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

KRISTIN B. STROUD,
Petitioner,
v.

Ref. No.: 16-000018AP-88B
UCN: 522016AP000018XXXXCI

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

ORDER AND OPINION

Petitioner challenges a final order by the Department of Highway Safety and Motor Vehicles ("DHSMV") affirming the suspension of her driving privilege. Petitioner asserts that (1) there was not substantial, competent evidence to establish that she was driving or in actual physical control of a motor vehicle; (2) the hearing officer departed from the essential requirements of law by considering Petitioner's privileged statements in the traffic accident report, which violated her protection against self-incrimination under the Fifth Amendment; and (3) the Horizontal Gaze Nystagmus ("HGN") test should not be considered because it was not shown that a properly qualified officer administered it. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

On February 13, 2016, Trooper Sin was dispatched to a vehicle collision and observed two vehicles moved from the travel lanes. Trooper Sin identified Petitioner as the driver of one of the vehicles. Trooper Sin observed Petitioner was unable to maintain her balance, had a strong odor of alcohol coming from her mouth as she spoke, and had bloodshot, watery eyes. When Trooper Sin concluded his crash investigation and began the criminal investigation, he read Petitioner her *Miranda* rights. She agreed to participate in field sobriety exercises. These included: Horizontal Gaze Nystagmus ("HGN"), Finger to Nose, and Modified Romberg Balance tests. Throughout the

exercises, Petitioner exhibited further clues of impairment. Trooper Sin did not have Petitioner perform the Walk and Turn or One Leg Stand exercises, due to Petitioner's unsteady balance and the fact she was wearing an orthopedic boot. Petitioner was placed under arrest for DUI and thereafter provided two breath samples reflecting .286g/210L and .273g/210L. After the DHSMV affirmed the suspension of her driver's license, Petitioner filed the instant Petition for Writ of Certiorari.

Standard of Review

Orders from the DHSMV are examined under a three-part standard of review: (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. *See Dep't of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551, 553 (Fla. 2d DCA 2002).

Discussion

The suspension of a driver's license for unlawful breath-alcohol level requires the hearing officer to find, by a preponderance of the evidence, that: (1) the law enforcement officer had probable cause to believe that the licensee was driving or in actual physical control of a motor vehicle while under the influence of alcohol; and (2) the person had an unlawful breath-alcohol level of 0.08 or higher. § 322.2615(7)(a), Fla. Stat. This Court is not entitled to reweigh the evidence. It reviews the evidence to determine 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).

Petitioner asserts that the record does not support the Hearing Officer's finding that Trooper Sin had probable cause to believe she was in actual physical control of a motor vehicle while under the influence. Petitioner contends that the record evidence lacks specificity as to how Trooper Sin came to his conclusion she was driving or in actual control of the vehicle.

Probable cause exists if "the facts and circumstances allow a reasonable officer to conclude that an offense has been committed." *Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) (internal citations omitted). This analysis considers the totality of the circumstances, "analyzed from

the officer's knowledge, practical experience, special training, and other trustworthy information." *Id.*

This case is analogous to *Dep't of Highway Safety & Motor Vehicles v. Silva*, in which Silva was found lying near, but not on, a motorcycle when the officer arrived on the scene. 806 So. 2d 551, 552 (Fla. 2d DCA 2002). The arresting officer in that case lacked any direct evidence that placed Silva driving or in actual physical control of the vehicle while under the influence; however, the officer's observations and the surrounding circumstances supported the reasonable inference that Silva was driving the vehicle when it crashed. *Id.* at 554.

Here, in support of Trooper Sin's probable cause determination of actual physical control are the facts that he identified Petitioner by her driver's license, noted the car was registered to her, and observed that she was accompanied only by her two dogs. Furthermore, after being read her *Miranda* rights, Petitioner admitted to driving the vehicle, as discussed below. In support of Trooper Sin's determination that Petitioner was under the influence are his observations that Petitioner was unable to maintain her balance as she leaned against her car, had a strong odor of alcohol coming from her mouth as she spoke, had bloodshot, watery eyes, had empty bottles of alcohol in her car, and performed poorly on the field sobriety exercises. Accordingly, to find the Hearing Officer's probable cause determination not supported by competent, substantial evidence would be to ignore all "obvious implications" and reasonable inferences to be drawn from the surrounding circumstances. *Id.* (citing *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 308 (Fla. 1st DCA 1995)).

In short, Trooper Sin's observations provided competent, substantial evidence supporting his determination that Petitioner was driving or in actual control of a motor vehicle while under the influence.

Next, Petitioner contends that the Hearing Officer abridged the accident report privilege created by section 316.066(4), Florida Statutes, by considering Petitioner's admission that she was driving. Petitioner maintains the Hearing Officer's consideration of the accident report departed

from the essential requirements of the law by violating her protection against self-incrimination under the Fifth Amendment.

Section 316.066(4) says that a "crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting." However, section 322.2615(2)(b) expressly allows a DHSMV hearing officer to consider the crash report in administrative hearings.[1]

Even if the accident report privilege applied, Petitioner's Fifth Amendment right would not have been violated because she waived her *Miranda* rights. *See State v. Marshall*, 695 So. 2d 686, 686 (Fla. 1997) (emphasizing that the privilege granted under section 316.066 is applicable if no *Miranda* warnings are given). The record establishes that Trooper Sin had completed the accident investigation, made it clear that a criminal investigation was beginning, and read *Miranda* rights before Petitioner admitted she was traveling from Orlando to her second home in Indian Rocks Beach, thereby, giving independent evidence that she was driving the vehicle. *See e.g., State, Dep't of Highway Safety & Motor Vehicles v. Bello*, 813 So. 2d 1023, 1025 (Fla. 3d DCA 2002).

Accordingly, the Hearing Officer was properly allowed to consider the accident report because the privilege does not apply. § 322.2615(2)(b), Fla. Stat. Furthermore, even if the privilege did apply, the Hearing Officer was permitted to consider Trooper Sin's observations to determine that Petitioner was driving or in actual physical control of her vehicle. *See State v. Cino*, 931 So. 2d 164, 167 (Fla. 5th DCA 2006) (noting that section 316.066(4) does not exclude consideration of the arresting officer's observations of the suspect's physical appearance, general demeanor, slurred speech, or breath scent).

Finally, Petitioner asserts the Hearing Officer improperly considered the HGN exercise because there was not competent, substantial evidence that a properly qualified officer administered

[1] "[T]he accident report privilege . . . does not apply to the administrative review of a license suspension pursuant to section 322.2615, Florida Statutes." *Juettner v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 538B (Fla. 6th Cir. Ct. Mar. 26, 2008).

it. In *Dep't of Highway Safety & Motor Vehicles v. Rose*, the circuit court properly concluded that evidence of the HGN exercise should not have been considered by the hearing officer because the administering officer was not a Drug Recognition Expert and the record evidence failed to justify the admission of the HGN results. 105 So. 3d 22, 24 (Fla. 2d DCA 2012). However, there was evidence of other field sobriety tests which indicated signs of impairment, so the court held that the hearing officer could properly consider these other observations. *Id.* at n.1. Here, there was no evidence that Trooper Sin was properly qualified to administer the HGN, so the Hearing Officer improperly considered the HGN. However, as in *Rose*, there was evidence of other field sobriety tests. Although the HGN evidence should have been excluded, the Hearing Officer properly considered the other field sobriety test evidence present in the record, and these other indicators of impairment in the record constituted competent, substantial evidence to support the Hearing Officer's decision. *See generally Dep't of Highway Safety & Motor Vehicles v. Chamizo*, 753 So. 2d 749, 752 (Fla. 3d DCA 2000) (stating that "[w]here the hearing officer makes an error but the error is harmless, the circuit court should affirm").

Conclusion

Because the Hearing Officer's final order affirming the suspension of Petitioner's license is supported by competent substantial evidence, it is

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

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this 8 day of August 2016.

Original Order entered on August 8, 2016, by Circuit Judges Jack Day, Pamela A.M. Campbell, and Thomas M. Ramsberger.

Copies furnished to:

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