NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA APPELLATE DIVISION

ROBERT FARRIS,

Petitioner,

v. Case No.: 22-000004-AP-88B

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

Respondent.
_____/

ORDER AND OPINION

Opinion filed: _____

PER CURIAM.

THIS MATTER came before the Court on Petitioner's Amended Petition for Writ of Certiorari dated March 15, 2022 ("Petition"); Respondent's Response to Amended Petition for Writ of Certiorari dated May 23, 2022 ("Response"); and Petitioner's Reply to Response to Amended Petition for Writ of Certiorari dated June 10, 2022. Petitioner seeks certiorari review of Respondent's decision to uphold

the suspension of Petitioner's driver's license. For the reasons set forth below, **the Petition is DENIED.**

I. Jurisdiction

This Court has jurisdiction to issue a writ of certiorari pursuant to article V, section 5(b), Florida Constitution; section 322.2615(13), Florida Statutes (2022); section 322.31, Florida Statutes (2022); and Florida Rule of Appellate Procedure 9.030(c)(2).

II. Relevant Facts and Procedural History

On January 15, 2022, Pinellas County Sheriff's Deputy Levi Blake stopped Petitioner, ROBERT FARRIS ("Petitioner") in Pinellas County around 1:03 a.m. for operating his vehicle without headlamps. Upon making contact with Petitioner, Deputy Blake observed indications of impairment and detained Petitioner to conduct a driving under the influence ("DUI") investigation. Petitioner was placed under arrest after he failed field sobriety exercises. Petitioner then submitted two breathalyzer[1] samples at the scene measuring at .153 and .146, well over the legal limit of .08. Upon notification of Petitioner's DUI citation, Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR

[1] The terms "breathalyzer" and "intoxilyzer" are used synonymously in this Opinion.

VEHICLES ("the Department") suspended Petitioner's driver's license pursuant to section 322.2615.

Per Petitioner's timely request, the Department conducted a formal administrative hearing on February 15, 2022 ("hearing") to review the suspension of Petitioner's driver's license. Counsel appeared on behalf of Petitioner. The hearing officer introduced several documents into the record at the hearing, including a Florida DUI Uniform Traffic Citation and Notice of Suspension, a Breath Alcohol Test Affidavit ("Affidavit"), and an Agency Inspection Report. Deputy Blake appeared and testified at the hearing that he detected the odor of alcohol on Petitioner's breath and noticed that Petitioner had a raspy voice upon making initial contact with Petitioner. He further testified that a raspy voice can be an indicator of "certain drug impairment." App. at 35, line 22 to App. at 36, line 6. The following exchange occurred between Deputy Blake and Petitioner's counsel at the hearing:

> **Mr. Sullivan:** So based upon the driving without headlights, the odor of alcohol, and the raspy voice, you elected to detain [Petitioner] for the purpose of conducting a DUI investigation?
>
> **Deputy Blake:** Yeah, I mean, that would be fair to say at that point. ***The contact with him***

> ***went further on, and once I was finally able to see his eyes, I noted that they were bloodshot and watery, but that was a little further on in his speaking.***
>
> **Mr. Sullivan:** Okay. At the point where you were either going to issue him a ticket, give him a warning, or detain him for the purpose of doing a DUI investigation, the information that you had was that he was driving without headlights, that he had an odor of alcohol on his breath, and his speech was raspy?
>
> **Deputy Blake:** That's correct.
>
> **Mr. Sullivan:** Okay. And what happened from there? You had him get out of his car?
>
> **Deputy Blake:** Yeah. A little bit further on, I had him get out of the vehicle, and that's when we began FSTs.

App. at 36, line 7 to App. at 37, line 1. (Emphasis added).

At the conclusion of Deputy Blake's testimony, Petitioner objected to the introduction of the Affidavit. Petitioner also formally moved to invalidate the license suspension on two bases: 1) the lack of an appropriate inspection report corresponding to the breathalyzer identified in the Affidavit[2] and used to obtain Petitioner's breath

[2] The Affidavit at issue is included in the Appendix attached to Petitioner's Amended Petition. *See* App. at 12. The Affidavit identifies the type of test performed, the time the two breath samples were collected, the results of the test, the serial number for the breathalyzer used to obtain Petitioner's breath samples, and the date of the last agency inspection. The Affidavit identifies the serial number for the breathalyzer used at the scene on Petitioner as 80-005290. However,

samples; and 2) unlawful detention of Petitioner for the purpose of conducting a DUI investigation. Per Petitioner's request, the hearing officer withheld ruling on February 15, 2022 and allowed Petitioner's counsel to submit a written memorandum concerning his motions to invalidate the suspension.

Ultimately, the hearing officer denied Petitioner's motions and upheld the license suspension in her Findings of Fact, Conclusions of Law and Decision dated February 23, 2022 ("Order"). Over Petitioner's objection, the hearing officer relied upon the Affidavit in upholding the suspension. The Order also found that Deputy Blake had reasonable suspicion to detain Petitioner for a DUI investigation. In doing so, the hearing officer relied upon Deputy Blake's testimony about Petitioner's bloodshot and watery eyes. App. at 25. Petitioner subsequently filed a timely petition for writ of certiorari.

III. Standard of Review

A circuit court's review of an administrative proceeding on a petition for writ of certiorari is limited to a three-prong analysis: 1) whether procedural due process was afforded; 2) whether the

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the Agency Inspection Report provided by law enforcement corresponds to a breathalyzer with serial number 80-005338. App. at 13.

essential requirements of the law have been observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The instant Petition only raises issues as to the first two prongs, and thus we need not address whether the administrative findings and judgment are supported by competent substantial evidence.

IV. Procedural Due Process

Due process is a flexible concept and requires only that the proceeding be essentially fair. *Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) (cleaned up). The quality of due process required in a quasi-judicial hearing is not the same as a full judicial hearing. *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (cleaned up). Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. *Id.* A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Id.*; *see also Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009) (stating "[p]rocedural due process requires both fair notice and a real opportunity to be

heard at a meaningful time and in a meaningful manner.") (cleaned up).

The Petition asserts that the Department deprived Petitioner of his procedural due process rights in the following ways: 1) admitting the Affidavit into the record over Petitioner's objection (Am. Pet. at 9-10); 2) denying Petitioner's Motion to Invalidate the Suspension due to the lack of a proper agency inspection report (*Id.*); and 3) denying Petitioner's Motion to Invalidate the Suspension for a lack of reasonable suspicion to detain the Petitioner (Am. Pet. at 12). However, Petitioner does not provide any support for these arguments. The Petition completely fails to identify any legal authority or facts in the record which substantiate these bare assertions.

Based on the record and the legal authority cited above, we are convinced that Petitioner was afforded procedural due process in the proceeding below. Petitioner's Appendix includes a document entitled Notice of Formal Review Hearing/Prehearing Order dated January 19, 2022 ("Notice") which includes the date, time, and additional details for the hearing on February 15, 2022. App. at 2. The Notice is addressed to Petitioner's counsel and signed by the hearing officer

who presided over the hearing. There is no evidence in the record that Petitioner objected to the Notice in any way. Petitioner's counsel appeared at the hearing and did not place an objection on the record concerning any notice issue. Accordingly, we do not find any issue with the notice provided by the Department.

Now we turn to the issue of whether Petitioner was afforded a meaningful opportunity to be heard. At the hearing, Petitioner had the opportunity to question Deputy Blake and to submit documents for the record. When counsel for Petitioner raised issues of law, the hearing officer agreed to keep the record open to allow for counsel to supplement the record with written argument and case law. App. at 48. Such factors demonstrate that the hearing bore the hallmarks of procedural sufficiency. *See, e.g.*, *Green Emerald Homes, LLC v. 21st Mortgage Corp.*, 300 So. 3d 698, 704 (Fla. 2d DCA 2019) (stating that "the right to be heard includes the right to meaningfully introduce evidence, cross-examine witnesses, and be heard on questions of law.") (cleaned up). Petitioner was undoubtedly afforded the opportunity to introduce evidence, to question Deputy Blake, and to raise issues of law during and after the hearing. As such, we find no

basis to conclude that the Department failed to provide Petitioner with a meaningful opportunity to be heard.

Because Petitioner has failed to identify deficiencies pertaining to notice or the opportunity to be heard in this case, there is no basis for any of Petitioner's procedural due process arguments, and we deny the Petition on such grounds.

V. Departure from the Essential Requirements of the Law

A departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. *Housing Authority of City of Tampa v. Burton*, 874 So. 2d 6, 8 (Fla. 2d DCA 2004) (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)). In *Haines City Cmty. Dev. v. Heggs*, the Florida Supreme Court stated:

> The required departure from the essential requirements of law means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 527-28 (Fla. 1995) (cleaned up).

A ruling constitutes a departure from the essential requirements of the law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice. *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005) (citing to *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)). Clearly established law can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003); *see also DecisionHR USA, Inc. v. Mills*, 341 So. 3d 448, 453 (Fla. 2d DCA 2022). A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, does not rise to the level of a departure from the essential requirements of the law. *Barker*, 909 So. 2d at 337-38 (citing to *Heggs*, 658 So. 2d at 525).

a. Breath Alcohol Test Affidavit

Petitioner argues that the Department departed from the essential requirements of the law by upholding the suspension of Petitioner's driver's license without a proper agency inspection report in the record, as such rendered the Affidavit inadmissible. In response, the Department asserts that there is no statute or rule

which requires the submission of an agency inspection report to validate a breath alcohol test affidavit in an administrative proceeding. We agree with the Department.

The admissibility of the subject Affidavit turns on section 316.1934(5), Florida Statutes (2022). This statute does not apply to administrative proceedings on its face. However, the Second District Court of Appeal made section 316.1934(5) applicable to administrative proceedings in *Dep't of Highway Safety & Motor Vehicles v. Falcone*, 983 So. 2d 755, 757 (Fla. 2d DCA 2008). *See also Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633, 638 (Fla. 2d DCA 2009) (applying section 316.1934(5) to an administrative review of a license suspension for a DUI citation after noting the court had done the same in *Falcone*). Section 316.1934(5) states in pertinent part:

> An affidavit containing the results of any test of a person's blood ***or breath*** to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. ***Such affidavit is admissible without further authentication*** and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath ***if the affidavit discloses***:

> (a) The type of test administered and the procedures followed;
>
> (b) The time of the collection of the blood or breath sample analyzed;
>
> (c) The numerical results of the test indicating the alcohol content of the blood or breath;
>
> (d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; ***and***
>
> (e) ***If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.***

§ 316.1934(5), Fla. Stat. (emphasis added).

A breath alcohol test affidavit "is presumptive proof of the results" and "admissible without further authentication" if the affidavit discloses all the information required by section 316.1934(5), including "the date of performance of the most recent required maintenance on the intoxilyzer." *Falcone*, 983 So. 2d at 757. Once a breath test affidavit is admitted into evidence, the record then contains competent, substantial evidence of impairment. *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 813 So. 2d 141, 144 (Fla.

2d DCA 2002). Per *Falcone* and *Alliston*, the key inquiry is whether the breath test affidavit in the record satisfies all the requirements of section 316.1934(5).

The Affidavit in the instant case meets every one of the requirements contained in section 316.1934(5). Petitioner does not argue that these requirements were not met. Instead, Petitioner argues that a separate agency inspection report for the subject breathalyzer is necessary for the Affidavit to be admissible. This is not the law. As the Department identifies in its Response, section 322.2615 provides all the documentation which law enforcement ***must*** submit to the Department following a DUI offense. Notably absent from the list is any mention of a breathalyzer inspection report.[3]

Here, the dispositive issue is whether the Department provided the date of the last inspection for the relevant breathalyzer – not whether law enforcement introduced a separate inspection report.

[3] The statute calls for the transmission of the following documents from law enforcement to the Department: the driver's license; an affidavit stating the officer's grounds for belief that 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; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test; the notice of suspension; the crash report; and a copy of a video recording of the field sobriety test or the attempt to administer such test.

Indisputably, the Affidavit includes an inspection date for the breathalyzer - January 15, 2022. App. at 12. We find that the Affidavit satisfied all the criteria provided in section 316.1934(5), and therefore the Affidavit was admissible in the proceeding below.

Lastly, Petitioner argues that Florida Administrative Code Rule 15A-6.013(2) requires the admission of an agency inspection report to authenticate a breath test affidavit. The regulation reads, in pertinent part:

> The hearing officer ***may*** consider any report or photocopies of such report submitted by a law enforcement officer, correctional officer or law enforcement or correctional agency relating to the suspension of the driver, the administration or analysis of a breath or blood test, ***the maintenance of a breath testing instrument***, or a refusal to submit to a breath, blood, or urine test, which has been filed prior to or at the review. Any such reports submitted to the hearing officer shall be in the record for consideration by the hearing officer.

Fla. Admin. Code R. 15A-6.013(2) (emphasis added). As the Department indicates in its Response, the language of the regulation is entirely permissive, as indicated by the word "may," and does not ***require*** the introduction of the agency inspection report. Thus, Petitioner's argument fails here as well.

We conclude that the hearing officer observed the essential requirements of the law as she correctly applied section 316.1934(5) and binding case law on the issue of the Affidavit's admissibility. Although the Agency Inspection Report provided by law enforcement added confusion to the proceedings, such a report was not required by law in the first place to authenticate the Affidavit in the proceeding below. As such, we also deny the Petition on these grounds.

b. Reasonable Suspicion

Petitioner further asserts that the Department departed from the essential requirements of the law due to the hearing officer's determination that Deputy Blake had reasonable suspicion to detain Petitioner to conduct a DUI investigation. Here, Petitioner raises two points of error: 1) the hearing officer should not have relied upon Deputy Blake's observation of bloodshot, watery eyes because it occurred post-detention; and 2) the other DUI indicators - driving without headlights on at 1:03 a.m., a raspy voice, and the odor of alcohol - were insufficient on their own to give rise to reasonable suspicion.

A law enforcement officer may stop a driver and request that the driver perform field sobriety tests based on a reasonable suspicion

that the crime of driving while intoxicated is being committed. *Dept. of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999) (citation omitted). Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than a preponderance of the evidence. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

As to Petitioner's first contention, we find that the record is unclear as to whether Deputy Blake's observations of Petitioner's eyes occurred prior to or after detention. The Order provides: "Deputy Blake requested the Petitioner exit his vehicle and the Petitioner complied. As Deputy Blake's contact with the Petitioner continued, Deputy Blake was able to see the Petitioner's eyes and observed them to be bloodshot and watery." App. at 23. However, Deputy Blake's testimony, provided above, does not clearly establish when the detention began or whether he observed Petitioner's eyes before or after Petitioner was asked to step out of his vehicle.

Although the lack of clarity on this issue suggests it was erroneous for the hearing officer to rely upon the observation of Petitioner's eyes, such error, if any, is harmless. The dispositive issue here is whether the hearing officer could properly base her

reasonable suspicion determination on the three remaining and undisputed indicators of impairment.[4]

Other than citing *State v. Delgado* for the general rule pertaining to reasonable suspicion during a DUI traffic stop, Petitioner otherwise relies exclusively on opinions from two Florida circuit courts - the Seventh Circuit and the Seventeenth Circuit - for his reasonable suspicion arguments. Petitioner cites these cases for the proposition that reasonable suspicion does not exist where an officer detains a DUI suspect solely on the basis of: 1) the underlying traffic offense; 2) the odor of alcohol emanating from the driver or the vehicle, and 3) some other third indicator. However, the Department also cites non-binding authority which defies the alleged principle that Petitioner attempts to establish. *See, e.g.*, *State v. Dunkle*, 29 Fla. L. Weekly Supp. 604a (Fla. 7th Cir. Ct. Oct. 7, 2021). The *Dunkle* court held that reasonable suspicion for a DUI investigation existed based on only three indicators of impairment: 1) driving at night

[4] These three indicators are: 1) driving without headlights on at 1:03 a.m.; 2) a raspy voice; and 3) the odor of alcohol on Petitioner's breath. Petitioner does not dispute the validity of these observations as indicators of impairment for a reasonable suspicion determination.

without headlights; 2) an odor of alcohol; and 3) an admission to having just left a bar. *Id.*

As outlined above, we may only grant a writ of certiorari for a departure of the essential requirements of the law if a clearly established principle of law has been violated. We agree with the position outlined in the Department's Response on this issue.[5] The Florida circuit court opinions cited by Petitioner do not demonstrate a clearly established principle of law as they are not binding upon this Court. Moreover, the Department has cited additional Florida opinions which contradict the authority cited by Petitioner - another clear indicator that the hearing officer did not violate a clearly established principle of law in rendering her reasonable suspicion determination.

Petitioner's inability to identify a clearly established principle of law which was violated by the Department further leads us to deny the Petition as to Petitioner's reasonable suspicion argument.

[5] The heading in the Response associated with the Department's reasonable suspicion argument erroneously invokes the competent substantial evidence standard, which is not at issue in this matter. However, this appears to be a scrivener's error as the substance of the argument associated with the incorrect heading addresses whether the essential requirements of the law were observed in the proceeding below. *See, e.g.*, Resp. at 36 (stating "the hearing officer's finding that there was reasonable suspicion was not a departure from such a clearly established principle of law.").

VI. Conclusion

In conclusion, the Court finds that the Department afforded procedural due process to Petitioner and the Department observed the essential requirements of the law in the proceeding below.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Amended Petition for Writ of Certiorari dated March 15, 2022 is hereby **DENIED.**

DONE AND ORDERED in Chambers, in St. Petersburg, Pinellas County, Florida, this 21st day of March, 2023. A true and correct copy of the foregoing has been furnished to the parties listed below.

Original Order entered on March 21, 2023 by Circuit Judges Amy M. Williams, Pamela A.M. Campbell, and Steve D. Berlin.

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