

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

CHRIS R. MURVIN,

Petitioner,

v.

CASE NO.: 2012-CA-10844-O

WRIT NO.: 12-53

**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,
Donna Petty, Hearing Officer.

Matthew P. Ferry, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE G. ADAMS, S. KEST, BLACKWELL, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Chris R. Murvin (“Murvin”), 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 driving with 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 and Procedural History

As gathered from the hearing officer's findings, including the testimony, arrest affidavit and other related documents provided at the formal review hearing held on April 19, 2012 and May 25, 2012, the facts were as follows: On March 17, 2012, at approximately 12:33 a.m., Deputy Kevin Johnson with the Orange County Sheriff's Office was on patrol as part of a multi law enforcement agency DUI check point when he noticed a vehicle traveling in front of his patrol vehicle swerving and crossing the solid yellow and white lane lines several times, almost hitting the curb and another vehicle causing the other vehicle to brake.

Deputy Johnson then initiated a traffic stop. While in contact with the driver, identified as Murvin, he noticed that Murvin exhibited signs of impairment including heavy eyelids, red and glassy eyes, slow speech, and the strong odor of alcohol impurities emitting from his breath as he spoke. Murvin stated that he was coming from a Chinese restaurant where he had consumed two drinks and was on his way home. Further, Murvin stumbled as he exited his vehicle having to reach out for the vehicle to regain his balance and he had an unsteady gait. Deputy Johnson then informed Murvin that he was conducting a DUI investigation and requested Murvin to submit to the field sobriety exercises. Murvin agreed and performed the field sobriety exercises poorly.

Based on Deputy Johnson's personal observations including Murvin's driving pattern, his signs of impairment, and his poor performance of the exercises, Murvin was placed under arrest for DUI and transported to the Orange County Breath Testing Facility where he was observed for thirty minutes and then provided two breath samples with results of .175 and .171. Murvin was issued citations for failure to maintain a single lane and for DUI and his license was suspended.

At the formal review hearing held on April 19, 2012, DUI technician Jimmy Burke and Deputy Johnson appeared and testified. However, Agency Inspector Kelly Melville (“Melville”), who also was subpoenaed by Murvin, did not appear and provided the hearing officer with just cause. The hearing was continued to May 25, 2012 solely for Melville to appear and testify. Melville again failed to appear at the May hearing and did not provide just cause. The hearing officer then advised Murvin’s counsel of his option to seek enforcement of the subpoena through the circuit court or to waive Melville’s testimony. Murvin’s counsel chose not to seek enforcement of the subpoena, but instead made a motion to invalidate the license suspension based on Melville’s failure to appear. Murvin’s counsel also brought motions to invalidate the license suspension arguing that both the stop and detainment of Murvin were unlawful lacking reasonable suspicion. The hearing officer denied all motions.

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). “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 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. (2012).

Arguments

In the Petition for Writ of Certiorari, Murvin argues that: 1) He was deprived of due process because Melville's failure to appear at the originally scheduled formal review hearing on April 19, 2012 and at the subsequent scheduled hearing on May 25, 2012 deprived him of his right to have a meaningful formal review hearing within the required thirty days and 2) His license suspension was not supported by competent substantial evidence that the arresting officer had reasonable suspicion to detain him for a DUI investigation and to request that he perform the field sobriety exercises.

Conversely, the Department argues that: 1) Murvin was not denied due process because the hearing officer granted his request to subpoena Melville and provided him the opportunity to seek enforcement of the subpoena in the circuit court that was consistent with both statutory and case law and 2) Reasonable suspicion existed to stop and detain Murvin for a DUI investigation and to request that he perform the field sobriety exercises based upon Murvin's erratic driving pattern and signs of impairment.

Analysis and Findings

Section 322.2615(6)(c), Florida Statutes, provides that a party may seek enforcement of a subpoena for a review hearing by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. However, Rule 15A-6.015(2)(c) of the Florida Administrative Code states that no hearing shall be continued for a second failure to appear. In this case, the formal review hearing held on April 19, 2012 was continued to May 25, 2012 due to Melville's failure to appear. At the May hearing, Melville again failed to appear and at that time the hearing officer was without authority to continue the hearing again. *Burrell v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 1060a (Fla. 9th Cir. Ct. Sept. 25, 2012). Therefore, Murvin was not required to seek enforcement of the subpoena in the circuit court as to Melville's second failure to appear. Accordingly, the hearing officer's decision to sustain Murvin's license suspension deprived him of due process and departed from the essential requirements of the law. Further, because Murvin's first argument is dispositive, this Court finds it unnecessary to address his second argument.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Chris R. Murvin's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 5th day of February, 2013.

/S/ _____
GAIL A. ADAMS
Circuit Court Judge

/S/ _____
SALLY D. M. KEST
Circuit Court Judge

/S/ _____
ALICE L. BLACKWELL
Circuit Court Judge

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, matt@warrenlindseylaw.com and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, richardcoln@flhsmv.gov on this 6th day of February, 2013.

/S/ _____

Judicial Assistant