

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.

RESPONDENT'S
ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On January 19, 2013, Respondent was issued a Notice of Suspension for being under the age of 21 and having an unlawful breath alcohol level of .02 or more. Pursuant to Florida Statute 322.2616 (2013) Respondent timely requested a Formal Review Hearing. The hearing was held on February 22, 2013. At the hearing, the hearing officer introduced into evidence a Notice of Suspension, a Breath Test Result Affidavit for Under 21 suspensions, an Affidavit of Probable Cause with a reference to a statement by Officer Frank L. Imparato and a Federal Department of Transportation Conforming Products List.

The Notice of Suspension listed the breath alcohol level to be .154 and .028 showing a large difference of .126 between the two results. The Breath Test Result Affidavit for under 21 suspensions listed the breath results to be 0.154 and 0.028 again showing a large difference of .126 between the two results. The Affidavit of Probable Cause which incorporated Officer Imparato's statement listed the breath test results to be **.0154** which would be under the legal limit of .020 and a .028 which would be just above the legal limit of .020.

Respondent never testified. At the hearing, through counsel, she moved to set aside the suspension based upon the documentation providing three different breath test results that were allegedly obtained on the evening of the contact with Respondent.

No testimony was presented by Petitioner explaining the reason that there existed three different results of .154, .0154 and .028. Respondent argued that due to the fact that all three of the results must be given equal weight, it was never established by Petitioner by a preponderance of the evidence which breath result of the three could be accepted as valid by the hearing officer.

Respondent argued at the hearing this was especially important since one of the results set forth on Officer Imperato's statement reflected the breath test result to be .0154 which was actually below the legal limit of .020. Respondent further argued that there did not exist competent substantial evidence in the record to support the suspension of Respondent's driver's license due to the irreconcilable results which showed one result that was below the .02 threshold and that there was a .124 difference between the other two results. Respondent argued this showed a scientifically unreliable breath testing machine. Without any evidence to support the same, the hearing officer speculated in his Final Order that the results of .0154 were a harmless scrivener's error caused by adding a "0" behind the decimal point.

After Respondent filed a Petition for Writ of Certiorari, the Circuit Court did not address this issue on appeal. Instead it ruled on an alternative ground raised by Respondent that the arresting officer illegally stopped Respondent without a showing of proper jurisdiction.

On October 24, 2013, Petitioner filed a second tier Petition seeking certiorari review of the Circuit Court's Order in the Fifth District Court of Appeal. Petitioner 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. Respondent countered that the Circuit Court provided Petitioner with procedural due process of law and did not violate the essential requirements of the law.

Respondent's Response advised the Fifth District Court of Appeal that in City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982) this Court determined that a District Court of Appeal conducting second tier certiorari review of a Circuit Court order is required to determine whether the Circuit Court afforded procedural due process and whether the Circuit Court observed the essential requirements of the law. Respondent also argued that Petitioner was improperly seeking a second appeal of the decision of the Circuit Court below. See Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, 62 So.3d 1086, 1093 (Fla. 2010).

On June 6, 2014 the Fifth District Court of Appeal entered an Order denying Petitioner's requested writ. While the Fifth District Court of Appeal reviewed the Circuit Court's Order and disagreed with the reasoning of the Circuit Court panel on the issue of the stop, the District Court of Appeal found that the Circuit Court still

reached the right result based on Respondent's alternative argument of improper breath results, which was an issue raised by Respondent below, but not addressed by the Circuit Court. The Fifth District Court of Appeal found that notwithstanding its decision on the jurisdiction issue, it was not necessary to relinquish the case back to the Circuit Court because there could only be one conclusion on Respondent's alternative ground concerning the three different breath test results obtained from Respondent. The Fifth District Court of Appeal impliedly decided that it would be a violation of the essential requirements of the law where documents are hopelessly in conflict on a material issue and the hearing officer can simply throw a dart to decide as to which one is correct.

Petitioner now seeks to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Although the Fifth District Court of Appeal found that the Circuit Court violated the essential requirements of the law on the issue of jurisdiction; it properly found that if the case was relinquished to the Circuit Court, the Circuit Court would have to violate the essential requirements of law to find that the breath test results obtained from Respondent were sufficient to sustain the administrative suspension of Respondent's driver's license. The Fifth District Court of Appeal specifically stated that it was not overlooking Petitioner's disagreement with Department of Highway

Safety and Motor Vehicles v. Trimble, 821 So.2d 1084, 1086-1087 (Fla. 1st DCA 2002), but noted that Petitioner made no attempt to distinguish it. Petitioner only asserted that it was not good law and did not cite any decision of the Florida Supreme Court rejecting the twelve year old precedent.

ARGUMENT

In Haines City Community Development v. Heggs, 658 So.2d 523, 525 (Fla. 1995) this Court held that the proper inquiry by a District Court of Appeal under certiorari review is to determine whether the Circuit Court afforded procedural due process and whether it applied the correct law. Heggs, Id. at 528. In City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982) this Court also determined that a District Court of Appeal conducting second tier certiorari review of a Circuit Court Order can determine whether the Circuit Court afforded procedural due process and whether the Circuit Court applied the correct law.

Contrary to Petitioner's interpretation of Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So.2d 1270 (Fla. 2001), the Fifth District Court of Appeal below did not violate the essential requirements of the law nor did it rule in express and direct conflict with the precedence of this Court or any other court. Dusseau involved direct administrative action taken by a County Commission.

The instant case is factually distinguishable because the hearing officer below

was supposedly separate and apart from the Department of Highway Safety and Motor Vehicles and was merely reviewing the administrative action taken by the arresting officer who suspended Respondent's driver's license on behalf of the Department in accordance with Section 322.2616, Florida Statutes (2013). Pursuant to Section 322.2616(13), Florida Statutes (2013): "The formal review hearing and the informal review hearing are exempt from chapter 120...." Since the Formal Review Hearing and the Informal Review Hearing are exempt from Chapter 120, otherwise known as Florida's Administrative Procedure Act, the proceeding before the hearing officer was not actually direct administrative action taken by an administrative agency but instead just a mere review by a hearing officer of administrative action taken by Petitioner which would make Dusseau inapplicable. The proper standard of review should therefore be that set forth in Heggs and Vaillant. Petitioner is improperly arguing that the Fifth District Court of Appeal and Circuit Court below were just supposed to be "rubber stamps" for the hearing officer who is not an administrative judge under Chapter 120 and who would appear to have no more legal education or legal training background to absorb and appreciate legal argument than any spectator in a courtroom gallery. See Treiman v. State, 343 So.2d 819 (Fla. 1977). The hearing officer is not a person, as in Dusseau, with superior technical expertise or a special vantage point so as to deserve deference in deciding legal issues when they have not even gone to law

school. This makes Dusseau involving direct administrative action inapplicable.

The Fifth District Court of Appeal, in the instant case, properly chose not to relinquish the case back to the Circuit Court. It decided a legal issue that appeared in the record before it that would have required upon relinquishment, the Circuit Court to quash the final decision of the hearing officer. The Fifth District Court of Appeal did nothing more than make an implied determination that the hearing officer's decision below did not apply the correct law where it could not be supported by substantial competent evidence based on three irreconcilable breath test results, one of which was below the legal limit of .02. Accepting the other two results would require sustaining the suspension where there was a disparity between the .154 and .028 breath results that exceeds expected scientific tolerances by a factor of over five and which created a "conundrum" which neither the hearing officer nor Petitioner could explain.

The Fifth District Court of Appeal properly followed the decision of the First District Court of Appeal in Department of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084 (Fla. 1st DCA 2002) (holding that a license suspension was not supported by competent substantial evidence where the Department's documentary evidence was "hopelessly in conflict" and discrepancies on critical facts went unexplained). The Fifth District Court of Appeal correctly found "the hearing officer cannot simply throw a dart to decide which was correct". By finding there was no need

to relinquish the case back to the Circuit Court, the Fifth District Court of Appeal legally found that the Circuit Court would not comply with the essential requirements of the law if it would have come to any conclusion other than the one reached by the Fifth District Court of Appeal.

The decision of the Fifth District Court of Appeal was correct due to the inconsistency in various breath test readings obtained from Respondent. In this regard the Fifth District Court of Appeal found:

Notwithstanding our disposition on the jurisdiction issue, it is not necessary to relinquish this case back to the Circuit Court because there can be only one conclusion on Respondent's alternative ground. Petitioner had the burden to show by a preponderance of the evidence that Respondent had a breath alcohol level of .02 or higher when the officer discovered her in possession of a vehicle. To do this, Petitioner relied upon inconsistent documentary evidence. The hearing officer was correct in his first conclusion - a scrivener's error had occurred. His second conclusion however, regarding which of the readings was correct, amounted to nothing more than the "flip of a coin" under the most favorable interpretation of the record. In circumstances such as this, the arbitrary choice of one document over another does not meet the substantial competent evidence test. See Department of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084, 1086-87 (Fla. 1st DCA 2002)...

Department of Highway Safety and Motor Vehicles v. Colling, 2014 WL 2532406, 2 (Fla. 5th DCA, June 6, 2014).

The Fifth District Court of Appeal went on to find that the hearing officer

ignored the logical choice in resolving this inconsistency, i.e. that .0154 and 0.028 are within the expected tolerances for breath testing equipment. See Fla. Admin. Code R. 11D-8.002(12). On the other hand, it found a disparity between .154 and .028 which exceeded expected tolerances by a factor of over five would violate the essential requirements of the law because it would ignore the obvious.

Petitioner's interpretation of the law that the Circuit Court and the Fifth District Court of Appeal should merely be a "rubber stamp" for the hearing officer, begs the implied resulting evil that when the hearing officer applies the incorrect law and makes findings not supported by the evidence, the effected party would never have a meaningful right of review. Taken in conjunction with the lack of recognized legal training for the hearing officers this argued interpretation of Dusseau would certainly violate the essential requirements of the law and procedural due process. Both of these are legal issues required to be resolved by a district court of appeal on certiorari review. See City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982).

The decision of the Fifth District Court of Appeal in the instant case was not in express and direct conflict with any precedent from this Court nor any other district court of appeal. The Fifth District Court of Appeal's decision is totally consistent with the argument and legal precedent that the essential requirements of law and procedural due process disallow a hearing officer, or a Circuit Court for that matter, from relying

upon documentary evidence that is "hopelessly in conflict", where the discrepancies on critical facts go unexplained, in order to sustain the suspension of a driver's license.¹

CONCLUSION

For the foregoing reason this Court should deny Petitioner's request to invoke its discretionary jurisdiction.

Respectfully submitted,

STUART I. HYMAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Kimberly Gibbs at kingibbs@flhsmv.gov this 29th day of July 2014.

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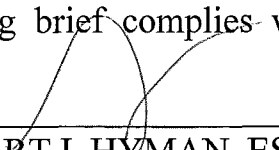
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¹ If this matter went back to the Circuit Court, to comply with the essential requirements of the law, it would have to rule based on the decision of the Fifth District Court of Appeal that there was not, based on Trimble, substantial competent evidence to sustain the finding of the hearing officer.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this foregoing brief complies with the font standards required by Fla. R. App. Pr. 9.100(1).



STUART I. HYMAN, ESQUIRE