

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

DEPARTMENT OF HIGHWAY  
SAFETY & MOTOR VEHICLES,

Petitioner

Supreme Court Case No.: SC14-1373

vs.

DCA CASE NO. 5D13-3755

CASEY COLLING,

Respondent.

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**PETITIONER'S AMENDED BRIEF ON JURISDICTION**

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## **STATEMENT OF THE CASE AND FACTS**

Effective January 19, 2013, Colling's driving privilege in this State was administratively suspended by the Department for a six month period pursuant to the legislative mandate in s. 322.2616(1), Florida Statutes (2013), Florida's 'under-the -legal-drinking-age' driver's license suspension statute. Colling obtained legal counsel and requested an administrative review hearing. A review hearing was timely scheduled and held on February 22, 2013. The documents necessary to support the administrative suspension were provided to the Department pursuant to Fla. Stat. s. 322.2616(3) and were accepted into the record for review at the start of the administrative hearing.

The record documents included the handwritten documents that were prepared by Officer Imperato at the time of his encounter with Colling, including the Notice of Suspension (DDL#1) where the officer wrote that Colling's breath-alcohol results were ".154/.028", and the properly sworn and notarized *Breath Test Result For Under Age 21 Suspensions* (DDL#4) in which the officer again wrote that Colling's breath-alcohol samples were ".154" and ".028". Also included in the record was the typed "Statement" (DDL#3) that was later prepared by the officer, wherein the officer typed that "[Colling] blew a .0154 a t 0021 hours and a .028 at 0025 hours."

Colling appeared and briefly testified in the administrative hearing but never disputed the facts in the record evidence establishing that she was under 21 and in control of a motor vehicle with a breath-alcohol level above .02. Colling did not present any other evidence or testimony. At the close of the evidentiary portion of the hearing, Colling made numerous motions to invalidate the administrative suspension. Of relevance to this brief, Colling argued that there was not competent substantial evidence (hereinafter 'CSE') to support the administrative suspension because there was a conflict in the evidence. The hearing officer reserved ruling and closed the hearing.

Pursuant to Fla. Stat. s. 322.2616(12), the hearing officer reviewed the documents that were submitted to the Department to support the administrative suspension and made the following findings of fact:

On January 19, 2013, at approximately 12:00 AM, Officer Imperato of the University of Central Florida Police Department observed a vehicle occupied by Ms. Colling, hereafter identified as Petitioner in this narrative, parked on the top floor of a parking garage. The vehicle's engine was running and Petitioner was in the driver seat and the sole occupant. Officer Imperato made contact with Petitioner and while speaking to her noted an odor of alcohol impurities coming from the vehicle. Officer Imperato requested Petitioner's driver license; was informed it was not in her possession and requested her name and date of birth. Both were provided and a DAVID search confirmed this information and that Petitioner was under the age of twenty-one. Officer Imperato then requested that Petitioner exit her vehicle and observed that she had difficulty shutting her vehicle door; that she swayed while standing; that her eyes were red, watery, bloodshot and glassy; that she was wearing a

bar entry wristband and that the odor of alcohol impurities was coming from her facial area. Petitioner admitted to having been out with her friends and consuming one alcoholic beverage during the evening. Petitioner was requested to perform the Field Sobriety Exercises and complied, exhibiting further clues of impairment. Based on his observations, Officer Imperato requested that Petitioner submit to a roadside test of her breath. Petitioner submitted to the test and the results were .154 and .028. Petitioner's privilege to operate a motor vehicle was suspended for driving with an unlawful breath alcohol level.

Based on these findings, the hearing officer rejected Colling's argument that there was not CSE to support the administrative suspension. Instead, the hearing officer determined that the sole odd breath test result (the under .02 result in the typed statement) from the *three* separate documents that listed the breath test results was a scrivener's error and the hearing officer specifically wrote that:

"DDL#1 and DDL#4 both list the first sample as .154. This hearing officer finds the result in DDL#3 to be a harmless scrivener's error, caused by adding a "0" behind the decimal point."

The hearing officer's factual findings were supported by the record documents and *in particular* the breath-alcohol test results were supported by DDL#1/Notice and DDL#4/Affidavit of Underage Suspension. Based on these factual findings, and in compliance with Fla. Stat. s. 322.2616(8), the hearing officer determined that a *preponderance* of the record evidence supported the

administrative suspension and the hearing officer sustained the administrative suspension in compliance with Fla. Stat. s. 322.2616(9)(b).

On March 21, 2013, Respondent filed a Petition for Writ of Certiorari in the Circuit Court of the Ninth Judicial Circuit that sought a *de novo* review of the same issues from the administrative hearing and argued that the proper CSE standard to be applied by the circuit court was found in the First District Court of Appeals *Trimble*<sup>1</sup> decision. Pursuant to *Trimble*, Colling argued that the circuit court was permitted to conduct a *de novo* review of the evidence from the administrative review hearing and to re-consider the issue of whether the record evidence was competent and substantial enough to support the administrative suspension. To this end, Colling re-argued that the record evidence could not support the administrative suspension because there was a conflict in one of the record documents. Based on the conflict, Colling argued that the remaining evidence relied upon by the hearing officer was *not* 'competent and substantial evidence' and that the remedy was for the court to quash the administrative order and *reinstate* Colling's driving privilege.

The Department's response advised the circuit court that Colling failed to address the proper issues for the court's consideration and that pursuant to this

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<sup>1</sup> *Department of Highway Safety & Motor Vehicles v. Trimble*, 821 So.2d 1084 (Fla. 1st DCA 2002).

court's ruling in *Dusseau*, the proper standard to be applied by the circuit court when conducting its CSE inquiry was the *Vaillant* CSE standard of review. See, *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270 (Fla. 2001), *Vaillant v. City of Deerfield*, 419 So. 2d 624, 626 (Fla. 1982). The Department further advised the court that the standard of administrative review adopted and applied by the First District Court in *Trimble* was not aligned with the standards of administrative review established by this Court in *Vaillant* and *Dusseau*; that the opinions of *this* Court in *Vaillant* and *Dusseau* controlled on this issue; and that pursuant to the holdings in *Vaillant* and *Dusseau*, the circuit court was *not* permitted to conduct a *de novo* review of the same issues from the administrative hearing or to reweigh the evidence and substitute its opinion for that of the hearing officer.

On October 19, 2013, the circuit court entered an order wherein the court addressed the following issues:

- 1). Whether Officer Imparato's actions of approaching Colling's vehicle and initiating contact with Colling were lawful;
- 2). Whether the initial contact and questions addressed to Colling were lawful under the community caretaker doctrine;
- 3). Whether jurisdiction existed for further investigation and *arrest*<sup>2</sup> of Colling;
- 4). Whether Officer Imparato had the authority to initiate the criminal investigation and make a citizen's *arrest* due to breach of the peace.

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<sup>2</sup> Colling was *never* arrested in this encounter. Instead, her license was simply temporarily suspended pursuant to the legislative mandate in Fla. Stat. s. 322.2616 and she was given notice of the administrative suspension at the time (DDL#1).



Based on the court's rulings on these issues, the circuit court concluded that:

“...[B]ecause CSE was lacking as to the authority of Officer Imparato to initiate the *criminal investigation* of Colling and to *arrest her* i. e. either by having the appropriate jurisdiction or due to a breach of the peace, this Court finds that the hearing officer's decision to sustain Colling's license suspension was not based on CSE.”

On October 24, 2013, the Department filed a second-tier petition seeking certiorari review of the circuit court's order and argued that the circuit court violated the essential requirements of the law, ignored Supreme Court case law and applied the wrong law and the wrong standard of administrative review; that the circuit court denied the Department the process it was due to be afforded by the circuit court; and that the court's order was not supported by the record because there clearly were *two* documents in the record supporting both the hearing officer's factual findings and the administrative suspension. Colling's response *again* re-argued the same evidentiary issues from the administrative hearing and insisted that *Trimble* was the correct law to be applied by the courts when conducting administrative review.

On June 6, 2014, the district court entered an order denying the Department the requested writ. In its order, the court reviewed the circuit court's order and agreed that the circuit court had failed to apply the correct law when conducting administrative review. (Order, p. 3, second full paragraph). The district court

failed to discuss or apply this court's holdings in *Vaillant* and *Dusseau*. Instead, the district court adopted the First District Court's holding in *Trimble* and (like the *Trimble* court) extended its second-tier review to include a review of *all* of the record documents, the transcript from the administrative hearing and *another* review on the issue of whether *a preponderance* of the record evidence supported the administrative suspension. (Order, entire). After reviewing and reweighing the evidence, the district court determined that:

“...[B]ecause two samples were taken and one was under the limit, the inference that [Colling] was under the limit is equally plausible. Accordingly, Petitioner having the burden of proof on this element by a preponderance of the evidence did not meet this burden by competent, substantial evidence.” (Order, p. 5).

Based on this determination, the district court refused to intervene and let stand the circuit court's order that quashed the Department's administrative order and refused to remand the matter for further administrative proceedings. The Department respectfully seeks this Court's intervention.

### **SUMMARY OF THE ARGUMENT**

The circuit court and the district court violated the essential requirements of the law by ignoring controlling Supreme Court case law and applying district court case law (*Trimble*) that expressly and directly conflicts with *this* Court's rulings in *Vaillant* and *Dusseau*.

## ARGUMENT

In *Dusseau*, this Court explained the proper standards of review to be applied by the circuit courts and the district courts when conducting appellate review of administrative orders. This court explained that the administrative hearing officer *alone* applies the CSE *standard of proof* and that on first-tier review the circuit courts apply the *Vaillant* CSE *standard of review*. This court also explained that under the *Vaillant* CSE *standard of review*, the circuit court was limited to reviewing the record for evidence to *support* the factual findings and order, and that any evidence that *did not* support the hearing officer was beyond the circuit court's scope of review. *Dusseau*, at 1274, citing *Vaillant*, 419 So.2d at 626.<sup>3</sup>

The circuit court clearly violated the holdings in *Dusseau* and *Vaillant* when the circuit court conducted a *de novo* review of the administrative proceeding, re-applied the CSE *standard of proof*, exceeded its scope of review to re-consider evidence that *did not* support the administrative suspension and then substituted *its* factual findings for those of the hearing officer to determine that the administrative suspension should be invalidated. The circuit court again violated

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<sup>3</sup> See also, *Broward County v. G.B.V. Intern., Ltd.*, 787 So.2d 838, 846, n.25, (Fla. 2001) ("On first-tier certiorari review, the circuit court's task is to review the record for evidence that *supports* the agency's decision, not that *rebut*s it - for the court cannot reweigh the evidence.") (Emphasis supplied).

the essential requirements of the law when the court failed to remand the matter to the Department for further proceedings after quashing the administrative order.<sup>4</sup>

This court also explained in *Dusseau* that when conducting second-tier administrative review, the district court cannot conduct *any* CSE inquiry and must instead confine itself to a review of the circuit court's order to determine whether the circuit court afforded the litigants due process and adhered to the essential requirements of law. See, *Dusseau*, 794 So.2d at 1275, citing *Florida Power & Light v. City of Dania*, 761 So.2d 1089 (Fla. 2000), and holding that:

“Once the district court determined-from the face of the circuit court order-that the circuit court had applied the wrong law, the job of the district court was ended.”

By re-evaluating the record for CSE to support the administrative decision, the district court wholly exceeded its scope of administrative review, usurped the jurisdiction of the Department's hearing officer and violated the essential requirements of the law. See, *Vaillant, Dusseau, supra*.

The *Trimble* opinion, which clearly adopted and applied a standard of administrative review that conflicts with this court's holdings in *Dusseau* and

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<sup>4</sup> See, *Lillyman v. Department of Highway Safety and Motor Vehicles*, 645 So.2d 113 (Fla. 5th DCA 1994); *Department of Highway Safety and Motor Vehicles v. Icaza*, 37 So.3d 309 (Fla. 5th DCA 2010)(granting the Department's second-tier petition and quashing circuit court orders failed to remand administrative cases for new administrative hearings, holding *that remand for another administrative*

*Vaillant*, is not good law in light of this conflict. As a result, the district court's discussion of *Trimble* in its order and the legal principles applied pursuant to *Trimble* "...supplies this Court with a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under section 3(b)(3)." *Ford Motor Company v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981).

### **CONCLUSION**

The courts are not affording the Department proper administrative review in these Chapter 322 proceedings. The district courts and the circuit courts have a duty to adhere to the proper *controlling* administrative case law and both courts failed in their duties when they chose to apply the *Trimble* standard of review. Both courts applied the wrong standard of review and both courts' orders directly and expressly conflict with the orders from this court in *Vaillant* and *Dusseau*. The Department respectfully requests this Court's intervention in this administrative appellate matter, and this court has express and conflict jurisdiction sufficient to intervene pursuant to Florida Rules of Appellate Procedure, Rule 9.030(3)(b)(3).

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*hearing is the proper remedy when there has been an evidentiary error by the Department in an administrative hearing.*)(Emphasis supplied.)

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been sent to **STUART I. HYMAN, ESQ.** at [shymanlaw@aol.com](mailto:shymanlaw@aol.com); and to the **Honorable J. Rodriguez; Honorable J. Shea, and Honorable A. Lattimore**, Circuit Judges, Orange County Courthouse, via e-mail to Judicial Assistant Alice Smith at [ctjaas1@ocnjcc.org](mailto:ctjaas1@ocnjcc.org), on this 22<sup>nd</sup> day of July, 2014.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is typed in Times New Roman 14-point font and is in compliance with Fla. R. App. P. 9.210(a)(2) and 9.120(d).

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