

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

KAYLA C. KUBALA,

Petitioner,

v.

CASE NO.: 2009-CA-14396-O

WRIT NO.: 09-14

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES**

Respondent.

_____/

Petition for Writ of Certiorari
From the Florida Department of
Highway Safety and Motor Vehicles,
Donna Petty, Hearing Officer.

Amir A. Ladan, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

Before ARNOLD, T. TURNER, and DAVIS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Kayla C. Kubala (“Kubala”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Final Order of License Suspension,” sustaining the suspension of her driver’s license pursuant to section 322.2616, Florida Statutes, for refusing to submit to a breath-alcohol test while under the age of twenty-one. This Court has jurisdiction pursuant to section 322.2616(14), Florida Statutes,

and Florida Rule of Appellate Procedure 9.030(c).

On February 25, 2009, Officers Wenner and Holt, of the University of Central Florida Police Department, observed Kubala drive through an intersection, failing to stop at a stop sign. The officers conducted a traffic stop, and Kubala exited her vehicle. Officer Wenner identified Kubala by her Florida driver's license, which also indicated that Kubala was under the age of twenty-one.

While speaking with Kubala, Officer Wenner could smell the odor of alcohol impurities. Officer Wenner requested that Kubala submit to a breath-alcohol test, and Kubala refused. Officer Holt read implied consent warnings to Kubala, and she again refused to submit. Therefore, the Department suspended her driving privilege.

Pursuant to section 322.2616, Florida Statutes, Kubala requested a formal review of her license suspension. On April 2, 2009, Hearing Officer Donna Petty held a formal review at which Kubala did not appear but was represented by counsel. At the hearing, Kubala moved to invalidate the license suspension on two grounds: 1) Officer Wenner lacked probable cause to request Kubala's submission to a breath-alcohol test and 2) Officer Wenner failed to establish that the breath test machine she proposed to use is listed on the federal conforming products list. The hearing officer reserved ruling on both motions. On April 8, 2009, the hearing officer entered an order denying both motions and sustaining the suspension of Kubala's driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of the law were observed; and 3) whether the decision was supported by competent substantial evidence. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001)

(citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] 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).

In a case where the individual’s license is suspended for refusing to submit to a breath test while under the age of twenty-one, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension.” § 322.2616(8), Fla. Stat. (2008). The hearing officer’s scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.
2. Whether the person was under the age of 21.
3. Whether the person refused to submit to a breath test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person was told that if he or she refused to submit to a breath test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2616(8)(b), Fla. Stat. (2008).

Kubala argues that her license suspension is not supported by competent substantial evidence that Officer Wenner had probable cause to believe that she had any breath-alcohol level or was under the influence of alcoholic beverages. Kubala also argues that her license suspension is not supported by competent substantial evidence that the testing device which Officer Wenner proposed to use complied with the Department of Transportation’s Conforming Products list.

Probable Cause to Request Breath Test

When the issue is whether an individual was driving with *any* blood-alcohol or breath-

alcohol level, the existence of the odor of alcohol is sufficient to establish probable cause. Kreda v. State, Dep't of Highway Safety & Motor Vehicles, Bureau of Driver Improvement, 16 Fla. L. Weekly Supp. 489a (Fla. 9th Cir. Ct. Mar. 19, 2009). To lawfully request submission to a breath test from an individual under the age of twenty-one, a law enforcement officer need not establish probable cause for a DUI arrest; rather, only probable cause to believe that the individual was driving with *any* blood-alcohol or breath-alcohol level is required. See Id.; see also § 322.2616(8)(b)(1).

Officer Wenner executed a lawful traffic stop after Kubala ran a stop sign. Officer Wenner established that Kubala was under the age of twenty-one by checking Kubala's driver's license. When Officer Wenner spoke with Kubala, she could smell "the odor of the impurities of alcohol." Therefore, we find that there is competent substantial evidence to support the finding that Officer Wenner had probable cause to believe that Kubala was under the age of twenty-one and driving with any blood-alcohol or breath-alcohol level.

Kubala argues that, because Officer Wenner did not specifically state that she smelled alcohol impurities *emanating from Kubala's breath*, she did not have probable cause. This argument is not persuasive. First, Kubala fails to cite to any legal authority in support of this argument. Second, Kubala failed to offer any evidence to suggest where the odor of alcohol impurities may have come from, and she elected to forgo cross-examining Officer Wenner on the issue. Finally, in her sworn statement, Officer Wenner attested that she could smell alcohol impurities *when she spoke with Kubala*. It was reasonable for the hearing officer to interpret this statement to mean that Officer Wenner smelled alcohol impurities on Kubala's breath, especially considering that Kubala did not offer any evidence to rebut this conclusion.

Testing Device's Compliance with DOT Regulations

“[A] driver who refuses to submit to a breath test may not object to the suspension of his or her license on the basis that the refused test was not approved or did not comply with administrative rules and regulations because these matters which, although relevant to the admissibility of a breath test, are irrelevant where the test has been refused.” Conahan v. Dep’t of Highway Safety & Motor Vehicles, Bureau of Driver Improvement, 619 So. 2d 988, 989 (Fla. 5th DCA 1993) (citation omitted). “There is no requirement that the state validate the hypothetical test which would have been given but for the refusal.” Id. Therefore, we reject Kubala’s argument regarding the lack of competent substantial evidence that the testing device which Officer Wenner proposed to use complied with administrative regulations.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 23rd day of June , 2010.

 /S/
C. JEFFERY ARNOLD
Circuit Judge

 /S/
THOMAS W. TURNER
Circuit Judge

 /S/
JENIFER M. DAVIS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Amir A. Ladan, Esq., Carsten & Ladan, P.A.**, 121 South Orange Avenue, Suite 1420, Orlando, Florida 32801 and **Kimberly A. Gibbs, Esq., Department of Highway Safety and Motor Vehicles – Legal Office**, 133 South Semoran Boulevard, Suite A, Orlando, Florida 32807 on the 23rd day of June , 2010.

 /S/
Judicial Assistant