

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

MARY CHRISTINA DELK,

Petitioner,

v.

**CASE NO.: 2009-CA-35440-O
WRIT NO.: 09-48**

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

Respondent.

_____ /

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE THORPE, WALLIS, LUBET, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Mary Delk (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of her driver’s license for refusing to submit to the breath-alcohol test. Also, pursuant to section 322.64(7)(b), Florida Statutes, Petitioner’s commercial driver’s license was disqualified. This Court has jurisdiction under sections 322.2615(13) and

322.64(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

The charging affidavit of Officer David Martin, with the Winter Park Police Department, states that on August 27, 2009 at around 9:53 p.m., he was traveling westbound on Aloma Avenue when he observed a small gray vehicle traveling eastbound on Aloma Avenue with only the parking lights on. He made a U-turn to catch up to the vehicle. He did not see any vehicles changing lanes and observed the taillights of the vehicle in the median lane. He caught up with Petitioner's 2003 gray Mercedes Benz that was approximately the same size as the vehicle he observed. As he approached St. Andrews Boulevard, he could see that Petitioner's vehicle headlights were now on, but another vehicle was in front of her vehicle. He could not determine if the vehicle in front had the headlights on. He turned on his emergency lights to pass Petitioner's vehicle to confirm that he was not mistaken in identifying the correct vehicle. Petitioner's vehicle was directly in front of him in the median lane and the right lane was open for her vehicle to move into.

Officer Martin continued to travel behind Petitioner's vehicle with his blue emergency lights flashing and followed her for approximately 6/10 of a mile as he watched the second vehicle in front continue to travel farther away. He remained 50 to 100 feet behind Petitioner's vehicle with his emergency lights on until the other vehicle was out of his view. When he and Petitioner reached Ranger Boulevard, he activated his siren to signal the Petitioner to stop. She then pulled left into a break in the median at the 2900 block of Aloma Avenue.

After making the traffic stop, Officer Martin approached Petitioner and explained that his reason for stopping her vehicle was in relation to the headlights and for being behind her

for about one half mile without her yielding. According to Officer Martin, he asked Petitioner for her driver's license, proof of insurance, and registration. In attempting to retrieve the items, her hand motions were slow and deliberate and she had moderate difficulty removing her driver's license from her wallet. She also handed him her class B commercial driver's license.

Because of their location in the road, Officer Martin instructed Petitioner to wait for him to block the eastbound traffic and then to drive into the nearby convenience store parking lot. After she parked her vehicle in the parking lot, Officer Martin asked her to step outside of the car and upon doing so, she placed a hand on her car for balance and she swayed when she stepped away from the car.

Officer Martin then cited Petitioner for Failure to Yield to an emergency vehicle. When a light rain began he asked her to step over to the front of the closed convenience store where the patio area was smooth, level, and well lit. As he was explaining the citation to her, he could smell the odor of alcohol impurities upon her breath. She was swaying severely as she stood and would lean against the newspaper dispensers for support. Also, her speech was slow and slurred.

Petitioner was having difficulty locating the registration card and throughout the traffic stop she had to be reminded to provide it. Also, several times during the traffic stop she asked Officer Martin why he made the traffic stop. Lastly, several times during the stop she spontaneously stated that she had been out celebrating with her girlfriends that night as they were all turning 50 years old and that she was not doing anything wrong.

Next, Officer Martin requested that Petitioner perform field sobriety exercises. He observed that her eyes were equal in size and not significantly dilated, did not appear

reddened, but appeared slightly glassy. She had some problems during the walk and turn exercise, including dropping her end of the tape, losing her balance, and swaying with difficulty when holding her position. After experiencing these difficulties, she refused to cooperate in any further exercises.

Based upon the totality of the circumstances, Officer Martin arrested Petitioner for driving while impaired. After securing her, he saw her registration and insurance card in the driver seat of her vehicle. He then took her to the station to conduct the breath alcohol test. She was read the implied warning by Officer Maingot and upon her request was read the warning again whereupon she refused to provide a breath sample. Accordingly, Petitioner's privilege to drive was suspended for one year and her commercial driver's license was disqualified.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on October 2, 2009. On October 9, 2009, the hearing officer entered a written order denying Petitioner's motion sustaining her driver's license suspension for a period of one year and sustaining the disqualification of her commercial driver's license. Petitioner now seeks certiorari review of this order.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a

breath-alcohol test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting 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 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. (2009).

Where the driver's commercial license was disqualified for refusing to submit to a breath-alcohol test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. That the law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a commercial motor vehicle, or any motor vehicle if the driver holds a commercial driver's license, in this state while he or she had any alcohol, chemical substances, or controlled substances in his or her body.
2. That the person refused to submit to the test after being required to do so by a law enforcement officer or correctional officer.
3. That the person was told that if he or she refused to submit to such test he or she would be disqualified from operating a commercial motor vehicle for a period of 1 year or, in the case of a second or subsequent refusal, permanently.

§ 322.64(7)(b), Fla. Stat. (2009).

In the Petition for Writ of Certiorari, Petitioner argues that the suspension of her driver's license and the disqualification of her commercial driver's license are not supported

by competent substantial evidence that she was lawfully stopped and arrested. Conversely, the Department argues that the hearing officer properly sustained the suspension and disqualification where there was competent substantial evidence to support the hearing officer's decision.

The only evidence before the hearing officer was Officer Martin's charging affidavit. Petitioner contends that the hearing officer properly refused to conclude that Petitioner's vehicle was lawfully stopped for driving without the vehicle's headlights illuminated because Officer Martin was unsure himself that it was her vehicle without the headlights on. However, Petitioner argues that the hearing officer's finding that the traffic stop was based on Petitioner's failure to yield to an emergency vehicle under section 316.126, Florida Statutes, was not proper as there was no probable cause to stop Petitioner for that violation.

Section 316.126(1)(a), Florida Statutes, provides:

Upon the immediate approach of an authorized emergency vehicle, while en route to meet an existing emergency, the driver of every other vehicle shall, when such emergency vehicle is giving audible signals by siren, exhaust whistle, or other adequate device, or visible signals by the use of displayed blue or red lights, yield the right-of-way to the emergency vehicle and shall immediately proceed to a position parallel to, and as close as reasonable to the closest edge of the curb of the roadway, clear of any intersection and shall stop and remain in position until the authorized emergency vehicle has passed, unless otherwise directed by any law enforcement officer.

The charging affidavit lacks facts that Officer Martin was on his way to an existing emergency and lacks facts that Officer Martin's vehicle actually "immediately approached" Petitioner's vehicle while staying 50 to 100 feet behind her for 6/10 of a mile. When Officer Martin decided to make the traffic stop and put his sirens on, Petitioner then pulled over accordingly.

Applying the plain language of section 316.126, Florida Statutes, to the facts presented in Officer Martin's charging affidavit, the Court concurs with Petitioner that the hearing officer's finding that the stop was lawful departed from the essential requirements of the law and was not supported by competent substantial evidence in the record. *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), *review denied*, 984 So. 2d 519 (Fla. 2008) (an individual does not violate the Implied Consent Law when he or she refuses to take a breath test that is not incidental to a lawful arrest); *Jones v. State*, 842 So. 2d 889 (Fla. 2d DCA 2003) and *Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513 (Fla. 5th DCA 2006) (police officer lacked probable cause to stop vehicle and issue a citation).

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension and Disqualification is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
____ 15th _____ day of ____ June _____, 2011.

_____/S/_____
JANET C. THORPE
Circuit Court Judge

_____/S/_____
F. RAND WALLIS
Circuit Court Judge

_____/S/_____
MARC L. LUBET
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure, Yates, and Ponall, P.A., P.O. Box 2728, Winter Park, FL 32790-2728 and to **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, on this _____16th_____ day of _____June_____, 2011.

_____/S/_____
Judicial Assistant