

**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**

**BRENTON BJORKLUND,**  
**Petitioner,**

**v.**

**UCN: 512018CA003079CAAXES**  
**Case No: 18-CA-3079**

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

\_\_\_\_\_/

Petition for Writ of Certiorari from  
Decision of Hearing Officer  
Bureau of Administrative Reviews  
Department of Highway Safety  
and Motor Vehicles

Keeley R. Karatinos, Esq.  
Attorney for Petitioner

Christie Utt, Gen. Counsel  
Mark L. Mason, Asst. Gen. Counsel  
Attorneys for Respondent

**PER CURIAM.**

Petitioner Brenton Bjorklund seeks certiorari review of the Final Order of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered on August 29, 2018. The Decision affirmed the order of suspension of the Petitioner's driving privileges based upon his refusal to take a breathalyzer test. The question before the Court is whether there was competent substantial evidence to support the hearing officer's finding by a preponderance of the evidence that law enforcement had probable cause to arrest the Petitioner for DUI as the driver of the vehicle at the time he refused to submit a breath sample. Upon review, the Petition for Writ of Certiorari is granted.

### **Statement of Case**

Petitioner was involved in a one-vehicle motor vehicle accident in the early morning hours of July 22, 2018. After law enforcement arrived, a DUI investigation was conducted. At the conclusion of the investigation, the Petitioner was arrested and taken to county jail. After being taken to county jail, the Petitioner refused to submit a breath sample. As a result, his driver license was suspended by the Department. He was issued a citation for DUI. The Petitioner sought review of the license suspension decision before a hearing officer.

The hearing was held on August 23, 2018 and August 28, 2018. Florida Highway Patrol Trooper Paez Hernandez's report was admitted into evidence. The report stated that Trooper Hernandez arrived on scene at approximately 2:45 a.m. and that the vehicle had come to rest on its driver's side with the passenger side facing up. The report stated that the Petitioner told the deputy that he was not the driver of the vehicle at the time of the crash and instead the driver was a third person that he did not know. The report states that the "front passenger was later identified by her Florida Driver License" as Kaitlyn Brooke Hart who stated that the Petitioner was the driver of the vehicle at the time of the crash. The trooper then wrote that Ms. Hart "was transported to Regional Medical Hospital Bayonet Point. Ms. Hart stated that she was not the driver at the time of the accident."

The trooper wrote that the Petitioner showed signs of impairment including a strong odor of alcohol, slurred speech, and bloodshot glassy eyes. The trooper wrote that the Petitioner was unsteady on his feet and swayed and that the Petitioner was defiant.

The trooper wrote that when he asked the Petitioner to perform field sobriety exercises, he refused. After he was arrested and taken to Pasco County Jail, he refused to provide breath samples despite implied consent warnings.

During the hearing before the hearing officer, a witness named Caesar Azua testified that he observed the vehicle leave the road, go off into a ditch, and roll over "roughly three times" at around 2:00 a.m. The witness testified that he immediately dialed 911 and ran over to the vehicle. He stated he observed that the driver's side of the vehicle was facing up. He testified that there were only two occupants of the vehicle, a man and a woman, and that the man emerged from the vehicle first through the rear driver's side

door and yelled “You wrecked my truck, you wrecked my F’ing truck” at the other occupant.

Mr. Azua testified that the woman was taken by ambulance to the hospital before law enforcement arrived at the crash site. Thus, Mr. Azua was there from the crash through to law enforcement’s arrival and only saw two vehicle occupants. He further impliedly testified that nobody from law enforcement spoke with Ms. Hart until she was already at the hospital.

Trooper Hernandez testified that prior to arresting the Petitioner, he called Bayonet Point hospital to speak with Ms. Hart. He testified that he did not otherwise corroborate that the person whom he was speaking with on the phone was Ms. Hart. He testified that Ms. Hart told him the Petitioner was driving the vehicle. He also testified that the Petitioner lied to him by claiming an unknown and non-existent third person was the person actually driving the vehicle. He testified that another trooper, Casey Briolat, met with Ms. Hart in person at the hospital later. Trooper Hernandez testified that he could not recall if Ms. Hart had given him her driver’s license number during his phone conversation with her. Trooper Briolat did not submit a supplemental report in this case and no other law enforcement witness testified.

Cameron Holloway, a friend of the Petitioner, testified that he was at a bar called San Ann Liquor’s, also known as Ralph’s, with the Petitioner and Ms. Hart. He testified that when the Petitioner left, the Petitioner got into the passenger seat and Ms. Hart was in the driver’s seat and Ms. Hart drove the pickup away from the bar. Mr. Holloway testified that this occurred at approximately 1:30 or 1:45 a.m.

On August 29, 2018, the hearing officer issued his “Findings of Fact, Conclusions of Law and Decision.” Relevant to the issue of who was driving the vehicle, the hearing officer found that the vehicle came to rest on its driver’s side, that the vehicle was owned by the Petitioner, and that the Petitioner informed law enforcement that the driver was a third person.

The hearing officer found that “Trooper met with passenger-1 (Kaitlyn Hart) in exam room number 8 at Bayonet Point Hospital and she said they were coming from Ralph’s Bar in San Antonio and her boyfriend (Petitioner) was driving and she was the right front seat passenger.

The hearing officer issued a finding of fact that recited Mr. Azua's testimony which included that Mr. Azua testified that the vehicle had come to rest on its passenger side and not its driver side, that he did not see who was driving, and that Mr. Azua heard the Petitioner yell at Ms. Hart that she had wrecked his truck.

The hearing officer issued a finding of fact that recited Mr. Holloway's testimony that Ms. Hart drove the vehicle from the bar with the Petitioner in the passenger seat.

The hearing officer's findings of fact did not make any findings regarding the credibility of any of the witnesses and did not directly address any of the conflicting testimony.

The hearing officer found that the Department established by a preponderance of the evidence that probable cause existed for the Petitioner to be arrested for DUI as the driver of the vehicle and upheld the driver's license suspension for failure to submit a breath sample.

### **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**

The "substantial evidence rule is not satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent references." *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002). A finding "must be based on something more than mere probabilities . . . , but rather on evidence in the record that supports a reasonable foundation for the conclusion reached." *Id.*

In the instant case, there is equal support to inconsistent references which creates equal suspicion regarding whether the Petitioner or Ms. Hart was driving. The Petitioner

testified that a third person was driving. Ms. Hart testified that the Petitioner was driving. An independent witness, Caesar Azua, offered testimony that supported either the Petitioner or Ms. Hart driving. On one hand, he testified that there was no third person in the vehicle, thus indicating that the Petitioner had lied to law enforcement. On the other hand, Mr. Azua offered unrefuted testimony that the Petitioner climbed out of the vehicle out of a rear seat window, not a front seat window. Additionally, Mr. Azua offered unrefuted testimony that the Petitioner yelled at Ms. Hart "You wrecked my truck, you wrecked my f'ing truck." The only other witness to testify to what occurred was the Petitioner's friend, Cameron Holloway, who testified that when the Petitioner and Ms. Hart left San Ann Liquor's bar prior to the accident, Ms. Hart was driving.

### **Conclusion**

There is no substantial, competent evidence to support a determination as a matter of law that Trooper Hernandez had probable to cause to arrest the Petitioner for DUI as driver of the vehicle. Therefore, the trooper had no authority to order a breathalyzer sample. Accordingly, it is

**ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**; "Findings of Fact, Conclusions of Law and Decision" **QUASHED**; and matter remanded the Department of Highway Safety and Motor Vehicles.

**DONE AND ORDERED** in Chambers at New Port Richey, Pasco County, Florida this \_\_\_\_ day of \_\_\_\_\_, 2019.

Original Order entered on April 2, 2019, by Circuit Judges Shawn Crane, Susan G. Barthle, and Linda Babb.

*Copies furnished to:*

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