

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

WILLIAM MULLER,

Petitioner,

v.

CASE NO.: 2009-CA-36769-O

WRIT NO.: 09-51

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

Respondent.

Petition for Writ of Certiorari
From the Florida Department of
Highway Safety and Motor Vehicles,
Jim Kuritz, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

Before KIRKWOOD, G. ADAMS, and EVANS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner William Muller (“Muller”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Findings of Fact, Conclusions of Law and Decision,” sustaining the suspension of his driver’s license pursuant to section 322.2615, Florida Statutes, for driving a motor vehicle with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida

Statutes, and Florida Rule of Appellate Procedure 9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On August 22, 2009, Trooper Hawkins, of the Florida Highway Patrol, arrested Muller for DUI. The DUI investigation and arrest resulted from Muller's stop at a scheduled DUI Checkpoint and Roving Patrol Operation (the "DUI Checkpoint"). Muller submitted to a breath test, which resulted in readings of .107 and .107 breath-alcohol content. Therefore, the Department suspended Muller's driving privilege.

Pursuant to section 322.2615, Florida Statutes, Muller requested a formal review of his license suspension. On September 24, 2009, Hearing Officer Jim Kuritz held a formal review at which Muller did not appear but was represented by counsel. Muller motioned for a continuance, which the hearing officer granted, because he was not provided with a copy of the record and the subpoenas that he requested prior to the hearing.

On October 23, 2009, Hearing Officer Jim Kuritz held a continuance formal review at which Muller did not appear but was represented by counsel. At the hearing, Muller moved to invalidate the license suspension on two grounds: 1) the breath test was incident to an unlawful traffic stop and arrest because the DUI Checkpoint's written guidelines were insufficient, rendering the checkpoint invalid; and 2) the record lacked competent substantial evidence that Trooper Hawkins had probable cause to believe that Muller was the driver of a motor vehicle. The hearing officer reserved ruling on the motions. On October 26, 2009, the hearing officer entered an order denying both motions and sustaining the suspension of Muller's driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of the law were observed; and 3) whether the decision was supported by competent

substantial evidence. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum.” Dep’t of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual’s license is suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension.” § 322.2615(7), Fla. Stat. (2009). The hearing officer’s scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in [section] 316.193.

§ 322.2615(7)(a), Fla. Stat. (2009).

In his petition, Muller argues that the hearing officer’s decision is not supported by competent substantial evidence that Muller was lawfully seized and detained for purposes of a DUI investigation. Specifically, he argues that the DUI Checkpoint’s written guidelines failed to properly limit the discretion of the officers operating the checkpoint, thus rendering the checkpoint constitutionally invalid. On the contrary, the Department asserts that the DUI Checkpoint’s written operational plan sufficiently limited the discretion of field officers and was thus constitutionally valid.

The DUI Checkpoint was organized pursuant to a written set of uniform guidelines,

prepared in advance specifically for this operation. The “Methodology of Operation” section of the DUI Checkpoint’s operational plan provides in pertinent part:

All north and southbound traffic will be stopped during this checkpoint operation. . . .

Should traffic become congested or vehicles backup causing excessive delays or traffic hazards, upon authorization of the Event Commander or designee, traffic will be allowed to flow through the checkpoint until an orderly traffic pattern is restored. Checkpoint operations will then resume. All starts/stops and flow troughs [sic] will be recorded by the Checkpoint Traffic Direction Officers and noted in the after action report.

“[A] written set of uniform guidelines must be issued before a roadblock [such as a DUI checkpoint] can be utilized. Campbell v. State, 679 So. 2d 1168, 1170 (Fla. 1996). The guidelines must provide a set of neutral criteria governing the officers in the field. Id. “Written guidelines . . . should set out with reasonable specificity procedures regarding the selection of vehicles, detention techniques, duty assignments, and the disposition of vehicles.” Id. Guidelines failing to cover each of these matters are not necessarily invalid. Id. “Rather, courts should view each set of guidelines as a whole when determining the plan’s sufficiency.” Id.

Muller relies upon two cases to support his argument, Guy v. State, 993 So. 2d 77 (Fla. 2d DCA 2008) and State v. Buchholz, 12 Fla. L. Weekly Supp. 993a (Fla. Brevard Cty. Ct. July 4, 2005). In Guy, the written guidelines provided that every vehicle was to be stopped. Guy, 993 So. 2d at 79. However, if a traffic backup occurred, the Event Commander/Checkpoint Supervisor would develop a contingency plan either temporarily closing the checkpoint until traffic cleared or changing the number of vehicles to be stopped. Id. The court found that the guidelines left the vehicle selection procedure to the discretion of a field officer to develop a contingency plan on the spot in the event of a traffic backup. Id. It further reasoned that the undeveloped contingency plan runs afoul of the mandate in Campbell that “the vehicle selection

procedure be governed by neutral criteria which limits the conduct of individual officers.” Id. Therefore, the court held the checkpoint to be constitutionally invalid. Id.

In Buchholz, “the roadblock guidelines permitted the officers, in their discretion, to divert vehicles around the roadblock, in the event that four vehicles are waiting in line.” Buchholz, 12 Fla. L. Weekly Supp. 993a. The court found that the guidelines provided officers with the ability to “effectively suspend the roadblock, without any guidelines or criteria for its resumption.” Id. Therefore, based on fact that the guidelines allowed multiple *officers*, in *their* discretion, to suspend and resume the roadblock, the court found the guidelines insufficient and the roadblock constitutionally invalid. Id.

We find the present case to be distinguishable from both Guy and Buchholz. Similar to Guy and Buchholz, the guidelines in the present case provide for the suspension and resumption of the checkpoint based on traffic patterns. However, unlike Guy, the guidelines in the present case do not allow the Event Commander to choose whether to close the checkpoint or change the number of vehicles to be stopped. Rather, the guidelines provide that, should traffic congestion, excessive delays, or traffic hazards occur, and only upon authorization of the Event Commander or designee, traffic will be allowed to flow through the checkpoint until an orderly traffic pattern is restored, and then resume stopping all vehicles thereafter. The only discretion left to the Event Commander is to determine what constitutes traffic congestion, excessive delays, or traffic hazards. We find this procedure to be “set out with reasonable specificity,” as required in Campbell. Campbell, 679 So. 2d at 1170.

Unlike Buchholz, the guidelines in the present case do not allow an undetermined number of multiple officers to suspend and/or resume the checkpoint, in their discretion. Rather, the guidelines allow only the Event Commander or designee, one person at any given time, the

limited discretion to completely suspend and/or completely resume the checkpoint based on traffic problems. Furthermore, all suspensions and resumptions were to be recorded and noted in the after action report. Such limited discretion granted to a single commanding officer has been approved by the Seventeenth Judicial Circuit Court. See Suffront v. State, 8 Fla. L. Weekly Supp. 700d (Fla. 17th Cir. Ct. Aug. 6, 2001); State v. Gill, 9 Fla. L. Weekly Supp. 823a (Fla. 17th Cir. Ct. Oct. 3, 2002). We agree with the Seventeenth Judicial Circuit Court and find the guidelines in the present case sufficient and DUI Checkpoint valid.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ____ 8th ____ day of ____ July _____, 2010.

/S/
LAWRENCE R. KIRKWOOD
Circuit Judge

/S/
GAIL A. ADAMS
Circuit Judge

/S/
ROBERT M. EVANS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Esq., Department of Highway Safety and Motor Vehicles – Legal Office**, Post Office Box 570066, Orlando, Florida 32857 on the ____ 8th ____ day of ____ July _____, 2010.

/S/
Judicial Assistant