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

CASE NO. 2008-CA-2866
WRIT NO. 08-13

MONTE LEE TOLAR,
Petitioner,

vs.

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

Petition for Writ of Certiorari from the
Department of Highway Safety and Motor
Vehicles, Darrin Bowen, Hearing Officer

Carlus L. Haynes, Esquire, for Petitioner

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

Before O'Kane, McDonald, and G. Adams, J.J.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Monte Lee Toler ("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); Fla. R. App. P. 9.100.

On December 5, 2007, Petitioner was charged with DUI. Upon being transported to the DUI testing center, he was read the implied consent warnings but refused to submit to a breath test. His license was suspended for 12 months. After a formal review, the DHSMV hearing officer issued an Order on January 11, 2008, sustaining the suspension. Petitioner filed the instant Petition for Writ of Certiorari on February 11, 2008, and an Amended Petition on May 8, 2008.

The scope of a 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 driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended 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), Fla. Stat. (2007), effective October 1, 2006.

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

[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*

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 a driver's license 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 ... the suspension." §322.2615(7), Fla. Stat. (2005).

First, Petitioner alleges he did not receive procedural due process, because the hearing officer "made assumptions and took 'leaps of faith' and read more into the affidavits that were present. He argues that only the security guard observed him in the car, and that if he was not behind the wheel and did not have the keys in his possession, he could not be required to submit to a breath test. He argues: "Being drunk inside of a vehicle is not illegal." Second, Petitioner alleges the hearing officer failed to observe the essential requirements of law, because there was no probable cause to believe he was operating a motor vehicle while under the influence of alcoholic beverages.

Respondent argues there is competent, substantial evidence to support the hearing officer's determination that Petitioner was in actual physical control of the vehicle involved in the accident, based on the affidavits of the trooper and lay witnesses, which

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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

are attached to the Petition as Appendix B.

Procedural due process requires "fair notice and a real opportunity to be heard ... at a meaningful time and in a meaningful manner." *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001), *quoting Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitioner's claim that the hearing officer made assumptions or took "leaps of faith" with respect to the affidavits does not establish a due process violation. This claim goes rather to the issue of whether there was competent, substantial evidence to support the lower court's ruling, which will be addressed below.

Failure to observe the essential requirements of law has been held synonymous with failure to apply the correct law. *Hous. Auth. of Tampa v. Burton*, 874 So. 2d 6, 8 (Fla. 2d DCA 2004), *quoting Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Petitioner's claim that there was no probable cause to believe he was operating a motor vehicle while under the influence of alcoholic beverages also goes to the issue of whether there was competent, substantial evidence to support the lower court's ruling.

The Court finds the State's Response to be persuasive and concludes that there was competent, substantial evidence to support the hearing officer's ruling, based on the affidavit of Trooper William McKenzie. Trooper McKenzie responded to the scene of a crash at the Coronado Springs Resort, and spoke with security guards Daniel Klingler and Charles Lindsey, who had received a report of a subject lying on the hood of a vehicle in

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been suspended. *See, e.g., Dept. of Highway Safety and Motor Vehicles v. Smith*, 687 So.

the parking lot of the Coronado Springs Resort. On the way to the parking lot, Mr. Lindsey saw a traffic gate on Coronado Circle that had been struck and badly damaged. Mr. Klingler saw Petitioner's car stopped at a traffic light with its flashers on, and noted that Petitioner, the sole occupant, was in the driver's seat. By the time Mr. Klingler turned around, Petitioner was standing outside the car and urinating on the pavement. Mr. Klingler saw the car keys sitting on the passenger seat.

When Trooper McKenzie arrived, he saw Petitioner sitting in the driver's seat of the car, which had sustained damage. He noted the odor of alcohol emitting from Petitioner, who had bloodshot, glassy eyes, slurred speech, and unsteady balance. He made slow, clumsy movements and wore a green wristband consistent with those used in nightclubs. Petitioner performed poorly on field sobriety exercises, which the trooper discontinued out of safety concerns and because of Petitioner's inability to follow directions or maintain balance. Petitioner would not answer any questions about where he got the wristband, or what and how much he had to drink. He admitted no one else was in the vehicle, but also claimed he was not the driver.

Far from establishing only an unfounded assumption or leap of faith, the record provided the hearing officer with ample probable cause to conclude that Petitioner was driving or had been in actual physical control of a vehicle while under the influence of alcohol. Although no one actually observed Petitioner driving the vehicle, no other conclusion was reasonable under the circumstances.

2d 30, 32 (Fla. 1st DCA 1997).

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 __6th _____ day of July 2009.

_/S/_____
JULIE H. O'KANE
Circuit Judge

/S/_____
ROGER J. MCDONALD
Circuit Judge

/S/_____
GAIL A. ADAMS
Circuit Judge

Certificate of Service

I hereby certify that a copy of the foregoing Order Denying Petition for Writ of Certiorari has been furnished this ___6th____ day of July 2009 to Carlus L. Haynes, Esquire, 550 Bumby Avenue, Suite 280, Orlando, Florida 32803; 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