IN THE SUPREME COURT OF FLORIDA

PEGGY ALLEN LUTTRELL,

Petitioner,

v. Supreme Court Case No. 08-1396

District Court Case No. 5D07-2384

DEPARTMENT OF HIGHWAY
SAFETY & MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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Statement of the Case and Facts

Petitioner's driving privilege was suspended for refusing a chemical test of her breath, blood, or urine. A formal review hearing was held October 17, 2006, before Hearing Officer Karen Dreggors. Several documents were introduced into evidence, establishing the following facts: At approximately 2:56 a.m., Port Orange Police Officer Dale Harler observed a red Honda parked at a Wachovia Bank on Nova Road. He pulled up to the Honda and saw that it was running and that its lights were on. No document filed by the police contained any factual information how the officer pulled up to the Honda. He made contact with Petitioner, the driver, who stated that she pulled into the parking lot to look for her glasses, which had fallen on the floor. Officer Harler smelled alcohol and noted that Petitioner had slurred speech and glassy eyes. Petitioner displayed clues of impairment on the field sobriety exercises. Officer Harler arrested Petitioner for driving under the influence ("DUI"). After receiving the implied consent warning, Petitioner refused to submit to a breath test.

Petitioner testified at the formal review hearing providing the following evidence: The bank was illuminated and had an operational ATM machine. Shortly after Petitioner arrived at the bank parking lot, the officer pulled up behind her with his blue lights on. The officer then approached

her on foot as she was sitting in her car. There were no posted "No Parking" signs in the parking lot.

Petitioner moved to invalidate the suspension on the ground that the seizure was unlawful. Specifically, Petitioner argued that the officer seized Petitioner without reasonable suspicion when he pulled behind her with his blue lights activated. On October 24, 2006, the hearing officer entered a Final Order of License Suspension, denying Petitioner's motion to invalidate.

Petitioner then filed a Petition for Writ of Certiorari in the Circuit Court in and for Volusia County. The Circuit Court quashed the Order of Suspension ruling the hearing officer departed from the essential requirements of law by denying Luttrell's motion to invalidate the suspension based on the unlawful stop. Regarding the issue presented in this Petition, the Circuit Court held:

> Respondent asserts that the encounter was consensual. This assertion is erroneous. It is well settled law that "uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory." *Gonzalez v. State*, 786 so.2d 559, 565 (Fla. 2001) Here there was no documentary or testimonial evidence to contradict petitioner's statement that the officer used his "take down" lights when he approached her. The hearing officer apparently rejected this testimony, but there is no finding that the uncontroverted factual evidence is contrary to law, improbable, untrustworthy, unreasonable or contradictory. The hearing officer was not free to simply

ignore the testimony.

The Department of Highway Safety and Motor Vehicles sought relief in the Fifth District Court of Appeal. They argued there that the Circuit Court failed to apply the correct law. They argued that the Circuit Court's ruling was in direct conflict with *Department of Highway Safety v. Dean*, 662 So.2d 371, 373 (Fla. 5th DCA 1995). Luttrell responded that *Dean* was not the controlling law, that the Supreme Court's holding in *Gonzalez v. State*, 786 So.2d 559, 565 (Fla. 2001), *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994); and *State v. Bowden*, 538 so.2d 83, 85 (Fla. 2nd DCA 1989) set forth the correct law.

The Fifth District granted the Writ and quashed the Order of the Circuit Court. Relying on *Dean* and their prior decision in *Dep't of Highway and Motor Vehicles v. Marshall*, 848 So.2d 482 (Fla. 5th DCA 2003) the Fifth District held:

> In doing so, we recognized that the statutory scheme established by the Legislature in license revocation proceedings held pursuant to section 316.2615 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. *Dean*, 662 So.2d at 373. As we observed in *Marshall* and *Dean*, the hearing officer was free to accept or reject the licensee's testimony.

The District Court also said

> "The probable cause affidavit reflects that Harler 'pulled up' to Luttrell's parked car and then made contact with her while she was sitting in the front seat of her vehicle. These facts, by themselves, would support a finding of a consensual encounter."

Further the District Court failed to acknowledge this Court's decision in *Gonzales* and *Walls*. It is from this decision that Luttrell seeks relief in the Supreme Court of Florida.

Summary of Argument

The issue before this Court is whether the district court applied the correct law when it held the hearing officer was free to reject uncontroverted factual evidence that was not contrary to law, improbable, untrustworthy, unreasonable or contradictory. If the district court was incorrect, then the circuit court applied the correct law and certiorari relief in the district court should not have been granted. The circuit court applied the correct law. The opinion of the district court should be quashed, the matter remanded to the district court to affirm the circuit court order.

Argument

THE DISTRICT COURT OF APPEAL FAILED TO APPLY THE CORRECT LAW IN QUASHING THE CIRCUIT COURT'S ORDER WHEN IT HELD THAT A FINDER OF FACT COULD DISREGARD UNCONTROVERTED FACTUAL EVIDENCE THAT IS NOT CONTRARY TO LAW, IMPROBABLE, UNTRUSTWORTHY, UNREASONABLE OR CONTRADICTORY

The standard of review is *de novo*. See Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992); Vaughn v. State, 711 So. 2d 64, 66 (Fla. 1st DCA 1998).

The position that Luttrell took at the administrative hearing, in the circuit court, in the district court of appeal and in this court is that uncontroverted factual evidence (testimony) cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. That is exactly the language from *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994) citing *Brannen v. State*, 94 Fla. 656, 114 So. 329 (1927) and *Gonzalez v. State*, 786 So.2d 559, 565 (Fla. 2001).

As justification for rejecting this position the district court noted

> "Our court has previously held that in this type of administrative hearing, the hearing officer is not required to believe the testimony of any witness, even if unrebutted." Citing Dean and Marshall "In doing so, we recognize that the statutory scheme established by the Legislature in license

> revocation proceedings held pursuant to section 316.2615 (sic)[1] 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. As we observed in Marshall and Dean, the hearing officer was free to accept or reject the licensee's testimony."

This is contrary to law and further makes no sense. The net effect of this ruling is that if the arresting officer files his report and, as in this case, does not include any factual information regarding a material issue and the licensee and/or an independent witness supplies the missing fact that is uncontroverted, is not contrary to law, improbable, untrustworthy, unreasonable or contradictory, the hearing officer is allowed to disregard the testimony.

The person giving the testimony has never been an issue. In *Brannen v. State*, supra, the defendant was charged with perjury in the criminal prosecution of Riley Douglas for unlawful carnal intercourse with an unmarried female person of previous chaste character, who was at the time of such intercourse under the age of 18 years. In his trial, the state introduced evidence tending to indicate that he had lied in his testimony during the prosecution of Riley Douglas. Brannen then testified on his own behalf that he recalled that testimony but later in the Douglas trial he was

[1] Should be 322.2615. There is no such statute as 316.2615.

allowed to retake the stand and correct his earlier testimony. The court noted

> "It was neither charged nor proven by the state that the last-quoted testimony of the defendant was also false; in fact, the latter testimony was nowhere alluded to in the state's case, either in the indictment or proof. It was introduced in this cause by the defendant, in explanation and extenuation of his original testimony. The fact that this defendant, when testifying as a witness in the prosecution against Douglass, resumed the stand and gave the additional testimony last quoted, is evidenced in this case only by the oral testimony of the defendant himself; but his testimony to that effect is unassailed in this record, and is not controverted, disputed, or otherwise discredited"
>
> 94 Fla. at 660; 114 So. at 430.

In reversing his conviction for perjury the court said:

> "Uncontroverted and undiscredited evidence is not necessarily always binding upon a court or jury, as, for instance, when it is essentially illegal, contrary to the natural laws, inherently improbable or unreasonable, opposed to common knowledge, in consistent with other circumstances established in evidence, or contradictory within itself. Ordinarily, however, and subject to certain well-defined exceptions (see 23 C.J. 47), such evidence, when material, properly admitted, and when it consists of facts (not opinions), cannot be wholly disregarded or arbitrarily rejected even though the witness giving it is an interested party."
>
> 94 Fla. at 661; 114 So. at 430-31.

This Court in *Walls* said "As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory." 641 So. at 390. This Court

quoted the same language in *Gonzalez*. 786 So.2d at 565. See also *State v. Bowden*, 538 So.2d 83, 85 (Fla. 2nd DCA 1989) ("A trial judge must accept evidence which is 'neither impeached, discredited, controverted, contradictory within itself, or physically impossible.'") and *State v. Fernandez,* 526 So.2d 192, 193 (Fla. 3d DCA), *caused dismissed,* 531 So.2d 1352 (1988) (Although the trial judge purported to find the testimony of the officers at the motion to suppress "not credible," he was not free to do so. A court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controverted, contradictory within itself, or physically impossible. *Flowers v. State,* 106 Fla. 686, 143 So. 612 (1932); *Brannen v. State,* 94 Fla. 656, 114 So. 429 (1927); *Harris v. State,* 104 So.2d 739 (Fla. 2d DCA 1958); see *State v. Navarro*, 464 So.2d 137 (Fla. 3d DCA 1984)).

Applying the correct law would not eviscerate the statute. It would be consistent with the goals of any adversarial proceeding – to seek the truth.

Conclusion

The ruling of the district court of appeal is in direct conflict with long standing law of the supreme court and other district courts of appeal. This Court should accept jurisdiction to resolve this conflict.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Heather Rose Cramer, Esq., Assistant General Counsel, DHSMV, 6801 Lake Worth Road, Suite 230, Lake Worth, Fl 33167, this 21 day of July, 2008.

_____

COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in the pleading is 14-point Times New Roman.

_____

COUNSEL FOR PETITIONER