IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STUART MAINGOT,

Petitioner,

CASE NO.: 2006-CA-006510-O
WRIT NO.: 06-63

v.

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

Respondent.

_____/

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Reginald Owes, Hearing Officer.

Stuart I. Hyman, Esquire
for Petitioner.

Heather Rose Cramer, Assistant General Counsel
for Respondent.

Before ADAMS, DAWSON, and STICKLAND, J.J.

ADAMS AND DAWSON, J.J.

STRICKLAND, J., (concurring with opinion)

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Stuart Maingot ("Maingot") timely petitions this Court for a Writ of Certiorari from the Florida Department of Highway Safety and Motor Vehicles' ("Department") *Final Order of License Suspension*, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes (2005). This Court has

jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3), sections 322.2615(13), and 322.31, Florida Statutes.

Factual and Procedural Background

On November 1, 2005, at approximately 3:30 a.m., Trooper Hall, of the Florida Highway Patrol, was dispatched to a traffic crash involving three vehicles. At the scene, Trooper Hall spoke with Maingot who had injuries to his head and blood on his clothing. He observed that Maingot's eyes were bloodshot, his speech was slurred, he displayed poor balance, and there was a moderate odor of an alcoholic beverage emanating from his mouth. Rescue personnel advised him that Maingot needed treatment for his injuries. Maingot was transported by a friend to Florida Hospital East. After completing the traffic crash investigation, Trooper Hall informed the drivers of the two other vehicles that he had completed the traffic crash investigation and was beginning a criminal investigation for DUI. Both drivers identified Maingot through descriptions and statements as the driver of the third vehicle.

Trooper Hall then proceeded to the hospital where, at approximately 6:03 a.m., he made contact with Maingot. He, again, smelled a moderate to strong odor of an alcoholic beverage emanating from the area around Maingot's mouth. He informed Maingot that he was switching from a traffic crash investigation to a criminal investigation of DUI. Trooper Hall then read Maingot the Miranda warnings, and Maingot stated that he understood his rights. Maingot admitted that he had consumed three to four beers. Trooper Hall then read the implied consent warnings to Maingot and requested that he submit to a blood test to the determine the alcoholic content of his blood, whereupon, Maingot agreed to have his blood drawn. Trooper Hall requested that Cathy Clough, a

registered nurse at Florida Hospital East, perform the blood draw using a blood kit that Trooper Hall provided. The blood kit was stored at the Florida Highway Patrol evidence storage facility until it was submitted to the Florida Department of Law Enforcement on November 18, 2005, for testing. The results of the test indicated that Maingot had blood alcohol content between 0.183 and 0.182 grams of ethyl alcohol per 100 milliliters of blood. Maingot was issued a DUI with property damage citation on May 14, 2006, and his license was suspended for six months for driving with an unlawful alcohol level.

Maingot requested a formal review hearing pursuant to section 322.2615, Florida Statutes. At the hearing, Maingot moved to invalidate the suspension, claiming: (1) there was no competent, substantial evidence that Maingot was driving or in actual physical control of a motor vehicle; (2) there was no showing that a urine or breath test was impossible or impractical; (3) the Department failed to place the Blood Test Results Affidavit into the record; (4) the Department failed to follow Florida Administrative Code, section 11D-8.012, regarding the labeling and collection of Blood Samples; (5) Maingot must have been placed under arrest before his blood could be lawfully drawn; and (6) Trooper Hall illegally entered Maingot's hospital room.[1]

After considering all the evidence submitted at the hearing, which was limited solely to the documents provided by the Department and the arguments of Maingot's counsel, the hearing officer entered a *Final Order of License Suspension*, sustaining the suspension of Maingot's driver's license. Maingot now seeks a Writ of Certiorari quashing the order sustaining the suspension of his driving privileges based on four

[1] Maingot, in his petition, does not re-allege the arguments that he must first have been placed under arrest before his blood could be drawn or that Trooper Hall illegally entered Maingot's hospital room. "When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1984).

arguments: (1) there existed no competent, substantial evidence indicating that Maingot was driving or in actual physical control of a vehicle; (2) there was no competent, substantial evidence indicating that a breath or urine test was impractical or impossible; (3) the hearing officer failed to follow the essential requirements of the law by not setting aside the suspension due to the failure of the Department to place a Blood Test Results Affidavit in the record; and (4) the blood test results should have been inadmissible due to the failure of the Department to show compliance with Rule 11D-8.012.

Standard of Review

A circuit court review of an administrative agency is limited to only a three-part standard of review: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and actions were supported by competent, substantial evidence. *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *County of Volusia v. City of Deltona, et al*., 925 So. 2d 340, 343 (Fla. 5th DCA 2006). The circuit court is not entitled to make separate findings of fact or to reweigh the evidence. *Haines City Cmty. Dev*., 658 So. 2d at 529; *see also Dep't of Highway Safety & Motor Vehicles v. Kurdziel*, 908 So. 2d 607, 609 (Fla. 2d DCA 2005).

Discussion

In a formal review hearing for the suspension of a driver's license for driving with an unlawful blood alcohol level in violation of section 316.193, Florida Statutes, the hearing officer is limited to a determination of the following by a preponderance of the evidence: (1) whether the arresting officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle while under the influence of

alcoholic beverages or controlled substances; (2) whether the person was placed under lawful arrest for a violation of section 316.193, Florida Statutes;[2] and (3) whether the person had an unlawful blood-alcohol level. § 322.2615, Fla. Stat. (2005).

Maingot petitions this Court to set aside the suspension based on numerous arguments. First, he argues that while Trooper Hall's charging affidavit indicated that the other drivers identified Maingot as the driver of the third vehicle, there was no factual or legal basis for the hearing officer to make that determination as competent, substantial evidence. In support of this proposition, Maingot relies on *Depatment of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, (Fla. 5th DCA 2006) and *Hudson v. Department of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 311a (Fla. 9th Cir. Ct. 2005).

In *Roberts*, the Fifth District Court of Appeal held that merely stating in an arrest affidavit that an officer observed the defendant traveling at a high rate of speed without more supporting facts as to the vantage point of the officer was insufficient reasonable suspicion to justify a *traffic stop*. *Roberts*, 938 So. 2d at 514-15. Therefore, without more, the hearing officer did not have competent, substantial evidence to find the *stop* was lawful. *Id*. In *Hudson*, another appellate panel of this Court concluded that the hearing officer lacked competent, substantial evidence to find a *traffic stop* for careless driving was lawful because there was no mention in the charging documents or testimony regarding what Hudson had actually done to constitute careless driving. *Hudson*, 12 Fla. L. Weekly Supp. 311a.

[2] This element was removed from section 322.2615(7)(a), Florida Statutes, effective October 1, 2006.

In the instant case, the question is not whether there was competent, substantial evidence presented to the hearing officer for a determination of whether there was sufficient reasonable suspicion to make a lawful *traffic stop*. Rather, the question here is whether there existed competent, substantial evidence for the hearing officer to determine whether Maingot was *driving* the third vehicle. Maingot argues that this Court should grant his petition because the hearing officer did not have sufficient supporting facts to conclude that Maingot was the *driver* of the third vehicle. When Trooper Hall arrived on the scene of the traffic crash he observed Maingot having the odor of an alcoholic beverage emanating from his mouth, slurring his words, demonstrating poor balance, and bleeding from a head wound. Trooper Hall's charging affidavit indicated that the drivers of the other two vehicles involved in the crash identified Maingot as the driver of the third vehicle through descriptions and statements. At the time the other drivers identified Maingot, Trooper Hall had advised them that he was switching from a traffic crash investigation to a criminal investigation for DUI with Property Damage. (Pet'r App. B.) A hearing officer is entitled to base his or her findings on the documents submitted by law enforcement. § 322.2615, Fla. Stat. (2005); *see also Dep't of Highway Safety & Motor Vehicles v. Dean*, 662 So. 2d 371, 372 (Fla. 5th DCA 1995).

Additionally, Maingot also argues that the hearing officer should not have considered Maingot's identification by the other two drivers because it violated the accident report privilege. The accident report privilege, embodied in section 316.066(4), Florida Statute (2005), states:

> Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this

> section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil, or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.

Id.

Recently, in *State v. Cino*, the Fifth District Court of Appeal decided a factually similar case regarding the use of statements made to law enforcement officers during a traffic crash investigation. *Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006). In *Cino*, two officers responded to the scene of a two vehicle crash. *Id*. at 166. During the traffic crash investigation, Sergeant Buster observed Cino emanating a strong odor of alcoholic beverages from his mouth and slurring his words. *Id*. Sergeant Buster also learned, from statements made by Cino and the driver of the other vehicle, that Cino had been the driver of one of the vehicles. *Id*. Sergeant Buster then conveyed his observations to Officer Munn, who switched hats and began the criminal DUI investigation. *Id*. at 166-167. Officer Munn read Cino the Miranda warnings, which he waived, and then Cino admitted to having just consumed three or four beers before driving. *Id*. Cino sought to suppress all statements made to Officer Munn by Sergeant Buster, including Sergeant Buster's observations of Cino, the statement of the other driver identifying Cino as the driver of the second vehicle, and all statements made by him to Officer Munn as a violation of the accident report privilege. *Id*.

The Fifth District Court of Appeal agreed with Cino that his own statements made to Sergeant Buster during the traffic crash investigation were compelled under section 316.066, Florida Statutes (2005), and therefore violated his constitutional privilege

against self-incrimination. *Id*. at 168. However, the Fifth District Court of Appeal also held that the other driver's statements, identifying Cino as the driver of the second vehicle, could be used by Officer Munn during the criminal DUI investigation and subsequent prosecution without implicating Cino's privilege against self-incrimination.

> The second mistake of law made by the circuit court was in holding that section 316.066(4) barred the State from using statements made to law enforcement during the traffic investigation by persons other than Cino in its prosecution of Cino. In 1991, the Legislature added the following language to section 316.066(4): "However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statements made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated." This addition to the statute effectively nullified prior cases interpreting an older version of the statue which allowed anyone to object to the state's attempt to use at trial any person's statements to an officer investigating traffic accident. Under the newer version of the statute, a law enforcement officer is not barred by section 316.066(4) from testifying at a criminal trial regarding statements made to him during his traffic investigation by anyone other than the defendant on trial (because doing so would in no way violate the non-defendant declarant's privilege against self-incrimination).

Cino, 931 So. 2d at 167- 68. In addition, the Fifth District Court of Appeal held that it was appropriate for Officer Munn to rely on the observations of Sergeant Buster concerning Cino's "physical appearance, general demeanor, slurred speech or breath scent," during his criminal investigation and in the subsequent prosecution. *Id*. at 167. "[E]ven though Cino was required by law to cooperate in the traffic investigation . . . [the] use of Sergeant Buster's observations regarding Cino's physical traits or demeanor did not violate Cino's privilege against self-incrimination." *Id*.

However, Maingot argues that *Cino* does not stand for the proposition that third party statements made to officers during a traffic accident may be used in an administrative hearing. Rather, Maingot urges this court that *Cino* only allows for the use of third party statements during a criminal trial and not at an administrative hearing. *See White v. Consolidated Freightways, Corp. of Delaware*, 766 So. 2d 1228 (Fla. 1st DCA 2000); *Dep't of Highway Safety & Motor Vechicles v. Corbin*, 527 So. 2d 868 (Fla. 1st DCA 1988); *Price v. Rizzuti*, 661 So. 2d 97 (Fla. 4th DCA 1995). This argument is without merit. The accident report privilege exists to prevent the state from violating an individual's constitutional privilege against self-incrimination where he or she is compelled to answer questions from law enforcement. *Brackin v. Boles*, 452 So. 2d 540, 544 (Fla. 1984). Assuming, without deciding, that this Court could ignore the holding in *Cino*, this Court must limit its inquiry to whether or not "there was competent, substantial evidence to support the hearing officer's finding." *Dep't of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551, 553 (Fla. 2d DCA 2002). In *Department of Highway Safety and Motor Vehicles v. Favino*, 667 So. 2d 305 (Fla. 1st DCA 1995), the First District Court of Appeal held that it was appropriate for a hearing officer to consider third party statements identifying the driver of a vehicle involved in a traffic accident. *Id*. at 307-09. Here, instead of reweighing the admissibility of certain statements made to law enforcement officers, this Court must focus solely upon the totality of the circumstances known to Trooper Hall when he made his probable cause determination that Maingot was the driver of the third vehicle. *Dep't of Highway Safety & Motor Vehicles v. Brass*, 906 So. 2d 1224 (Fla. 1st DCA 2005) (*quashing the circuit court's grant of certiorari based on its determination that the accident report privilege should have made certain*

statement's inadmissible). Therefore, there was competent, substantial evidence to support the hearing officer's determination that Trooper Hall had probable cause to believe that Maingot was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages.

Next, Maingot argues that the suspension should be set aside because there was no evidence that a breath or urine test was impossible or impractical. The pertinent statute pertaining to blood draws for the purpose of determining the alcoholic content of a person's blood is the implied consent statute, section 316.1932(1)(c), Florida Statutes (2005). It requires that before a person's blood may be lawfully drawn there must be (1) reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence, (2) the person appears for treatment at a hospital or other medical facility, and (3) the administration of a breath or urine test is impractical or impossible. *Id*. The Fifth District Court of Appeal has held that the impractical or impossible requirement for a breath or urine test means that a "breath or urine test would have been statutorily permissible . . . but for the inability to administer these tests." *State v. Hilton*, 498 So. 2d 698, 700 (Fla. 5th DCA 1986). For a breath or urine test to be permissible under the statute requires reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence and it must be incidental to a lawful arrest. *Hilton*, 498 So. 2d at 700. A blood test administered under section 316.1932(1)(c), Florida Statutes, however, does not have to be incidental to a lawful arrest. *Id*.

The hearing officer determined that Trooper Hall had probable cause to believe that Maingot was driving or in actual physical control of motor vehicle while under the

influence of alcohol. Maingot was in the hospital receiving treatment for injuries sustained in a traffic crash. Trooper Hall read Maingot the Miranda warning and Maingot admitted that he had consumed three or four beers. At this point, Trooper Hall could have lawfully arrested Maingot and requested that he submit to test of his breath or urine to determine the alcoholic content of his blood. *See also, State v. Serrago*, 875 So. 2d 815, 818-819 (Fla. 2d DCA 2004) (*distinguishing between* § 316.1932(1)(a) (*allowing for breath and urine tests only pursuant to a lawful arrest*) and § 316.1932(1)(c) (*authorizing blood draws not incidental to a lawful arrest*)). Instead, Trooper Hall requested a blood draw. Therefore, the hearing officer had sufficient facts to conclude that a breath or urine test was impractical or impossible, and did not depart from the essential requirements of the law.

Maingot then argues that his suspension should be overturned because the Department failed to place a Blood Test Results Affidavit into the record. The hearing officer admitted for review: (1) notice of suspension; (2) the uniform traffic citation; (3) the Charging Affidavit; (4) the FDLE Blood Results Form; (5) evidence form; (6) a toxicology services work request form; (7) the blood kit draw fatality procedure form; (8) the certification of blood withdrawal form; and (9) the blood alcohol consent and collection report form. Maingot asserts, and the Department does not deny, that a Blood Test Result Affidavit, FDLE Form 15, was not submitted for review.

Rule 15A-6.013(2) of the Florida Administrative Code states in part:

> The hearing officer shall consider any report or photocopies of such report submitted by a law enforcement officer, correctional officer or law enforcement or correctional agency relating to the arrest of the driver, the administration or analysis of a breath or blood test . . . which has been filed prior to or at the review. Such reports,

> which shall be in the record for consideration by the hearing officer, include: . . .
>
> (d) The results of any breath or blood test documenting the driver's alcohol level; . . .
>
> (j) Blood Test Result Affidavit, FDLE/ICP Form 15; . . .
>
> No extrinsic evidence of authenticity as a condition precedent to admissibility is required.

Id.

Maingot asserts that *Department of Highway Safety & Motor Vehicles v. Garcia*, 935 So. 2d 542 (Fla. 3d DCA 2006), stands for the proposition that Rule 15A-6.013(2) requires the submission to the hearing officer of both the results of the blood test and Form 15, the Blood Test Affidavit. In *Garcia*, a case involving the submission of the wrong intoxilyzer test printout card to the hearing officer, the Third District Court of Appeal held:

> If the drafters of rule 15A-6.013 intended that the introduction of the Breath Test Result Affidavit required in 15A-6.013(2)(i) would relieve law enforcement of its obligation of submitting the print card, which documents the breath test results, they would not have listed the requirement to provide that evidence as a separate requirement in 15-6.013(2)(d). In situations where a driver submits a breath test, we interpret rule 15-6.013 as requiring that the record before the hearing officer include both the Breath Test Result Affidavit and the actual result card inserted into the intoxilyzer machine and which records the results of the test.

Garcia, 935 So. 2d at 545. However, in *Department of Highway Safety & Motor Vehicles v. Anthol*, the Second District Court of Appeal held that in an administrative hearing the hearing officer may properly consider the results of a blood test, even if those results were not in affidavit form, and properly find by a preponderance of the evidence

that a driver had an unlawful blood alcohol level. *Anthol*, 742 So. 2d 813, 814 (Fla. 2d DCA 1999).

> While the rule acknowledges that the hearing officer may consider Form 15, it provides, *alternatively*, that "the results of any breath or blood test documenting the driver's alcohol level" may be considered. The rule does not require the results of "any breath or blood test" to be in affidavit form. Further, it provides that "[n]o extrinsic evidence of authenticity as a condition precedent to admissibility is required" for the results. We conclude that section 322.2615 and rule 15A-6.013 permit consideration of reports other than Form 15, relating to the results of blood-alcohol tests that are not in affidavit form at a formal administrative review hearing.

Id. (emphasis added.)

Additionally, in *Department of Highway Safety & Motor Vehicles v. Perry*, the Fifth District Court of Appeal quashed a circuit court's order overturning a licensee's suspension where the Department failed to provide an affidavit of refusal to the hearing officer, but the refusal had been documented in the Charging Affidavit. *Perry*, 751 So. 2d 1277 (Fla. 5th DCA 2000). There, the court found that charging affidavit was enough to meet the dual affidavit requirements of the statue. *Id*. at 1280. This Court has also cited *Anthol* for the proposition that section 322.2615(11), Florida Statutes, does not require the documents submitted to the hearing officer to be in affidavit form. *Telesh v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 13a (Fla. 9th Cir. Ct. Oct. 11, 2004) (*citing State v. Anthol*, 742 So. 2d 813, 814 (Fla. 2d DCA 1999)).

In the instant case, the hearing officer placed into the record (1) the Certification of Blood Withdrawal Form, (2) The Blood Kit Draw Procedures Form, and (3) the Blood Test Results Form which was signed and certified by F.D.L.E. Also, the hearing officer admitted the Charging Affidavit which included the results of the blood test in affidavit

form. Unlike the intoxilyzer machine printout card, which was in issue in *Garcia*, here there appears to be no valid reason for the interpretation, given the holding in *Anthol*, that the Legislature would require the Department to provide two forms of blood test results to be submitted to the hearing officer. Even if the Legislature did so require, the hearing officer had a certified results form from FDLE and an affidavit of the results contained within the Charging Affidavit. "The hearing officer was entitled to give controlling weight to [the officer's] charging affidavit and the other supporting documentation submitted by law enforcement." *Werle v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 664a (Fla. 9th Cir. Ct. Feb. 20, 2006). Thus, the hearing officer had substantial, competent evidence from the charging affidavit and other supporting documents to find that Maingot had an unlawful blood alcohol level by a preponderance of the evidence.

Finally, Maingot urges this Court to grant his petition because the Department failed to demonstrate its compliance with F.D.L.E. Rule 11D-8.012 at the hearing. Indeed, he argues that the Department offered no evidence indicating: (1) the blood was refrigerated; (2) the use of a non-alcoholic anti-septic; (3) the powder used in the tubes was a preservative or anticoagulant; and (4) proper labeling of the tubes. However, as the Department points out, Maingot did not subpoena any witnesses, nor did he offer any evidence that Rule 11D-8012 had not been complied with by the Department. The hearing officer admitted: (1) the Certification of Blood Withdrawal Form; (2) the Blood Kit Draw Procedures Form; and (3) the Blood Test Results Form which certified that it was conducted in accordance with Rule 11D-8. While Maingot offered numerous cases holding that non-compliance with F.D.L.E. regulations may necessarily result in the

suppression of blood test evidence, Maingot failed to offer any witnesses or evidence supporting the charge that those regulations had not been followed in the present case. *See Robertson v. State*, 604 So. 2d 783 (Fla. 1992); *Rafferty v. State*, 799 So. 2d 243 (Fla. 2d DCA 2001); *State v. Miles*, 775 So. 2d 950 (Fla. 2000); *Gulley v. State*, 501 So. 2d 1388 (Fla. 4th DCA 1987); *Gargone v. State*, 503 So. 2d 421 (Fla. 3d DCA 1987); *But see also Boston v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 909a (Fla. 9th Cir. Ct. April 27, 2005) ("The hearing officer was entitled to give controlling weight to [trooper's] charging affidavit and other supporting documents," where petitioner did not present any witnesses or evidence to raise doubts); *Bogdan v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 5a (Fla. 9th Cir. Ct. Oct. 27, 2004) ("In order for a licensee to successfully challenge the admissibility of his or her breath test results based upon the Department's noncompliance with the FDLE rules, he or she must come forth with some evidence of noncompliance that is more than theoretical or speculative.") (*citing Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001)).

It is neither the function nor the prerogative of this court to reweigh or reevaluate the evidence presented to the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20 (Fla. 5th DCA 1989). The hearing officer is in the best position to evaluate the evidence. *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). Therefore, this Court may not set aside the suspension by reevaluating unknown or speculative facts.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Maingot's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this ___15_ day of ___January_____, 2008.

__/S/_____
GAIL A. ADAMS
Circuit Court Judge

_/S/_____
DANIEL P. DAWSON
Circuit Court Judge

STRICKLAND, J., concurring with opinion.

While I concur with the majorities' opinion in this matter, I write separately to address what appears to be a conflict between the Third and Second districts. In *Department of Highway Safety and Motor Vehicles v. DeGroot*, No. 2D07-162 (Fla. 2d DCA Jan. 4, 2008), the Second District Court of Appeal quashed an order of the circuit court that overturned DeGroot's license suspension because the record before the hearing officer failed to contain both a Breath Test Result Affidavit and the actual Breath Test result contained on the intoxilyzer print card. The Second District held that the circuit court erred by relying on the language of rule 15A-6.013(2) and "ignored the patently permissive language of section 322.2615(2)," that:

> [T]he results of any breath or blood test **or** an affidavit stating that the breath, blood, or urine test was requested by a law enforcement officer or correctional officer and the person refused to submit.

§ 322.2615(2), Fla. Stat. (2005) (emphasis added). The Second District held that because the statute does not specifically require that the intoxilyzer print card with the printed results be submitted in addition to the breath test results affidavit "the circuit court erred when it concluded that the suspension of DeGroot's driver's license was not supported by

competent, substantial evidence due to the failure to include the intoxilyzer print card in the record. . . ." *Department of Highway Safety and Motor Vehicles v. DeGroot*, No. 2D07-162 (Fla. 2d DCA Jan. 4, 2008). Applying that language to the instant case, the failure to include the Blood Test Affidavit, Form 15, would not be fatal. Thus, I concur.

My reason for not joining the majority opinion is that I am not absolutely convinced that the Third District Court of Appeal was incorrect in *Department of Highway Safety & Motor Vehicles v. Garcia*, 935 So. 2d 542 (Fla. 3d DCA 2006). The problem inherent in the *Garcia* case was that the intoxilyzer print card submitted to the hearing officer referred to a Jose A. Gonzalez, obviously someone other than the defendant. *Garcia,* 935 So. 2d at 544. The intoxilyzer print card submitted in the record showed results which did not correspond to the Breath Test Affidavit. *Id*. Therefore, there was no competent, substantial evidence confirming the breath results asserted in the Breath Test Result Affidavit. *Garcia*, 935 So. 2d at 545. Likewise, in the present case there is no Form 15, Blood Test Affidavit, to confirm the results of the blood test. However, the Second District appears to be correct about the permissive language of section 322.2615(2). Nonetheless, I agree with the Third District's application of Rule 15A-6.013(2) in *Garcia*. Given the apparent conflict between the Second and Third districts, I cannot state that the hearing officer in the present case departed from the essential requirements of the law, and I concur that the petition for Writ of Certiorari should be **DENIED**.

_____/S/_____
STAN STRICKLAND
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to **Stuart I. Hyman, Esq.,** Stuart I. Hyman, Esquire, 1250 E. Amelia Street, Orlando, Florida 32803; and to **Heather Rose Cramer,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, Suite 230, Lake Worth, Florida, 33467 on this _15_____ day of _____January_____, 2008.

_____/S/_____
Judicial Assistant