

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES – Suspension – Section 322.2615, Fla. Stat. (2013). The failure of subpoenaed civilian witnesses to appear at the formal review hearing is not grounds to invalidate a license suspension. Petitioner was accorded procedural due process - Petition denied. *Hamalian v. Fla. Dep't of Highway Safety and Motor Vehicles*, No. 12-000059AP-88B (Fla. 6th Cir. App. Ct. October 4, 2013).

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

KELLY HAMALIAN,
Petitioner,

v.

**Ref. No.: 12-000059AP-88B
UCN: 522011AP000059XXXXCV**

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

_____ /

ORDER AND OPINION

Background

Petitioner challenges a final order of the Department of Highway Safety and Motor Vehicles (Department) suspending her license under §322.2615(1)(a), Fla. Stat., for refusing to submit to a breath test in connection with her arrest for driving under the influence stemming from a car accident on July 5, 2012. Petitioner subpoenaed John Killea and Andrew Kukulya to testify at her license suspension hearing. One of the witnesses, John Killea, did not witness the crash but came out immediately and saw a female exiting from the driver's side of the vehicle and identified the driver as the Petitioner. The second witness, Andrew Kukulya, stated that he did not see the crash either, however, when he came outside a female was in the driver's seat and was attempting to back up. He also identified the driver as the Petitioner. Both witnesses completed sworn witness statement forms. Despite being properly subpoenaed, however, both witnesses failed to appear at the license suspension hearing. Counsel for Petitioner was asked if he would like to continue the hearing in order to enforce the subpoenas in the circuit court. Relying on *Pfleger v. Florida Department of Highway Safety and Motor Vehicles*, No. 10-000038AP-88B (Fla. 6th Cir. App. Ct. May 20, 2011), and *Dep't of Highway Safety & Motor Vehicles v. Robinson*, 93 So.3d 1090 (Fla. 2d DCA 2012), Petitioner chose not to enforce the subpoenas, and moved

to invalidate the suspension because of the failure of the subpoenaed witnesses to appear. The hearing officer denied the motion to invalidate, and suspended Petitioner's license for refusing to submit to a breath test. Petitioner filed the instant Petition for Writ of Certiorari, contending that the witnesses' failure to appear denied her due process. Petitioner also asserts that the hearing officer did not follow the essential requirements of the law when the hearing officer denied Petitioner's request for a proffer.

Standard of Review

In reviewing the Department's Order, this Court must determine (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. *See Vichich v. Department of Highway Safety and Motor Vehicles*, 799 So.2d 1069, 1073 (Fla. 2d DCA 2001).

Procedural Due Process

In *Pfleger*, this panel held that where a hearing officer continued the license suspension hearing to allow the licensee to enforce the subpoena for the arresting officer who failed to appear at hearing, the hearing officer effectively added a procedural step to the review process that deprived the licensee of opportunity to be heard and challenge suspension on the merits within 30 days. In *Robinson*, dealing with similar facts as *Pfleger*, the Sixth Circuit Appellate Court granted the Petition for Writ of Certiorari based on the precedent of *Pfleger*, concluding that the Petitioner's due process rights were violated by the arresting officer's unexcused, unexplained non-appearance at the administrative formal review hearing.

Effective July 2, 2013, §322.2615(6)(c), Fla. Stat., was amended to make clear that "[t]he failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension." Section 322.2615(11) goes on to clarify, however, that "[i]f the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension." This amendment codifies this Court's holding in *Pfleger* and *Robinson*, that the failure of a properly subpoenaed arresting officer to appear is grounds to invalidate a license suspension. The amended statute also makes clear that Petitioner's reliance on *Pfleger* and *Robinson* was misplaced. Both of those cases involved the arresting officer's failure to appear after being properly subpoenaed. In the instant case, the subpoenaed witnesses are civilians, not the arresting officer or breath technician. Accordingly, under both the prior and the amended statute, and consistent with this Court's prior decisions, it was not a violation of due process to require the petitioner to seek enforcement of the subpoena in the circuit court.

Essential Requirements of the Law

Petitioner also claims that the hearing officer departed from the essential requirements of the law by denying counsel's request for a proffer. Counsel was attempting to question the officer who asked Petitioner whether she'd take a breath test about an interaction between Petitioner and the officer. Counsel stated at the hearing that this interaction may have led the petitioner to have hostility towards the officer, and thus Petitioner's refusal might not have been voluntary. The hearing officer did not allow counsel to question the officer about this interaction, stating that it was outside the scope of review. Notations on the incident report describe the interaction as one where the petitioner's headband fell into the trash can while she was vomiting. The officer removed the headband from the trashcan and put it on the counter, at which point the petitioner got angry and accused the officer of breaking her headband. The hearing officer determined that the questioning about the headband was outside the scope of review, and denied counsel's attempt to have the officer proffer an answer to the question, "did there appear to be some sort of a confrontation between you and my client over this headband during the breath test?" The hearing officer has broad discretion regarding the admissibility of evidence, and such rulings are subject to an abuse of discretion standard. *Nardone v. State*, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). In the instant case, the hearing officer had plenty of information on the alleged interaction detailed by the officer in his report, the petitioner did not testify that she was compelled to take the breath test, and there was competent substantial evidence that the petitioner refused to submit to the breath test.

Conclusion

Because we find that the petitioner was accorded procedural due process, and the essential requirements of law were observed, the Petition for Writ of Certiorari is denied.

Accordingly, it is

ORDERED that the Petition for Writ of Certiorari is DENIED.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, on this _____ day of _____, 2013.

Original order entered on October 4, 2013, by Circuit Judges Amy M. Williams, Jack Day, and Pamela A.M. Campbell.

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