

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

JAMES D. WINTERS,

**CASE NO.: 2013-CA-011969-O
WRIT NO.: 13-81**

Petitioner,

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,
Isabel Gibson, Hearing Officer.

Richard E. Hornsby, Esquire,
for Petitioner.

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

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

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, James D. Winters (“Winters”) 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 ICJIS Arrest Affidavit, Breath Alcohol Test Affidavit, and other related documents presented at the formal review hearing on August 29, 2013, the facts are summarized as follows: On August 3, 2013 at approximately 1:44 a.m., Deputy Felix Mangual observed a vehicle traveling eastbound with the high beams activated and observed that the vehicle did not have a tag. The deputy then conducted a traffic stop.

Upon making made contact with the driver identified as Winters by his driver's license, Deputy Mangual detected an odor of alcoholic beverages emanating from Winters' breath and observed that Winters' eyes were glassy, his speech was slurred, and he swayed while standing. Also, Winters admitted that he consumed alcoholic beverages prior to driving. At that point, Deputy Mangual asked Winters to perform the field sobriety exercises and he agreed. The deputy also asked Winters medical questions and Winters stated that he did not have any medical issues, but did wear contacts. Winters performed the exercises poorly as he did not follow instructions, was unsteady on his feet, and he swayed during the exercises.

Based on the totality of the circumstances including Winters' statements, the observations of Winters, and his performance of the field sobriety exercises, Deputy Mangual determined that Winters was impaired beyond his normal faculties and arrested him for DUI. Winters was then transported to the Orange County DUI Center where he was observed for twenty minutes, read the Implied Consent Warning, and requested that he submit to the breath test. Winters submitted to the breath test with results of .197 from the first sample and .198 from the second sample. Winters' privilege to operate a motor vehicle was suspended for driving with an unlawful alcohol level. Winters was also cited for failure to dim his vehicle's headlights and failure to register his vehicle.

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’s 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

In the Petition, Winters argues that the Hearing Officer’s decision to sustain his license suspension is not supported by competent substantial evidence as there were discrepancies in the in the Arrest Affidavit where the deputy copied and pasted whole passages from another Arrest Affidavit. Thus, he concludes that the Hearing Officer erred by ignoring the inconsistencies without an explanation of how she found the evidence credible, competent, and substantial, and incorrectly ruled that it was Winters’ burden to have explained away these inconsistencies.

Conversely, the Department argues: 1) The Hearing Officer's decision sustaining Winters' license suspension is supported by competent substantial evidence and is clearly lawful and 2) Remand for a new administrative hearing is the only proper remedy if this Court finds any error in the hearing that was held.

Analysis

At the formal review hearing, Winters' counsel moved to invalidate the license suspension arguing that the Arrest Affidavit as to Winters referenced a previous Arrest Affidavit as to another person, Elliot Maier ("Maier"). Both Arrest Affidavits were authored by Deputy Mangual. The Arrest Affidavit as to Maier was submitted into evidence and Winters' counsel further argued that from comparing both Affidavits, the Arrest Affidavit as to Winters was basically identical to the Arrest Affidavit as to Maier; thus, it appeared that Deputy Mangual essentially copied and pasted whole passages from one Arrest Affidavit into the other Arrest Affidavit. Winters' counsel then pointed out specific sections of the Arrest Affidavits where the passages were identical or substantially similar including: 1) the personal contact section in each Affidavit that mentions an alleged conversation about a fight that took place earlier; 2) the performance of the HGN exercises; 3) the walk-and-turn and one-leg stand exercises; and 4) the Rhomberg balance exercise. Winters' counsel then concluded that based upon the inconsistencies identified from the two Affidavits, the Arrest Affidavit as to Winters was not a true and accurate depiction of what happened with Winters' arrest and thus, competent substantial evidence was lacking to uphold the license suspension. The Hearing Officer reserved ruling on this motion and thereafter in her Order denied the motion stating:

Counsel indicated during the formal review that Deputy Gallup and Deputy Mangual were the authors, however; Deputy Danjou was not the author nor did he participated [sic] during the petitioner's arrest. In addition, Counsel did not subpoena the deputy to clarify the alleged inconsistencies.

First, this Court addresses the Hearing Officer's ruling on Winters' motion. From review of the transcript from the hearing, there is no mention about Deputy Gallup or Deputy Danjou. Thus, this Court finds it odd that these deputies are mentioned in the Hearing Officer's findings. This Court can only speculate that perhaps, the Hearing Officer's findings as to this motion were copied and pasted in from another Order from another case?

Next, this Court has reviewed both Arrest Affidavits and concurs with Winters that there are several sections of text in both Affidavits that are identical or substantially identical to each other. The most glaring portion of text that raises concern is in the personal contact section where Deputy Mangual references Maier's battery and DUI case stating: "As the defendant and I spoke, I took note that his speech was slurred while he spoke about the battery that took place see case number (13-049485)."

Notwithstanding the issues with the Arrest Affidavits, the Hearing Officer as the finder of fact was responsible for determining the weight, credibility, and reliability of the Arrest Affidavit and other evidence in this case. *Dep't of Safety & Motor Vehicles v. Marshall*, 848 So. 2d 482, 485-486 (Fla. 5th DCA 2003). Also, the cases Winters presents in support of his argument are distinguishable from the case at hand as they address discrepancies within a document or between documents in evidence such as conflicting arrest dates or times or conflicts in the time a person refused or submitted to a breath test. From review of the evidence in this case, specifically the Arrest Affidavit as to Winters and the Breath Alcohol Test Affidavit, there does not appear to be discrepancies, nor did Winters argue that there were, as to dates of the events that all occurred on August 3, 2013 with Winters' arrest at 2:08 a.m., the observation period beginning at 2:57 a.m., and the breath samples taken at 3:22 a.m. and 3:35 a.m.

Further, while it does appear that portions of text were copied from the Arrest Affidavit as to Maier into the Arrest Affidavit as to Winters, there were still other portions of text that were not the same. Thus, the concerns with the Arrest Affidavits alone do not automatically negate the truth of Deputy Mangual's account of the events that occurred and his observations of Winters. Moreover, while this issue raises concerns, it is no surprise that there are similarities between DUI cases as to the observations made of drivers, the instructions given to drivers pertaining to the administration of the exercises etc. Thus, also as no surprise, in an effort to save time, there is the possibility that law enforcement officers might copy and paste certain language into an arrest affidavit from a previous arrest affidavit. Lastly, while copying and pasting of text is not surprising in certain situations, this Court cautions that special care should be taken to ensure that arrest affidavits and other documents accurately reflect the events, observations of drivers, and other information.

Conclusion

Based on the foregoing, this Court finds that Winters was provided due process 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, James D. Winters' Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 23rd day of April, 2014.

/S/

MARC L. LUBET
Presiding Circuit Judge

G. ADAMS and MIHOK, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Richard E. Hornsby, Esquire**, Richard E. Hornsby, P.A., 1217 E. Robinson Street, Orlando, Florida 32801-2115 and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 23rd day of April, 2014.

/S/

Judicial Assistant