

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

JAMES CHRISTOPHER BURRELL,

Petitioner,

v.

**CASE NO.: 2012-CA-3666-O
WRIT NO.: 12-16**

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

Respondent.

Petition for Writ of Certiorari.

Matthew P. Ferry, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE MURPHY, WALLIS, HIGBEE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, James Christopher Burrell (“Burrell”), 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 Arrest Affidavit and other related documents provided at the formal review hearing held on February 3, 2012, the facts were as follows:

On December 2, 2011, Officer Steven Morris of the Maitland Police Department observed a dark colored truck directly in front of his patrol vehicle. While traveling behind the truck the officer observed the driver side tires cross onto the dotted divided line twice and the passenger side tires cross onto the solid white curb line one time. The officer then observed the truck make a left turn while the traffic control signal for the lane of travel was red. The officer activated his emergency equipment and conducted a traffic stop. The driver of the truck was identified as Burrell who was the sole occupant of the vehicle. While speaking with Burrell, the officer detected a strong odor of an alcoholic beverage coming from his breath and noticed his eyes were red and glassy. Burrell had difficulty retrieving the documents the officer requested and had to be asked repeatedly for the documents. The officer then asked Burrell to complete the field sobriety exercises and he agreed. Burrell performed the exercises poorly as he took the incorrect number of steps, exhibited an orbital sway, and recited the alphabet incorrectly. Burrell also admitted to consuming three sixteen ounce beers.

Based on Officer Morris' personal observations including Burrell's driving pattern, his signs of impairment, and his poor performance of the exercises, Burrell was placed under arrest for DUI and transported to the Orange County Breath Test Center. Burrell was then observed for twenty minutes, read the Implied Consent Warning, and was requested to submit to a breath test. Burrell refused to submit to the breath test and his privilege to operate a motor vehicle was suspended for a period of one year.

The formal review hearing was originally scheduled for January 4, 2012 but Officer Steven Morris, who was subpoenaed by Burrell, was unable to attend and provided the hearing officer with just cause. The hearing was continued to February 3, 2012 and Officer Morris failed to appear again, but this time he did not provide the hearing officer with just cause for not complying with the subpoena. The hearing officer then advised Burrell's counsel of his option to seek enforcement through the circuit court or waive Officer Morris' testimony and provide the hearing officer with his final objections and motions. Burrell's counsel made a motion to invalidate the suspension based on the officer's failure to appear and the hearing officer denied the motion on the record. Burrell's counsel chose not to seek enforcement of the subpoena and did not provide the hearing officer with any final motions or objections.

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. (2011).

Arguments

In the Petition for Writ of Certiorari, Burrell argues that Officer Morris' failure to appear albeit with just cause at the originally scheduled formal review hearing on January 4, 2012, and his failure to appear without providing just cause at the subsequent scheduled hearing on February 3, 2012, deprived him of his right to due process.¹

Conversely, the Department argues that Burrell was not denied due process because the hearing officer granted his request to subpoena Officer Morris and provided him the opportunity to seek enforcement of the subpoena in the circuit court including the granting of a continuance of the hearing and extension of his temporary driving permit. Therefore, the Department argues that Burrell's failure to seek enforcement of Officer Morris' subpoena does not constitute a violation of due process and the procedure that the hearing officer instructed Burrell to follow is consistent with both statutory and case law.

¹ In the Petition under Argument II, Burrell also challenged the constitutionality of section 322.2615(6)(c), Florida Statutes. On May 23, 2012, this Court struck without prejudice Argument II as it should be brought as an original action, not in a certiorari review proceeding.

Analysis and Findings

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. However, Rule 15A-6.015(2)(c) of the Florida Administrative Code states that no hearing shall be continued for a second failure to appear.

In this case, the formal review hearing held on January 4, 2012 was continued to February 3, 2012 due to Officer Morris' failure to appear. At the February hearing, Officer Morris again failed to appear and at that time the hearing officer was without authority to continue the hearing again. Therefore, Burrell was not required to seek enforcement of the subpoena in the circuit court as to Officer Morris' second failure to appear. Accordingly, the hearing officer's decision to sustain Burrell's license suspension departed from the essential requirements of the law.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, James Christopher Burrell'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 25th day of September, 2012.

/S/ _____
MIKE MURPHY
Circuit Court Judge

/S/ _____
F. RAND WALLIS
Circuit Court Judge

/S/ _____
HEATHER L. HIGBEE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Matthew P. Ferry, Esquire**, Law Office of Warren W. Lindsey, P.A., 1150 Louisiana Avenue, Suite 2, Winter Park, FL 32789 and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 28th day of September, 2012.

/S/ _____
Judicial Assistant