

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

CARRIE SIMON,
Petitioner,

v.

**Ref. No. 14-000061AP-88B
UCN: 522014AP000061XXXXCI**

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

ORDER AND OPINION

Petitioner challenges a final order of the Department of Highway Safety and Motor Vehicles suspending her license under §322.2615, Fla. Stat., for operating a motor vehicle while having an unlawful breath-alcohol level. Petitioner contends that the Department's refusal to invalidate her license suspension due to Officer Whetstone and Acri's failure to timely appear at the scheduled formal review hearing denied her procedural due process. Petitioner also contends that there was no competent substantial evidence that she was driving under the influence because the officers never actually saw her operating the vehicle.

FACTS AND PROCEDURAL HISTORY

On April 2, 2014, Officer Whetstone responded to a call concerning a disabled vehicle. Upon arrival, he observed Petitioner standing outside the disabled vehicle and heard Petitioner, talking on the phone, state that she had struck a curb and damaged her vehicle. Officer Acri arrived at the scene to assist and to conduct a crash investigation, and upon making contact with Petitioner, detected indications of impairment. Officer Acri completed the crash investigation and turned further investigation over to Officer Cox, the arresting officer. Officer Cox informed Petitioner that Officer Acri had completed the crash investigation and that he was there to conduct a DUI investigation. Officer Cox observed a strong odor of alcohol on Petitioner's breath; bloodshot, watery eyes; a blank, dazed expression on her face; and slurred speech. Officer Cox requested that Petitioner perform field sobriety exercises. Petitioner performed the exercises poorly and was arrested for DUI. Petitioner submitted breath samples of .159 and .153 g/210L.

A formal review hearing was scheduled for May 1, 2014. In advance of the hearing, Petitioner requested a subpoena for Officers Cox, Whetstone, and Acri. At the May 1st hearing,

Officer Cox was the only subpoenaed witness that appeared. The St. Petersburg Police Department rejected the subpoenas for Officers Whetstone and Acri because they were in training. Petitioner moved to invalidate the license suspension based on an unlawful rejection of the subpoenas and the failure of the two officers to appear, and the motion was denied. The hearing was continued to June 12, 2014 in order for Officers Whetstone and Acri to appear. At the June 12th hearing, Officer Whetstone appeared to testify, but once again Officer Acri failed to appear. Petitioner again moved to invalidate the suspension based on the failure of Officer Acri to appear. Petitioner's motion was denied, and the hearing was continued to July 23, 2014 for Petitioner to seek enforcement of Officer Acri's subpoena. Officer Acri appeared at the July 23rd hearing, and after hearing, Petitioner's suspension was upheld.

DISCUSSION

Failure of Subpoenaed Officers to Appear

Petitioner relies on this Panel's decision in *Pfleger v. State of Florida, DHSMV*, 18 Fla. L. Weekly Supp. 706a (Fla. 6th Cir. App. Ct. May 20, 2011) for support of her contention that Officers Whetstone and Acri's failure to appear denied her due process. In *Pfleger*, we held that the hearing officer's decision to continue the hearing to allow for enforcement of the arresting officer's subpoena effectively added a procedural step to the review process, and deprived the petitioner of an opportunity to be heard and challenge the suspension on the merits within 30 days.

However, effective July 2, 2013, section 322.2615 was amended as follows:

(6)(a) If the person whose license was suspended requests a formal review, the department must schedule a hearing ~~to be held~~ within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.

(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. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged.

(11) If 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.

These amendments make clear that only the failure of the subpoenaed *arresting officer or breath technician* to appear at the formal review hearing is grounds to invalidate a suspension. The amendments also clarify that the Department must only *schedule* a hearing with 30 days, the hearing does not need to be *held* within 30 days. Under the current version of the statute, the analysis in

Pfleger is not applicable to the instant case. Because neither Officer Whetstone nor Officer Acri was the arresting officer or breath technician, their failure to appear at the formal review hearing is not grounds to invalidate the suspension. Section 322.2615(6), Fla. Stat. (2013).

Unlawful Rejection of Subpoenas

Petitioner further contends that the rejection of service of the subpoenas for Officers Whetstone and Acri violated administrative law and deprived her of the right to confront and cross-examine witnesses. Department of Highway Safety and Motor Vehicles Rule 15A-6.012 states that service of a subpoena may only be rejected if (1) the date of attempted service was less than seven days prior to the scheduled hearing, (2) the officer is no longer employed with the agency, or (3) the witness is not scheduled to work in between the date of attempted service and the date of the scheduled hearing. Because none of these exceptions applied to the officers in this case, Petitioner argues that the liaison was obligated to accept service pursuant to administrative rule 15A-6.012 (3).

In *Estraviz v. State of Florida, DHSMV*, 4 Fla. L. Weekly Supp. 813a (Fla. 4th Cir. App. Ct. July 15, 1997), the court held that when a subpoena is unlawfully rejected, and the rejection is not attributable to or the fault of the petitioner but precludes the petitioner from having a meaningful hearing, such conduct requires that the suspension be invalidated due to a violation of the petitioner's due process rights. Like *Pfleger*, the statutory scheme in place at the time *Estraviz* was decided has since been amended, and is no longer controlling of the instant case. First, the amended statute no longer requires that a hearing be held within 30 days, and thus the concerns in *Estraviz* about precluding Petitioner from having a meaningful hearing within 30 days are no longer implicated. Second, because the amended statute clearly states that the failure of a subpoenaed witness to appear is not grounds to invalidate a suspension, it would be in direct contravention of the statute to invalidate a suspension when service of the non-arresting officer is rejected.

Lack of Competent Substantial Evidence

Petitioner next argues that because law enforcement did not observe the accident or any of the events leading up to the accident, but rather was notified by an unknown caller, there was no proof that Petitioner was driving or in actual physical control of the vehicle. This argument is without merit. On review, the Circuit Appellate Court is not entitled to reweigh the evidence; it may only determine whether competent substantial evidence supports the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So.2d 1247, 1249 (Fla. 2d DCA 2006). Under

administrative rule 15A-6.013(6), any relevant evidence that is timely filed shall be admitted at the hearing.

Upon officer Whetstone's arrival at the accident scene, he observed Petitioner, identified by her Florida driver's license, standing outside the disabled vehicle. Officer Whetstone also saw the owner's manual to the vehicle and a set of keys, later determined to belong to the vehicle, sitting on top of a barrier next to Petitioner. Additionally, Officer Whetstone heard Petitioner on the phone stating that she had struck a curb and damaged her vehicle. Under what is commonly referred to as the "fellow officer rule," these observations were properly imputed to Officer Cox. *Sawyer v. State*, 905 So. 2d 232 (Fla. 2d DCA 2005). These facts constituted reasonable and probable grounds that Petitioner had been in actual physical control of the vehicle, and constitute competent substantial supporting the hearing officer's determination of the same. *See State v. Hemmerly*, 723 So. 2d 324 (Fla. 5th DCA 1998) and *Cuciak v. State*, 18 Fla. L. Weekly Supp. 716 (Fla. 17th Cir. Ct. June 27, 2011) (discussing arrest authority of an officer at the scene of a traffic accident).

CONCLUSION

Because the Department's rejection of the subpoenas and the officers' failure to timely appear at the scheduled formal review hearing were not a denial of Petitioner's procedural due process under the current version of the section 322.2615, and because the Department's findings were supported by competent substantial evidence, the petition must be denied.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is DENIED.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 25 day of March 2015.

Original Order entered on March 26, 2015, by Circuit Judges Amy M. Williams, Peter Ramsberger, and Pamela A.M. Campbell.

Copies furnished to:
J. KEVIN HAYSLETT, ESQUIRE
250 NORTH BELCHER ROAD, SUITE 102
CLEARWATER, FL 34625

DEPT. OF HIGHWAY SAFETY AND MOTOR VEHICLES
OFFICE OF GENERAL COUNSEL
P.O. BOX 540609
LAKE WORTH, FL 33454