

**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**

**SEAN T. MURPHY,
Petitioner,**

**Case No.: 16-000005AP-88A
UCN: 522016AP000005XXXXCI**

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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Attorneys for Respondent

PER CURIAM.

Sean T. Murphy 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 December 16, 2015. The Decision affirmed the order of suspension of Mr. Murphy's driving privileges. The petition is denied.

Statement of Case

No testimony was presented in this case, but at the Formal Review Hearing the Hearing Officer accepted documentary exhibits into evidence. The hearing officer's decision may be based solely upon the documents submitted by the arresting agency. See § 322.2615(11), Fla. Stat. (2015). These documents are admissible into evidence for the hearing officer's consideration without any further requirement of authenticity. See Ch. 15A-6.013(2), Fla. Admin. Code.; State Dep't of Highway Safety & Motor Vehicles v. Saxlehner, 96 So. 3d 1002, 1007 (Fla. 3d DCA 2012).

An "Alcohol/Drug Influence-Initial Contact Supplement" report prepared by Florida Highway Patrol Trooper Lara states that on November 4, 2015, at approximately 9:45 p.m., Trooper Lara heard a loud noise consistent with a vehicle crash. The Trooper walked to the scene on Interstate 75 and observed a van with a flat tire lawfully parked on the shoulder of the inside lane of traffic. A car had crashed into the rear of the van. Mr. Murphy was observed in the driver's seat of the car that crashed into the van. In response to the Trooper's inquiry, Mr. Murphy indicated he was "ok" and exited the vehicle. The Trooper noted that Mr. Murphy had slurred speech, bloodshot and watery eyes, and a strong odor of alcohol about his person. While the Trooper was requesting that the dispatcher send tow trucks, Mr. Murphy proceeded to pull his pants down and began to urinate between the crashed car and crashed van. The Trooper observed an open sixteen ounce can of beer in the center console of the vehicle. Subsequently, Mr. Murphy was transported to a hospital.

Florida Highway Patrol Trooper Nixon prepared an "Arrest Report" and an "Alcohol and Drug Influence Report" that indicate the Trooper arrived at the scene of the crash after Mr. Murphy had been transported to the hospital. Trooper Nixon completed his on-scene accident investigation and proceeded to the hospital. When the trooper arrived, Mr. Murphy was lying in a hospital bed wearing a neck brace. Trooper Nixon observed that Mr. Murphy's eyes were red, bloodshot, and glassy; his speech was mumbled; and the odor of alcoholic beverages emanated from Mr. Murphy's mouth. Due to his neck brace, in order to observe Trooper Nixon, Mr. Murphy moved his eyes approximately 45 degrees. In the "Alcohol and Drug Influence Report" Trooper Nixon reported observing nystagmus in Mr. Murphy's left eye at that time.

At approximately 12:10 a.m., almost two and one-half hours after the crash, Trooper Nixon informed Mr. Murphy that the crash investigation was concluded. Miranda warnings were read to Mr. Murphy at approximately 12:11 a.m. Mr. Murphy waived his Miranda rights and stated to Trooper Nixon that he had consumed one beer at a gasoline station in Wildwood at 5:30 p.m., had driven south, "and it was a blur after that."

Trooper Nixon states in his "Alcohol and Drug Influence Report:"

Due to exigent circumstances of time delay from crash and unsure if the defendant was going to be admitted into the hospital. Also, based on Trooper A. Lara's observations at the crash scene and my observations at the hospital with the defendant; I asked the defendant if he was willing to give a sample of his blood to determine his blood alcohol content. [Mr. Murphy] said no. At approximately 12:18 a.m. I read [Mr. Murphy] the Implied Consent warning. [Mr. Murphy] once again refused.

At approximately 1:18 a.m. the defendant was advised he was being released from the hospital by medical personnel. I then informed the defendant he was now under arrest for DUI-Property Damage.

Mr. Murphy's driving privileges were suspended. On December 10, 2015, a formal review hearing was conducted pursuant to section 322.2615 that resulted in the December 16, 2016, Findings of Fact, Conclusion of Law and Decision.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: The standard of review applicable to circuit court review of an administrative decision is: (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 & 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. 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. (2015).

"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).

Analysis

Mr. Murphy raises two issues on appeal:

I. The Hearing Officer improperly sustained the suspension of the Petitioner's driving privilege because, due to a hopeless conflict in the paperwork making up the record, therefore, [sic] there cannot be substantial, competent evidence in the record that he refused to submit to a lawful blood test, and whether or not a blood test was lawfully requested.

II. Mr. Murphy's suspension must be invalidated because he only had an obligation to consent to a blood test if it was impossible or impractical to administer a breath or urine test, and the record lacks competent, substantial evidence that it was impossible or impractical to administer a breath or urine test.

Section 316.1932(1)(c), Florida Statutes (2015), 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 operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the

person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible. . . .

Mr. Murphy asserts the documentary evidence concerning the request to submit to a blood test by Trooper Nixon contains inconstancies. Specifically, Mr. Murphy raises the issue of whether the evidence demonstrates that Mr. Murphy refused a blood test pursuant to a lawful arrest, or whether he refused a blood test prior to his arrest because it was impractical or impossible to administer a breath test.

The Court is directed to the "Affidavit of Refusal to Submit to Breath, Urine, or Blood Test" that states in part that on November 5, 2015, at 12:18 a.m., Mr. Murphy "was placed under lawful arrest for the offense of DUI-Property Damage." The Affidavit also states that on November 5, 2015, at 12:18 a.m., Trooper Nixon requested that Mr. Murphy submit to a blood test and he refused.

It is asserted that the Affidavit conflicts with the statements in Trooper Nixon's "Arrest Report" and an "Alcohol and Drug Influence Report" that indicate Mr. Murphy was not arrested until 1:18 a.m. when he was advised he was being released from the hospital. It is asserted that the Affidavit of Refusal creates a hopeless conflict, especially in light of "the absence of facts surrounding whether or not a breath test was possible or practical."

As noted above, this Court is not to reweigh the evidence, but only to review the evidence to determine if the administrative findings and judgment are supported by competent substantial evidence. See Sarmiento, 989 So. 2d at 693; Stenmark, 941 So. 2d at 1249. In this case, there is no hopeless conflict because Trooper Nixon's reports are clear that Mr. Murphy was asked to submit to a blood test at the hospital before he was arrested. The generic form Affidavit of Refusal does not provide for notations that the blood test is requested pursuant to section 316.1932(1)(c), prior to an arrest.

Substantial, competent evidence supports the Hearing Officer's determination by a preponderance of the evidence that Mr. Murphy refused a lawful request for a blood test pursuant to section 316.1932(1)(c) prior to Mr. Murphy's arrest. The Hearing Officer complied with the essential requirements of law.

Mr. Murphy's argument that there is an "absence of facts" surrounding whether a breath test was possible or practical is without merit. The statements of Trooper Nixon in his "Arrest Report" and an "Alcohol and Drug Influence Report" reflect that the trooper requested the blood test approximately two and one-half hours after the crash, "[d]ue to exigent circumstances of time delay from crash and unsure if [Mr. Murphy] was going to be admitted into the hospital." This statement constitutes evidence that the administration of a breath or urine test was impractical or impossible.

Mr. Murphy directs this Court to Chu v. State, 521 So. 2d 330 (Fla. 4th DCA 1988), for the proposition that the appearance at a hospital alone is not sufficient to warrant the taking of a blood test. There still is a requirement that the taking of a breath or urine test must be impractical or impossible. In Chu, Ms. Chu was involved in an accident and was sitting on the back of an emergency vehicle when she was observed by the trooper. Testimony was received from the trooper that he asked for a blood test rather than a breath test because "the paramedics were already there and he thought that it would be the most accurate and quickest way to test the Defendant." Id. at 331. No exigent circumstances were cited by the trooper. The Chu case is factually distinguishable from the present case.

Mr. Murphy also cites to State v. Banoub, 700 So. 2d 44 (Fla. 2d DCA 1997), to support his statement that taking a breath test four hours after a crash would not be unreasonable. However, Banoub is a criminal prosecution in which the trial court was found to have improperly suppressed the results of a blood alcohol test. The case does not involve section 322.1932, but discusses the requirement in section 344.1933(1), Florida Statutes, that a blood test be performed in a reasonable manner. The case does not support Mr. Murphy's argument.

Mr. Murphy also cites to two circuit court appellate opinions involving criminal prosecutions for driving under the influence. These opinions were issued from the Seventh Judicial Circuit Court and from the Fifteenth Judicial Circuit Court. These cases are not binding upon this Court.

This Court finds that the essential requirement of law have been met as there is competent, substantial evidence in support of the Hearing Officer's determination by a preponderance of the evidence that the request for the blood test was lawful. See Hale

v. State of Fla., Dep't of Hwy. Safety & Motor Vehicles, 21 Fla. L. Weekly 1a (Fla. 6th Cir. App. Ct. Oct. 4, 2013); Stone v. Dep't of Hwy. Safety & Motor Vehicles, 18 Fla. L. Weekly 570a (Fla. 6th Cir. App. Ct. April 7, 2011).

Conclusion

There is no hopeless conflict in the record; competent, substantial evidence supports the Hearing Officer's determination; the Hearing Officer did not depart from the essential requirements of law. The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 7th day of December, 2016.

Original Order entered on December 7, 2016, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

Copies furnished to:

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