IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR OKEECHOBEE COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 16-AP-216
Petition for Writ of Certiorari

JOSHUA PADGETT,

Petitioner,
v.

Not final until time expires for filing motion
for rehearing, and if filed, disposed of.

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

Respondent.
_____/
Decision filed June 21, 2016.

Petition for Writ of Certiorari to the Department of Highway Safety and Motor Vehicles.

Amy Ritchey, Fort Pierce, for petitioner.

Monique L'Italien, Assistant General Counsel, Lake Worth, for respondent.

PER CURIAM.

On February 6, 2016 at approximately 5:00 p.m., dispatch received a reckless driver complaint that a gray Dodge SUV with chrome wheels was swerving on southbound US Highway 98. The complainant observed the vehicle pull into the Bream Room parking lot, and he saw that the driver was wearing an orange shirt. Deputy Varnadore of the Okeechobee Sheriff's Office saw a vehicle matching the description enter SR70 from US Highway 98, and he observed the driving pattern. He saw the vehicle cross the center line, then swerve to the right and cross the line dividing line. He saw the driving pattern occur three times before initiating a traffic stop. When he approached the vehicle, the Petitioner was wearing an orange shirt. Deputy Varnadore smelled a strong odor of alcohol, observed the Petitioner's bloodshot watery eyes, and heard his slurred speech; therefore, he called Deputy Pollock to perform a DUI investigation. Deputy Pollock

observe the same indicators. The Petitioner consented to perform Field Sobriety Exercises, and based on his poor performance, Deputy Pollock transported him to the Okeechobee County jail. Deputy Pollock read the Petitioner the implied consent warning and requested that he submit to a breath test; the Petitioner refused.

The Petitioner's driver's license was suspended, and he sought administrative review. On March 10, 2016, the hearing officer conducted a hearing and affirmed the suspension.

The standard of review applicable to circuit court review is whether procedural due process was afforded, whether the essential requirements of the law were observed, and whether the findings and judgment were supported by competent substantial evidence. *State of Florida, Department of Highway Safety and Motor Vehicles v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008) (quoting *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995).

The Petitioner argues that the hearing officer's order to uphold the Department's suspension of his driver's license is not supported by competent substantial evidence because his refusal to submit to a breath test was not incident to a lawful arrest. The implied consent law in §316.1932 states that the test is authorized only if it is incident to lawful arrest. *Florida Dept. of Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011). In the instant case, the documentary evidence conflicts on when the arrest and refusal occurred, which is similar to the facts in *Department of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). Like the instant case, *Trimble* consisted of a paper only record with conflicting documents:

> In the case before us, the circuit court concluded that the documentary evidence presented by the Department, which was the only evidence submitted to prove its case, was legally insufficient to constitute CSE on the warning issue, because the documents were hopelessly in conflict and the discrepancies on the critical facts went unexplained. For example, the arresting officer's sworn Affidavit of Refusal to Submit to Breath, Urine or Blood Test recited that on September 27, 2000, at *11:40 p.m.*, Trimble was arrested for DUI. Inconsistently, however, it further recounted that a request was made to Trimble at *12:45 a.m.*, on September 27, 2000, to submit to a breath test with a warning that a refusal could result in a one-year suspension of her driver's license, but that Trimble had then refused. A printout from the Breathalyzer machine reflected that refusal had occurred at 12:47 a.m. on the 27th. The officer's Alcohol Influence

> Report, which was not attested to, narrated, however, that the consent warning was given at 12:50 a.m., on the 27th.
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> ***
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> …we cannot say that the circuit court in the instant case misapplied the above law in determining that the documentary evidence presented by the Department was not CSE. The critical determination of when or whether the motorist was given the consent warning required by law as a predicate for the conclusion that she refused to submit to the test, thereby leading to a suspension of the license, was supported only by evidence that gives equal support to inconsistent inferences, and as such can hardly be deemed so sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached. The hearing officer's finding that Trimble was given a consent warning before her refusal could have rested as much on the flip of a coin as on the documentary evidence submitted. As a consequence, we reject the Department's argument that the circuit court's order reweighed the evidence or misapplied the law.

Id. 1086-87. *Trimble* is exactly on point with the facts in the instant case. Deputy Pollock's sworn Affidavit of Refusal to Submit to Breath, Urine or Blood Test recited that on February 6, 2016, at 6:52 p.m., the Petitioner was arrested for DUI; however, the same document states that the Petitioner refused to submit to a breath test on February 6, 2016 at 6:01 p.m., which is prior to arrest. The Breath Alcohol Test affidavit, which is the printout from the Intoxilyzer machine, states that the Petitioner refused to submit to the test on February 6, 2016 at 6:01 p.m. The citations written to the Petitioner were issued at 6:52 p.m. The cover sheet for the arrest affidavit lists the date and time arrested as 12:25 a.m. on February 7, 2016.

The Department argues that Deputy Pollock's narrative in the arrest affidavit distinguishes the instant case from *Trimble* because it clearly narrates the sequence of events. It states that Deputy Varnadore first encountered the Petitioner on February 6, 2016 at 4:56 p.m., and after a DUI investigation but before leaving the scene, Deputy Pollock arrested the Petitioner; this document provides another suggestion of the arrest time, which is in the five o'clock hour on February 6, 2016. It states that Deputy Pollock began the twenty minute observation period at 5:39 pm at the jail, then he read the Petitioner the implied consent. The Department argues that the arrest affidavit alone is competent substantial evidence that the arrest occurred prior to the implied consent warnings. However, the Department is asking this court to reweigh and reevaluate the evidence, which it cannot do. *Dusseau v. Metropolitan Dade County Board of County*

Commissioners, 794 So.2d 1270, 1275–76 (Fla.2001). As in *Trimble*, the Department here did not present live testimony at the hearing and instead chose to rely solely on the written documents, despite the hearing officer's ability to subpoena witnesses on her own initiative. F.A.C. 15A-6.012(1). Without live testimony to explain the discrepancies, the conflicting documents are not competent substantial evidence to affirm the suspension.

Therefore, the petition is granted, and the hearing officer's order is quashed.

BAUER, BUCHANAN, JJ., and DISQUE, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.