

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

RICHARD BRIAN BRASS,

Petitioner,

CASE NO.: 2011CA005919XXXXMB  
CIVIL APPELLATE DIVISION "AY"

v.

FLORIDA DEPARTMENT OF  
HIGHWAY SAFETY AND  
MOTOR VEHICLES,

Respondent.

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Opinion filed: **OCT 05 2011**

Appealed from the Department of Highway Safety and Motor Vehicles, Division of Driver  
Licenses, Bureau of Administrative Reviews

✓ For Petitioner: Ira D. Karmelin, Esq.  
3951 Haverhill Road North, Suite 203  
West Palm Beach, FL 33417-8112

✓ For Respondent: Damaris E. Reynolds, Esq.  
Dept. of Highway Safety & Motor Vehicles, P.O. Box 540609  
Greenacres, FL 33454-0609

PER CURIAM

PETITION GRANTED.

The Petitioner, RICHARD BRIAN BASS ("the Petitioner"), seeks review of an order of the Hearing Officer for the Department of Highway Safety & Motor Vehicles entered on March 21, 2011, upholding the suspension of Petitioner's driver's license for refusal to submit to a urine test on February 10, 2011. The order found that Petitioner was provided the appropriate informed consent and Petitioner's failure to provide a urine sample after forty-five minutes and several glasses of water constituted a refusal to submit to a required test as directed by a law enforcement officer. This Court has jurisdiction pursuant to section 322.31, Florida Statutes

(2010). For the reasons set forth below, we find that the Hearing Officer's order was not supported by competent substantial evidence and grant the petition for writ of certiorari.

On February 10, 2011 at approximately 7:53 am, Corporal Thomas Zeichman of the Palm Beach County Sheriff's Office was on routine patrol when he observed the Petitioner, Richard Brass, abruptly apply his car's brakes and swerve in and out of the exit lane. (Pet. App. A, 3). Corporal Zeichman subsequently stopped the Petitioner's vehicle and, upon viewing the Petitioner, observed indications that the Petitioner may have been under the influence of substances. *Id.* Specifically, Corporal Zeichman saw that the Petitioner's movements were slow, his actions were lethargic, his eyes were red, and he had a slight odor of alcohol emanating from his person. *Id.* In addition, the Petitioner indicated to Corporal Zeichman that earlier he had taken Xanax as medication. *Id.* As a result, Corporal Zeichman asked the Petitioner to perform a field sobriety test which the Petitioner performed poorly. *Id.*

Corporal Zeichman transported the Petitioner to the police station and, while recording on camera, asked the Petitioner to submit to a breath test even though he did not believe that the Petitioner was under the influence of alcohol. (Pet. App. F, 9-10). The Petitioner agreed to take the breath test and was "very cooperative." (Pet. App. F, 10). The Petitioner performed the breath test which subsequently resulted in scores of .000 and .000. (Pet. App. A, 4). Corporal Zeichman then asked the Petitioner on camera recording to perform a urine test, and the Petitioner agreed to do so. (Pet. App. F, 11). The Petitioner drank numerous glasses of water, repeatedly asked for additional time and water, and never told Corporal Zeichman that he refused to take the urine test.<sup>1</sup> (Pet. App. F, 12, 29). After forty-five minutes, Corporal Zeichman determined that the Petitioner's failure to urinate was a refusal. (Pet. App. A, 4). Corporal

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<sup>1</sup> The Petitioner later testified that he was unable to urinate because he suffers from a prostate issue that is treated with Flomax. (Pet. App. F, 28).

Zeichman then allegedly read the Petitioner Implied Consent Warnings. (Pet. App. C, DDL-7; Pet. App. E, DDL-11).

The Petitioner subsequently moved to invalidate the suspension of his driver's license because the Petitioner physically could not urinate at the moment and did not willfully refuse the urine test. (Pet. App. F, 30-32). The Petitioner also moved to invalidate the suspension alleging that Corporal Zeichman never advised the Petitioner of the implied consent warning prior to the suspension. (Pet. App. F, 32-33). The Petitioner's case was reviewed by Hearing Officer Odileinis Gibson from the Department of Highway Safety and Motor Vehicles who, after hearing testimony from the Petitioner, Corporal Zeichman, and Technician Engel, upheld the suspension because the Petitioner "would not provide a sample of his urine, at which time Corporal Zeichman deemed it a refusal." (Pet. App. A, 4). Additionally, the hearing officer denied the Petitioner's motion to invalidate for lack of an implied consent warning because there was sufficient evidence that they had read to the Petitioner. (Pet. App. A, 5). Because the Court finds that there was not competent substantial evidence to support the Hearing Officer's finding of refusal, the Court does not address the issue of implied consent.

A driver may appeal a department's decision to sustain the suspension of his or her driver's license by a Petition for Writ of Certiorari to the circuit court. § 322.2615(13), Fla. Stat. (2011). The circuit court's review, however, "shall not be construed provide *de novo* appeal." § 322.2615(13), Fla. Stat. (2011). Additionally, the circuit court may not re-weigh the evidence or substitute its judgment for that of the hearing officer. *Dep't of Hwy Safety and Motor Vehicles v. Smith*, 687 So.2d 30, 33 (Fla. 1st DCA 1997). Rather, the circuit court's review is limited to a determination of "(1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) *whether the administrative findings and*

*judgment are supported by competent substantial evidence.” Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) (emphasis added); see also § 120.68(7)(b), Fla. Stat. (2011); Metropolitan Dade County v. Mingo, 339 So.2d 302 (Fla. 3rd DCA 1976); McGuaran v. Susskind, 175 So.2d 218 (Fla. 3rd DCA 1965).*

In the instant case, it is uncontested that the Petitioner’s actions provided Corporal Zeichman with sufficient reasonable suspicion that the Petitioner was under the influence of alcohol or substances. (Pet. App. A, 3). The point of contention is Corporal Zeichman’s determination that the Petitioner refused to perform the urine test, giving valid justification for the suspension. Specifically, the Petitioner argues that his failure to provide a urine sample was the result of a physical impediment which precluded him from being able to urinate, not a willful choice to disregard Corporal Zeichman’s commands. In resolving this issue, this Court must decide “whether the administrative findings and judgment [of the hearing officer] are supported by *competent substantial evidence.*” *Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).* Specifically, this Court must consider whether “the evidence relied upon to sustain the ultimate finding [was] sufficiently relevant and material *that a reasonable mind would accept it as adequate to support the conclusion reached.*” *De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (emphasis added).*<sup>2</sup>

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.” 11 Fla. Prac., DUI Handbook § 10:2 (2010-2011 ed.) (emphasis added). In *Wolok v. Department of Highway Safety and Motor Vehicles*, 1 Fla. L. Weekly Supp. 204 (Fla. 11th Cir. Ct. 1992), the Eleventh Judicial Circuit of Florida held that the failure to

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<sup>2</sup> Furthermore, in *Department of Highway Safety and Motor Vehicles v. Trimble*, the First District Court of Appeals of Florida held that conflicting evidence cannot be considered to be competent and substantial evidence. 821 So.2d 1087 (Fla. 1st DCA 2002).

perform a urine test is not a refusal when the driver physically cannot provide a urine sample. *See also Stack v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 322 (Fla. 11th Cir. Ct. 2006) (holding that the driver did not refuse a test because the driver was confused about whether the urine test was required).<sup>3</sup> In *Wolok*, the defendant's failure to provide a urine sample was the result of the defendant having a 'bashful kidney' and because "he was inhibited by the officer who stared at his genitals." *Wolok*, 1 Fla. L. Weekly Supp. 204. The *Wolok* court thereby recognized that "[t]he only evidence before the hearing officer was that the petitioner *could not urinate* on demand." *Id.*

In this case, there is evidence that the Petitioner did not *willfully refuse* to provide a urine sample. Specifically, the record indicates that the Petitioner promptly performed a roadside sobriety test and a breath test when requested by Corporal Zeichman. (Pet. App. A, 3-4). Similarly, the Petitioner readily agreed to provide a urine sample when asked and was 'very cooperative' throughout the entire process. (Pet. App. D; F, pages 11-12, 29; G); (Pet. App. F, page 10, 12, 29).<sup>4</sup> At the hearing, Corporal Zeichman testified that the Petitioner was given "several times to urinate . . . at which time he *couldn't*." (Pet. App. F, 15). Corporal Zeichman later explained this statement by further saying, "[w]hether he wanted to [urinate] or not I don't know." (Pet. App. F, 15). Finally, although the Petitioner did not make Corporal Zeichman aware of it at the time, he subsequently made the Hearing Officer aware that he has a prostate issue which requires medication and affected his ability to urinate. (Pet. App. F, page 28). Thus,

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<sup>3</sup> *But see Dunn v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 18a (Fla. 9th Cir. Ct. July 26, 2005) ("The instant case is distinguishable [from *Wolok*], however, because Dunn made no attempt to blow into the breath-testing machine."). In doing so, the Ninth Judicial Circuit recognized that *Wolok* stands for the requirement 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.

<sup>4</sup> Corporal Zeichman admitted on the stand that the Petitioner never told him that he was refusing to provide a urine sample. (Pet. App. F, 12).

the Court finds that the Petitioner simply lacked the ability to perform the test as requested; consequently, his failure to provide a urine sample cannot constitute willful refusal. Therefore, based on the evidence in the record and the Court's interpretation of *Wolok*, this Court finds that the Hearing Officer's finding of willful refusal is not supported by competent substantial evidence. Accordingly, it is

**ORDERED and ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**;  
The Order of the Hearing Officer is hereby **QUASHED**.

CROW, SASSER, and BARKDULL, JJ. concur