

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED  
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION**

KRISTEN GREGG,  
Petitioner,

v.

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

Ref. No.: 16-000062-AP  
UCN: 522016AP000062XXXXCI

**ORDER AND OPINION**

Petitioner challenges a final order by the Department of Highway Safety and Motor Vehicles (“DHSMV”) upholding the suspension of her driver’s license. Petitioner asserts that the officer lacked probable cause to arrest her for driving under the influence (“DUI”). For the reasons set forth below, the Petition for Writ of Certiorari is granted.

**Facts and Procedural History**

On October 15, 2016, Deputy Lange of the Pinellas County Sheriff’s Office conducted a traffic stop of Petitioner’s vehicle for an equipment violation based on not having functioning tag lights. According to the Hearing Officer’s final order, Deputy Lange approached the driver of the vehicle, Petitioner, and noticed several signs of intoxication, including an odor of alcohol on her breath, bloodshot, watery, glassy eyes, “a blank stare,” and a slight slur to her speech. Petitioner twice refused to perform field sobriety exercises, and Deputy Lange placed her under arrest for DUI. Petitioner was transported to a breath testing facility, where she refused to submit to a breath test. After being read the implied consent warnings, Petitioner again refused. Her license was suspended for eighteen months based on a prior refusal. After a hearing, Petitioner’s license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

**Standard of Review**

The circuit court examines DHSMV orders under a three-part standard of review: (1) whether procedural due process has been provided; (2) whether the essential elements of law have been observed; and (3) whether the action is supported by competent, substantial evidence. *Dept. of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551, 553 (Fla. 2d DCA 2002).

## Discussion

In reviewing the suspension of a driver's license for refusal to submit to a breath test, a hearing officer must first determine if "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 . . . while under the influence of alcoholic beverages or chemical or controlled substances." § 322.2615(7)(b)(1), Fla. Stat. "Probable cause for a DUI arrest must be based upon more than a belief that a driver has consumed alcohol; it must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his [or her] system." *State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000). DUI arrests often occur after an officer observes the reckless or dangerous operation of a vehicle, which provides a compelling factor in establishing probable cause. *See Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) (listing numerous cases where erratic driving contributed to a finding of probable cause for a DUI arrest). Additional factors "may include . . . slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises." *Kliphouse*, 771 So. 2d at 22. While an odor of alcohol is significant, alone it "is rarely deemed sufficient for a finding of probable cause." *Id.* at 23.

Petitioner asserts that the Hearing Officer should have invalidated her driver's license suspension because the indicators of alcohol impairment were insufficient to establish probable cause for her arrest. Petitioner relies on *State v. Taylor*, for contrast. 648 So. 2d 701 (Fla. 1995). In *Taylor*, the defendant exhibited multiple signs of intoxication, such as staggering upon exiting the vehicle, slurred speech, bloodshot and watery eyes, and a strong odor of alcohol, in addition to driving dangerously at a high rate of speed. *Id.* at 703. The present case lacks any reckless or dangerous operation of a vehicle, balance or dexterity issues,<sup>1</sup> or flushed face, and there was no admission given or field sobriety exercises performed by Petitioner. The paperwork conflicts on whether Petitioner's speech was slurred. The field sobriety test form indicates that her speech was "clear," but the PCSO offense report indicates that her speech was slurred. At a minimum, the paperwork is in agreement that Petitioner exhibited an odor of alcohol, bloodshot, watery, glassy eyes, and a "blank stare."

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<sup>1</sup> The complaint/arrest affidavit indicates "Balance: swayed," but Petitioner did not exit the vehicle until after she was placed under arrest so this cannot be considered a factor in the probable cause analysis.

Determining if competent substantial evidence supports the hearing officer's finding of probable cause "involves a purely legal question: whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). Competent evidence must "be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence must be "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Id.* The competent substantial evidence rule cannot be "satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent inferences." *Id.* (quoting *Fla. Rate Conference v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)). Due to the conflict in the paperwork concerning the speech, the slurred speech factor is not supported by competent evidence. Furthermore, the additional factors that are supported by competent evidence, which are the odor of alcohol, bloodshot, watery, glassy eyes, and "a blank stare," are not sufficiently substantial to support the Hearing Officer's finding that probable cause existed for the arrest.

### Conclusion

Because the Hearing Officer's final order affirming the suspension of Petitioner's driver's license was not supported by competent substantial evidence, it is

**ORDERED AND ADJUDGED** that:

1. The Petition for Writ of Certiorari is **GRANTED**.
2. Petitioner's request for attorney's fees and costs is **DENIED** without prejudice to Petitioner moving for costs in the lower tribunal pursuant to Florida Rule of Appellate Procedure 9.400.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, this 8<sup>TH</sup> day of August, 2017.

Original Order entered on August 8, 2017, by Circuit Judges Jack Day, Amy M. Williams, and Thomas Ramsberger.

Copies furnished to:

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