

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

DEVIN A. TOCCO,  
Petitioner,

CASE NO.:20-CA-8481

v.

DIVISION: E

STATE DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,  
Respondent.

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ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Devin A. Tocco's Petition for Writ of Certiorari filed October 28, 2020. The petition, which seeks review of the Department's September 28, 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 contends that, where the inspection report did not accompany the breath test affidavit submitted in accordance with section 316.1934(5), Florida Statutes, breath test results should not have been admitted. As a result, Petitioner contends the record lacks competent, substantial evidence that he operated a motor vehicle while under the influence of alcohol. Because the documents submitted on behalf of the Department complied with state law, and nothing precluded Petitioner from obtaining the inspection report and challenging the validity of the state's compliance with testing procedures, the Department's suspension of Petitioner's driving privilege will be upheld and the petition 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 driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, 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; and 2. whether 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 s. 316.193. See §322.2615(7)(a)1-2, 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). "It is neither the function nor the prerogative of a circuit court to reweigh evidence and make findings when it undertakes a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989). It is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Id.*

## FACTS AND PROCEDURAL HISTORY

On August 14, 2020, a Florida Highway Patrol trooper stopped Petitioner, who was driving recklessly. The existence of probable cause for the stop and to arrest on suspicion of DUI are not at issue in this proceeding. Based on observations and evidence gathered at the scene, Petitioner was arrested for driving under the influence and taken to the Hernando County Jail, where he was read the implied consent law and asked to provide a breath sample. He agreed to and took the test. The level at which a driver is presumed to be impaired is .08 g/210L. Petitioner's results were .183 and .189 g/210L, respectively.

On September 17, 2020, an administrative hearing was held to review the suspension of Petitioner's driving privilege. Petitioner argued that the test results should be invalidated, and the suspension lifted, because the inspection report related to the instrument used to test Petitioner's breath was not included in the record. The hearing officer considered the argument and determined the documentary evidence submitted met the minimum statutory requirements. Thereafter, on September 28, 2020, the hearing officer rendered his written order upholding the suspension of Petitioner's driving privilege.

## DISCUSSION

Petitioner's only argument in this proceeding is that the Department departed from the essential requirements of law when it admitted, over counsel's objection, the breath test *affidavit*, which indicated the date of the most recent inspection, but was not accompanied by the most recent agency or department inspection *report* in the record.

Section 322.2615 addresses the conduct of administrative review of driver's license suspensions.

(2)(a) Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, 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; *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; and the notice of suspension. The failure of the 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.

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(7) In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:

(a) If the license was suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher:

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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

The materials listed in section 322.2615(2)(a) were provided to the Department before the hearing and were considered by the hearing officer. Petitioner objected to the admission of the breath test results because the document reflecting the results was not accompanied by an inspection report. Petitioner maintains that without the report, the test results are not admissible. After considering the issue, the hearing officer denied the objection, admitted the breath test results and sustained the suspension.

Petitioner argued below, and again in his petition, that section 316.1934(5) requires that the affidavit meet the requirements of subsections (a) through (e) before the affidavit is admitted into evidence. Section 316.1934(5), which addresses presumption of impairment, says:

(5) An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:

(a) The type of test administered and the procedures followed;

- (b) The time of the collection of the blood or breath sample analyzed;
- (c) The numerical results of the test indicating the alcohol content of the blood or breath;
- (d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and
- (e) If the test was administered by means of a breath testing instrument, the *date* of performance of the most recent required maintenance on such instrument.

(Emphasis added.)

As required by section 316.1934(5)(a-e), the affidavit submitted by Tpr. Gartner indicates a) the type of test administered measures the alcohol level of the breath and that Petitioner was observed for at least 20 minutes before administration of the test to ensure that he did not take anything by mouth or regurgitate, b) that the first sample was collected 11:03 p.m. and the second at 11:06 p.m., c) that the results of the test were .183 and .189, respectively, d) the identity of the breath test operator and the fact that he held a valid breath test operator permit issued by the Florida Department of Law Enforcement, and e) that most recent required maintenance on the instrument used was performed July 27, 2020, 18 days before administration of the subject tests. The affidavit also identifies the instrument used by make, model, serial number, and its location at the Hernando County Sheriff's Office. Comparing this information with the information the statute requires, it is clear the affidavit, which is on a form FDLE provides, complies with the law.

Although Petitioner argues strenuously that the foregoing does not assure the integrity of the tests in the absence of the inspection reports, the statute provides that the foregoing is presumptive proof of a valid test. §316.1934(5), Fla. Stat. The statute does not require or even mention inclusion of the inspection report, only that the date of the last required inspection be provided. Inspections are conducted annually by FDLE. Section 11D-8.004, Fla. Admin. Code. Inspections are conducted monthly by an agency inspector. Section 11D-8.006(1), Fla. Admin. Code. Petitioner

is correct, however, that case law does mention inspection reports. Petitioner relies predominately on *Dep't of Highway Safety & Motor Vehicles v. Falcone*, 983 So. 2d 755 (Fla. 2d DCA 2008), *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657 (Fla. 5th DCA 2001), and *State v. Buttolph*, 969 So. 2d 1209 (Fla. 4th DCA 2007).

*Falcone* does not support Petitioner's argument that an inspection report must accompany the affidavit to validate the breath test results. In *Falcone*, an inspection report did accompany the affidavit, but *Falcone* does not hold that the absence of an agency inspection report precludes the Department from solely relying upon a breath alcohol test affidavit. Regarding the affidavit, *Falcone* says if the requirements of section 316.1934(5) (a) through (e) are met, the test results are admissible, and the burden shifts to the driver to prove otherwise. *Falcone*, 983 So. 2d at 756, citing *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 813 So.2d 141, 144 (Fla. 2d DCA 2002) (noting an affidavit meeting the requirements of section 316.1934(5) is admissible without further authentication and is presumptive proof of the results obtained...however, once the breath test results are admitted into evidence, the record contains competent, substantial evidence of impairment, and the burden shifts to the driver).

*Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 658 (Fla. 5th DCA 2001), also concludes that it is the driver's burden to prove noncompliance with regulations affecting breath testing instruments in the administrative context. As in *Falcone*, the opinion referred to an inspection report that had been included in the record, but it did not mandate the reports' inclusion. *Mowry* does not support Petitioner's argument.

*State v. Buttolph*, 969 So. 2d at 1211, says that proof of annual inspection of breath testing instrument is necessary only when the *annual* test, rather than the monthly one, was the most recent test under section 316.1934(5). If the most recent required maintenance was monthly maintenance, the state is not required to prove both the monthly and annual inspection. *Id.* Here, it appears that the monthly inspection was the more recent one. But it must be noted that *Buttolph* involved a criminal prosecution of DUI, not an administrative license suspension. As the Department pointed out, the burden of proof in the administrative proceeding is more relaxed than it would be in a criminal trial. Moreover, in the administrative context, the burden is on the driver, not the state. Accordingly, *Buttolph* does not support Petitioner's argument.

In light of the foregoing, the decision of the hearing officer was correct that the affidavit complied with state law, and that it was Petitioner's, not the Department's, burden to prove any inadequacy with regard to required inspections.

Petition DENIED.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 4/28/2021

Anne-Leigh Gaylord Moe

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ANNE-LEIGH G. MOE, Circuit Court Judge

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