IN THE SUPREME COURT OF FLORIDA

JOSEPH WIGGINS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.: SC14-2195
L.T. Case No(s).: 1D13-2471
2011-CA-9988

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

EPSTEIN & ROBBINS

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REPLY ARGUMENT

ISSUE PRESENTED

WHETHER A CIRCUIT COURT FAILS TO APPLY THE CORRECT LAW BY REJECTING AS NON-CREDIBLE THE ENTIRETY OF AN ARRESTING OFFICER'S TESTIMONY AND REPORT CONCERNING A TRAFFIC STOP, UPON WHICH THE HEARING OFFICER'S FACTUAL FINDINGS RELIED, BASED SOLELY ON THE CIRCUIT COURT'S OWN INDEPENDENT REVIEW AND ASSESSMENT OF EVENTS ON THE VIDEO OF A TRAFFIC STOP?

The question before this Court is essentially how to apply the competent substantial evidence standard of review in the context of a license suspension hearing conducted under s. 322.2615. The application of the competent substantial standard of review suggested by the Department in its Answer Brief is too narrow. Contrary to the Department's suggestion, the review by the circuit court is not for **any** evidence in the record, but for competent substantial evidence in the record. As found by this Court in *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry,* 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion

reached. To this extent the 'substantial' evidence should also be 'competent.'

The Department's suggested narrow standard of review would afford the Department unchecked discretion in license suspension hearings. This would render any protections under s. 322.2615 illusory at best. Illusory protections do not meet the requirements of a meaningful hearing required by the due process clauses of the United States and Florida Constitutions. *Dep't of Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1078-1079 (Fla. 2011)(driver entitled to a meaningful process for review of driver's license suspension).

The Department's argument is based on decisions arising out of administrative hearings in a different context. Although the hearings under s. 322.2615 are administrative hearings, there are many types of administrative hearings. Not all types of administrative proceedings are governed by the same rules or even follow the same procedures. Many proceedings are governed by Ch. 120, commonly referred to as the Administrative Procedures Act, and the protections afforded under the Act. Others, as in the case at bar, are governed by statutes covering the specific agency action. Further, not all administrative proceedings affect constitutionally protected property rights as in the case at bar. It is not a one size fits all simply because the proceeding is an administrative proceeding.

The decisions rendered in *Broward County v. G.B.V. Intern., Ltd.*. 787 So. 2d 838 (Fla. 2001) and *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270 (Fla.2001) arose out of attempts by developers to change zoning and land use plans. As recognized by this Court in *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993), " '[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision **can be functionally viewed as policy application**, rather than policy setting, are in the nature of ... quasi-judicial action....' *Snyder,* 595 So.2d at 78." (emphasis added). The policy aspects of these decisions cannot be divorced from the evidentiary findings. *See e.g. Dusseau* at 1275, 1276 (wherein this Court discussed concerns that a circuit court not exert coverts control over policy decision in the guise of a competent substantial evidence review.). Further, there is no property interest in a requested zoning change.

To the contrary, under s. 322.2615, the factual determinations should not be policy driven. Also, as recognized by this Court, there is a protected property interest in a driver's license. *Hernandez, supra.* In a hearing under s. 322.2615, there is no presumption that the suspension is lawful. The Department must

establish that the suspension is lawful by a preponderance of the evidence. The non-lawyer hearing officers do not have "superior technical expertise and special vantage point," *Dusseau* at 1275-1276, in questions of search and seizure law. Issues of whether the actions of law enforcement were lawful are no different than in a criminal proceeding other than the burden of proof. The hearing officer must make factual determinations from an impartial viewpoint and apply legal standards consistent with statutory and decisional law. Therefore, the review of the record to determine whether the evidence as a whole is of a quality to constitute competent substantial evidence requires a full review of the record. The evidence must be viewed in the context of the entire proceeding.

In *Gonci v. Panelfab Products, Inc*, 179 So. 2d 856 (Fla. 1965) this Court reviewed by petition for writ of certiorari a decision of the state industrial commission. In that case, the deputy commissioner made factual findings after hearing conflicting medical evidence. His findings were set aside by the full commission. In this Court's review of that action, this Court addressed the importance of an explanation by a fact finder as to why the testimony of one expert is accepted over another expert in the case of a clear conflict. This Court stated, "[s]uch explanation is essential on appellate review in determining whether the deputy's findings are-as the law requires- supported by *competent, substantial* evidence, which comports with *logic* and *reason*." (emphasis in the original). *Id.* at

858. This language by this Court demonstrates this Court's recognition that the mere fact that evidence exists does not make it **competent** evidence, contrary to the position taken by the Department.

The necessity to review the entire record to assess whether a factual finding as to a constitutional issue is supported by competent substantial evidence was recognized by this Court in *Cuervo v. State*, 967 So. 2d 155 (2007). In that case, the issue before this Court was the lawfulness of a waiver of the right to remain silent. The entire interview was recorded on an audiotape. This Court began its analysis by recognizing that factual findings that are supported by competent substantial evidence must be upheld, but noted that the audio recording "assists us in assessing whether the trial court's finding that Cuervo failed to unequivocally invoke his right to remain silent is based on competency substantial evidence." *Id.* at 160. The issue arose because the defendant spoke Spanish and the communication took place through a Spanish speaking police officer.

The police officers who conducted the interview testified at the suppression hearing. After hearing the audiotape, the testimony of the Spanish speaking officer, and the testimony of an interpreter, the trial court found that the defendant did not unequivocally invoke his right to remain silent. This finding was based on the interpretation of his statement by the interpreter who listened to the audiotape. This interpretation was contrary to the interpretation provided by the

Spanish speaking officer who was present when the tape was made. It appeared that the interpreter left out a significant word. *Id.* at 162-163. This Court concluded that the trial court's finding of fact was not supported by competent substantial evidence. *Id.* at 163.

This Court further considered the testimony of the questioning officer that she was simply attempting to clarify the defendant's answer when she proceeded to question him after he indicated he did not wish to speak. In considering the sufficiency of this testimony to support the finding of the circuit court this Court again considered the audiotape. Ultimately, this Court found that the officer's stated concern that she had to inquire further because the defendant did not understand his rights is not supported by the audiotape or the transcript of the interrogation. *Id.* at 164. It is clear based on this analysis by this Court that when reviewing the record for competent substantial evidence to support the lawfulness of police action related to constitutional protections, the entire record must be reviewed. In addition, this Court's analysis underscores that testimony contrary to what is depicted by audio or video evidence cannot be deemed competent.

The First District Court of Appeal engaged in a similar analysis in reviewing for competent substantial evidence in *Diejuste v. J.Dodd Plumbing, Inc.*, 3 So. 3d 1275 (Fla. 1st DCA 2009). In this worker's compensation appeal, the claimant argued that the finding of the compensation judge was not supported by competent

substantial evidence. In evaluating that claim, the district court reviewed the full record, including a surveillance tape relied on by the compensation judge to deny benefits. After a full review of the record, the district court reversed the order below finding that there was not competent substantial evidence in the record to support the finding of the compensation judge. *See also Martin v. State*, 141 So. 3d 1226 (Fla. 1st DCA 2014)(wherein the district court reviewed both the testimony and the video of the statement in considering whether the factual finding of the trial court was based on competent substantial evidence.) and *Rodriguez v. Albertson's*, 614 So. 2d 678 (Fla. 1st DCA 1993). The Petitioner recognizes that *Diejuste* was before the district court on direct appeal. However, since the review authorized before the circuit court in its review of proceedings under s. 322.2615 is akin to a plenary appeal, the same analysis would apply.

In *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975), the United States Supreme Court stated,

> Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' In re Murchison, supra, 349 U.S., at 136, 75 S.Ct., at 625; cf. Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Although the statutory procedures set out in s. 322.2615 have been found to be constitutional, if the Department's interpretation of the competent substantial standard of review is upheld, the probability of actual bias becomes intolerable. Appellate courts have already relied on the decision of the First District Court of Appeal to find that they are without authority to review a contradictory videotape in its review for competent substantial evidence. *See Restall v. Dep't of Highway Safety and Motor Vehicles,* (Fla. 18th Cir. Ct., Feb. 9, 2015)(Supplemental Appendix, SA. 1-2). *See also Dep't of Highway Safety and Motor Vehicles v. Lanning*, 2015 WL 47034 (Fla. 1st DCA Jan. 2, 2015). Recognizing the propriety of the circuit court's review of the entire record to evaluate whether there is competent substantial evidence to support the actions of the law enforcement officer is not the same as a prohibited *de novo* review.

Other types of administrative proceedings provide for protection from agency overreaching and remove unbridled control from the agency. Under the Florida Administrative Procedures Act, hearings regarding substantial interests in which there is a factual dispute are conducted by administrative judges from the Division of Administrative Hearings. S. 120.57(1), *Fla. Stat.* (2014). Florida Administrative Code provisions also recognize that proceedings which include disputed material facts should be held before an administrative judge. *Fla. Admin. Code R.* 28-106.201. *See also Koehler v. Fla. R.E. Comm'n*, 390 So. 2d 711 (Fla.

1980). Because the protections of Ch. 120 do not apply in proceedings under s. 322.2615, the only protection against agency overreaching is the review by the circuit court. *See Cherokee Crushed Stone, Inc. v. City of Miramar*, 421 So. 2d 684, 688- 689 (Fla. 4th DCA 1982)(wherein the district court recognized that there was a greater need for a full review of agency action that was not subjected to the procedural safeguards of the Administrative Procedures Act).

The Department also engages in the same improper review of the actual evidence in this case as the district court of appeal. Although it is within the province of the circuit court to review the record for competent substantial evidence, it is not proper for either this Court or the district court of appeal to conduct such a review. The issue before both the district court of appeal and this Court is the proper standard of review of the circuit court which only includes consideration of what evidence the circuit court can review. The question is not whether the circuit court came to the correct conclusion that the videotape contradicted the entirety of the testimony, but whether the circuit court is permitted to consider the videotape at all.

The Department argues that all that a circuit court can do is review the record to confirm that the documents required by s. 322.2615 are in the record. The Department suggests that at that point, the circuit court can take no further action to review the record for competent substantial evidence. In furtherance of

its argument the Department also suggests that the circuit court is not even permitted to review whether the hearing officer's determination of the lawfulness on the stop is based on competent substantial evidence or meets the essential requirements of law. In essence, the Department argues that the orders of the hearing officers are sacrosanct and are beyond any type of judicial review. This position of the Department applies this Court's decisions in *Dusseau* and *G.B.V. Int'l* with too broad a brush.

As technology advances and more and more DUI arrests are recorded on videotapes, this issue is going to become increasingly more prevalent. Further, the extremely narrow standard of review relied on by the district court and proposed by the Department would afford the Department unbridled power over a driver's license suspension with no meaningful ability to obtain a full fair review. The Department's position also fails to recognize that although the review provided under s. 322.2615 is certiorari review, it is a review as of right. In order for this review to have any meaning, a circuit court cannot be required to turn a blind eye to an objective videotape simply because the Department's hearing officer has chosen to do so.

The purpose of videotaping a DUI investigation and subsequent arrest is to insure the best available evidence of what happened untainted by personal, perceptions, memories, and exaggerations. One need only consider the childhood

game of telephone where each person repeats to the next person what they have been told by the person before him. Over time and retellings, facts always change. Discrepancies between personal recollection and what appears on a videotape are inevitable.

It is also inevitable that hearing officers who answer only to the agency that hires, trains, and monitors them will make decisions to uphold a suspension based on the assertions of a law enforcement officer even if they are contradicted by the videotape[1]. Absent some form of checks and balances the rights of the drivers of this state cannot be protected. In the context of a suspension under s. 322.2615, the check and balances are provided by circuit court review.

Without the ability to consider the entire record including an objective videotape in its review for competent substantial evidence, the review by the circuit court would be rendered meaningless. A negative answer to the certified questions does not grant the circuit court the broad authority to reweigh the evidence. It simply insures that reviews under s. 322.2615 meet the basic requirements of due process.

[1] If this was not an ongoing problem, this case would not be before this Court.

CONCLUSION

The First District Court of Appeal incorrectly decided that under the circuit court's standard of review of an administrative order upholding a driver's license suspension under s. 322.2615, a court is prohibited from reviewing a recording of the events and determining that because it clearly contradicts the statements of the law enforcement officer, there is a lack of competent substantial evidence to support the order. This Court therefore should reverse the decision of the First District Court of Appeal and answer the certified question in the negative.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed in Times New Roman 14.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the Office General Counsel, Department of Highway Safety and Motor Vehicles, 2900 Apalachee Parkway, Room A-432, Tallahassee, Florida 32399, by electronic service at OGCFiling@flhsmv.gov, jasonhelfant@flhsmv.gov, and marianneallen@flhsmv.gov, on the 19th day of February, 2015.

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