

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

GONZALO NOVOA,
Petitioner,

CASE NO.:21-CA-3080

v.

DIVISION: B

STATE DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This matter is before the Court on Amended Petition for Writ of Certiorari filed April 21, 2021 (Doc. 9). The petition, originally filed April 9, 2021 is timely, and this court has jurisdiction. §322.31, Fla. Stat.; Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P. Petitioner seeks review of the Department’s final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner contends that: 1. the Department departed from the essential requirements of the law in upholding the suspension because Petitioner’s breath samples were requested after Petitioner was arrested for Resisting Arrest Without Violence; 2. the Department lacked competent, substantial evidence to find that the breath tests were administered properly, and; 3. the Department violated Petitioner’s right to due process and departed from the essential requirements of the law when it denied Petitioner’s motion to invalidate because the breath test operator provided testimony telephonically and failed to provide subpoenaed documents. Upon review of the petition, response, appendices, and relevant case law, the Court finds that: 1. the Department did not depart from the essential requirements of the law because the arrest preceding a breath test is not required to be for DUI where there is cause for a DUI arrest; 2. the Department relied on competent, substantial evidence in the form of testimony and self-authenticating documents demonstrating substantial compliance with the rules for administering breath tests, and; 3. the Department did not violate Petitioner’s right to due process when it denied Petitioner’s motion to invalidate because

the invalidation requirement for failure to appear by the breath test operator does not apply to the duces tecum portion of a subpoena.

STANDARD OF REVIEW

The Court reviews the administrative decision to determine whether Petitioner received procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The Court may not reweigh the evidence contained in the record. *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012).

FACTS AND PROCEDURAL HISTORY

On December 27, 2020, Officer Raines of the Lake Wales Police Department responded to a restaurant parking lot in response to a report about a possible drunk driver. Upon making contact with Petitioner, Officer Raines observed Petitioner sitting in the driver's seat of his vehicle with the keys in the ignition. Officer Raines also observed that Petitioner displayed multiple indicators of intoxication, including slurred speech, an odor of alcohol, and failure to maintain his balance after exiting the vehicle. Petitioner attempted to get back into his vehicle multiple times after being told that he could not reenter the vehicle. Petitioner also placed his hands in his pockets several times after being instructed to keep his hands out and that he would be handcuffed if he made another attempt. After Petitioner's last attempt to put his hands in his pockets, Officer Raines began to place Petitioner in handcuffs and Petitioner resisted. Petitioner was placed under arrest for resisting without violence and taken to the Lake Wales Police Department to perform Field Sobriety Tests (FSTs). Petitioner displayed additional signs of impairment during the FSTs and provided two breath samples with results of 0.135 and 0.133 g/210L. Petitioner was ultimately charged with driving under the influence and resisting without violence.

A formal review hearing of the administrative suspension was held February 4, 2021 and March 1, 2021. When reviewing a suspension that is the result of a driver's unlawful breath-alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while

under the influence of drugs or alcohol, and whether Petitioner had a breath alcohol level of 0.08 or higher. § 322.2615(7)(a), Fla. Stat. The hearing officer determined that law enforcement had probable cause, Petitioner was placed under lawful arrest for DUI, and Petitioner's breath-alcohol level was above 0.08.

The breath test operator, Deputy Martinez, appeared pursuant to a subpoena duces tecum and gave testimony at the February 4 hearing, but did not provide all of the duces tecum documents prior to the hearing. Deputy Martinez testified that the documents at issue were not in her possession and that she would need to obtain them from the agency inspector. At the conclusion of the hearing, the hearing officer stated that he would allow another subpoena if Petitioner still wished to obtain the documents.

DISCUSSION

Petitioner first contends that the Department departed from the essential requirements of law in finding that Petitioner's breath sample was incidental to a lawful arrest. Specifically, Petitioner argues that because Petitioner was no longer in control of a motor vehicle when he was arrested for resisting without violence, the samples were not taken in accordance with § 316.1932(1)(a)(1)(a), Fla. Stat.

Section 316.1932(1)(a)(1)(a) states in pertinent part that the "breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages." Although Petitioner was initially arrested for resisting without violence and later charged with DUI, the hearing officer determined that where Petitioner was behind the wheel of his vehicle with the keys in the ignition, smelled of alcohol, admitted drinking and feeling intoxicated, failed to follow instructions, and was unsteady on his feet, competent, substantial evidence supported Petitioner was in actual physical control of the vehicle and under the influence of alcohol at the outset of the investigation leading up to the arrest. *Griffin v. State*, 457 So. 2d 1070, 1071 (Fla. 2d DCA 1984) (finding that a person occupying the driver's seat of a vehicle with the keys in the ignition has actual physical control of the vehicle).

The hearing officer applied the correct law after considering Petitioner's argument and thus did not depart from the essential requirements of the law with regard to Petitioner's arrest and breath samples. *DHSMV v. Whitley*, 846 So.2d 1163, 1167 (Fla. 5th DCA 2003) (finding that the statute requires that a lawful arrest precede a breath test, but that the arrest need not be for DUI if there was cause for a DUI arrest at the time).

Petitioner next contends that the Department lacked competent, substantial evidence that Petitioner was observed for 20 minutes prior to providing breath samples because Petitioner was not observed by the breath test operator. The breath test operator testified that the arresting officer ordinarily performs the observation. The observation requirement is in place to ensure that an arrestee does not take anything orally or regurgitate and does not hinge on the identity or position of the law enforcement officer who conducts the observation. *Kaiser v. State*, 609 So. 2d 768, 770 (Fla. 2d DCA 1992) (finding that a breath test is valid when the test was conducted in substantial compliance with the governing regulations). The hearing officer relied on testimony and documentation sufficient to support the conclusion that Petitioner had been observed for at least 20 minutes prior to providing breath samples, in compliance with Rule 11D-8.007, Fla. Admin. Code.

Finally, Petitioner contends that the Department violated his right to due process when it failed to invalidate his suspension because the breath test operator failed to provide documents in accordance with the subpoena duces tecum. §322.2615(11), Fla. Stat. The breath test operator appeared telephonically and gave testimony at the hearing on February 4, 2021. When asked about the documents, the breath test operator testified that she was not in possession of the documents and that they would need to be obtained from the agency inspector. Before concluding her testimony, the breath test operator offered to get the inspection date before work that day and "have [her] stuff re-sent to see if it will show up on the computers," and Petitioner's counsel responded that it would not be necessary. After the testimony was concluded, the hearing officer stated that he would allow Petitioner to subpoena the breath test officer again. Petitioner was also authorized to seek enforcement of the subpoena by filing a motion with the circuit court and failed to avail himself of this remedy. § 322.2615(6)(c), Fla. Stat. Although section 322.2615(11) requires the Department to invalidate a suspension in certain cases where the breath test operator fails to appear, it has no such requirement regarding documents pursuant to a duces tecum subpoena. *Cf. DHSMV v. Lankford*, 956 So. 2d 527, 528 (Fla. 1st DCA 2007) (stating that

§ 322.2615 does not contain a provision that authorizes invalidation of a license suspension because a witness did not provide a good reason for failing to bring evidence pursuant to a subpoena duces tecum).

It is well-settled that the appropriate remedy for a due process violation is remand for a new hearing. See *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So.3d 616, 623 (Fla. 5th DCA 2014); *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. Icaza*, 37 So. 3d 309, 312 (Fla. 5th DCA 2010); *Tynan v. Dep't of Highway Safety & Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005); *Dep't of Highway Safety and Motor Vehicles v. Chamizo*, 753 So. 2d 749, 752 (Fla. 3d DCA 2000). The hearing officer in this case issued the subpoena as requested, the breath test operator appeared to testify, providing an explanation for the missing documents, and the hearing officer informed Petitioner that he would allow Petitioner to subpoena the breath test operator to appear at the March 1st hearing. Petitioner's failure to enforce the duces tecum portion of the subpoena, and his rejection of the opportunity to subpoena the breath test operator for the March 1st hearing, amount to a waiver of his 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). See also *Nicole Stevenson v. Dep't of Highway Safety and Motor Vehicles*, 29 Fla. L. Weekly Supp. 568a (Fla. 13th Jud. Cir. [Appellate] 2021) (party may not reject remedy offered at administrative hearing level and later obtain relief on certiorari review).

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 4/5/2022
Mark Wolfe

MARK WOLFE, Circuit Court Judge

Electronic copies provided through JAWS.