

IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIRCUIT CIVIL DIVISION

NICOLE STEVENSON,
Petitioner,

CASE NO.:21-CA-464

v.

DIVISION: G

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

_____ /

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Nicole Stevenson’s Petition for Writ of Certiorari filed January 18, 2021, as amended February 18, 2021. The petition, which seeks review of the Department’s December 17, 2020, final order, is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner advances two arguments in support of the petition: 1) that Petitioner’s right to due process was violated by her inability to confront and cross-examine a witness, and 2) that the hearing officer violated Petitioner’s due process rights by not properly placing witnesses under oath. As to the first issue, because Petitioner elected not to further pursue service of a subpoena in Puerto Rico to secure the witness’s testimony, relief is denied as to this issue. As to the second issue, where the remedy for due process violations is a new hearing, and where, after the hearing officer agreed with Petitioner that the witnesses were incorrectly sworn Petitioner was offered and rejected a new hearing, relief is denied as to this issue. Accordingly, the petition is denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. Therefore, this court has jurisdiction to review the decision upholding the suspension of Petitioner’s driving privilege.

STANDARD OF REVIEW

When, as here, a person's driving privileges are suspended for refusing to submit to a breath test to determine whether she is driving under the influence, the administrative hearing officer is to determine whether the following elements have been established by a preponderance of the evidence: 1) whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; 2) whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer; and 3) whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. See §322.2615(7)(b)1-3, Fla. Stat.

This court's review of an administrative decision upholding the suspension is not de novo. §322.2615(13), Fla. Stat. Rather, this court must determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

FACTS AND PROCEDURAL HISTORY

On February 15, 2020 officers were dispatched to the scene of an accident near the intersection of Armenia and Columbus in Tampa. At this location, Armenia is a one-way street with traffic going southbound. Petitioner, who was driving northbound on Armenia, collided with another driver, Mr. Vargas-Torres. Tampa Fire and Rescue ("TFR") was already on the scene. They advised the officers that they had confiscated Petitioner's keys because she had attempted to drive away from the scene, and that Petitioner was the vehicle's sole occupant. According to Officer Cabale, the victim, Mr. Vargas-Torres, indicated that Petitioner turned off of a street south

of Columbus onto Armenia and started driving northbound into southbound traffic. She crossed Columbus through a red light without getting hit. She then continued driving the wrong way and struck the victim's southbound vehicle. She backed up and hit the victim's vehicle again, multiple times. The victim, Mr. Vargas-Torres, identified Petitioner as the driver and confirmed that she was alone in her vehicle. Petitioner remained in the driver's seat until police arrived. The victim and TFR personnel identified Petitioner to law enforcement as the driver who struck Mr. Vargas-Torres's vehicle.

While Officer Cabale interviewed Mr. Vargas-Torres, Officer Pendzick spoke to Petitioner. Officer Pendzick noted the odor of alcohol about Petitioner and observed that she was slow to retrieve documents. Petitioner admitted that she had consumed five Tito's (vodka) that evening. Officer Pendzick cited Petitioner for driving in the wrong direction and failure to provide proof of insurance. The officers requested a DUI investigation. Officer Bailey, a certified drug recognition expert and DUI investigator, performed the DUI investigation.

Officer Bailey indicated that he was told Petitioner had been driving the wrong way on a one-way street, and that she hit another vehicle, damaging it. He said Petitioner had been positively identified as the driver. He noted that her speech was slurred, she had a strong odor of alcohol about her, she was unsteady on her feet, she was swaying, belligerent, and had extreme difficulty following directions. He performed a horizontal gaze nystagmus test and determined Petitioner met six out of six indicators for impairment. His report indicated that Petitioner insisted on performing field sobriety tests (FSTs), so he allowed her to choose a location. The location was well-lit, dry, and free of debris. She performed the walk-and-turn test and one-leg stand, both of which she performed poorly. She exhibited extreme difficulty in following directions. Officer Bailey performed a computer check on her license, which revealed two prior DUI convictions. He arrested her on suspicion of DUI. When asked to provide a breath sample to determine her blood alcohol level, Petitioner refused. Her license was administratively suspended. Thereafter, she requested formal review of the suspension.

The first of four hearings took place on April 15, 2020. The hearing officer received without objection all the documentation required by

§322.2615(2)(a), Florida Statutes, including the following: the driver 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; 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; and the notice of suspension.

Officers Pendzick and Bailey appeared and were sworn in by telephone. There was no video by which the hearing officer could confirm the officers' identities. Petitioner's counsel objected on this ground. The hearing officer noted the objection and proceeded with the hearing. Officer Pendzick testified that she is a traffic crash investigator who has investigated hundreds of crashes. She said she had been dispatched to the scene of the subject accident at 7:53 p.m. and arrived about 8:02 p.m. on February 15, 2020. She observed Petitioner sitting in the driver's seat of her vehicle. Rescue personnel advised Officer Pendzick that Petitioner might be under the influence, and that she had admitted to drinking. Thereafter, Officer Pendzick made contact with Petitioner to assess her condition. She said that Petitioner repeated that she was sorry several times. Upon being asked to step out of the car, Petitioner was unsteady on her feet. The officer assisted Petitioner to safety while rescue personnel moved the vehicles. Thereafter, the officer advised Petitioner she would be safer at her car so she escorted her back to the car, whereupon she requested Petitioner to provide the vehicle's registration and insurance. Petitioner was unable to locate these documents and instead provided random paperwork to the officer.

Officer Pendzick also testified that Officer Cabale, a fellow officer who interviewed Mr. Vargas-Torres because he did not speak English, relayed to Officer Pendzick what Mr. Vargas-Torres had told him. Mr. Vargas-Torres had told him that he was traveling southbound, and Petitioner's vehicle was traveling northbound, hit him, and that Petitioner was driving and was the only person in the vehicle. She added that fire and rescue personnel advised her that they had taken Petitioner's keys because she had attempted to drive away.

Officer Bailey, a certified drug recognition expert who conducted the DUI investigation, also appeared for this hearing. He testified that he gave Petitioner her Miranda warning. Although he indicated that Petitioner invoked her right to remain silent, she insisted on performing FSTs. She was unable to follow instructions and performed the FSTs poorly. Based on the information provided by the other officers and his personal observations, Officer Bailey arrested Petitioner for DUI and requested that she provide a breath sample. She refused.

Petitioner, through counsel, determined that Mr. Vargas-Torres's testimony was required to put her behind the wheel, so the April 15, 2020, hearing was continued to enable her to subpoena him, which she did. At the rescheduled hearing on June 2, 2020, both Mr. Vargas-Torres and an interpreter attended via telephone, but Mr. Vargas-Torres was not in a position to be sworn in by a qualified individual who could identify him as required by this circuit's decision in *Eckert v. Dep't of Highway Safety and Motor Vehicles*, 28 FLW Supp. 285 (13th Jud. Cir. May 26, 2020). Based on the *Eckert* ruling, the hearing officer permitted Petitioner an opportunity to re-subpoena the officers who had appeared at the first hearing and were sworn in telephonically in contravention of the subsequent decision in *Eckert*. Petitioner rejected that offer, but the hearing was nonetheless continued again to allow Mr. Vargas-Torres to appear by video conference.

The next hearing was scheduled for June 18, 2020. Although Mr. Vargas-Torres could be reached at the number he had previously provided, he had not received a subpoena for this date. He advised the tribunal that he had been in Tampa vacationing at the time of the accident and that he had returned to his home in Puerto Rico. Although his phone had videoconferencing capability, it was not through an application the Department used. Moreover, he evidently did not understand that he had to be in the presence of a notary to be sworn in. The hearing officer advised Petitioner's counsel that the proceeding could be continued again to allow Petitioner to apply to the court to enforce the subpoena for Mr. Vargas-Torres's visual appearance. He also reiterated his offer to allow Petitioner to re-subpoena the officers who had previously testified. Again, Petitioner refused the offer to re-subpoena the officers who had previously testified.

But the hearing was continued to allow Petitioner the opportunity to enforce the subpoena for Mr. Vargas-Torres.

The hearing resumed for a final time on December 8, 2020. Here it was learned that Petitioner had obtained a court order enforcing the subpoena to Mr. Vargas-Torres. Service of the subpoena was attempted at the local address and failed. When Petitioner investigated serving Mr. Vargas-Torres in Puerto Rico, it was learned the cost would be nearly \$700. Apparently, Petitioner was unwilling to incur this expense, and the hearing proceeded without Mr. Vargas-Torres's testimony. Thereafter, Petitioner made several motions, which the hearing officer took under advisement.

The hearing officer issued a written order on December 17, 2020. It denied all of Petitioner's motions except the motion related to excluding statements made to medical personnel related to medical diagnosis. Ultimately, the hearing officer upheld the suspension finding competent, substantial evidence that Petitioner operated a motor vehicle while under the influence where evidence established that Petitioner was behind the wheel, and was in possession of the key fob in a vehicle with a push-to-start ignition, and the victim advised a police officer that Petitioner was the driver who had struck his vehicle, along with observations about her physical condition.

DISCUSSION

Petitioner first contends that her right to due process was violated by her inability to confront and cross-examine a witness—the victim, Mr. Vargas-Torres. Petitioner contends that Mr. Vargas-Torres is the only witness that can identify her as the driver of her car and as such, his testimony was required to uphold the suspension. “Procedural due process requires both fair notice and a real opportunity to be heard . . . ‘at a meaningful time and in a meaningful manner’.” *Dep’t of Highway Safety & Motor Vehicles v. Hofer*, 5 So.3d 766, 771 (Fla. 2d DCA 2009) (quoting others).

Four administrative hearings were held in this case. Mr. Vargas-Torres appeared by phone, without video capability, at the second and third hearings. After counsel's objection due to the inability to properly swear in Mr. Vargas-Torres in accordance with the subsequent ruling in *Eckert*, the

hearing officer rescheduled the hearing to allow Petitioner an opportunity to enforce the subpoena. The Court finds that Petitioner was afforded procedural due process where she had two opportunities to confront and cross-examine the witness, despite the fact that he could not be properly placed under oath, and was given ample time to enforce the subpoena so as to compel Mr. Vargas-Torres's visual appearance. Petitioner chose not to fully enforce that subpoena. Moreover, as discussed in further detail below, the Court finds that Mr. Vargas-Torres's testimony was not necessary to support a finding that Petitioner was in actual physical control of her vehicle. As such, the Court finds that the hearing officer was not required to do anything more or different to afford Petitioner procedural due process, especially where Mr. Vargas-Torres's testimony was not necessary to uphold the suspension of Petitioner's driver's license.

Petitioner contends that without Mr. Vargas-Torres's testimony, there is not competent, substantial evidence to support a finding that she was in actual physical control of the vehicle. The Court disagrees. The case of *State Dep't. of Highway Safety & Motor Vehicles v. Saxlehner*, 96 So.3d 1002 (Fla. 3d DCA 2012) is instructive. In the underlying proceedings which led to the opinion in *Saxlehner*, counsel for the driver argued at the administrative review hearing that the suspension should be invalidated because the officer who conducted the initial stop failed to appear, and he was the only officer who observed Saxlehner behind the wheel. *Id.* at 1004. The hearing officer disagreed, but allowed the driver an opportunity to seek enforcement of the subpoena. The hearing officer later sustained the suspension of Saxlehner's driver's license. On petition for writ of certiorari, the circuit court granted the petition finding that the only evidence presented to establish that Saxlehner was driving or in actual physical control of the vehicle came from the two officers who did not personally make the observation (but rather were told the information from the third officer who did not appear at the review hearing), amounting only to hearsay evidence. *Id.*

The Department then sought second-tier certiorari review, arguing that the circuit court failed to apply the correct law and failed to acknowledge and apply statutory and case law which allows for admission of evidence under the Fellow Officer Rule. The appellate court agreed and found that the circuit court failed to apply the correct statutory and administrative provisions governing formal review hearings for driver's license suspensions. The appellate court pointed out that in the context of administrative review hearings on driver's license suspensions, "[n]either the statute nor the

administrative regulation prohibits the admission of hearsay evidence.” *Id.* at 1007. “Nor do these provisions require non-hearsay evidence to corroborate any hearsay evidence admitted at the hearing.” *Id.* (contrasting with the procedures governing administrative hearings under Chapter 120).

Just as in *Saxlehner*, in this case, competent, substantial evidence was presented to support a finding that Petitioner was in actual physical control of her car. Namely, the reports submitted by law enforcement, including the crash investigation and police reports, as well as the testimony of Officers Pendzick and Bailey, confirm that Petitioner was the driver who caused the accident. Those documents and testimony further report that TFR personnel took away Petitioner’s keys to prevent her from driving away. Officers Pendzick and Bailey both personally observed Petitioner still behind the wheel of her car upon arrival on the scene. Petitioner was the only person in her car. The hearing officer was permitted to rely on this documentary and testimonial evidence and did not need corroborating, non-hearsay evidence to support its finding that Petitioner was in actual physical control of the vehicle. See *Saxlehner*, 96 So.3d at 1007. Nor does the source of the documentary and testimonial evidence—whether learned through or provided by other law enforcement personnel, fire rescue personnel, a victim or mere observer—impact the conclusion that such hearsay evidence is permissible in administrative review hearings for driver’s license suspensions. Given the foregoing, the Court concludes that Mr. Vargas-Torres’s testimony at the administrative hearing was not necessary to uphold the suspension in light of the other evidence which supported the hearing officer’s decision.

Next, Petitioner contends that the hearing officer violated Petitioner’s due process rights by not properly placing witnesses under oath, namely the two testifying law enforcement officers. It is well-settled that the appropriate remedy for a due process violation is remand for a new hearing. See *Lillyman v. Dep’t of Highway Safety & Motor Vehicles*, 645 So. 2d 113, 114 (Fla. 5th DCA 1994); *Dep’t of Highway Safety & Motor Vehicles v. Corcoran*, 133 So.3d 616 (Fla. 5th DCA 2014); *Dep’t of Highway Safety & Motor Vehicles v. Icaza*, 37 So.3d 309 (Fla. 5th DCA 2010); *Tynan v. Dep’t of Highway Safety & Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005). As noted above, the *Eckert* decision, which requires a hearing officer taking testimony by electronic means to verify the identity of the witness, was issued after the first administrative hearing in this matter. The hearing officer acknowledged this and permitted Petitioner an opportunity to re-subpoena the testifying

officers so that they could be sworn in accordance with *Eckert*. Petitioner, through counsel, rejected this offer. Yet now, Petitioner asks this court to set aside the suspension because she rejected the remedy which was previously offered to her.

The Court finds that Petitioner has waived her entitlement to relief. See *generally State v. Silvia*, 235 So.3d 349 (Fla. 2018) (finding that criminal defendant's valid waiver of postconviction proceedings precluded him from claiming a right to relief under subsequent case law). Public policy concerns further support the Court's ruling. While not explicitly addressed by the parties, the Court notes case law which provides that where a remand is directed but the driver's license suspension has expired, no further action can be taken by the Department. *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815, 815 (Fla. 2d DCA 2012).¹ Whether or not the suspension in this case has now expired, the Court cannot support a situation whereby parties might exploit the shelf life of a suspension by rejecting the remedy that would be available on certiorari review that was offered at the administrative hearing level, and notably offered at a time that conserves judicial resources.

It is therefore ORDERED that the petition is DENIED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 9/25/2021
Christopher Nash

Christopher Nash, Circuit Court Judge

Electronic copies provided through JAWS

¹ *Cf. Gordon v. State Dep't of Highway Safety & Motor Vehicles*, 166 So.3d 902, 905 (Fla. 4th DCA 2015) (disagreeing with the Second District that the validity of the license suspension is moot once the term of the suspension expires. As the Department notes, the license suspension has other consequences. A license suspension remains on a driving record for many years into the future.).

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IN AND FOR THE STATE OF FLORIDA
GENERAL CIVIL DIVISION

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DIVISION: G

STATE DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

_____ /

ORDER DENYING REHEARING

Petitioner's motion for rehearing is DENIED. Fla. Admin. Code R. 15A-6.012 ("A driver who requests subpoenas to be issued is responsible for the service of such subpoenas and payment of any costs and fees.")¹

ORDERED on the date imprinted with the Judge's signature.

Electronically Conformed 10/12/2021
Christopher Nash

CHRISTOPHER NASH, Circuit Court Judge

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¹ The court notes that Petitioner's assertion that Fla. Admin. Code R. 15A-6.012 "authorizes the hearing officer to issue a subpoena and have it served as (sic) his expense" is in direct contradiction to what the rule states.