

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**

HEATHER BRAZILL,
Petitioner,

vs.

Ref. No.: 16-0040AP-88B
UCN: 522016AP000040XXXXCI

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

ORDER AND OPINION

Petitioner challenges the Findings of Fact, Conclusions of Law, and Decision (“Decision”) by the Department of Highway Safety and Motor Vehicles affirming the suspension of her driving privilege. Petitioner asserts that (1) competent substantial evidence does not support the hearing officer’s finding that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol, and (2) the hearing officer departed from the essential requirements of law by considering Petitioner’s statements made during the civil traffic investigation in violation of the accident report privilege and Petitioner’s right against self-incrimination. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

On June 2, 2016, Officer Brinkman was called to the scene of an accident investigation. She noticed Petitioner sitting in the driver’s seat of the car with her seat belt buckled. Petitioner was the sole occupant of the car. Sergeant Divincent was standing next to the car and informed Officer Brinkman that he had removed the keys from the vehicle. Officer Brinkman asked Petitioner to step out of the car. When Petitioner exited the vehicle, she “stumbled and almost fell.” Officer Heredia conducted the crash investigation. After the crash investigation was complete, Office Brinkman notified Petitioner that a criminal investigation was going to be conducted for driving under the

influence. After being read the *Miranda*¹ warning, Petitioner refused to speak with Officer Brinkman concerning the investigation. Officer Brinkman noticed a distinct odor of alcohol emanating from Petitioner from five feet away. Petitioner had “watery, bloodshot, and glassy” eyes, slurred and incoherent speech, and was “swaying, stumbling, clumsy, unsteady and needed support at times.” Petitioner performed poorly on the field sobriety tests and was arrested. She refused to take a breath test, and her license was suspended. After a hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process was accorded; (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551, 553 (Fla. 2d DCA 2002).

Discussion

At the hearing challenging Petitioner’s driver’s license suspension for failure to submit to a breath test, the significant issue before the hearing officer was whether Officer Brinkman had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol. *See* § 322.2615(7)(b), Fla. Stat. The question before this Court, therefore, is whether competent substantial evidence supports the hearing officer's finding that probable cause existed. *See Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 308–09 (Fla. 1st DCA 1995). Petitioner asserts that competent substantial evidence does not support the hearing officer’s probable cause determination. She maintains that the “conclusory nature of the police reports” cannot constitute competent substantial evidence of probable cause.

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

Under this Court's standard of review, the Court must "defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, *in light of the record as a whole*, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel*, 163 So. 3d 527, 529–30 (Fla. 1st DCA 2015) (emphasis added). Thus, although the hearing officer's Decision states only that when Officer Brinkman arrived, "Sergeant Divincent was standing by the Petitioner, who was in the driver's seat of her vehicle," the Court is "tasked with searching the record for competent, substantial evidence supporting the hearing officer's finding of probable cause." *Id.* at 530. Probable cause exists "where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Favino*, 667 So. 2d at 309 (citation omitted). "Probable cause is often a conclusion drawn from reasonable inferences." *Id.* Here, the facts and circumstances would lead a reasonable man to believe that Petitioner was driving the vehicle when she was sitting in the driver's seat with her seatbelt fastened, alone in the car, from which Sergeant Divincent had removed the keys. *See Silva*, 806 So. 2d at 554 ("In this case the facts and circumstances surrounding the incident would lead a reasonable man to believe that Silva was driving the motorcycle found lying on the road shoulder next to him.").

While Petitioner concedes that her arguments concerning the evidence required to establish probable cause may be controlled by the *Silva* case, she contends that the Petition should still be granted because the hearing officer departed from the essential requirements of law by considering her statements to Officer Heredia during the crash investigation. Florida Statutes section § 316.066(4) creates an accident report privilege that prohibits statements made during a crash investigation from being "used as evidence in any trial, civil or criminal." However, Florida Statutes section 322.2615(2)(b) states that "[n]otwithstanding [section] 316.066(4), the crash report shall be considered by the hearing officer" in driver's license suspension review hearings. Petitioner alleges

that section 322.2615(2)(b) is unconstitutional because, to the extent that it allows her statements to be used against her, it violates her Fifth Amendment right against self-incrimination.

The Fifth Amendment privilege against compelled “self-incrimination ‘not only protects the individual against being involuntarily called as a witness against himself [or herself] in a *criminal* prosecution but also privileges him [or her] not to answer questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future *criminal* proceedings.’” *In re Amendments to Florida Rules of Traffic Court*, 105 So. 3d 1267, 1269 (Fla. 2012) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)) (emphasis added). “The suspension of a driver's license is an administrative proceeding and is a civil, not a criminal, sanction.” *Dep't of Highway Safety & Motor Vehicles v. Rigau*, 901 So. 2d 339, 339 (Fla. 2d DCA 2005). Accordingly, the consideration of the crash report by the hearing officer, as provided by section 322.2615(2)(b), is not unconstitutional because any allegedly incriminating statements are not being used in a criminal proceeding.

Conclusion

Because the hearing officer could properly consider the crash report, the essential requirements of law were followed. Moreover, competent substantial evidence supports the hearing officer's decision that probable cause existed to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol.

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

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this
1st day of December, 2016.

Original Order entered on December 1, 2016, by Circuit Judges Jack Day, Amy M. Williams, and Pamela A.M. Campbell.