

IN THE SUPREME COURT OF FLORIDA

PEGGY ALLEN LUTTRELL,

Case No. SC08-1396

Lower Case No. 5D07-2384

Petitioner/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY AND MOTOR
VEHICLES

Respondent/Appellee.

**ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA**

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In this brief, Appellee/Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Appellant/Petitioner, Peggy Allen Luttrell, will be referred to as "Luttrell".

Following Luttrell's arrest for driving under the influence, Luttrell requested a formal administrative review of her license suspension pursuant §322.2615 (1)(b)(3), Florida Statutes. After an evidentiary hearing for that purpose, the Department hearing officer who presided over the case made the following findings of fact:

On September 2, 2006 at approximately 2:56 a.m., Officer Harler of the Port Orange Police Department observed a vehicle sitting in the parking lot of Wachovia Bank. He observed that the door was open, but saw no one at the ATM machine. When he pulled up to the vehicle, he saw that it was running and the lights were on. He contacted the driver, Peggy Luttrell, who told him that her glasses fell and she pulled into the bank parking lot to find them. Officer Harler smelled an odor commonly associate with an alcoholic beverage coming from the driver. He observed that her eyes were very glassy and her speech was slurred.

Officer Harler took Ms. Luttrell's driver license to his vehicle to run her information. When he returned, he observed that she was asleep. After he woke her up, she told him that she had consumed two beers that evening. Ms.

Luttrell agreed to perform some field sobriety exercises. She performed poorly, exhibiting further signs of impairment. Officer Harler arrested Ms. Luttrell for DUI and read her the Implied Consent Warning. Ms. Luttrell refused to take the breath test. She was transported to the Port Orange Police Department and later to the Volusia County Branch Jail. Her driver license was subsequently suspended for the Refusal.

Ms. Luttrell testified at the administrative hearing that there were no "No Parking" signs in bank parking lot.

The hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain Luttrell's suspension. The Department informed Luttrell in an Order dated October 24, 2006, that the suspension of her driving privilege was sustained for a period of twelve months.

On November 27, 2006, Luttrell filed a Petition for Writ of Certiorari with the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, challenging the Department's Final Order of License Suspension. On June 15, 2007, the circuit court rendered the Order Granting Petition for Writ of Certiorari, which reversed the Department's administrative suspension of Luttrell's driver's license. The circuit court ruled that the hearing officer departed from the essential

requirements of law by denying Luttrell's motion to invalidate for an unlawful stop. In finding the stop unlawful, the Court relied on Luttrell's testimony at the hearing that the stop officer's "take down" lights were on when he approached her vehicle. In relying on this testimony, the circuit court rejected the findings of the hearing officer and the Department's position that the initial encounter was consensual. The Court also held that the hearing officer could not reject Luttrell's uncontroverted factual testimony because, it was not "contrary to law, improbable, untrustworthy, unreasonable, or contradictory."

The Department appealed the Circuit Court's decision to the Fifth District Court of Appeal, which reversed the circuit court. The district court reaffirmed its previous holding that in this type of administrative hearing, the hearing officer is not required to believe the testimony of any witness, even if unrebutted and that the circuit court misapplied the law by reweighing the evidence. Luttrell now seeks review in this Court for which the Department is filing its Answer Brief on the issue of this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

There is no basis for discretionary Jurisdiction in this case since there is no express conflict with a decision of this Court or another district court of appeal on the same question of law (Fla. R. App. P. 9.030(a)(2)(A)(iv)).

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY JURISDICTION TO REVIEW THIS CASE BECAUSE THE DISTRICT COURT'S RULING IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OTHER DISTRICT COURT OF APPEAL.

Luttrell has failed to show much less allege any conflict between the Fifth District Court of Appeal's holding in Luttrell v. Department of Highway Safety and Motor Vehicles, 983 So.2d 1215 (Fla. 5DCA 2008), and any decision of this Court or any other District Court of Appeal on the same question of law. Therefore, there is no basis for this Court to exercise its discretionary jurisdiction to review Luttrell's case.

First, the Fifth District Court of Appeal properly rejected the circuit court's holding that the hearing officer was not free to reject Luttrell's testimony. Luttrell cites to Gonzalez v. State, 786 So.2d 559, 565 (Fla. 2001) also relied on by the circuit court, as well as Walls v. State, 641 So.2d 381, 390 (Fla. 1994) and Brannen v. State, 94 Fla. 656, 114 So. 429 (Fla. 1927) to suggest a conflict. However, the district court in Luttrell did not reject the holdings in Gonzalez, Walls or Brannen or create a conflict with those cases. On the contrary, the Court recognized another clearly established principle of law

which is that the finder of fact is not required to believe testimony of any witness, even if unrebutted. City of Orlando Police Dept. v. Rose, 974 So.2d 554, 555, (Fla. 5th DCA, 2008). "Even though the state's witnesses are uncontradicted, a jury does not have to accept and believe them." State v. Paul, 638 SO.2d 537, 539 (Fla. 5th DCA 1994), review denied, 651 So.2d 131 (Fla. 1995); Bouler v. State, 389 So.2d 1197 (Fla. 5th DCA 1980) (a jury can accept or reject all or any part of the testimony of any witness).

Given the forgoing principle, the Court properly held that the hearing officer in an administrative license suspension hearing is not required to believe the unsupported testimony of the suspended licensee. Given Luttrell's standing in the case, her testimony can certainly be considered self-serving if not untrustworthy.

Next, in Luttrell, the district court recognized that the statutory scheme established by the Legislature in license revocation proceedings held pursuant to s. 322.2615, Florida Statutes was designed to avoid requiring the physical presence of the arresting officer at the hearing. "To accept the position that a hearing officer was required to accept the unrebutted testimony of a licensee (or any other witness) would eviscerate the

statute." Luttrell, at 1217, citing Department of Highway Safety v. Dean, 662 So. 2d 371, 373 (Fla. 5th DCA 1995).

This is true. If Petitioner's position is accepted and the circuit court holding to stand, any driver would have the ability to testify at an administrative hearing to self-serving facts not otherwise in the record. Without the presence of the officer at the hearing, the hearing officer would be forced to invalidate an otherwise valid suspension. In addition to the facts at bar, another example of this is a refusal case such as Dean, supra.

Dean involved a refusal to submit to a breath test where the driver (Dean) testified at his formal review that he recanted his refusal. The arresting officer's did not testify and his affidavit did not mention recantation. The hearing officer rejected Dean's testimony and sustained the suspension based upon a valid refusal. The lower court quashed the hearing officer's Order and held that the hearing officer could not reject Dean's testimony, which was the only evidence in the record on the issue of his recantation. As in the case at bar, the court based its findings on the grounds that since Dean's testimony was "neither impeached, discredited, controverted, contradictory, physically impossible, or inherently incredible" the hearing officer could not reject the

testimony and the suspension had to be vacated. Id. 662 So.2d at 372.

The Fifth District Court of Appeal reversed the circuit court in Dean holding that the finder of fact is not required to believe the testimony of any witness, even if unrebutted. Dean, 662 So.2d at 372-373. As in the case at bar, the court recognized that the statutory scheme of s. 322.2615 is designed to avoid the requirement of the physical presence of the arresting officer at the licensure hearing. In footnote 2, the court noted, "if a licensee wishes to bolster his evidence, the licensee can call the officer to corroborate his or her testimony on that issue." Section 322.2615(11), Florida Statutes.

As the finder of fact in this case, the hearing officer had before her competent substantial evidence of a lawful encounter. The hearing officer had the authority to reject Luttrell's testimony regarding Officer Harler's lights and the location of his vehicle when he approached her. Certainly, the trustworthiness of a suspended driver is an issue at a license suspension hearing and a hearing officer cannot be bound in every case to accept the credibility of the suspended driver.

Based on the foregoing, the district court's opinion in Luttrell is not in conflict with any decision of this

Court or another district court of appeal as specified in Fla. R. App. P. 9.030(2)(A)(iv). Clearly, Luttrell has not shown that this Court has discretionary jurisdiction in this case.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to deny Luttrell's request to accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Answer Brief has been furnished by United States Mail to FLEM K. WHITED, III, ESQUIRE, 630 N. Wild Olive Avenue, Suite A, Daytona Beach, Florida, 32118, this ____ day of August, 2008. I hereby certify that the font size used in the Department's Jurisdictional Answer Brief is Courier New 12 point.

HEATHER ROSE CRAMER
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