 2017

DATE OF PANEL: JULY 18, 2017

PANEL JUDGES: SMALL, OFTEDAL, SASSER

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:)	DISSENTING:)	CONCURRING SPECIALLY:)
)	With/Without Opinion)	With/Without Opinion)
<u>Small</u>)))
DATE: 8.29.17 J.)))
<u>Mon 8/31/17</u>)))
DATE: J.)))
<u>OKW 9/15/17</u>)))
DATE: J.)))