

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

WILLIAM KIRK,

CASE NO.: 2010-CA-12090-O

WRIT NO.: 10-30

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
L. Labbe, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Michael J. Alderman, General Counsel and
Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

Before KOMANSKI, McDONALD, and M. SMITH, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner William Kirk 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 his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction. 322.2615, 322.31, Fla. Stat.; Fla. R. App. P. 9.030(c)(3).

At approximately 1:10 a.m. on March 11, 2010, Officer Espinosa of the Belle Isle Police Department observed Petitioner traveling eastbound on Hoffner Avenue. Officer Espinosa observed that the tag light on Petitioner's vehicle was not working. As a result, Officer Espinosa initiated a traffic stop. After initially failing to stop for Officer Espinosa, Petitioner finally pulled his vehicle over and exited it at Officer Espinosa's direction.

Upon making contact with Petitioner, Officer Espinosa observed that Petitioner moved slowly and that his hands were shaking. Officer Espinosa also observed an odor of alcohol on Petitioner's breath and that Petitioner's eyes were bloodshot. Officer Espinosa next inquired as to how much Petitioner had to drink that night, to which Petitioner responded that he had consumed a couple of beers. At this point, Officer Espinosa asked Petitioner to submit to field sobriety testing. Petitioner responded that he was not sure if he had consumed too many beers to pass the test, and refused to submit to field sobriety testing. Based on his training and experience, Officer Espinosa felt that Petitioner was impaired and placed him under arrest for DUI. Petitioner was transported to the DUI testing center where he also refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on April 15, 2010, Petitioner was granted a formal review held by Department Hearing Officer Labbe. Petitioner's counsel and Officer Espinosa were present. At the hearing, Petitioner moved to set aside the suspension on the basis that Officer Espinosa did not have probable cause to believe that Petitioner was driving while under the influence of alcohol. On April 20, 2010, the hearing officer entered the

Findings of Fact, Conclusions of Law and Decision denying Petitioner's motion and sustaining the suspension of his 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. 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 refusal 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 . . . the suspension." § 322.2615(7), Fla. Stat. The hearing officer's scope of review is limited to the following issues:

1. Whether the arresting law enforcement officer had probable cause to believe that the person 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 was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person refused to submit to any such 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 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 eighteen months.

§ 322.2615(7)(b), Fla. Stat.

The Petitioner argues that the evidence in the record failed to establish that Officer Espinosa had probable cause to arrest the Petitioner for DUI. Thus, Petitioner argues that the stop and arrest were unlawful, and therefore, the hearing officer's decision was not supported by competent substantial evidence. Conversely, the Department argues that the arresting officer did have probable cause to arrest the Petitioner for DUI based on competent substantial evidence contained in the DUI citation, the charging affidavit and the incident report, and on Officer Espinosa's sworn testimony.

Review of the submitted evidence and testimony indicates that Petitioner failed to initially stop for the arresting officer. Upon making contact with the Petitioner, the arresting officer observed a strong smell of alcohol and his bloodshot eyes. Petitioner also stated that he had consumed a couple of beers and may have consumed too many beers to pass the field sobriety tests. Based on these observations, the Court finds that the hearing officer had competent substantial evidence to support his findings that the arresting officer had probable cause to arrest the Petitioner for DUI. To evaluate the evidence further would put the Court in the impermissible position of reweighing the evidence presented in the administrative action. In reviewing an administrative action, the circuit court is prohibited from weighing or reweighing the evidence presented to the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30 (Fla. 1st DCA 1997).

Accordingly, 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 4th day of November , 2010.

 /S/
WALTER KOMANSKI
Circuit Judge

 /S/
ROGER MCDONALD
Circuit Judge

 /S/
MAURA SMITH
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 **William R. Ponall, Esquire**, 1150 Louisiana Ave., Ste. 1, Winter Park, FL 32789 and **Michael J. Alderman, General Counsel and Kimberly A. Gibbs, Assistant General Counsel**, P.O. Box 570066, Orlando, FL 32857 on this the 4th day of November , 2010.

 /S/
Judicial Assistant