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

CASE NO. 2006-CA-7413
WRIT NO. 06-72

RYAN KREDA,
Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,
Respondent.
_____/

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

Jose A Baez, Esquire, for Petitioner

Judson M. Chapman, General Counsel, and
Heather Rose Cramer, Assistant General
Counsel, for Respondent

Before O'Kane, Komanski, and Thorpe, J.J.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Ryan Kreda ("Petitioner") seeks timely certiorari review of the order of the Final Order of License Suspension issued by the Florida Department of Highway Safety and Motor Vehicles ("Respondent"). This Court has jurisdiction. *See* §§322.2615, 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

On June 30, 2006, Petitioner was arrested for DUI and his driver's license was

suspended based on his refusal to submit to a breath test. On July 6, 2006, he requested a formal review hearing pursuant to section 322.2615(1)(b)(3), Florida Statutes, which was conducted on August 8, 2006. At the hearing, Petitioner's attorney moved to dismiss on two grounds: (1) Respondent did not schedule the hearing within 30 days of the request. (2) There was a lack of probable cause to believe Petitioner was under the influence of alcohol. The arresting officer did not testify, but Petitioner's attorney argued there was no statement of facts in the probable cause affidavit and no mention of the roadside sobriety tests. "They just state that they smelled alcohol. I don't think that rises to the level of preponderance of the evidence." The hearing officer reserved ruling and subsequently issued an order finding Petitioner was under the age of 21, drove a motor vehicle while under the influence of alcohol, and refused to submit to a breath test after being told such refusal would result in the suspension of his license.

Arguments

I. The law enforcement officer lacked the probable cause necessary to suspend Petitioner's driving privileges.
II. The formal review hearing was not scheduled within the statutorily required 30 days.

Review of an administrative agency's decision is governed by a three-part standard:

> (1) whether the agency accorded procedural due process; (2) whether the agency observed the essential requirements of the law; and (3) whether competent, substantial evidence supported the decision.

City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982).[1] "It is neither the

function nor the prerogative" of the circuit court to re-weigh evidence and make findings of fact when reviewing such a decision. *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989). When the license of a person under 21 years of age 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, amend, or invalidate the suspension." §322.2616(8)(b), Fla. Stat. (2005).[2] The scope of the hearing officer's review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.

2. Whether the person was under the age of 21.

3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement or correctional officer.

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[1] Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue, and requires fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner. *See Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority,* 795 So. 2d 940 (Fla. 2001). A ruling constitutes a departure from "the essential requirements of law" when it amounts to "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983). Finally, a finding of competent, substantial evidence precludes the appellate court from re-weighing that evidence, i.e., making its own findings and deductions from the record or conducting an independent fact-finding mission on the question of whether the license should have been suspended. *See, e.g., Dept. of Highway Safety and Motor Vehicles v. Smith*, 687 So. 2d 30, 32 (Fla. 1st DCA 1997).

[2] Notwithstanding section 316.193, it is unlawful for a person under the age of 21 who has a blood-alcohol or breath-alcohol level of 0.02 or higher to drive or be in actual physical control of a motor vehicle. *See* §322.2616(1)(a), Fla. Stat. (2005).

4. Whether the person 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.

§322.2616(8)(b)1. through 4., Fla. Stat. (2005).

Discussion - Argument I

Petitioner was pulled over for operating a motor vehicle with a broken headlight. He acknowledges the officer reported smelling alcohol, but raises the following arguments: He was not operating the vehicle in a manner that would show a probability he was impaired by an unlawful amount of alcohol; i.e., he was not driving erratically or speeding. There was nothing to corroborate the officer's belief that he was under the influence. There were multiple occupants in the vehicle and no evidence that he was the one who smelled like alcohol, or that he had bloodshot eyes or slurred speech. Finally, the probable cause affidavit lacked evidence of field sobriety tests; the officer did not conduct the horizontal gaze nystagmus, walk and turn, one leg stand, and finger to nose tests.

Respondent contends it is erroneous for Petitioner to argue that the odor of alcohol alone was insufficient to find probable cause. The cases on which Petitioner relies[3] relate to probable cause for an arrest, and Respondent argues arrest was not an issue for the

[3] *Johnson v. State*, 660 So. 2d 648, 654 (Fla. 1995), and *State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000).

hearing officer to consider since Petitioner was under 21 years of age.[4] This is correct; the hearing officer was not required to find that Petitioner was impaired or intoxicated at a level of 0.08 or higher. Instead, the issue was whether there was probable cause to believe he was driving with *any* blood-alcohol or breath-alcohol level.

The odor of alcohol is sufficient to establish probable cause that Petitioner was driving with any blood-alcohol or breath-alcohol level. The fact there were passengers in the car does not change this conclusion, because the hearing officer was privileged to determine the weight of the evidence. It would constitute impermissible re-weighing of that for this Court to rule that the alcohol might have emanated from one or more of the passengers.

Discussion - Argument II

Petitioner states he made the request for a formal administrative hearing on July 6, 2006. He argues the last day of the allotted period was a Saturday, August 5, 2006, and the next business day was Monday, August 7, 2006. However, the hearing was not held until August 8, 2006. Respondent argues the Bureau of Administrative Reviews office is closed on Mondays and therefore, the time ran until Tuesday, August 8, 2006.

As Petitioner acknowledges in his pleading, "the last day of the period so computed shall be included unless it is a Saturday, Sunday, legal holiday *or any other day in which the applicable division office is closed in which event the period shall run until*

[4] Petitioner does not challenge the finding that he was under 21 or that he refused to submit to a breath test.

the end of the next day which is neither a Saturday, Sunday, legal holiday or other day in which the applicable division office is closed." *See* Fla. Admin. Code Ann. Rule 15A-6.004 (2006) (emphasis added) . Therefore, since the applicable office was closed on Monday, August 7, 2006, the hearing was timely conducted on Tuesday, August 8, 2006.

Based on the foregoing, 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 ___19____ day of March 2009.

/S/
ALICIA L. LATIMORE
Circuit Judge

/S/
JANET C. THORPE
Circuit Judge

/S/
A. THOMAS MIHOK
Circuit Judge

Certificate of Service

I hereby certify that a copy of the foregoing Order has been furnished this __19_____ day of March 2009 to Jose A. Baez, Esquire, 37 North Orange Avenue, Suite 500, Orlando, Florida 32801; and Heather Rose Cramer, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, Florida 33467.

/S/
Judicial Assistant