Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES—Suspension—Competent, substantial evidence supports the Hearing officer's decision that deputy had objectively reasonable basis for traffic stop for DUI and supports the decision that Petitioner was under arrest when he refused to submit to the breath-alcohol test. Distinguishing State v. Gunn, 408 So. 2d 647 (Fla. 4th DCA 1981). Petition denied. *Menikheim v. Fla. Dep't of Highway Safety and Motor Vehicles*, No. 12-000002AP-88A (Fla. 6th Cir. App. Ct. March 6, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

DANIEL MENIKHEIM,
Petitioner,

Case No.: 12-000002AP-88A
UCN: 522012AP000002XXXXCV

v.

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

Opinion Filed _____

Petition for Writ of Certiorari from
Decision of Hearing Officer
Bureau of Administrative Reviews
Department of Highway Safety
and Motor Vehicles

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PER CURIAM.

Daniel Menikheim seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews,

Department of Highway Safety and Motor Vehicles entered on December 22, 2011. The Decision affirmed the order of suspension of Mr. Menikheim's driving privileges. The petition is denied.

Statement of Case

On November 6, 2011, Mr. Menikheim was stopped by an officer of the Pinellas County Sheriff Department. After allegedly unsuccessfully completing field sobriety tests Mr. Menikheim was arrested for driving while under the influence of an alcoholic beverage ("DUI"). Mr. Menikheim refused to submit to a breath, urine, or blood alcohol test and previously had refused to submit to a breath test in Hillsborough county on June 21, 2002.

A formal review hearing was conducted before a Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety. At the hearing, counsel for Mr. Menikheim filed a "Motion to Invalidate Mr. Menikheim's Driver's License Suspension" and presented argument to the Hearing Officer. In the "Findings of Fact, Conclusions of Law and Decision" the Hearing Officer denied the motion and upheld the suspension of Mr. Menikheim's driving privileges. This Petition for Writ of Certiorari followed.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

Analysis

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes (2011). The hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. Scope of the review is limited to a determination of (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; and (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 one year or, in the case of a second or subsequent refusal, for a period of eighteen months. § 322.2615(7)(b), Fla. Stat. Additionally, the Department cannot suspend a driver's license under section 322.2615 for refusal to submit to a breath test under section 316.1932, Florida Statutes (2011), if the refusal is not incident to a lawful arrest. Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1076 (Fla. 2011).

Mr. Menikheim raises three arguments in the Petition for Writ of Certiorari:

Issue One: "The Department's Order does not comport with the essential requirements of the law when the Hearing Officer upheld the administrative suspension of the Petitioner's driving privilege notwithstanding a lack of evidence to establish that the Petitioner was lawfully stopped."

At the hearing, the Department presented several pieces of evidence including the Complaint/Arrest Affidavits for DUI and for Refusal to Submit to Breath Test (Pet. Ex. 3-5), and the ACISS PCSO-Offense Report SO11-379644 ("the Report") (Pet. Ex. 6) prepared by Deputy Williams of the Pinellas County Sheriff Department. The narrative portion of the Report states that Corporal Smalley of the Pinellas County Sheriff Department stopped Mr. Menikheim's truck at approximately 2357 hours after he observed the Toyota truck "approach an intersection at a high rate of speed and break abruptly, skidding on the pavement toward another vehicle which was stationary in the same lane at the intersection. Refer to Cpl. Smalley's supplemental report." Corporal Smalley's supplemental report was not submitted to the Hearing Officer.

The narrative by Deputy Williams continues:

> Cpl. Smalley contacted me via the laptop computer and advised me that the driver, Daniel Menikheim, displayed signs of impairment.

> I arrived at the traffic stop location at approximately 0012 hours. The Toyota truck and Cpt. Smalley's marked patrol vehicle were parked in the eastbound lane of Lake Tarpon Drive.
>
> Daniel Menikheim was sitting in the driver's seat of the Toyota truck, and he was the sole occupant of the Toyota truck.
>
> Cpl. Smalley said Daniel Menikheim would have crashed into the rear of the vehicle which was stationary at the intersection, but the male driver of the stationary vehicle observed Daniel approaching at a high rate of speed and moved out of the lane. Cpl. Smalley said Daniel displayed obvious signs of impairment, and Daniel admitted that he should not be driving.
>
> Cpl. Smalley provided me Daniel Menikheim's Florida driver's license which he had obtained from Daniel prior to my arrival.

Mr. Menikheim notes that no citation for careless driving was submitted to the Hearing Officer. He claims that probable cause cannot be shown through the use of conclusory statements which do not permit the reviewing court to consider whether the facts available to the law enforcement officer were sufficient to support the officer's conclusions. In support of this argument, Mr. Menikheim cites to Parker v. State, 693 So. 2d 92, 95 (Fla. 2d DCA 1997)(involving denial of a motion to suppress contraband in a criminal trial for possession of cocaine in which appellate court held that the officers did not have probable cause to seize contraband in a tissue dropped to the ground by the defendant), and Department of Highway Safety and Motor Vehicles v. Roberts, 938 So. 2d 513 (Fla. 5th DCA 2006).

In Roberts the appellate court held that "to justify a warrantless stop an officer must have an articulable, reasonable suspicion that a violation of the law has occurred." 938 So. 2d at 514. The only evidence presented to the hearing officer of the Bureau of Administrative Reviews regarding the stop of Mr. Roberts was the affidavit of probable cause that made the conclusory statement that Mr. Roberts was driving 71 mph in a 45 mph speed limit area. No information was presented to the hearing officer concerning how the officer reached the conclusion about the speed Mr. Roberts was traveling. The appellate court denied the Department's petition for writ of certiorari. It found that the trial court had not departed from the essential requirements of law when it concluded

that the evidence presented was insufficient to establish an objective basis upon which to conclude that the officer's suspicions were reasonable. Id.

Further, Mr. Menikheim cites to Blizzard v. Department of Highway Safety and Motor Vehicles, Case No. 99-4599-CA (Fla. 4th Cir. App. Ct. Feb. 1, 2001). In that case, the Sheriff Deputy came upon a crash and the Arrest and Booking Report stated that Mr. Blizzard ran a red light and was involved in a crash with another vehicle. Mr. Blizzard testified at the administrative hearing that he was at the intersection in question before any law enforcement vehicles arrived, he was not inside his vehicle when the deputies arrived, and not seated in the vehicle at any time after the deputies arrived. The deputies asked Mr. Roberts questions about the accident before his Miranda rights were read, but after the warnings were read he was not asked any questions about who was driving the vehicle during the accident. The appellate court found that there was no competent substantial evidence to support the hearing officer's finding that the officer had probable cause to believe Mr. Blizzard was DUI because there was no admissible evidence upon which the deputy's statements could have been based.

Mr. Menikheim cites several other appellate decisions in which the courts held that there was a lack of competent, substantial evidence upon which to base the arresting officer's conclusions that there was probable cause to believe an individual was driving or was in actual physical control of a motor vehicle while intoxicated.

Mr. Menikheim states that in the present case the Hearing Officer relied upon Corporal Smalley's "groundless conclusion that Petitioner violated the careless driving statute to uphold the license suspension without reliable facts." Mr. Menikheim centers his argument on the Corporal's conclusion that Mr. Menikheim was traveling at a "high rate of speed" and questions how the rate of speed could be determined without more. Mr. Menikheim states, "Finally, it is not careless to approach other vehicles at a high rate of speed and slam on brakes as long as you do not endanger life, limb or property of other people."

In evaluating the validity of a traffic stop, this Court is to determine if the deputy had an objectively reasonable basis to effectuate the initial stop. See Dobrin v. Fla. Dep't of Highway Safety & Motor Vehicles, 874 So. 2d 1171 (Fla. 2004). A law enforcement officer does not have to have probable cause to believe that a driver is

intoxicated in order to make an investigatory stop; a founded suspicion of criminal activity is all that is required. As explained in State, Department of Highway Safety and Motor Vehicles v. DeShong, 603 So. 2d 1349, 1351 (Fla. 2d DCA 1992):

> In order to effect a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity. Thereafter, the probable cause needed to arrest or to suspend a license for DUI may be based upon evidence obtained during the standard procedures following a valid traffic stop . . . . The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior.

See also Dep't of Highway Safety and Motor Vehicles v. Ivey, 73 So. 3d 877, 881 (Fla. 5th DCA 2011).

Mr. Menikheim correctly states that there is no evidence in the record to document what the Corporal's training and experience was with regard to evaluating whether a vehicle is traveling at a high rate of speed. However, the Court concludes that Corporal Smalley's conclusion that Mr. Menikheim was driving in a careless manner is supported by competent, substantial evidence. Mr. Menikheim was observed to approach the intersection and was seen "braking abruptly, skidding on the pavement toward another vehicle" that was stationary. This observation was sufficient to give the corporal an objectively reasonable basis to effectuate the initial investigatory stop. When Mr. Menikheim approached the intersection in this manner he did endanger the life, limb or property of the driver who was stationary. According to the observations of Cpl. Smalley, if the other driver had not been alert, Mr. Menikheim would have crashed into the back of the stationary vehicle.

This Court concludes that the Hearing Officer properly denied Mr. Menikheim's motion because there is competent, substantial evidence to support the investigatory stop of the vehicle.

Issue Two: "The Department's Order does not comport with the essential requirements of law because the Hearing Officer upheld Petitioner's driver's license suspension even though there was hopeless contradiction in the documentation submitted by the Department for the Hearing Officer to determine by competent substantial evidence that Petitioner refused the breath test after being placed under arrest."

In order for the suspension of a driver's license to be valid under the statute at issue, the law requires that a defendant must have been under arrest at the time the request to submit to the breath test was made. See §§ 316.1932(1)(a); 322.2615, Fla. Stat. (2011); Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070 (Fla. 2011). Mr. Menikheim argues there are hopeless conflicts within the documents submitted by the Department to determine if he refused to submit to the breath test after being placed under lawful arrest.

In his Petition, Mr. Menikheim points to the Complaint/Arrest Affidavits for DUI and for Refusal to Submit to Breath Test (Pet. Ex. 4-5), that states Mr. Menikheim was arrested at 12:40 a.m. on November 7, 2011. Then directs the Court to the "Implied Consent for DUI in a Motor Vehicle" (Pet. Ex. 8) that states Mr. Menikheim refused to take the breath test after being informed of the consequences of such a refusal at 0040 hours, the exact same time. Mr. Menikheim claims he could not have been arrested and read his implied consent after arrest as required by statute, because the documents submitted demonstrate that the events happened simultaneously. It is asserted that because the Department presented no evidence to resolve this discrepancy, there was not competent, substantial evidence to support a finding that the implied consent was read after arrest.

Mr. Menikheim cites to Department of Highway Safety and Motor Vehicles v. Trimble, 821 So. 2d 1084 (Fla. 1st DCA 2002), to support his argument that due to the inconsistencies in the evidence, the hearing officer's affirmance of the suspension of his driver's license should be quashed. See also Stellar v. Dep't of Highway Safety & Motor Vehicles, 17 Fla. L. Weekly Supp. 152a (Fla. 6th Cir. App. Ct. Dec. 10. 2009); Ojiem v. Dep't of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 535a (Fla. 6th Cir. App. Ct. March 26, 2008); Cellamare v. Dep't of Highway Safety & Motor Vehicles, 14 Fla. L. Weekly Supp. 908a (Fla. 6th Cir. App. Ct. April 13, 2007).

In Trimble, the circuit court acting in its appellate capacity found that competent, substantial evidence did not support the Hearing Officer's determination that inconsistencies between the timing of events in the various documents submitted by the Department were the result of "clerical errors." In affirming the circuit appellate court,

the First District Court of Appeal concluded that the circuit court had not impermissibly reweighed the evidence when it granted Ms. Trimble's petition for writ of certiorari.

The issue in Trimble was whether Ms. Trimble was given the Implied Consent warnings prior to her refusal to submit to the breath/blood/urine test. In that case, clearly the evidence was in conflict. The "Affidavit of Refusal to Submit to Breath, Urine or Blood Test" recited that Trimble was arrested on the evening of September 27, 2000, at 11:40 p.m. The same document recounted that the warning, request to submit to the breath test, and refusal to submit were made on the early morning hours of September 27, 2000, at 12:45 a.m. The printout from the Breathalyzer machine reflected that Ms. Trimble's refusal occurred on September 27, 2000, at 12:47 a.m. But, contradicting the statements in both documents was the arresting officer's narrative report indicating that the Implied Consent Warning was given on September 27, 2000, at 12:50 a.m.

The First District Court of Appeal in Trimble quoted De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957), when discussing the definition of competent, substantial evidence:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

Trimble, 821 So. 2d at 1086-87. The opinion notes that two years later the Florida Supreme Court further refined the definition when it stated, "Although the terms 'substantial evidence' or 'competent substantial evidence' have been variously defined, past judicial interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient." Id. at 1087 (quoting Fla. Rate Conference v. Fla. R.R. & Pub. Util. Comm'n, 108 So. 2d 601, 607 (Fla. 1959)). The First District Court of Appeal concluded, "The hearing officer's finding that Trimble was given a consent warning before her refusal could have rested as much

on a flip of a coin as on the documentary evidence submitted." Id. at 1087. The circuit appellate court's decision to set aside the suspension of Trimble's driver's license was affirmed by the First District Court of Appeal when it denied the second-tier certiorari petition.

In the present case, the narrative portion of the ACISS PCSO-Offense Report SO11-379644 (Pet. Ex. 6) describes the stop of Mr. Menikheim's vehicle as detailed above and then sets forth Deputy Williams' observation of Mr. Menikheim's attempt to complete field sobriety tests, his appearance, and the distinct odor of an alcoholic beverage on Mr. Menikheim's breath. The narrative states that Deputy Williams read the Miranda warnings to Mr. Menikheim who invoked his Fifth Amendment rights. Deputy Williams states that he arrested Mr. Menikheim at approximately 0040 hours. In the next paragraph of the narrative, the deputy states that he requested Mr. Menikheim submit to a breath test and read the "State of Florida Implied Consent for DUI in a Motor Vehicle" form. Mr. Menikheim refused to submit to a test knowing that his driving privileges would be suspended for at least a year.

The narrative states that Mr. Menikheim was transported to the Central Breath Testing facility and arrived at approximately 0119 hours. Mr. Menikheim was observed for twenty minutes from 0125 to 0145. At approximately 0151 the deputy again requested that Mr. Menikheim submit to a breath test. Mr. Menikheim again refused to submit to the test and the deputy completed the "Affidavit of Refusal to Submit to Breath, Urine, or Blood Test" form.

In addition to the narrative contained in the Report, other documents presented to the Hearing Officer evidence the following timeline:

11/06/11 at 23:56-23:57	Corporal Smalley observes Mr. Menikheim driving vehicle apparently DUI Call RE: traffic stop received by dispatch	ACISS PCSO-Offense Report SO11-379644, page 1 (Pet. Ex. 6); Florida DUI Uniform Traffic Citation (Pet. Ex. 2)
11/06/11 at 23:57	Mr. Menikheim stopped for careless driving Field Sobriety Tests given to Mr. Menikheim	Complaint/Arrest Affidavits for DUI and for Refusal to Submit to Breath Test (Pet. Ex. 4, 5);

		Pinellas County Standardized Field Sobriety Test Form (Pet. Ex. 7)
11/07/11 at 00:02; Deputy arrives 00:12	Dep. Williams dispatched to scene	ACISS PCSO-Offense Report SO11-379644, page 1 (Pet. Ex. 6)
11/07/11 at approx.11:57 p.m.	Mr. Menikheim while driving (after having license suspended for prior refusal to take breath test) did refuse to submit to breath test, and who arresting officer had probable cause to believe was DUI, or lawfully arrested and informed that license would be suspended and informed refusal is a misdemeanor	Complaint/Arrest Affidavits for DUI and for Refusal to Submit to Breath Test (Pet. Ex. 4, 5)
11/07/11 at 12:40 a.m.	Mr. Menikheim was arrested	Complaint/Arrest Affidavits for DUI and for Refusal to Submit to Breath Test (Pet. Ex. 4, 5); ACISS PCSO-Offense Report SO11-379644, page 5 (Pet. Ex. 6)
11/07/11 at 0040	Mr. Menikheim refused to take the breath test after being informed of consequences of refusal	"Implied Consent for DUI in a Motor Vehicle" (Pet. Ex. 8)
11/07/11 at 01:25-01:49	Observation period for administration of breath test	Breath Alcohol Test Affidavit from the Intoxilyzer 8000 (Pet. Ex. 9)
11/07/11 at 01:51	A second time Mr. Menikheim refused to submit to the breath test at the Central Breath Testing Facility	Breath Alcohol Test Affidavit from the Intoxilyzer 8000 (Pet. Ex. 9); "Refusal to Submit to Breath, Urine, or Blood Test" (Pet. Ex. 10)

The Hearing Officer is to review the evidence submitted and "shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. Preponderance of evidence is

defined as evidence “which as a whole shows that the fact sought to be proved is more probable than not.” Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011)(quoting State v. Edwards, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)).

The appellate court is not to reweigh the evidence, but is to determine if competent, substantial evidence supports the Hearing Officer's findings and decision. Stenmark, 941 So. 2d at 1249. In reviewing all the evidence of record as detailed above, including the narrative contained in Dep. Williams' Report, this Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's decision that all elements necessary to sustain the suspension of Mr. Menikheim's driving privileges were met; including the requirement that Mr. Menikheim be under arrest at the time he refused to submit to the breath-alcohol test. The evidence in the record is such that "a reasonable mind would accept [it] as adequate" to support the suspension of Mr. Menikheim's driver's license. See De Groot, 95 So. 2d at 916; see also Trimble, 821 So. 2d at 1086-87; Leverence v. Dep't of Highway Safety & Motor Vehicles, 17 Fla. L. Weekly Supp. 313a (Fla. 7th Cir. App. Ct. Nov. 3, 2009).

Issue Three: "The Department's Order does not comport with the essential requirements of law when the Hearing Officer upheld Petitioner's driver's license suspension despite the hopeless contradiction in documentation submitted by the Department for the Hearing Officer to determine by competent substantial evidence that Petitioner refused the breath test after being informed of Implied Consent."

Mr. Menikheim states that there were "hopeless conflicts within the documents" submitted to the Hearing Officer. He correctly states that the law requires that a defendant be informed of the consequences of the refusal to submit to a breath/urine/blood alcohol test. It is asserted that the conflicts in the documentation make the Hearing Officer's determination that Mr. Menikheim refused the breath test after being read implied consent baseless. He directs the Court to the DUI citation (Pet. Ex. 2); the Complaint/Affidavit for refusal to submit to breath test (Pet. Ex. 5); Pinellas County Standardized Field Sobriety Test Form (Pet. Ex. 7); the "Implied Consent for DUI in a Motor Vehicle" (Pet. Ex. 8); the Breath Alcohol Test Affidavit from the Intoxilyzer 8000 and the affidavit of "Refusal to Submit to Breath, Urine, or Blood Test"

(Pet. Ex. 9., 10). Mr. Menikheim argues that from the documentary evidence it is equally likely that Mr. Menikheim refused to take the breath test before being read the implied consent form.

As stated above, the appellate court is not to reweigh the evidence, but is to determine if competent, substantial evidence supports the Hearing Officer's findings and decision. Stenmark, 941 So. 2d at 1249. In reviewing all the evidence of record as detailed above, including the narrative contained in Dep. Williams' Report, this Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's decision that all elements necessary to sustain the suspension of Mr. Menikheim's driving privileges, including the requirement that Mr. Menikheim be given the Implied Consent Warnings before he twice refused to submit to the breath-alcohol test.[1] The evidence in the record is such that "a reasonable mind would accept [it] as adequate" to support the suspension of Mr. Menikheim's driver's license. See De Groot, 95 So. 2d at 916; see also Fla. Rate Conference, 108 So. 2d at 607; Leverence, 17 Fla. L. Weekly Supp. 313a.

The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 6th day of March, 2013.

Original order entered on March 6, 2013, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

[1] In its Response to the Petition, the Department argues that it was not necessary for a driver of a vehicle to be given Implied Consent warnings prior to being asked to take a breath-alcohol test. See State v. Gunn, 408 So. 2d 647 (Fla. 4th DCA 1981).

The Gunn case is distinguishable in that it involved a criminal prosecution for DUI in which Mr. Gunn submitted to the Intoxilyzer breath-alcohol test. The trial court granted a motion to suppress the results of the Intoxilyzer test because the law enforcement officer did not inform Mr. Gunn that if he had refused to submit to the breath-alcohol test, his driving privileges would have been suspended. The Fourth District Court of Appeal reversed the order suppressing the evidence and concluded that the Legislature did not intend for evidence of Intoxilyzer test results in a criminal prosecution to be suppressed when an officer fails to give the Implied Consent warnings to an individual who does not refuse to submit to a breath-alcohol test.

In the present case it is not necessary for this Court to determine if a driver must be given the Implied Consent warnings before being asked to take a breath-alcohol test. The evidence demonstrates that Mr. Menikheim was asked to take an alcohol-breath test on two occasions and clearly, at a minimum, at the time of the second request he had been read the Implied Consent warnings prior to his refusal.

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