

80 A.D.3d 911, 914 N.Y.S.2d  
436, 2011 N.Y. Slip Op. 00119

In the **Matter** of Ellen M. **Berlin**, Petitioner

v

**New York State** Department of  
**Motor Vehicles**, Respondent.

Supreme Court, Appellate Division,  
Third Department, **New York**  
January 13, **2011**

CITE TITLE AS: **Matter** of **Berlin** v  
**New York State** Dept. of **Motor** Vehs.

#### HEADNOTE

##### **Motor Vehicles**

Operating **Vehicle** while Under Influence of Alcohol or  
Drugs

Sufficiency of Evidence

Menter, Rudin & Trivelpiece, P.C., Syracuse (John Thomas  
Graff of Ciampa Fray-Witzer, L.L.P., Boston, Mass., of  
counsel, admitted pro hac vice), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Paul  
Groenwegen of counsel), for respondent.

Stein, J. Proceeding pursuant to CPLR article 78 (transferred  
to this Court by order of the Supreme Court, entered in  
Ulster County) to review a determination of respondent which  
revoked petitioner's driver's license.

Late one evening, petitioner was driving her automobile on  
Route 32 in the Town of Esopus, Ulster County, when an  
axle and tire came off. She left the **vehicle** in front of a  
private residence and began walking north on Route 32.  
Shortly thereafter, **State** Trooper Theresa Diluvio responded  
to a report of a **motor vehicle** accident at the location  
where petitioner had left her **vehicle**. When she arrived at  
the scene, she found an unattended **vehicle** with both air  
bags deployed and missing a tire and axle. The tire and axle  
were found in the area of a nearby guardrail. While Diluvio  
was investigating the scene, Ulster County Sheriff Deputy  
Jason Bruck stopped and asked Diluvio if she needed **\*912**  
any assistance, which she declined. Both Bruck and Diluvio  
checked registration records, which revealed that the **vehicle**  
was registered to petitioner and included her date of birth.

After encountering Diluvio, Bruck continued to drive north  
on Route 32 and came upon petitioner walking alongside  
the road. According to Bruck, petitioner was staggering and  
did not turn around until he activated his air horn, startling  
her. Bruck exited **\*\*2** his **vehicle** and requested petitioner's  
identification. When petitioner inquired as to why he wanted  
such information, Bruck repeated his request, whereupon  
she allegedly became argumentative. Bruck then grabbed  
petitioner's arm and pinned her to the hood of his police car.  
Petitioner's purse fell from her shoulder and Bruck removed  
her identification from the purse. He then radioed Diluvio to  
advise her that he had located the owner and operator of the  
**vehicle**.

When Diluvio arrived at the location where petitioner was  
detained by Bruck, she observed that petitioner's breath  
smelled like alcohol, her speech was slurred, her eyes were  
glassy and her **motor** coordination was impaired. Petitioner  
admitted to Diluvio that she had been driving the car that  
was left by the road, but refused Diluvio's request to perform  
field sobriety tests. Diluvio then placed petitioner under arrest  
for driving while intoxicated and transported her to the **State**  
Police barracks, where she was advised of, among other  
things, the consequences of refusing to submit to a chemical  
test to measure her blood alcohol level. Petitioner declined to  
take the test.

After a refusal revocation hearing pursuant to **Vehicle and  
Traffic Law § 1194** (2) (c), an Administrative Law Judge  
(hereinafter ALJ) determined that Diluvio had reasonable  
grounds to believe that petitioner had operated a **motor  
vehicle** in violation of **Vehicle and Traffic Law § 1192** (1)  
and lawfully arrested petitioner for driving while intoxicated  
pursuant to **Vehicle and Traffic Law § 1194** (1) (a). The  
ALJ further found that the refusal warnings administered  
to petitioner were sufficient and that petitioner had refused  
to take the chemical test. Accordingly, the ALJ revoked  
petitioner's driver's license and respondent's Administrative  
Appeals Board subsequently affirmed the determination. **\***  
Petitioner thereafter commenced this CPLR article 78  
proceeding to challenge the revocation. **\*913**

We confirm. The issues to be determined by the ALJ at the  
license revocation hearing were limited to whether the police  
officer had reasonable grounds to believe that petitioner  
had been operating a **vehicle** in violation of **Vehicle and  
Traffic Law § 1192**, whether the officer made a lawful  
arrest of petitioner, whether the warnings with regard to  
the consequences of refusal to take the chemical test were

sufficient and whether petitioner refused to take such test (*see Vehicle and Traffic Law § 1194* [2] [c]). It was undisputed that petitioner had been driving the **vehicle** found on the road and that petitioner left the **vehicle** and proceeded to walk home. Bruck's observations that petitioner matched the general age of the registered owner of the **vehicle**, that she was in the vicinity of where the **vehicle** was abandoned and that she was staggering along the shoulder of the road late in the evening provided credible, objective reasons for him to approach her to ask limited questions regarding her identity (*see generally People v McIntosh*, 96 NY2d 521, 525 [2001]; *People v Hollman*, 79 NY2d 181, 184-185 [1992]; *People v Savage*, 59 AD3d 817, 819 [2009], *lv denied* 12 NY3d 920 [2009]). Bruck also testified that, throughout his encounter with petitioner, he observed that she had a strong odor of alcohol, **\*\*3** slurred speech and red glassy eyes and she exhibited erratic behavior. This gave him reasonable suspicion of criminality to justify her detention (*see People v Phillips*, 46 AD3d 1021, 1023 [2007], *lv denied* 10 NY3d 815 [2008]; *People v Williams*, 305 AD2d 804, 806 [2003]). Significantly, Diluvio also testified that petitioner exhibited signs of intoxication. In addition, it is undisputed that petitioner refused to take the field sobriety or chemical tests when requested by Diluvio to do so. Thus, based on the record before us, we find that there was substantial evidence to

support the ALJ's determination that Diluvio had reasonable grounds to believe that petitioner had been operating a **motor vehicle** while intoxicated and that the subsequent arrest was lawful (*see Matter of Craig v Swarts*, 68 AD3d 1407, 1409 [2009]; *Matter of Giampia v New York State Dept. of Motor Vehs.*, 256 AD2d 578, 578 [1998]). Accordingly, we find no basis to disturb respondent's determination (*see CPLR 7803* [4]; *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997]; *Matter of Gallo v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 37 AD3d 984, 985 [2007]; *Matter of Somma v Jackson*, 268 AD2d 763, 763 [2000]).

Petitioner's remaining contentions have been considered and are either academic or without merit.

Spain, J.P., Lahtinen, Kavanagh and Garry, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed. **\*914**

## FOOTNOTES

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### Footnotes

- \* Although the Board mischaracterized the ALJ's rationale and incorrectly reasoned that Bruck had probable cause to detain and arrest petitioner for leaving the scene of a property damage accident in violation of **Vehicle and Traffic Law § 600** (1) (a), the Board found no basis to disturb the ALJ's assessment of the witnesses' credibility and ultimately adopted the ALJ's conclusions by affirming the determination and finding that "[t]he original decision remains."