

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

RITA SHARON COUNTS,

Petitioner,

v.

DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES

Respondent.

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APPELLATE DIVISION (CIVIL): AY  
CASE NO.: 502011CA019524XXXXMB.

Appealed from the Department of  
Highway Safety and Motor Vehicles

Opinion filed: **SEP - 5 2012**

Appeal from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Brian P. Gabriel, Esq.  
4601 Military Trail, Suite 206  
Jupiter, FL 33458

For Respondent: Jason Helfant, Esq.  
Assistant General Counsel  
Department of Highway Safety and Motor Vehicles  
P.O. Box 540609  
Lake Worth, FL 33454-0609

PER CURIAM.

The issue before the Court is whether there was competent substantial evidence to support a finding that the Petitioner refused to submit to a breath test. We find that there was undisputed evidence that the Petitioner's asthma prevented her from providing valid breath samples, therefore her license suspension must be quashed because the refusal was not willful.

The Petitioner was arrested for DUI and brought to the Palm Beach County Breath Alcohol Testing Facility where she was read her Implied Consent and verbally agreed to submit to a breath test. The Petitioner continuously attempted to breathe into the Intoxilyzer 8000 but only submitted one (1) valid breath sample. Throughout the breath test she stated that she had

asthma and that the breath test was hard to complete. She breathed heavily, coughed, and repeatedly requested a blood test. After repeated attempts at producing a second valid sample, the officer called a refusal. When the refusal was called, the Petitioner stated that she was not refusing anything and she was trying the best she could. At the formal review hearing, the Petitioner submitted evidence of her asthmatic condition, including a copy of her Albuterol prescription and a doctor's report. The Breath Technician agreed that the Petitioner's medical conditions report showed that she had asthma, and that she coughed a lot during the breath test. The Breath Technician also testified that the Petitioner repeatedly requested a blood test, saying that the breath test was hard to perform. Throughout the video that was submitted into evidence, the Petitioner attempted to blow into the Intoxilyzer 8000 numerous times and breathed heavily or coughed after most attempts.

The Hearing Officer found that the Petitioner failed to follow the Breath Technician's instructions and provide proper breath samples. Consequently, the Hearing Officer found that the Petitioner refused to submit to a breath test and affirmed the Petitioner's license suspension. The Petitioner argues that there was no competent and substantial evidence to support a finding that she voluntarily and willfully refused to submit to a breath test. The Department of Highway Safety and Motor Vehicles argues that the Petitioner did not comply with the Breath Technician's instructions and was properly written up as a refusal pursuant to Florida Statute section 322.2615(1)(a).<sup>1</sup>

This case is similar to *Brass v. Department of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp 5a (Fla. 15th Cir. Ct. 2011), where the petitioner agreed to perform a urine test

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<sup>1</sup>Section 322.2615, Florida Statutes, reads in pertinent part:

A law enforcement officer or correctional officer shall, on behalf of the department, suspend the driving privilege of a person who is driving or in actual physical control of a motor vehicle and who has an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, or of a person who has refused to submit to a urine test or a test of his or her breath-alcohol or blood-alcohol level.

but was unable to do so due to a prostate issue which affected his ability to urinate. This Court found that the petitioner “*simply lacked the ability to perform the test as requested,*” and that “*his failure to provide a urine sample cannot constitute a refusal.*” The undisputed evidence in the record is that the Petitioner lacked the ability to follow the instructions and perform the test as requested; thus her failure to provide a breath sample was not willful.

This Court is mindful that it cannot reweigh the evidence and substitute its judgment for that of the hearing officer. *See Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). In determining whether or not competent substantial evidence exists, however, the Court may determine that the evidence is undisputed and cannot support the Hearing Officer’s decision. *See, e.g., Dep’t of Highway Safety & Motor Vehicles v. Sarmiento*, 989 So. 2d 692 (Fla. 4th DCA 2008) (noting that the circuit court’s determination that there was undisputed evidence at the hearing that the vehicle was inoperable “is equivalent to holding that no competent substantial evidence was present to support a finding that the vehicle was operable.”). This Court finds that the evidence is undisputed that the Petitioner was physically unable to perform the breath test, therefore there is no competent substantial evidence to support a finding that she refused to submit to a breath test.

Additionally, because the Petitioner submitted herself to the breath test, she was entitled to reasonable assistance from law enforcement in obtaining an independent blood test upon her request, as authorized under section 316.1932(1)(f)(3). *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996); *State v. Kilpatrick*, 4 Fla. L. Weekly Supp 176a (Fla. 15th Cir. Ct. 1996).<sup>2</sup> The Fifth District Court of Appeal recently held that “[t]he right to an independent blood test only matures after the DUI arrestee submits to the DUI breath test and desires to obtain an independent test.” *Cherry v. Dep’t of Highway Safety & Motor Vehicles*, 18 Fla. Weekly Supp. at 1079b (citing

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<sup>2</sup> This is a very narrow holding that only applies because the Petitioner did not willfully refuse the breath test.

*Dep't of Highway Safety & Motor Vehicles v. Green*, 702 So. 2d 584, 586 (Fla. 2d DCA 1997).

The Court finds that under the circumstances of this case the Petitioner did submit to a breath test, therefore the law enforcement officers should have provided her assistance in obtaining an independent blood test.

As the Hearing Officer's error in finding that the Petitioner refused to submit to a breath test is sufficient to quash the Petitioner's license suspension, the Court need not decide the Petitioner's second issue regarding the Intoxilyzer 8000 maintenance. Accordingly, the Petition for Writ of Certiorari is GRANTED and the Order of the Hearing Officer is QUASHED.

Keyser, Kastrenakes, and Rosenberg, JJ., concur.