

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR THE STATE OF FLORIDA  
GENERAL CIVIL DIVISION

ELIZABETH NIEBLAS,  
Petitioner,

CASE NO.: 22-CA-005623

v.

DIVISION: B

DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,  
Respondent.

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ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Elizabeth Nieblas's Amended Petition for Writ of Certiorari filed dated July 14, 2022 seeking review of the Department's May 26, 2022 order upholding the suspension of her driving privilege for her unlawful breath-alcohol level. The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P; §322.31, Fla. Stat. The petition contends that the interplay of Rule15A-6.012(3)(a), Florida Administrative Code, and section 119.071(4)(d), Florida Statutes, prevented her from subpoenaing the arresting officer and, in the process, denied her a fair hearing. Petitioner contends that the petition should be granted on the authority of this Court's decision in *Smith v. DHSMV*, 30 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir. [Appellate], May 25, 2022). In *Smith*, a similar occurrence was framed in the hearing and on circuit court review as a lack of due process stemming from Petitioner's inability to secure the arresting officer's attendance at the hearing, whereas here, Petitioner framed the issue in the proceeding below as a lack of competent, substantial evidence to support the suspension because the arresting officer was not present. Because Petitioner did not preserve the due process issue for appellate review, and the law allows the hearing officer to uphold a suspension on the basis of documentary evidence alone, competent, substantial evidence supports the hearing officer's decision to uphold the suspension. Accordingly, the petition must be denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. As such, this court has jurisdiction to review the decision upholding the suspension of Petitioner's driving privilege.

STANDARD OF REVIEW

The Court reviews an administrative decision to determine whether Petitioner received procedural due process, whether the essential requirements of the law have been

observed, and whether the administrative findings and judgement are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

## FACTS AND PROCEDURAL HISTORY

On February 1, 2022, at 2:41 P.M. Trooper Fisher of the Florida Highway Patrol was dispatched to an accident scene at North Dale Mabry Highway and West Lambright Street. Petitioner was identified by officers initially responding to the scene as the driver who caused the accident. Trooper Fisher observed several indicators of impairment, specifically that she was aggressive and uncooperative, smelled strongly of alcohol, had slurred speech, bloodshot eyes, and she appeared unsteady on her feet. After completing his crash investigation, Trooper Fisher began a DUI investigation. Petitioner admitted consuming alcohol and Xanax. After Petitioner refused to perform field sobriety exercises, Petitioner was placed under arrest. Petitioner later agreed to and did provide a breath sample. Her breath-alcohol levels were .236 and .234 g/210L—well over the legal limit of .08. As a result, her driving privilege was suspended.

Petitioner requested a formal review hearing to challenge the administrative suspension. A hearing was held May 26, 2022. At a formal review hearing of an administrative suspension because of an unlawful breath alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, and whether Petitioner had a breath-alcohol level of 0.08 or higher. §322.2615(7)(a), Fl. Stat. Petitioner attempted to subpoena Trooper Fisher; the subpoena was returned unserved because Trooper Fisher was no longer an employee of the Florida Highway Patrol. Although the hearing officer appears to have been amenable to a continuance, Petitioner's attorney indicated that he wished to proceed. Counsel presented no evidence; instead, he moved to invalidate the administrative suspension of Petitioner's license on the ground that Trooper Fisher's absence left the record without competent, substantial evidence to support upholding the suspension. The hearing officer's May 26, 2022 Order determined that the facts within the self-authenticating documents submitted by Trooper Fisher provided the necessary evidence that Petitioner was driving or in actual physical control of a vehicle while under the influence of alcohol. This timely petition followed.

## DISCUSSION

Petitioner's sole argument is that Rule 15A-6.012(3)(a), Fla. Admin. Code, and §119.071(4)(d), Florida Statutes collectively deprive the Petitioner of due process because an arresting officer who has left an agency's employment cannot be subpoenaed by the Petitioner, depriving Petitioner of a real opportunity to be heard. Under the administrative rule, an agency employee designated to accept service for a subpoenaed witness is not required to accept service if the witness is no longer employed by the agency. Rule 15A-6.012(3)(a), Fla. Admin. Code R. Under state law, the personal contact information of active or former law enforcement personnel is exempt from the public record.

§119.071(4)(d) Fla. Stat. Petitioner supplied *Smith v. DHSMV*, 30 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir. [Appellate], May 25, 2022) as supplemental authority for her argument. In *Smith*, this court found that the interplay of the two rules, in addition to the hearing officer's *refusal* to issue subpoena on her own initiative, deprived the petitioner of due process and that additional safeguards may be employed in cases with similar situations without creating undue burden or altering the existing rules and procedures. *Id.*

*Smith* is distinguishable from this case. In *Smith*, the issue was framed in the underlying hearing as a denial of due process. Here, the brief transcript in Petitioner's appendix shows that the issue was presented as one involving a lack of evidence. Regarding the evidence, Florida law allows a hearing officer to conduct review of the suspension, even a formal review, based on the reports of law enforcement and documents relating to the administration of a breath or blood test. §322.2615(11), Fla. Stat. In this case, the documentary evidence alone provided competent, substantial evidence to uphold the suspension. *See also Dep't of Highway Safety and Motor Vehicles v. Pitts*, 815 So. 2d 738, 742 (Fla. 1st DCA 2002) (a hearing officer's determination can be based on written documents and reports submitted by law enforcement).

The foregoing said, a suspension must be invalidated if an arresting officer fails to appear *pursuant to a subpoena*. §322.2615(11), Fla. Stat. (Emphasis added.) Here, however, Trooper Fisher did not fail to appear pursuant to a subpoena because a subpoena was not served. Moreover, Petitioner did not raise the issue that she was denied due process by her then-present inability to secure Trooper Fisher's appearance; she simply argued that the record lacked competent, substantial evidence to uphold the suspension. As already stated, competent, substantial evidence supports the hearing officer's decision. Having failed to raise the due process issue, Petitioner failed to preserve it for appellate review. "Generally, a petitioner cannot raise in a petition for writ of certiorari a ground that was not raised below." *Watkins v. State*, 159 So. 3d 323, 325 (Fla. 1st DCA 2015) (quoting *First Call Ventures, LLC v. Nationwide Relocation Servs., Inc.*, 127 So.3d 691, 693 (Fla. 4th DCA 2013)). "For [the] argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the...motion below." *Allis v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (quoting *Harrell v. State*, 894 So.2d 935, 940 (Fla.2005)).

Petition DENIED.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 11/1/2022  
Mark Wolfe

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MARK WOLFE, Circuit Court Judge

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