Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES—Suspension—Petitioner's erratic driving warranted brief investigatory stop and established founded suspicion validating DUI stop. Uncertified copy of Transcript of Driving Record received by Hearing Officer without objection sufficient evidence of prior refusal(s) to submit to breath–alcohol test supporting enhanced suspension. For purposes of administrative license suspension, there is no right to attorney before submitting to breath-alcohol test. No evidence Petitioner communicated confusion regarding the interplay of Implied Consent and Miranda rights in order to invoke "Confusion Doctrine." Petition denied. *Vanek v. Dept. of Highway Safety and Motor Vehicles*, No. 13-000040AP-88A (Fla. 6th Cir. App. Ct. January 13, 2014).

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

TERENCE M. VANEK,
Petitioner,

Case No.: 13-000040AP-88A
UCN: 522013AP000040XXXXCI

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.

Terence M. Vanek 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 March 25, 2013. The Decision affirmed the order of suspension of Mr. Vanek's driving privileges. The petition is denied.

Statement of Case

At the formal review hearing, the Hearing Officer admitted the following documents into evidence: (DDL1) Notice of Suspension; (DDL2) Oath Form; (DDL3) Complaint/Arrest Affidavit; (DDL4) Florida Highway Patrol DUI Investigation Report; (DDL5) Affidavit of Refusal to Submit to Breath, Urine, or Blood Test; and (DDL6) Mr. Vanek's uncertified driving record. Testimony was received from Tampa Police Officer Baranowski and Trooper McMillan who had assisted Trooper Consuegra in the DUI investigation. Mr. Vanek was not present and Trooper Consuegra had not been subpoenaed to appear at the hearing.

Counsel for Mr. Vanek was permitted to file a written Motion to Invalidate after the hearing. Counsel raised the following arguments: (1) invalidate the suspension because it was not a justifiable traffic stop; (2) invalidate the suspension due to insufficient evidence of a prior refusal to submit to a breath-alcohol test; (3) invalidate the suspension due to the "Confusion Doctrine;" (4) invalidate the suspension due to Trooper McMillan improperly construing Mr. Vanek's right to counsel as a refusal; and (5) invalidate the suspension due to Trooper McMillan's intentional misinformation to Mr. Vanek. The Hearing Officer summarily denied the Motion to Invalidate.

In the "Findings of Fact, Conclusions of Law and Decision," the Hearing Officer made the following findings of fact: On January 12, 2013, Tampa Police Officer Baranowski observed Mr. Vanek's vehicle drifting between lanes, unable to maintain within his lane of travel. Although the traffic was light, Mr. Vanek almost struck other vehicles. Officer Baranowski observed Mr. Vanek driving close to the steering wheel and became concerned for public safety. Therefore, she stopped his vehicle to check on his wellbeing. Upon making contact with Mr. Vanek, Officer Baranowski detected

clues of impairment and requested a Driving Under the Influence (DUI) investigation by Florida Highway Patrol.[1]

Florida Highway Patrol Trooper Consuegra arrived on the scene and upon contact with Mr. Vanek the trooper detected a strong odor of alcoholic beverage; observed that Mr. Vanek had bloodshot, watery eyes; and that Mr. Vanek's speech was slow and lethargic. Trooper Consuegra asked Mr. Vanek to perform field sobriety testing. Mr. Vanek responded, "I need to speak to my lawyer and will not do Field Sobriety Exercise."

Mr. Vanek was arrested and transported to Central Breath Testing. Trooper Consuegra observed Mr. Vanek for twenty minutes before reading the Implied Consent Warning to him. Mr. Vanek was asked to submit to a breath-alcohol test. Mr. Vanek stated he did not wish to take the test without first speaking with his lawyer. Trooper Consuegra advised Mr. Vanek it would be considered to be a refusal if he did not submit to the breath-alcohol test and again read the Implied Consent Warning. Mr. Vanek again stated that he would not take the breath-alcohol test until he spoke to his lawyer. Trooper Consuegra charged Mr. Vanek with refusal to submit to a breath test.

By a preponderance of the evidence the Hearing Officer found all the elements necessary to sustain the suspension of Mr. Vanek's license based on his refusal to submit to a breath, blood, or urine test. The suspension was affirmed.

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 Hwy. 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

[1] Tampa Police Officer Baranowski was off duty when she observed Mr. Vanek and the traffic stop was made in Pinellas County. However, the stop was legal because a law enforcement officer outside his or her jurisdiction can make a legal stop and arrest as a private citizen for a breach of the peace based on erratic and unsafe driving. See Roberts v. Dep't of Highway Safety and Motor Vehicles, 976 So. 2d 1241, 1242 (Fla. 2d DCA 2008).

Decision. Dep't of Hwy. Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes (2012). The hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. 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 (2012), if the refusal is not incident to a lawful arrest. Fla. Dep't of Hwy. Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1076 (Fla. 2011).

In a formal review of a driver's license suspension pursuant to section 322.2615(1)(b)3, the 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.

Analysis

Five Issues are raised in the Petition for Writ of Certiorari

Issue One: "The Decision of the Hearing Officer departed from the essential elements of law and created a miscarriage of justice to the prejudice of Petitioner because the Hearing Officer used challenged and refuted improper evidence to find Petitioner's stop was legal and the arrest lawful, and thereby wrongly sustained Petitioner's suspension, in violation of his Due Process Rights."

This Court first notes that Mr. Vanek is incorrect when he states in his Petition that the Hearing Officer made no specific finding that the stop of Mr. Vanek's vehicle was legal, lawful, or made with reasonable suspicion or probable cause. The Hearing Officer reviewed the arguments raised in Mr. Vanek's written Motion to Invalidate prior

to entering the Decision in this case. The Decision states: "The motion to invalidate the suspension because it was not a justifiable traffic stop is denied."

Mr. Vanek claims that the record fails to show that the stop of his vehicle was legal because it was not based on a reasonable suspicion of impairment, "in that Petitioner's driving was not so erratic to reasonably raise that suspicion." Citing Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998), Mr. Vanek argues that simple weaving, when no other traffic is interfered with or persons or property imperiled, but itself is insufficient justification for a traffic stop.

Crooks is not applicable to the present case because Crooks did not involve a DUI stop. The deputy stopped Mr. Crook's vehicle for a violation of section 316.089(1), Florida Statutes (1995), for failure to maintain a single lane. The appeal challenged Crook's conviction for possession of marijuana following the denial of his dispositive motion to suppress. The appellate court stated that the traffic infraction of failure to maintain a single lane does not occur in isolation, but "requires evidence that the driver's conduct created a reasonable safety concern." Id. at 1043. In that case the appellate court reversed the denial of Mr. Crook's motion to suppress because the arresting deputy sheriff had no objective basis to stop the vehicle based on probable cause. Id. at 1042 (citing Holland v. State, 696 So. 2d 757 (Fla. 1997)).

Mr. Vanek's reliance on the cases of Hurd v. State, 958 So. 2d 600 (Fla. 4th DCA 2007); S.A.S. v. State, 884 So. 2d 1167 (Fla. 2d DCA 2004); and Jordan v. State, 831 So. 2d 1241 (Fla. 5th DCA 2001), similarly is misplaced. These cases do not involve DUI stops, but are direct appeals from criminal convictions relating to the trial court order denying motions to suppress. The appellants in those cases argued that the law enforcement officers did not have probable cause to believe a traffic violation had occurred.

In order to effect a valid stop for DUI, probable cause is not necessary; the officer need only have a “founded suspicion” of criminal activity. State, Dep't of Hwy. Safety & Motor Vehicles v. DeShong; 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992); see Dep't of Hwy. Safety & Motor Vehicles v. Ivey, 73 So. 3d 877, 881 (Fla. 5th DCA 2011). Thereafter, the officers must have probable cause to arrest or to suspend a license for

DUI based upon evidence obtained during the standard procedures following a valid traffic stop. Id.

"[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." DeShong, 603 So. 2d at 1352. Erratic driving has been held sufficient to establish a founded suspicion and to validate a DUI stop. Id.; see, e.g., Roberts v. State, 732 So. 2d 1127 (Fla. 4th DCA 1999) (finding continuous weaving within a lane presented objective basis for suspecting driver under the influence and supported stop); State v. Carrillo, 506 So. 2d 495 (Fla. 5th DCA 1987) (involving weaving within a traffic lane); Esteen v. State, 503 So. 2d 356 (Fla. 5th DCA 1987) (involving weaving within a lane on the highway at of 45 m.p.h.). Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. DeShong, 603 So. 2d at 1352; see Bailey v. State, 319 So. 2d 22, 26 (Fla. 1975); State v. Davidson, 744 So. 2d 1180, 1181 (Fla. 2d DCA 1999).

Mr. Vanek correctly states that a mere suspicion is insufficient to justify an investigatory stop. See Carter v. State, 454 So. 2d 739 (Fla. 2d DCA 1984). He acknowledges that concern for the safety of the motoring public can warrant a brief investigatory stop to determine if the driver is ill, tired, or driving under the influence. However, he points out that there must be some evidence to support a finding that the stop was due to these concerns, and not merely pretextual. See e.g. Duke v. State, 82 So. 3d 1155 (Fla. 2d DCA 2012).

It is argued that the allegations in Trooper Consuegra's report that Mr. Vanek almost struck other vehicles was refuted and "challenged" by the testimony of Officer Baranowski who actually conducted the traffic stop in this case. Mr. Vanek claims the legality of the stop must stand on Officer Barnowski's testimony and not the incorrect allegations in the "second-hand report" of Trooper Consuegra.

This Court notes that the Findings of Fact in the Hearing Officer's Decision does state that Mr. Vanek almost struck other vehicles. However, the Decision continues and states that Officer Baranowski "observed [Mr. Vanek] driving close to the steering wheel and, concerned for public safety, conducted a traffic stop to check the wellbeing of [Mr.

Vanek]." These findings were the basis of the Hearing Officer's conclusion that the stop of Mr. Vanek's vehicle was lawful.

> At the formal review hearing, Officer Baranowski testified as follows:
>
> It was the early morning hours of the 12th, and I was driving on the Howard Franklin Bridge in the far right-hand lane when I observed a vehicle in front of me, I believe it was a jeep. I noticed that the vehicle was swerving in and out of the lane to the left and to the right, crossing over the dashed line to the left and over the solid white line to the right.
>
> I continued to follow the vehicle for approximately a mile to, you know, to see if it would continue or if it would stop, and the driving continued.
>
> I maneuvered myself into the next left-hand lane so [the subject vehicle] would be in the middle right-hand lane and pulled up next to the vehicle, where I observed the driver, which was a white male, driving the vehicle. He was scooted up in his seat, very, very close to the wheel, grasping the wheel with both of his hands. It appeared that he had a hard time, you know, driving and observing the road; so at that point, for safety purposed, I went ahead and conducted a traffic stop on the vehicle—on the Howard Franklin Bridge.

(App. 1, Tr. 5-6). The Officer stated that there was "very, very light passing traffic on the bridge." The Officer was questioned further by counsel for Mr. Vanek and the following colloquy occurred:

> Q. Okay. So he didn't almost cause an accident or anything like that?
>
> A. No, sir. I was, I was just afraid that he was going to veer off the road—
>
> Q. Okay.
>
> A. --or if there had been a passing --
>
> Q. Okay.
>
> A. --he may cause [an] incident.
>
> Q. So basically you pulled him over to basically see what was going on with him?
>
> A. Right. I mean, he was weaving in and out of the lanes.
>
> Q. Okay. All right. So it wasn't that he almost caused an accident or endangered other people; but your concern is that this would happen in the future—
>
> A. Correct.
>
> Q. --a fair statement?

(App. 1, Tr. 6-7). In response to the Hearing Officer's questioning, Officer Baranowski stated, "I was just driving, and I noticed that the vehicle kept jogging in between the lines, and I thought it was, you know, kind of odd, so that's when I focused my attention on the vehicle." (App. 1, Tr. 13).

The Florida Highway Patrol DUI Investigation Report prepared by Trooper Consuegra does include the statement that Officer Baranowski "noticed the vehicle almost strike several vehicles." (Resp. App. 11). This statement was not supported by the testimony of Officer Baranowski at the formal review hearing.

In evaluating the validity of a traffic stop, this Court is to determine if the law enforcement officer had an objectively reasonable basis to effectuate the initial stop. See Dobrin v. Fla. Dep't of Hwy. Safety & Motor Vehicles, 874 So. 2d 1171 (Fla. 2004). This Court is not to reweigh the evidence, but is to determine if competent, substantial evidence supports the Hearing Officer's Decision. Stenmark, 941 So. 2d at 1249.

The sworn testimony of Officer Baranowski alone demonstrates that by a preponderance of the evidence, Officer Baranowski had a founded suspicion validating the investigatory stop of the vehicle to determine if Mr. Vanek was ill, tired, or driving under the influence, based on the officer's legitimate concern for the safety of the motoring public. Disregarding the disputed sentence within Trooper Consuegra's Report, this Court concludes that competent, substantial evidence supports the Hearing Officer's decision. There was no departure from the essential requirements of law.

Issue Two: "The Decision of the Hearing Officer sustaining Petitioner's suspension violated Petitioner's Due Process rights by departing from the essential requirements of law, as the record does not reflect that there is sufficient competent substantial evidence that Petitioner had prior refusals to justify the extended suspension, creating a miscarriage of justice to the prejudice of Petitioner."

On December 12, 2013, Mr. Vanek was issued a Florida DUI Uniform Traffic Citation 1398-WOY for refusal to submit to a breath-alcohol test. The citation notes, "PRIOR REFUSAL: 10/18/2008." The refusal to submit to a breath/urine/blood test is documented in the "Uncertified Transcript of Driver Record" that was admitted into evidence before the Hearing Officer.

Mr. Vanek asserts that the uncertified driving record did not supply competent substantial evidence of a prior refusal to submit to a breath-alcohol test. However, he does acknowledge that according to Fender v. State, 980 So. 2d 516 (Fla. 4th DCA 2007), an uncertified copy of a driving record was sufficient in a criminal prosecution for DUI to raise a rebuttable presumption of a prior DUI conviction. See also Littman v. State, Dep't of Hwy. Safety & Motor Vehicles, Div. of Driver Licenses, Bureau of Driver Improvement, 869 So. 2d 711, 712 (Fla. 2d DCA 2004). However, Mr. Vanek asserts that without evidence in addition to the uncertified driving record the "printout is at best a mere suspicion of a prior suspension or prior refusal."

The transcript of the formal review hearing does not indicate that Mr. Vanek objected to the introduction into evidence of the uncertified driving record. Mr. Vanek vaguely argues in the Petition, and in the written Motion to Invalidate, that the driving record was "uncertified, inaccurate, and incomplete copy of a suspect computer printout." But he does not indicate how the driving record is inaccurate or incomplete. Mr. Vanek did not appear at the formal review hearing to testify. At the hearing, counsel for Mr. Vanek did argue that Mr. Vanek did not have a prior refusal to submit to a breath-alcohol test. However, no evidence was submitted to rebut the uncertified driving record that documented Mr. Vanek's prior refusal to submit to a breath-alcohol test. See Fender, 980 So. 2d 516.

The standard of review in a criminal prosecution is beyond a reasonable doubt. In a formal review hearing the hearing officer only needs to determine by a preponderance of the evidence that sufficient cause exists to sustain, amend, or invalidate the suspension. This Court concludes that competent, substantial evidence supports the Hearing Officer's determination that Mr. Vanek had a prior refusal to submit to a breath-alcohol test and the enhanced suspension was properly affirmed. There was no violation of due process.

This Court notes that in its Response to the Petition, the Department argues that the length of Mr. Vanek's suspension is not an item for consideration by the Hearing Officer. This Court has rejected this argument in Kelsey v. Department of Highway Safety and Motor Vehicles, 19 Fla. L. Weekly Supp. 176a (Fla. 6th Cir. App. Ct. Oct. 31, 2011).

Issue Three: "The Decision of the Hearing Officer sustaining the suspension of Petitioner['s driving privilege] for refusing a breath test violated his Due Process rights, as the Hearing Officer used Petitioner's legitimate attempt to invoke his Federal and Florida Constitutional right to counsel, improperly construed by [Trooper] Consuegra as a refusal, during a 'crucial stage' of a criminal FSS 316.1939 investigation, thereby violating essential the (sic) elements of law and creating a miscarriage of justice."

Mr. Vanek did not subpoena Trooper Consuegra to appear at the formal review hearing. The Complaint/Arrest Affidavit prepared by Trooper Consuegra states that Mr. Vanek was arrested at the scene of the traffic stop and was informed of his Miranda[2] rights. Mr. Vanek indicated that he did not wish to speak to the troopers until his attorney was present. He was then arrested and transported to the Pinellas County Central Breath Testing ("CBT") for a DUI investigation.

After arriving at the CBT, Mr. Vanek was observed for twenty minutes before the Implied Consent Warning was read to him. The Complaint/Arrest Affidavit in evidence states that in response to Trooper Consuegra's request that he submit to the test, Mr. Vanek stated that he did not wish to take the test without first speaking to his lawyer. Trooper Consuegra advised Mr. Vanek that the test results would be recorded as a refusal to submit to the breath-alcohol test if he did not comply. The trooper again read the consequences of a refusal to Mr. Vanek from the Implied Consent Warning. Once more, Mr. Vanek indicated he would not take the breath-alcohol test without speaking with his lawyer. Trooper Consuegra submitted his Report and the Breath Alcohol Test Affidavit indicating that the breath-alcohol test was refused.

The Affidavit of Refusal to Submit to Breath, Urine, or Blood Test prepared by Trooper Consuegra states that Mr. Vanek had been informed that if he refused to submit to the breath-alcohol testing his license could be suspended for one year for a first refusal or for a period of eighteen months if his driving privilege had been previously suspended for a refusal. Further, he was informed he would commit a misdemeanor if his license previously had been suspended for refusing to submit to a test of his breath, urine, or blood.

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Mr. Vanek notes that after July 1, 2001, section 316.1939 was amended to provide it was a misdemeanor violation for a second or subsequent refusal to submit to alcohol testing. He claims that the right to counsel attaches at this "crucial stage" for the criminal prosecution for a violation of that statute. He also states that the Fifth Amendment right to counsel attaches during "custodial interrogation."

In the Petition, Mr. Vanek states that Trooper Consuegra was aware that he had a prior suspension of his license for refusal to submit to a breath-alcohol test. Therefore, the trooper knew if Mr. Vanek refused to submit to the test he would be committing a misdemeanor. It is asserted that when he was asked to take the breath-alcohol test, Trooper Consuegra violated Mr. Vanek's prior invocation of his Miranda rights given at the time of his arrest. He asserts that the request to submit to the breath-alcohol test constituted an inculpatory question after arrest "when custodial interrogation was again initiated by the officer on the 'second and subsequent refusal' investigation under FSS 316.1939," a misdemeanor.

It is asserted that the case law on the right to counsel decided before the 2001 amendment to section 316.1939 is no longer valid for persons with a prior refusal to submit to an alcohol content test, "especially after invoking and not waiving his Miranda rights, when the questioning officer is aware of the prior refusal."

This same argument was advanced by the Appellee in State v. Busciglio, 976 So. 2d 15 (Fla. 2d DCA 2008), in a criminal prosecution which the State appealed the suppression of the arresting officer's request and Anthony Busciglio's refusal to take a breath-alcohol test. Mr. Busciglio was read his Miranda rights at the time he was arrested before being transported to the police station. Unlike Mr. Vanek, Mr. Busciglio did not invoke his Miranda rights. Mr. Busciglio was read the Implied Consent Warnings and when asked if he would submit to the test. Once again, unlike Mr. Vanek, Mr. Busciglio did not invoke his Miranda rights, but he responded, "No."

At the hearing on the motion to suppress, counsel for Mr. Busciglio raised the argument that after the criminalization of a second or subsequent refusal to submit to a breath-alcohol test, he was entitled to counsel. Although the trial court was convinced, the appellate court reversed. It held:

> The flaw with this assertion is that the enactment of the subject statute does not change the analysis of when the right to counsel under Miranda is applicable. The fact that a second or subsequent refusal can now be a first-degree misdemeanor under certain circumstances, as opposed to merely subjecting the defendant to license suspension, is not the relevant inquiry. Rather, the relevant inquiry is whether there is a right to counsel at all prior to deciding to refuse to take the test.

Id. at 18-19 (emphasis in original). In the present case, although Mr. Vanek attempted to invoke his Miranda rights before submitting to the breath-alcohol test, according to the appellate court decision in Busciglio, he had no such right to invoke.

In the present case Trooper Consuegra was aware that Mr. Vanek previously had refused to submit to a breath-alcohol test; however, this distinguishing fact is not dispositive in this case. The matter currently before the Court is a review of an administrative proceeding that resulted in the suspension of Mr. Vanek's driver's license; not a criminal prosecution. This Court has no opinion as to whether there would be a different result in a motion filed by Mr. Vanek in a criminal prosecution for a violation of section 316.1939.

Busciglio, explained that under section 316.1932(1)(a)(1)(a), Florida Statutes (2012), when a licensee, such as Mr. Vanek, is asked to submit to a breath-alcohol test, the law enforcement officer is merely asking him "to comply with conduct he has no 'right' to refuse does not invoke any degree of coercion associated with impermissible interrogation." See Busciglio, 976 So. 2d at 19. The Second District Court of Appeal noted, "Thus a driver is statutorily preordained to have already consented to take a breath test, and coercion cannot be a factor when an officer prompts an arrestee to perform the test he already agreed to take." Id. at 20.

The appellate court also found in Busciglio that there had been no violation of article I, section 9, of the Florida Constitution or the Fifth Amendment of the United States Constitution because a refusal to submit to the test could not qualify as a testimonial response because "the primary purpose of any solicitation was not to establish or prove a past event." Id. at 21-22 (emphasis in original).

In State v. Burns, 661 So. 2d 842, 848 (Fla. 5th DCA 1995) the appellate court held:

> We hold that administering a breathalyzer and having a defendant perform the field sobriety test on videotape are really nothing more than the collection and preservation of physical evidence, as is done in every type of case, and do not constitute a crucial confrontation requiring the presence of defense counsel.

(Emphasis added); see also Kurecka v. State, 67 So. 3d 1052, 1056 (Fla. 4th DCA 2010). The Hearing Officer properly rejected Mr. Vanek's arguments to invalidate the suspension of his license on these grounds as there was no violation of due process or a departure from the essential requirements of law.

Issue Four: The Hearing Officer violated the Constitutional rights of Petitioner, because the officer's intentional misinformation that Petitioner had no right to confer with counsel before answering the interrogatory breath sample question, in violation of the Due Process rights of Petitioner by violating the essential requirements of law and creating a miscarriage of justice to the prejudice of Petitioner."

As discussed above, the matter currently before the Court is a review of an administrative proceeding that resulted in the suspension of Mr. Vanek's driver's license; not a criminal prosecution. According to Busciglio, Mr. Vanek had no right to counsel before deciding whether to submit to the breath-alcohol test. Therefore, Mr. Vanek's argument that Trooper Consuegra provided "misinformation" to Mr. Vanek that he was not entitled to an attorney before answering the trooper's inquiry about taking the breath-alcohol test is meritless.

This Court has no opinion as to whether there would be a different result in a motion filed by Mr. Vanek in a criminal prosecution for a violation of section 316.1939. The Hearing Officer properly rejected Mr. Vanek's arguments to invalidate the suspension of his license on this ground. In a license suspension proceeding there was no violation of due process or departure from the essential requirements of law.

Issue Five: Due to the actions of, and lack of explanation from, [Trooper] Consuegra regarding the Petitioner's Miranda rights, and as [Trooper] Consuegra was made aware that the Petitioner reasonably believed he had created a 'safe haven' by requesting to speak to counsel before providing a breath sample, Petitioner properly invoked the Confusion Doctrine, making the Decision of the Hearing Officer to sustain Petitioner's suspension a violation of his Due Process [rights] under the Florida Constitution and a departure from the essential elements of law, creating a miscarriage of justice prejudicial to Petitioner.

The "Confusion Doctrine" refers to the confusion created when a driver is confused about the interplay between Miranda rights and the Implied Consent law. Kronen v. State of Fla., Dep't of Hwy. Safety & Motor Vehicles, 18 Fla. L. Weekly Supp. 9b (Fla. 6th Cir. App. Ct. Nov. 3, 2010)(citing Ringel v. State of Florida, Dep't of Hwy. Safety & Motor Vehicles, 9 Fla. L. Weekly Supp. 678a (Fla. 18th Jud. Cir. App. Ct. July 30, 2002).

As noted above, Trooper Consuegra's DUI Incident and Arrest Narrative was admitted into evidence at the formal review hearing. The Narrative states that Trooper McMillan, who was assisting Trooper Consuegra, asked Mr. Vanek for his driver's license and thereafter read him his Miranda rights. Mr. Vanek first stated that he did not understand his rights. However, after the Miranda rights were read a second time, Mr. Vanek indicated that he did not want to speak to either Trooper McMillian or Trooper Consuegra until he could speak with his attorney. Mr. Vanek refused to perform field sobriety tests and Trooper Consuegra placed Mr. Vanek under arrest for DUI based on the trooper's observations of Mr. Vanek's physical appearance and actions. The report was substantiated by the testimony of Trooper McMillian at the formal review hearing.

Trooper Consuegra's DUI Incident and Arrest Narrative states that while Mr. Vanek was in the trooper's patrol car, Trooper Consuegra read Mr. Vanek his Miranda rights at 2:30 a.m. Mr. Vanek stated he did not wish to speak any further until he spoke to his lawyer and he was transported to CBT.

According to Trooper Consuegra's DUI Incident and Arrest Narrative, at 2:50 a.m. Trooper Consuegra and Mr. Vanek arrived at CBT. After observing Mr. Vanek for twenty minutes, Trooper Consuegra read the Implied Consent Warning and asked Mr. Vanek to submit to a breath-alcohol test. Mr. Vanek stated that he did not want to take the test without first speaking to his attorney. Trooper Consuegra informed Mr. Vanek that his response would be considered a refusal and again read the consequences of a refusal from the Implied Consent Warning. Mr. Vanek again replied that he would not take the breath-alcohol test until he had spoken with his attorney.

Mr. Vanek did not appear at the formal review hearing and Trooper Consuegra was not subpoenaed to appear. Trooper McMillian testified at the formal review hearing and stated that he was present at the time Trooper Consuegra requested that Mr.

Vanek take the breath-alcohol test. Trooper McMillian was not asked and did not testify that Mr. Vanek indicated that he was confused. There is no evidence before the Hearing Officer or in the record before this Court that Mr. Vanek communicated to either of the troopers his confusion about the applicability of Miranda rights to the decision to take a breath test.

The question of whether Mr. Vanek made his confusion known to Trooper Consuegra when he refused to submit to the breath-alcohol test was presented in the written motion to invalidate the suspension and was a question of fact to be determined by the Hearing Officer. See Mastenbroek v. State of Fla., Dep't of Hwy. Safety & Motor Vehicles, 17 Fla. L. Weekly Supp. 949a (Fla. 6th Cir. App. Ct. April 16, 2010). Although the record reflects that Mr. Vanek repeatedly told the trooper he would not take the breath-alcohol test until he had spoken to his attorney, he did not clearly communicate any confusion regarding Miranda and the Implied Consent law.

In Ringel, 9 Fla. L. Weekly Supp. 678a, the circuit appellate court described the requirements to invoke the confusion doctrine:

> If, after receiving the implied consent warning, the licensee is still confused about the applicability of Miranda rights to the decision to take a breath test, the licensee should make that confusion known to law enforcement, so that law enforcement is aware that further explanation is necessary.

This Court has adopted Ringel's requirements for the invocation of the confusion doctrine. See Platte v. Fla. Dep't of Hwy. Safety & Motor Vehicles, 18 Fla. L. Weekly Supp. 9b; Kronen, 18 Fla. L. Weekly Supp. 9b; Mastenbroek, 17, Fla. L. Weekly Supp. 949a ; see also Lavin v. State of Fla., Dep't of Hwy. Safety & Motor Vehicles, 16 Fla. L. Weekly Supp. 605a (Fla. 6th Jud. Cir. App. Ct. May 15, 2009); Wojciechowski v. State of Fla. Dep't of Hwy. Safety & Motor Vehicles, 20 Fla. L. Weekly Supp. 903a (Fla. 20th Cir. App. Ct. June 4, 2013); Farah v. Dep't of Hwy. Safety & Motor Vehicles, 3, Fla. L. Weekly Supp. 1a (Fla. 4th Jud. Cir. Ap. Ct. March 4, 1994).

Trooper Consuegra had no duty to provide further explanation to Mr. Vanek other than the Implied Consent warning. The appellate court in Kurecka stated:

> Florida's implied consent statute does not require police officers to advise persons arrested for DUI that the right to counsel does not attach to their decision to submit to the breath test. The statute requires only that the person be told that his failure to submit to the test will result in a suspension of the privilege

> to drive for a period of time and that a refusal to submit can be admitted at trial. The implied consent statute establishes a presumption that those who have elected to enjoy the privilege of driving will, in turn, be required to submit to chemical testing if they are suspected of driving under the influence. The licensed driver in Florida, having already consented to the test, is thus not entitled to secure the advice of an attorney. Accordingly, excluding evidence based on a suspect's misconception about the right to counsel prior to taking the breath test would be contrary to the legislative intent of Florida's implied consent law.
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> . . . .
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> Of course, we cannot impose duties beyond those created by the legislature. The implied consent statute was enacted to assist in the prosecution of drunk drivers. Determining whether informing a suspect that he does not have the right to an attorney for breath testing purposes—as part of the implied consent warning—supports or frustrates the goal of gathering evidence for these cases is a matter for the legislature to decide.

67 So. 3d at 1060-62 (citations and footnote omitted).

This Court is not to reweigh the evidence, but is to determine if competent, substantial evidence supports the Hearing Officer's decision that, by a preponderance of the evidence, Mr. Vanek willfully refused to submit to the breath-alcohol test. This Court has reviewed the evidence under this standard and concludes that the Hearing Officer's denial of Mr. Vanek's motion to invalidate the suspension is supported by competent, substantial evidence. There was no violation of due process or departure from the essential requirements of law.

Conclusion

This Court concludes that procedural due process has been accorded; the essential requirements of law have been observed; and the Hearing Officer's decision is supported by competent, substantial evidence.

The petition for writ of certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of _____, 201__.

Original order entered on January 13, 2014, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

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