IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2008-CA-001256-XXXX-MA
DIVISION: CV-A

JUSTIN M. METTS,

Petitioner,

vs.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

Petition for Writ of Certiorari arising from the decision of the Department of Highway Safety and Motor Vehicles sustaining the administrative suspension of Petitioner's driver's license.

David M. Robbins, Esq., Cheyenne L. Palmer, Esq., Attorneys for Petitioner.
Michael J. Alderman, Esq., Senior Assistant General Counsel, Attorney for Respondent.

OPINION

This cause came before the Court upon the Petition for Writ of Certiorari filed by the Petitioner, Justin M. Metts, on January 28, 2008. Petitioner seeks review of the decision of the Department of Highway Safety and Motor Vehicles entered on December 28, 2007, sustaining the administrative suspension of his driver's license for driving with an unlawful alcohol level of .08 or higher. The Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c)(3), and sections 322.2615(13) and 322.31, Florida Statutes (2007). Having considered the record, pleadings, and argument of counsel, the Court makes the following findings of fact and conclusions of law:

I. Factual Background and Procedural History

On November 13, 2007, Officer J. F. Byrne of the Jacksonville Sheriff's Office (JSO) observed the Petitioner exiting the driver's side of his vehicle after having crashed into a retaining wall. Officer Byrne made contact with the Petitioner, and after observing signs of impairment, conducted a DUI investigation. Following the DUI investigation, the Petitioner was placed under arrest for DUI and transported to the Duval County jail. At the jail, the Petitioner submitted to a breath test, the results of which were .176 and .183.

As a result of the breath test, the Petitioner's driver's license was administratively suspended. Petitioner requested a formal review hearing, which was held on December 27, 2007. Prior to the review hearing, the Petitioner requested a subpoena duces tecum for Sergeant James Branch of JSO, or his designee. Robert Thomason, as the designee of Sergeant Branch, conducted the monthly agency inspection on the intoxilyzer instrument used for the Petitioner's breath test and completed the Agency Inspection Report. Petitioner also requested a subpoena duces tecum for Matthew Malhiot, who conducted the Florida Department of Law Enforcement (FDLE) annual inspection on the intoxilyzer instrument and completed the Department Inspection Report. Both subpoenas were denied by the Department. Petitioner also requested a subpoena duces tecum for Lieutenant Colvin of JSO, requesting that he bring a copy of any video made of the Petitioner at the jail. Lieutenant Colvin maintains control over all recordings made by the video cameras which are located inside the sally port and intake vestibule areas of the jail. This subpoena was also denied.

A number of documents were entered into evidence and considered by the hearing officer at the formal review hearing, including the Breath Alcohol Test Affidavit, the Agency Inspection Report, and the Department Inspection Report. A crash report was not placed into evidence.

Following the hearing, the suspension of the Petitioner's driver's license was upheld by the hearing officer.

II. Standard of Review

The scope of the circuit court's review of a hearing officer's suspension order is extremely limited. In reviewing an administrative order by certiorari, the circuit court must determine (1) whether procedural due process is 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. Dep't of Hwy. Safety and Motor Vehicles v. Favino, 667 So. 2d 305, 308 (Fla. 1st DCA 1995). The Court is not permitted to re-weigh the evidence or to substitute its judgment for the findings of the Department's hearing officer. See Education Dev. Ctr., Inc. v. West Palm Beach Zoning Bd. Of Appeals, 541 So. 2d 106, 108 (Fla. 1989); Dep't of Hwy. Safety and Motor Vehicles v. Smith, 687 So. 2d 30, 32 (Fla. 1st DCA 1997).

III. Application of Standard of Review to Petitioner's Claims

Petitioner raises four arguments in his Petition for Writ of Certiorari. First, he argues that he was denied due process when the Department denied his request for subpoenas for Sergeant Branch of JSO, or his designee, and for Matthew Malhiot of FDLE. Petitioner alleges that he was entitled to subpoena Sergeant Branch or his designee and Matthew Malhiot based upon Florida Administrative Code Rule 15A-6.013(5), which states in part: "[t]he driver shall have the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witnesses, and to rebut the evidence presented against the driver." Since the JSO Agency Inspection Report and the FDLE Department Inspection Report were both entered into evidence at his formal review hearing, he argues that he was denied the right to attempt to rebut this evidence by cross-

examining Sergeant Branch or his designee and Matthew Malhiot. The Department argues that there was no error below because the hearing officer does not have the authority to subpoena these witnesses.

Florida Statute 322.2615(6)(b) states that the hearing officer has the authority to "issue subpoenas for the officers and witnesses identified in documents in subsection (2)...." The documents identified in subsection 322.2615(2) are: "the driver's license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; the notice of suspension; and a copy of the crash report, if any." The Department argues that Officer Branch's designee and Matthew Malhiot are only identified in the Agency Inspection Report and the Department Inspection Report, respectively, and since neither of these documents are specifically identified in subsection 322.2615(2), the hearing officer is without the authority to issue subpoenas for them.

This issue has been previously addressed by courts in this circuit, and this Court agrees with the reasoning of the Honorable Aaron K. Bowden in Salter v. Department of Highway Safety & Motor Vehicles, (Fla. 4th Cir. Ct., Sept. 18, 2007), and the Honorable L. Haldane Taylor in Brooks v. Department of Highway Safety & Motor Vehicles, (Fla. 4th Cir. Ct., March 7, 2008). In both Salter and Brooks, the courts rejected the Department's argument as to Sergeant Branch or his designee, and held that section 322.2615(6)(b) does give the hearing officer the authority to subpoena any persons identified in the Agency Inspection Report which is referenced in the Breath

Alcohol Test Affidavit.

The Breath Alcohol Test Affidavit contains the results of the breath test; thus, it is a document identified in section 322.2615(2). The Breath Alcohol Test Affidavit references the "Date of Last Agency Inspection: 10/31/2007." Since the Agency Inspection Report identifies Robert Thomason (Sergeant Branch's designee) as the person who conducted the JSO agency inspection, the hearing officer has the authority to issue a subpoena for him. However, since the Breath Alcohol Test Affidavit does not reference in any way the FDLE Department Inspection Report, which identified Matthew Malhiot, the hearing officer does not have the authority to issue a subpoena for him.

Other courts in this Circuit have held that when a petitioner has the opportunity to examine the person who administers a breath test, as well as the person who is responsible for the maintenance of the equipment used to administer the breath test, no denial of due process occurs. See Ponton v. Dep't of Highway Safety & Motor Vehicles, 13 Fla. L. Weekly Supp. 211a (Fla. 4th Cir. Ct. Sept. 20, 2002) (citing Wishon v. Dep't of Highway Safety & Motor Vehicles, 9 Fla. L. Weekly Supp. 143a (Fla. 4th Cir. Ct. Oct. 25, 2001)). As the hearing officer was authorized to issue a subpoena for Mr. Thomason and denial of the requested subpoena prevented Petitioner from being able to examine the person responsible for the maintenance of the equipment used to administer Petitioner's breath test, the Court finds that a denial of due process occurred when the Branch subpoena was denied. However, as the Department did not have the authority to subpoena Matthew Malhiot, the Petitioner was not denied due process when the Department denied the Malhiot subpoena.

Contrary to Petitioner's argument, the Salter and Brooks decisions only found that the denial

of the Branch subpoena, not the Malhiot subpoena, was a denial of due process. Further, the cases relied on in those decisions only support a finding that the denial of the agency subpoena is a denial of due process, not the denial of the department subpoena. In Wishon v. Dep't of Highway Safety & Motor Vehicles, 9 Fla. L. Weekly Supp. 143a (Fla. 4th Cir. Ct. Oct. 25, 2001), upon which Ponton v. Dep't of Highway Safety & Motor Vehicles, 13 Fla. L. Weekly Supp. 211a (Fla. 4th Cir. Ct. Sept. 20, 2002) relies, the court held that it was not a denial of due process to fail to subpoena Laura Barfield of FDLE when the JSO personnel who conducted the breath test and the JSO personnel who conducted the maintenance on the intoxilyzer testified at the hearing. Neither case specifically required that the FDLE personnel who conducted the annual department inspection be subpoenaed.

The Court recognizes that in Cragg v. Department of Highway Safety & Motor Vehicles, 14 Fla. L. Weekly Supp. 997a (Fla. 4th Cir. Ct., Aug. 32, 2007), cert. den'd 974 So. 2d 1073 (Fla. 1st DCA 2008), this distinction between the Branch and Malhiot subpoenas is not made. However, that case, like Salter and Brooks also relied on Ponton and Wishon. As stated above, those cases only support a finding that the Petitioner is entitled to subpoena the agency inspection personnel. Further, the Cragg decision did not address the hearing officer's lack of authority under section 322.2615(6)(b) to subpoena Matthew Malhiot.

The Department also argues that the Petitioner's first argument should be denied because counsel for the Petitioner failed to make a proper proffer of what the witness would have testified to at the formal review hearing. However, as Sergeant Branch's designee conducted the Agency Inspection Report, which was relied on by the Department to prove the breath test results, this Court finds that the Petitioner has sufficiently shown the relevance and materiality of the witness.

In the Petitioner's second argument, he alleges that the Department failed to comply with

Florida Statute 322.2615(2) when the crash report was not entered into evidence at the hearing below.

Subsection 322.2615(2) lists the materials which shall be forwarded to the Department by law enforcement. The list includes "a copy of the crash report, if any." Materials submitted to the Department shall be placed in evidence at the formal review hearing. It is undisputed that a crash report was not placed into evidence at the hearing below. The Petitioner argues this was a violation of due process, relying on the decision of the Honorable John H. Skinner in Carter v. Department of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 1b (Fla. 4th Cir. Ct., Oct. 10, 2007). In that case the court granted the Petition for Writ of Certiorari because there was no crash report placed in the record at the formal review hearing.

The Department argues that there is no evidence that a crash report was completed in the instant case, therefore, there is no denial of due process. Florida Statute 316.066(3) provides that a written report of a crash must be done when law enforcement investigates a crash which (1) involves death or personal injury; (2) involves a violation of section 316.066(1) (leaving the scene); (3) involves a violation of 316.193 (DUI); or (4) when a vehicle is rendered inoperable to a degree which requires a wrecker to remove it. The instant case involved a DUI. In addition, there is evidence to suggest that the vehicle may have had to have been towed: the arresting officer listed the damage on the ticket at $20,000.00, and he also testified that he thought the vehicle was totaled. In either event, a crash report was required to have been completed pursuant to Florida Statute 316.066.

Further, the evidence at the hearing supports a finding that a crash report was done in the instant case. The arresting officer is heard on the DVD of the arrest requesting a unit to conduct the crash investigation while he conducted the DUI investigation. In addition, a Florida Highway Patrol

trooper was present at the scene and the arresting officer testified that he thought at some point that the trooper may have been thinking about "taking the crash." Therefore, the Court finds that a crash report should have been entered into evidence at the hearing below.

The Department also argues that the Petitioner's argument on this issue should be denied because counsel did not make a proffer at the hearing below as to the relevance of the crash report. However, since Florida Statute 322.2615(2) requires that the crash report be placed into evidence, regardless of the relevance, a proffer as to relevance is unnecessary.

In his third argument, the Petitioner argues that he was denied due process when the Department denied his request for a subpoena for Lieutenant Colvin which would have required him to bring to the hearing a copy of any video made of the Petitioner at the jail on the night of his arrest. This issue has been addressed by the Honorable Charles O. Mitchell, Jr. in Hernandez v. Department of Highway Safety & Motor Vehicles, (Fla. 4th Cir. Ct., Jan. 29, 2008), petition for cert. filed, (No. 1D08-1424); and by the Honorable L. Haldane Taylor in Brooks v. Department of Highway Safety & Motor Vehicles, (Fla. 4th Cir. Ct., March 7, 2008). Both cases found that the Department does not have the authority to issue a subpoena for Lieutenant Colvin because he is not identified in any document listed section 322.2615(2), Florida Statutes. This court agrees and finds that the hearing officer lacked the authority to issue this subpoena.

In his argument, the Petitioner relies on Burleson v. Department of Highway Safety & Motor Vehicles, (Fla. 4th Cir. Ct., Aug. 9, 2002). In that case, the court held that the hearing officer erred by failing to allow counsel for the petitioner to introduce into evidence the petitioner's booking photo taken on the day of his arrest for DUI. Id. at 3. The court held that the photo was relevant to whether the petitioner was driving while impaired. Id. at 1-2. However, that case is distinguishable

from the instant case. In Burleson, the petitioner's counsel had obtained the photograph prior to the hearing and offered it into evidence at the hearing; therefore, the Department was not asked to issue a subpoena for a person which it did not have the statutory authority to subpoena. Since the Department in the instant case has no statutory authority to issue a subpoena for Lieutenant Colvin, there was no denial of due process.

In his fourth argument, the Petitioner argues that he was denied due process and a fair hearing because the hearing officer departed from her role as a neutral magistrate. This Court disagrees. The Court has reviewed the transcript of the hearing and does not find any instances where the hearing officer can be said to be impartial. Further, the Petitioner's argument is based mainly upon the denial of counsel's motions by the hearing officer. In instances involving disqualification of a judge, it has been held that an adverse ruling is not sufficient to establish bias or prejudice by the judge. Correll v. State, 698 So. 2d 522, 525 (Fla. 1997). Therefore, this argument is denied.

Based on the above, the Petition for Writ of Certiorari should be granted as to the Petitioner's first and second arguments, and denied as to the third and fourth argument. However, as the errors below were evidentiary errors, the proper remedy is to remand for further proceedings. Lillyman v. Dep't of Highway Safety & Motor Vehicles, 645 So. 2d 113, 114 (Fla. 5th DCA 1994).

Finally, the Petitioner has moved for attorney's fees based upon the errors alleged below. In Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002), the Florida Supreme Court held that the court's inherent ability to award attorney's fees "...must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct...." Similarly, in Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998), the Court held that such an award of attorney's fee's is limited to those cases in which a party has "...exhibited

egregious conduct or acted in bad faith.... We note that this doctrine is rarely applicable. It is reserved for those extreme cases where a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons." (Citations omitted.) The Court finds that the Department's conduct does not rise to this level and attorney's fees are not warranted.

Based on the above, it is **ORDERED AND ADJUDGED** that:

1. The Petition for Writ of Certiorari is hereby **GRANTED** as to Issues One and Two and **DENIED** as to Issues Three and Four.

2. This cause is hereby **REMANDED** for a new hearing consistent with this Opinion within 30 days of the filing of this Opinion. On remand, the Petitioner shall be entitled to a subpoena for Sergeant Branch or his designee, should he so request. In addition, on remand it shall be the Department's burden to enter the crash report into evidence. Should the Department fail to allow the Branch subpoena or fail to enter the crash report into evidence, the suspension should be invalidated.

3. The Petitioner's Motion for Attorney's Fees is hereby **DENIED**.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 2nd day of May, 2008.

Peter J. Fryefield

PETER J. FRYEFIELD, Circuit Judge

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