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

ANDREW J. REYNOLDS,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES,

Respondent.
_____/

CASE NO. 2013-CA-13279-O

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

Matthew R. Bark, Esq.
Attorney for Petitioner

Richard M. Coln, Esq.
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
Attorney for Respondent

Before DAVIS, BLACKWELL, HIGBEE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner seeks review of a final order of the Department of Highway Safety and Motor Vehicles sustaining the suspension of his driver's license following an arrest for driving under the influence. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). The Court's review is limited to a determination of whether procedural due process was accorded, whether the essential

requirements of law were observed, and whether the administrative order is supported by competent substantial evidence. *Florida Dept. of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008).

Factual Background

According to the testimony of Deputy Nye at the Department hearing held on October 1, 2013, and the documents reviewed by the hearing officer, Nye observed Petitioner's vehicle driving away from a bar on August 31, 2013 at about 1:30 a.m. He noticed that the car had very dark window tint and that its tag light was not functioning. The car drove a short distance, pulled into a business's parking lot and parked in a clearly marked handicap parking spot. Nye initiated a traffic stop. Petitioner admitted he was not handicapped and did not have a handicap parking placard or sticker Nye smelled alcohol on Petitioner's breath and observed red, glassy eyes.

Deputy Danjou arrived and conducted a DUI investigation. According to his arrest affidavit, Danjou also noted the odor of alcohol and red, glassy eyes with dilated pupils. Petitioner told Danjou he had consumed a couple of beers. On the field sobriety tests, Danjou reported some loss of balance and a stumble, as well as a failure to follow instructions, failure to walk heel to toe on all steps, and swaying while listening to directions. Petitioner was arrested for DUI and refused a breath test.

Deputy's Failure to Appear

Petitioner had Deputy Nye and Deputy Danjou subpoenaed for the license suspension hearing. Danjou contacted the hearing officer five days before the hearing and asked for a continuance because he had to be in court the day of the hearing. Instead of scheduling a continuance, the hearing officer explained to Petitioner's attorney at the hearing that Danjou could not attend. He suggested that they take the testimony of Deputy Nye, who was there, and

then continue hearing so that Petitioner's attorney could question Deputy Danjou at another time. Counsel declined a continuance. Instead, he argued that Petitioner was entitled to have the license suspension dismissed under the newly added final sentence of section 322.2615(11), Florida Statutes (2013), which reads:

> (11) The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. **If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension.**

§ 322.2615(11), Fla. Stat. (2013). (Emphasis added).

The hearing officer heard the testimony of Deputy Nye, and reviewed the documentary evidence. Petitioner's attorney also placed into evidence a video recording of the field sobriety exercises. The hearing officer refused to invalidate the suspension based on the absence of Deputy Danjou and upheld the license suspension.

The question for review is whether Deputy Danjou failed to appear as meant by section 322.2615(11). Petitioner argues that "fails to appear" should be given it most literal meaning: Danjou was not at the hearing; therefore he failed to appear. Because this is a new provision of section 322.2615(11), there is no other reported case law yet interpreting it. The Department's own procedural rules, however, do clarify the term. Chapter 15A-6 of the Florida Administrative Code sets out the rules for license suspension hearings. Rule 15A-6.015 is entitled "Failure to Appear" and subsection (d) states:

> (d) Notification to the department of a witness's non-appearance with just cause prior to the start of a scheduled formal review shall not be deemed a failure to appear.

This same rule, at subsection (b), defines "just cause" as "extraordinary circumstances beyond the control of . . . the witness which prevent that person from attending the hearing," and states that if just cause is shown, the hearing *shall* be continued.

While an agency's interpretation of the statute it is charged with enforcing is entitled to great deference, "a court need not defer to an agency's construction or application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute." *Florida Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 847-48 (Fla. 1st DCA 2002). The interpretation of "fails to appear" is not a one that requires special agency expertise and Petitioner argues that the agency rule conflicts with the plain meaning of the new statute. But, the agency is charged by statute to adopt rules for the conduct of license suspension hearings:

> (12) The formal review hearing and the informal review hearing are exempt from the provisions of chapter 120. The department may adopt rules for the conduct of reviews under this section.

§ 322.2615(12), Fla. Stat. (2013). Additionally, section 322.2615(6)(b), Florida Statutes (2013), states:

> the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a), regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension.

A rule defining what does and does constitute a failure to appear falls within the agency's authority to adopt procedural rules regarding the conduct of its hearings. The statute does not define "fails to appear," and the Department's rule concerning this phrase cannot be considered an unreasonable one. It gives the parties and the hearing officer guidance as to how to handle witness attendance problems.

Further, the Department rule, as it currently reads, was in existence at the time the legislature added the new sentence to section 322.2615(11). When the legislature reenacts or amends a statute, it is presumed to know and adopt the construction placed on the statute by the administrative agency charged with enforcing it, except to the extent that the new statute differs from prior constructions. *State ex rel. Szabo Food Services, Inc. of N. Carolina v. Dickinson*, 286 So. 2d 529, 531 (Fla. 1973); *Cole Vision Corp. v. Dep't of Bus. & Prof'l Regulation, Bd. of Optometry*, 688 So. 2d 404, 408 (Fla. 1st DCA 1997). There is nothing in the amended section 322.2615(11) to suggest the legislature intended to redefine "failure to appear" in a manner that differed from the already-existing Department rule.

Danjou notified the hearing officer in advance, and the hearing officer made a finding that Danjou had just cause not to attend. Danjou thus did not fail to appear. The hearing officer offered to extend Petitioner's driving permit until Danjou's testimony could be obtained. Since Petitioner's attorney refused a continuance, the hearing officer properly ruled based on the evidence available to him at the time.

In short, the Department did not depart from the essential requirements of law or deny due process by refusing to invalidate the license suspension because of Danjou's absence. To interpret the new statutory provision as Petitioner argues would be to allow persons to escape a license suspension on the basis of any number of random, unforeseeable events that could prevent an officer from attending a hearing. Drivers are entitled to fair hearings and to have their subpoenaed witnesses appear; they are not entitled to an automatic dismissal on the basis of luck.

Reasonable Suspicion for Stop and Probable Cause to Arrest

The remaining issue for review is whether there was substantial competent evidence to support the hearing officer's conclusion that the traffic stop and subsequent arrest were lawful.

A hearing officer only needs to find reasonable suspicion and probable cause by a preponderance of the evidence. *Dep't of Highway Safety & Motor Vehicles v. Swegheimer*, 847 So. 2d 545, 546 (Fla. 5th DCA 2003). The Court is not to review the evidence to make an independent assessment, but instead, the "sole starting (and ending) point is a search of the record for competent substantial evidence *supporting* the decision." *State, Dept. of Highway Safety & Motor Vehicles v. Wiggins*, 1D13-2471, 2014 WL 4358472 (Fla. 1st DCA 2014) (Emphasis in original).

The hearing officer's conclusion that there was reasonable suspicion for the stop is supported by Nye's testimony that Petitioner's tag light was not illuminated; this is a violation of section 316.22(2), Florida Statutes (2013) and allows a stop. *Davison v. State*, 15 So. 3d 34, 35 (Fla. 1st DCA 2009).

To request that a driver perform field sobriety exercises, an officer needs to have reasonable suspicion of impairment. *State, Dept. of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999). The hearing officer made a finding of reasonable suspicion based on Petitioner's admission that he had been drinking, the odor of alcohol emanating from him and his watery, bloodshot eyes. While no one of these factors on their own might have been sufficient to support a finding of reasonable suspicion, in concert they do, particularly where reasonable suspicion need only be established by a preponderance of the evidence. See, e.g., *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) (bloodshot, watery eyes and slow movements); *Robinson v. Dep't of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 641a (Fla. 9th Cir. Ct. 2013) (odor, slurred speech and admission of drinking); *Fewell v. State*, 14 Fla. L. Weekly Supp. 704a (Fla. 9th Cir.Ct.2007) (odor, bloodshot eyes and sunburned appearance).

The deputies needed probable cause to arrest Petitioner for DUI. The hearing officer made a finding of probable cause based on the above mentioned factors supporting reasonable suspicion, coupled with Petitioner's performance on the field sobriety exercises. The description of the field sobriety exercises did not seem to indicate an egregiously poor performance but some swaying, stumbling and other mistakes were reported. As this Court said in *Meade v. State of Florida, Dept. of Highway Safety and Motor Vehicles*, 21 Fla. L. Weekly Supp. 479(a) (Fla. 9th Cir. Ct. 2013), "once the reviewing court determines that there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end as the issue is not whether the hearing officer made the best, right, or wise decision, instead, the issue is whether the hearing officer made a lawful decision." The hearing officer's finding of probable cause in this case is supported by the record.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 7th day of October , 2014.

/S/
JENIFER M. DAVIS
Presiding Circuit Judge

BLACKWELL and HIGBEE J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Matthew R. Bark, Esq.,** 999 Douglas Avenue, Suite 3317, Altamonte Springs, Florida 32714; and **Richard M. Coln, Esq, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 7th day of October , 2014.

/S/
Judicial Assistant