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

Circuit Case No. 18-AP-5
Petition for Writ of Certiorari

PATRICIA MCCLELLAND,

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 July 10, 2018.

Petition for Writ of Certiorari to the Department of Motor Vehicles.

Heather Rose Cramer, Palm Beach Gardens, for petitioner.

Nathaniel Sebastian, Assistant General Counsel, Jacksonville, for respondent.

PER CURIAM.

On Christmas Day at approximately 3:10pm, Officer Lee of the Stuart Police Department responded to a request for assistance with a traffic crash involving a possible drunk driver at the intersection of State Road 5 and Monterey Road. He made contact with the Petitioner, who was sitting behind the wheel of her car, appearing flustered after rearing ending another vehicle. Officer Lee smelled an odor of alcohol on her breath mixed with perfume, and he asked her to exit the vehicle; she had difficulty balancing on her feet. She appeared confused, rambled on about the accident, flailed her arms, and stumbled while attempting to walk. Therefore, Officer Lee moved her to a parking lot and informed her that he was now conducting a DUI investigation. He administered field sobriety exercises, and based on her poor performance, he arrested the Petitioner for DUI and transported her to the Martin County jail. After a twenty minute observation period,

he requested that she submit to a breath test. She was unable to complete the test, supposedly due to her asthma.

The Petitioner's driver's license was suspended, and she requested formal review. On February 8, 2018, an administrative hearing was conducted, and the suspension was affirmed.

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 decision is not supported by competent substantial evidence because she argues that the documents in her paper only record are inconsistent, similar to *Department of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002). Like here, *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[1] 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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> …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

[1] CSE stands for competent substantial evidence.

> 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 (Emphasis added). 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).

The relevant document timeline in the instant case is as follows:

- The arrest affidavit states that the offense time was 3:10pm and the arrest time was 3:25pm.
- The affidavit of refusal to submit to a breath test says that both the arrest time and the refusal time were 4:00pm. Note that this document puts the arrest time as thirty-five minutes later than the arrest affidavit, despite the fact that both affidavits were sworn to and signed by Officer Lee.
- The breath alcohol test affidavit printout from the intoxilyzer machine states that the Petitioner refused at 3:54pm, after a twenty minute observation period.
- The DUI citation certifies that the offense time was 4:03pm. It was written by Officer Lee.

Like *Trimble*, the instant case has documents that are hopelessly in conflict. The arrest affidavit has an arrest time of 3:25pm, but the affidavit of refusal to submit to a breath test has an arrest time of 4:00pm; both sworn documents were written by the same officer. Setting aside that these are sworn affidavits signed by the same arresting officer with different arrest times on them, the breath alcohol test affidavit printout from the intoxilyzer states that the Petitioner refused at 3:54pm, which is before the 4:00pm arrest time listed on the affidavit of refusal to submit to a breath test. *See Hernandez*, 74 So. 3d 1070 (breath tests are authorized only if incident to lawful arrest). The DUI citation indicates that Officer Lee certified that the time of the DUI was 4:03pm, which is directly in conflict with the sworn affidavit times of 3:25pm and 4:00pm and would have occurred after the intoxilyzer printout shows that the Petitioner refused to provide a breath sample.

The hearing officer's order does not explain these time inconsistencies or how she arrived at the conclusion that the Petitioner was properly arrested for DUI. In *Department for Highway Safety and Motor Vehicles v. Colling*, the Fifth District stated:

> When the documents conflict on a material issue, however, the hearing officer cannot simply throw a dart to decide which one is correct. This does not necessarily mean that live testimony is always needed to resolve such conflicts. For example, had the record here contained the machine-generated printout of the results, the hearing officer might appropriately have chosen to prefer it over a report, because it is an inherently reliable expression of the result. We are aware that the Department is authorized to proceed without witnesses in a formal review. It also has the authority to compel the attendance of witnesses when it chooses. When it elects the former strategy, however, it does so at the risk that the documents might contain irreconcilable, material contradictions.

178 So. 3d 2, 5 (Fla. 5th DCA 2014). The instant case does have a machine generated report to indicate the time of the refusal; however, that report does not resolve the inconsistency on the issue of the arrest time. Therefore, there is not competent substantial evidence to support the hearing officer's order because too many documents create a conflict of the arrest time, including one which indicates that the offense time occurred after the machine generated report of the refusal took place.

The Petitioner properly moved to invalidate the suspension based on the inconsistencies in the documents. Since the Petitioner's attorney appeared by phone, the hearing officer allowed her two business days to submit physical copies of the case law that she cited at the hearing. However, the hearing officer's order states that the motion to invalidate the suspension based on the inconsistencies in the documents is denied based on the following:

> Counsel failed to provide DHSMV v. Trimble, 821 So. 2d 1084 and Papper v. DHSMV, Fl. L. Weekly Supp, 813a. This Hearing Officer found a differently spelled case as Popple referenced in the Mitchell v. DHSMV, 25 Fl. L. Weekly Supp. 585b,[2] case law quoted and provided for the subsequent motion listed below with a different quote than indicated by Counsel during the hearing.[3]

[2] The court has no idea what the hearing officer is referencing here. When reading the *Mitchell* case found in the Petitioner's Appendix as submitted to the Department, the *Papper v. Dep't of Highway Safety and Motor Vehicles*, Fla. L. Weekly. Supp. 813a (Fla. 15th Cir. Ct. Jan. 28, 2016) case is clearly referenced with a full citation. *Popple v. State*, 626 So. 2d 185 (Fla. 1993) is not mentioned in the *Mitchell* opinion or even remotely on topic, so it is bizarre that the hearing officer mentioned it in her order.

[3] The hearing officer is incorrect. The transcript clearly shows that the Petitioner cited *Papper* with the full citation as listed by the Fifteenth Judicial Circuit in their *Mitchell* order on the record.

First, the Petitioner's appendix contains her case law packet that she claims she submitted to the hearing officer after the hearing; it specifically contains a copy of *Trimble*. Even if it did not, the Petitioner gave the case citations to the hearing officer at the hearing, which is evidenced by the hearing officer's listing of them in her order. Oddly, the Department's response does not address this issue at all; it certainly does not argue that the case law packet was not timely received by the hearing officer. Clearly, the hearing officer was aware of *Trimble* and its citation because she used it in her order. *Trimble* is a "red cow" case, in that it is factually and procedurally on point with the instant case; yet, the hearing officer chose to ignore it and deny the Petitioner's motion to invalidate the suspension. *See State, Dept. of Highway Safety and Vehicles v. Walsh*, 204 3d 169, 171 (Fla. 1st DCA 2016) (citing *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1390 (11th Cir.1993) ("The term 'red cow' is used in some legal circles, particularly in Florida, to describe a case that is directly on point, a commanding precedent."). "The refusal to apply a governing precedent, for example, because the circuit court does not agree with it, would be an error serious enough to qualify for discretionary review by certiorari." *Id*.; (quoting Philip J. Padovano, *Florida Appellate Practice,* § 19:8 (2d ed. 2015). Though we are one level lower in the posture of the *Walsh* case, the same principle still applies. Therefore, the hearing officer did not observe the essential requirements of law when she failed to consider *Trimble* when it was properly raised, cited to, and submitted by the Petitioner, which was error.

Because the hearing officer's order is not supported by competent substantial evidence and she departed from the essential requirements of law by not following binding precedent, the petition for writ of certiorari is granted, and the hearing officer's order is quashed.

VAUGHN, SWEET, JJ., and Bryant, Acting Circuit Judge, concur.

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