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

APPELLATE DIVISION (CIVIL)
Case No.: 502009CA038373XXXXMB

ASHLEY ELDER

Petitioner,

v.

DEPARTMENT OF HIGHWAY SAFETY
AND MOTOR VEHICLES

Respondent.

_____/

Appealed from the Department of
Highway Safety and Motor Vehicles

Opinion filed: APR 13 2011

Appeal from the Bureau of Administrative Reviews, DHSMV, Donna George, Hearing Officer

For Petitioner: Rebecca Sonalia, Esq., Musca Law, 2650 Airport Road S., Suite H, Naples, Florida 34112

For Respondents: Michael J. Alderman, Esq., Acting General Counsel & Heather Rose Cramer, Esq., Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV—Legal Office, P.O. Box 540609, Lake Worth, Florida 33454-0609

PER CURIAM.

PETITION DENIED.

In her Petition for Writ of Certiorari, Ms. Elder alleges multiple violations of her procedural due process, that the Department of Highway Safety and Motor Vehicles ("DHSMV") hearing officer did not observe the essential requirements of law, and that the DHSMV hearing officer's findings were not supported by competent substantial evidence with regard to Ms. Elder's §322.2616 Fla. Stat. (2009) administrative driver's license suspension.

This Court does not find any of Ms. Elder's procedural due process arguments to be persuasive. The hearing officer ruled on each of Ms. Elder's five separate motions pursuant to Fla. Admin. Code R. 15A-6.010. Further, consideration of the substantial portion of Ms. Elder's motions (regarding alleged problems with the twenty-minute observation period, allegations regarding the accuracy of the breath-test result, and general allegations that the hearing officer did not adequately consider key arguments and facts) would require this Court to reweigh evidence that is solely within the purview of the hearing officer. This Court declines to do so. Additionally, we find that any procedural due process violation that occurred when Ms. Elder's first DHSMV hearing was not recorded was adequately remedied by the Circuit Court's May 17, 2010 Order quashing the initial suspension.

The Court likewise finds Ms. Elder's argument that the hearing officer did not observe the essential requirements of law because a twenty-minute observation period was not completed and because only one breath sample[1] was collected unpersuasive. First, the Court notes that the hearing officer questioned the police officer who testified that a twenty-minute observation period was completed during the administrative hearing and found the police officer's testimony to be satisfactory. Further, we note that even if the hearing officer reached a conclusion contrary to the one which Ms. Elder urges, the standard on a divergence from the essential requirements of law "is something more than a simple legal error . . . [and certiorari review should be granted] only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 1121, 1125 (Fla. 4th DCA 2007). The hearing officer's determination that the police officer's testimony was

[1] Approved Breath Alcohol Test - a minimum of two samples of breath collected within 15 minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level. Fla. Admin. Code R. 11D-8.002(12).

credible does not rise to such a level. She considered the testimony of the officer and reached a conclusion that was not, contrary to Ms. Elder's suggestion, a departure from the essential requirements of law.

Furthermore, we determine that it was unnecessary for the hearing officer to reach the issue of whether a twenty-minute observation period had been completed, nor was it necessary for the police officer to collect two breath samples from Ms. Elder as both of these procedures are requirements for breath-testing as it is performed under §316.1932, Fla. Stat. (2009). While §322.2616(17) gives a police officer the option of performing a breath-test pursuant to §316.1932—"[a] breath test to determine breath-alcohol level pursuant to this section may be conducted as authorized by §316.1932," this section also gives an officer a second option—"*or* by a breath-alcohol test device listed in the United States Department of Transportation's ("DOT") conforming-products list of evidential breath-measurement devices." (emphasis added.) This second option for performing breath-testing does not require an officer to comply with the standards set forth in §316.1932, standards that specifically state, "[a]n analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Law Enforcement." §316.1932(1)(b)(2), Fla. Stat. (2009). Ms. Elder's breath-test was performed on an Intoxilyzer 400, a breath-testing device which *is* listed in the United States Department of Transportation's conforming-products list. The hearing officer only needed to consider this issue to determine if the breath-test was properly conducted.

An administrative suspension pursuant to §322.2616 is neither a criminal violation nor is it even a traffic infraction such that it warrants the same degree of procedural protections as would an arrest for DUI. The State of Florida has devised a system whereby an under-age

person's driving privileges may be suspended when that person operates a motor vehicle with even small amounts of alcohol in their system. This Court recognizes the State's zero-tolerance policy for under-age drinking and driving and the right to administratively suspend a person's driving privilege in this manner. We find that the hearing officer did not depart from the essential requirements of law when she upheld Ms. Elder's administrative license suspension.

Ms. Elder's final argument is that the hearing officer's findings are not supported by competent substantial evidence. Ms. Elder argues that the record is devoid of any kind of evidence that indicates that the Intoxilyzer 400 used in this suspension has the ability to produce accurate results. In *Uglietta v. State*, 11 Fla. Supp. 285a (Fla. 9th Cir. Ct. 2004), the State offered a breath-test result affidavit into evidence at the administrative hearing. Because the affidavit contained a statement, as it does in this case, that the machine is listed among the Department of Transportation's conforming products and has been calibrated and checked in accordance with the manufacturer's and/or agency procedures, per the last sentence of §322.2616, Fla. Stat. (2009), "[t]he reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section."

The court went on to say that at this point, the burden shifted to the petitioner to prove that such results were not accurate. *Uglietta*, 11 Fla. Supp. 285a at 4. The petitioner did not ask the officer for any kind of certification at the hearing and the court found that she had failed to meet her burden of showing noncompliance, citing to *Aberhorn v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. Supp. 228a (Fla. 17th Cir. Ct. 2001) which denied certiorari because the petitioner "chose not to utilize the power given to her by the legislature to subpoena persons and records." Likewise, Ms. Elder chose not to subpoena records in this case and therefore Ms. Elder

has not shown that the hearing officer's findings are supported by less than competent substantial evidence. Ms. Elder has not overcome the presumed accuracy of the results of the machine.

Ms. Elder also again raises her argument regarding the lack of the twenty-minute observation period rendering the hearing officer's findings based on less than competent substantial evidence. As discussed, *supra*, the twenty-minute period is not required to be performed under §322.2616. Therefore, this Court finds no indication that the hearing officer's conclusions were based on anything less than competent substantial evidence. The hearing officer determined that Ms. Elder was under the age of 21 and that she had a breath-alcohol level of 0.02 or higher. Her license suspension was properly upheld.

(ROSENBERG and CROW, JJ., concur.) (HAFELE, J., concurs, with an opinion.)

HAFELE, J., concurring.

While I am compelled to concur with the majority's denial of the Petition for Writ of Certiorari relative to Ms. Elder's administrative license suspension under §322.2616, I write separately to express my concerns with both the potential for a disparity in police protocol in these types of cases and because such a disparity could potentially work to erode a citizen's individual rights.

The majority determines that the two clauses of §322.2616(17) offer law enforcement the option of complying with the procedures for administering a breath-test pursuant to §316.1932 *or* with the option of forgoing any of the procedural requirements of the Administrative Code (namely the twenty-minute observation period and the requirement of two breath samples) thereby allowing law enforcement to administer a breath-alcohol test in any manner they wish, so long as the test is performed on a device that is listed in the Department of Transportation's

conforming-products list. I believe, however, that in order for an officer to perform a breath-test under §322.2616, he or she must know what a breath-test *is*.

There is no reason to create an arbitrarily vague or unnecessarily fluid definition of breath-test when a breath-test is already defined in the Administrative Code. In agreeing with the reasoning that §322.2616 is to be read to allow for a test that is in compliance with basic procedural safeguards, *or none at all*, it seems that the potential for a disparity to arise among administrative license suspensions across various police departments is broad, to say the least. An under-age driver who is stopped by an officer of a police department that, for any number of reasons, does not utilize hand-held testing devices will be afforded a much greater level of protection from potential errors, human or mechanical, than a driver who is pulled over and administered one test on a hand-held device, as was the case here. Based upon the majority's interpretation of this statute, a driver could potentially be stopped, questioned, and even regurgitate[2] and then still immediately be administered one breath-test and have their driving privileges suspended based on the reading from such test. Further, because §322.2616(2)(b)(5)(c) creates an additional penalty if the driver's breath-alcohol level is above 0.05—that the driver's license suspension remain in effect until the driver has completed a substance abuse course, one whose "reasonable costs" the driver assumes—even greater potential for inequity of results and financial consequences becomes apparent.

In order for a police officer to know what constitutes a breath-test, the officer should be able to simply look to the definition of a breath-test already provided for him or her in Rule 11D-8.002(12). The legislature may have intended to allow police the flexibility to use hand-held breath-testing devices in 0.02 suspensions by constructing a statute that creates options—a

[2] The administrative code specifically instructs an administrator of the breath-test to reasonably ensure that a driver has not taken anything by mouth or regurgitated because this may cause an incorrect reading. *See* Fla. Admin Code R. 11D-8.007(3).

breath-test performed on the Intoxilyzer 5000 or 8000, or a breath-test on another approved device, however, I question whether in order to do that the legislature intended to erase the simple definition of breath-test already provided by the Administrative Code. Like the majority, I agree that the legislative intent in lowering the breath-alcohol level in these types of suspensions to 0.02 is to create a zero-tolerance policy toward under-age drinkers who get behind the wheel. However, I believe this end can be accomplished while still requiring officers to comply with basic procedural safeguards to insure the accuracy of the test results.

Although I remain concerned with any impression that individual rights are being eroded, I believe that the majority has correctly applied the statutorily mandated interpretation of §322.2616(17) and I therefore concur with the majority's opinion to deny this Petition for Writ of Certiorari.