

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

R [REDACTED] B [REDACTED]

Petitioner,

v.

Case No. 2005-CA-6931

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

Respondent.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the Court on the Petitioner's Writ of Certiorari filed on July 20, 2005. Pursuant to Florida Rule of Appellate Procedure 9.030(c)(2), the Petitioner seeks review of an administrative order of the Department of Highway Safety and Motor Vehicles (the "Department") suspending his driving privileges. In a July 5, 2005 Final Order of License Suspension the Department sustained the suspension of the Petitioner's driving privileges for one year pursuant to Section 322.2615, Florida Statutes. The Court has carefully reviewed the record and files, and is otherwise duly advised in the premises.

Standard of Review

The circuit court's proper standard of review on a petition for writ of certiorari is to determine whether the administrative tribunal (1) accorded procedural due process, (2) observed the essential requirements of the law, and (3) based its administrative findings on competent substantial evidence. See *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). In

applying this standard, this Court is not allowed to re-weigh the evidence or substitute its judgment for that of the administrative tribunal. See *Haines City Community Dev. Co. v. Heggss*, 658 So. 2d 523, 530 (Fla. 1995).

Facts

On May 25, 2005, Officer K. Vespia, of the Sarasota Police Department, stopped the Petitioner, Roger Bray, for hitting a curb several times while driving his vehicle. The probable cause affidavit indicates that upon approaching the driver, the Officer observed an odor of an alcoholic beverage emanating from the Petitioner's breath and person, and that the Petitioner exhibited a dazed appearance. Subsequently, Officer Bales arrived and attempted to conduct the Field Sobriety Tasks, which the Petitioner refused to perform. The Petitioner was arrested and transported to the jail where he was read an implied consent warning. After his refusal to take a breath test, the Petitioner's privilege to drive was subsequently suspended.

The Petitioner requested a formal review of this administrative suspension. Following a formal review, the Department entered an order that upheld the suspension of the Petitioner's driving license. The Petitioner requests that this Court enter an order directing the Department to set aside the suspension order, and to reinstate the Petitioner's driving privilege. The Petitioner further requests this Court order the Department to remove the entry on the Petitioner's permanent driving record which reflects the administrative suspension that commenced on the date of the Petitioner's arrest in the instant case.

Analysis

The Petitioner raises two arguments in his petition for writ of certiorari. First, he argues that the action of the Department was not supported by competent substantial evidence, as the documentary evidence supporting the Petitioner's suspension was not properly notarized pursuant to Section 117.10, Florida Statutes. A review of the record indicates that the affidavit of refusal to submit to breath, urine or blood test (the "refusal affidavit") was executed by Officer K. Vespia. The attestation is also signed by Officer K. Vespia. On the refusal affidavit, the signature of law enforcement officer line (to execute the affidavit) is above the signature of attesting officer line (to notarize the affidavit), both of which are signed by Officer Vespia. Above the signature of attesting officer line, is the language: "[t]he affidavit must be notarized or attested to (F.S. 117.10)". The proper procedure would have been for an Officer other than Vespia to sign the signature of attesting officer line. Section 117.10, Florida Statutes, states: "[a]n officer may not notarize his or her own signature." This is precisely the error that occurred in the instant case.

The Department cites *House of Lyons v. Marcus* for the proposition that obvious clerical errors and technical omissions will not defeat an acknowledgment, if the acknowledgment when viewed alone or in connection with the instrument acknowledged fairly shows substantial compliance with the statute. See *House of Lyons v. Marcus*, 72 So. 2d 34 (Fla. 1954.) The error in the instant case, however, is too serious to be considered a mere technicality. *State v. Johnston* establishes that an improperly notarized affidavit, such as one without an oath, is invalid. See *State v. Johnston*, 553 So. 2d 730 (Fla. 2d DCA 1989). In *Johnston*, the court explained that:

"A sworn statement requires an oath. The state argues that the physical act of swearing to the refusal affidavit is nothing more than an artificial act which places

form over substance. If we were to accept this argument, we would create enormous mischief in the law concerning untold numbers of present statutory requirements. Such an argument could be used to justify the failure to give oath in every instance where an oath is required. Contrary to the state's stance, an oath is not merely a physical, artificial act which is devoid of meaning. Rather, the main purpose of the requirement of obtaining a valid oath is that perjury will lie for its falsity." *Johnston* at 732.

The language in the *Johnston* opinion directly applies to the instant case. In the instant case, the execution and attestation of the refusal affidavit by the same Officer renders the oath invalid, and therefore renders the affidavit invalid. Without a proper oath, there is no procedural safeguard in place to ensure that the Officer's statement was properly sworn.

Section 322.2615, Florida Statutes, specifies that a law enforcement Officer:

"shall forward to the department, within 5 days after the date of the arrest, a copy of the notice of suspension, the driver's license of the person arrested, and a report of the arrest, including an affidavit stating the officer's grounds for belief that the person arrested was in violation of s. 316.193; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person arrested refused to submit; a copy of the citation issued to the person arrested; and the officer's description of the person's field sobriety test, if any".


The statutory language mandates what documents need to be forwarded to the department. As the refusal affidavit was invalid because it was not properly notarized, the hearing officer went outside the essential requirements of the law by considering the affidavit. Further, the hearing officer's decision was not based on competent, substantial evidence because the refusal affidavit was invalid, and, therefore, could not have been considered as evidence. Without a refusal affidavit the hearing officer did not have the required documentary evidence to uphold the suspension of the Petitioner's driving privileges.

The Petitioner's second argument is that the Petitioner was not properly notified of the consequences of a refusal to take a chemical test where the State of Florida failed to comply with Section 316.1932(1)(e)3, Florida Statutes. The Petitioner maintains that the statute requires the

implied consent warning for drivers licensed by the state of Florida to appear above the signature line on the driver's license, whereas the implied consent language appears below the signature line on the Petitioner's license. The Court rejects this argument.

Therefore, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED**. The Final Order of License Suspension entered by the Department on July 5, 2005 is QUASHED and this cause is remanded for action consistent with this Order.

DONE AND ORDERED in chambers, in Sarasota, Florida this ^{4th} 18 day of October, 2005.



BECKY A. TITUS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished
by U.S. Mail as follows on this 18 day of October, 2005.

Thomas S. Hudson, Esq.
7780 Westmoreland Drive
Sarasota, Florida 34243

Carlos J. Raurell, Esq.
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Division of Driver Licenses
Neil Kirkman Building
Room A-432
Tallahassee, Florida 32301



Karen Yost
Judicial Assistant