

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

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502018CA012978XXXXMB

SHAWN TARN PAYMAR,
Petitioner,

v.

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

Opinion filed:

JAN 28 2020

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

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PER CURIAM.

Petitioner seeks review of an order affirming the suspension of his driver license based on his refusal to submit to a urine test. Petitioner contends that the suspension order is not supported by competent, substantial evidence proving that Petitioner refused to submit to a urine test. We disagree and deny the Petition for Writ of Certiorari.

Petitioner was pulled over on suspicion of driving under the influence after a law enforcement officer witnessed Petitioner fail to maintain his lane and strike a curb on two occasions. During the stop, Petitioner exhibited several indicators of impairment and performed poorly on the field sobriety exercises. Petitioner also admitted to consuming a small amount of alcohol and the arresting officer found a pill bottle containing five (5) Xanax pills in Petitioner's vehicle. Based on the foregoing, Petitioner was arrested and taken to the breath testing facility. There, he provided two breath samples yielding breath alcohol concentrations of .037 and .036. Petitioner remained respectful and cooperative throughout this process.

After Petitioner provided his breath samples, the arresting officer asked Petitioner to provide a urine sample. Upon this request, Petitioner's demeanor noticeably shifted and he became combative and nonresponsive. Petitioner refused to answer questions in a straightforward manner instead giving sarcastic responses to the officer and the breath test technician. The arresting officer made it clear that if Petitioner did not agree to provide a urine sample, it would count as a refusal, and Petitioner acknowledged that a refusal would lead to a suspension of his license. Petitioner then agreed that he would let the officer know when he was ready to provide a sample. The officer warned Petitioner that if he did not provide a sample before the officer finished his paperwork, it would qualify as a refusal.

The officer took about fifty minutes thereafter to complete his paper work. During that time, Petitioner made no effort to provide a sample. Neither did Petitioner indicate he had any medical issues that would prevent him from giving a sample. Upon completion of his paperwork, the officer documented Petitioner's refusal and Petitioner's license was suspended. At the request of Petitioner, a hearing officer for the Department of Highway Safety and Motor Vehicles reviewed the suspension and affirmed.

“In the context of an alleged refusal to submit to a urine test, it must be determined that the driver’s “refusal [was] willful to the extent that if the [driver] *is able to submit*, he or she is expected to take the test.” *Brass v. Dep’t of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp 5a (Fla. 15th Cir. Ct. 2011) (quoting 11 Fla. Prac., DUI Handbook § 10:2 (2010-2011 ed.) (emphasis and alterations provided)). “[F]ailure to perform a urine test is not a refusal when the driver physically cannot provide a urine sample” after making good faith attempts to do so. *Id.* For example, in *Brass*, this Court found that a driver did not refuse to provide a urine sample where he was very cooperative throughout the process, tried to urinate on several occasions, and testified that he had a prostate issue which affected his ability to urinate. *Id.* Likewise, in *Wolok v Dep’t of Highway Safety & Motor Vehicles*, 1 Fla. L. Weekly Supp. 204a (Fla. 11th Cir. Ct. 1992), the court held that the driver did not willfully “refuse” to provide a sample where the driver’s un rebutted testimony established that he had a “bashful kidney,” could not provide a sample due to officers looking at his genitals, and requested that officers turn on the water tap to assist him in providing a sample. *Id.* Finally, in *Strouse v. Dep’t of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp 309a (Fla. 9th Cir. Ct. 2014) the court held that a driver did not refuse to provide a urine sample where he agreed to provide the sample every step of the way, asked for water but was denied, and made efforts to urinate but was unsuccessful. *See also Dunn v. Dep’t of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 18a (Fla. 9th Cir. Ct. July 26, 2005) (holding that *Wolok* stands for the proposition that a defendant does not refuse a urine test when he or she makes a good faith effort to perform the test but fails to do so because of a physical impediment).

Petitioner’s case is wholly distinguishable from cases where courts found there was no “refusal” by drivers who attempted in good faith to provide a sample but could not physically do so. To begin with, there is competent substantial evidence that Petitioner was not cooperative once

it was requested that he provide a urine sample. He was argumentative, nonresponsive, and often gave sarcastic responses. Further, Petitioner was placed in a holding cell with unlimited access to water, but there is no evidence he ever drank any. Neither did Petitioner ever request a cup to provide the sample or indicate that he would like to try to urinate. Finally, Petitioner never indicated/testified/informed law enforcement that he had any medical issue that would prevent him from urinating, or that he wanted to urinate but he was unable to. Under these circumstances, we hold that there is competent substantial evidence establishing that Petitioner's inaction and unwillingness to cooperate qualified as a refusal to submit to the urine test. *See Farah v. Dep't of Highway Safety & Motor Vehicles*, 3 Fla. L. Weekly Supp 1a (Fla. 4th Cir. Ct. 1994) (holding that a refusal to submit to a breath test is not contingent upon the licensee expressly stating that he or she is refusing to submit to the test, but may occur by act or inaction of the licensee). Accordingly, Petitioner's Petition for Writ of Certiorari is **DENIED**.

NUTT, HAFELE, and BONAVIDA, JJ., concur.

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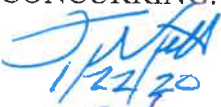


Petition filed: October 15, 2018

_____/_____
DATE OF PANEL: AUGUST 21, 2019

PANEL JUDGES: NUTT, HAFELE, BONAVIDA

GRANTED/DENIED/OTHER: PETITION DENIED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:)
	)	With/Without Opinion	)	With/Without Opinion)
 DATE: <u>1/22/20</u> J.	)	_____ J.	)	_____ J.)
 DATE: _____ J.	)	_____ J.	)	_____ J.)
 DATE: <u>1.23.20</u> J.	)	_____ J.	)	_____ J.)