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

CHARLES LOUNSBERRY,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

CASE NO.: 2010-CA-24626-O
WRIT NO.: 10-100

Petition for Writ of Certiorari.

Adam L. Pollack, Esquire,
for Petitioner.

Jason Helfant, Assistant General Counsel,
for Respondent.

BEFORE THORPE, O'KANE, MIHOK, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Charles Lounsberry ("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 322.2615, Florida Statutes, the order sustained the suspension of his driver's license. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

Findings of Fact

As gathered from the hearing officer's findings of fact, the arrest affidavit, and other related documents provided at the formal review hearing, the facts were as follows: On August 28, 2010, Officer Justin Walker and Officer Steve Lorengo of the Maitland Police Department were traveling together southbound on State Road 600 at Magnolia Avenue in the City of Maitland in Orange County when Officer Lorengo visually estimated a vehicle traveling 10 miles below the speed limit and observed the vehicle almost striking a median. The officers then made a U-turn and followed the vehicle. The vehicle then changed lanes into the left turning lane at State Road 600 and Lake Avenue and came to a complete stop approximately 20 feet from the stop bar. The vehicle then slowly moved forward and came to another complete stop at the stop bar. Once the traffic light turned green the vehicle remained stationary for approximately 13 seconds before making the turn. After the vehicle completed the turn, the officers noticed that the vehicle made a sudden jerking motion and then it turned off the side of the road.

At this time, based on the officers' observations, Officer Walker conducted a traffic stop and the driver was identified as Petitioner. While speaking with Petitioner, Officer Lorengo observed signs of impairment, including the odor of alcohol coming from the vehicle and that Petitioner's eyes were bloodshot and glassy. Further, Petitioner admitted that he consumed alcoholic beverages before driving. Officer Walker then asked requested Petitioner to perform the field sobriety exercises and he agreed to do so. While performing the field sobriety exercises, Petitioner had trouble following instructions and he raised his arms for balance.

After completing the exercises, Petitioner was placed under arrest for driving under the influence and transported to the Orange County DUI Center. Petitioner was read the implied consent warning and he was asked to submit to a breath-alcohol test. Petitioner consented to the breath-alcohol test and was observed for the twenty minute period before the test was administered. Petitioner provided one valid breath sample of 0.50, but then he refused to provide the second breath sample after having ample opportunities to do so. Due to Petitioner's refusal to provide the required number of samples his privilege to operate a motor vehicle was suspended for one year.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on October 4, 2010. On October 12, 2010, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this order.

Standard of Review

"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. Where the driver's license was suspended for refusing to submit to a breath-alcohol test, 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 whose license was suspended 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)(b), Fla. Stat. (2010).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer departed from the essential requirements of the law and her decision to sustain Petitioner's license suspension based on Petitioner's refusal to provide the second breath sample was not supported by competent substantial evidence. Specifically, Petitioner argues that the hearing officer disregarded Rule 11D-8.002(12) of the Florida Administrative Code by not considering the fact that the machine in question was in good working order and that Petitioner blew a .05 breath-alcohol result which is less than the .08 legal limit.

Conversely, the Department argues that the hearing officer's order sustaining the suspension of Petitioner's driver's license conforms to the essential requirements of law and is supported by competent substantial evidence.

Court's Analysis and Findings

Petitioner's argument centers around Rule 11D-8.002(12) of the Florida Administrative Code that defines the approved breath alcohol test as follows:

> [a] minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

At the formal review hearing, Petitioner's counsel moved to invalidate the license suspension based upon the argument that the breath test instrument, the Intoxilizer 8000, was in good working order therefore the breath sample that Petitioner did provide was a valid sample. He claimed that the last sentence Rule 11D-8.002(12) that states "Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level" supports that the breath sample provided by Petitioner was sufficient and negates that Petitioner refused to comply with the test.

The hearing officer denied Petitioner's motion and in response, Petitioner's counsel requested that he be allowed to supplement the record with documentation showing that the Intoxilizer 8000 machine utilized in this case was operating in a good working manner and legally in compliance. The hearing officer granted his request and the supplemental documents were submitted accordingly. In the hearing officer's October 12, 2010 order she again denied the motion. Therefore, Petitioner brought this petition arguing that the hearing officer did not correctly apply Rule 11D-8.002(12) when she denied his motion.

This Court finds that upon the plain reading of the Rule 11D-8.002(12), it is clear that a minimum of two valid breath samples must be provided, thus helping to ensure that accurate test results are obtained. The portion of rule stating that "Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath

alcohol level", addresses the admissibility of a valid breath sample as evidence and does not negate the requirement that a person is required to provide at least two valid breath samples. If the drafters of the Rule had intended that only one valid breath sample is required, then the language in the first sentence of the Rule stating that a minimum of two breath samples be collected, instead, would have stated that a minimum of one breath sample be collected. Where a statute is plain and unambiguous there is no need for judicial interpretation. *Maddox v. State*, 923 So. 2d 442 (Fla. 2006). Also see *State of New Jersey v. White*, 602 A.2d 295 (N.J. Super. Ct. Law Div. 1991), where the court specially addressed a similar implied consent law and found that the clear wording of the statute indicated that drivers are deemed to consent to providing more than one breath sample.

Further, even if the language in Rule 11D-8.002(12) was not clear and interpretation of it was required, departing from the hearing officer's interpretation of the Rule would not be warranted unless the interpretation was clearly erroneous. "It suffices to say that it is well settled that the construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight, and the court generally will not depart there from except for the most cogent reasons and unless clearly erroneous. *Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585, 587 (Fla. 1968). "A statute is not unconstitutional simply because it is subject to differing interpretations. The administrative construction of a statute by the agency charged with its administration is entitled to great weight. We will not overturn an agency's interpretation unless clearly erroneous." *Dep't of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815, 820 (Fla. 1983). "As a general principle, the construction of a statute or regulation by the administrative agency charged with its enforcement and interpretation is entitled to great weight and persuasive

force, and the courts will not depart from that interpretation unless it is clearly erroneous." *Cohen v. School Board of Dade County, Florida*, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). Also see *State of Florida v. Saar*, 4 Fla. L. Weekly Supp. 744a (Fla. 15th Cir. Ct. May 16, 1997).

Accordingly, in the instant case, this Court finds that the hearing officer correctly applied Rule 11D-8.002(12) and her ruling was based upon competent substantial evidence supporting that Petitioner was properly cited for refusing to submit to the breath test by not providing the second breath sample. Among the evidence admitted at the formal review hearing and reviewed by the hearing officer was the arrest affidavit (DDL # 3), the breath alcohol test affidavit (DDL #4), and the refusal to submit to a breath test affidavit (DDL # 5). These documents support the hearing officer's findings that the implied consent warnings were given, the breath test operator complied with the test procedure, and Petitioner refused to perform the breath test by not providing the second breath sample. See *Kirkcaldy v. State of Florida, Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 306a (Fla. 8th Cir. Ct. January 20, 2006).

In addition, no evidence was presented that Petitioner attempted to provide a second breath sample including any evidence that the Intoxilzer 8000 testing instrument utilized was not in good working order. Such evidence could have shown that Petitioner was not capable of providing a second valid sample. On the contrary, as part of Petitioner's argument that the one breath sample was valid and sufficient, he argued that the Intoxilzer 8000 instrument was in good working order and provided the hearing officer with additional evidence in support of this claim.

Accordingly, this Court finds that Petitioner was provided due process of law and the hearing officer's decision to sustain Petitioner's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 24th day of January, 2012.

/S/
JANET C. THORPE
Circuit Court Judge

/S/
JULIE H. O'KANE
Circuit Court Judge

/S/
A. THOMAS MIHOK
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 **Adam L. Pollack, Esquire**, Law Office of Adam L. Pollack, P.A., 5151 Adanson Street, Suite 100, Orlando, Florida 32804 and Jason Helfant, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 540609, Lake Worth, Florida 33454-0609 on this 24th day of January, 2012.

/S/
Judicial Assistant