

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

FREDERICK BOND,

CASE NO.: 2013-CA-006539-O

Petitioner,

WRIT NO.: 13-40

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

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

Thomas B. Feiter, Esquire,
for Petitioner.

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

Before MIHOK, LUBET, and G. ADAMS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Frederick Bond (“Bond”) 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 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 ICJIS Arrest Affidavit with Statements, Breath Alcohol Test Affidavit, Affidavit of Refusal to Submit to Breath Test, and other documents submitted at the formal review hearing on April 8, 2013, the facts are summarized as follows: On March 3, 2013, at approximately 3:03 a.m., Officer Donald LaCentra with the Orlando Police Department (“OPD”) was at the scene of a hit-and-run DUI crash assisting other OPD officers, Officer William Becton and Officer Mills, at the intersection of Long Street and Easy Avenue in Orlando. Officer LaCentra was blocking oncoming traffic while Officer Becton conducted the crash investigation. While blocking the traffic, Officer LaCentra’s patrol vehicle had the steady red and blue light overhead lights activated and Officer Becton’s rear flashing lights were activated to warn oncoming traffic of the road closure ahead. Both vehicles were west of the intersection to allow traffic to turn onto Easy Avenue.

While conducting the road block, Officer LaCentra observed a vehicle approaching his patrol vehicle. Officer LaCentra then motioned the vehicle to turn on Easy Avenue; however, the vehicle did not do so and began to pull forward towards the road block. Officer LaCentra again motioned the vehicle to turn and the vehicle then stopped. At that point, Office LaCentra approached the vehicle and informed the driver, later identified as Bond, of the road closure. Officer LaCentra observed that Bond looked confused, his eyes were glassy, and his speech was thick and slurred. Bond then began to pull the vehicle forward about to hit the curb and the officer told him to stop. When asked if he had been drinking and where he was coming from, Bond had difficulty answering the questions, took his seat belt off, and tried to get out of the vehicle. Officer LaCentra asked Bond why he was getting out of the vehicle as he was not requested to do so. Bond then stopped in attempting to exit the vehicle. While speaking with

Bond, Officer LaCentra noticed that Bond's answers were delayed and he was slow in responding. At that point, Officer LaCentra conducted a traffic stop and notified Officer Becton, a DUI officer, to take over the stop.

Officer Becton also observed that Bond's vehicle was trying to fit in between the patrol vehicle and the curb on Long Street. Also, he observed that when Bond exited the vehicle per the traffic stop, he used his vehicle to prop himself up. Upon making contact with Bond, Officer Becton noticed that Bond had an orbital sway as he stood still. When Bond answered his questions, Officer Becton detected the strong odor of alcohol impurities coming from Bond and when Bond spoke he had a very strong slur to his speech. At that point, Officer Becton requested Bond to perform the field sobriety exercises. Bond agreed and performed the exercises poorly.

Bond was then placed under arrest and transported to the Orange County DUI Testing Center where Bond was observed for the 20 minute observation period and was read the Implied Consent Warnings. Bond was requested to submit to the breath test. Bond consented to the breath test, however, he failed to provide proper breath samples which resulted in Officer Becton calling a refusal and Bond's driver license was suspended.

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-alcohol 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. (2013).

Arguments

In the Petition for Writ of Certiorari, Bond argues that the Hearing Officer’s decision is not supported by competent substantial evidence because: 1) the Arrest Affidavit and Statement were improperly notarized or attested; 2) there is a discrepancy as the arrest occurred on March 3, 2013, but the Arrest Affidavit was not signed by the other officer until March 20, 2013; and 3) the Arrest Affidavit and Statement lack reasons as to why the breath samples were deemed a refusal and lack facts that Bond was re-instructed on how to blow or warned that failure to properly blow would result in a refusal.

Analysis

Argument I – addressing the notarization or attestation of the documents in evidence:

First, Bond argues that the Arrest Affidavit and Statement were improperly notarized or attested to. Section 117.10, Florida Statutes, provides that law enforcement officers are permitted to administer oaths when engaged in the performance of official duties. At the formal review hearing, there was no testimony provided so the question centers on whether the evidence provided to the Hearing Officer, without testimony, confirms that the applicable documents in the record were sworn to before a proper notary or another law enforcement officer or corrections officer as required by law.

Upon review of the documents in evidence, this Court finds that the following were included: 1) At the bottom of all 3 pages of the Arrest Affidavit, Officer Becton's signature and badge # 11262 is under the portion "I swear or affirm that the statements are true and correct" and the attesting officer's signature and printed name, Officer Shorter and badge # 19013 is included under the "sworn to and subscribed before me" portion, and on page 1, the "law enforcement or corrections officer" block is marked; 2) At the bottom of the Statement, Officer LaCentra's signature and badge # 18923 is included under the "I swear/affirm the above and/or attached statements are correct and true" and Officer Becton's signature as the attesting officer is included under the "Sworn to and subscribed before me" portion, and the "law enforcement officer" block is marked; 3) In the Breath Alcohol Test Affidavit, the breath test operator, Brett Coleman's printed name and signature are included and Officer Becton's signature as the attesting officer is included under the "Sworn to (or affirm) before me" portion, and the "personally known" portion is marked; and 4) In the Affidavit of Refusal to Submit to Breath Test, Officer Becton's signature is included under the "swear or affirm" narrative portion and the

signature and seal of the notary, Brett Coleman, is included, and the “personally known” portion is circled.

This Court finds that the signatures, combined with the badge numbers, and the location of the signatures and badge numbers, support that the documents discussed above were sworn and attested to before a law enforcement officer (in the Arrest Affidavit, Statement, and Breath Alcohol Test Affidavit) and before a notary (in the Affidavit of Refusal to Submit to Breath Test) in compliance with sections 117.10 and 322.2615(2)(a), Florida Statutes, addressing the required affidavits that must be submitted to the Department. Accordingly, this Court finds that these documents provided competent substantial evidence in support of the Hearing Officer’s findings and decision denying Bond’s motion to set aside the license suspension as to the alleged improper notarization or attestation of the documents. *See Gupton v. Dep’t of Highway Safety & Motor Vehicles*, 987 So. 2d 737 (Fla. 5th DCA 2008) (holding that both notaries and police officers can administer oaths).

Argument II – addressing the discrepancy of the arrest date and signing date of the Arrest Affidavit:

Second, Bond argues that competent substantial evidence is lacking because the arrest occurred on March 3, 2013, but the Arrest Affidavit was not signed by the other officer until March 20, 2013. At the hearing, Bond’s counsel brought a motion to set aside the license suspension based on this issue. The Hearing Officer denied the motion finding that the alleged conflict in dates only indicated that the Arrest Affidavit was signed at a later date than the arrest and does not reduce the merit of the document as there are no conflicting dates as to the arrest.

This Court concurs with the Hearing Officer’s findings as to this argument as all of the documents including the Arrest Affidavit and Statement, the Breath Alcohol Test Affidavit, Affidavit of Refusal to Submit to Breath Test, and the Citations all state that the date of the

events including Bond's arrest and breath test refusal occurred on March 3, 2013; thus, there is no conflict in the record evidence as to the date of the arrest or other events.

Argument III – addressing the lack of reasons and facts in the Arrest Affidavit and Statement as to the determination of the refusal:

Third, Bond argues that there is a lack of competent substantial evidence as to a lawful and valid refusal in this case. As stated in the Arrest Affidavit and Breath Alcohol Test Affidavit, the basis for calling the refusal was that Bond's breath samples, that registered a 0.151 and a 0.180, were deemed not reliable due to volume not met. Specifically, Bond argues that there is nothing in the Arrest Affidavit and Statement showing that he was re-instructed on how to blow or warned that failure to properly blow would result in a refusal and nothing showing that he was provided a third chance to blow a sufficient sample. He also argues that there was no Breath Tech Operator Affidavit entered into evidence in this case.

Bond's argument that there was no Breath Tech Operator Affidavit entered into evidence in this case is misplaced. The Breath Alcohol Test Affidavit signed by Breath Test Operator, Brett Coleman, was entered into evidence at the hearing. Further, Brett Coleman stated that he administered the breath test to Bond in accordance with Chapter 11D-8 of the Florida Administrative Code. Among the rules under Chapter 11D-8, is Rule 11D-8.002(12) that addresses the Approved Breath Alcohol Test and states:

To be a minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal or failure to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

Accordingly, Chapter 11D-8 governs the procedures for administering the breath test, including Rule 11D-8.002(12). Therefore, this Court finds, that notwithstanding that the record is silent as to whether Bond was re-instructed and provided an opportunity to provide a third breath test sample, the Breath Alcohol Test Affidavit that includes Brett Coleman's statement that he administered the breath test in accordance with Chapter 11D-8 provided competent substantial evidence for the Hearing Officer to deny Bond's motion to set aside the license suspension as to this argument.

Conclusion

In conclusion, Bond 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. Because the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decision, this Court's review cannot go further to reweigh the evidence presented and as long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this Court's job is ended. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Frederick Bond's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 5th day of November, 2013.

/S/ _____
A. THOMAS MIHOK
Presiding Circuit Judge

LUBET and G. ADAMS, J.J., concur.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Thomas B. Feiter, Esquire**, The Fighter Law Firm, P.A., 1100 E. Robinson Street, Orlando, Florida 32801, tom@fighterlaw.com 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, richardcoln@flhsmv.gov, marianneallen@flhsmv.gov on this 5th day of November, 2013.

/S/ _____
Judicial Assistant