

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

KYLE JOHN SCANLON,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-10919-O

Writ No.: 13-73

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

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE APTE, THORPE, MURPHY, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Kyle Scanlon (“Scanlon”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

As stated in the arrest affidavit entered into the record as DDL#3, on June 23, 2013 at approximately 1:38 a.m. Trooper L.R. Lawrence was traveling eastbound on Interstate-4 when he observed a 2010 Jeep approach him from behind at a high rate of speed then suddenly slow as it approached the rear of his vehicle. He observed the vehicle weaving from side to side and travel onto the inside paved shoulder almost into the grass median. The vehicle then increased its speed and pulled ahead and the trooper increased his speed in excess of 75 mph to pace clock the vehicle. The Jeep continued to increase its speed suddenly braking within three feet of the rear of another vehicle. Trooper Lawrence continued to observe the Jeep weaving between the inside and outside center lanes and again suddenly brake at a close distance from the rear of another vehicle. Trooper Lawrence activated his in-car video and pulled in behind the Jeep. The Jeep then suddenly accelerated and he pace clocked it for approximately one mile in excess of 86 mph in a posted 60 mph zone. At that time, he activated his emergency lights and conducted a traffic stop.

Trooper Lawrence approached the vehicle and identified Scanlon from his Florida driver's license. Scanlon stated he was on his way home from a wedding and acknowledged he was traveling in excess of the speed limit that he believed was 70 mph. When the trooper requested his registration Scanlon removed it from the glove box, dropped it on the passenger side floor and continued to look in the glove box. When the trooper asked what he was looking for he stated his insurance card and the trooper again asked him for the registration. He picked up the registration from the floor, put it on the passenger seat, then picked it up and handed it to the trooper. The trooper requested that he confirm his current address and he stated he had recently moved from the address on his driver's license. The trooper asked him to write his current address and observed that he was having difficulty writing it legibly. The trooper asked

Scanlon to confirm what he had written and he stated his apartment number was twenty three one hundred. The trooper asked if his apartment number was 23100 and he stated no, 2310. While speaking with Scanlon, Trooper Lawrence observed that he displayed an excited demeanor and his speech was slurred. The trooper smelled the odor of an alcoholic beverage coming from within the vehicle and noticed Scanlon's eyes were watery and bloodshot.

After issuing a citation for speeding, he asked Scanlon to exit his vehicle so he could explain it to him. He then noticed Scanlon was unsteady on his feet and could smell the odor of alcoholic beverage coming from his facial area. He asked Scanlon if he had consumed any alcoholic beverages and he stated yes, he had two twelve ounce Bud Light beers and he was at the wedding for about an hour from 8:00 P.M. Trooper Lawrence then requested Scanlon perform field sobriety exercises and he agreed. The trooper transported him to a gas station off the exit to conduct the exercises in a safe area. Before beginning the exercise, Scanlon denied taking any medications or drugs or having any injuries or illness that would prevent him from performing the exercise and stated he was wearing contact lenses. After Scanlon performed the exercises poorly, he was arrested for driving while under the influence. He was transported to the DUI testing center and provided breath samples of 0.191 and 0.192.

Scanlon requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearing was held on July 29, 2013. The hearing officer entered a written order sustaining Scanlon's license suspension on July 31, 2013.

"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 arresting law enforcement trooper had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages 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 § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2013).

Due Process

Scanlon argues that he was denied due process because the hearing officer refused to issue subpoenas for the arresting officer and custodian of records for the in-car video. The Department argues that the subpoenas were not issued because counsel failed to make the corrections to the subpoenas as directed by the hearing officer.

Scanlon’s counsel submitted subpoenas for the arresting officer, custodian of records for the in-car video, the breath test operator, and the agency inspector. The subpoenas for the breath test operator and agency inspector were issued and they both testified at the hearing. The subpoena for Trooper Lawrence requested he bring the calibration records for the speed-measuring device used for the most recent six months. “Six months” was crossed out and “3 months” was written under the crossed out text. The subpoena for the custodian of the video

requested the custodian provide a copy of the videos made of Scanlon by the Florida Highway Patrol and Orange County Community Correction Division. “Community Correction Division” was crossed out and “Sherriff Office-Breath Center or DUI Center” was written under the crossed out text. Written on both subpoenas was a note stating, “Please resubmit with corrections.”

Due process requires fair notice and a meaningful opportunity to be heard, which includes the right to present evidence, cross-examine witnesses, impeach witnesses, and rebut evidence. *Keys Citizens For Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001); *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 757 (Fla. 1st DCA 2009); Fla. Admin. Code R. 15A-6.013(5). The hearing officer is authorized to issue subpoenas to witnesses identified in documents provided under section 322.2615(2)(a). § 322.2615(6)(b); *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 839 (Fla. 5th DCA 2013).

Florida Administrative Code, Rule 15A-6.012 states:

- (1)
- (b) If a subpoena duces tecum is requested, the driver shall also **describe with particularity and specificity any material to be produced** and the relevancy of such material. Materials requested pursuant to a subpoena duces tecum are limited to a time period **not to exceed three months prior to the date of suspension.**
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- (6) A hearing officer is authorized to amend or strike a request for subpoena or subpoena duces tecum which does not comply with the provisions of this rule.

Fla. Admin. Code R. 15A-6.012 (Emphasis added).

The hearing officer, within her authority, instructed Scanlon’s counsel to amend the subpoenas to comply with Rule 15A-6.012. Scanlon has not alleged that his counsel resubmitted

the subpoenas with the corrections. Therefore, the subpoenas were not issued due to counsel's failure to correct and resubmit the subpoenas. Accordingly, Scanlon was not denied due process.

Lawfulness of Arrest

Next, Scanlon argues that the hearing officer's decision was not supported by competent substantial evidence that he was lawfully arrested for driving under the influence. He also claims that the hearing officer should not have considered the horizontal gaze nystagmus (HGN) exercise because there is no evidence that Trooper Lawrence is a drug recognition expert.

In the charging affidavit Trooper Lawrence noted his observation of Scanlon swerving on the roadway while speeding; slurred speech; watery bloodshot eyes; admission to drinking; the odor of alcoholic beverage coming from his facial area; swaying while standing; during the walk and turn: failed to keep his hands at his sides after being instructed several times, swayed while standing, unsteady while walking the line, failed to walk heel to toe, staggered while walking, failed to look at his feet while walking, and stepped off the line on step 6; and during the one leg stand: put his foot down after 20 seconds and stated that he estimated the passage of time during the exercise as 10-15 seconds, swayed as he stood, and counted one thousand fourteen twice. Even without considering the HGN test, based on the totality of the facts contained in the charging affidavit, there was competent substantial evidence to support the hearing officer's decision that Scanlon was lawfully arrested for DUI.

Reliability of Breath Test Results

Scanlon argues the *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993), requires the State demonstrate that the breath test result are based on sufficient facts or data, are a product of reliable principles and methods, and the principles and methods were reliably applied to the facts of the case. Scanlon states that the breath test technician testified that a scientifically

reliable breath test result requires the subject to blow for one second, provide 1.1 liters of breath, and the slope has to rise and level off. He claims that because there was no testimony about the length of time Scanlon blew into the machine, the volume of his breath, or the slope of his breath; there was not competent substantial evidence that the breath test results were reliable. However, the breath test technician also testified that if a sample was collected, the requirements of time, volume, and slope were met. Two valid samples were collected in this case.

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. Berne*, 49 So. 3d 779, 782 (Fla. 5th DCA 2010); *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001). The breath test affidavit is presumptive proof of the results of an authorized test to determine alcohol content of the breath if the affidavit contains all the statutorily required information prescribed in section 316.1934(5) of the Florida Statutes. § 316.1934(5), Fla. Stat. (2013); *Berne*, 49 So. 3d at 783; *Gurry v. Dept. of Highway Safety*, 902 So. 2d 881, 884 (Fla. 5th DCA 2005).

In this case, the Department admitted the breath test result affidavit, DDL#4 and the agency inspection report, DDL#5. The breath test affidavit and the agency inspection report contained all the statutorily required information to establish that the Intoxilyzer 8000 used for Scanlon's test was properly inspected and maintained, performed appropriately, and produced accurate and reliable test results. *See Berne*, 49 So. 3d at 783; *Russell*, 793 So. 2d at 1076; *Dep't of Highway Safety & Motor Vehicles v. Dehart*, 799 So. 2d 1079, 1081 (Fla. 5th DCA 2001). Therefore, the breath test affidavit together with the agency inspection report is presumptive proof of results of an authorized test and that the Department complied with the applicable

statutes and rules. Scanlon has not presented any evidence that the breath test results are not accurate or that the Department did not comply with the applicable rules and statutes. Therefore, the evidence submitted at the hearing was competent substantial evidence to support the hearing officer's decision that Scanlon had an unlawful breath alcohol level.

Accordingly, Petitioner Scanlon was provided due process and there was competent substantial evidence to support the hearing officer's findings.

Based on the foregoing, 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 6th day of August, 2014.

/S/ _____
ALAN S. APTE
Presiding Circuit Judge

THORPE and MURPHY, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 6th day of August, 2014 to: **Matthew P. Ferry, Esq.**, Law Office of Warren W. Lindsey, P.A., 1150 Louisiana Avenue, Ste. 2, Winter Park, Florida 32789; **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857.

/S/ _____
Judicial Assistant