

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA
CRIMINAL APPEALS DIVISION

GREGORY EUGENE POWELL,

Petitioner,

vs.

CASE NO: 07-CA 5354

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

Respondent.

PETITION FOR A WRIT OF CERTIORARI

PRESENTED BY:

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Mackey v. Montrym, 443 U.S. 1 (1979)

Mulane v. Central Hanover Trust Co., 339 U.S. 306, 313
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Pierce v. Underwood, 487 U.S. 552, 564-65 (1988)

State v. Woodruff, 676 So.2d 975, 977-78 (Fla. 1996)

State v. Harbaugh, 754 So.2d 691, 694 (Fla. 2000)

Sawyer v. State, 729 So.2d 534 (Fla. 3d DCA 1999)

State v. Rodriguez, 575 So.2d 1262 (Fla. 1991)

Vichich v. DHSMV, 799 So.2d 1069, 1073 (Fla. 2d DCA 2001)

FLORIDA STATUTES:

Section 316.192(2)(b)

Section 322.2615(13)

Section 322.31

Sections 322.26(1)(a)

Section 322.28(2)(e); (3)

PRELIMINARY STATEMENT

The Petitioner, GREGORY EUGENE POWELL, petitions this Court for issuance of a Writ of Certiorari to review the action of the State of Florida, Department of Highway Safety and Motor Vehicles in the permanent revocation of the Petitioner's driver's license.

In this Petition, Petitioner shall be referred to as "Petitioner" or "Powell." Respondent shall be referred to as the "Respondent" or "Department." Any references to the appropriate pages of the Petitioner's Appendix attached to the Petition For Certiorari, shall be made by "A" followed by the exhibit number.

JURISDICTION

This Court has jurisdiction to entertain this Petition pursuant to Rules 9.020(e) and 9.190(c)(1), Florida Rules of Appellate Procedure, Section 322.31, F.S., and Article V, Section 5 of the Florida Constitution, which authorizes this Honorable Court to issue Writs of Certiorari. Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995).

STATEMENT OF THE CASE AND FACTS

The Petitioner, Gregory Eugene Powell, seeks review of the Final Order of permanent revocation of his driver's license by the Department. On September 26, 2007, a formal review hearing was conducted per request by the Petitioner, in accordance with statutory provisions, in which he sought administrative review of a previous Order revoking his driver's license permanently. Subsequently, in an Order entered on October 12, 2007, Dan Henry, DHSMV Field Hearing Officer, Bureau of Administrative Reviews, sustained the permanent revocation of Petitioner's driver's license based on a review of Department records and the evidence presented by Petitioner's counsel at the hearing.

To Petitioner's knowledge, the Department relied in part on their own records in concluding that Petitioner had been convicted on four (4) separate occasions for DUI. In particular, one (1) such alleged "conviction" noted by the Department during the subject hearing was a 1974 DUI occurring in Walton County, Florida. Documentary evidence was presented to the contrary by Petitioner, specifically,

a Notice, dated July 7, 2004, from Sara Lowery, Deputy Clerk to Martha Ingle, Clerk of Court for Walton County, affirming that Petitioner had not received any DUI in Walton County in 1974. However, permanent revocation of the Petitioner's driver's license was still sustained by the Department.

Petitioner finds himself at somewhat of a disadvantage in that he is unable to ascertain totally and specifically what Department records were used for consideration at the subject hearing.

In seeking appellate review of the Department's Order, Petitioner timely filed a Notice of Application for Writ of Certiorari on November 9, 2007 with proper service being executed on the Department. On November 21, 2007, counsel for the Petitioner sent a letter, via facsimile, to Dan Henry, Department Field Hearing Officer for the Board of Administrative Reviews, requesting a copy of the record on Petitioner, Gregory Powell. No record was ever forwarded to counsel for the Petitioner in accord with that request.

On July 24, 2008, Petitioner filed a Notice of Status and Motion for Continuance in this cause. Petitioner informed the Court that a formal request for the record had been made

upon the Department and to that date, the Department had failed to respond accordingly.

On October 14, 2008, counsel for the Petitioner again sent a second letter, via facsimile, to Dan Henry, Department Field Hearing Officer for the Board of Administrative Reviews, requesting a copy of the record on Petitioner, Gregory Powell. Likewise, to this current date of this Petition, no record has been forwarded to counsel for the Petitioner in accordance with his second specific request.

There is no other proper appellate avenue available for the Petitioner to seek review of the Department's action of permanent revocation. As such, this matter is prime for this Courts' review.

ARGUMENT

STANDARD OF REVIEW

Certiorari is the proper remedy to seek review of an administrative order sustaining the revocation of a driver's license. Florida Stat. section 322.2615(13), F.S. In reviewing the Department's order, this Court must determine (1) whether procedural due process had been accorded, (2) whether the essential requirements of law had been observed, and (3) whether the administrative findings and judgment were supported by competent substantial evidence. Vichich v. Department of Highway Safety and Motor Vehicles, 799 So.2d 1069, 1073 (Fla. 2d DCA 2001)(setting forth the standard of review for administrative action taken by the Department). See also, Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995).

ISSUES PRESENTED

ISSUE 1:

THE PERMANENT REVOCATION OF PETITIONER'S DRIVER'S LICENSE BY THE DEPARTMENT'S BOARD OF ADMINISTRATIVE REVIEWS, IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The United States Supreme Court defines "substantial competent evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 564-65 (1988). At the formal review hearing, the Department had the burden of proving by a preponderance of the evidence that the Petitioner had at least four (4) prior convictions for the charge of DUI in order to sustain or impose a permanent revocation of his driver's license. fourth conviction for DUI and the criminal court has not revoked the license.

The Department does not enjoy the luxury of construing a statute as it sees fit in order to accommodate it's holdings. As the Supreme Court stated in Holly v. Auld, 450 So.2d 217 (Fla. 1931), "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of

statutory interpretation and construction; the statute must be given its plain and obvious meaning." Id. at 219 (quoting A.R. Douglass, Inc. v. McRaney, 137 So. 157 (Fla. 1931)).

Sections 322.26(1)(a) and 322.28(2), F.S....(3) require the Department to permanently revoke a driver's license when the driver has received a fourth "conviction" for driving under the influence and the criminal court has not revoked the license.

The Department relied in part on a computer-generated copy of the Petitioner's driving record which directly conflicted with actual documentary evidence from the Walton County Clerk of Court submitted by the Petitioner. There is no record of court-certified judgments of convictions upon which the Department can rely to justify its holding. In fact, the Petitioner shows no record to support having ever been convicted of a felony. Particularly relevant in that a person receiving even a third DUI is then subjected to felony charges and sanctions. In State v. Woodruff, 676 So.2d 975, 977-78 (Fla. 1996), the court held that in order to substantiate the crime of felony DUI, there had to be a

conviction of the misdemeanor currently before the court and proof of an additional element of the existence of three (3) or more prior misdemeanor DUI convictions. (s. 316.192(2)(b)). See, State v. Harbaugh, 754 So.2d 691, 694 (Fla. 2000); Sawyer v. State, 729 So.2d 534 (Fla. 3d DCA 1999); State v. Rodriguez, 575 So.2d 1262 (Fla. 1991).

In addressing the non-existence of any felony convictions is the supportive documentary evidence reflected in court-certified form of the Petitioner's participation for Jury Duty through a Jury Summons and Certificate of Jury Service issued on May 18, 2009 by the Clerk of the Court for Okaloosa County. The very county in which the Petitioner sought administrative review of his license revocation. There exists no record on conviction as a felon for the Petitioner. The Petitioner has never had his civil rights restored, lost by virtue of a felony conviction. And, as a ex-felon, he would likely have never been summoned for jury duty as such a felony conviction would have been reflected in the record when registering to vote. The Department lacked in sufficient competent evidence necessary to sustain any permanent revocation of the Petitioner's driver's license.

ISSUE 2:

PERMANENT REVOCATION OF PETITIONER'S DRIVER'S LICENSE
WITHOUT SUFFICIENT COMPETENT EVIDENCE SUPPORTED BY THE
RECORD IS A DENIAL OF DUE PROCESS

The Due Process Clause found in the Fourteenth Amendment to the United States Constitution clearly applies to any action by the state to cancel, suspend or revoke a driver's license. Since a driver has a constitutionally protected property interest in his or her driver's license, a license cannot simply be canceled, suspended or revoked without due process of law. Mackey v. Montrym, 443 U.S. 1 (1979). In the context of a citizen's right to a driver's license, the due process requirement is an application of the general proposition that relevant constitutional restraints limit the State's power to terminate an entitlement whether that entitlement is denominated a "right" or a "privilege." Bell v. Burson, 402 U.S. 535 (1971). The constitutional guarantee of the Fourteenth Amendment's right of procedural due process has always been understood to embody and embrace a presumptive requirement of notice and a meaningful opportunity to be heard before any State acts to deprive a citizen of his property. Mulane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

Florida Stat. S. 322.28(2)(e) states permanent revocation of a driver's license can occur upon finding a "conviction" for four or more charges of DUI.

The legislature knows the law. Dickinson v. Davis, 244 So.2d 262 (Fla. 1969). As such, a Court, or administrative body, must presume that the legislature knew what they were doing when they established the requisite fourth "conviction" necessary to permanently revoke a driver's license. To not do so would require the Department to afford the Petitioner the full panolpy of constitutional protections, including, but bnot limited to the right of confrontation, the right to call witnesses, the right to disclosure of all evidence the State has against him, right to a jury trial, and in particularly the right to make the State prove every element of the charged crime beyond and to the exclusion of every reasonable doubt.

The Department preserved no record by which to support it's posture that the Petitioner has four (4) DUI convicitons. Or, if the Department is in possession of such records, it simply refuses to comply with the Petitioner's request, twice in fact, to provide a copy accordingly. Petitioner

submits no record exist and as such the sustaining of any permanent revocation of his driver's license by the Department is nothing less than an abuse of authority.

CONCLUSION

The Department sustained the permanent revocation of the Petitioner's driver's license based on insufficient and incompetent evidence as well as evidence Petitioner submits was either erroneous or never existed from the onset. Further, the Department has failed to preserve any record of the review proceedings by which to support their actions. As a result, the Petitioner suffers a loss of a privilege and property interest without having been afforded his constitutionally protected right to due process of law.

RELIEF SOUGHT

Based on the foregoing, Petitioner respectfully seeks an order reversing the permanent revocation of his driver's license imposed by the Department, and any other such relief the Court deems proper and fit.

BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to the STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, 115-D N.W., Racetrack Road, Fort Walton Beach, Florida 32547, this _____ day of _____, 2010.

BY: _____
GLENN M. SWAITEK
Criminal Defense Attorney
Attorney for GREGORY POWELL

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the Petition For Certiorari and the Appendix are in compliance with the font requirements set forth in Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

BY: _____
GLENN M. SWAITEK
Criminal Defense Attorney
Attorney for Gregory Powell

APPENDIX AND INDEX

Exhibit "A":

Result of Show Cause Order Letter dated October 12, 2007

Exhibit "B":

Martha Ingle / Clerk of the Court for Walton County / Fax Information Sheet / Duplicate Copy of Original Florida Uniform Traffic Citation # 267-935H

Exhibit "C":

Notice of Application for Writ of Certiorari dated November 9, 2007

Exhibit "D":

Records Request letter to Dan Henry, HSMV Officer dated November 21, 2007

Exhibit "E":

Notice of Status and Motion for Continuance dated July 24, 2008

Exhibit "F":

2nd Records Request letter to Dan Henry, HSMV Officer dated October 14, 2008(Fax Confirmation Report attached)

Exhibit "G":

Jury Summons/Certificate of Jury Service dated May 18, 2009

Exhibit "H":

Substance Abuse and Driver Education Certificate dated November 9, 2007

Exhibit "I":

Substance Abuse Outpatient Program Certificate dated January 14, 2009