IN THE SUPREME COURT OF FLORIDA

PEGGY ALLEN LUTTRELL,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

Respondent.
_____/

Case No. SC08-1396
Lower Case No. 5D07-2384

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT/APPELLEE'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In this brief, Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Petitioner, Peggy Allen Luttrell, will be referred to as "Petitioner". References to Petitioner's Appendix attached to the Amended Initial Brief on the Merits will be referred to as "A.___" followed by the appropriate exhibit number or letter.

Following Petitioner's arrest for driving under the influence, Petitioner requested a formal administrative review of her license suspension pursuant section 322.2615 (1)(b)(3), Florida Statutes. In a formal review conducted under section 322.2615, Florida Statutes, the hearing officer must determine by a preponderance of the evidence whether sufficient cause exists to sustain the suspension. The scope of the review is limited to the following issues in a case where a driver is suspended for refusal to submit to a breath, blood, or urine test:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
>
> 2. Whether the person was placed under lawful arrest for a violation of s. 316.193.

> 3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement or correctional officer; and
>
> 4. Whether the person was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year, or in the case of a second or subsequent refusal, for a period of eighteen months.

s. 322.2615(7)(b), Fla. Stat. (2006). [1]

After Petitioner's hearing, 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.

[1] Subsequent to Petitioner's arrest, the legislature amended s. 322.2615 effective October 1, 2006 to remove the lawfulness of the arrest from the hearing officer's scope of review. Whether the lawfulness of the arrest remains an issue to be addressed in a formal review is currently pending before this Court Department of Highway Safety and Motor Vehicles v. McLaughlin, SC08-2394; Department of Highway Safety and Motor Vehicles v. Hernandez, SC08-2330.

> 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 Petitioner's suspension. The Department informed Petitioner in an Order dated October 24, 2006, that the suspension of her driving privilege was sustained for a period of twelve months. (A.A).

On November 27, 2006, Petitioner 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 Petitioner's driver's license. The circuit court ruled that the hearing officer departed from the essential requirements of law by denying Petitioner's motion to invalidate for an unlawful stop. In finding the stop unlawful, the Court relied on Petitioner'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 Petitioner's uncontroverted factual testimony because it was not "contrary to law, improbable, untrustworthy, unreasonable, or contradictory." Luttrell v. Department of Highway Safety and Motor Vehicles, Case No: 2006-32085-CICI Order Granting Petition for Writ of Certiorari (Fla. 7th Cir. Ct. June 15, 2007).

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 holdings 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. Department of Highway Safety and Motor Vehicles v. Luttrell, 983 So. 2d 1215 (Fla. 5th DCA 2008). (A.E).

Petitioner now seeks review in this Court for which the Department is filing its Answer Brief on the Merits.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly quashed the circuit court order overturning the suspension of Petitioner's driving privilege. The district court properly held that the circuit court misapplied the law by reweighing the evidence and held that a hearing officer in a formal review conducted pursuant to s. 322.2615, Florida Statutes is free to accept or reject the testimony of the licensee.

ARGUMENT

The District Court Reached The Correct Conclusion In Quashing The Circuit Court's Order Quashing The Department's Order Upholding The Suspension Of Petitioner's Driving Privilege Because The Circuit Court Reweighed The Evidence In Concluding That The Hearing Officer Could Not Accept Or Reject The Testimony Of A Licensee.

The Fifth District Court of Appeal correctly quashed the circuit court order overturning the suspension of Petitioner's driving privilege. The district court properly held that the circuit court misapplied the law by reweighing the evidence and held that a hearing officer in a formal review conducted pursuant to section 322.2615, Florida Statutes, is free to accept or reject the testimony of the licensee. The statutory framework specifically allows the hearing officer to conduct the formal review based on reports of law enforcement officers, in order to determine if by a "preponderance of the evidence" there is sufficient cause to sustain, invalidate or amend a license suspension. Section 322.2615(7), Florida Statutes. This is a civil administrative proceeding. Standards applicable to the trial of a criminal matter do not necessarily apply.[2] The hearing officer's scope of review is also very narrow. Section 322.2615(7)(b), Florida Statutes.

[2] For example, hearsay is admissible in formal review hearings and rules of evidence do not apply. Rule 15A-6, Florida Administrative Code.

As the finder of fact in this case, Hearing Officer Dreggors had before her the very comprehensive and thorough charging affidavit of the arresting officer which described his encounter with Petitioner. (A.C-2). The district court correctly held that the evidence in the Officer Harler's affidavit alone supported a lawful consensual encounter. Luttrell at 1217; Popple v. State, 626 So. 2d 185, 186 (Fla. 1993); Department of Highway Safety and Motor Vehicles v. Favino, 667 So. 2d 305 (Fla. 1st DCA 1995); Sommer v. State, 465 So. 2d 1339, 1343 (Fla. 5th DCA 1985). In his affidavit, Officer Harler detailed his encounter with Petitioner including where he was located when he first noticed Petitioner's vehicle, that her lights were on and her car door open. Officer Harler further specified that Petitioner had a passenger and that passenger's name among many other details of the encounter. (A.C-2). Officer Harler also stated that between the time he retrieved Petitioner's license, went to his patrol car to run her information and returned to Petitioner's vehicle, she had fallen asleep. (A.C-2). Petitioner also lied to Officer Harler and changed her story before disclosing that she was coming from a bar before the encounter. (A.C-2). Officer Harler did not comment on the state of his lights. However, as the District Court held, "the officer was not required to negate each and every possible act or circumstance that

might transform a consensual encounter into an investigatory stop." Luttrell, at 1217.

The Petitioner bears the burden of subpoenaing any and all witnesses against her and in her favor, including the arresting officer, to challenge the evidence against her. Scritchfield v. DHSMV, 648 So. 2d 1246 (Fla. 2d DCA 1995); DHSMV v. Stewart and Henry, 625 So. 2d 123 (Fla. 5th DCA 1993). In an attempt to present only a one-sided case, Petitioner did not subpoena Officer Harler to her formal review. However, Petitioner testified as to her initial encounter with Officer Harler. (A.B). In her brief testimony in response to her attorney's mostly leading questions, Petitioner testified that Officer Harler's blue lights were on when he approached her vehicle. (A.B.6-8). Petitioner's self-serving testimony regarding the lights was irrefutable because Petitioner did not subpoena Officer Harler. It is important to recognize that at the formal review, the hearing officer is a neutral trier of fact. Furthermore, although the driver may be represented by counsel, the state has no representation and does not subpoena witnesses.

After weighing the evidence including Officer Harler's affidavit and considering the credibility of the witness, the hearing officer issued an Order sustaining Petitioner's license suspension. The hearing officer specifically rejected Petitioner's motion to invalidate her suspension based upon an

unlawful stop. (A.A). As the district court correctly held, "the hearing officer was free to accept or reject the licensee's testimony" regarding the officer's lights that turned her otherwise lawful consensual encounter into an unlawful detention. Luttrell, at 1217.

Petitioner 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 support her contention that the district court applied the incorrect law in holding that the hearing officer was not required to believe her unrebutted factual testimony regarding the officer's lights. Luttrell, at 1217. Petitioner argues that because her testimony was not "contrary to law, improbable, untrustworthy, unreasonable, or contradictory" the hearing officer was required to believe it.

Gonzalez, Walls and Brannen are all distinguishable from the case at bar. First, each is a criminal case. Second, in Walls and Gonzalez, the testimony was that of an expert witness not the testimony of an interested party such as Petitioner. Finally, in Brannen, the court found that Brannen's testimony was "consistent with and finds corroboration in the testimony of the state's witness." Brannen, at 660-661. Petitioner's testimony is not consistent with nor corroborated by any of the record evidence.

Furthermore, the district court in Luttrell did not reject the holdings in Gonzalez, Walls or Brannen that uncontroverted factual testimony may not be rejected unless contrary to law, improbable, untrustworthy, unreasonable or contradictory. Instead, 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, coupled with the unique nature of license suspension hearings, the district 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. Luttrell, at 1217.

In light of Petitioner's standing in the case, her testimony can certainly be considered suspect if not untrustworthy and as such her testimony certainly also falls with the "untrustworthy" exception established in Brannen. In fact, Florida's standard jury instructions section 3.9

addresses credibility of witnesses. The very responsibility of jurors is to judge credibility of witnesses and jurors are instructed that a witness's interest in the outcome of the case is a factor to be considered in weighing evidence. Florida Standard Jury Instructions Section 3.9(4). Jurors are further informed, "You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness."

Certainly, Hearing Officer Dreggors as the trier of fact was privileged to consider the weight of the evidence and credibility of the witness. Petitioner would have this court issue a holding that the hearing officer was required to believe her self-serving testimony elicited from her attorney's leading questions, regarding the status of the officer's lights. Petitioner makes this argument despite the fact that the evidence reflects that on the evening of her arrest for driving under the influence she could not remain awake during her brief detention and lied to the officer in an attempt to conceal that she was coming from a bar. (A.C-2).

As the district court held "[t]o 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. As illustrated here, 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. Such a scenario would emasculate the intent of the legislature that the hearing officer can make a determination on the suspension without the appearance of witnesses. Department of Highway Safety and Motor Vehicles v. Satter, 643 So. 2d 692 (Fla. 5th DCA 1994).

In addition to the facts at bar, other cases exemplify how such a ruling would undermine the role of the hearing officer as well as the statute. For example, in Dean, supra the driver (Dean) testified at his formal review that he recanted his refusal. The arresting officer 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 section 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.

Another example is Department of Safety & Motor Vehicles v. Marshall, 848 So. 2d 482 (Fla. 5th DCA 2003), where the driver claimed that the license suspension was invalid because of the confusing and contradictory statements by the police about whether she could speak to an attorney before taking the breath test. Although the driver testified at the hearing, the hearing officer found Marshall's testimony unpersuasive. The Fifth District stated:

> The only evidence that Marshall was misled was her own self-serving testimony, which the hearing officer rejected. Cf. Department of Highway Safety v. Dean, 662 So.2d 371 (Fla. 5th DCA 1995) (finder of fact is not required to believe unrebutted testimony of witness). Although

> Marshall had the opportunity to subpoena witnesses, she did not subpoena Officer MacDowell to confirm the statements she alleges the officer made to her.

Id. at 486.

Here, Petitioner had the opportunity to subpoena Officer Harler and question him regarding the status of his lights when he approached her vehicle. However she chose not. The hearing officer had the authority to reject Petitioner's testimony regarding Officer Harler's lights at the time 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. Under Petitioner's scenario an officer would have to anticipate every circumstance and defense that a driver may raise at a formal review or a licensee's single statement could invalidate the legality of a stop entirely. An implausible situation properly rejected by the district court. Luttrell, at 1217. This is the very reason courts have repeatedly held that the hearing officer is privileged to determine the weight and credibility of the evidence. City of Deland v. Benline Process Color Company, 493 So. 2d 26, 28 (Fla. 5th DCA 1986); Heifitz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Cenac

v. Florida State Board of Accountancy, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1991).

> It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence.
>
> If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

Heifitz, 475 So. 2d at 1281-82.

As the Second District Court of Appeal noted in Department of Highway Safety and Motor Vehicles v. Stenmark, 941 So. 2d 1247 (Fla. 2d DCA 2006), the function of weighing evidence belongs to the hearing officer, and not the circuit court.

> But the circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer's findings. State, Dep't of Highway Safety & Motor Vehicles v. Porter, 791 So.2d 32, 35 (Fla. 2d DCA 2001). If the circuit court reweighs the evidence, it has applied an improper standard of review, which "is tantamount to departing from the essential requirements of law[.]" Broward County v. G.B.V. Int'l, Ltd., 787 So.2d 838, 845 (Fla.2001); see also Dep't of Highway Safety & Motor Vehicles v. Kurdziel, 908 So.2d 607 (Fla. 2d DCA 2005) (granting second-tier certiorari relief when circuit court improperly reweighed the evidence).

Hearing Officer Dreggors properly evaluated the evidence and found that Petitioner was lawfully stopped. The legislature gave the Petitioner the power to subpoena persons and records. Yet, Petitioner did not subpoena Officer Harler. As such, Petitioner failed bolster her testimony regarding the officer's lights. Marshall, 848 So. 2d at 485.

The district court properly reversed the circuit court holding that the circuit court applied the incorrect law by assuming the role of fact finder and reweighing the evidence by finding Petitioner's argument persuasive and assigning her self-serving testimony more weight than the affidavit of Officer Harler that supported the lawfulness of the stop as a consensual encounter. In doing so, the district court correctly overturned the circuit court as the circuit court's opinion resulted in a miscarriage of justice, by exceeding the proper scope of its certiorari review. In reviewing an administrative action, the circuit court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). In the instant case, the hearing officer's resolution of the evidence and determination to sustain the suspension was within her discretion and supported by the record evidence. She properly denied Petitioner's motion to invalidate on the basis of an unlawful stop. It was neither the function nor the prerogative of the circuit

court on certiorari review to reweigh or reevaluate the evidence. State of Florida, Department of Highway Safety and Motor Vehicles, Division of Driver Licenses v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989); City of Deland v. Benline Process Color Company, Inc., 493 So. 2d 26, 28; Campbell v. Vetter, 392 So. 2d 6, 8 (Fla. 4th DCA 1980); Satter, 643 So. 2d at 695.

In addition to the statutory basis for the Department's actions cited above, this Court has held that driving is a privilege which can be taken away or encumbered as a means of meeting legitimate legislative goals. See Lite v State, 617 So. 2d 1058 (Fla. 1993). "Driving is not a right, and as with many other activities, the government has the power to regulate the privilege to drive subject to the condition that the licensee will perform the activity safely and competently." State of Florida, Department of Highway Safety and Motor Vehicles v. DeGrossi, 680 So. 2d 1093 (Fla. 3d DCA 1996)(citing Thornhill v. Kirkman, 62 So. 2d 740 (Fla. 1953)). The expressly provided "legislative goals" of Chapter 322 to are primarily to **"[p]rovide maximum safety** for all persons who travel or otherwise use the public highways of the state. Section 322.263, Florida Statues. (emphasis added).

To extend the holding in Brannen that a witness's uncontroverted factual testimony may not be rejected unless "contrary to law, improbable, untrustworthy, unreasonable or contradictory" to unrebutted testimony of a suspended driver in a license suspension hearing held pursuant to s. 322.2615, Florida Statutes would undermine the role of the hearing officer as the trier of fact and judge of witness credibility. The effect would also be to defeat the intent of the legislature that administrative license suspension hearings held pursuant to section 322.2615 can be conducted and the suspensions sustained based on affidavits without requiring the presence of the arresting officer.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to deny Petitioner's appeal and affirm the Fifth District Court of Appeal's Order quashing the circuit court's Order Granting Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to FLEM K. WHITED, ESQUIRE, 630 N. Wild Olive, Suite A, Daytona Beach, Florida 32118, this ____ day of February, 2009. I hereby certify that the font size used in the Department's answer brief is Times New Roman 14 point.

_____

HEATHER ROSE CRAMER
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