

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**

**KIRIAKOULA PASTIS SISOIS,
Petitioner,**

**Case No.: 14-000066AP-88A
UCN: 522014AP000066XXXXCI**

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.

Kiriakoula Pastis Sisois 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 August 19, 2014. The Decision affirmed the order of suspension of Ms. Sisois' driving privileges. The Petition for Writ of Certiorari is granted.

Statement of Case

The Supplemental Incident Report of Tarpon Springs Police Sergeant Faugno states that he responded to a report of a single-car crash. The vehicle was observed

facing the guardrail with front-end damage. Three males and two females were in the immediate area. One of the females was Ms. Sisois. (App. 9, Supp. Incident Report). "I was advised by two witnesses, Tara M. Mitchell and Dustin B. Benefield, that she [Ms. Sisois] was the driver, and lone occupant of the crashed vehicle." (App. 9, Supp. Incident Report). Signs of impairment in Ms. Sisois were observed. Sgt. Faugno's narrative continues:

I responded to U.S. Alt. 19 and Oscar Hill Rd., on Sunday 07/13/14 at 0122 hours, in reference to a single car crash. . . . I interviewed witness Tara Mitchell first. She stated that she works at Capt. Jack's, which is directly due west of the roadway where the crash occurred. She was standing at the stated location with Dustin Benefield when she heard the crash and went to the roadway with Benefield. She observed Sisois behind the driver's side position of the vehicle. She stated that Sisois appeared to her to be intoxicated. Mitchell stated that there were no other occupants of the crashed vehicle. I then interviewed Benefield, who advised that he is a paramedic/fire fighter and employed by Polk County EMS. Benefield was standing with Mitchell at the stated location and heard the crash. He approached the scene and observed Sisois in the driver's position of the vehicle. There were no other occupants of the vehicle. Benefield stated that he assessed her for injury and then helped her from the vehicle and turned on the vehicle flashers as instructed by the 911 operator. Benefield stated that he did not detect any signs of "ETOH" from Sisois which is a term EMS personnel utilize for someone being under the influence of alcohol, which is contrary to Mitchell's statement. They did not have further information.

(App. 9, Supp. Incident Report). Tarpon Springs Police Department Corporal Spatz and Tarpon Springs Police Department Officer Gibson arrived on the scene thereafter.

Off. Gibson's Incident Report was admitted into evidence and states in part:

On 7/13/14 at approximately 0130 hours, I responded to the area of N. Pinellas Ave. and Oscar Hill Road, in reference to a single vehicle accident. Upon arrival, I observed a silver Nissan 4 door sedan, crashed into the guard rail. I was informed by Corporal Spatz, that it is believed the driver was intoxicated, due to the witnesses' account of what happened and their observations thereafter. See Sergeant Faugno's supplement.

I approached the vehicle and observed a female sitting on the guardrail, near the vehicle. She was identified as Kiriakoula Sisois (W/F/ 8/7/1973) by her FL Driver's License. I asked Sisois to stand up and come with me to the parking lot of Captain Jack's. I had positioned by patrol vehicle in the parking lot, in a spot conducive to conducting field sobriety exercises. Sisois stood from the guardrail, and I observed her to be unsteady on [her] feet. As she neared me, I smelled the odor of an alcoholic beverage emitting from her breath and person. I also observed Sisois to have glassy, watery eyes. I escorted her to the parking lot.

She did have slight difficulty negotiating the walk down the sidewalk to the parking lot. . . .

(App. 9, Incident Report). The report indicates that Ms. Sisois was advised of her rights and asked to submit to field sobriety testing. Ms. Sisois did not answer questions and refused to perform the field sobriety tests. Off. Gibson placed Ms. Sisois under arrest for Driving Under the Influence ("DUI") and transported her to the Tarpon Springs Police Department where she declined to take a breath-alcohol test. Off. Gibson issued a DUI citation and a citation for careless driving.

A hearing was conducted before the Department Hearing Officer and counsel for Ms. Sisois presented a Motion to Invalidate Suspension raising three arguments: (1) The arrest by Off. Gibson was unlawful because it violated section 316.645, Florida Statutes (2014), that the officer must personally investigate the traffic accident to be able to arrest for DUI. Off. Gibson never saw Ms. Sisois driving or in actual physical possession of a motor vehicle and he did not take part in or personally conduct the accident investigation; (2) the arrest was unlawful because Ms. Sisois' vehicle was inoperable and no witnesses saw her driving, but can only place her behind the wheel of the inoperable vehicle; (3) the documents and reports cannot be competent, substantial evidence because there are numerous inconsistencies with regard to time and dates.

The Hearing Officer denied counsel's Motion to Invalidate and upheld the suspension of Ms. Sisois' driver's license.

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 (2014). 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 (2014), 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).

Ms. Sisois raises three arguments in the Petition for Writ of Certiorari:

(1) "Whether DHSMV departed from the essential requirements of law by failing to invalidate the suspension of Petitioner's Driver's License, based solely on documentary evidence, admitted over the objection of [P]etitioner, that failed to meet the standard of competent, substantial evidence."

Ms. Sisois presents three arguments that the documents admitted into evidence by the Hearing Officer allegedly have flaws:

(a) There are four different offense times on four different documents:

Document	Date and Time	Item
App. 2, DDL-1	07/13/14 2:50 a.m.	DUI Uniform Traffic Citation – offense of DUI committed
App. 3, DDL-2	07/13/14 3:04 a.m.	Uniform Traffic Citation – offense of careless driving committed
App. 5, DDL-4	07/13/14 – offense at approximately 1:19 a.m.; arrest at	Complaint/Arrest Affidavit

	1:58 a.m.	
App. 9, DDL-8	07/13/14 – Accident occurred "on or from" 01:20 to 01:29; Reported 01:29	Incident Report: Off. Gibson responded at approximately 0130 hours. Supplemental Incident Report: Sgt. Faugno responded at 0122 hours.

Section 322.2615(2) provides that after the issuance of a notice of suspension of driver's license, materials properly submitted to the Department of Highway Safety and Motor Vehicles by a law enforcement agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer.

The DUI Uniform Traffic Citation (App. 2, DDL-1) is signed by Off. Gibson, but is not sworn. The Uniform Traffic Citation (App. 3, DDL-2) is signed by Off. Gibson, but is not sworn. The Law Enforcement Oath Form (App. 4) has been signed under oath by Off. Gibson. The sworn Oath states that the statements in the complaint/arrest affidavit (App. 5, DDL-4) and/or offense report (App. 9, DDL-8) are a summary of the facts of the case as known by the officer as a result of the investigation of the case.

The unsworn citations indicate that the offense occurred at 2:50 a.m. and 3:04 a.m. The sworn complaint/arrest affidavit and sworn Incident Report indicate that the accident occurred at approximately 1:20 a.m. and Ms. Sisois was arrested at 1:58 a.m. This Court will disregard the times stated on the unsworn citations and evaluate the sufficiency of the evidence based on the documents in the record that have been sworn: statements in the complaint/arrest affidavit (App. 5, DDL-4) and/or offense report (App. 9, DDL-8) to support the time of the accident and arrest.

(b) the Affidavit of Refusal is invalid because the document was notarized thirty days before the offense:

Document	Date and Time	Item
App. 8, DDL-7	07/13/14 – Refusal "on or about" 4:00 a.m.	Affidavit of Refusal to Submit to Breath, Urine, or Blood Test. Notary states that the instrument was sworn and subscribed on 13th day of June, 2014.

This Court will disregard the Affidavit of Refusal to Submit to Breath, Urine, or Blood Test due to the erroneous date on the notary certificate and evaluate the sufficiency of the evidence based on the documents in the record that have been sworn: statements

in the complaint/arrest affidavit (App. 5, DDL-4) and/or offense report (App. 9, DDL-8) to support a finding that Ms. Sisois refused to submit to the breath-alcohol test.

(c) The sworn police report makes a statement that clearly conflicts with the Breath Alcohol Test Affidavit:

Document	Date and Time	Item
App. 7, DDL-6	07/13/14- observation began 03:45 a.m.; subject sample #1 (Ref) 04:07	Breath Alcohol Test Affidavit
App. 8, DDL-7	07/13/14 – Refusal "on or about" 4:00 a.m.	Affidavit of Refusal to Submit to Breath, Urine, or Blood Test.
App. 9, DDL-8	07/13/14 –	Incident Report: Off. Gibson states: "After the required observation period, Sisois was asked to provide two samples of her breath."

Ms. Sisois argues that in the Incident Report (App. 9, DDL-8) Off. Gibson states after the required observation period Ms. Sisois was asked to give a breath sample. The statute requires a twenty-minute observation period. The Breath Alcohol Test Affidavit (App. 7, DDL-6) indicates that the observation period began at 3:45 a.m. The Department argues that this statement conflicts with the Affidavit of Refusal to Submit to Breath Test (App. 8, DDL-7) that allegedly "states she refused at 4:00 a.m., which is only a 15-minute observation period." (Petition p. 14).

There is no conflict. The Incident Report states that there was compliance with the required observation period, twenty minutes. The Breath Alcohol test states that the observation period began at 3:45 a.m. and Ms. Sisois refused to submit to the breath-alcohol test at 4:07 a.m.: twenty-two minutes later. The Affidavit of Refusal states that Ms. Sisois refused to submit to the breath-alcohol "on or about 4:00 a.m." The time of 4:07 a.m. is on or about 4:00 a.m.

The 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. Without considering the unsworn citations or the Affidavit of Refusal to Submit to Breath, Urine, or Blood Test with the defective notary certificate, this Court concludes that the verified or sworn document in the record are competent,

substantial evidence that supports the Hearing Officer's finding that (1) Ms. Sisois refused to submit to the breath-alcohol test after being requested to do so by the deputy; and (2) Ms. Sisois was told if she refused to submit to breath-alcohol testing her privilege to operate a motor vehicle would be suspended for a period of one year.

The Petition for Writ of Certiorari is denied on the basis of this argument.

(2) "Whether the DHSMV departed from the essential requirements of law by failing to invalidate the suspension of Petitioner's Driver's License because Officer Gibson did not have probable cause to make an arrest of Petitioner for DUI because he did not witness her driving or [in] actual physical control of the vehicle and he did not have the legal authority to make an arrest because he did not personally investigate that issue as required by law."

In the Response to this argument, the Department relies upon the fellow officers' rule to support a finding that Ms. Sisois was the driver of the vehicle involved in the accident.¹ The Department's response is unpersuasive because the fellow officers' rule does not apply to support a finding that Ms. Sisois was behind the wheel of the vehicle at the time of the crash.

Sgt. Faugno was the first officer on the scene and he conducted interviews with Tara M. Mitchell and Dustin B. Benefield. These individuals heard the crash and observed Ms. Sisois, the only occupant of the vehicle, in the driver's seat. (App. 9, Supp. Incident Report). When Sgt. Faugno arrived, Ms. Sisois was standing outside the vehicle. The officer did not personally observe Ms. Sisois driving the vehicle or in physical control of the vehicle. Off. Gibson, the arresting officer, arrived on the scene after the interviews with Ms. Mitchell and Mr. Benefield had been conducted. "The fellow officers' rule allows the arresting officer to assume that probable cause to arrest a suspect exists when he relies upon the representations of an officer who has firsthand knowledge of events." State, Dep't of Highway Safety & Motor Vehicles v. Shonyo, 659 So. 2d 352, 353 (Fla. 2d DCA 1995); see Bowers v. State, 23 So. 3d 767, 770-71 (Fla. 2d DCA 2009), approved, 87 So. 3d 704 (Fla. 2012); Sawyer v. State, 905 So. 2d 232, 233 (Fla. 2d DCA 2005); see also Carroll v. State, 497 So. 2d 253, 259 (Fla. 3d DCA 1985)(discussing origins of fellow officers' rule). Sgt. Faugno did not have firsthand

¹ The Department incorrectly cites section 901.18, Florida Statutes (2014), as the fellow officers' rule. Section 901.18 states, "A peace officer making a lawful arrest may command the aid of persons she or he deems necessary to make the arrest. A person commanded to aid shall render assistance as directed by the officer. A person commanded to aid a peace officer shall have the same authority to arrest as that peace officer and shall not be civilly liable for any reasonable conduct in rendering assistance to that officer."

knowledge that Ms. Sisois was driving the vehicle when it crashed, but was informed by non-officer witnesses that Ms. Sisois was seen in the driver's seat of the vehicle after the crash.

In the Response, the Department states, "Here, Officer Gibson's investigation also included the statements of Tara Mitchell and Dustin Benefield, two independent eye-witnesses to the crash. They both identified Ms. Sisois as the driver of the crashed vehicle. (P.A[pp]. 9)." (Response p. 23). The Department's representation that the statements of the eyewitnesses were included in Off. Gibson's report is not true. The witnesses are only mentioned. Off. Gibson's Incident Report does not include the statements, but references Sgt. Faugno's Supplemental Incident Report: "I was informed by Corporal Spatz, that it is believed the driver was intoxicated, due to the witnesses' account of what happened and their observations thereafter. See Sergeant Faugno's supplement." (App. 9, DDL-8). Off. Gibson's Incident Report does not indicate that Off. Gibson interviewed Ms. Mitchell or Mr. Benefield or otherwise conducted an investigation into the crash of the vehicle, nor did the officer independently verify that Ms. Sisois was driving the vehicle at the time of the crash.

Section 316.645, Florida Statutes (2014), Arrest authority of officer at scene of a traffic crash, states:

A police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash.

However, as noted above, Off. Gibson did not conduct an independent investigation into the cause of the accident or to determine who was the driver of the vehicle. The statutory "accident exception" does not apply. See Op. Att'y Gen. Fla. 073-55 (1973), "Traffic Control Law: Arrests In Connection with Traffic Accidents; Questioning Driver Involved" (discussing § 316.017, Fla. Stat. (1973), now § 316.645).

The Department misrepresents the facts of this case in the Response:

(a) "Furthermore, it was a single car crash and no one other than the Petitioner was reported present at the scene of the crash with his [sic] own automobile." (Response p. 23).

Sgt. Faugno's Supplemental Incident Report indicates that when he arrived on the scene three males and two females were in the immediate area. (App. 9, DDL-8).

(b) "Further, there is no evidence that Petitioner had a passenger or that there were any other people at the scene who could have driven Petitioner's vehicle." (Response p. 24-25).

Sgt. Faugno's Supplemental Incident Report indicates that when he arrived on the scene three males and two females were in the immediate area. (App. 9, DDL-8).

(c) "Here, apart from the eyewitness statements, Officer Gibson's investigation, which included his observations of Petitioner, constitutes competent substantial evidence to find that Petitioner was driving a motor vehicle in violation of section 316.193, Florida Statutes, at the time of the crash." (Response p. 25).

Off. Gibson's investigation only included observations of Ms. Sisois for the purpose of determining if Ms. Sisois was under the influence of alcohol or some other substance. The officer did not independently investigate the cause of the crash or investigate who was driving the vehicle. (App. 9, DDL-8).

(d) "Next, the Department submits that in this case, law enforcement had ample probable cause to believe Petitioner was not only the driver of the vehicle, he [sic] was also operating the hit and run vehicle while under the influence of alcohol or a controlled substance. Officer Gibson's sworn reports [sic] in and of itself lays out the facts in which he relied on to both [sic] place Petitioner behind the wheel of his [sic] automobile while intoxicated." (Response p. 26).

In this case there was no hit and run incident. The vehicle that was crashed at the scene was inoperable and found to be totaled. Off. Gibson's report only indicates that he relied upon the statement of Cpl. Spatz and Sgt. Faugno's report to place Ms. Sisois behind the wheel of the vehicle. This was insufficient as those officers did not have firsthand knowledge that Ms. Sisois was driving. Further, Off. Gibson did not investigate the cause of the crash or investigate who was driving the vehicle. (App. 9, DDL-8).

There is no competent, substantial evidence to support the Hearing Officer's determination that Off. Gibson had probable cause to believe that Ms. Sisois was driving or in actual physical control of a motor vehicle because (a) the fellow officers'

rule does not apply and (b) the "accident exception" does not apply because Off. Gibson did not conduct an independent investigation of the crash, did not interview witnesses, and had no independent knowledge that Ms. Sisois was the driver of the vehicle at the time of the crash.

The Petition for Writ of Certiorari is granted on this basis.

(3) "Whether the Hearing Officer departed from the essential requirements of law by basing her decision on the facts not in evidence."

In the Hearing Officer's "Findings Of Fact" it states, "Two independent witnesses observed the Petitioner striking the guardrail and disabling her vehicle." (App. 16, p. 3) Ms. Sisois correctly argues that this is a misstatement of the evidence.

The witnesses, Ms. Mitchell and Mr. Benefield, informed Sgt. Faugno that they heard the sound of the accident and went to the roadway where they saw the crashed vehicle. The witnesses did not observe the crash as it happened. However, they did observe the Ms. Sisois, the only occupant of the vehicle, in the driver's seat.

The misstatement of the evidence by the Hearing Officer in the written order does not change the result of the hearing because the witnesses did observe Ms. Sisois behind the wheel of the vehicle after it crashed. However, this information was never given directly by the eyewitnesses to the arresting officer, Off. Gibson.

The Petition for Writ of Certiorari is denied on the basis of this argument.

Conclusion

The Petition for Writ of Certiorari is granted because there is no competent, substantial evidence to support the Hearing Officer's determination that Off. Gibson had probable cause to believe that Ms. Sisois was driving or in actual physical control of a motor vehicle at the time of the crash.

If she is otherwise eligible, the Department of Highway Safety and Motor Vehicles shall reinstate Kiriakoula Pastis Sisois' driving privilege and remove from Kiriakoula Pastis Sisois' permanent driving record any entry that reflects the administrative suspension sustained by the August 19, 2014, Decision of the Hearing Officer.

Petition for Writ of Certiorari granted; "Findings of Fact, Conclusions of Law and Decision" quashed; and matter remanded the Department of Highway Safety and Motor Vehicles to comply with the directives of this opinion.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 5th day of March, 2015.

Original Order entered on March 5, 2015, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

Copies furnished to:

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