

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

ELVIRA XHOKLI,
Petitioner,

Case No.: 14-000079AP-88A
UCN: 522014AP000079XXXXCV

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

Leslie M. Sammis, Esq.
Attorney for Petitioner

Stephen D. Herm, Gen. Counsel
Kimberly A. Gibbs, Sr. Asst. Gen. Counsel
Attorney for Respondent

PER CURIAM.

Elvira Xhokli 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 October 24, 2014. The Decision affirmed the order of suspension of Ms. Xhokli's driving privileges. The petition is denied.

Statement of Case

Nine documents were admitted into evidence before the Hearing Officer, including the "Complaint/Arrest Affidavit" and the Pinellas County Sheriff's Office "Offense Report." Testimony was received from Pinellas County Sheriff Corporal Euler,

the officer who conducted the traffic stop, and Pinellas County Sheriff Deputy Blair who issued a speeding citation, conducted the Driving Under the Influence ("DUI") investigation, and arrested Ms. Xhokli for DUI.

Cpl. Euler testified that he observed Ms. Xhokli driving recklessly and erratically. Using in-car radar, Cpl. Euler determined Ms. Xhokli's vehicle was traveling at seventy-nine miles per hour in a zone posted for a maximum speed of fifty-five miles per hour. Other vehicles were observed by Cpl. Euler to be braking due to Ms. Xhokli's abrupt lane changes. Ms. Xhokli's vehicle was stopped for speeding. The corporal noted that Ms. Xhokli's movements were very slow and when she was asked to produce her registration she had difficulty locating it. Cpl. Euler suspected that there was impairment involved "because she was just that slow."

Upon Cpl. Euler's request, Ms. Xhokli exited her vehicle, he evaluated her sobriety status, and conducted a horizontal gaze nystagmus test (HGN). He observed "some pretty significant nystagmus" that indicated impairment. Ms. Xhokli's eyes were noted to be "glossy, glassy," and her speech was slurred. Based on his observations, Cpl. Euler requested that a DUI enforcement officer be dispatched to their location. Cpl. Euler testified that he did not suspect alcohol impairment and did not detect the odor of alcohol. He suspected drug impairment was involved and she was under the influence of chemical or controlled substances

Deputy Blair, the DUI enforcement officer, testified that upon his arrival he had a brief conversation with Cpl. Euler before speaking with Ms. Xhokli. The deputy testified:

I observed the obvious signs of impairment: Bloodshot, watery, slurred speech. She had an accent, but it was still -- I could still tell that it was slurred through her accent -- distinct odor of an alcoholic beverage emanating from the vehicle. Later I determined it was emanating from her breath when she spoke. Based on what Corporal Euler observed and what I observed, I requested that she submit to field sobriety exercises at that point.

(App. C, p. 41). The deputy was questioned by counsel for Ms. Xhokli:

Q. And as you're talking to her and she's seated inside the vehicle, you smell a distinct odor of an alcoholic beverage?

A. Yes.

Q. And you smell that odor coming from the vehicle?

- A. I smelled it while she was inside the vehicle, so I smelled it coming from inside the vehicle at first.
- Q. Right. But at that point you don't know whether it's her or the vehicle that smells of alcohol; you just smell it coming from the vehicle?
- A. Right.
- Q. Did you smell it coming from her breath as she's seated inside the vehicle?
- A. When she exited the vehicle, I could smell it coming from her breath.
- Q. Was it a strong odor of alcohol coming from the vehicle?
- A. It was a strong odor of an alcoholic beverage emanating from inside the vehicle, yes.
- Q. Okay. After Ms. Xhokli exits the vehicle, you have a conversation with her, correct? And you're saying that you also note a distinct odor of alcoholic beverages coming from Ms. Xhokli's breath?
- A. Yes.

(App. C, page 41-42).

Dep. Blair was of the belief that Cpl. Euler had detected the odor of alcoholic beverages at the time of the traffic stop. In reviewing the report Dep. Blair had prepared, the deputy stated that the report did not indicate whether Cpl. Euler had detected the odor of alcoholic beverages. Counsel for Ms. Xhokli asked if Dep. Blair could explain why Cpl. Euler testified that he had not smelled alcohol. Dep. Blair responded that he did not know, but confirmed, "I know I smelled alcohol, yes." (App. C, p. 44-45).

Ms. Xhokli voluntarily performed field sobriety tests. The tests were not completed satisfactorily and Ms. Xhokli was arrested for DUI. (App. B, DDL 5, 6). Counsel for Ms. Xhokli questioned Dep. Blair about the basis for the arrest. Dep. Blair testified that he had probable cause to believe Ms. Xhokli was under the influence of an alcoholic beverage or a drug, or both, to the point she could not safely operate a motor vehicle. (App. C, p. 48-49). The deputy admitted that he could not state that intoxication was caused solely by drugs or solely by alcohol; but he confirmed that he concluded she was impaired by something and it could be alcohol. (App. C, p. 48-49).

The deputy had no recollection of whether Ms. Xhokli made any admission about consuming alcohol or controlled substances. (App. C, p. 50-51).

Counsel for Ms. Xhokli questioned Dep. Blair further about probable cause:

Q. You can't say that you had probable cause that she was under the influence of alcohol by itself, correct?

A. I can say that she was under the influence of something making her impaired.

Q. Okay. You can't say that just alcohol by itself made her under the influence?

A. No. I have no idea.

Q. I mean, drugs could have added to it? And made her more impaired?

A. Absolutely.

Q. Just as far as believing she was under the influence of alcohol, you can't say that?

A. No, I can't say that.

Q. You didn't have probable cause that she was under the influence of alcohol?

A. I had probable cause that she was impaired. I can tell you there was alcohol on her breath, the odor of an alcoholic beverage on her breath, but I don't know if that was making her impaired. I don't know. I couldn't tell you.

Q. Okay. What observations did you make of Ms. Xhokli that were inconsistent with alcohol impairment?

A. They're all about the same, you know, alcohol and drug impairment. I mean, they kind of mirror each other. There's minor differences there when you get the to [sic] HGN and stuff like that.

Q. Did you notice any minor differences?

A. No, I didn't.

Q. Did you see anything that was solely – that you thought solely could be contributed to alcohol or anything you thought could be solely contributed to chemical or controlled substances?

A. Well, the odor of alcohol on the breath is, you know, pretty self-explanatory. You can't get that from drugs. But other than that, I mean, everything else it could be either or – I don't know.

- Q. Okay. You didn't have any reasonable cause to believe that she was under the influence of alcohol specifically, correct?
- A. No. I believe she was impaired. I can't tell you if she was just alcohol or drugs. I can't tell you if it was a combination of both. I don't know.

(App. C, p. 52-54).

Dep. Blair testified that after her arrest, Ms. Xhokli was read her Miranda¹ rights and she refused to speak to the deputy. Ms. Xhokli was transported to the Pinellas County Central Breath Testing for a DUI investigation. Dep. Blair also was the breath-alcohol test operator. Ms. Xhokli refused to supply a breath sample and was not asked to supply a urine or blood sample. Dep. Blair explained, "Can't take the urine test unless you take the breath test first. She refused that, so technically she refuses everything." (App. C, p. 55).

When testimony was concluded at the hearing, counsel for Ms. Xhokli moved to invalidate the suspension based on the failure of the arresting officer to have reasonable cause to arrest Ms. Xhokli for DUI or to request a breath-alcohol test. Counsel argued that the statute specifically provides that the breath-alcohol test can be requested only if there is reasonable cause to believe the person is under the influence of alcohol, and there was not competent, substantial evidence that Ms. Xhokli was under the influence of alcoholic beverages.

The "Findings of Fact, Conclusions of Law and Decision" was entered on October 24, 2014. The Hearing Officer denied Ms. Xhokli's motion to invalidate the suspension.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process is 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 and Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may review the evidence to

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

determine only whether it supports the hearing officer's findings. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

In a review hearing, the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be 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 or correctional 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. (2014).

Analysis

In the petition for writ of certiorari, Counsel for Ms. Xhokli asserts that the driver's license suspension should be invalidated for refusal to submit to a breath-alcohol test because Dep. Blair was not authorized under section 316.1932, Florida Statutes (2014), to request that Ms. Xhokli submit to a breath test. The Court is directed to the language in section 316.1932(1)(a)1a, that states in part:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. **The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.** The administration of a breath test does not preclude the administration of another type of test. . . .

(Emphasis added). Counsel for Ms. Xhokli argues that, although the deputy did testify

that he smelled an odor of alcohol, "he did not believe he had reasonable cause of impairment due to the consumption of alcoholic beverage. Instead, the arresting officer testified that he had reasonable cause of impairment from a chemical or controlled substance. (T. 56 [sic 55]: 14-19)." (Initial Br. p. 18). In the petition counsel for Ms. Xhokli has mischaracterized the evidence.

This Court is directed to Gruszczycki v. Department of Highway Safety and Motor Vehicles, 18 Fla. L. Weekly Supp. 642a (Fla. 4th Cir. App. Ct. July 8, 2008), in which the evidence established that the driver was impaired, but the officers did not detect the odor of alcoholic beverages on the driver's breath. The Fourth Circuit Court sitting in its appellate capacity found there was no evidence the driver was impaired by alcohol. The appellate court concluded that the officers were not authorized under section 316.1932(1)(a)1a, Florida Statutes (2007), to request a breath-alcohol test. Due to the fact that the breath-alcohol test was not authorized, the driver did not refuse to take a "lawful" breath-alcohol test. The appellate court found no merit to the argument that the officers were entitled to request breath and urine tests in progression to rule out impairment by alcohol.

Clearly the Gruszczycki case is factually distinguishable from the present case as demonstrated by the colloquy set out above. Dep. Blair repeatedly stated that he smelled the odor of alcoholic beverages on Ms. Xhokli's breath. He believed she was under the influence of alcohol and that she may have been also under the influence of a drug. (App. C, p. 41-42, 44-45, 52-54). Dep. Blair was the officer conducting the DUI investigation and the issue to be determined by the Hearing Officer was whether Dep. Blair had reasonable cause to believe Ms. Xhokli was driving a motor vehicle while under the influence of alcoholic beverages in order to authorize Dep. Blair to request a breath-alcohol test.²

The other cases cited by counsel for Ms. Xhokli in the petition are similarly factually distinguishable. See Dep't of Hwy. Safety and Motor Vehicles v. Carillon, 95 So. 3d 901 (Fla. 1st DCA 2012)(denying petition in which circuit court found "the record

² In the petition, counsel for Ms. Xhokli emphasizes the testimony of Cpl. Euler who initially stopped Ms. Xhokli's vehicle. Cpl. Euler testified he did not detect the odor of alcohol on Ms. Xhokli's breath. However, Cpl. Euler was not the officer conducting the DUI investigation. The observations of Dep. Blair as the DUI enforcement officer are dispositive in this matter. Further, this Court is not permitted to reweigh the evidence, but is to determine only if competent, substantial evidence supports the Hearing Officer's decision. Stenmark, 941 So. 2d at 1249.

was devoid of any evidence that the impairment was due to consumption of alcohol"); Zvierko v. Dep't of Hwy. Safety and Motor Vehicles, 20 Fla. L. Weekly Supp. 1120a (Fla. 7th Cir. App. Ct. July 9, 2013)(granting petition holding "not only was there no affirmative evidence of alcohol use, there was overriding evidence of the use of controlled substances, specifically cannabis"); Stachura v. Dep't of Hwy. Safety and Motor Vehicles, 18 Fla. L. Weekly Supp. 1073a (Fla. 15th Cir. App. Ct. August 25, 2011)(granting petition when officer specifically stated he did not suspect driver under influence of alcohol, only controlled substance; no evidence of alcohol use).

Conclusion

The Hearing Officer is required to determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. "The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not Substantial evidence has been defined as evidence 'which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.' " State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

"Probable cause" or "reasonable cause" exists "where the facts and circumstances, as analyzed from the officer's knowledge . . . and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." Dep't of Highway Safety & Motor Vehicles v. Silva, 806 So. 2d 551, 554 (Fla. 2d DCA 2002)(quoting Dep't of Highway Safety & Motor Vehicles v. Favino, 667 So. 2d 305, 308 (Fla. 1st DCA 1995)). The facts and circumstances surrounding the incident should be examined. "It has been said that probable cause is a conclusion often drawn from 'reasonable inferences.'" Id. The Court should not ignore all "obvious implications" and reasonable inferences to be drawn from the surrounding circumstances and the arresting officer's observations. See id. (citing Favino, 667 So. 2d at 308).

In the present case there were clear indications that Ms. Xhokli was intoxicated. The testimony of Dep. Blair demonstrates that he had reasonable cause to believe Ms. Xhokli was under the influence of alcohol. When viewed under the totality of the

circumstances, the fact that Dep. Blair testified that Ms. Xhokli additionally could have been under the influence of a drug did not negate the probability or possibility that Ms. Xhokli was under the influence of alcohol. The testimony did not eliminate the cause of intoxication as being alcohol consumption.

This Court is not to reweigh the evidence, but is to determine only if competent, substantial evidence supports the Hearing Officer's decision. This Court concludes that competent, substantial evidence supports the Hearing Officer's conclusion that, by a preponderance of the evidence, Dep. Blair had probable cause and reasonable cause to believe Ms. Xhokli was under the influence of alcohol when the deputy requested that Ms. Xhokli take a breath-alcohol test. Procedural due process is accorded, the essential requirements of law have been observed, and the Hearing Officer's findings of fact and decision are supported by competent substantial evidence.

Petition denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 23 day of December, 2014.

Original Order entered on December 23, 2014, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

Copies furnished to:

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