

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

KIMBERLY SIMPSON
Petitioner,

APPEAL No.: 09 3AP 88A
UCN: 522009AP000003XXXXCV

v.

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

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2009 MAY 14 PM 12:09
KEN BURKE
CLERK OF CIRCUIT COURT

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court on Petitioner's, Kimberly Simpson, Petition for Writ of Certiorari filed on January 7, 2009. Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, filed its response on March 13, 2009. Petitioner filed a reply on March 27, 2009. Upon consideration, this Court finds that the Petition for Writ of Certiorari must be denied as set forth below.

The standard of review for this Court is limited to: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by substantial competent evidence. Haines City Cmty. Dev. V. Heggs, 658 So.2d 523, 530 (Fla. 1995) (citing City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982)).

Pursuant to Florida Statutes §316.2615, "the hearing officer is only required to determine by a preponderance of the evidence that the arresting officer had probable cause for arresting the accused; that the accused was arrested lawfully; that the accused refused to submit to a test; and that the accused was told that his license would be suspended for one year if he refused." Department of Highway Safety v. Dean, 662 So. 2d 371, 372 (Fla. Dist. Ct. App. 5th Dist. 1995) (citing Department of Highway Safety and Motor Vehicles v. Satter, 643 So. 2d 692, 695 (Fla. 5th DCA 1994)).

KEN BURKE, CLERK OF COURT
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In his "Findings of Fact", the Hearing Officer states that Petitioner only attempted the test once. The fact that Petitioner attempted the test not once, but twice (the first attempt not registering), is a harmless error that would not change the outcome of the case. Petitioner's first two attempts to take the breath test were inconclusive. The Hearing Officer made the factual finding that the testing operator requested Petitioner to submit to testing a third time in order to obtain an accurate result, and Petitioner refused. The degree of willfulness in making that refusal is a factual issue that this Court is not permitted to reweigh or determine. In making a finding that the Petitioner refused the breath test, the Hearing Officer implicitly determined that it was a willful refusal. Because Petitioner refused a breath test after being requested to do so by law enforcement officers, her license was properly suspended. Fla. Stat. § 322.2615.

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DENIED**.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida
this 11 day of May, 2009.

Original opinion entered by Circuit Judges Pamela A.M. Campbell, George W. Greer, & John A. Schaefer

Copies furnished to:

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