

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES – Due Process - Suspension—Fact that Petitioner requested continuance of first Formal Review Hearing due to her inability to subpoena arresting officer distinguishes this case from Robinson v. Florida Department of Highway Safety and Motor Vehicles, 93 So. 3d 1090 (Fla. 2d DCA 2012), review denied, 112 So. 3d 83 (Fla. 2013); and Pfleger v. Florida Department of Highway Safety and Motor Vehicles, 88 So. 3d 159 (Fla. 2d DCA 2011). Petitioner failed to subpoena officer who stopped her vehicle for continued hearing. No due process violation; evidence supports hearing officer's decision to deny motion to invalidate suspension; and competent, substantial evidence supports probable cause for arrest – Petition denied. Ashley Tyson v. Fla. Dep't of Highway Safety and Motor Vehicles, No. 12-000041AP-88A (Fla. 6th Cir. App. Ct. October 11, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

ASHLEY TYSON,
Petitioner,

Case No.: 12-000041AP-88A
UCN: 522012AP000041XXXXCI

v.

**FLORIDA DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES**
Respondent.

Opinion Filed _____/

Petition for Writ of Certiorari from
Decision of Hearing Officer
Bureau of Administrative Reviews
Department of Highway Safety
and Motor Vehicles

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PER CURIAM.

Ashley E. Tyson seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway

Safety and Motor Vehicles entered on August 30, 2012. The Decision denied Ms. Tyson's motions and affirmed the order of suspension of Ms. Tyson's driving privileges. The Petition is denied.

Timeline

06/03/2012	St. Petersburg Police Officer Fender stopped Ms. Tyson for an alleged traffic violation. St. Petersburg Police DUI Investigative Officer Gosnell responded to Off. Fender's request for assistance. Ms. Tyson refused to perform field sobriety testing for Off. Gosnell. Ms. Tyson was arrested for DUI by Off. Gosnell. St. Petersburg Police Officer Cox requested that Ms. Tyson submit to a breath-alcohol test. Allegedly Ms. Tyson refused and she was transported to jail.
06/06/2012	Notice of Formal Review Hearing/Prehearing Order issued by Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles. The Formal Review Hearing was scheduled for June 27, 2012. (Pet. App. Ex. 5; Resp. Supp. App. p. 9)
06/27/2012	<u>First Hearing conducted.</u> Ms. Tyson was unable to serve arresting Off. Gosnell with a subpoena for the hearing as he was on vacation. Off. Cox testified about Ms. Tyson's refusal to submit to breath-alcohol testing. Off. Fender had been served with a subpoena for the hearing, but did not appear. Counsel for Ms. Tyson moved to invalidate the suspension due to Off. Fender's failure to appear. Ms. Tyson moved for a continuance to enable her to subpoena Off. Gosnell. The Hearing Officer granted the continuance and denied the motion to invalidate the suspension.
08/30/2012	<u>Conclusion of Formal Review Hearing.</u> Off. Gosnell testified about the DUI investigation. Off. Fender did not appear at the hearing. Ms. Tyson moved to invalidate the suspension due to Off. Fender's failure to appear. The Hearing Officer denied the motion.

At the June 27, 2012, hearing counsel for Petitioner was asked how she wished to proceed concerning Off. Fender's absence. She responded:

I'm going to ask that if there is no just cause, obviously I'm going to move to invalidate, based on his willful nonattendance. He was the officer who did the stop of the vehicle, and I believe the only one who can testify that she was in actual physical control or driving a motor vehicle.

My understanding is, because I'm moving to continue for attendance, so Officer Gosnell, who was the DUI investigator, we will have to reschedule this. I will attempt another subpoena on the new date, to see if we can get Officer Fender in here, if that's possible.

(Pet. App. 6, Trans. 1, p. 10). The Hearing Officer denied the motion to invalidate and stated: "If Fender shows just cause, we will continue . . . and keep his subpoena in effect." Counsel for Petitioner was informed that a continuance would be entered and that she would need a new subpoena for Officer Gosnell. The Hearing Officer continued, "If Fender does not show just cause, I'm going to call you [on July 3, 2012] and let you know Then you can enforce the subpoena . . . at that time. Either way we're going to have a continuance . . . with or without Fender." (Pet. App. 6, Trans. 1, p. 11-13).

Thereafter, Petitioner did not move to enforce the June 27, 2012, subpoena and a new subpoena was not issued for Off. Fender's attendance at the August 30, 2012, hearing.

At the August 30, 2012, hearing counsel for Petitioner renewed her motion to invalidate based on Off. Fender's lack of attendance at the hearing "when we had lawful service [for the June 27, 2012, hearing] and based on the Pflieger case, that would have been the officer who actually observed the driving that was resulting in the stop, and I will renew my motion to invalidate based on that." (Pet. App. 6, Trans. 2, p. 11-12). The Hearing Officer denied the motion without comment.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

Analysis

Initially, this Court holds that this case is factually distinguishable from Pflieger v. Department of Highway Safety & Motor Vehicles, 18 Fla. L. Weekly Supp. 706a (Fla. 6th Cir. App. Ct. May 20, 2011), pet. denied, 88 So. 3d 159 (Fla. 2d DCA 2011); and Department of Highway Safety & Motor Vehicles v. Robinson, 18 Fla. L. Weekly Supp. 1099b (Fla. 6th Cir. App. Ct. Sept. 1, 2011), pet. denied, 93 So. 3d 1090 (Fla. 2d DCA 2012), review denied, 112 So. 3d 83 (Fla. 2013). In the present case Petitioner requested and was granted a continuance of the Formal Review Hearing to enable her to secure Off. Gosnell's appearance.

In the Petition and in the Reply Brief, Petitioner argues that the Hearing Officer erred when he denied the motion to invalidate the suspension of her license. She informs this Court that at the August 30, 2012, hearing, "Petitioner's counsel again requested invalidation of [Petitioner] Tyson's suspension for [Off.] Fender's failure to appear or provide any explanation or excuse for his prior nonappearance, which was denied." (Pet. Reply Brief, p. 4; emphasis added).

As has been noted by the Department in its Response to the Petition, the Off. Fender did not appear for the August 30, 2012, hearing because Petitioner did not move to enforce the subpoena that had been issued for the June 27, 2012, hearing and did not request a new subpoena for his attendance at the continued hearing.

Counsel for Petitioner also asserts that the Hearing Officer erred when he denied her motion to invalidate the suspension of her driver's license based on a lack of probable cause for the arrest. She argued at the August 30, 2012, hearing that there was no probable cause to believe that the Petitioner was

impaired: "There was no HGN [horizontal gaze nystagmus test] done, and it sounds like there was obviously some conflict between the arresting officer and Ms. Tyson." (Pet. App. 6, Trans. 2, p. 12).

Motion to Invalidate

Section 322.2615(6)(a) only requires that the Formal Review Hearing be scheduled to be held within thirty days of the request for such review. See also § 322.2615(9), Fla. Stat. The statute does not require the hearing to be completed within thirty days of the request. The original hearing in this case was timely scheduled and commenced on June 27, 2012. The case was continued at the request of Petitioner because Off. Gosnell could not be served with a subpoena to appear at the original hearing.

Off. Fender's Report documenting the probable cause to stop Petitioner's vehicle was properly admitted into evidence at the June 27, 2012, hearing. However, pursuant to Florida Administrative Code 15A-6.013(5): "The driver shall have the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver."

As noted above, in her Reply Brief Petitioner states that Off. Fender did not present good cause for his failure to appear at the June 27, 2012, hearing. Therefore, Petitioner was required to move to enforce the original subpoena under section 322.2615(6)(c), or to request the issuance of a new subpoena.

Although Petitioner challenged Off. Fender's report by subpoenaing him for the June 27, 2012, hearing; she failed to pursue the challenge for the hearing conducted on August 30, 2012, that had been continued at her request. Petitioner was not deprived of due process and competent, substantial evidence supports the Hearing Officer's decision to deny the motion to invalidate the suspension due to Off. Fender's failure to appear.

Probable Cause to Arrest for DUI

In evaluating Petitioner's argument that there was a lack of probable cause for the arrest the Court has reviewed the documents admitted into evidence at the June 27, 2012, hearing: Complaint/Arrest Affidavit (Pet. App. 2); the Refusal to Submit to Breath, Urine, or Blood Test (Pet. App. 3); the Incident/Investigation Report (Pet. App. 4). See Fla. Admin. Code R. 15A-6.013(2); State Dept. of Highway Safety v. Edgell-Gallowhur, 114 So. 3d 1081, 1085-88 (Fla. 3d DCA 2013). This Court has also considered the testimony of Off. Cox at the June 27, 2012, hearing and the testimony of Off. Gosnell at the August 30, 2012, hearing.

This Court concludes that competent, substantial evidence supports the Hearing Officer's decision that Off. Gosnell 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. The Hearing Officer properly affirmed the suspension of Petitioner's driving privileges.

The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 11th day of October, 2013.

Original order entered on October 11, 2013, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

Copies furnished to:

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