

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

KYLE MAHONEY,

Petitioner,

Appellate Division (Civil)
Case No.: 502010CA006254XXXXMB
Division: "AY"

v.

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

Respondent.

Opinion filed: FEB 03 2012

Appeal from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Donna P. Levine, Esq.
324 Datura Street, Suite 145
West Palm Beach, FL 33401

For Respondent: Damaris E. Reynolds, Esq.
P.O. Box 540609
Lake Worth, FL 33454

HAFELE, J.

Kyle Mahoney ("Mahoney") seeks review of the Hearing Officer's order sustaining the suspension of his license. Mahoney argues that the Hearing Officer failed to observe the essential requirements of law when she upheld his license suspension although no one testified as to the lawfulness of his arrest incident to his refusal to submit to a breath test. The issue of whether the lawfulness of an arrest is incident to a refusal to submit to a breath test "is within the allowable scope of review of the DHSMV hearing officer" in a proceeding to determine if sufficient cause exists to sustain the suspension of a license. *See Dep't Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011). The Hearing Officer made this finding implicitly. The Hearing Officer relied on the live testimony of a civilian witness and a

law enforcement officer and she also relied on reports submitted by law enforcement. One of those reports included the Probable Cause Affidavit where the deputy who responded to the scene of the accident noted that Mahoney's speech was slurred, he smelled of alcohol and admitted to drinking three beers and a shot of whiskey. Therefore, the Hearing Officer implicitly found that Mahoney's arrest after refusing to submit to a breath test was lawful.

Accordingly, the Petition for Writ of Certiorari is DENIED.

COX, J., concurs specially with opinion.

CROW, J., dissents with opinion.

COX, J., concurring specially.

I concur that the Petition for Writ of Certiorari should be denied. This case is distinguishable from our court's recent opinions applying *Hernandez*. In each of those cases, the facts showed that the hearing officer failed to consider whether refusal to submit to a breath test was incident to a lawful arrest. In this case, the Hearing Officer did consider whether Mahoney's refusal to submit to a breath test was incident to a lawful arrest. The Hearing Officer simply did not write it in the final order. I agree that we should not extend *Hernandez* to require a written finding when one is not required by the statute or by the Florida Supreme Court's opinion in *Hernandez*.

CROW, J., dissenting.

I respectfully dissent. First, the circuit court in its appellate capacity is not entitled to reweigh the evidence and must limit itself to determining whether the evidence supporting the decision was competent and substantial. *Dep't of Highway Safety and Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006); *Dep't of Highway Safety and Motor Vehicles v. Kurdziel*, 908 So. 2d 607, 609 (Fla. 2d DCA 2005). Second, the Hearing Officer failed to make a finding on the record whether Mahoney's refusal to submit to a breath test was

incident to a lawful arrest as required by the Florida Supreme Court's recent decision in *Dep't Highway Safety and Motor Vehicles v. Hernandez*, 36 Fla. L. Weekly S243a (Fla. June 9, 2011). Therefore, I would remand to the Hearing Officer for a determination whether the arrest was incident to a lawful arrest. This would place us in line with existing Fifteenth Judicial Circuit precedent. See *Maesel v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 1101a (Fla. 15th Cir. Ct. Sept. 26, 2011); *Bennett v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24b (Fla. 15th Cir. Ct. Oct. 17, 2011); *Lebrun v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24a (Fla. 15th Cir. Ct. Oct.17, 2011); *Christensen v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24c (Fla. 15th Cir. Ct. Oct.17, 2011); *Rielly v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24d (Fla. 15th Cir. Ct. Oct.17, 2011); *Smith v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11c (Fla. 15th Cir. Ct. (Appellate) Oct. 14, 2011); *Hollingsworth v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11b (Fla. 15th Cir. Ct. Oct. 14, 2011); *Maloney v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11a (Fla. 15th Cir. Ct. Oct.14, 2011); *Thomas v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Marsh v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Fraxedas v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Flanagan v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Ehilow v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming).

Accordingly, I would grant the Petition for Writ of Certiorari.