

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

SAMUEL RICHARDSON,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-9348-O

Writ No.: 13-58

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

William J. McClellan, Esquire,
for Petitioner.

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

BEFORE WOOTEN, HIGBEE, H. RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Samuel Richardson (“Richardson”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2616(14), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

On May 9, 2013, Richardson was issued a Notice of Suspension by Trooper Evans for driving with an unlawful breath alcohol level under the age of 21. Richardson provided breath

test results of 0.151 and 0.149 and his license was suspended. He requested a formal review hearing pursuant to section 322.2616, Florida Statutes, and a hearing was held on June 12, 2013. On June 18, 2013, the hearing officer entered a written order sustaining Richardson's license suspension.

“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 under the age of 21, 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 was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.
2. Whether the person was under the age of 21.
3. Whether the person had a blood-alcohol or breath-alcohol level of 0.02 or higher.

§ 322.2616(8)(a), Fla. Stat. (2013).

Richardson argues that the breath test result affidavit was the only supporting document confirming the validity of the breath alcohol results and this was insufficient evidence of a valid breath test. Richardson claims the breath test print card, the agency inspection report and the Department inspection report were not submitted into evidence and therefore, the Department failed to meet its burden of proof and show substantial compliance with the statutes and rules.

For an analysis of a person's breath to be considered valid, the Department must show that it was performed substantially according to the methods approved by the Department as reflected in the administrative rules and statutes. *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001). Once the Department meets its burden, the contesting party must demonstrate noncompliance by the Department. *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

In this case, DDL#1- the notice of suspension and the breath test result affidavit, DDL#2- Richardson's driver license, DDL#3- Trooper Evan's statement, and DDL#4- uncertified transcript of Richardson's driver record were entered into the record. All of the documents required by section 322.2616(3)¹ were provided to the hearing officer.

Section 322.2616(17) states a breath test may be conducted "by a breath-alcohol test device listed in the United States Department of Transportation's conforming-product list of evidential breath-measurement devices. The reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section." § 322.2616(17), Fla. Stat. (2013). The breath test affidavit states that the breath test device used, Alco-sensor FST serial number 056778, "is listed in the U.S. Department of Transportation's conforming products list, and has been calibrated and checked in accordance with the manufacture's and/or agency's procedures." The affidavit also states that Trooper Evans administered the breath test in accordance with section 322.2616.

¹ Section 322.2616(3) states:

The law enforcement officer shall forward to the department, within 5 days after the date of the issuance of the notice of suspension, a copy of the notice of suspension, the driver license of the person receiving the notice of suspension, and an affidavit stating the officer's grounds for belief that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle with any blood-alcohol or breath-alcohol level, and the results of any blood or breath test or an affidavit stating that a breath test was requested by a law enforcement officer or correctional officer and that the person refused to submit to such test.

§ 322.2616(3), Fla. Stat. (2013).

Rule 15A-6.013(2) as well as section 322.2616(12) states that a hearing officer *may* consider other reports submitted by a law enforcement officer including documents relating to administration or analysis of a breath test, refusal to take a breath test, and maintenance of the breath testing machine. § 322.2616(12), Fla. Stat. (2013); Fla. Admin. Code R. 15A-6.013(2) (Emphasis added). However, these other documents are not required to be submitted. The only documents required to be submitted are those listed in section 322.2616(3), which were submitted to the hearing officer. § 322.2616(3), Fla. Stat. (2013); *See Dep't of Highway Safety & Motor Vehicles v. DeGroot*, 971 So. 2d 237, 239 (Fla. 2d DCA 2008) (print card of breath test results not required to establish the results of the breath test). Based on the foregoing, the documentary evidence demonstrates that the Department substantially complied with the statutes and rules. However, Richardson did not present any evidence to overcome the presumption of substantial compliance or the presumption of the accuracy of the breath test results.

Richardson also claims that Trooper Evans failed to explain that he could refuse to take the breath test and the effect of such refusal on his license. He argues that the implied consent warning is an integral part of any suspension and failure to provide the warning deprived him of due process.

When a petitioner submits to a breath test, the hearing officer's scope of review is limited to (1) whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages; (2) whether the person was under the age of 21; and (3) whether the person had a blood-alcohol or breath-alcohol level of 0.02 or higher. § 322.2616(8)(a), Fla. Stat. (2013). Only when a petitioner refuses to submit to a breath test must the hearing officer consider whether the person was told that if he or she refused to submit to a breath test his or her privilege to operate a

motor vehicle would be suspended. § 322.2616(8)(b), Fla. Stat. (2013); *Pardo v. State*, 429 So. 2d 1313, 1314 (Fla. 5th DCA 1983) (warning that failure to submit to a breath test will result in a suspension of the driver's driving privilege is not a prerequisite to a valid breath test, but is a prerequisite to the imposition of the suspension as a sanction for a driver's refusal to submit to a breath test). Since Richardson submitted to the breath test, the hearing officer correctly stated the scope of review was limited to the issues listed in section 322.26168(a). Therefore, Richardson was not deprived of due process.

Based on the foregoing, the hearing officer did not depart from the essential requirements of the law, Richardson was not deprived of due process, and there was competent substantial evidence to support the hearing officer's decision.

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 10th day of December, 2013.

/S/ _____
WAYNE C. WOOTEN
Presiding Circuit Judge

HIGBEE and H. RODRIGUEZ, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail/ email to: **William J. McClellan, Esq.**, bmaclaw@yahoo.com, 200 Ernestine Street, Orlando, Florida 32801; **Richard M. Coln, Assistant General Counsel**, richardcoln@flhsmv.gov, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 10th day of December, 2013.

/S/ _____
Judicial Assistant