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

JEFFREY THOMAS TYSON,

Petitioner,

v.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

APPELLATE DIVISION (CIVIL) "AY"
CASE NO.: 502012CA010477XXXXMB

Opinion filed: JAN 11 2013

Appeal from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Ira D. Karmelin, Esq.
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For Respondent: Peter N. Stoumbelis, Esq.
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PER CURIAM.

Petitioner's driver's license was suspended on April 4, 2012 for driving with an unlawful blood alcohol level and challenged the suspension on May 4, 2012 before Hearing Officer Tangie Hall-Jeffrey ("Hearing Officer Hall-Jeffrey"). At the hearing, the Petitioner objected to the introduction of the DUI Probable Cause Affidavit based on the fact that the jurat was defective because it merely listed a name, Peter Buhr, without indicating whether he was a clerk of court, notary public, or police officer. He argued that based on this defect, and without live testimony from Officer Adam G. Reisner ("Officer Reisner"), there was no true DUI probable

cause affidavit as required by statute and the proceeding must be dismissed. This timely Petition for Writ of Certiorari followed.

The sole issue on appeal is whether there was competent substantial evidence that Officer Reisner had probable cause to believe the Petitioner was driving under the influence because the only document evincing probable cause failed to indicate whether the attestor was a clerk, notary, or police officer. When a driver's license is suspended, the law enforcement officer must:

> [F]orward to the department, within 5 days after issuing the notice of suspension, the driver's license; *an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances*; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension.

§ 322.2615(2), Fla. Stat. (2012) (emphasis added).[1] "Section 92.50, Florida Statutes, indicates that an affidavit must be sworn to before a person authorized to administer oaths." *Crain v. State*, 914 So. 2d 1015, 1019 (Fla. 5th DCA 2005); § 92.50(1), Fla. Stat. (2012).

> An affidavit is a written statement made under oath and administered by a duly authorized person. An oath may be undertaken by an unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of a statement and assumes the obligation of an oath.

Youngker v. State, 215 So. 2d 318, 321 (Fla. 4th DCA 1968), *superseded on other grounds by statute*, Ch. 81-85, § 1, Laws of Fla.

"By definition, 'an affidavit' is a written or printed declaration or statement of facts, *made under oath, before a person having authority to administer such oath or affirmation.*"

[1] Though the Petitioner notes that these materials were not forwarded until fifteen (15) days after the issuance of the notice of suspension, section 322.2615(2), Florida Statutes (2012), further states that "[t]he failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing." § 322.2615(2), Fla. Stat. (2012). Therefore, these documents were properly considered by Hearing Officer Hall-Jeffrey.

Jackson v. State. 881 So. 2d 666 (Fla. 5th DCA 2004) (emphasis added); *see also State v. Johnston*, 553 So. 2d 730 (Fla. 2d DCA 1989) (recognizing that a sworn statement requires an oath, and an oath is an unequivocal act, before an officer authorized to administer oaths, by which the person knowingly attests to the truth of a statement and assumes the obligations of an oath.). "Law enforcement officers . . . are authorized to administer oaths when engaged in the performance of official duties. *Sections 117.01, 117.04, 117.05, and 117.103 do not apply to the provision of this section.*" § 117.10, Fla. Stat. (2012) (emphasis added).

In *Gupton v. Dep't of Highway Safety*, 987 So. 2d 737 (Fla. 5th DCA 2008), the Fifth District Court of Appeal denied second-tier certiorari review based on a challenge to the probable cause affidavit used to suspend a driver's license. The probable cause affidavit was signed by the arresting officer and the attestor but the attestor "did not indicate whether the document was executed in the capacity of a notary, or as a law enforcement officer." *Id.* at 738. The petitioner argued that this deficiency caused the document to not meet the "affidavit" requirement of section 322.2615, Florida Statutes. *Id.* The Fifth District Court of Appeal rejected this argument as "an overly technical interpretation of the affidavit requirement" and recognized that courts in Florida "have concluded that minor technical defects in an affidavit do not render it a nullity." *Id.* The district court explained:

> If the attestor had been a notary public, the notary's seal would have been affixed to the document. Since no seal was on the document, it is not unreasonable to conclude that the attestor was a fellow law enforcement officer, a conclusion buttressed by common experience and the fact that the attestor indicated that the affiant was personally known to him.

Id. (internal citations omitted); *see also Dep't of Highway Safety and Motor Vehicles v. McGill*, 616 So. 2d 1212 (Fla. 5th DCA 1993) (holding that where affidavit statute was amended, prior forms still qualified as affidavits even where they did not satisfy the technical requirements of

the new rule and recognizing that "[h]ad there been an issue concerning the officer's identity or proof at the hearing, this defect may have been relevant; however, in the present case, this defect clearly had no substantive or evidentiary significance and was not fatal to the state's proof."). Other circuit courts sitting in an appellate capacity have applied *Gupton* to defeat challenges to the adequacy of the probable cause affidavit for failing to clearly indicate whether the attestor was a law enforcement officer, notary, or clerk. *See e.g., Randall v. State of Florida, Dep't of Highway Safety and Motor Vehicles, Div. of Driver Licenses*, 16 Fla. L. Weekly Supp. 614a (Fla. 9th Cir. Ct. 2009) (affidavit failed to indicate whether attestor was notary or police officer); *Blizzard v. Dep't of Highway Safety and Motor Vehicles*, 16 Fla. L. Weekly Supp. 1130c (Fla. 12th Cir. Ct. 2009) (affidavit lacked indication of whether attestor was notary or police officer and how the attestor knew the affiant).[2]

To suspend a driver's license, evidence of probable cause must be entered at the suspension hearing. In the present case, because the officer did not testify, the only evidence of probable cause provided to the hearing officer was a document entitled "Probable Cause Affidavit" which set forth the facts of the arrest. The Petitioner argues that the probable cause affidavit submitted for review was defective because it failed to indicate whether the attestor was a notary, clerk, or police officer. He argues that this, coupled with the fact that it fails to indicate whether the affiant was personally known to the attestor, constitutes more than a "minor technicality" and therefore *Gupton* and *McGill* are inapplicable. In support he cites to this Court's decision in *Silvester v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 647b (Fla. 15th Cir. Ct. 2011), in which this Court held that where there is conclusive

[2] This Court, like the court in *Gupton*, is constrained to use common sense in evaluating the identity of the occupation of the individual named on the face of a police-generated probable cause affidavit. By virtue of the type of document to which his name was affixed, and considering the totality of the circumstances presented in this case, it is patently obvious that Peter Buhr is a law enforcement officer who was engaged in the performance of his official duties at the time he signed the probable cause affidavit.

evidence in the form of testimony that an oath was not actually administered, an affidavit is defective even if it indicates an oath was administered.

In this case, however, there is no allegation that an oath was not given, nor is there any evidence to suggest otherwise. Further, section 117.10, Florida Statutes (2012), exempts officers from the technical notary requirements contained in Chapter 117. "Thus, the requirements under section 117.05, including 'the specific type of identification the notary public is relying upon in identifying the signer,' are clearly inapplicable to" affidavits attested to by police officers. *Blizzard*, 16 Fla. L. Weekly Supp. 1130c. The argument advanced by the Petitioner is simply that the failure of the attestor to indicate his title and whether he personally knew the affiant renders the affidavit invalid. *Gupton* and *Blizzard* clearly held otherwise.

Accordingly, the Petition for Writ of Certiorari is **DENIED**.

KASTRENAKES, CROW, JJ., concur.

COX, J., dissenting,

I would grant the petition and quash the order of the hearing officer. The Fifth District Court of Appeal's opinion in *Gupton* is distinguishable in that the facts as stated in the opinion show that the "attestor indicated that the affiant was personally known to him." *Gupton v. Dep't of Highway Safety*, 987 So. 2d 737, 738 (Fla. 5th DCA 2008). The absence of those facts preclude the application of *Gupton*. Section 117.10, Florida Statutes (2012) does exempt police officers from the technical notary requirements applicable to clerks of court and notaries public, however, there are still requirements that must be observed. This section provides that:

> Law enforcement officers, correctional officers, and correctional probation officers, as defined in s. 943.10, and traffic accident investigation officers and traffic infraction enforcement officers, as described in s. 316.640, are authorized to administer oaths when engaged in the performance of official duties. Sections 117.01, 117.04, 117.045, 117.05, and 117.103 do not apply to the provisions of

this section. An officer may not notarize his or her own signature.

§ 117.10, Fla. Stat. (2012). This statute clearly states that when law enforcement officers are engaged in their official duties, they are authorized to administer oaths. There are no facts which establish this element. Therefore, the focus for a reviewing court must be whether a police officer acting as an attestor was engaged in his or her official duties. An easy way to determine this would be for the officer to place his or her badge number next to the signature line, which is a common practice in place today. Nothing in the record or on the probable cause affidavit tells us who "Peter Buhr" is or in what capacity he is signing.

The Fifth District Court of Appeal in *Gupton*, concluded that the lack of any indication of whether the attestor was a police officer or notary was insignificant and it explained its rationale by stating:

> If the attestor had been a notary public, the notary's seal would have been affixed to the document. Since no seal was on the document, it is not unreasonable to conclude that the attestor was a fellow law enforcement officer, a conclusion buttressed by common experience *and the fact that the attestor indicated that the affiant was personally known to him.*

Gupton, 987 So. 2d at 738 (emphasis added). Nowhere does it say, nor is it anywhere in the record, that "Peter Buhr" personally knows the affiant.

The court in *Blizzard* explained its rationale by stating that "the requirements under section 117.05, including the specific type of identification the notary public is relying upon in identifying the signer, are clearly inapplicable" to situations where an oath is administered by a police officer. *Blizzard*, 16 Fla. L. Weekly Supp. 1130c. (internal quotations and citations omitted). *Blizzard* is distinguishable because here, we have nothing to show that "Peter Buhr" was a police officer and was "engaged in the performance of official duties." § 117.10, Fla. Stat.

(2012). Probable cause is a fundamental constitutional concept. Statutes setting forth requirements must, in my opinion, be strictly observed and followed.