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

APPELLATE DIVISION (CIVIL): AY
CASE NO: 2015CA013392XXXXMB

CHRISTOPHER T. WILSON,
Petitioner,

v.

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

Opinion filed: AUG 1 2016

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

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K. MARX, J.

Petitioner, Christopher T. Wilson, filed the instant Petition for Writ of Certiorari, seeking a review of an order of the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") suspending his driver license for eighteen (18) months based on Petitioner's second refusal to submit to a breath alcohol test. We find that Petitioner's arguments lack merit and deny the Petition for Writ of Certiorari. We write only to address Petitioner's argument that the D.U.I Probable Cause Affidavit and Roadside Tasks Report should not have been considered because they are not proper affidavits, and thus there was no competent substantial evidence to

support a finding of probable cause.

Petitioner contends that there was no competent, substantial evidence supporting DHSMV's order suspending his license because the D.U.I Probable Cause Affidavit, DDL-8, and the Roadside Tasks Report, DDL-10, are not affidavits as required by section 322.2615(2), Florida Statutes (2015) and therefore should not have been admitted into evidence.[1] Without these two documents, Petitioner concludes that there is no other evidence in the record to support a finding that the arresting officer had probable cause to believe that Petitioner was driving or in actual physical control of the vehicle while under the influence of alcohol. We disagree.

Regardless of whether the Probable Cause Affidavit, DDL-8, was a proper affidavit, we find that the hearing officer was permitted to consider the remaining documents in finding sufficient cause to sustain Petitioner's suspension. Section 322.2615(2), Florida Statutes, requires only two documents to be in affidavit form: (1) the officer's statements of grounds for belief that the person was driving under the influence of alcoholic beverages or chemical or controlled substances; and (2) an affidavit stating that the person refused to submit to a breath, blood, or urine test. No other document submitted to the hearing officer is statutorily required to be in affidavit form or under oath, including the "D.U.I. Test Report (setting forth the officer's description of the driver's performance of any field sobriety exercises)." *Edgell-Gallowhur*, 114 So. 3d at 1087; *see DHSMV v. Currier*, 824 So. 2d 966, 968 (Fla. 1st DCA 2002) (finding that the circuit court erred by "failing to take into proper account the evidence submitted at the hearing which the [hearing officer] was required by law to consider in resolving such issue,

[1] Petitioner additionally argued that the other probable cause affidavit—admitted by the officer who stopped and detained him—contained inconsistencies that rendered it invalid. We find this argument to be without merit. *See Rysdon v. DHSMV*, 18 Fla. L. Weekly Supp. 0187b (Fla. 6th Jud. Cir. Ct., Aug. 11, 2011) (*citing DHSMV v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002)).

specifically the arrest report and the field sobriety report"). Section 322.2615(11) broadly provides that "[t]he formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test." *See also* Fla. Admin. Code R. 15A-6.013(2) (authorizing a DHSMV hearing officer to consider "any report" submitted by law enforcement relating to the suspension of the driver, the administration or analysis of a breath or blood test, the maintenance of a breath testing instrument, or a refusal to submit to a breath, blood, or urine test, which has been filed prior to or at the review").

In the present case, the hearing officer considered the Roadside Tasks Report and the Reporting Officer Narrative, which contain the arresting officer's description of Petitioner's stop and detention, observations of signs of intoxication exhibited by Petitioner, and his refusal to submit to a field sobriety test. As such documents relate "to the suspension of the driver . . . for a refusal to submit to a breath, blood, or urine test," we find that these documents constitute competent, substantial evidence that support the DHSMV's order finding that the arresting officer had probable cause to believe that Petitioner was driving or in actual physical control of his vehicle while under the influence of alcohol. § 322.2615(11), Fla. Stat. (2015); Fla. Admin. Code R. 15A-6.013(2); *Edgell-Gallowhur*, 114 So. 3d at 1087; *Currier*, 824 So. 2d at 968. Accordingly, the Petition for Writ of Certiorari is DENIED.

COX, J., concurs with an opinion. BONAVITA, J., dissents with an opinion.

COX, J., concurring.

The Petition for Writ of Certiorari should be denied. I would affirm the Hearing Officer's decision finding substantial competent evidence.

This Court has rendered a series of opinions relative to the application of Fla. Stat. 322.2615 "Suspension of License; Right to Review." Regrettably, reading the Statute is difficult and it might have been better to have written it in two parts. That said, an analysis of the Statute requires a preliminary understanding that the Statute provides two mechanisms by which to suspend a driver's license. The first of which is set forth in Section 1a through 2b. That portion of the Statute allows for a law enforcement officer or a correctional officer on behalf of the Department to suspend a driving privilege. The other method is set forth under Subsection 3 and applies where the Department itself suspends a driver's license.

In the first instance, the law enforcement officer or correctional officer suspends the driver's privilege. The officer takes the person's actual driver's license away and issues a person a 10 day temporary permit. The officer transmits to the Department results of tests within five days after receipt. The officer prepares and provides the driver with the Notice of Suspension. The officer is then required to forward to the Department within 5 days after issuing the Notice of Suspension, the actual driver's license that the officer has taken away from the driver and 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.

The officer is allowed to submit to the Department copies of the crash report, a video recording of the field sobriety test, attempts to administer the test, and other information. This information is to support the officer's decision to suspend the license.

It's understandable that rarely, if ever, does the Court see a suspension of a driver's license by a law enforcement officer or correctional officer. In Mr. Wilson's case, his driver's license was not suspended by law enforcement. His license was suspended on September 21, 2015 by the Department directly (Respondent's Exhibit RA2). Though the Order of License

Suspension says it's pursuant to Section 322.2615, Fla. Stat., it's more specifically pursuant to Section 322.2615(3).

Subsection 3 reads importantly in part as follows:

> (3) If the Department determines that the license should be suspended pursuant to this section and if the Notice of Suspension has not already been served upon the person by a law enforcement officer or correction officer as provided in Subsection (1) the Department shall issue a Notice of Suspension, unless the Notice is mailed pursuant to Section 322.251, a temporary permit that expires 10 days after the date of issuance if the driver is otherwise eligible.

It is important in the analysis of this case to know whether or not the initial suspension was done by a law enforcement officer/correctional officer under Subsection 1 and 2, or if the suspension was done initially under Subsection 3 by the Department. If suspended by Law Enforcement, then there is a need for a valid fully executed affidavit. If suspended by the Department there is no statutory requirement of an affidavit.

A review of the Statute demonstrates that the only requirement of an affidavit is set forth in Section 2a. Section 2a is that portion of the Statute which relates to a suspension of a driver's license by a law enforcement officer or correctional officer. It makes good sense that when a law enforcement officer or correctional officer is suspending a person's driver's license and physically taking the license away from them and issuing a temporary permit, that there be some sworn testimony stating the officer's grounds for doing so.

In Mr. Wilson's case, he received his citations on September 19, 2015, and 3 days later on September 21, 2015 he received the Order of License Suspension directly from the Department. Nothing in the Statute requires the Department to receive the information set forth in Subsection 2a or 2b prior to suspending a driver's license. Therefore, no affidavit is required by statute and thus the issue of whether an affidavit is notarized or not is irrelevant.

As we know, Mr. Wilson elected not to have an informal review and requested a formal review on September 22, 2015 as a result of his attorney, Mr. Reagan's letter to the Bureau of Improvement (Exhibit RA2). Approximately 10 days later, on October 2, 2015, Mr. Reagan was notified of the Notice of Formal Hearing/Prehearing Order (Exhibit RA2). That notice set the formal hearing for October 29, 2015 at 11:00 a.m.

Subsection 6b allows the Hearing Officer to regulate the course and conduct of the hearing, question witnesses, issue subpoenas, administer oaths, and receive relevant evidence. Subsection 6b is read in conjunction with Subsection 11, which provides that the formal review hearing may be conducted upon a review of the reports of a law enforcement officer or correction officer, including documents relating to the administration of a breath test, a blood test, or the refusal to take either test, or the refusal to take a urine test. (Subsection 11 does not require any sworn affidavits.)

This Court has said that the only other time a valid fully executed Affidavit is required is when there is no other competent evidence before the Hearing Officer. *See Schwartz v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 87a (Fla. 15th Cir. Ct., Oct. 3, 2012). The *Schwartz* analysis does not apply because there was other evidence. In *Lane v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 334a (Fla. 15th Cir. Ct. Dec. 13, 2012) this Court distinguished the *Schwartz* case.

> "In *Schwartz*, however, the officer did not testify at the suspension hearing and therefore the only evidence of probable cause came from a defective probable cause affidavit. In this case, Deputy Godden testified, under oath, as to the facts that led him to believe the Petitioner was under the influence while driving. This distinction renders *Schwartz* inapplicable to the instant case. The circuit court is not entitled to reweigh evidence; it may only review the evidence to determine whether it supported the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Porter*, 791 So. 2d 32, 35 (Fla. 2d DCA 2001). If the circuit court reweighs the evidence, it has applied an improper standard of review, which "is tantamount to departing from the essential requirements of law." *Broward*

> *County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 845 (Fla. 2001); *Dep't of Highway Safety & Motor Vehicles v. Kurdziel*, 908 So. 2d 607 (Fla. 2d DCA 2005) (granting second-tier certiorari relief when circuit improperly reweighed the evidence); *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247 (Fla. 2d DCA 2006)..."

Here, the Hearing Officer admitted into evidence 22 exhibits. Exhibits 1 through 21 are clearly reports of law enforcement, including documents relative to refusal to submit to breath tests, all of which are competent, substantial, and relevant evidence. I therefore agree the Petition be DENIED.

BONAVITA, J., dissenting.

With respect for my colleagues, I would grant the Petition. I believe this case is controlled by this Court's decision in *Schwartz v. DHSMV*, 20 Fla. L. Weekly Supp. 87a (Fla. 15th Cir. Ct., Oct. 3, 2012). Here, as in *Schwartz*, the sole document relied upon by the hearing officer setting forth the officer's grounds to believe that the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substance is not sworn. Nor did the police officer in this case appear at the review hearing and provide sworn testimony as to this. *See Lane v. DHSMV*, 20 Fla. L. Weekly Supp. 334a (Fla. 15th Cir. Ct. Dec. 13, 2012). Without any testimony or a properly sworn affidavit, the Department's finding that the officer had probable cause to believe that the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substance is unsupported by competent substantial evidence. *See id.*; *Schwartz*; § 322.2615(2)(a), Fla. Stat.

Nor do I agree that § 322.2615, Fla. Stat. "provides two mechanisms by which to suspend a driver's license." Rather, my reading of subsections (1), (2), and (3) of the statute leads me to

conclude that these subsections all operate together.

> (1)(a) A law enforcement officer or correctional officer shall, on behalf of the department, suspend the driving privilege of a person who is driving or in actual physical control of a motor vehicle and who has an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, or of a person who has refused to submit to a urine test or a test of his or her breath-alcohol or blood-alcohol level. The officer shall take the person's driver license and issue the person a 10-day temporary permit if the person is otherwise eligible for the driving privilege and shall issue the person a notice of suspension. If a blood test has been administered, the officer or the agency employing the officer shall transmit such results to the department within 5 days after receipt of the results. If the department **then** determines that the person had a blood-alcohol level or breath-alcohol level of 0.08 or higher, the department shall suspend the person's driver license pursuant to subsection (3).
>
> (2)(a) Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver 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. The 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.
>
> (3) If the department determines that the license should be suspended pursuant to this section and if the notice of suspension has not already been served upon the person by a law enforcement officer or correctional officer as provided in subsection (1), the department shall issue a notice of suspension and, unless the notice is mailed pursuant to s. 322.251, a temporary permit that expires 10 days after the date of issuance if the driver is otherwise eligible.
> §§ 322.2615(1)(a), (2)(a), (3), *Fla. Stat.* (e.s.).

My reading of these two subsections, along with subsection (3) is that once the officer, on behalf of the Department, suspends the person's driving privilege and takes possession of that person's driver's license, he must then forward it, along with *inter alia*, "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 substance,"

within five (5) days to the Department. § 322.2615(2)(a), *Fla. Stat.* At that point, subsection (3) of the statute automatically comes into play: "If the department then determines that the person had a blood-alcohol level or breath-alcohol level of 0.08 or higher, the department shall suspend the person's driver license pursuant to subsection (3). . ." § 322.2615(1)(a), *Fla. Stat.* (e.s.) The driver may thereafter request a formal or informal review of the Department's suspension within ten (10) days after the date of issuance of the notice of suspension. § 322.2615(1)(b)3., *Fla. Stat.* I do not read subsections (1) and (2) as providing one review proceeding in which some form of sworn testimony of the officer's probable cause for DUI would be required to support a suspension order whereas under section (3), such evidence would not be required.

Nor for that matter do I agree that s. 322.2615(11) dispenses with the sworn evidence requirement, either in the form of testimony or affidavit. Rather, that provision simply permits the hearing officer to rely upon certain documents in a formal review hearing in making his or her determination whether to sustain the Department's order of suspension. *Id.* If my reading of *Schwartz* is correct, I believe it stands for the proposition that there must be sworn testimony, live or in affidavit form, "of 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," before a person's driving privilege may be suspended. § 322.2615(2)(a), *Fla. Stat.* This is true regardless of whether the suspension is sustained following a formal or an informal review hearing. As in *Schwartz*, in this case because such testimony was not part of the evidence before the hearing officer, I believe there is no competent substantial evidence to support the order of suspension of the Petitioner's driver's license. Accordingly, I must respectfully dissent.

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Respondent.

Petition filed: December 3, 2015

_____/

DATE OF PANEL: MARCH 28, 2016

PANEL JUDGES: COX, K. MARX, BONAVITA

GRANTED/DENIED/OTHER: PETITION DENIED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
4/13/16 J.	J.	J.
7/18/16 J.	J.	J.
8-1-16 J.	8-1-2016 J.	J.