

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

**WILLIAM ALLEN,**

Petitioner,

v.

**CASE NO.: 2011-CA-17182-O**

**WRIT NO.: 11-112**

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

Respondent.

\_\_\_\_\_ /

Petition for Writ of Certiorari  
from the Florida Department of  
Highway Safety and Motor Vehicles,  
Mary Varnadore, Hearing Officer.

Stuart I. Hyman, Esquire,  
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,  
for Respondent.

BEFORE EVANS, MUNYON, APTE, JJ.

PER CURIAM.

**FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, William Allen (“Allen”), 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 for refusing to submit to a breath test. 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, including the testimony, Charging Affidavit, and other related documents provided at the formal review hearings held on February 2, 2009, March 20, 2009, and November 17, 2011, the facts are summarized as follows:

On December 11, 2008 at approximately 10:50 p.m., Officer Julie Myers with the Orlando Police Department was on patrol at the parking garage at 53 West Central Boulevard in Orlando when she observed a vehicle waiting to exit the parking garage. It appeared to Officer Myers that the driver of the vehicle had fallen asleep. She also observed that the vehicle then rolled forward and stopped before almost hitting the car in front of it. Officer Myers then conducted a well-being check of the driver identified as Allen. Upon making contact with Allen, she smelled the odor of alcohol coming from the vehicle and noticed that his eyes were red and bloodshot. Allen admitted to consuming alcoholic beverages prior to operating the motor vehicle. Officer Myers also smelled the odor of alcohol on Allen's breath and noticed that his speech was slow.

Officer Steve Adams then arrived on the scene and Officer Myers relayed her observations to him. Officer Adams then conducted a DUI investigation. When Officer Adams made contact with Allen he noticed that Allen exhibited the same signs of impairment as relayed by Officer Myers. Also, upon exiting the vehicle, Allen was unsteady on his feet. Allen agreed to submit to the field sobriety exercises. While performing the exercises he had trouble following instructions and swayed while balancing. Officer Adams then arrested Allen for DUI and transported him to the breath test center. At the breath test center, Officer Adams read the implied consent warning to Allen and a breath test was requested. Allen refused to submit to the breath test and his privilege to drive was suspended for one year.

### *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). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum.” *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

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, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the 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. (2008).

### *Arguments*

In the Petition for Writ of Certiorari, Allen argues that: 1) There was no probable cause or reasonable suspicion to stop his vehicle or to detain him longer than necessary to issue a traffic citation; 2) The hearing officer improperly failed to set aside the license suspension when Officer Myers repeatedly failed to appear pursuant to a lawfully served subpoena; 3) The license suspension should have been set aside based upon the improper destruction of the roadside video; and 4) There was no probable cause to arrest him. Conversely, the Department argues that: 1) The administrative formal review hearing adhered to the essential requirements of the law and afforded Allen proper due process and 2) competent substantial evidence in the record supports the hearing officer's decision affirming the license suspension.

### *Analysis and Findings*

#### ***Argument II - The hearing officer improperly failed to set aside the license suspension when Officer Myers repeatedly failed to appear pursuant to a lawfully served subpoena:***

This Court first addresses Allen's second argument as it involves the procedural history of the formal review hearings as follows: Prior to the initial hearing on February 2, 2009, subpoenas were properly issued and served on Officer Myers and Officer Adams and breath tech operator, William Hardin. At the February 2, 2009, William Hardin testified, but Officers Myers and Adams did not appear and the hearing was continued to March 20, 2009. At the March 20, 2009 hearing, Allen appeared and provided testimony including his account of the events and issues leading to the stop of his vehicle, his detainment, arrest, and refusal to submit to the breath test. Officer Adams also appeared and testified, but again Officer Myers did not appear. Allen's counsel then made several motions including to set aside the suspension based on the repeated failure of Officer Myers to appear arguing that her testimony was crucial because the traffic stop was the primary issue in the case and she was the person who conducted the stop. The hearing

officer denied the motion and instead offered Allen's counsel the opportunity to enforce the subpoena in the circuit court.

After the March 20, 2009 hearing, the hearing officer entered a Final Order on March 30, 2009 sustaining the suspension. Allen's counsel then moved to vacate the Final Order and requested to enforce the subpoena of Officer Myers. On April 13, 2009, the hearing officer granted the Motion to Vacate the Final Order and continued the hearing until December 11, 2009, after she received a copy of the Petition to Enforce the Subpoena that had been filed in the circuit court.

According to Allen, after almost a two year period he became disenchanted with the length of the enforcement process and the hearing was re-noticed for November 17, 2011. At the hearing on November 17, 2011, Allen's counsel advised the hearing officer that the Petition for Enforcement had been voluntarily dismissed by Allen. Allen then sought a ruling on the motions he had previously made during the course of the hearings including the motion to set aside the license suspension based upon the fact that he had been denied due process of law by the failure of Officer Myers to appear. The hearing officer denied all of Allen's motions and stated in her rulings that the fellow officer rule applied rendering Officer Myers a non-critical witness. On November 23, 2011, the hearing officer entered the Final Order sustaining the license suspension.

Allen argues in his Petition that the hearing officer improperly failed to set aside the license suspension when Officer Myers repeatedly failed to appear pursuant to a lawfully served subpoena. Section 322.2615(6)(c), Florida Statutes, provides that a party may seek enforcement of a subpoena for a review hearing by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides.

Allen initially chose not to pursue enforcement of the subpoena in the circuit court and the hearing officer then made her rulings and entered the Final Order. However, shortly thereafter, Allen's counsel moved to vacate the Final Order in order to pursue enforcing the subpoena of Officer Myers and the hearing officer granted the Motion. Accordingly, from review of the specific procedural history in this case, this Court finds that Allen's right to due process was not violated. Allen was provided the opportunity to avail himself of the statutory procedure to secure the attendance of the witness and chose not to complete the enforcement process when he dismissed the Petition to Enforce the Subpoena.

***Argument I - There was no probable cause or reasonable suspicion to stop his vehicle or to detain him longer than necessary to issue a traffic citation:***

### ***The Stop***

Allen argues that there was no probable cause or reasonable suspicion to stop his vehicle. Upon review of the Charging Affidavit and Officer Adams' testimony, the observations that Officer Myers relayed to him that led her to conduct a well-being check of Allen included the appearance that Allen had fallen asleep while waiting to exit the garage and that Allen's vehicle rolled forward and stopped before almost hitting the car in front of it.

A person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992); *See Terry v. Ohio*, 392 U.S.1, 88 S. Ct. 1868 (1968); *State v. Carrillo*, 506 So.2d 495 (Fla. 5th DCA 1987). Accordingly, competent substantial evidence existed for the hearing officer to find that Officer Myers was justified in making the stop based on a

legitimate concern for the safety of Allen, who appeared to have fallen asleep, and for the safety of any other persons Allen could come in contact with while driving.

### *Allen's Detainment*

Allen also argues that there was no probable cause or reasonable suspicion to detain him longer than necessary to issue a traffic citation. Upon making contact with Allen, the signs of impairment that Officer Myers observed of Allen as relayed to Officer Adams included: 1) the odor of alcohol coming from the vehicle and Allen's breath; 2) Allen's red bloodshot eyes; 3) Allen's admittance to consuming alcoholic beverages prior to operating the motor vehicle; and 4) Allen's slow speech. In addition, when Officer Adams arrived on the scene and made contact with Allen, he observed the same signs of impairment as relayed by Officer Myers thus, supporting his decision to conduct the DUI investigation of Allen. Lastly, upon exiting the vehicle, Officer Adams observed that Allen was unsteady on his feet.

Accordingly, the totality of Officers Myers' and Adams' observations, including Allen's signs of impairment provided competent substantial evidence to support the hearing officer's findings that both the stop and the detainment of Allen for a DUI investigation, including the field sobriety exercises, were lawful. Further, notwithstanding the contrary testimony provided by Allen, the hearing officer as the finder of fact was responsible for weighing the evidence including the credibility of the witnesses. Accordingly, this Court's review can go no further in addressing this argument. *See Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) *citing Dep't of Highway Safety & Motor Vehicles v. Marshall*, 848 So. 2d 482 (Fla. 5th DCA 2003); *Dep't of Highway Safety & Motor Vehicles v. Dean*, 662 So. 2d 371 (Fla. 5th DCA 1995); *Rodriguez-Havlovic v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 536b (Fla. 9th Cir. Ct. 2006).

***Argument III - The license suspension should have been set aside based upon the improper destruction of the roadside video:***

At the hearing on March 20, 2009, Allen's counsel questioned Officer Adams about the roadside video. Officer Adams explained the process for handling the video as follows: The roadside videos are recorded onto a DVD. When the State Attorney requests the video, the original DVD is then placed into a locker in the Orlando Police Department's video department. At that point, the video department staff makes a copy of the DVD. The staff then sends the copy of the DVD to the State Attorney's Office and returns the original DVD to the law enforcement officer. According to Officer Adams, in this case, the video department had the original DVD for two weeks and then returned the original DVD to him. On the day of the hearing, Officer Adams reviewed the DVD, but found that it was blank. He also stated that there have been problems with the video camera on and off since October 2008 mostly due to the video department staff not being able to locate the video on the DVD.

When the hearing officer provided Officer Adams an opportunity to make an independent statement to provide any additional relevant information he stated:

The video is the video. That's out of my control. I hit record. If it records, it records. If it doesn't, I have no knowledge of it not recording. If the record light illuminates on the control head, I assume that it's videoing.

And he was arrested. He was in actual physical control, Officer Myers stopped him. I did the field sobriety exercises. I thought he was impaired. Placed him under arrest. He made no opportunity to take the breath test whatsoever.

Allen's counsel then moved to invalidate the suspension, claiming that the DVD was destroyed. The hearing officer denied the motion ruling that:

Officer Steve Adams testified that the disk was blank he stated, that he thought it was recording, but it was malfunctioning and did not record the roadside arrest. Counsel submitted no evidence or proof that Officer Adams had destroyed the DVD.



From review of the Charging Affidavit, Officer Adams' testimony, and the rest of the record there was no evidence that the video was destroyed. Instead, it was reasonable for the hearing officer to conclude that the video recording equipment or process malfunctioned. Further, notwithstanding the lack of the roadside video, the Charging Affidavit and Officer Adams' testimony provided competent substantial evidence to support the hearing officer's findings.

***Argument IV – There was no probable cause to arrest him:***

In the Petition, Allen argues that at the hearing he testified about his exemplary performance of the field sobriety exercises including his ability to keep his foot raised at all times and his ability to walk the line with no difficulty. He also claims that Officer Adams' report was devoid of any instructions provided to him concerning the field sobriety exercises and therefore the State failed to meet its burden that he was unable to comply with the instructions.

Contrary to this argument, in the Charging Affidavit, Officer Adams described the field sobriety exercises that were conducted and stated that they were instructed and demonstrated. Included in his account of Allen's performance of the field sobriety exercises, Officer Adams stated that during the walk and turn exercise: 1) Allen stepped from the instruction stance; 2) He failed to touch heel to toe on steps one, two, and four; 3) He made an improper turn; 4) He failed to touch heel to toe on steps three and five; and 5) After the turn, he touched heel to side of foot on step eight. As for Allen's performance of the one-leg-stand exercise, Officer Adams stated that: 1) Allen held his left ear; 2) He swayed while balancing; 3) He hopped and put his foot down at 1021 and 1022; and 4) He was told to stop at 1023 and he continued to count to 1024 and 1025.

Allen also argues that the breath test center video tape showed that his speech patterns were clear and uninhibited, his mental processes were logical, coherent, and thoughtful, and his eyes were white and not bloodshot or glassy, contrary to Officer Adams' report. This Court has reviewed the video from the breath test center. However, there was nothing blatant that the video revealed as to Allen's speech patterns, mental processes, or the condition of his eyes. To go further into examining the video and possibly speculating to determine Allen's level of impairment would exceed this Court's scope of review. Instead, the hearing officer, who also reviewed the video, as the finder of fact was responsible for discerning from the video the relevant information necessary for making her findings.

Lastly, Allen argues that both Officer Adams and Officer Myers described an odor of alcohol only coming from the vehicle, but there was no evidence of an odor of alcohol coming from him. Accordingly, he concludes that the evidence presented by the Department was insufficient to place him under arrest which required the higher standard of probable cause versus reasonable suspicion as the odor of alcohol and bloodshot eyes did not show that his normal faculties were impaired.

As discussed above, from review of the Charging Affidavit and Officer Adams' testimony, their observations of Allen's signs of impairment included: 1) the odor of alcohol coming from the vehicle and his breath; 2) red bloodshot eyes; 3) his admittance to consuming alcoholic beverages prior to driving; 4) his slow speech; 5) his unsteadiness on his feet when he exited the vehicle; and 6) his difficulty in performing the field sobriety exercises. These signs of impairment provided competent substantial evidence for the hearing officer to find that Officer Adams had probable cause to believe that Allen was driving or in actual physical control of a motor vehicle while under the influence of alcohol. Further, the hearing officer as the finder of

fact considered Allen's testimony and found it not persuasive. "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

***Conclusion***

Accordingly, this Court finds that Allen was provided due process of law and the hearing officer's decision to sustain Allen'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, William Allen's Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 3rd day of April, 2013.

/S/ \_\_\_\_\_  
**ROBERT M. EVANS**  
Circuit Court Judge

/S/ \_\_\_\_\_  
**LISA T. MUNYON**  
Circuit Court Judge

/S/ \_\_\_\_\_  
**ALAN S. APTE**  
Circuit Court Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803, [shymanlaw@aol.com](mailto:shymanlaw@aol.com) and **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, [kimgibbs@flhsmv.gov](mailto:kimgibbs@flhsmv.gov) on this 3rd day of April, 2013.

/S/ \_\_\_\_\_  
Judicial Assistant