

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

CAITLIN CLARK,

Petitioner,

v.

CASE NO.: 2010-CA-25602-O
WRIT NO.: 10-104

**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,
Mary Varnadore, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Damaris E. Reynolds, Esquire,
for Respondent.

Before WHITEHEAD, BRONSON, and THORPE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Caitlin Clark (“Clark”) 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 her 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.

Facts and Procedural History

On March 1, 2009, Officer Holt, of the University of Central Florida Police Department, arrested Petitioner for driving under the influence and transported her to the Orange County DUI Testing Center. Breath Test Operator Brown ("BTO Brown") conducted the twenty-minute observation of Petitioner, and Officer Holt read implied consent warnings to her. Petitioner submitted to a breath-alcohol test, which resulted in breath-alcohol levels of .158 and .155. Therefore, the Department suspended her driving privilege.

The instant Petition for Writ of Certiorari is the second petition brought by Petitioner addressing the suspension of her driver's license. The first Petition was reviewed and ruled upon by the Circuit Court in its Order rendered on June 15, 2010 granting the Petition and remanding the case back to the hearing officer for further proceedings. *Clark v. Dep't of Highway Safety & Motor Vehicles*, 2009-CA-19417 (Fla. 9th Cir. Ct. June 15, 2010). The Petition was granted because at the formal review hearing on April 1, 2009 the hearing officer limited Petitioner's cross examination of FDLE Intoxilyzer machine Inspector Roger Skipper. Thus, Petitioner was deprived of due process. Specifically, the hearing officer limited Petitioner from questioning Inspector Skipper about the Intoxilyzer machine's micron bands and its inclusion on the

U.S. Department's Conforming Products List of Evidential Breath Measurement Devices ("CPL").

Also, on August 17, 2010, the Circuit Court granted in part Petitioner's Motion for Clarification and Rehearing of the Order and ruled on the other argument in her Petition.¹ However, the Court still remanded the case back to the hearing officer to provide Petitioner with an opportunity to fully question Inspector Skipper.

Formal Review Hearing on October 27, 2010

Pursuant to the court's order remanding this case, the hearing officer issued and served Inspector Skipper with a subpoena to appear and subpoena duces tecum for the formal review hearing that was held on October 27, 2010. Inspector Skipper appeared at the hearing, but did not bring any records. At the hearing, Petitioner's counsel examined Inspector Skipper and asked him why he did not bring any records per the subpoena. Inspector Skipper responded that there was no need to produce the records because: 1) the documents were already submitted as evidence or were a matter of public record; 2) the records were not in his possession as he was not the custodian of the records; and 3) some of the records requested constituted new discovery not allowed under Florida Administrative Rule 15.

Petitioner's counsel asked Inspector Skipper whether he knew what version of

¹ In the Order Granting in Part Petitioner's Motion for Clarification and Rehearing, the Court addressed and ruled on Petitioner's other argument, finding that the hearing officer's decision that Petitioner was lawfully stopped and detained was supported by competent substantial evidence. The Court also found that the competent substantial evidence standard had been met through the affidavits submitted by the Department, thus constituting presumptive proof that the breath test was conducted in substantial compliance with the applicable administrative rules. However, the Court reiterated that the case must be remanded to provide Petitioner with the opportunity to rebut the presumption by questioning Inspector Skipper about the micron bands used in the Intoxilyzer instrument.

micron bands were used on the Intoxilyzer instrument utilized to test Petitioner's breath-alcohol level. Inspector Skipper answered the question by stating that he did not know what version of micron bands were used because the testing/verification of the micron bands was not a requirement of his job duties and department procedures. He also stated that the letter from Toby S. Hall president of CMI, Inc., manufacturer of the Intoxilyzer machine, to Laura Barfield, Manager of the FDLE Alcohol Testing Program, was submitted into evidence by Petitioner's counsel and sufficiently explained the discrepancies between the micron bands. Inspector Skipper was also questioned about the Intoxilyzer 8000 guide that is public record. Inspector Skipper answered that it is the general reference guide for the Intoxilyzer 8000, but he does not use the reference guide to perform a department inspection.

Standard of Review

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of the law were observed; and 3) whether the decision was supported by competent substantial evidence. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual's license is suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2008). The hearing officer's scope of review is limited to the following issues:

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 [section] 316.193.

§ 322.2615(7)(a), Fla. Stat. (2008).

This Court's Findings

Upon review of the transcript from the October 27, 2010 formal review hearing, this Court finds that the hearing officer sufficiently complied with the mandate from this Circuit's prior Order by providing Petitioner's counsel an opportunity to question Inspector Skipper about the Intoxilyzer micron bands used and the discrepancies between them. While Petitioner may not be satisfied by the answers provided by Inspector Skipper, he answered the questions nonetheless and provided the reasons why he could not provide any specific information nor produce the documents via the subpoena duce tecum. Among the reasons Inspector Skipper provided was that the information was outside the scope of his expertise and his job duties. He also explained that the documents requested from him were already admitted into evidence such as the letter

from CMI, Inc. to FDLE or were public record such as the Intoxilyzer 8000 general reference guide.

The scope of this Court's review in this case prohibits the ability to reweigh evidence, including the credibility of Inspector Skipper's testimony. Accordingly, upon review of the hearing officer's order, transcript from the formal review hearing, and the other documents in the court record, this Court finds that the hearing officer's decision to sustain Petitioner's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 27th day of October, 2011.

/S/
REGINALD K. WHITEHEAD
Circuit Court Judge

/S/
THEOTIS BRONSON
Circuit Court Judge

/S/
JANET C. THORPE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure and Ponall, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32789 and to **Damaris E. Reynolds, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609, on this 28th day of October, 2011.

/S/

Judicial Assistant