

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

JOHNNY N. PEELE,

CASE NO.: 2014-CA-005389-O

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,
Linda Labbe, 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 DENYING 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 testimony, the ICJIS Arrest Affidavit, witness statements, and other related documents presented at the formal review hearing on April 29, 2014 (new hearing on remand), 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. Peele performed the field sobriety exercises poorly by swaying while balancing; using his arms for balance; missing heel to toe on steps 3-10; making an improper turn; stepping off the line during a turn; failing to

keep both legs straight; putting his foot down before instructed; failing to close his eyes as instructed; and failing to recite as instructed. 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 he argues that 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.

Analysis

Procedural History and Peel's First Argument that He was Deprived of Due Process

First, this Court addresses the procedural history of this case as the formal review hearing on April 29, 2014 was held as a result of a remand from this Court's ruling entered on February 24, 2014 addressing Peele's first Petition for Writ of Certiorari in case no. 2013-CA-007153-O. The procedural history was as follows: 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 that 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. Peele's counsel then asked the Hearing Officer to not consider the Arrest Affidavit until he could subpoena Officer Morris and 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. Thereafter, at the April 26, 2013 hearing, Kelly Melville appeared and testified, but the issue pertaining to Officer Morris was not addressed again at that hearing.

Upon review of the Peele's first Petition, this Court found that although Officer Morris was on indefinite medical leave and the Maitland Police Department was not required to accept service of the subpoena at that time, 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 should have stricken the Arrest Affidavit from the record evidence. Accordingly, this Court found 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, this Court remanded this case for a new hearing because the record was 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 would functionally and reasonably deprive Peele of his right to due process.

On remand at the new hearing held April 29, 2014 before a different Hearing Officer, Peele's counsel questioned Officer Morris as to the nature of his medical leave and the duration. Officer Morris testified that the medical leave was taken due to the birth of his second child by C-section. Officer Morris stated that he could not be sure of the exact date he went on leave but indicated it was approximately on February 25, 2013. Officer Morris also stated that he could not remember the exact date of his return to work, but he was certain that he returned to work in June 2013. Also, at the new hearing, Peele's counsel again made a motion to invalidate the suspension arguing 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 within 30 days of his request for a hearing. The Hearing Officer denied the motion

finding that this Court addressed this very issue in the ruling on the first Petition of Writ of Certiorari in remanding this case for a new hearing and that the Florida Administrative Code requires only that the hearing be scheduled within 30 days of receipt of the timely request for the hearing.

In Peele's second Petition at hand, Peele again 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 within 30 days of his request for a hearing. The specific portions of the applicable statutes and rules relevant to this argument are as follows:

The driver may request a formal or informal review of the suspension by the department within 10 days after the date of issuance of the notice of suspension or may request a review of eligibility for a restricted driving privilege under s. 322.271(7).

§ 322.2615(1)(b)3., Fla. Stat. (2013); *see* Rule 15A-6.006, Florida Administrative Code (includes procedures in compliance with the statute's 10 day time period for filing the request).

If the person whose license was suspended requests a formal review, the department must schedule a hearing within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.

§ 322.2615(6)(a) Fla. Stat. (2013); *see* Rule 15A-6.013(1), Florida Administrative Code, (includes procedures in compliance with the statute's 30 day time period for scheduling a hearing).

A request for a formal review hearing or an informal review hearing shall not stay the suspension of the person's driver license. If the department fails to schedule the formal review hearing within 30 days after receipt of the request therefor, the department shall invalidate the suspension. If the scheduled hearing is continued at the department's initiative or the driver enforces the subpoena as provided in subsection (6), the department shall issue a temporary driving permit that shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege. Such permit may not be issued to a person who sought and obtained a continuance of the hearing. The permit issued under this subsection shall authorize driving for business or employment use only.

§ 322.2615(9), Fla. Stat. (2013); *see* Rule 15A-6.013(1), Florida Administrative Code, (includes procedures in compliance with the statute).

Accordingly, this Court finds that the applicable statutes and rules only require that the formal review hearing be scheduled within 30 days of receipt of the timely request for the hearing. Further, there is nothing in the record showing the date when Peele requested the formal review hearing. However, because the record does show that Peele was arrested on February 23, 2013 and his first hearing was held on March 28, 2013, it is reasonable to conclude that Peele's first hearing was held within 30 days from his request for the hearing. Lastly, upon remand of this case, Peele was provided the opportunity to cross-examine Officer Morris and did so at the new hearing on April 29, 2014. Therefore, this Court finds that Peele was not deprived of due process.

***Peele's Second & Third Arguments -
Lack of Competent Substantial Evidence that He was Lawfully Detained and Arrested***

At the hearing, Peele's counsel made a motion to invalidate the suspension arguing that the exhibits fail to contain competent substantial evidence that Peele was lawfully detained by Officer Morris. The Hearing Officer denied the motion based on the record evidence including the statements from the two witnesses to the crash who both identified Peele as the driver of the Range Rover that backed into the parked red Mazda; the one witness statement that Peele had been in the club throughout the night; and the other witness statement that Peele was definitely intoxicated.

Peele's counsel also made a motion to invalidate the suspension based on the lack of reasonable suspicion to detain Peele for the DUI investigation. The Hearing Officer also denied that motion based on the witnesses' observations combined with Officer Morris' observations that after he made contact with Peele, Officer Morris smelled the strong odor of an alcoholic beverage coming from Peele's breath and that Peele was swaying while standing. Lastly, Peele's counsel made a motion to invalidate the suspension based on the lack of competent substantial

evidence that Peele was lawfully arrested for DUI. The Hearing Officer also denied that Motion based on the record evidence.

This Court finds that the witnesses' observations and combined with Officer Morris' detection of the strong odor of alcoholic beverage emitting from Peele's breath and his observation that Peele swayed while standing provided competent substantial evidence for the Hearing Officer to find that Peele's detainment was lawful for both the crash investigation and DUI investigation. Further, Peele's admission to consuming two glasses of wine at Jazz Tastings and scotch before arriving at Jazz Tastings and his statement that he was unsure how his vehicle arrived at the location, provided competent substantial evidence to pursue the DUI investigation including requesting Peele to perform the field sobriety exercises. Lastly, Peele's poor performance of the field sobriety exercises combined with Officer Morris' and the witnesses' observations of Peele provided competent substantial evidence for the Hearing Officer to find that Peele's arrest was lawful.

Conclusion

Based on the foregoing, this Court finds that Peele 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).

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Johnny N. Peele's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 18th day of July, 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 and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, FL 32857, on this 18th day of July, 2014.

/S/

Judicial Assistant