

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR THE STATE OF FLORIDA  
GENERAL CIVIL DIVISION

AARON HOPKINS,  
Petitioner,

Circuit Case No.: 20-CA-8073  
Division: F

vs.

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

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**ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

**THIS CAUSE** is before the Court on Petitioner’s Amended Petition for Writ of Certiorari filed November 4, 2020. Petitioner seeks to quash the order upholding the suspension of his driving privilege arguing that the record lacks competent, substantial evidence that there was reasonable suspicion to justify the stop or initiate the DUI investigation. Petitioner also claims the breath test results should be excluded because the breath test operator failed to dissipate the effects of multiple readings of radio frequency interference (RFI) before he provided samples for analysis. Further, Petitioner claims that law enforcement’s failure to provide the Department of Highway Safety and Motor Vehicles (the “DHSMV”) with documents related to the RFI violated his due process rights. The Petition must be denied because competent, substantial evidence supports that an objective basis for the stop existed, and section 322.2615(2)(a), Florida Statutes, expressly states that failures to provide required documents within five

days of the issuance of the administrative suspension do not preclude the hearing officer from considering any evidence submitted at or prior to a formal review hearing.

### **JURISDICTION**

Jurisdiction to review a decision of the DHSMV upholding a driver's license 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 petition.

### **STANDARD OF REVIEW**

On a petition for certiorari, which challenges a decision by an administrative agency such as the DHSMV, the circuit court's review is limited. The court may only determine whether procedural due process was afforded, whether the essential requirements of law were observed, and whether there was competent, substantial evidence supporting the findings and judgment. *Dep't of Highway Safety and Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1085 (Fla. 1<sup>st</sup> DCA 2002). A reweighing of the evidence is not permitted upon review by the circuit court. *Id.* at 1085-86. The circuit court may deny the petition or grant it and quash the order being reviewed. However, the court cannot order the lower tribunal to enter any contrary order. *Tynan v. Dep't of Highway Safety and Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5<sup>th</sup> DCA 2005).

### **PROCEDURAL HISTORY**

On July 26, 2020, Petitioner was arrested for driving under the influence ("DUI") and taken to the New Port Richey Police Department. Petitioner provided

breath samples, which were above the legal limit of 0.08 g/210L. As a result, Petitioner's driving privilege was administratively suspended for six months.

Petitioner requested a formal review hearing, which was held September 2, 2020. Officers Dennison, who conducted the traffic stop, and Pennell, who conducted the DUI investigation, testified at the hearing. After the evidence was presented, Petitioner moved to set aside the suspension based on a lack of competent, substantial evidence. More specifically, Petitioner claimed a lack of evidence showing that law enforcement possessed reasonable suspicion for the traffic stop or probable cause to arrest. In addition, Petitioner argued that the breath test results were unreliable based on instances of RFI. In the proceeding below, Petitioner argued that Officer Pennell, who conducted the breath tests, did not demonstrate sufficient knowledge of the machine's operation to get an accurate reading. The hearing officer considered the evidence, the law, the arguments of counsel, and entered an order upholding the suspension.

### **FACTS**

On July 26, 2020, Officer Dennison of the New Port Richey Police Department saw Petitioner's vehicle at an intersection with its taillights out. Officer Dennison initiated her emergency lights and siren, but Petitioner did not immediately pull over. Several blocks and a bridge-crossing later, Petitioner stopped. Petitioner provided his driver's license, but not his insurance information. Because the car was a rental, Petitioner was unable to provide its registration. During this interaction, Officer Dennison noted that Petitioner's speech was slurred. Fellow officer Pennell arrived shortly thereafter, in response to Officer Dennison's call for backup. He conducted a DUI investigation. He

observed the same initial indicators of impairment that Officer Dennison had. When Petitioner refused to perform the requested field sobriety exercises, Officer Pennell placed Petitioner under arrest for DUI.

Petitioner was then asked to submit to a breath test, which he ultimately agreed to do. The breath test was delayed because the breath test machine needed to be restarted and by radio frequency interference caused by Officer Pennell's cell phone.<sup>1</sup> After the RFI was cleared and completing the required observation period, Officer Pennell successfully administered the breath test. The two results obtained revealed a breath alcohol level of 0.176 and 0.184 g/210 L. Drivers are presumed impaired at 0.08 g/210 L.

### **LEGAL ANALYSIS**

Petitioner seeks to invalidate the suspension of his driver's license on several grounds. In order to have a valid driver's license suspension based on an unlawful blood or breath alcohol level of .08 or higher, the preponderance of the evidence must show that:

1. 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; and
2. the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 g/210L or higher as provided in section 316.193.

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<sup>1</sup> Initially, the breath test machine was not operating properly. Officer Pennell had his cell phone in the breath testing room to call for assistance with the machine. He learned that he simply needed to restart the machine by turning it off and back on.

See §322.2615(7)(a)1-2, Fla. Stat. Petitioner contends that his breath test results were unreliable because the breath test machine had a variety of issues the night it was used on him. The breath test operator, Officer Pennell, admitted that he had some issues with the machine, that he received assistance from other officers to resolve these issues, and that he did not discover what caused the issues. More specifically, the breath test machine initially was not in standby mode and would not start a test. After receiving advice from the officer that certifies the breath test machine, Officer Pennell did a restart of the machine by turning it off and back on. After the restart, the machine worked as intended. Thereafter, Officer Pennell received notice that there was RFI, which was resolved prior to the two breath test results obtained from Petitioner. Ultimately, Officer Pennell obtained breath test results of 0.176 and 0.184 g/210 L.

To the extent Petitioner contends the RFI and alleged operator error caused the results to be unreliable, it is Petitioner's burden to demonstrate their unreliability. *Velte v. Dep't of Highway Safety and Motor Vehicles*, Case No. 12-CA-016995 (Fla. 13th Jud. Cir. Oct. 4, 2013) (absent evidence showing machine was malfunctioning at the time of the breath test, hearing officer does not depart from essential requirements of law in upholding license suspension). *See also Aaron Brewster v. Florida Dept. of Highway Safety & Motor Vehicles*, 14-CA-1897 (Fla. 13th Jud. Cir. July 27, 2015). Other than Officer Pennell's testimony as to the initial issues he had getting the machine to go into start mode and the RFI, which were all successfully resolved, Petitioner did not provide any evidence to

cast doubt on the results or otherwise show that the machine was not operating properly.

Petitioner also alleges that his due process rights were violated when Officer Pennell deliberately concealed the instances of RFI that the machine detected before Petitioner's breath test was performed. Petitioner contends the RFI message is a "result" under section 322.2615(2)(a), Florida Statutes, which must be provided to the Department before a hearing, and, failing that, requires invalidation of the suspension. Neither Petitioner nor the Department provided any authority that defines "results" as used in this statute. Instead, each relies upon the statute's language.

Section 322.2615(2)(a), Florida Statutes requires law enforcement to forward to the Department, within five days after issuing the notice of suspension, a specific list of items, including 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." *Id.* The statute never uses the term "radio frequency interference" or references the forwarding of materials related to RFI. However, section 322.2615(2)(a) provides that the failure of the officer to submit the materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing."<sup>2</sup>

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<sup>2</sup> In this case, the documentation was considered by the hearing officer as it was submitted by the defense.

Petitioner contends that law enforcement deliberately did not provide the documents showing the RFI, thereby causing Petitioner's due process right to be violated. Therefore, Petitioner argues that this court should grant the writ. Again, the statute does not specifically reference the forwarding of documents related to the detection of RFI. For the sake of argument, if this court construes the statute as Petitioner would have it, law enforcement's failure to provide the documents related to the RFI cannot be considered willful or deliberate because the statute is not clear that they were intended for inclusion. Officer Pennell's testimony did not demonstrate that he willfully did not forward these documents. Rather, it showed that he did not think they were relevant or that it was required by the statute. Moreover, the statute clearly provides that "the failure of any officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the Department's ability to consider any evidence submitted at or prior to the hearing." §322.2615(2)(a), Fla. Stat. Accordingly, failure to forward the documents related to the RFI did not constitute a due process violation. *See Richardson v. Dep't of Highway Safety & Motor Vehicles*, 21 Fla. L. Weekly Supp. 299a (Fla. 9<sup>th</sup> Cir. Ct. Dec. 10, 2013)(holding that the absence of the breath test print card is not a basis to invalidate a suspension); *Runyon v. Dep't of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 588a (Fla. 13<sup>th</sup> Cir. Ct. June 13, 2003)(holding that the absence of the video evidence and traffic citation were insufficient grounds for invalidation).

Petitioner also contends that the Department lacked competent, substantial evidence to find that the law enforcement officers had a legal basis

for stopping Petitioner, or probable cause for the arrest. Petitioner argues that portions of the officers' testimony are hopelessly in conflict because one officer saw the vehicle operating without headlights and the other officer saw the vehicle operating without taillights. Petitioner also points to the officers' observations of signs of intoxication up to and around the DUI investigation, arguing that the majority of the signs of impairment were observed after the investigation began and that the officers lacked probable cause as a result. The Department lacks competent, substantial evidence when evidence is hopelessly in conflict, to the point where the hearing officer's decision could have resulted from the flip of a coin. *Wiggins v. Florida Dept. of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017) (stating that neutral video evidence directly conflicted with and refuted the officer's testimony); *Florida Dept. of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1086 (Fla. 1st DCA 2002) (stating that documented inconsistencies regarding the time of petitioner's arrest, nearly one day apart, and the absence of testimony to determine which documents were correct, supported a finding that the hearing officer lacked competent substantial evidence). Here, the testimony of one officer does not flatly contradict or totally refute the testimony of the other. The officers provided live testimony, and the hearing officer had the opportunity to weigh the testimony and the documents provided by law enforcement, as well as judge the credibility of the witnesses and evidence. This amounts to competent, substantial evidence that the initial stop and subsequent arrest were lawful.



It is therefore **ORDERED** that the Amended Petition for Writ of Certiorari is **DENIED** in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 3/10/2023  
Jennifer Gabbard

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Jennifer Gabbard  
Circuit Judge

Copies electronically served via  
JAWS on all Attorneys and Parties  
registered for this case.