

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

JOSHUA R. MACWHINNIE,

CASE NO.: 2014-CA-5659-O

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY & MOTOR  
VEHICLES,

Respondent.

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

Terrence Dowdel, Esquire,  
for Petitioner.

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

BEFORE LUBET, MCDONALD, HIGBEE, J.J.

PER CURIAM.

**FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, Joshua R. MacWhinnie (“MacWhinnie”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for refusing to submit to a breath test.<sup>1</sup> This Court has

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<sup>1</sup> The Court notes that the Petition, certificate of service, and certificate of compliance are not signed or dated by counsel as required by Florida Rule of Judicial Administration 2.515 and Florida Rules of Appellate Procedure. However, the Court accepts the Petition and proceeds as if the Petition was properly signed and served so that this proceeding will not be delayed by requiring counsel to file a properly signed Petition.

jurisdiction pursuant to section 322.2616(14), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

On March 21, 2014, Trooper Hawkins responded to a vehicle crash call. When he arrived at the scene, he determined that the crash was caused by a domestic violence incident. The driver of the vehicle was identified from his Florida driver's license as Joshua MacWhinnie who was under the age of 21. While talking to MacWhinnie, the trooper noticed his eyes were bloodshot; face was flushed; and smelled the odor of alcoholic beverages. MacWhinnie stated they were coming from Knight's Library and admitted to drinking. The trooper did not request MacWhinnie perform field sobriety exercises due to his emotional state but requested he submit to a breath test and he agreed. The trooper attempted to administer the breath test and informed MacWhinnie that a refusal would result in suspension of his license, but MacWhinnie failed to follow directions. The trooper determined that MacWhinnie refused to submit to the breath test and he was issued a Notice of Suspension for a refusal pursuant to section 322.2616.

MacWhinnie requested a formal review hearing that was held on April 23, 2014. The notice of suspension, affidavit of refusal, affidavit of probable cause, and his driver's license were submitted at the hearing. MacWhinnie testified that his girlfriend attacked him while he was driving and she grabbed the steering wheel causing the car to veer off the road. He stated that the officer approached him, asked him what occurred, and he was asked to submit to a breath test. He claimed he agreed to submit to a breath test and followed the instructions provided. He also testified that he was not charged or arrested for DUI or domestic violence. On April 23, 2014, the hearing officer entered a written order sustaining MacWhinnie'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 refusal to submit to a breath test pursuant to section 322.2616, 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 refused to submit to a breath test after being requested to do so by a law enforcement officer or correctional officer.
4. 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 for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2616(8)(b), Fla. Stat. (2014).

MacWhinnie argues that the Department cannot suspend a driver’s license under section 322.2615 for a refusal to submit to a breath test if the refusal is not incident to a lawful arrest. MacWhinnie claims that because he was not lawfully arrested for DUI and the hearing officer acknowledged that he was not arrested for DUI, the hearing officer’s decision is not supported by competent substantial evidence and he was denied due process.

MacWhinnie is correct that the Department cannot suspend a license under section 322.2615 for a refusal to submit to a breath test if the refusal is not incident to a lawful arrest. *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1076 (Fla. 2011), *as revised on denial of reh'g* (Nov. 10, 2011) (holding that a “lawful test” under section 322.2615, Florida Statutes, is one that is requested incident to a lawful arrest, as specified in section 316.1932, Florida Statutes). However, MacWhinnie’s license was suspended for a refusal pursuant to section 322.2616, not section 322.2615.

When a license is suspended for refusal to submit to a breath test pursuant to section 322.2616 the hearing officer must only consider whether the following elements have been established: 1) the driver was in actual or physical control of a vehicle, 2) the driver was under age 21, 3) the driver refused to submit to a breath test, and 4) the driver was informed that a refusal would result in a suspended license. *See Dep't of Highway Safety & Motor Vehicles v. Colling*, 39 Fla. L. Weekly D1195 (Fla. 5th DCA June 6, 2014) *review denied*, SC14-1373, 2014 WL 3919600 (Fla. 2014) (finding that when a license is suspended for an under 21 driver with a breath-alcohol level above 0.02, section 322.2616 does not require the hearing officer to determine the legality of the detention, only whether probable cause existed on three elements: age, control of a vehicle, and alcohol level). An under age 21 driver is not arrested when his or her license is suspended pursuant to section 322.2616. Therefore, the lawfulness of the arrest is not an element to be considered by the hearing officer for a suspension pursuant to section 322.2616. *Id.*

Based on the foregoing, the Court finds that the documents submitted at the hearing was competent substantial evidence to support the hearing officer’s decision that MacWhinnie

refused to submit to a breath test pursuant to section 322.2616 and he was not deprived of due process.

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 24th day of November, 2014.

/S/  
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**MARC L. LUBET**  
**Presiding Circuit Judge**

MCDONALD and HIGBEE, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **Terrence Dowdel, Esq.**, The Dowdel Law Firm, PLLC, P.O. Box 781847, Orlando, Florida 32878; **Matthew J. McHugh, Esq.**, The Law Offices of Matthew J. McHugh, 216 South Pine Avenue, Inverness, Florida 34452; **Kimberly A. Gibbs, Senior Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 9, Ocoee, Florida 34761 on this 24th day of November, 2014.

/S/  
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Judicial Assistant