

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

JAMES WILLARD LINDSAY, JR.,

Petitioner,

v.

CASE NO.: 2009-CA-25060-O

WRIT NO.: 09-27

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT**

Respondent.

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

Matthews R. Bark, Esquire,
for Petitioner.

James K. Fisher, Esquire,
for Respondent.

Before J. ADAMS, THORPE, and MCDONALD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner James Willard Lindsay, Jr. (“Lindsay”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Findings of Fact, Conclusions of Law and Decision,” sustaining the suspension of his driver’s license pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and

Florida Rule of Appellate Procedure 9.030(c).

Facts and Procedural History

On May 30, 2009, Trooper Jacob Vaughn (“Trooper Vaughn”), of the Florida Highway Patrol, arrested Lindsay for DUI and transported him to the Orange County DUI Testing Facility. Trooper Vaughn, along with a breath test operator, conducted the twenty-minute observation of Lindsay and read implied consent warnings to Lindsay. Lindsay refused to submit to a breath-alcohol test. Therefore, the Department suspended his driving privilege.

Pursuant to section 322.2615, Florida Statutes, Lindsay requested a formal review of his license suspension. On July 1, 2009, Hearing Officer Donna Petty held a formal review at which Lindsay did not appear but was represented by counsel. At the hearing, Lindsay objected to the very nature of the proceeding, alleging that it is unconstitutional, and the hearing officer overruled.

During his examination of Trooper Vaughn, Lindsay’s counsel asked whether there were any other law enforcement officers present at the scene of the arrest. Trooper Vaughn testified that an Orlando Police Department (“OPD”) officer “pulled up at some point.” Trooper Vaughn stated that he did not know the OPD officer’s name, nor did he know whether he would be able to determine it by reviewing law enforcement records. Lindsay’s counsel persisted in asking Trooper Vaughn to speculate as to whether he may be able to determine the other officer’s name, but the hearing officer intervened and asked Lindsay’s counsel to move on. Lindsay’s counsel moved on without objection or motion.

Later in the hearing, Lindsay’s counsel asked Trooper Vaughn why, considering the fact that most of the field sobriety exercises were not video-recorded at the scene, he chose not to conduct them a second time in front of the camera at the DUI Center. Trooper Vaughn testified

that he believed it was not safe to remove an arrested person's handcuffs and place him in a closed room with a civilian, specifically, the breath test operator. Furthermore, Trooper Vaughn stated that he believed doing so would have been against the Orange County Sheriff's Office policies. Lindsay's counsel moved to strike the Sheriff's Office policy because Trooper Vaughn could not produce the policy at the hearing.

Lindsay's counsel then asked Trooper Vaughn to identify the breath test operator that was present at Lindsay's refusal. Trooper Vaughn testified that he could not recall which breath test operator was present, but he stated that the refusal was videotaped. He also stated that he was not sure whether the person who notarized the Charging Affidavit, Osvaldo Caner, was the breath test operator present at the refusal.

At the end of the hearing, Lindsay moved for a continuance to ascertain the identities of the passenger¹ and the breath test operator, and he moved to invalidate the license suspension on the ground that Trooper Vaughn lacked probable cause to arrest Lindsay for DUI. The hearing officer denied his motions. On July 8, 2009, the hearing officer entered an order sustaining the suspension of Lindsay's driver's license.

Discussion of Law

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]

¹ Although the passenger, Benjamin Marrs, owned the truck Lindsay was driving and was identified in the Charging Affidavit, Lindsay's counsel moved for a continuance at the formal review, claiming that the passenger's identity was not discernable prior to the hearing. Lindsay does not forward that argument in his petition to this Court.

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, blood, or urine test, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension.” § 322.2615(7), 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 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.
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 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2008).

In his petition, Lindsay argues that the hearing officer denied his right to due process by refusing to grant him a continuance to discern the identity of witnesses whom he alleges were not discernable prior to the hearing. Lindsay further argues that the hearing officer denied his due process rights by refusing to grant him a continuance to obtain a copy of the Orange County Sheriff’s Office policy concerning the removal of handcuffs from an arrestee at the DUI Center. Finally, Lindsay argues that he was denied due process because the hearing officer denied his motion to invalidate the license suspension without a procedure that allowed Lindsay to challenge the evidence against him.

Refusal of Continuance to Ascertain Identity of Witnesses

Lindsay asserts that there were two witnesses not discernable prior to the hearing, the

OPD officer and the breath test operator. However, Lindsay never requested a continuance to ascertain the identity of the OPD officer. When the hearing officer asked Lindsay's counsel to move on from questions regarding the OPD officer, Lindsay's counsel moved on without objection or motion for a continuance.²

Lindsay did, in fact, motion for a continuance to ascertain the identity of the breath test operator. However, Lindsay failed to cite to any authority establishing his right to a continuance. Furthermore, Lindsay failed to demonstrate that the identity of the breath test operator was not discernable prior to the hearing. On the contrary, he suggests that Osvaldo Caner, the individual who notarized the Charging Affidavit, may have been the breath test operator. Lindsay failed to demonstrate that he made any effort to ascertain the identity of the breath test operator prior to the hearing. There is no evidence in the record showing, nor does Lindsay attempt to argue, that he contacted the Orange County Sheriff's Office, the Florida Highway Patrol, the Department, Trooper Vaughn, or Osvaldo Caner attempting to ascertain the identity of the breath test operator.³ Because Lindsay failed to demonstrate prior due diligence in ascertaining the breath test operator's identity and procuring his or her presence, he was not entitled to a continuance. See Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996). Therefore, we find that the hearing officer did not deny Lindsay due process by refusing to grant a continuance to ascertain the identity of certain witnesses.

Refusal of Continuance to Obtain Orange County Sheriff's Office Policy

Lindsay never requested a continuance to obtain a copy of any Orange County Sheriff's

² Lindsay's argument that the hearing officer improperly limited his questioning of Trooper Vaughn regarding the identity of the OPD officer is unpersuasive. Trooper Vaughn testified that he did not know the name of the officer and he did not know whether he would be able to determine it from law enforcement records. When Lindsay's counsel continued to ask Trooper Vaughn to speculate as to whether there was any possible way to find the OPD officer's name, the hearing officer reasonably asked him to move on.

³ Lindsay's argument that he was denied a subpoena for Osvaldo Caner is unpersuasive. There is no evidence in the record that Lindsay requested a subpoena for Osvaldo Caner.

Office policy. Lindsay cannot properly argue that the hearing officer refused to grant a motion that he never forwarded. Furthermore, “a certiorari proceeding is limited to review of the matters before the lower tribunal at the time the order to be reviewed was resolved.” Matthews v. City of Maitland, 923 So. 2d 591, 594 (Fla. 5th DCA 2006) (citing Dade County v. Marca, S.A., 326 So. 2d 183 (Fla. 1976)). Therefore, we reject Lindsay’s argument that he was denied due process under this theory.

Constitutionality of Formal Review Process

Despite the vagueness of Lindsay’s issue statement, the gist of his third argument is that the formal review process is unconstitutional. However, Lindsay fails to cite to any case, statute, or constitutional provision in support of this argument. Conversely, the Fifth District Court of Appeal has issued several opinions upholding the constitutionality of the process set forth in section 322.2615, Florida Statutes. See Dep’t of Highway Safety & Motor Vehicles v. Satter, 643 So. 2d 692 (Fla. 5th DCA 1994); Dep’t of Highway Safety & Motor Vehicles v. Stewart, 625 So. 2d 123 (Fla. 5th DCA 1993).

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 12th day of July , 2010.

 /S/
JOHN H. ADAMS, SR.
Circuit Judge

 /S/
JANET C. THORPE
Circuit Judge

 /S/
ROGER J. MCDONALD
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: **Matthews R. Bark, Esq., Jaeger & Blankner**, 217 East Ivanhoe Boulevard, Orlando, Florida 32804 and **James K. Fisher, Esq., Department of Highway Safety and Motor Vehicles**, Post Office Box 570066, Orlando, Florida 32857 on the 12th day of July , 2010.

/S/ _____
Judicial Assistant