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

Circuit Case No. 18-AP-11
Petition for Writ of Certiorari

ANDREA LARROUDE,

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 November 6, 2018.

Petition for Writ of Certiorari to the Department of Highway Safety and Motor Vehicles.

David Kaplan, Fort Pierce, for petitioner.

April Haile, Assistant General Counsel, Miami, for respondent.

PER CURIAM.

The Petitioner's driver's license was suspended for refusal to submit to a breath test, and she requested administrative review. The hearing officer conducted the administrative hearing and set aside the suspension. She determined that there was insufficient evidence to support the driver's license suspension because the DUI packet was not received by the Department prior to or at the hearing. The Indian River County Sheriff's Office filed a petition for writ of certiorari, seeking this court's review, and after review, this court rendered an opinion granting the petition for writ of certiorari and remanded for a new hearing. A hearing officer conducted the new formal review hearing, and she affirmed the suspension. The Petitioner filed this petition for writ of certiorari, seeking this court's review of the hearing officer's order.

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 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 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**

[1] CSE stands for competent substantial evidence.

> **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 breath 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[2] document timeline in the instant case is as follows:

- The arrest affidavit states that the time of arrest was 8:53pm; however, in the narrative, Deputy Teltelbaum stated that he responded to the Petitioner's address at approximately 9:00pm (Appendix, p. 11, 13).
- Deputy Teltelbaum wrote two DUI Uniform Traffic Citations for the Petitioner, one for DUI and one for refusing to submit to a breath test. However, both list 8:53pm as the offense time (R21,22).
- The affidavit of refusal to submit to breath test states that the Petitioner was arrested at 11:39pm and refused at the exact same time[3], which conflicts with the 8:53pm and 9:00pm times on the other documents (R23).

Like *Trimble*, the instant case has documents that are hopelessly in conflict. The arrest affidavit has an arrest time that occurs prior to the deputy's own narrative of when he arrived on the scene, so arrest would have been impossible to accomplish, making the document itself internally conflicting. The citations, which were also written by the same deputy, have 8:53pm listed as the offense time, which creates another conflict because the reading of implied consent and refusal must happen after the driver is arrested. *See Hernandez*, 74 So. 3d 1070 (breath tests are authorized only if incident to lawful arrest). Finally, the refusal affidavit creates conflict with the other documents by proposing a new arrest time hours later than the others, as well as having the same

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[2] The appendix includes a letter from the Indian River County Sheriff's Office and attached call log, which cannot be considered by this court because it was not entered into the document review by the hearing officer. The hearing officer specifically asked the Petitioner's counsel if he had any evidence to present, and he said no (R27). "[T]he well [-]established rule applicable to ... certiorari proceedings[s][is] that the reviewing court's consideration shall be confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based." *City of Ft. Myers v.* Splitt, 988. So. 2d 28, 32 (Fla. 2d DCA 2008) (quoting *Dade County v. Marca, S.A.*, 326 So.2d 183, 184 (Fla.1976)).

[3] The affidavit is not fully completed, as the deputy who filled it out did not select the box to indicate whether she requested that the Petitioner submit to a breath test or a urine test (R23).

issue at the citations: the impossibility of stating that the Petitioner was arrested and refused to submit to testing (of some sort) at the same time.

The hearing officer's order does not explain these time inconsistencies. 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 not contain a machine generated printout of results with a timestamp. Though the Department had the authority to compel witnesses, i.e. the deputies who created the conflicting documents, it chose not to do so. Therefore, just like the Fifth District warned in *Colling*, the documents in this case contained irreconcilable material contradictions that cannot be overcome.

At the hearing, the Petitioner properly moved to invalidate the suspension based on these conflicting documents. Instead of granting the motion, the hearing officer reserved ruling and later entered an order that stated:

> "Motioned (sic) denied. DDL #3, The Arrest Affidavit, indicates Petitioner was arrested at 8:53pm hours prior to the request for a breath test and subsequent refusal."

There was no reason given as to why the hearing officer chose to accept 8:53pm as the time of arrest, instead of approximately 9:00pm or 11:39pm listed on other documents. Without live testimony or a machine generated printout, the hearing officer "threw a dart" to decide which time was correct, and that was error. *Colling*, 178 So. 3d at 5.

Interestingly, the Department argues that *Trimble* does not apply because the Petitioner was arrested for Leaving the Scene of a Crash with Property Damage. It is unclear how the Department draws that conclusion to the exclusion of the other possible charges. The Department argues that *State, Dept. of Highway Safety and Motor Vehicles v. Whitley* applies because the Fifth District held that nothing in §322.2615(7) requires an individual to be arrested for DUI as the

predicate for the administration of the breath test. 846 So. 2d 1163, 1168 (Fla. 5th DCA 2003). In *Whitley*, the motorist was instead arrested for fleeing and eluding a law enforcement officer, transported to the jail, consented to a breath test, and finally charged with DUI. *Id*. at 1165. The District Court specifically acknowledged the provision of §316.1932(1)(a) that requires a breath test to be incident to lawful arrest, and here "it was administered well after Whitley was lawfully arrested." *Id*. at 1167. The Department would like this court to use *Whitley* as a basis to uphold the suspension, which it cannot do.[4] *Whitley* is highly distinguishable from the instant case, as it involves a case where a motorist submitted to a breath test and the timing on the documents is not in question; in fact, we do not know if witnesses testified at the administrative hearing in that case. 846 So. 2d 1163. The Department is missing the distinction of a paper only record in an administrative review case involving implied consent and refusal to submit to a breath test, which is what is involved here. *Trimble* is a "red cow" case, in that it is factually and procedurally on point with the instant case. *See State, Dept. of Highway Safety and Vehicles v. Walsh*, 204 So. 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.").

Since the documents in the record hopelessly conflict, the hearing officer's order is not supported by competent substantial evidence. Therefore, the petition for writ of certiorari is granted, and the hearing officer's order is quashed.

BAUER, BUCHANAN, JJ., and STEELE, Acting Circuit Judge, concur.

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

[4] Both parties, in the response and reply brief, argue their point on this issue using the Indian River County Sheriff's Office call log. As discussed in footnote 2, it cannot be considered.