

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

PHILIP A. MCCORMICK,  
Petitioner,

Case No.: 15-000060AP-88A  
UCN: 522015AP000060XXXXCI

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

Debora Moss, Esq.  
Attorney for Mr. McCormick

Stephen D. Hurm, Gen. Counsel  
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Attorneys for Respondent

**PER CURIAM.**

Philip A. McCormick 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 ("DHSMV") entered on September 28, 2015. The Decision affirmed the order of suspension of Mr. McCormick's driving privileges. The petition is denied.

**Statement of Case**

On August 22, 2015, Mr. McCormick's car was struck by a wrong-way driver. During the accident investigation, Officer Clancy noticed signs of alcohol impairment from both Mr. McCormick and the other driver and requested a DUI unit to investigate.

After a brief investigation during which Mr. McCormick “respectfully declined” to answer questions or perform any tests, Officers Berger and Arkovich arrested him for DUI. The officers then escorted Mr. McCormick to the mobile breath test unit and asked him to submit to a breath test, which he refused. He was read the implied consent warning and again refused to submit to the test, saying he “respectfully declined.” Mr. McCormick was then placed in the back of the patrol car.

Officer Berger’s supplemental police report narrative is the only document in the record that describes Mr. McCormick’s refusals and recantation. (App., Ex. 2, p. 23-24). According to the narrative, Officer Arkovich learned that Mr. McCormick had a prior suspension for refusing to submit to a breath test and informed Mr. McCormick that he would be charged with a misdemeanor for a subsequent refusal. Mr. McCormick then stated he would take the “official” breath test at the station. Officer Arkovich explained that the breath test offered at the scene was the official test; nevertheless, he asked Mr. McCormick if he would submit to a breath test if he took him to the station. Mr. McCormick said he would take the test at the station, but when Officer Arkovich returned to his patrol car to drive to the station Mr. McCormick again said he was not going to take the breath test. Thereafter, Mr. McCormick and the other driver were transported to jail by Officer Estoch.

At the formal review hearing, Mr. McCormick testified that on the way to jail, but shortly after leaving the scene and with the police station in view, he unequivocally recanted his refusal and insisted he would take the test at the station. Mr. McCormick asserts that Officer Arkovich drove him to the station and heard this final recantation, but he refused to allow him to take the test, stating it was “too late.” (App., Ex. 3, p. 59-60). Counsel for Mr. McCormick moved to invalidate the suspension based on his recantation of the refusal within a reasonable time. In an order entered on September 28, 2015, the Hearing Officer summarily denied the motion, and the suspension of Mr. McCormick’s driving privileges 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 Highway Safety & Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008).

### **Analysis**

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes. 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 a breath, blood, or urine 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.

Mr. McCormick asserts that the Hearing Officer erred in sustaining his driver's license suspension because the un rebutted testimony proves that he recanted his refusal within a reasonable amount of time. Mr. McCormick relies on Larmer v. State, Dep't of Highway Safety & Motor Vehicles, 522 So. 2d 941 (Fla. 4th DCA 1988). In Larmer, the petitioner initially refused to take the breath test. After being allowed to call his employer, he requested to take the breath test, but the police officer would not allow it. Id. at 942. The Fourth District Court of Appeal granted the petition for writ of certiorari because the "petitioner's retraction of his initial refusal came moments after that refusal, while petitioner was continuously in the presence of the police officers, and in circumstances where no inconvenience would result." Id. at 944. In Larmer, the record evidence indicated that the petitioner made an unequivocal request to take the test. In the instant petition, the record is devoid of any mention of a final recantation. This case is more analogous to Dep't of Highway Safety v. Dean, 662 So. 2d 371 (Fla. 5th DCA



1995) cause dismissed, 667 So. 2d 774 (Fla. 1996). In Dean, the police reports contained no mention of a final recantation and the officers did not testify; the only evidence that the petitioner rescinded his refusal was his own testimony. Id. at 372.

The Fifth District Court of Appeal stated:

This court has strongly held to the view that the finder of fact is not required to believe the testimony of any witness, even if unrebutted. . . . As the finder of fact in this case, the hearing officer had before it competent evidence of refusal. Dean offered testimony that he had recanted . . . . The hearing officer could have accepted such testimony that indeed the initial refusal was nullified or withdrawn and that Dean had consented. The hearing officer is not obliged, however, to accept a licensee's testimonial claim of consent in the face of the officer's sworn report that consent had been refused. The statutory scheme is designed to avoid the requirement for the physical presence of the arresting officer at the licensure hearing. To allow a licensee's unrebutted testimony that he recanted his refusal to trump such other evidence would eviscerate the statute.

Id. at 372-373 (footnote omitted).

Here, Officer Berger's sworn report recounts the events in detail. It states that after the initial refusal, Mr. McCormick recanted and then refused again. While Mr. McCormick testified that on the way to the jail he again recanted his refusal to Officer Arkovich, Officer Berger's narrative indicates that Officer Estoch actually transported Mr. McCormick to jail, not Officer Arkovich. Officer Berger appeared at the hearing, but was not questioned. Officer Arkovich was not subpoenaed because he was on vacation, and Mr. McCormick did not want a continuance to allow for his testimony.

If a preponderance of the evidence indicated that Mr. McCormick refused the breath test, then he had the burden to show that he rescinded his refusal. See Dep't of Highway Safety & Motor Vehicles v. Satter, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). At the DHSMV hearing, Mr. McCormick chose not to question the officers or introduce video from the in-car camera. Therefore, the Hearing Officer could rely solely on the documentary evidence to determine that Mr. McCormick refused to submit to the breath test. See § 322.2615(11), Fla. Stat.; Dean, 662 So. 2d at 372 ("By statute, such a determination may be made based upon the written documents and reports generated by law enforcement."). In consideration of Mr. McCormick's failure to introduce evidence to establish that he unequivocally rescinded his refusal and the Hearing

Officer's discretion to rely on the documentary evidence to determine that Mr. McCormick refused to submit to a breath test, competent substantial evidence supports the Hearing Officer's Decision.

Furthermore, the Hearing Officer did not violate the essential requirements of law by refusing to apply Larmer to the facts of this case. Unlike Larmer, the recantation in this case is disputed. The police reports do not contain any mention of a request to take a breath test once Mr. McCormick was en route to jail. The Hearing Officer was free to accept or reject Mr. McCormick's testimony. Consequently, the issue rests solely on the weight of the evidence. The Hearing Officer was the trier of fact and as such, was in the best position to evaluate the evidence. 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).

#### **Conclusion**

Competent substantial evidence supports the Hearing Officer's determination that Mr. McCormick refused to submit to breath-alcohol testing.

The petition for writ of certiorari is denied.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this 1 day of April, 2016.

Original Order entered on April 1, 2016, by Circuit Judges Linda R. Allan, Patricia A. Muscarella, and Keith Meyer.

Copies furnished to:

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