

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

JOHNNY N. PEELE,

CASE NO.: 2013-CA-007153-O

Petitioner,

WRIT NO.: 13-44

v.

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

Respondent.

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

Matthew P. Ferry, Esquire, for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE J. RODRIGUEZ, SHEA, and LATIMORE, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Johnny N. Peele (“Peele”) 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 ICJIS Arrest Affidavit, witness statements, and other related documents presented at the formal review hearing on March 28, 2013 and April 26, 2013, the facts are summarized as follows: On February 23, 2013, Officer Steven Morris with the Maitland Police Department was flagged down by witnesses who told him that a white male driving a dark colored Range Rover backed into a red vehicle that was parked in the Jazz Tastings parking lot on Lake Avenue and the driver then got out of his vehicle and left the area. While speaking with the witnesses, the suspect, later identified as Peele, was observed walking across Lake Avenue. When the officer approached Peele he detected the strong odor of alcoholic beverage emitting from Peele's breath and observed that Peele swayed while standing.

Upon making contact with Peele, Officer Morris read Peele his Miranda Rights and told him that he was conducting a traffic crash investigation. Upon completion of the crash investigation, Officer Morris informed Peele of the DUI investigation and Peele stated that he understood. When asked, Peele admitted to consuming two glasses of wine at Jazz Tastings and scotch before arriving at Jazz Tastings. Peele denied driving in the parking lot and was unsure how the vehicle arrived at the location.

Officer Morris then informed Peele about his concerns regarding Peele's possible impairment and requested Peele to perform the field sobriety exercises. Peele agreed to perform the exercises and was first asked a series of medical questions to which Peele responded that he had eye implants for cataracts and he injured his knee running a week prior. Upon completion of the exercises Officer Morris believed that Peele was impaired and placed him under arrest for DUI.

Subsequent to the arrest, Peele was searched and the keys for the Range Rover were found in his front right pocket. Peele was later taken to the Orange County DUI testing facility where he was read the implied consent warning and provided samples of his breath. The results were volume not met (0.115 at 2:45 a.m.), then 0.125 at 2:49 a.m., and 0.109 at 2:54 a.m.

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 license was suspended for driving with an unlawful breath alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2013).

Arguments

Peele argues that he was deprived of his right to due process to a meaningful formal review hearing because of his inability to cross-examine Officer Morris regarding his Arrest Affidavit and the Hearing Officer's decision to sustain his license suspension was not supported by competent substantial evidence that he was lawfully detained and arrested for DUI.

Conversely, the Department argues that Peele was afforded administrative due process, the administrative review adhered to the essential requirements of section 322.2615, Florida Statutes, and the Hearing Officer's order affirming Peele's license suspension is supported by competent substantial evidence. The Department also argues that remand for a new hearing is the only proper remedy if this Court finds any error in the administrative hearing that was held.

Analysis

In this case, the Hearing Officer issued a subpoena for Officer Morris to appear at the March 28, 2013 hearing. However, the Maitland Police Department did not accept service of the subpoena because Officer Morris was currently on indefinite medical leave and thus, he did not appear at the hearing. At the hearing, Peele's counsel moved to strike Officer Morris' Arrest Affidavit arguing that because Officer Morris was not available for the hearing, he was not able to cross-examine him regarding the Arrest Affidavit. Counsel then asked the Hearing Officer to not consider the Arrest Affidavit until he had a right to subpoena Officer Morris and to ask him questions regarding the Affidavit. The Hearing Officer overruled counsel's objection without findings.

Also subpoenaed for the March 28, 2013 hearing was the agency inspector Kelly Melville with the Orange County Sheriff's Office who also did not appear. The hearing was then continued for Kelly Melville to appear and testify. At the April 26, 2013 hearing, Kelly Melville appeared and testified. The issue pertaining to Officer Morris was not addressed again the April 26, 2013 hearing.

Rule 15A-6.012(3), Florida Administrative Code states:

Service of a witness subpoena upon a law enforcement officer or upon any federal, state or municipal employee called to testify in an official capacity may be made as provided in Section 48.031(1), F.S., or by delivery to a designated supervisory or administrative employee at the witness' place of employment if the agency head or highest ranking official at the witness' place of employment has designated such employee to accept such service. However, no such designated employee is required to accept such service:

- (a) For a witness who is no longer employed by the agency at that place of employment;
- (b) If the witness is not scheduled to work prior to the date the witness is required to appear; or
- (c) If the appearance date is less than seven (7) days from the date of service.

The agency head or highest ranking official at the witness' place of employment may determine the days of the week and the hours that service may be made at the witness' place of employment.

In this case, because Officer Morris was on indefinite medical leave, the Maitland Police Department was not required to accept service of the subpoena at that time. However, the Hearing Officer should have provided Peele an opportunity to continue the hearing in order to obtain service on Officer Morris at a later date or the Hearing Officer should have stricken the Arrest Affidavit from the record evidence. Accordingly, this Court finds that Peele was deprived of his right to due process to a meaningful formal review hearing because of his inability to cross-examine Officer Morris regarding the Arrest Affidavit. Further, remand of this case is necessary because the record is devoid of the length of time or duration

of the officer's "indefinite" medical leave and the Hearing Officer failed to make findings as to whether the duration of the "indefinite" medical leave will functionally and reasonably deprive Peele of his right to due process. Therefore, due to this evidentiary error it is necessary that this case be remanded for a new hearing. *See Lillyman v. Dep't of Highway Safety and Motor Vehicles*, 645 So. 2d 113 (Fla. 5th DCA 1994)(holding that remand for another administrative hearing is the proper remedy when there has been an evidentiary error by the Department in an administrative hearing). Lastly, because Peele's first argument is dispositive, this Court finds it unnecessary to address his other arguments.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Johnny N. Peele's Petition for Writ of Certiorari is **GRANTED**; the Hearing Officer's Final Order of License suspension is **QUASHED**; and this case is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 24th day of February, 2014.

/S/ _____
JOSE R. RODRIGUEZ
Presiding Circuit Judge

SHEA and LATIMORE, J.J., concur.

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., P.O. Box 505, Winter Park, FL 32790, matt@warrenlindseylaw.com and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, FL 32857, kingibbs@flhsmv.gov, marianneallen@flhsmv.gov, on this 25th day of February, 2014.

/S/ _____
Judicial Assistant