

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES – Suspension—Petitioner's due process rights not violated when police officer, who had been served with subpoena for final review hearing, failed to appear. In correspondence requesting formal review hearing, Petitioner stated he "waive[d] any time requirements" and subsequently requested a continuance. Case is factually distinguishable from Pfleger v. Florida Department of Highway Safety and Motor Vehicles, 18 Fla. L. Weekly Supp. 706a (Fla. 6th Cir. App. Ct. May 20, 2011), and Florida Department of Highway Safety and Motor Vehicles v. Robinson, 18 Fla. L. Weekly Supp. 1099b (Fla. 6th Cir. App. Ct. September 1, 2011), pet. denied, 93 So. 3d 1090 (Fla. 2d DCA 2012). Petition denied. Bragg v. Florida Department of Highway Safety and Motor Vehicles, No. 13-000022AP-88A (Fla. 6th Cir. App. Ct. December 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**

ANDREW BRAGG,
Petitioner,

**Case No.: 13-000022AP-88A
UCN: 522013AP000022XXXXCV**

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

J. Armando Edmiston, Esq.
Attorney for Petitioner

Stephen D. Hurm, Gen. Counsel
Judson M. Chapman, Sr. Asst. Gen. Counsel
Attorneys for Respondent

PER CURIAM.

Andrew Bragg 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 February 18, 2013. The Decision denied Mr. Bragg's motion to invalidate and affirmed the order of suspension of Mr. Bragg's driving privileges. The Petition is denied.

Statement of Facts

On December 8, 2012, Clearwater Police Officer Nick Giordano issued a Florida Uniform Traffic Citation to Mr. Bragg for unlawful speed by traveling seventy-five miles per hour in a sixty mile per hour speed zone. Officer Giordano also issued a Florida DUI Uniform Traffic Citation, noting that Mr. Bragg refused to submit to a breath, blood, or urine test for alcohol levels. Mr. Bragg's driving privileges were suspended.

In correspondence dated December 13, 2012, counsel for Mr. Bragg¹, informed the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles, that a formal review hearing was requested and stated in part, "I waive any time requirements." Thereafter, counsel for Mr. Bragg requested a continuance of the scheduled hearing.²

The formal review hearing was conducted on February 1, 2013. The Hearing Officer was informed that the subpoena issued for Officer Giordano had been served. The following documents were admitted into evidence without objection: (DDL1) DUI traffic citation; (DDL2) Mr. Bragg's driver's license; (DDL3) the "Complaint/Offense/

¹ Appellate counsel did not represent Mr. Bragg at the formal review hearing.

² Contrary to the argument raised for the first time in Mr. Bragg's Reply Brief, there is no legal basis to support, and no evidence, that the Department of Highway Safety and Motor Vehicles requested a continuance.

Arrest Affidavit;" (DDL4) the law enforcement officer's oath form; (DDL5) the ACISS CW-Offense DUI report; (DDL6) the standard field sobriety test form; (DDL7) the refusal to submit to breath, blood, or urine test affidavit; and (DDL8) Mr. Bragg's driving record.³

Although Officer Giordano had been served with the subpoena for his attendance, he was not present. The Hearing Officer denied the motion to invalidate the suspension of Mr. Bragg's driving privilege to allow the officer forty-eight hours to show just cause for the failure to appear.

Thereafter, when the officer did not supply just cause for failing to appear, the Hearing Officer notified counsel for Mr. Bragg that he would be allowed until February 13, 2013, to seek enforcement of the subpoena against Officer Giordano. The Hearing Officer warned Attorney Pardue that if no documentation was received, a decision would be entered based on the preponderance of the evidence admitted at the February 1, 2013, hearing.

The "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer was entered on February 18, 2013. The Decision states that as of February 18, 2013, no documentation was received by the Hearing Officer to demonstrate that counsel was seeking to enforce the subpoena. The motion to invalidate the suspension was denied and the order of suspension of Mr. Bragg's driving privileges was affirmed. This petition followed.

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).

³ Section 322.2615(2), Florida Statutes (2012), provides that after the issuance of a notice of suspension of driver's license, materials properly submitted to the Department of Highway Safety and Motor Vehicles by a law enforcement agency shall be considered self-authenticating.

The only issue raised in the Petition for Writ of Certiorari is whether Mr. Bragg's due process rights were violated.

Analysis

Pursuant to section 322.2615(6)(a), Florida Statutes (2012), if a person whose license has been suspended requests a formal review, the Department must schedule the hearing to be held within thirty days of the Department's receipt of the request.

In the present case, counsel for Mr. Bragg "waive[d] any time requirements" and also requested a continuance. This case is factually distinguishable from Pfleger⁴ and Robinson.⁵ There was no due process violation in the present case because counsel waived the time restriction imposed by the statute.

Although the 2012 version of section 322.2615 is applicable in the present case, the Court notes that the statute was amended effective July 1, 2013. The statute has been clarified and states in part: "(6)(c) The failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension. If a witness fails to appear, a party may seek enforcement of a subpoena under paragraph (b) 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 or by filing a motion for enforcement in any criminal court case resulting from the driving or actual physical control of a motor vehicle that gave rise to the suspension under this section. . . ." (emphasis added).

The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this _____ day of December, 2013.

Original order entered on December 9, 2013, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

⁴ Pfleger v. Dep't of Hwy. 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).

⁵ Dep't of Hwy. 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).

Copies furnished to:

J. Armando Edmiston, Esq.
609 W. DeLeon Street
Tampa, FL 33606

Stephen D. Hurm, Gen. Counsel
Judson M. Chapman, Sr. Asst. Gen. Counsel
6855 62nd Ave. North
Pinellas Park, FL 33781