

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

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502014CA004759XXXXMB

SCOTT BAREN OSTER,
Petitioner,

v.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

Opinion filed: **NOV 24 2014**

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

In his Petition for Writ of Certiorari to the Fifteenth Judicial Circuit in its appellate capacity, Petitioner Scott Baren Oster ("Petitioner") asks the Court to quash an order of the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") revoking his drivers license. DHSMV revoked Petitioner's license for two (2) years following his conviction for unlawful prescription of a controlled substance under Section 893.13(8), Florida Statutes. Petitioner argues that the revocation was improper because unlawful prescription of a controlled substance is not listed in Section 322.055 as one of the crimes qualifying for license revocation.

Accordingly, Petitioner claims that his suspension was a departure from the essential elements of the law. We agree and grant the Petition.

Factual Background

Petitioner, a medical doctor, was charged with five (5) counts of trafficking in oxycodone for selling prescriptions. Petitioner pled guilty to four counts of the lesser charge of unlawful prescription of a controlled substance, a second degree felony. At sentencing, according to the court event form, the trial court ordered that the Department of Highway Safety and Motor Vehicles (“DHSMV”) revoke Petitioner’s drivers license for two (2) years. Petitioner thereafter moved to amend the court event form as to the revocation. Petitioner’s motion was granted, and the trial court delegated authority to determine whether to revoke Petitioner’s license to DHSMV. Subsequently, DHSMV issued an Order of License Revocation, which stated that Petitioner’s driving privileges were revoked for two (2) years. Petitioner did not apply for an administrative hearing to review this decision. Petitioner now requests review of the DHSMV Order of License Revocation.

Discussion

Petitioner argues that DHSMV departed from the essential elements of the law in revoking his license because the crime that Petitioner was convicted of is not explicitly listed in the statute authorizing revocation. DHSMV counters that his offense essentially amounts to trafficking or selling a controlled substance, which is crime listed in the statute authorizing revocation.

A driver may appeal a DHSMV order suspending his or her driver’s license through a petition for writ of certiorari to the circuit court. § 322.31, Fla. Stat. (2012); Fla. R. App. P. 9.030(c)(2). In evaluating such a petition, the circuit court’s review is limited to a three-prong

test: (1) whether DHSMV afforded the petitioner procedural due process; (2) whether DHSMV observed the essential requirements of law; and (3) whether DHSMV's findings and judgment are supported by competent, substantial evidence. *Deerfield Beach v. Valliant*, 419 So.2d 624, 626 (Fla. 1982); *DHSMV v. Sarmiento*, 989 So.2d 692, 693 (Fla. 4th DCA 2008). Additionally, "[i]t is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings when he undertakes a review of a decision of an administrative forum." *Dep't of Highway Safety and Motor Vehicles v. Allen*, 539 So. 2d 20, 20 (Fla. 5th DCA 1989).

The authority to revoke Petitioner's license stems from section 322.055, Florida Statutes (2011), which states, in relevant part, that

upon the conviction of a person 18 years of age or older **for possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance**, the court shall direct the department to revoke the driver's license or driving privilege of the person. The period of such revocation shall be 2 years.

§ 322.055(1), Fla. Stat. (2011) (emphasis added) (hereinafter referred to as "the revocation statute"). The revocation statute only applies to those offenses specifically listed in the plain language of the statute. *See Huesca v. State*, 841 So. 2d 585, 586 n.1 (Fla. 2d DCA 2003). For instance, although the revocation statute applies to the crimes of possession and trafficking, it does not apply to manufacturing of a controlled substance. *Id.* Nor does it apply to purchase or delivery. *See Lite v. State*, 617 So. 2d 1058, 1060 (Fla. 1993); *Lee v. State*, 673 So. 2d 990 (Fla. 4th DCA 1996); *see also Pugh v. State*, 971 So. 2d 225, 227 (Fla. 4th DCA 2008) (citing *Huesca*, 841 So. 2d at 586) (holding that "[s]olicitation to deliver [a controlled substance] is not one of the enumerated offenses contained in the [revocation] statute").

Furthermore, the revocation statute generally does not apply where an offense merely falls within the definition of one of the listed offenses. For example, "trafficking" in a controlled substance includes the acts of knowingly selling, purchasing, manufacturing, delivering, or

bringing the substance into the state, or knowingly being in actual or constructive possession of such substance. *See* § 893.135, Fla. Stat. (2011). However, as noted above, the revocation statute does not apply to convictions for the manufacture, purchase, or delivery of controlled substances. Accordingly, conduct amounting to one of the listed offenses is insufficient – the statute only applies to convictions under the specific statutes dealing with possession, sale, or trafficking.

In the Order of License Revocation, DHSMV found that the revocation statute applied to Petitioner's conviction for unlawful prescription of a controlled substance under section 893.13(8)(b)(d), Florida Statutes (2011).¹ (Petition, Ex. A). "Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration." *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). "Of course, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand." *Id.* The burden of showing an agency's construction is clearly erroneous "is satisfied if it is shown that the agency's construction clearly contradicts the unambiguous language of the rule or if it is arbitrary or unsupported by evidence." *Citizens of State of Fla. v. Wilson*, 568 So. 2d 1267, 1271 (Fla. 1990) (internal quotation marks and citations omitted).

DHSMV is "charged with the administration and function of enforcement of the provisions" of Chapter 322, which includes the revocation statute. § 322.02, Fla. Stat. (2011). As such, DHSMV's interpretation of the revocation statute generally merits deference.

¹ Section 893.13(8) prohibits prescribing practitioners from knowingly assisting in obtaining controlled substances through fraudulent representations, or writing prescriptions solely for monetary benefit. § 893.13(8)(a), Fla. Stat. (2011). The violation is reclassified as a second degree felony if a prescribing practitioner (1) received \$1,000 or more in payment for writing prescriptions, or (2) wrote prescriptions for a quantity of a controlled substance which meets the threshold for the offense of trafficking in that controlled substance under section 893.135. § 893.13(8)(d), Fla. Stat. (2011).

However, the plain language of the revocation statute clearly and unambiguously limits its application to convictions for trafficking, possession, or sale of controlled substances, or conspiracy to traffic, possess, or sell. This list does not include “unlawful prescription of a controlled substance.” Nonetheless, DHSMV found that the revocation statute applied to Petitioner’s conviction. Accordingly, DHSMV’s interpretation of the revocation statute contradicts the unambiguous language of the statute, and is therefore clearly erroneous.²

Furthermore, despite DHSMV’s claims to the contrary, the application of the revocation statute is not affected by the fact that Petitioner was originally charged under the trafficking statute, or that his actions essentially qualify as trafficking. Petitioner was not convicted under the trafficking statute, and therefore his conviction does not merit application of the revocation statute. DHSMV’s interpretation of the revocation statute is clearly erroneous. DHSMV therefore departed from the essential requirements of law. Moreover, as a result of its clearly erroneous interpretation of section 322.055, DHSMV’s decision is also not supported by competent substantial evidence, as there was no record evidence that Petitioner had a conviction for one of the enumerated offenses.³ Should the Legislature choose to include additional offenses under the purview of section 322.055(1), Florida Statutes (2011), they are certainly able to do so. However, until such time, this Court gives due deference to the clear statutory language

² Although the Order incorrectly states that the revocation statute applies to “a violation of chapter 893,” the statute does not necessarily conflict with the requirement that the conviction also “involve[d] a controlled substance listed in section 893.03(1) or (2), which was your 2nd offense of s. 562.11(2), s. 562.111, chapter 893, or s. 322.24.” (Petition, Ex. A). As such, this application of the revocation statute may be entitled to deference. Nonetheless, it is not directly at issue in the present case.

³ “Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.” *NITV, L.L.C. v. Baker*, 61 So. 3d 1249, 1251 (Fla. 4th DCA 2011) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). Additionally, although it does not appear that Petitioner sought an administrative hearing to review the Order, DHSMV does not argue that Petitioner’s action is barred by failure to exhaust administrative remedies. Nonetheless, the procedures for review laid out in the Order suggest that Petitioner was not required to seek administrative relief, and could independently seek certiorari review. Accordingly, the availability of administrative review in the present case does not bar the present Petition. See *Barry Cook Ford, Inc. v. Ford Motor Co.*, 616 So. 2d 512, 516-17 (Fla. 1st DCA 1993).

currently in place. Accordingly, the Petition for Writ of Certiorari is **GRANTED**, the order revoking Petitioner's drivers license is **QUASHED**, and the case is remanded for further proceedings consistent with this opinion.

BLANC, SASSER, and SMALL, JJ., concur.