

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

KEVIN ANDERSON,

CASE NO.: 2012-CA-6133-O

WRIT NO.: 12-26

Petitioner,

v.

**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,
Ronald Barnes, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE ROCHE, LUBET, EGAN, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Anderson (“Anderson”), 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).

Findings of Fact

As gathered from the hearing officer's findings, including the Charging Affidavit and testimony from Officer Jeffrey Hershone, Officer Adrian Aguilera's sworn statement, the Affidavit of Refusal to Submit to Breath Test, and other related documents provided at the formal review hearing held on February 14, 2012 and March 9, 2012, the facts were as follows:

On January 15, 2012 at approximately 4:52 p.m., per a call from witness, Pamela Smith, officers from the Winter Park Police Department were dispatched and responded to the scene of a suspicious vehicle. The officers were informed that the vehicle was parked facing the wrong way on Park Avenue and that the driver, a white male wearing black shorts and operating a red Ford SUV, had been seen walking in the middle of the roadway.

Officer Aguilera was the first officer to respond and observed a vehicle matching the description of the dispatch call that was parked the wrong way, facing northbound on the southbound side of the roadway. Officer Aguilera also observed that the occupant of the vehicle, later identified as Anderson, was sitting in the driver seat and matched the description of the dispatch call. Anderson was requested to provide his driver license and he stated that it was in his wallet. However, after searching for his wallet, he could not locate it and stated that he must have left it at the bar. Officer Aguilera observed that Anderson leaned back and almost fell over when exiting his vehicle to search for his wallet. Anderson's wallet was later found in the vehicle. Officer Aguilera also observed three empty bottles of vodka on the ground directly below the driver side door of the vehicle.

Officer Jeffrey Hershone was the second officer to arrive at the scene and observed that Anderson was sitting on a park bench. Officer Hershone was informed by Officer

Aguilera that he had found Anderson sitting in the driver seat and in physical control of the vehicle when he arrived at the scene. Officer Hershone then looked into Anderson's vehicle and observed that the vehicle key was in the open area, in front of the vehicle cup holders and within inches of where Anderson had been seated. Officer Hershone also observed three empty small plastic vodka bottles in the vehicle.

Officer Hershone then spoke with witness Smith who reported that she was on Park Avenue when she observed Anderson pull up to the curb and parallel park on the wrong side of the road (left wheels to the curb). She stated that Anderson's vehicle almost struck another vehicle and a pedestrian as it pulled in. She then observed Anderson get out of the vehicle and stumble around. She also observed Anderson throw an unknown bottle under his vehicle and observed him walking across the street and in the middle of the roadway to the extent that other vehicles had to stop for him.

Upon making contact with Anderson, Officer Hershone could smell the odor of alcohol coming from his mouth as he spoke. His eyes were glassy/watery in appearance and his eyelids were slow blinking. Also, some of the words he spoke had a slur to them. Officer Hershone then explained to Anderson his concerns and requested that he perform the field sobriety exercises to make sure that he was okay to drive. Anderson consented and performed the exercises poorly exhibiting further clues of impairment including an extreme orbital sway to the point where Officer Hershone had to put his hand up to prevent his falling. He also had a lack of smooth pursuit and nystagmus in both eyes, having to be reminded to follow the stimulus several times during the HGN exercise. He had to use his arms for balance and was unable to maintain the starting position, putting his foot down and stumbling to the side significantly enough so that the one-legged stand exercise was stopped for his safety. He fell

out of the starting position during the instruction five to seven times, and was so precarious in his balance that the walk-and-turn exercise was stopped for his safety.

According to Officer Hershone, based on the totality of the circumstances and the determination that Anderson was in physical control of his vehicle, he placed Anderson under arrest for DUI. Then, while walking to the patrol vehicle, Anderson had to be held to keep from falling. Also, while his vehicle was being searched, he was unable to maintain his balance and had to be held by Officer Aguilera. Further, the post-arrest search of Anderson's vehicle revealed a full bottle of the same brand of vodka as was found under his vehicle.

Anderson was then transported to the Winter Park Police Department where the twenty minute observation period was completed and he was read the implied consent warning. Anderson refused to submit to the breath test. Anderson also admitted, post-Miranda, that he had consumed a bottle of vodka of the same brand as the empty bottles found under his vehicle. Anderson's driver's license 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. (2012).

Argument I – Failure of Hearing Officer to Recuse Himself

Anderson argues that the hearing officer erred by not recusing himself and making findings that were not supported by competent substantial evidence. At the formal review hearing held on February 14, 2012, counsel for Anderson submitted to the hearing officer a Motion to Recuse. The Motion was based upon information provided to Anderson's counsel, Stuart Hyman, on April 20, 2011 pursuant to a public records request submitted by Mr. Hyman. The information was a report spanning October 2010 through April 2011 that included the number of hearings presided over by Hearing Officer Ronald Barnes (182) with a breakdown of the number of license suspensions sustained (177) and invalidated (18). The hearings addressed in the report were unrelated to Anderson's hearings. However, Anderson claims, that based on the disparity of the 177 license suspensions sustained verses the 18

license suspensions invalidated, he believed that he would not receive a fair and impartial hearing from Hearing Officer Barnes. At Anderson's formal review hearing on February 14, 2012, Hearing Officer Barnes denied the motion.

Rule 15A-6.008 of the Florida Administrative Code addresses recusal of hearing officers and requires the following:

(1) Any motion for recusal of a hearing officer shall be filed with the hearing officer before whom the case is pending prior to the start of the hearing. The motion shall be accompanied by a written statement stating particular grounds for which a hearing officer may be recused. The written statement must state facts sufficient to show that the driver has a well-founded fear that he will not receive a fair and impartial hearing.

(2) Unless denied as untimely, a motion shall be decided by the hearing officer before whom the case is pending. The hearing officer shall determine the legal sufficiency of the motion and affidavit. If the motion and affidavit are found to be legally sufficient, the hearing officer shall recuse himself or herself, after which the division shall appoint another hearing officer to hear the case.

First, per the transcript it appears that the Motion to Recuse was not provided to Hearing Officer Barnes until at the hearing on February 14, 2012. Also, the Motion's certificate of service states that the Motion was furnished to the Division of Driver Licenses, Bureau of Driver Improvement on February 14, 2012. Therefore, it appears that the Motion was not provided to Hearing Officer Barnes prior to the start of the hearing. *See Perez v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 354a (Fla. 11th Cir. Ct. 2011).

Second, notwithstanding the possible untimeliness of the Motion, it was insufficient because it lacked a supporting affidavit from Anderson. Rule 15A-6.008(2), Florida Administrative Code. The Motion also lacked a certificate of good faith from counsel. *See* section 38.10, Florida Statutes; Florida Rule of Judicial Administration 2.330; *Perez* at 18 Fla. L. Weekly Supp. 354a.

Third, the Motion was legally insufficient as it lacked sufficient grounds. The only ground asserted in the Motion addressed the report of prior rulings made by Hearing Officer Barnes that also were unrelated to Anderson's license suspension. Adverse prior rulings are not legally sufficient as grounds for a motion to recuse or to disqualify a hearing officer. See *Krawczuk v. State*, 92 So. 3d 195 (Fla. 2012); *Jackson v. State*, 599 So. 2d 103 (Fla. 1992); *Howard v. State*, 950 So. 2d 1260 (Fla. 5th DCA 2007); *Winburn v. Earl's Well Drilling & Pump Service*, 939 So. 2d 199 (Fla. 5th DCA 2006); see also *Ginther v. Dep't of Highway Safety & Motor Vehicles*, Case No. 2003-30622-CICI (Fla. 7th Cir. Ct. 2003).

Lastly, upon review of the transcripts from Anderson's formal review hearings, this Court finds no action or ruling by Hearing Officer Barnes that would support the Motion to Recuse him in this case and his rulings were based on competent substantial evidence as addressed below under Arguments II and III.

Arguments II & III

Lack of Probable Cause or Reasonable Suspicion for the Stop, Detainment, and Arrest

Anderson first argues that when Officer Aguilera initiated the traffic stop and detained him for further investigation, the evidence failed to establish that Officer Aguilera had probable cause or reasonable suspicion to make the stop and detain him because he did not observe Anderson driving or in actual physical control of the vehicle, but instead he only relied upon the information provided by witness Smith. Anderson also argues that Officer Hershone illegally arrested him in violation of section 901.15, Florida Statutes, because all the elements of a violation under chapter 316, Florida Statutes, were not committed in Officer Hershone's presence.

At the formal review hearing, Anderson's counsel moved to invalidate the suspension arguing that witness Smith's observations were the basis for the traffic stop. Hearing Officer Barnes denied the motion and stated that he did not consider any evidence by witness Smith, but instead, he found that the independent observations of the officers were sufficient cause for the traffic stop.

Anderson's counsel also moved to invalidate the suspension claiming that there was no probable cause for the stop because: 1) Officer Aguilera's statement did not provide probable cause for the stop because Anderson's vehicle was parked on his arrival and he did not observe Anderson operating the vehicle; 2) Anything Officer Aguilera told Officer Hershone was hearsay; and 3) Officer Hershone did not observe Anderson being in physical control of the vehicle.

Section 901.15 (5), Florida Statutes (2012), provides that a law enforcement officer may arrest a person without a warrant when:

A violation of chapter 316 has been committed in the presence of the officer. Such an arrest may be made immediately or in fresh pursuit. Any law enforcement officer, upon receiving information relayed to him or her from a fellow officer stationed on the ground or in the air that a driver of a vehicle has violated chapter 316, may arrest the driver for violation of those laws when reasonable and proper identification of the vehicle and the violation has been communicated to the arresting officer.

Also, as correctly pointed out in the Department's Response to the Petition, in administrative proceedings such as formal review hearings addressing driver license suspensions as in the instant case, the documents provided by law enforcement are self-authenticating pursuant to section 322.2615(2), Florida Statutes, and Rule 15A-6.013(2), Florida Administrative Code. Therefore, formal review hearings may be conducted based solely upon a review of the written reports of the arresting officer and supporting documents. *Dep't of Highway Safety &*

Motor Vehicles v. Dean, 662 So.2d 371, 373 (Fla. 5th DCA 1995); *Dep't of Highway Safety & Motor Vehicles v. Swegheimer*, 847 So. 2d 545 (Fla. 5th DCA 2003). Accordingly, in the instant case, Hearing Officer Barnes was authorized to rely solely on the documents submitted by law enforcement.

In his ruling, Hearing Officer Barnes found that the officers responded independently to a call from their dispatch. Officer Aguilera observed that the vehicle specified by dispatch was illegally parked, constituting an infraction, and further observed Anderson seated in the driver seat of the vehicle, in physical control. Officer Hershone, after being informed of Officer Aguilera's observations, ascertained that the vehicle keys were within easy reach of Anderson, further providing competent substantial evidence of Anderson being in physical control of a motor vehicle.

This Court finds that upon review of the transcripts from the hearings and Hearing Officer Barnes' order including his detailed findings of fact, conclusions of law, and decision, Hearing Officer Barnes applied the correct law when he made his rulings. Further, from review of the record evidence including the officers' observations as gathered from Officer Hershone's Charging Affidavit, his testimony, and Officer Aguilera's sworn statement, competent substantial evidence existed in support of Hearing Officer Barnes' findings and rulings that Anderson was driving or in actual physical control of the vehicle while under the influence of alcoholic beverages and that Officers Hershone and Aguilera had reasonable suspicion to make the traffic stop, detain Anderson, and had probable cause to arrest him for driving under the influence of alcohol.

Conclusion

Accordingly, upon review of the hearing officer's order in conjunction with all the other documents in the record, this Court finds that Anderson was provided due process of law and the hearing officer's decision to sustain his 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, Kevin Anderson's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 5th day of November, 2012.

/S/ _____
RENEE A. ROCHE
Circuit Court Judge

/S/ _____
MARC L. LUBET
Circuit Court Judge

/S/ _____
ROBERT J. EGAN
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 and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 5th day of November, 2012.

/S/ _____
Judicial Assistant