IN THE CIRCUITCOURT FOR THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

THOMAS MORGAN,

Petitioner,

v.

CASE NO.: 2006-CA-8671-O
Writ No.: 06-78

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, DIVISION OF DRIVER LICENSES,

Respondent.
_____/

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE M. SMITH, MUNYON, and WATTLES, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Thomas Morgan ("Petitioner") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") Final Order of License Suspension. Pursuant to section 322.27(1)(a), Florida Statutes, the order sustained the one year suspension of his driver's license for having committed an offense for which mandatory revocation of the license is required upon conviction. This

Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).B We dispense with oral argument. Fla. R. App. P. 9.320.

On January 14, 2006, Petitioner was involved in an accident resulting in the death of another. On May 23, 2006, Petitioner was charged with DUI manslaughter. Upon notice of this charge, the Department issued a May 23, 2006 order suspending Petitioner's driving privilege for one year pursuant to section 322.27(1)(a), Florida Statutes, for having committed an offense for which mandatory revocation of the license is required upon conviction. Petitioner requested a hearing to review his suspension pursuant to Rule 15A-1.0195, Florida Administrative Code, and a hearing was held on September 5, 2006. At the hearing, Petitioner moved to set aside the suspension arguing that the documents placed into the record by the Department failed to establish that he had actually committed an offense for which a mandatory license revocation is required upon conviction. On September 12, 2006, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of his driver's license for one year.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver's license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the

hearing officer must find that the following elements have been established by a preponderance of the evidence:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
>
> 2. Whether the person was placed under lawful arrest for a violation of s. 316.193.
>
> 3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 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.

§ 322.2615(7)(b), Fla. Stat. (2006).

Petitioner argues that the evidence before the hearing officer failed to establish that Petitioner committed any criminal offense. Thus, argues Petitioner, the Department's decision to suspend Petitioner's license pursuant to section 322.271, Florida Statutes, was not supported by competent substantial evidence. Conversely, the Department argues that it had evidence within its records that Petitioner committed the offense of DUI manslaughter, an offense for which a mandatory license revocation is required upon conviction.)

Specifically, Petitioner argues that the records placed into evidence at the hearing failed to establish that Petitioner committed any criminal offense. Petitioner argues that the Driver and Vehicle Information Database (D.A.V.I.D.) report and charging document fail to constitute competent substantial evidence that Petitioner was the driver of any of the vehicles

involved in the accident. To support this proposition, Petitioner cites *Darnley v. Department of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 116a (Fla. 6th Cir. Ct. 2005). In *Darnley*, the Department suspended an individual's driver's license for one year pursuant to section 322.271(1)(a), Florida Statutes, for his involvement in an automobile crash. *Id.* At the hearing regarding the suspension, the only document entered into evidence by the Department was the D.A.V.I.D. report. *Id.* The D.A.V.I.D. report showed that the individual was involved in the accident, that the accident was alcohol related, and that a blood test was initiated. *Id.* The court found that the D.A.V.I.D. report was admissible in the administrative hearing and could be considered by a hearing officer. *Id.* However, the court concluded that the information found in the D.A.V.I.D. report was not competent substantial evidence to support the hearing officer's conclusion that Darnley had committed an offense which would require mandatory revocation of his license upon conviction. *Id.* The court reasoned that the D.A.V.I.D. report only generally stated that the accident was alcohol related and a blood test was initiated. *Id.* Additionally, the court noted that the report did not provide the results of the blood test nor did it say whether Darnley was arrested or suspected of DUI. *Id.* Thus, the court held that the department's "decision to sustain Darnley's license suspension based *solely* on the D.A.V.I.D. report is not supported by competent substantial evidence." *Id.* (emphasis added).

The Court finds that the present case is distinguishable from *Darnley*. In this case, the hearing officer did not rely *solely* on the D.A.V.I.D. report in deciding to sustain the suspension, and the D.A.V.I.D. report contained more information than that found in the *Darnley* report. Here, the Department admitted into evidence the D.A.V.I.D. report, a charging document indicating that Petitioner was charged with DUI manslaughter, and

Petitioner's driving record. The D.A.V.I.D. report in this case indicates that Petitioner was the driver to be reviewed for suspension. Also, the charging document indicates that Petitioner was charged with DUI manslaughter. These documents together are not general and are specific enough for the hearing officer to conclude that Petitioner committed the offense of DUI manslaughter.

Pursuant to section 322.28(4)(a), Florida Statutes, the offense of DUI manslaughter is one for which mandatory revocation of the license is required upon conviction. Thus, according to section 322.27(1)(a), Florida Statutes, the Department has authority to suspend Petitioner's license for committing an offense for which mandatory revocation of the license is required upon conviction. Based on the evidence presented by the Department at the hearing, there was competent substantial evidence to support the hearing officer's conclusion that Petitioner committed an offense for which a mandatory license revocation is required upon conviction.

Petitioner argues that the Department's refusal to provide the Petitioner with copies of the documents placed into evidence at the administrative hearing has deprived him of procedural due process. The Department argues that Petitioner's claim is without merit as he had the ability to review the record documents both before and at the administrative hearing.

It is well established that an issue not presented at the trial level will not be considered for the first time on appeal. *Jackson v. Whitmire Constr. Co.*, 202 So. 2d 861, 862 (Fla. 2d DCA 1967). *See also Augustin v. State Unemployment Appeals Comm'n*, 906 So. 2d 1238, 1239 (Fla. 4th DCA 2005); *Sparta State Bank v. Pape*, 477 So. 2d 3, 4 (Fla. 5th DCA 1985) (citing *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981)).

Upon a careful review of the record below, Petitioner did not present to the hearing officer the due process issue that he now raises on appeal. Specifically, Petitioner argues that the Department refused to provide him with copies of the evidentiary documents making it difficult for Petitioner to successfully make his argument on appeal; however, Petitioner had an opportunity at the hearing to review the documentary evidence and indicated to the hearing officer that he had, in fact, reviewed the documents the previous week. Petitioner did not make any arguments regarding lack of access to the evidentiary documents at the hearing. As a result, the Court cannot properly consider this issue. The Court finds that Petitioner was not denied procedural due process based on his inability to obtain copies of the documentary evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Morgan's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _5___ day of ____February_____, 2009.

__/S/_____
MAURA T. SMITH
Circuit Court Judge

__/S/_____
LISA T. MUNYON
Circuit Court Judge

_/S/_____
BOB WATTLES
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esq.,** Kirkconnell, Lindsey, Snure, & Yates, P.A., P.O. Box 2728, Winter Park, FL 32790-2728**;** and to **Heather Rose Cramer, Esq.,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on this _5_____ day of _____February_____, 2009.

___/S/_____
Judicial Assistant