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

BOGDAN JOSEF STACHURA,

Petitioner,

v.

THE STATE OF FLORIDA
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

APPELLATE DIVISION (CIVIL): "AY"
CASE NO. 502011CA004239XXXXMB

Appealed from the Department of
Highway Safety and Motor Vehicles

Opinion filed: AUG 25 2011

Appeal from the Department of Highway Safety and Motor Vehicles.

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

For Respondent: Damaris Reynolds, Esq.
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
DHSMV-Legal Office
P.O. Box 540609
Lake Worth, FL 33454-0609

PER CURIAM.

Bogdan Josef Stachura seeks review of the suspension of his driver's license based upon his refusal to submit to a breath test. Stachura argues that the suspension should be quashed because the implied consent law does not apply in this case because the law enforcement officer

who requested the breath test did not suspect that Stachura was under the influence of alcohol. We agree.

On January 14, 2011, a citizen called 911 regarding a possible impaired driver in a black Mercedes in the City of Lake Worth. The vehicle was traveling westbound on Sixth Avenue South from Dixie Highway. Sergeant Mendelsberg of the Palm Beach County Sheriff's Office was dispatched and located the Mercedes north of Forest Hill Blvd. on northbound I-95. The Mercedes stopped north of Southern Boulevard on the right shoulder. Sergeant Mendelsberg made contact with the driver, who was confirmed to be Stachura. Deputy Sheriff Moral arrived as back-up and advised Sergeant Mendelsberg that he was familiar with Stachura, and stated that he was a chiropractor at a pain clinic in Lake Worth who uses prescription narcotics. Sergeant Mendelsberg observed that Stachura talked very slowly, his movements were very sluggish, his pupils were very dilated, and he appeared "as if in a trance." Sergeant Mendelsberg suspected Stachura of driving under the influence and requested a Drug Recognition Expert to respond and investigate the possible DUI.

Deputy Sheriff Noel, a certified Drug Recognition Expert, was dispatched to the scene and observed the following regarding Stachura: his speech was slurred, he had difficulty answering questions, he was unable to follow simple instructions, he appeared dazed and disoriented, his movements were slow and delayed, he had poor balance, he swayed in a circular motion, he had mood swings, and there was a lack of coordination. Stachura admitted to consuming Xanax and Seraquel and refused to submit to field sobriety exercises. Deputy Sheriff Noel asked Stachura to submit to a breath test and he refused. Implied Consent Warnings were read and Stachura still refused a breath test. Deputy Sheriff Noel specifically stated that based upon his observations:

> **I did not suspect alcohol but rather drugs**, particularly a CNS depression due to his above-mentioned indicators such as being very drowsy, dazed, disoriented, and extremely uncoordinated. **Again, it should be noted that I did not suspect ETOH[1] since I did not observe any odors of alcohol.**

(emphasis added). Deputy Sherriff Noel issued a citation that suspended Stachura's driver's license based solely upon his refusal to submit to a breath test. At the formal review hearing, the Hearing Officer sustained Stachura's license suspension.

This Court "must determine if the administrative hearing afforded all participants procedural due process, whether the essential elements of the law have been observed, and if the judgment is supported by competent, substantial evidence." *Miami-Dade County v. Reyes*, 772 So.2d 24 (Fla. 3d DCA 2000); *see also Campbell v. Vetter*, 392 So.2d 6, 7-8 (Fla. 4th DCA 1981) (holding that the Court's standard of review of a petition for writ of certiorari is limited to determining whether the Department's actions accorded procedural due process, whether the Department observed the essential requirements of law, and whether the Department's actions were supported by substantial, competent evidence.) However, this Court is not free to re-weigh or re-evaluate the evidence presented at the administrative hearing or substitute its judgment for that of the agency. *Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla.1995). Florida Statute section 322.2615(13) specifies that it shall not be construed to provide de novo appeal. *Id.*

Stachura argues that the Hearing Officer erred by sustaining his driver's license suspension because Florida Statute section 316.1932 (hereinafter, the Implied Consent Law) did not apply to his refusal to submit to a breath test given the facts of this case. Specifically, Stachura argues that the Implied Consent Law is inapplicable to his refusal because Deputy

---

[1] Ethanol.

Sheriff Noel did not suspect that Stachura was under the influence of alcohol when he requested the test.

It is undisputed that Stachura refused to submit to a breath test. The issue, however, is whether the Implied Consent Law applied to Stachura's refusal given that Deputy Sheriff Noel only suspected that Stachura was under the influence of drugs, not alcohol. The Florida Supreme Court recently considered the interplay between the hearing officer's scope of review[2] and the Implied Consent Law, and held that although section 322.2615(7)(b) limits the hearing officer's scope of review to three enumerated determinations, that section must be read in *pari materia* with the Implied Consent Law:

> Section 322.2615 does not establish any obligation on the part of a driver to take a test upon the request of law enforcement; it only establishes consequences for refusal. Section 316.1932 is what creates and defines the scope of the obligation. ... These statutes cannot be construed in isolation ... because they are interdependent. Instead, we must consider them in pari materia. ...
> ...
> [T]he language of subsection 322.2615(7) ... purports to "limit" the scope of review to three issues. ... The second issue directs the hearing officer to address whether the driver "refused to submit to any such test." We construe "any such test" to refer to the "lawful" test that the suspension must be "pursuant to." ... Therefore we do not construe this so-called limitation on the hearing officer's scope of review to nullify the statute's directive that the hearing officer "determine ... whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007).

---

[2] If a driver's license was suspended for refusal to submit to a breath, blood, or urine test, the hearing officer must determine:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended 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.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused 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.

§ 322.2615(7)(b), Fla. Stat. (2010).

Dep't of Highway Safety & Motor Vehicles v. Hernandez, 36 Fla. L. Weekly S243a (Fla. 2011) (citations omitted). Accordingly, the obligation of a driver to submit to a breath, blood, or urine test arises only from the Implied Consent Law, and the hearing officer must look to the Implied Consent Law to determine whether there is sufficient cause to sustain the suspension.

Breath test

The Implied Consent Law regarding alcoholic beverages provides:

> Any person who accepts the privilege ... of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test ... of his or her breath **for the purpose of determining the alcoholic content of his or her blood or breath** if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. **The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.**

§ 316.1932(1)(a), Fla. Stat. (2010) (emphasis added). The Implied Consent Law clearly states that the consent to a breath test is for the purpose of determining the alcoholic content of the driver's breath. The Court is to strictly interpret Florida's implied consent laws. *State v. Demoya*, 380 So. 2d 505 (Fla. 3d DCA 1980). The Implied Consent Law further states that the law enforcement officer requesting the breath test must have reasonable cause to believe the driver was under the influence of alcoholic beverages.

There is no competent substantial evidence in the record that Deputy Sheriff Noel suspected Stachura of driving while under the influence of alcoholic beverages. Deputy Sheriff Noel explicitly stated in the DUI probable cause affidavit that he did not suspect Stachura of being under the influence of alcohol, and that he only suspected Stachura of driving under the influence of drugs, specifically a CNS depressant. Accordingly, since Deputy Sheriff Noel did

not suspect alcohol impairment, the Implied Consent Law did not oblige Stachura to submit to a breath test.

Urine test

Since Deputy Noel had reasonable cause to believe that Stachura was under the influence of drugs and specifically stated this suspicion in the DUI probable cause affidavit, the Implied Consent Law regarding tests for chemical substances or controlled substances could apply in this case. The Implied Consent Law provides for consent to urine tests for chemical or controlled substances as follows:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to a **urine test** for the purpose of detecting the presence of **chemical substances** as set forth in s. 877.111 **or controlled substances** if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of chemical substances or controlled substances. The urine test must be incidental to a lawful arrest and administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests **at the request of a law enforcement officer who has reasonable cause to believe such person was driving** or was in actual physical control of a motor vehicle within this state **while under the influence of chemical substances or controlled substances**.

§ 316.1932(1)(b), Fla. Stat. (2010)(emphasis added). Thus, in the instant case, the Implied Consent Law would have obliged Stachura to submit to a urine test had one been requested.

Hearing Officer Gibson found in her order that "Petitioner refused to submit to a urine test or a test of his breath-alcohol or blood-alcohol level after being requested to do so by a law enforcement officer or correctional officer." Nevertheless, there is no competent substantial evidence in the record that Deputy Sheriff Noel, or any other law enforcement officer, ever requested a urine test. Had Deputy Noel requested a urine test to which Stachura refused, the driver's license suspension would have been properly sustained. Given the record before the

Hearing Officer, however, there is no competent substantial evidence that Stachura was ever offered – or refused – a urine test.

Blood test

There is also no competent, substantial evidence in the record that Deputy Sheriff Noel requested a blood test at any time. Had a blood test been requested, it appears from the record that a suspension based upon Stachura's refusal to submit to a blood test would be a departure from the essential requirements of law. The Implied Consent Law provides for blood tests for determining presence of chemical or controlled substances when there is "reasonable cause to believe the person was driving ... a motor vehicle while under the influence of ... chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible." *See* § 316.1932(1)(c), Fla. Stat. (2010). There is no evidence in the record that Stachura was transported to a hospital, clinic, or other medical facility or that a urine test was impractical or impossible.

It is clear from the record that the Stachura's license was suspended based solely upon his refusal to submit to a breath test, despite the fact that the law enforcement officer who requested the test did not suspect that Stachura was under the influence of alcohol. Based upon the foregoing, the Petition for Writ of Certiorari is hereby **GRANTED** and the order of suspension is **QUASHED**.

FRENCH, KEYSER, and ROSENBERG, JJ., concur.