

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

KENNETH WOOD,

Petitioner,

CASE NO.: 2011-CA-5603- O

WRIT NO.: 11-36

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER LICENSES,**

Respondent.

Petition for Writ of Certiorari.

William R. Ponall, Esquire and Warren W. Lindsey, Esquire,
for Petitioner.

Richard M. Coln, Esquire,
for Respondent.

BEFORE LEBLANC, S. KEST, O’KANE, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Kenneth Wood (“Petitioner”) 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 for having an unlawful breath-alcohol level. 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 of fact, on March 4, 2011, at approximately 7:30 p.m., Officer Velez of the Apopka Police Department arrived to the scene of a crash to conduct an investigation. During the investigation, Officer Velez found Petitioner to be the at-fault driver and cited him for careless driving. Officer Velez also noticed the odor of alcoholic impurities coming from Petitioner's mouth and face area, that his eyes were red and bloodshot, that his speech was slurred, and that he was unsteady on his feet. After receiving Petitioner's driver's license, Officer Velez requested that Petitioner remain on the scene while he completed the crash investigation. Officer Velez then returned to his patrol car to get the appropriate forms. While Officer Velez was in his vehicle, one of the Apopka Fire Department personnel approached him and advised him that Petitioner had just left the scene of the crash in his vehicle.

Officer Velez then radioed Petitioner's vehicle description and residence address. Officer Tapscott responded to Petitioner's residence and located Petitioner in his driveway, walking around his vehicle. Officer Tapscott observed that the vehicle's engine was still running and there was no one else around the vehicle. Officer Velez then arrived at Petitioner's residence and made contact with him again. Officer Velez advised Petitioner that the crash investigation was complete and he was conducting a DUI investigation. Officer Velez observed that Petitioner's pants were wet in the front as if he had urinated on himself. Petitioner was requested to perform the field sobriety exercises and complied. He

exhibited further clues of impairment including nystagmus and uncontrollable movement in both eyes during the HGN exercise, an inability to stay in the starting position and an inability to complete the walk-and-turn exercise as instructed. He also was hopping, putting his foot down and losing his balance to the point where the officer stopped the one-legged stand exercise for Petitioner's safety.

Petitioner was placed under arrest for DUI and transported to the Apopka Police Department for the breath-alcohol test. Petitioner was read the Implied Consent Warning after the twenty-minute observation period and was requested to submit to the breath-alcohol test. Petitioner submitted to the test with results of .186 and .174. Petitioner's privilege to operate a motor vehicle was suspended for driving with an unlawful breath-alcohol level.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on April 6, 2011. On April 7, 2011, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this order.

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. In cases where the individual's license is suspended for 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. (2011).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer departed from the essential requirements of law by sustaining his license suspension because the documentary evidence submitted to the hearing officer failed to contain the statutorily required affidavit of probable cause per section 322.2615, Florida Statutes. Specifically, Petitioner argues that the first page of the Apopka Police Department Prisoner Transport Jurat, DDL-4, indicates that it was signed and sworn to on March 4, 2011, and indicates that it applies to the attached charging affidavit that includes a document date and date-time booked as March 5, 2011. Therefore, Petitioner argues that it was impossible for the arresting officer to swear to these documents on March 4, 2011, when the documents were not created until March 5, 2011.

Petitioner also argues that the hearing officer's decision was not supported by competent substantial evidence that the arresting officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle as the arrest affidavit failed to contain sufficient factual detail to support the arresting officer's conclusion that he was the driver of the vehicle in question.

Conversely, the Department argues that the dates and times contained in the documents reviewed by the hearing officer are consistent with each other and clearly establish that Petitioner was driving while under the influence of alcohol and that he had a breath alcohol level above .08. Accordingly, the Department argues that the evidence at the formal review hearing supported the hearing officer's preponderance of the evidence determination that Petitioner's license was properly suspended.

As to Petitioner's second argument, the Department argues that there was competent substantial evidence in the record that Petitioner was observed operating a motor vehicle and that he was also in actual physical control of his vehicle.

Court's Analysis and Findings

From review of the court record, the events that occurred on March 4, 2011 are relevant to the issues within the hearing officer's scope of review those being 1) whether Officer Velez had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and 2) whether Petitioner had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193, Florida Statutes.

The findings relied upon by the hearing officer in rendering his decision were found in the documents submitted into evidence at the formal review hearing, including the traffic citations, the Apopka Police Department Prisoner Transport Jurat (“Jurat”) with the ICJIS Arrest Affidavit attached, the Apopka Police Department Supplemental Report, the Breath Test Result Affidavit, and the crash report. All of these documents indicate that the events leading up to and through Petitioner’s arrest, including his completion of the breath-alcohol test occurred on March 4, 2011. Officer Velez attested to the events that occurred on March 4, 2011 through his sworn signing of the Jurat that included as an attachment the ICJIS Arrest Affidavit (charging affidavit) with a detailed narration of the events that occurred on March 4, 2011 and includes the time of arrest at 20:46. The only event that occurred on March 5, 2011 was booking Petitioner into the Orange County Corrections Booking and Release Center (“BRC”) at 03:09. It is logical that due to processing time, the formal booking of Petitioner into the BRC did not occur until the following morning. Further, the event of booking Petitioner into the BRC was not relevant to the issues within the scope of the hearing officer’s review. Therefore, Petitioner’s argument lacks merit as no conflict existed as to dates in the evidence relevant to the issues that were before the hearing officer.

As to Petitioner’s second argument, competent substantial evidence existed that Petitioner was observed operating a motor vehicle and that he was also in actual physical control of his vehicle. Among the hearing officer’s findings were that 1) During the crash investigation, Officer Velez found Petitioner to be the at-fault driver and cited him for careless driving; 2) When Officer Velez was completing paperwork as to the crash

investigation, Apopka Fire Department personnel advised him that Petitioner had left the scene of the crash in his vehicle; and 3) When Officer Tapscott responded to Petitioner's residence, he located Petitioner in his driveway, walking around his vehicle, observed that the vehicle's engine was still running, and that there was no one else around the vehicle.

Further, the hearing officer in his order specifically ruled that:

The crash report identifies Mr. Wood as the sole occupant and registered owner of the at-fault vehicle in the crash. Counsel also provided no evidence that another person arrived on scene to drive Mr. Wood's vehicle away from the crash scene, and Officer Tapscott informed Officer Velez that Mr. Wood was alone in the vicinity of his vehicle with the engine running at his residence.

See Findings of Fact, Conclusions of Law and Decision, PA-A, page 4.

Accordingly, this Court finds that procedural due process was followed; the essential requirements of law were followed; and the hearing officer's administrative findings were supported by competent substantial evidence.

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 12th day of December, 2011.

/S/

BOB LEBLANC
Circuit Court Judge

/S/

SALLY D. M. KEST
Circuit Court Judge

/S/

JULIE H. O'KANE
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 and Warren W. Lindsey, Esquire**, Kirkconnell, Lindsey, Snure and Yates, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32789 and to **Richard M. Coln, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 13th day of December, 2011.

/S/
Judicial Assistant