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

EDWARD PRIETO,

Petitioner,

v.

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

Respondent.

_____/

CASE NO.: 2011-CA- 7011-O
WRIT NO.: 11-50

Petition for Writ of Certiorari.

William R. Ponall, Esquire and
Matthew P. Perry, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel
for Respondent.

BEFORE JOHNSON, O'KANE, WALLIS, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Edward Prieto ("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, the arrest affidavit, the video, and other related documents provided at the formal review hearing, the facts were as follows: On April 9, 2011, Officer Montfort[1] of the Orlando Police Department was dispatched to Washington Street and Rosalind Avenue in Orlando in reference to a single vehicle crash at Lake Eola. Officer McFarland heard the call over his radio and responded to the area. When Officer McFarland arrived at the scene, he observed a vehicle six feet from going into the water and when he made contact with Petitioner who was in the driver's seat of the vehicle and attempting to start the vehicle, he smelled the odor of alcohol emanating from Petitioner. Officer McFarland had Petitioner exit the vehicle and noticed that he was extremely unsteady on his feet, his speech was slurred, and the odor of alcohol increased when he spoke. Officer McFarland then called Officer Steven Adams to respond for a DUI investigation.

When Officer Adams arrived at the scene, Officer McFarland informed him of his observations as stated above. When Officer Montfort completed the crash investigation concluding that the damage to the vehicle was caused by Petitioner, he asked Officer Adams to speak to Petitioner. When Officer Adams made contact with Petitioner he recognized him from an earlier encounter about twenty minutes prior to the crash.[2] Officer Adams told Petitioner that he had just spoken to him during the prior encounter and that Officer Montfort had completed the crash investigation and determined Petitioner to be at fault. Officer Adams

[1] In Officer Adams' arrest affidavit, he spells the officer's last name "Montfort" and "Montford".

[2] During the prior encounter, Officer Adams observed Petitioner standing by the OFD Station 1 zipping his pants. Officer Adams then rode up to Petitioner and noticed that he was extremely unsteady on his feet. There was another person with Petitioner. Officer Adams asked Petitioner and the other person some questions including how they were getting home. In response, the other person stated that he would call his wife. Officer Adams also asked how they got downtown and per the other person's response, they got downtown in Petitioner's car. Officer Adams then told Petitioner not to drive.

then informed Petitioner that he was now conducting an investigation for DUI. Officer Adams informed Petitioner of the observations he had made and requested that Petitioner consent to performing the field sobriety exercises. According to Officer Adams, Petitioner stated something that was so mushy he was unable to understand. Officer Adams then told Petitioner that if he refused to perform the field sobriety exercises, he would have to base his decision whether to arrest him on the observations he had made. In response, Petitioner stated that he wasn't doing the test.

Based on the crash investigation, the observations of Officers McFarland and Adams, and the refusal to perform the field sobriety exercises, Officer Adams placed Petitioner under arrest for driving under the influence and transported him to the DUI Center. After the 20 minute observation, Officer Adams read Petitioner the implied consent warning and requested that he submit to a breath test. Petitioner's first response to this request was "roger". Following this response, Officer Adams asked Petitioner several times for a yes or no answer as to whether he would submit to the breath test. Ultimately, Petitioner answered "no". Petitioner's driver's license was suspended for refusing to submit to the breath test. *(See analysis and findings portion of this order that addresses in detail this Court's review of the video recording of the questions and answers that transpired.)*

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on May 9, 2011. On May 10, 2011, 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. (2011).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's decision to sustain Petitioner's license suspension is not supported by competent substantial evidence that petitioner actually refused to submit to a breath test. Specifically, Petitioner argues that the DVD video introduced into evidence at the formal review hearing established

that Petitioner repeatedly agreed to submit to a breath test but was not provided with the opportunity to do so by the arresting officer or the breath technician.

Conversely, the Department argues that the hearing officer properly sustained the suspension of Petitioner's driver's license where there was competent and substantial evidence to support his decision as the hearing officer's order indicates that he watched the DVD video and determined that the arresting officer's request for a breath test was ultimately answered by Petitioner with a negative response. Further, the Department points out that Petitioner did not appear and testify at his review hearing and no additional documents (other than the authenticity letter for the video) were presented to the hearing officer by Petitioner to rebut the record evidence. Lastly, the Department argues that the circuit court may not usurp the hearing officer's role as finder-of-fact and may not reweigh the evidence when conducting certiorari review.

Court's Analysis and Findings

At the formal review hearing Petitioner moved to invalidate his license suspension based on the DVD video recorded at the DUI Center/breath testing facility as evidence that Petitioner did not refuse to submit to the breath test. Accordingly, the video was entered into evidence. The hearing officer reserved ruling until he could review the video. Upon review of the video, the hearing officer on page four of his order denied the motion and stated:

> After viewing the video, it is this Hearing Officer's opinion that Mr. Prieto was given several opportunities to properly answer the request of Officer Adams. Mr. Prieto failed to follow the requests of Officer Adams by simply saying yes or no. Officer Adams request was ultimately answered with a negative response and accepted as a refusal.

This Court has reviewed the video. From what this Court can best discern from the video is that 1) Officer Adams first read to Petitioner the implied consent warning; 2) Officer

Adams then asked Petitioner if he would submit to the breath test; 3) Petitioner answered "roger"; 4) Officer Adams then instructed Petitioner to answer either yes or no to the question; 5) Petitioner responded " roger means yes in military terms" then he said "no"; 6) Officer Adams then read Petitioner the implied consent warning a second time and asked the question again; 7) Petitioner responded again " roger means yes"; 8) Officer Adams again instructed Petitioner that he must answer either yes or no to the question; 9) Petitioner responded "negative"; and 10) Petitioner was asked the question again at which point he responded in his final answer "no". [3] This final answer of "no" from Petitioner appears to be the only unequivocal answer he gave.

In certiorari review, this Court cannot reweigh the evidence considered by the hearing officer nor determine whether or not the hearing officer made the right decision. "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 et al.,* 794 So. 2d 1270, 1276 (Fla. 2001). This Court finds that the hearing officer's decision was supported by Officer Adams' arrest affidavit, the breath test refusal affidavit, the traffic citation for refusal to submit to the breath test, and the video. Also, as the Department pointed out, Petitioner did not appear and testify at the formal review hearing and did not provide any additional documents (other than the authenticity letter for the video) to rebut the record evidence. In the cases cited by Petitioner from the Thirteenth Judicial Circuit, both Petitioners testified at their formal review hearings refuting the Department's evidence, unlike in the instant case.

[3] It was unclear from viewing and listening to the video whether it was Officer Adams or another person such as the breath test technician or another law enforcement officer who asked the question the last time.

In addition, when administering the implied consent warning and determining whether or not a person has actually consented to submit to the breath test, it would be reasonable for law enforcement personnel and breath test technicians to require clear answers of yes or no. Therefore, it was reasonable for the hearing officer to conclude from the video that Petitioner refused to submit to the breath test based upon what appeared to be his final unequivocal answer of "no".

Lastly, this Court finds that there are no documents in the court record specifically addressing training policies and procedures for law enforcement and breath test technician personnel. However, as a side note only, it is possible that there exists a requirement for clear yes or no answers from rules or policies implemented by law enforcement, the Department, or other governmental agencies for training personnel when interpreting and enforcing the provisions addressing a person's refusal to submit to a breath test under section 322.2615(7)(b), Florida Statutes. Therefore, if such rules or policies exist, it would not be proper for this Court to depart from the hearing officer's interpretation of the requirements of the statute or any related administrative rule or policy unless the interpretation was clearly erroneous, which was not the situation in the instant case. "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). Also see *Dep't of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815 (Fla. 1983); *Cohen v. School Board of Dade County, Florida*, 450 So. 2d 1238 (Fla. 3d DCA 1984); *State of Florida v. Saar*, 4 Fla. L. Weekly Supp. 744a (Fla. 15th Cir. Ct. May 16, 1997).

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, Edward Prieto's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 9th day of February, 2012.

/S/
ANTHONY H. JOHNSON
Circuit Court Judge

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

/S/
F. RAND WALLIS
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, Esquire and Matthew P. Perry, Esquire,** Kirkconnell, Lindsey, Snure and Ponall, P.A., P.O. Box 2728, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 10th day of February, 2012.

/S/
Judicial Assistant