

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER’S LICENSES–Suspension–No denial of due process when Petitioner was not denied the opportunity to consult with his attorney during administration of breath test. Administration of a breath test is not a critical stage of the proceedings to which a Sixth Amendment right to counsel attaches. – Petition denied. *Platte v. Fla. Dep’t of Highway Safety and Motor Vehicles*, No. 13-000019AP-88B (Fla. 6th Cir. App. Ct. August 9, 2013).

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

DAVID EDWARD PLATTE,
Petitioner,

vs.

Ref. No.: 13-0019AP88B
UCN: 522013AP000019XXXXC1

FLA. DEP’T OF HIGHWAY SAFETY
AND MOTOR VEHICLES
Respondent.

_____ /

ORDER AND OPINION

THIS CAUSE is before the Court on a Petition for Writ of Certiorari seeking review of an Order of License Suspension issued by the Department of Highway Safety and Motor Vehicles (“DHSMV”). Petitioner’s license was suspended for refusing to submit to a test of his breath-alcohol level after being requested to do so by a law enforcement officer. Because the Petitioner was provided procedural due process and the Department’s actions were supported by competent substantial evidence, the Petition for Writ of Certiorari is **DENIED**.

FACTS AND PROCEDURAL HISTORY

On December 1, 2012, the Petitioner was involved in a traffic accident and Officer Hatch conducted a crash investigation. During the crash investigation, Officer Hatch observed that the Petitioner’s eyes were bloodshot and glassy, his speech was slurred and there was an odor of an alcoholic beverage on his person. When the Petitioner exited the vehicle, Officer Hatch observed that he was unsteady and that he was swaying while standing. Officer Hatch read the Petitioner Miranda Warnings and a male civilian at the scene identified himself as the Petitioner’s attorney, Mr. Bauer. This individual interjected that the Petitioner was not going to do any tests. Mr. Bauer

was given verbal warning not to interfere with the DUI investigation. The Petitioner was asked if he would waive his rights and speak with the Officer. Again, Mr. Bauer advised the Petitioner not to say anything. Officer Hatch told the Petitioner he was not entitled to an attorney at this juncture of the DUI investigation. The Petitioner was requested to perform a field sobriety test and the Petitioner refused. The Petitioner was arrested for DUI and refused to take the requested breath-alcohol test.

Following Petitioner's arrest for driving under the influence, the Petitioner requested a formal administrative review of his license suspension pursuant to §322.2615, Florida Statutes.

STANDARD OF REVIEW

In reviewing an administrative order, this Court is limited to determining (1) whether procedural due process has been accorded, (2) whether the essential elements of law have been observed, and (3) whether the administrative findings are supported by competent, substantial evidence. Vichich v. Dep't of Highway Safety & Motor Vehicles, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001).

DISCUSSION

The Petitioner contends that once Officer Hatch read the Miranda warnings, initiating the start of his DUI investigation, the Petitioner was entitled to consult with his attorney and that the denial of that constitutional right voided his refusal suspension. To the contrary, the cases of State v. Hoch, 500 So. 2d 597 (Fla. 3rd DCA 1986), and State v. Burns, 661 So. 2d 842 (Fla. 5th DCA 1995), held that (1) administration of a breath test is not a critical stage of the proceedings to which a Sixth Amendment right to counsel attaches; (2) the results of a breath test are physical evidence, not testimonial, and thus no Sixth Amendment right to counsel attaches. Additionally, because an accused has no right to refuse to take the test—only an option to refuse—there can be no denial of due process because no actual deprivation of a right has occurred South Dakota v. Neville, 459 U.S. at 565. Officer Hatch correctly observed that the Petitioner was not entitled to an attorney at that juncture of a DUI investigation.

The Petitioner contends under the so-called “Confusion Doctrine” the Petitioner’s confusion about his right to counsel should invalidate his driver’s license suspension. In Kurecka v. Florida, 67 So. 3d 1052, 999 (Fla. 4th DCA 2010), the court stated that the “Confusion Doctrine” might properly apply if law enforcement created a defendant's confusion about the

right to counsel, such that the defendant refused under the mistaken belief he had the right to consult counsel first. However, the Fourth District also noted the holding in Ringel v. State, 9 Fla. Supp. 678a (Fla. 18th Cir. 2002), requiring that the “licensee expresses confusion about his rights when asked to take a breath test” for the doctrine to apply. In the case at hand, Officer Hatch made no misstatement of law in either reading Miranda or denying access to counsel, properly advising the Petitioner he had no right to consult at that juncture. The Petitioner never expressed confusion about his rights. The “Confusion Doctrine” does not apply to this case.

Although the Petitioner contends that the suspension was not supported by competent substantial evidence, the hearing officer can draw reasonable inferences from the evidence and reach ultimate findings of fact. Department of Highway Safety and Motor Vehicles v. Dean, 662 So. 2d 371 (Fla. 5th DCA 1995). The Second District Court of Appeal has also stated in Department of Highway Safety and Motor Vehicles v. Rose, So. 3d (Fla 2nd DCA 2012) that even in the absence of an odor of alcohol, other indicia of impairment such as reckless or dangerous operation of a vehicle, slurred speech, lack of balance, flushed face, bloodshot eyes, admissions and poor performance of field sobriety exercises, the courts could support an arrest for DUI. Officer Hatch testified that the Petitioner smelled like mouthwash, had slurred speech, bloodshot eyes, and swayed side to side while standing. The Hearing Officer has supported its finding of facts with competent substantial evidence. Therefore, it is,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **DENIED**.

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

Original order entered on August 9, 2013 by Circuit Judges Amy M. Williams, Pamela Campbell, and Jack Day.

Copies furnished to:

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