

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

KRISSY LITTLEJOHN,

Petitioner,

CASE NO.: 2007-CA-0015697-O

WRIT NO.: 07-68

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,
Jim Kuritz, Hearing Officer.

William R. Ponall, Esquire,
For Petitioner.

Thomas C. Mielke, Assistant General Counsel,
For Respondent

Before LEBLANC, KIRKWOOD, MACKINNON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Krissy Littlejohn (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (Department) Final Order of License Suspension, sustaining the suspension of her driver's license pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath test. This Court has jurisdiction pursuant to section 322.2615 (13), Florida Statutes, and Florida Rule of Appellate Procedure

9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

At approximately 11:38 p.m., on September 19, 2007, Officer Schellhorn of the Orlando Police Department was on patrol in an unmarked car and traveling west on East Central Boulevard approaching the intersection of Rosalind Avenue. He observed a red Ford Mustang without headlights driving towards him in his lane of travel. He took evasive action by quickly pulling to right and after the car passed him, he made a u-turn and began following the car. As Officer Schellhorn was following the Mustang, he observed the driver cross over the double yellow lines and swerve to the left and right several times. As the Mustang approached Lake Avenue, Officer Schellhorn activated his emergency lights and siren. The Mustang turned right on South Osceola Avenue and traveled approximately 50 feet before stopping.

Upon making contact with the driver, Petitioner Krissy Littlejohn, Officer Schellhorn detected an overpowering odor of alcohol coming from Petitioner's breath. Additionally, Officer Schellhorn observed that Petitioner's eyes were red and bloodshot, her face was flushed, and her speech was slow and slurred. After twice asking for her driver's license and vehicle registration, Petitioner handed Officer Schellhorn her driver's license, and told him that the vehicle was a rental. When asked how much she had to drink, Petitioner shrugged her shoulders and said nothing. Officer Schellhorn requested that Petitioner step out of her vehicle and walk over to a covered parking garage on South Osceola Avenue because it was dark and raining. Petitioner appeared to lose her balance as she stepped out of the car and she walked with a side to side stagger towards the garage.

Next, Officer Schellhorn requested Petitioner to submit to field sobriety exercises and she consented. Officer Schellhorn administered the following exercises: Horizontal Gaze

Nystagmus, walk and turn, and one-leg stand. While completing the walk and turn exercise, Petitioner missed touching heel to toe by more than one-half inch on several steps, failed to execute the turn as instructed, and raised her arms away from her body by more than six inches throughout the exercise. Petitioner was unable to complete the one-leg stand exercise without swaying, raising her arms more than six inches away from her body, and counting properly. Consequently, Officer Schellhorn placed Petitioner under arrest and transported her to the DUI center where she refused to submit to a breath test after being read the implied consent. Petitioner was cited for operating a motor vehicle in the hours of darkness without headlights, driving on the wrong side of the roadway, and failure to maintain a single lane.

Pursuant to section 322.2615, Florida Statutes, Petitioner requested a formal review of her license suspension. On October 18, 2007, Hearing Officer Kim Kuritz held a formal review at which Petitioner did not appear but was represented by counsel. Petitioner moved to invalidate the suspension on four grounds: (1) that Officer Schellhorn was not qualified to give scientific testimony regarding the HGN evidence and in the absence of the HGN evidence, there is insufficient evidence that Officer Schellhorn had probable cause to believe that Petitioner was impaired; (2) that Petitioner was deprived of her right to counsel immediately following her alleged refusal to submit to a breath test; (3) that Officer Schellhorn lacked authority to act as a law enforcement officer because the breath test center was outside his territorial jurisdiction; and (4) that the documents and testimony were ambiguous as to which test Officer Shellhorn requested when he read the implied consent warnings. The hearing officer reserved ruling on all of the motions. On October 19, 2007, the hearing officer entered an order denying Petitioner's motions, with the exception of granting the motion to strike the HGN evidence on the basis that

Officer Schellhorn was not qualified to give scientific testimony, and sustaining the suspension of her driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual's license is suspended for refusal to submit to a breath, blood, or urine test, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension." §322.2615(7), Fla. Stat. (2007).

The hearing officer's scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§322.2615(7)(b), Fla. Stat. (2007).

At issue in the instant case is whether the hearing officer's decision to sustain Petitioner's driver's license suspension was supported by competent substantial evidence. Petitioner argues that the evidence established that she was requested to submit to a breath, urine, or blood test, but

because Officer Schellhorn lacked authority to request her to submit to a blood test, her alleged refusal was not unlawful and cannot support the suspension of her driver's license. Dept. of Highway Safety and Motor Vehicles v. Clark, 974 So. 2d 416 (Fla. 4th DCA 2007); Trauth v. Dept. of Highway Safety and Motor Vehicles, 14 Fla. L. Weekly Supp. 10a (Fla. 11th Cir. Ct. Oct. 17, 2006).

Alternatively, the Department maintains that the record does not demonstrate that Officer Schellhorn either improperly advised Petitioner of the implied consent statute or even requested Petitioner to submit to a blood test.

Petitioner asserts that the instant case is controlled by the Fourth District Court of Appeal's decision in Clark and the Eleventh Circuit Court's decision in Trauth, where the respective courts held that the drivers' licenses were improperly suspended because the individuals were improperly informed that a suspension would result from a refusal to submit to a breath, blood, or urine test. 974 So. 2d at 418; 14 Fla. L. Weekly Supp. 10a. Florida's implied consent law permits the withdrawal of a blood sample from a DUI suspect under limited circumstances: (1) when there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence and the person appears for treatment at a hospital, clinic, or other medical facility, and the administration of a breath or urine test is impractical or impossible; or (2) when there is probable cause to believe the person was driving or in actual physical control of a motor vehicle and has caused death or serious bodily injury to a human being. §§ 316.1932(1)(c); 316.1933(1), Fla. Stat. (2007).

Petitioner is correct in her assertion that like in Clark and Trauth, neither circumstance permitting a blood test is present in the instant case; however, there was no testimony nor evidence presented which indicates that Officer Schellhorn requested a blood test from

Petitioner. The Charging Affidavit states that the Petitioner was advised of a ruling “regarding contacting an attorney prior to the admission of a breath test [sic]” and “was read implied consent and refused to submit to a breath test.” The Affidavit of Refusal states that “said person [was requested] to submit to a breath, urine, or blood test to determine the content of alcohol in his or her blood or breath or the presence of chemical or controlled substances therein.” At the review hearing, Officer Schellhorn testified that in all cases, he reads the same implied consent warning from a prepared sheet; however, that document was neither read into nor entered into the record and there is no testimony indicating that the language in the Affidavit of Refusal is the same as the language on the prepared sheet used by Officer Schellhorn.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 21 day of April , 2008.

 /S/
BOB LEBLANC
Circuit Judge

 /S/
LAWRENCE R. KIRKWOOD
Circuit Judge

 /S/
CYNTHIA Z. MACKINNON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **William R. Ponall, Esquire**, 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32789 and **Thomas C. Mielke, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 West Flagler Street, Miami, Florida 33135 on the 28 day of April , 2008.

 /S/
Judicial Assistant