IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ROBERT JAMES LANE,

Petitioner,

v.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

APPELLATE DIVISION (CIVIL) "AY"
CASE NO.: 502012CA007787XXXXMB

Opinion filed: DEC 13 2012

Appeal from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Elizabeth Parker, Esq.
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For Respondent: Jason Helfant, Esq.
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Lake Worth, FL 33454

PER CURIAM.

Robert James Lane ("Petitioner") seeks review of a decision by Hearing Officer Donna George ("Hearing Officer George") sustaining the suspension of his license. We find that because the Petitioner waived any argument related to the deficiency with the affidavit submitted in this case by failing to raise it before Hearing Officer George, the petition must be denied. Further, even if no waiver occurred, we find that there is competent substantial evidence to support Hearing Officer George's findings.

The Petitioner challenged the suspension on January 30, 2012 before Hearing Officer George. Notably, at the hearing, the Petitioner did not object to the introduction of documents

introduced, including DDL-3, the DUI Probable Cause Affidavit. Further, at the hearing, Deputy Godden testified under oath that the facts contained within the affidavit were true and correct and testified as to the facts that provided probable cause to arrest the Petitioner for DUI.

Petitioner argues that there was no competent substantial evidence that Deputy Godden had probable cause to believe that he was driving under the influence. The Petitioner contends that the sole "evidence" of Deputy Godden's probable cause was in the form labeled "D.U.I. Probable Cause Affidavit," which was not notarized, sworn to, or submitted under oath and as a result, does not satisfy the affidavit requirement of section 322.2615(2), Florida Statutes (2011).

The Affidavit's Defects are Non-Jurisdictional

The Department argues that the issues regarding the affidavits technical defects were not preserved for appellate review because the Petitioner never objected to the introduction of the affidavit at the hearing before Hearing Officer George. Petitioner cites to *State v. Johnston*, 553 So. 2d 730 (Fla. 2d DCA 1989) for the proposition that the issue is jurisdictional and may therefore be raised for the first time on appeal.

For the purposes of administrative hearings conducted by the Department, Florida courts have stated that "[d]ue process requires adherence to the legislature's mandate that before the Department of Motor Vehicles may initiate proceedings to suspend a person's privilege to operate a motor vehicle, it must first receive the arresting officer's properly sworn statement." *Id.* The court in *Johnston* relied on language contained in section 322.261(1), Florida Statutes (1987), which stated that "where a person refuses to submit to a breath test when an officer has reasonable cause that the person is driving under the influence of alcohol or drugs, the Department of Motor Vehicles 'shall suspend' the person's privilege to operate a motor vehicle 'upon receipt of the officer's *sworn statement*' of reasonable cause." *Johnston*, 553 So. 2d at 732

(emphasis added). Therefore, failure to provide this sworn statement "fails to provide the department initial jurisdiction upon which it could proceed with any administrative action to suspend the person's privilege to operate a motor vehicle." *Id.* at 733. The court went on to state that:

> In section 322.261, the legislature specifically requires the officer to *swear* there is reasonable cause to believe the person had been driving or in physical control of a motor vehicle while under the influence of alcohol or controlled substances and refused to submit to a test. Thus, in consideration of this specific requirement, we hold that where there is failure to provide a *sworn* statement, there is no reasonable cause inasmuch as the attempted affidavit containing the facts alleging that the person refused to submit to a test, sans an oath, is a nullity.

Id. at 732 (emphasis in original). This section of the Florida Statutes has since been repealed. *See* Ch. 89-525, § 6, Laws of Fla.

The Legislature later codified section 322.2615, Florida Statutes (2011), which addresses the right of review and states that "[a] law enforcement officer . . . *shall, on behalf of the department*, suspend the driving privilege . . . of a person who has refused to submit to a urine test or a test of his or her breath-alcohol level." § 322.2615(1)(a), Fla. Stat. (2011) (emphasis added). It further states that "the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, . . . an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages . . . ." § 322.2615(2), Fla. Stat. (2011). The Department reviews this information "to determine whether the materials comply with applicable statutes, rules, and policies, and the department shall inform the law enforcement officer when a deficiency exists so that the deficiency may be corrected prior to the hearing." § 322.26151, Fla. Stat. (2011). It is then incumbent upon the driver to request an informal or formal hearing to review the propriety of the suspension. *See* § 322.2615(1)(b)3., Fla. Stat. (2011).

Whereas former section 322.261(1) required the officer to forward an affidavit to the Department as a condition precedent to a license suspension, section 322.2615 instead requires the officer to forward a sworn statement to the Department only after the suspension is effectuated.[1] We therefore find that the act of forwarding the sworn statement is no longer the trigger conferring jurisdiction upon the Department to proceed with a suspension, since the license is suspended by the officer at the time of arrest. *See* § 322.2615(1)(a), Fla. Stat. (2011).

Although section 322.2615 does not require a sworn statement from the officer prior to the initiation of the suspension, it does require one in order to uphold a suspension at a later hearing. However, since the issue is not jurisdictional, it must be raised at the hearing to attack the sufficiency of the evidence. Petitioner waived this argument by failing to first raise it before Hearing Officer George, therefore the Petition for Writ of Certiorari must be denied.

Even Without an Affidavit, There Was Competent, Substantial Evidence in the Record to Support a Finding of Probable Cause

Even if Petitioner had not waived his arguments regarding the affidavit's defects, we find that there was competent substantial evidence in the record to support the findings made by Hearing Officer George. In *Schwartz v. Dep't of Highway Safety and Motor Vehicles*, No. 502012CA004706XXXXMB (Fla. 15th Cir. Ct. Oct. 3, 2012), this Court held that where the only documents evidencing probable cause in a license suspension hearing did not qualify as affidavits, a resulting decision issued by a hearing officer was not supported by competent substantial evidence. In *Schwartz*, the petitioner's license was suspended for refusing to submit

[1] Other circuit appellate panels have held that the reasoning in *Johnston* applies to suspensions made pursuant to section 322.2615. *See Jannotti v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 39b (Fla. 18th Cir. Ct. 2006); *Williams v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 544a (Fla. 4th Cir. Ct. 2007); *Lambo v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly 838b (Fla. 13th Cir. Ct. 2007); *Boggs v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 1025a (Fla. 13th Cir. Ct. 2007); *Blizzard v. Dep't of Highway Safety and Motor Vehicles*, 16 Fla. L. Weekly 1130c (Fla. 12th Cir. Ct. 2009). Therefore, courts in Florida have held that a proper affidavit is necessary to confer jurisdiction to the Department to conduct the administrative hearing. These cases, however, do not address the changes made to the statutory scheme and how those changes affect the resulting administrative proceedings.

to a breath test after being arrested for DUI. *Id.* at *2. At the review hearing, he argued that the DUI Probable Cause Affidavit used did not contain a proper jurat and was therefore, insufficient to support a suspension. *Id.* The Department countered that the probable cause affidavit was incorporated into a composite form with a Roadside Tasks Sheet that stated "THE FOLLOWING INSTRUMENT WAS NOTARIZED OR ATTESTED BEFORE ME THIS 01-08-12." *Id.* at *2-*3. The Court found that, though it was notarized, the Roadside Tasks Sheet did not constitute an affidavit because it lacked a declaration that the document was sworn to or submitted under oath or the penalty of perjury. *Id.* at *3. Therefore, the Court held that because the only document evidencing probable cause lacked proper jurat was deficient, there was no competent substantial evidence to support a suspension. *Id.* at *3-*4.

In *Schwartz*, however, the officer did not testify at the suspension hearing and therefore the only evidence of probable cause came from a defective probable cause affidavit. In this case, Deputy Godden testified, under oath, as to the facts that led him to believe the Petitioner was under the influence while driving. This distinction renders *Schwartz* inapplicable to the instant case. The circuit court is not entitled to reweigh evidence; it may only review the evidence to determine whether it supported the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Porter*, 791 So. 2d 32, 35 (Fla. 2d DCA 2001). If the circuit court reweighs the evidence, it has applied an improper standard of review, which "is tantamount to departing from the essential requirements of law." *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 845 (Fla. 2001); *Dep't of Highway Safety & Motor Vehicles v. Kurdziel*, 908 So. 2d 607 (Fla. 2d DCA 2005) (granting second-tier certiorari relief when circuit court improperly reweighed the evidence); *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247 (Fla. 2d DCA 2006); *see also Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20 (Fla. 5th

DCA 1989). Deputy Godden's sworn testimony at the hearing was competent, substantial evidence that supported Hearing Officer George's finding of probable cause.

Accordingly, the Petition for Writ of Certiorari is **DENIED**.

COX, BARKDULL, BONAVITA, JJ., concur.