

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

GINA SHORTREED,

Petitioner,

APPELLATE DIVISION (CIVIL)

CASE NO.: 502008CA033076XXXMB

Division: 'AY'

v.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES

Respondent.

Opinion filed: *Sept. 24, 2009.*

Appeal from the Department of Highway Safety and Motor Vehicles

For Petitioner: Steven K. Bell, Esq.
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West Palm Beach, FL 33406

For Respondent: Damaris E. Reynolds, Esq.
P.O. Box 540609
Lake Worth, FL 33454

Gina Shortreed asserts that she was not afforded procedural due process because the hearing officer departed from her role as a neutral and detached hearing officer by asking a question that had been already answered twice with consistent responses. We agree and grant the Petition for Writ of Certiorari.

A neutral decision maker is the basic constituent of minimum due process. DHSMV v. Pitts, 815 So. 2d 738, 743 (Fla. 1st DCA 2002). The requisite of neutrality does not foreclose asking questions designed to make prior ambiguous testimony clear, but the general ability to clear up ambiguity is not an invitation to supply essential elements in the state's case. McFadden v. State, 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999). Shortreed and DHSMV both rely on DHMSV v. Boesch, 979 So. 2d 1024 (Fla. 3d DCA 2008), to support their arguments. In

Boesch, the Third District held that when the hearing officer asked two additional questions of the arresting officer, it was simply to clarify the officer's prior testimony and did not seek to elicit new information essential to one party's case. Id. at 1027. The deputy in Boesch gave conflicting answers to two different questions that concerned the same matter. The issue of whether the deputy included the request for blood when informing Boesch of implied consent could invalidate the breath test warning and invalidate the suspension. Id. at 1026. After direct examinations were concluded, the hearing officer asked the deputy what exactly he asked Boesche to do as far as testing. Id. The deputy responded that he only asked for a test of his breath. Id.

Unlike Boesch, where the hearing officer asked questions to clarify two conflicting answers, in the instant case, Officer Lowry answered the same question twice and supplied the same answer each time. Specifically, the questions were as follows:

Officer Lowry: After the observation's finished, [Shortreed is] taken to the actual breathalyzer machine [sic]. She's asked to submit to blood alcohol—sorry breath alcohol testing.

Counsel: By Tech Dorsey?

Officer Lowry: Yes.

Counsel then clarified the sequence of events and again asked if it was Tech Dorsey that asked for the breath test:

Counsel: Tech Dorsey requests the breath test, and she agrees. Is that that sequence of events?

Officer Lowry: Yes.

Counsel's second question was very direct, and Officer Lowry again supplied the same answer. After the testimony was complete, Shortreed's attorney argued that the request was unlawful because Tech Dorsey had requested the breath test, rather than a law enforcement officer. The

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hearing officer responded that she was going to ask the officer in for a clarifying question. Shortreed's attorney objected based on the fact that Officer Lowry's testimony was not contradictory. The hearing officer overruled the objection, and the following exchange took place:

Hearing Officer: Officer Lowry, there are clarifying questions that have recently been raised in this hearing. Who, if anyone, requested the breath test from Ms. Shortreed?

Officer Lowry: I did, or maybe I –

Counsel: And what did he say five minutes ago?

Officer Lowry: I ordered the test. She reads – she reads some kind of statement to the – I figure I must have misunderstood the question. I, myself, as a law enforcement officer, am actually the one requesting the actual test, the blood alcohol – or excuse me – the breathalyzer test.

...

Counsel: Can you say with a hundred percent certainty that you're the one who asked for the breath test? Because you just told me five minutes ago the breath tech asked. Is there some confusion?

Officer Lowry: No, I think I just misunderstood the question. I, as the officer, I request the actual breath test.

Prior to the hearing officer's additional questioning of Officer Lowry, it was undisputed that Tech Dorsey requested the breath test. Because the suspension of Shortreed's driver's license could not be upheld without the answer elicited by the hearing officer (*i.e.*, that it was a law enforcement officer, rather than the breath technician, that requested the breath test), it appears that the hearing officer was attempting to supply essential elements required for the suspension. Thus, the hearing officer departed from her role of neutrality when she asked Officer Lowry a question that Shortreed's counsel had already asked twice with consistent answers. In Boesch, the Third District Court noted:

[T]here is no sign that the administrative hearing officer sought anything other than clarification of the officer's testimony. She obtained that clarification. She did not try to repair missing elements of a prima facie case for an unprepared prosecutor. ... It cannot reasonably be argued that the hearing officer took over the prosecution or elicited new information essential to one party's case. Florida law allows – and most would say, encourages – hearing officers and judges to seek and obtain clarification in such instances. The hearing officer is not a potted plant.

Id. at 1027. Although the hearing officer called her question “clarifying,” her question is distinguishable from the question in Boesch because she elicited testimony that contradicted the prior consistent testimony. Until Officer Lowry answered the hearing officer's question, it was undisputed that Tech Dorsey requested the breath test. Furthermore, the hearing officer in Boesch asked the clarifying question after direct examination was concluded; in the instant case, the Hearing Officer asked the question in response to Shortreed's counsel's argument that the suspension should be invalidated because Tech Dorsey requested the breath test. These circumstances indicate that the hearing officer was eliciting testimony favorable to DHSMV; accordingly, the hearing officer departed from her role as a neutral decision maker. The Petition for Writ of Certiorari is hereby **GRANTED** and the order of suspension is quashed.

(ROSENBERG and COX, JJ., concur.) (MCCARTHY, J., dissents with an opinion.)

MCCARTHY, J., dissenting.

I respectfully disagree with my colleagues.

FACTS

The Petitioner was stopped at 3:46 a.m. for going 60 mph in a 35 mph zone. She told the officer she was coming from the “Ugly Mug Bar”. She had bloodshot, glassy eyes and had a strong odor of alcohol. The officer administered sobriety tasks, all of which she failed badly. She was then arrested for DUI. The Petitioner agreed to submit to two (2) breath tests which read .139 and .143 respectively. Her license was suspended.

The Petitioner then requested a formal review of the suspension before a hearing officer pursuant to Florida Statute 322.2615, **Suspension of license,: right to review.**

FLORIDA STATUTE 322.2615

Florida Statute 322.2615 states in pertinent part . . .

“(6) (a) If the person whose license was suspended requests a formal review, the department must schedule a hearing to be held within 30 days after such request was received by the department, and must notify the person of the date, time, and place of the hearing.

(b) Such formal review hearing shall be held before a hearing officer employed by the department, and **the hearing officer shall be authorized to administer oaths, examine witnesses** and take testimony, receive relevant evidence . . .

(2) Regulate the course and content of the hearing, **question witnesses** and make a ruling on the suspension.”

[Emphasis added]

NATURE OF SUSPENSION REVIEWS

An obvious reason for the legislature to specifically authorize a suspension hearing officer to both “examine witnesses” and “question witnesses” in a suspension review is the very nature of the administrative hearing itself. Unlike the more sophisticated court hearings and trials, there are often no lawyers involved at all. There is rarely, if ever, a lawyer present to represent the interests of the State or law enforcement personnel. The Petitioner does not have a constitutional right to have an attorney appointed if she can’t afford one. Therefore, it is the hearing examiner herself who is to “examine witnesses” and “question witnesses”.

In this case, the Petitioner exercised her right to hire counsel to represent her. The law enforcement officers did not have a counter-part to examine or cross examine witnesses, or even to object to counsel’s questions. Other than Petitioner’s counsel, the only person in the room with the authority to “examine witnesses” and “question witnesses” was the hearing officer herself.

ISSUE

The issue here is not whether there was probable cause to stop the Petitioner who was driving at 60 mph in a 35 mph zone. There was.

The issue is not whether the failed sobriety tasks were properly administered. They were.

The issue here is not whether the Petitioner gave her permission to have the breathalyzer test administered. She did.

The issue here is not whether the breath tests were properly administered. They were.

The issue here is not whether the breathalyzer readings of .139 and .143 were accurate. They were.

The sole issue on appeal is whether the hearing officer properly asked clarifying questions concerning who it was who requested the breathalyzer test.

The confusion here arose because Florida Statute 316.1932 states that the person requesting the breath test must be a law enforcement officer. The Petitioner alleges in this appeal that at the administrative hearing, arresting officer Lowry, at first testified that it was the breathalyzer technician (presumably is not a law enforcement officer) who requested the breathalyzer. The actual testimony is not that tidy.

A review of the pertinent testimony reveals why this point was muddled and needed clarification.

TESTIMONY

In answering a litany of rapid-fire leading questions, propounded by defense counsel, Officer Lowry answered "yes" to a number of questions in which defense counsel portrayed a sequence of events. Beginning at page 10, line 1:

"Q. If you can describe the interior of that office?

A. It's like any office. You walk in. First when you walk in, there's a bathroom to the right. To the left, there's a desk area where you have several meters and things, paperwork set up for you. To the right side, there's two chairs for defendants to sit during the observation period.

Q. Was there ever a time she's placed in a holding cell?

A. After – after the breathalyzer, the breathalyzer test was taken, she was placed in the holding cell.

Q. Never before that?

A. Um, no, sir.

Q. Are you sure, or you're not sure?

A. She was never placed in before.

Q. So who's in charge of the observation, yourself or the breath tech?

A. That was me.

Q. Okay. And then what happens after the observation is finished?

A. After the observation's finished, she's taken to the actual

breathalyzing machine, the Intoxilyzer. She's asked to submit to blood alcohol - - sorry, breath alcohol testing.

Q. By Tech Dorsey?

A. Yes.

Q. So, I want to understand the sequence of events. You do your investigation, place her under arrest. You transport her to the BAT.

A. Correct.

Q. You go (unintelligible) where there's an observation room.

A. Correct.

Q. You observe her.

A. Yes.

Q. You then walk her over to the Intoxilyzer, as you mentioned before.

A. Yes.

Q. Tech Dorsey requests the breath test, and she agrees. Is that that sequence of events?

A. Yes.

Q. Did you have any conversation with Tech Dorsey prior to that?

A. I don't recall, sir.

Q. What happens next?

A. After the test itself, or after she's requested to take it?

Q. She agreed to take the test.

A. Yes, she agreed to take the test. She complied. She completed the test with the machine. At that point, I read her her rights. She declined to answer any questions.

Q. Anything else happen, or is that it?

A. That's pretty much it.

Mr. Hollander: Thank you. No further questions."

[Emphasis added]

TR, September 12, 2008, pages 10-12.

A review of the rapid-fire questions and answers reveals that the only purported identification of the person who made the request for the breathalyzer was made by the defense

attorney in two leading and confusing questions. The first question can be construed to be asking who will be doing the testing and the second question is a compound question. Officer Lowry merely answered "yes" to each.

In this case, the hearing officer had the benefit of hearing the testimony live, and observing the demeanor of the witnesses as they testified. The hearing officer fulfilled her statutory authority to examine witnesses and question witnesses when she asked . . . :

Hearing Officer: Officer Lowry, there are clarifying questions that have recently been raised in this hearing. Who, if anyone, requested the breath test from Ms. Shortreed?

Officer Lowry: I did, or maybe I - -

Counsel: And what did he say five minutes ago?

Officer Lowry : I ordered the test. She reads – she reads some kind of statement to the – I figure I must have misunderstood the question. I, myself, as a law enforcement officer, am actually the one requesting the actual test, the blood alcohol – or excuse me – the breathalyzer test. As far as I recall, the technician herself was the one who had read something else. TR, page 20.

"GOTCHA" REDUX

To now condone the Petitioner's suggestion that the hearing officer clarifying questions here should be disallowed also reopens the "gotcha school of litigation" which was nailed shut 30 years ago in Salcedo v. Asocian, 368 So.2d 1337 (Fla. 3rd DCA 1979).

DISCUSSION

The hearing officer's question was neither leading, nor compound and did not raise any new or different issues than had not already been raised. The hearing officer asked a straight-forward question and merely sought clarification from the witness who offered that he misunderstood the question.

I find that the previous testimony (offered primarily by defense counsel) was confusing and needed clarification.

The hearing officer merely clarified a confused issue. That is her job.

"Florida law allows – and most would say, encourages – hearing officers and judges to seek and obtain clarification in such instances. **THE HEARING OFFICER IS NOT A POTTED PLANT.**"

Boesch, *supra*, page 1027.

I would deny the Writ of Certiorari.