

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

CASE NO.: 2010-CA-20512-O
WRIT NO.: 10-72

JOHN RUSSELL CARSON,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,

Respondent.

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

Neal T. McShane, Esq.,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

Before POWELL, BRONSON, and O'KANE, J.J.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Carson appeals by way of petition for writ of certiorari a hearing officer's order affirming the suspension of his driver's license. We have carefully considered his Petition, the Appendix, the respondent Department's response, and the applicable law. We have read the transcript and viewed the video several times. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and deny the Petition.

Leaving aside and not considering the evidence of Petitioner's instability in exiting his vehicle and walking (Petitioner had a hip replacement), and his refusal to take the field sobriety exercises (FSE), there was ample other evidence to support the hearing officer's finding that there was probable cause to arrest petitioner for DUI. *See Peden v. Dep't of Highway Safety & Motor Vehicles*, 11 Fla. L. Weekly Supp. 953a (Fla. 6th Cir. Ct. Aug. 19, 2004).

We turn now to Petitioner's other argument based on what we will call the "misstatement/misinformation doctrine."¹ Everything the deputy and breath test technician told Petitioner was correct. They correctly:

- read Petitioner the implied consent warning.
- read him the holding of the *Hoch* case.²
- told him that a second breath test refusal where a motorist's license was suspended for a previous refusal was a misdemeanor. *See* § 316.1939, Fla. Stat. (2010)
- told him he had 10 days to take himself (meaning drive under the 10 day temporary permit) to the DMV and apply for a business only permit.³
- told him he would still have to go to jail whether or not he took the breath test.⁴

¹ Based on emerging case law this doctrine holds that if an officer makes a misstatement of law or gives misinformation regarding a motorist's rights, evidence of his taking or refusal to perform FSE, or of the taking or refusal to take an approved blood alcohol test can be suppressed at the trial of a criminal case. *See* cases collected in David Demers, *Florida DUI Handbook*, § 7.2, nn. 57-67 (2011-2012 ed.).

² *State v. Hoch*, 500 So. 2d 597 (Fla. 3d DCA 1986) (motorist has no right to meet with or talk to attorney prior to taking a blood alcohol test).

³ Upon filing request for final hearing the Department is required to issue the motorist, if otherwise eligible, a temporary business purpose permit which remains in force until the hearing officer renders a final order sustaining the license suspension. *See* § 322.2615(2), Fla. Stat.; Fla. Admin. Code R. 15A-6.011(2)(d); *see also* §§ 322.2616(10), 322.271(3), Fla. Stat. (providing for a separate procedure for applying for a hardship business purpose license, if eligible, allowing the permittee to drive to work and for business, educational, medical and religious purposes).

⁴ Petitioner was under arrest and in custody for DUI and still had to be transported to the county jail for booking and release on bail.

We conclude Petitioner was accorded due process, and there was sufficient competent evidence to support the hearing officer's decision to sustain the suspension of his driver's license. Therefore, the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED at Orlando, Florida this 7th day of February, 2012.

/S/
ROM W. POWELL
Senior Judge

/S/
THEOTIS BRONSON
Circuit Judge

/S/
JULIE H. O'KANE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished on this 7th day of February, 2012, to the following: **Neal T. McShane, Esq.**, 836 N. Highland Avenue, Orlando Florida 32803; and **Kimberly A. Gibbs, Assistant General Counsel**, P.O. Box 570066, Orlando, Florida 32857.

/S/
Judicial Assistant