

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

APPELLATE DIVISION (CIVIL): AY  
Case No.: 2014CA006122

ROSA ELENA PAPPER,  
Petitioner,

v.

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

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Opinion filed: JAN 28 2016

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

The instant case involves a Petition for Writ of Certiorari ("Petition") seeking relief from an order of the Department of Highway Safety and Motor Vehicles ("DHSMV") upholding Petitioner, Rosa Elena Papper's, license suspension. Petitioner argues the DHSMV's decision lacks support of competent, substantial evidence and must be quashed. For the reasons set forth below, the Court agrees and grants the Petition.

### **Background**

On March 14, 2014, Petitioner was arrested by Deputy Sheriff Ramon Pruitt for Driving Under the Influence (“DUI”). The initial basis for Deputy Pruitt’s stop was Petitioner’s speeding. Petitioner refused to submit to a breath test following this arrest. Under section 322.2615(a), Florida Statutes, Petitioner’s license was suspended following her refusal to submit to a breath test.

Petitioner challenged the suspension of her license pursuant to section 322.2615(1)(b)(3), Florida Statutes. A formal review of Petitioner’s suspension was conducted before DHSMV Hearing Officer Aisha Westcarth on April 17, 2014. At the hearing, Deputy Pruitt testified that Petitioner was stopped for speeding and reckless driving, not for suspension of DUI. Deputy Pruitt also testified that Petitioner was never told she was being arrested for DUI and that she was only told she was being arrested for reckless driving. Deputy Sheriff James Levey, who was also present during Petitioner’s arrest, testified that he never told Petitioner he was taking her to jail for suspicion of DUI.

Hearing Officer Westcarth denied Petitioner’s challenge on April 21, 2014. Hearing Officer Westcarth concluded that Deputy Pruitt had probable cause

to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

Petitioner filed the instant Petition seeking relief from this order on May 20, 2014. The DHSMV filed a Response to Order to Show Cause and Motion to Dismiss and/or Strike Petition for Writ of Certiorari and Appendix (“Motion to Dismiss”) on July 30, 2014. Included in Petitioner’s

Reply to this Motion to Dismiss, Petitioner sought a Motion for Sanctions against the DHSMV. The DHSMV's Motion to Dismiss was denied by Order dated December 15, 2015, but Petitioner's Motion for Sanctions remains outstanding.

### **Standard of Review**

On certiorari review of an administrative action, this Court asks only "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by substantial evidence." *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003). When considering whether administrative findings are supported by substantial evidence, a reviewing court must ask whether the evidence "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (citations omitted). Further, evidence need not only be "substantial," but also "competent," in that "a reasonable mind would accept [the evidence] as adequate to support a conclusion." *Id.*

### **Analysis and Legal Conclusions**

#### **A. Petitioner's Substantive Arguments**

Petitioner argues Hearing Officer Westcarth's decision is not supported by competent, substantial evidence regarding three separate issues: (1) whether Petitioner refused to take a breath test; (2) whether Petitioner was physically capable of taking a breath test; and (3) whether there was probable cause to stop Petitioner for DUI. Only Petitioner's first claim is meritorious, and the remainder of Petitioner's claims is rejected.

Petitioner's first argument involves whether there is competent, substantial evidence that she refused to take a breath test. Petitioner raises inconsistencies in the record as grounds for

granting the Petition. Deputy Pruitt's Affidavit of Refusal to Submit to Breath, Urine, or Blood Test ("Pruitt Affidavit") states that Petitioner was arrested for DUI at 23:55 on March 14, 2014. The same Affidavit then states that Petitioner refused to submit to a breath test at 02:25 on March 14, 2014. Petitioner's Florida DUI Uniform Traffic Citation reflects that Petitioner committed the offense of DUI at 3:26 A.M. on March 14. A separate Probable Cause Affidavit reflects that Petitioner committed the crime of DUI at 23:40 on March 13. The Probable Cause Affidavit also states Petitioner refused to provide a sample of her breath, urine, or blood after being read the implied consent disclosures, but does not reflect when that reading occurred. Petitioner's D.U.I. Probable Cause Affidavit reflects the events underlying Petitioner's DUI arrest occurred on March 13, 2014, at 11:46 P.M.

Petitioner argues that these inconsistencies show that the Hearing Officer's decision is not supported by competent, substantial evidence. In support of this position, Petitioner relies on *Department of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). There, the First District Court of Appeal upheld a finding that a DHSMV order lacked competent, substantial evidence that the officer had given the petitioner an implied consent warning of her right to refuse to submit a breath, urine, or blood test prior to her refusal. *Id.* at 1085. Specifically, the First District found a lack of competent substantial evidence where

the documents were hopelessly in conflict and the discrepancies on the critical facts went unexplained. For example, the arresting officer's sworn Affidavit of Refusal to Submit to Breath, Urine or Blood Test recited that on September 27, 2000, at 11:40 p.m., Trimble was arrested for DUI. Inconsistently, however, it further recounted that a request was made to Trimble at 12:45 a.m., on September 27, 2000, to submit to a breath test with a warning that a refusal could result in a one-year suspension of her driver's license, but that Trimble had then refused. A printout from the Breathalyzer machine reflected that refusal had occurred at 12:47 a.m. on the 27th. The officer's Alcohol Influence Report, which was not attested to, narrated, however, that the consent warning was given at 12:50 a.m., on the 27th.

821 So. 2d at 1086 (emphasis in original). Because this evidence equally supported inconsistent inferences regarding when or even if the petitioner was read a consent warning, the First District upheld the circuit court's decision. *Id.* at 1087. *Trimble* was discussed further in *Department of Highway Safety and Motor Vehicles v. Colling*, 39 Fla. L. Weekly D1195 (Fla. 5th DCA June 6, 2014), where the Fifth District stated

not every conflict in documents must be resolved against the Department. When the documents conflict on a material issue, however, the hearing officer cannot simply throw a dart to decide which one is correct.

Testimony resolving the discrepancy in documentary evidence or evidence containing an “inherently reliable expression”<sup>1</sup> of the material issue can be sufficient to trump other inconsistencies in the record. *Id.*

The Court finds that, under *Trimble*, the Hearing Officer's decision is not supported by competent, substantial evidence and that the Petition must be granted as a result. In her decision, Hearing Officer Westcarth found that

Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, *subsequent* to a lawful arrest . . . .

(emphasis added). The documentary evidence in the record completely conflicts in terms of both the date and time when Petitioner was arrested for DUI and when she was read her implied consent warning. The Pruitt Affidavit states that Petitioner's refusal came long before she was arrested. The Probable Cause Affidavits reflect Petitioner was stopped by Deputy Pruitt the day before the date indicated in the Pruitt Affidavit. The Florida DUI Uniform Traffic Citation lists a different time for arrest than any other documentary evidence in the record, stating arrest occurred an hour after the time for refusal listed in the Pruitt Affidavit. While testimony was

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<sup>1</sup> The *Colling* court, for example, found that had the record included the machine-generated printout of the petitioner's breath test results, it would have trumped the otherwise inconsistent results of the test found in the record.

taken at the hearing on Petitioner's license suspension, no testimony explaining these discrepancies was provided at all. This set of facts is wholly analogous to *Trimble*, and here too the record only contains conflicting, unexplained discrepancies on the material issue of when Petitioner refused to provide a breath sample. Nothing in the record indicates the Hearing Officer's resolution of these discrepancies was anything but arbitrary. While the DHSMV's Response advocates accepting the narrative provided in the Probable Cause Affidavit, doing so would be akin to "throwing a dart" at which document to rely on, a practice cautioned against in *Colling*, 39 Fla. L. Weekly D1195. Under *Trimble*, the Hearing Officer's decision lacks the support of competent, substantial evidence because the documents at issue are in conflict without explanation. Accordingly, the Petition must be granted.

#### **B. Petitioner's Motion for Sanctions.**

In her Reply to DHMSV's Response to Order to Show Cause and Motion to Dismiss and/or Strike Petition for Writ of Certiorari and Appendix, Petitioner alleges that DHSMV's counsel intentionally made false, misleading, and frivolous arguments, causing delay. Petitioner seeks sanctions pursuant to Florida Rule of Appellate Procedure 9.410 as a result of these purported statements. Under Rule 9.410(b)(4), a motion for sanctions requires a certification that an initial copy of the motion was served on the offending party twenty-one days prior to filing the motion to give an opportunity to correct any misstatements in the pleading. Petitioner's reply contains no such certification and accordingly the motion for sanctions is defective under the rule. Accordingly, Petitioner's Motion for Sanctions must be denied as procedurally improper.

#### **Conclusion**

The Court finds the DHSMV's order lacks the support of competent, substantial evidence regarding when Petitioner refused provide a sample of her breath, urine, or blood after being read

the implied consent disclosures. Accordingly, the Petition for Writ of Certiorari is **GRANTED**. The Final Order of the Hearing Officer is **QUASHED** and the matter is **REMANDED** to the DHSMV for a new hearing. Petitioner's Motion for Sanctions is **DENIED**.

ARTAU, G. KEYSER, and BARKDULL, JJ., concur.