

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

AMY MCLARTY,

Petitioner,

v.

**CASE NO.: 2010-CA-12644-O
WRIT NO.: 10-33**

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

_____ /

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE LUBET, THORPE, RODRIGUEZ, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Amy McLarty (“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 one year suspension of her driver’s license for being under the age of twenty-one and refusing to submit to the breath-alcohol test. This Court has jurisdiction under

sections 322.2616(14), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

As gathered from the Affidavit of Probable Cause, Affidavit of Refusal to Submit to Breath Test, and the hearing officer's findings, on March 20, 2010, Deputy Scott Danjou with the Orange County Sheriff's Department observed a vehicle running a red light without stopping. Accordingly, he initiated a traffic stop and made contact with Petitioner who was the driver. Deputy Danjou identified Petitioner by her Florida driver's license that revealed she was under the age of twenty-one. Also, he detected the odor of an alcoholic beverage on Petitioner's breath and observed that her eyes were bloodshot, red, and glassy. Based upon his detection and observations of Petitioner, he requested that she perform the field sobriety exercises. Petitioner performed the field sobriety exercises and based upon her performance, Deputy Danjou determined that there were not enough clues (indicators of impairment) to arrest her for DUI. However, because she was under the age of twenty-one combined with the detection of alcohol on her breath, he requested that she submit to a breath-alcohol test. Petitioner refused to submit to the breath-alcohol test and was read the Implied Consent warning. Accordingly, Petitioner's driver's license was suspended for one year.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on April 28, 2010. On May 3, 2010, the hearing officer entered a written order denying Petitioner's motion and sustaining her driver's license suspension for a period of one year. Petitioner now seeks certiorari review of this order.

"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 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 a breath test after being requested to do so by a law enforcement or correctional officer.
4. Whether the person whose license was suspended was told that if he or she refused to submit to a breath 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), Fla. Stat. (2010).

In the Petition for Writ of Certiorari, Petitioner argues that (1) the probable cause affidavit was improperly attested to; (2) there existed no competent evidence in the record to establish that Petitioner was the driver in actual physical control of a vehicle; and (3) there existed no probable cause to stop and detain Petitioner. Conversely, the Department argues that the hearing officer properly sustained the suspension where there was competent substantial evidence to support the hearing officer’s decision.

Argument I: Petitioner argues that the probable cause affidavit of Deputy Danjou that was relied upon by the hearing officer was improperly attested to and legally insufficient to be considered an affidavit based upon the following:

- The signature of the individual who notarized the document was illegible;
- The document lacked a printed name revealing the identity of the notary;
- The document was only acknowledged instead of being sworn as required;
- The document showed the exact same signature in both the space for the signature of the officer and the space for the signature of the attesting officer. Thus, it appears that Deputy Danjou illegally attested his own signature;
- The document did not contain a notary seal; and
- The document failed to facially indicate whether the notary was a law enforcement officer, a notary public, or some other person with authority to administer an oath and function in a notarial capacity.

From review of the court record, the documents relied upon by the hearing officer were: Notice of Suspension, Affidavit of Probable Cause, Affidavit of Refusal to Submit to Breath Test, Petitioner's driver's license, and the FDOT conforming products list. The Affidavit of Probable Cause and the Affidavit of Refusal to Submit to Breath Test are unclear as to the signatures contained in them. Both Affidavits fail to include printed names of the signatories or a notary seal. So it is impossible to determine whether the affidavits were properly executed, sworn, and notarized or attested to.

Section 322.2616(3), Florida Statutes, requires that the law enforcement officer forward to the Department an affidavit stating the officer's grounds in support of the driver's license suspension. This Court concurs with Petitioner's argument and supporting case law as follows: In *Pina v. Simon-Pina*, 544 So. 2d 1161, 1162 (Fla. 5th DCA 1989), the Fifth District Court of Appeal addressed the difference between an affidavit and an acknowledgment that the former requires the person swearing before a notary must under oath assert that the facts set forth in the document are true and the latter merely declares that the person executed and signed the document.

In the instant case, it appears from the record that the Affidavits were the primary evidence relied upon by the hearing officer. There was no testimony provided by Deputy Danjou or any other law enforcement to provide clarification as to the signatories and whether the affidavits were properly sworn, notarized or attested to. Because the burden is on the Department to show that the suspension of Petitioner's driver's license was lawful, the Department should have called and elicited sworn testimony from Deputy Danjou and any other witnesses to provide clarification in support that the affidavits were properly executed, sworn, and notarized or attested to.

In *Messer v. Dep't of Highway Safety & Motor Vehicles*, 3 Fla. L. Weekly Supp. 563b (Cir. Ct. 9th Jud. Cir. 1995), the arrest form contained no indication that the illegible attestation signature was provided by someone with the authority to administer an oath or execute an affidavit. Also, the Department chose not to call and elicit sworn testimony from the arresting officer and any other witnesses. The Court found that the hearing officer lacked jurisdiction to continue the suspension of Messer's driver's license and the hearing officer's final order was not based on competent substantial evidence capable of supporting a finding of probable cause or establishing the legality of Petitioner's arrest. In *Messer*, the court cited *State v. Johnson*, 553 So. 2d 730 (Fla. 2d DCA 1989) (due process requires adherence to the legislature's mandate that before the Department of Motor Vehicles may initiate proceedings to suspend a person's privilege to operate a motor vehicle, it must first receive the arresting officer's properly sworn statement). Also, cited in *Messer* are cases, *J. Hammond v. E.L. Eastmoore*, 513 So. 2d 770 (Fla. 5th DCA 1987) and *McGibney v. Smith*, 511 So. 2d 1083 (Fla. 5th DCA 1987).

Accordingly, in the instant case, the Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of the law and was not based on competent substantial evidence. Because Petitioner's Argument I is dispositive, the Court finds that it is unnecessary to address Arguments II and III.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Amy McLarty's, Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__20th__ day of __May__, 2011.

_____/S/_____
MARC L. LUBET
Circuit Court Judge

_____/S/_____
JANET C. THORPE
Circuit Court Judge

_____/S/_____
JOSE R. RODRIGUEZ
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 **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803 and to **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, on this __20th__ day of __May__, 2011.

_____/S/_____
Judicial Assistant