

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

JAMES F. YOUNG,

Petitioner,

v.

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

Respondent.

_____/

Petition for Writ of Certiorari

Lance Armstrong, Esq., on behalf of Petitioner.

Thomas C. Mielke, Esq., Assistant General Counsel
Florida Department of Highway Safety and Motor Vehicles, on behalf of Appellee.

Before STRICKLAND, DAWSON and ADAMS, J.J.

PER CURIAM

ORDER GRANTING PETITIONER'S WRIT OF CERTIORARI

Petitioner, James F. Young (hereinafter Petitioner), timely appeals a Final Order of License Suspension for refusing to take a breath test after being arrested for driving while under the influence of alcohol, pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(1)(C).

When reviewing a final order of license suspension pursuant to section 322.2615, Florida Statutes, this Court's standard of review is limited to determining whether the petitioner was accorded due process, the essential requirements of law were observed, and whether the findings of fact and judgment are supported by competent, substantial evidence. *City of Deerfield Beach*

v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). In conducting this review, this Court is not “entitled to reweigh the evidence or substitute its judgment for that of the” administrative hearing officer. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20 (Fla. 5th DCA 1989).

FACTS

On December 24, 2005, Petitioner was arrested for driving while under the influence of alcohol. After refusing to take a breath test after being read an implied consent warning, Petitioner’s license was suspended. On December 29, 2005, Petitioner requested a formal review of his license suspension by the Department of Highway Safety and Motor Vehicles (hereinafter Respondent or “Department”). Respondent received Petitioner’s request on December 30, 2005. However, Petitioner did not include a copy of the Florida DUI Uniform Traffic Citation (hereinafter “Citation”) as required by Florida Administrative Code Rule 15A-6.006. Respondent received the Citation on January 4, 2006, and the formal review hearing was held on February 1, 2006. At the hearing, Petitioner moved to invalidate his license suspension arguing that his hearing was not scheduled within thirty (30) days from the date his formal review request was received. The hearing officer rejected this argument and sustained the license suspension. This appeal followed.

DISCUSSION

When a person’s driver’s license is suspended for refusing to take breath test, he may submit a written request for a formal or informal review of the suspension to the Department. *See* § 322.2615(1)(b)3, Fla. Stat. (2005); Fla. Admin. Code R. 15A-6.006(1). The written request must include, among other information, a copy of the Citation or notice of license

suspension. Fla. Admin. Code R. 15A-6.006(2).¹ Once the request is received, the review hearing must be scheduled within thirty (30) days. § 322.2615(6)(a), Fla. Stat. (2005). If the review hearing is not scheduled within thirty (30) days after receipt of the written request, the license suspension must be invalidated. § 322.2615(9), Fla. Stat. (2005). The issue before this Court is whether Petitioner's failure to include a copy of the Citation with his request for a formal review of his license suspension tolled the thirty (30) day time limit to schedule the hearing until Respondent received the Citation.

Petitioner argues that Florida Administrative Code Rule 15A-6.006 is invalid because it imposes a greater burden on him than the enacting statute, section 322.2615, Florida Statutes, citing *Department of Highway Safety & Motor Vehicles v. Snelson*, 817 So. 2d 1045 (Fla. 2d DCA 2002). Specifically, Petitioner objects to Florida Administrative Code Rule 15A-6.006's requirement that he submit a copy of the Citation with his written request for a review hearing. There is no record evidence to indicate that this argument was raised in front of the hearing officer. Thus, it does not seem that this issue has been preserved for this Court's review. *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981).

Petitioner admits he did not send a copy of the Citation with his formal review request because he was not provided a copy of it after refusing to sign it. However, Petitioner points to

¹ Florida Administrative Code rule 15A-6.006(2) states,

All requests for review shall include:

- (a) The name, address, driver license number, and date of birth of the driver;
- (b) A statement of the date of the arrest and the county where the driver was arrested and received notice of suspension or disqualification of the driving privilege.
- (c) A copy of the uniform traffic citation or notice of suspension/disqualification issued to the driver.

the arresting officer's tardy compliance with section 322.2615(2), Florida Statutes, as excusing his noncompliance. This statutory section requires the arresting officer to forward, among other documents, "a copy of the citation issued to the person arrested" to Respondent within five days of the arrest. Petitioner undisputedly points out that the Citation was not forwarded to Respondent until January 4, 2006, eleven days after his arrest. According to Petitioner, had the arresting officer timely complied with the statutory mandate of section 322.2615, Respondent would have had the Citation by the time Petitioner had filed his formal review request. Notwithstanding the Respondent's late receipt of the Citation, Petitioner argues that Respondent failed to schedule his formal review hearing within thirty (30) days from when it received his request and thus, his license suspension must be invalidated pursuant to section 322.2615(9), Florida Statutes.

It is undisputed that Respondent received Petitioner's request for a formal review hearing on December 30, 2005. It is further undisputed that the formal review hearing was scheduled for February 1, 2006, thirty three (33) days after Petitioner's request was received. This violates the clear, unequivocal terms of section 322.2615(9), Florida Statutes, and seems to require invalidation of Petitioner's license suspension. Respondent raises three arguments for why Petitioner's hearing was not untimely.

First, Respondent contends that Petitioner's request for a formal review hearing was not complete when submitted on December 29, 2005, because he failed to include a copy of the Citation as required by Florida Administrative Code Rule 15A-6.006. It appears that Respondent is arguing that it is not required to schedule a formal review hearing until a complete formal review request is submitted. This is because, according to Respondent, it is unaware of any

license suspension until it receives a copy of the Citation.² Assuming, without deciding, that this assertion is true, Respondent fails to cite to any binding or persuasive authority to support this argument. Respondent's own actions also undermine this argument.

In both *Cook v. Department of Highway Safety & Motor Vehicles*, 9 Fla. L. Weekly Supp. 509a (Fla. 9th Cir. Ct. 2002) and *Cantu v. Department of Highway Safety & Motor Vehicles*, 9 Fla. L. Weekly Supp. 421a (Fla. 9th Cir. Ct. 2002), the petitioners sought invalidation of their license suspensions arguing that they did not have notice of their license suspension because they did not receive a copy of the DUI citation. In each case, the petitioners did not receive a copy of the DUI citation because they were “in custody.” *Id.* Despite the fact these petitioners could not have submitted a copy of the DUI citation with their formal review requests, the Department was apparently able to schedule their formal review hearings within the statutory time frame. *Id.* More importantly, there is no provision in section 322.2615, Florida Statutes, that permits Respondent to indefinitely postpone scheduling a formal review hearing until it receives a copy of the DUI citation.

Second, Respondent argues that Petitioner's failure to receive a copy of the Citation is attributable to his refusal to sign it and thus, Petitioner should not be allowed to profit from his wrongdoing. However, Respondent fails to cite to any binding or persuasive precedent to indicate that a refusal to accept the Citation allows it to postpone the scheduling of the formal review hearing until it receives the Citation. Further undermining this argument is the fact that

² Although this may be practically true, it seems that Respondent, at a minimum, has constructive or implied notice of the suspension since the law enforcement officer is acting on Respondent's behalf when he suspends a driver's license. See § 322.2615(1)(a), Fla. Stat. (“A law enforcement officer . . . shall, on behalf of the department, suspend the driving privilege of a person . . .”).

Respondent has been faced with a similar situation before, yet still has been able to schedule the formal review hearing within thirty days of receiving the written request. *See id.*

Finally, Respondent argues that because a formal review hearing was held within thirty days after the receipt of Petitioner's completed request (i.e.: receiving the Citation), Petitioner cannot demonstrate any prejudice and thus, there was "no violation of fundamental fairness" that would warrant the invalidation of Petitioner's license suspension, citing *State v. Roess*, 451 So. 2d 879, 880 (Fla. 2d DCA 1984). This argument misses the point. Section 322.2615(9), Florida Statutes, requires Respondent to schedule the formal review hearing of a license suspension within thirty days of receiving the written request. Respondent's failure to schedule the hearing within thirty days requires the license suspension be invalidated. *See* § 322.2615(9), Fla. Stat. The statute's terms are clear and unequivocal.

CONCLUSION

Respondent was required to schedule the formal review hearing within thirty (30) days after it received Petitioner's request. *See* § 322.2615(9), Fla. Stat. Respondent scheduled the hearing outside the statutory time frame. Respondent's arguments attempting to justify its noncompliance are unpersuasive, particularly in light of its past actions. *See Cook v. Dep't of Highway Safety & Motor Vehicles*, 9 Fla. L. Weekly Supp. 509a; *Cantu v. Dep't of Highway Safety & Motor Vehicles*, 9 Fla. L. Weekly Supp. 421a. Respondent's failure to schedule Petitioner's formal review hearing within thirty days of receiving his request, violated the plain

terms of section 322.2615(9), Florida Statutes, and in turn Petitioner's due process rights. As a result, Petitioner's license suspension must be invalidated. Furthermore, Respondent could have simply requested a continuance which may have disposed of the need for the instant Petition. *See* § 322.2615(9), Fla. Stat.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Writ of Certiorari is **GRANTED** and Petitioner's license suspension is invalidated.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 17 day of September, 2007.

/S/
STAN STRICKLAND
Circuit Judge

/S/
DANIEL P. DAWSON
Circuit Judge

/S/
GAIL A. ADAMS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to: **Lance Armstrong, Esq.**, 1351 N.W. 16th Street, Miami, FL 33125; **Thomas C. Mielke, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler Street, Miami, FL 33135 on this 17 day of September, 2007.

_____/S/_____
Judicial Assistant