

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

THEODORE DEAN PARKER,

Petitioner,

v.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

No. 2D21-1472

May 6, 2022

Petition for Writ of Certiorari to the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Andrea Flynn Mogensen, Sarasota, for Petitioner.

Christie S. Utt, General Counsel, and Roberto R. Castillo, Assistant General Counsel, Tallahassee, for Respondent.

SMITH, Judge.

The circuit court denied Theodore Parker's first-tier certiorari petition in an order that both reviewed an agency order from December 2019 that notified him of the permanent revocation of his

driver's license by the Department of Highway Safety and Motor Vehicles (DHSMV) and declined to review a second DHSMV order from February 2020 that conducted an agency review of the December revocation and upheld DHSMV's original determination to permanently revoke Mr. Parker's driver's license. Mr. Parker seeks second-tier certiorari review of the circuit court order, and because the circuit court should have afforded Mr. Parker the opportunity to have the February 2020 order reviewed by way of first-tier certiorari but failed to do so, we grant the petition and quash the circuit court order denying his petition.

I.

Mr. Parker entered into a plea agreement in November 2019 to a driving under the influence (DUI) charge that included a one-year license suspension as part of the agreement. The plea, and the related suspension, was approved by the trial court, and information regarding the suspension was forwarded to DHSMV following sentencing to take steps related to it as required by statute. After his criminal charges were resolved, Mr. Parker received an order from DHSMV on December 13, 2019, indicating that his driving privilege was permanently revoked as a result of the

plea. The order from DHSMV listed the conviction stemming from the 2019 plea and also listed two other Sarasota DUI convictions from 1984 and 2004 that were apparently known to everyone at the time the plea was entered. In addition, however, the DHSMV order also included a previously unknown Michigan DUI conviction from 1983—making Mr. Parker's DUI convictions a total of four and his license therefore subject to permanent revocation.¹ It is undisputed that this alleged Michigan conviction was not considered in the plea process and that the plea and sentence proceeded to finality only in regard to three convictions, with no indication that a fourth might have existed.

Since receiving the DHSMV order, Mr. Parker has maintained that he knows nothing about a Michigan DUI and that it is not his conviction. Accordingly, and based on the instructions contained in the DHSMV order, Mr. Parker timely filed a first-tier certiorari

¹ The December 2019 order from DHSMV does not cite the statutory basis upon which the revocation was made. But the statutory basis for revocation by DHSMV following a fourth DUI conviction stems from sections 322.26(1)(a) and .28(2)(d), Florida Statutes (2019). The order itself informed Mr. Parker that he could assert a challenge to the revocation by filing a petition for writ of certiorari with the circuit court seeking review of a final agency order pursuant to section 322.31.

petition in the circuit court in January 2020. To it, Mr. Parker attached official Michigan records purportedly showing that he had no such 1983 Michigan DUI conviction.² Mr. Parker argued within this first-tier petition that he was denied due process as a result of DHSMV's order of permanent revocation, which was entered without notice or an opportunity to challenge the reliance on a conviction that he claims is not actually part of his driving record.

The circuit court ordered DHSMV to show cause why Mr. Parker was not entitled to relief in an order that also recognized that the circuit court's review of final agency actions includes determining whether procedural due process was followed, whether

² Clearly these records were never presented to DHSMV prior to the entry of the DHSMV order because Mr. Parker was never given notice or opportunity to present those factual records before he received the December DHSMV order. That order then instructed him to challenge it as a final order through a certiorari petition to the circuit court rather than by any further challenge through agency channels. Thus, although he presented these records to the circuit court at the first opportunity he had to do so, the circuit court, under the bounds of its certiorari review, was tasked with looking at whether DHSMV had departed from the essential requirements of law and, on review of the initial petition alone, could not make new factual determinations related to the December order based on those newly presented records. See *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1171 (Fla. 2017).

the essential requirements of the law were observed, and whether the administrative findings and judgment were supported by competent substantial evidence. *See Moore v. Dep't of Highway Safety & Motor Vehicles*, 169 So. 3d 216, 219 (Fla. 2d DCA 2015). DHSMV responded to the order to show cause and claimed that Mr. Parker had the right to request a DHSMV agency hearing to make such a factual challenge through the agency process and had not done so. DHSMV alleged, without explaining why it had otherwise instructed Mr. Parker only to seek certiorari review of a final agency order rather than further in-agency review, that Mr. Parker instead should have brought—and, at that time, still could bring—a challenge to the decision pursuant to section 322.27(5)(a), Florida Statutes (2019). According to DHSMV, Mr. Parker was not denied due process because he had not requested such a challenge, but he could still request it. *See Dep't of Highway Safety & Motor Vehicles v. Spells*, 502 So. 2d 19, 21 (Fla. 2d DCA 1986) ("As pointed out by the Department, however, review under section 322.27(5) [following license revocation] remained open to the appellant. He could have appeared before a departmental hearing officer to demonstrate in a formal administrative hearing why his license should not have been

revoked.").³ In reply, Mr. Parker both moved to incorporate his own

³ Despite the reference by DHSMV and *Spells*, it is not clear that section 322.27(5) is the statutory basis under which Mr. Parker could make such a challenge. Neither the parties nor the circuit court offer clarification, nor does it matter to the outcome of this petition, but if section 322.27(5), in fact, was not actually the basis for the revocation, it is not clear why DHSMV indicated that Mr. Parker had failed to seek a review afforded only to that subsection's category of revocation. Section 322.27(1) outlines times when DHSMV might "suspend" a license without a hearing, but subsection (5) deals expressly with the revocation of a license following a habitual traffic offender designation. Such designation is determined by section 322.264 and requires, in relevant part, three or more convictions for DUI within a five-year period. The December order cites neither section 322.264 nor .27 as the basis for revoking the license, but if indeed sections 322.264 and .27 were the basis, the dates of convictions listed in that order do not fall within the five-year time period. However, Mr. Parker's license revocation more appropriately appears to have been made under sections 322.26 and .28, for which he was entitled to request what amounts to the same type of agency review hearing under section 322.271(1)(a) (rather than section 322.27(5)) upon receiving notification of the revocation. See § 322.271(1)(a) ("Upon the suspension, cancellation, or revocation of the driver license of any person as authorized or required in this chapter, except a person whose license is revoked as a habitual traffic offender under s. 322.27(5) . . . , the department shall immediately notify the licensee and, upon his or her request, shall afford him or her an opportunity for a hearing pursuant to chapter 120").

The failure to accurately cite the appropriate statutes by DHSMV in its original order and throughout these proceedings is both the reason the petition was originally and prematurely filed in the circuit court by Mr. Parker instead of seeking further agency review and among the significant reasons contributing to why Mr. Parker has not yet received the due process to which he is entitled to obtain review of the final agency order. We cannot stress enough the importance that an agency follow the express language of the

records showing that Michigan had confirmed no DUI existed on his driving record into the appendices for the petition and sought with DHSMV the agency review that DHSMV claimed had thus far precluded him from making a due process argument within his then-pending first-tier petition.

II.

Following an agency review hearing, in February 2020, DHSMV denied Mr. Parker's requested review and the earlier permanent revocation order of December was affirmed. In doing so, DHSMV relied on its own records, the same records on which the December order was based, over the documents Mr. Parker had obtained from Michigan indicating that no DUI conviction from 1983 existed in its records for Mr. Parker.

In March, within thirty days of DHSMV's February order and while the certiorari review of the original December order remained pending, Mr. Parker moved to amend his certiorari petition seeking review of this second DHSMV order determining with finality that

correct statutes in performing its duties under the authority granted to it by those statutes within any individual set of case facts.

his license should remain revoked. Mr. Parker also sought to supplement his appendix with the DHSMV hearing record, the order of denial arising out of the subsequent DHSMV hearing, and the Michigan driving records he attempted to present at the hearing.

Mr. Parker is indisputably and expressly entitled to obtain certiorari review of the final agency determination included in that February DHSMV order. *See* § 322.27(7), .31.⁴ Rather than recognizing this, DHSMV sought to strike all records related to the second hearing as outside the scope of the review of the pending petition related to the December order, and it further sought to strike both Mr. Parker's reply and the amended petition he filed seeking his entitled certiorari review of the February order.

⁴ We need not address whether the December order alone actually constituted a final order subject to review as well. The circuit court did not dismiss the December certiorari petition as from a nonfinal order; therefore we need not hypothesize as to whether a dismissal as premature would have been a correct outcome prior to the filing of the amended petition. Our focus instead is on the fact that the circuit court was asked to review both the December and February orders in a single amended petition, the latter of which certainly remedied any issues of finality that might have existed in regard to the former. *Cf. N. Beach Ass'n of St. Lucie Cnty., Inc. v. St. Lucie County*, 706 So. 2d 62, 63 (Fla. 4th DCA 1998) (discussing authority for granting leave to amend petitions for writ of certiorari).

The circuit court, in granting that motion to strike, purportedly did not consider anything related to the new February order and, as a result, also denied the petition as to the original December order standing alone, concluding that apart from those stricken records and review of the February order, DHSMV had not departed from the essential requirements of the law in entering the December order.⁵ Notably, the circuit court also concluded there was no reason to afford Mr. Parker an opportunity to refile a new petition to seek separate review of the February order and related hearing records because the court could never review the DHSMV factual determination from the February hearing in any significant way. Therefore, the court essentially refused to consider the February order substantively within the original proceeding related to the December order despite the timely filed amended petition requesting it, and the court also concluded that there was no

⁵ Although it purportedly did not consider anything related to the February hearing, the circuit court nevertheless expressly relied on section 316.193(12) to conclude that DHSMV had sufficient evidence to enter the December order, despite the fact that the record reflects that section 316.193(12) was only cited and addressed within the February order.

reason to allow for the February order to be considered in a separate petition apart from the pending December one either.

Mr. Parker now seeks second-tier certiorari review of the circuit court's order, which denied the petition as to the December order and struck the amended petition as to the February order without considering its substance despite it being both timely and from a final order of license revocation.⁶

III.

"In a second-tier certiorari proceeding, the scope of this court's review is limited to whether the circuit court afforded procedural due process and whether it applied the correct law." *Dep't of Highway Safety & Motor Vehicles v. DeGroot*, 971 So. 2d 237, 239 (Fla. 2d DCA 2008). "This two-part analysis allows this court to 'decid[e] whether the lower court "departed from the essential requirements of [the] law." ' " *Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 770 (Fla. 2d DCA 2009) (alterations

⁶ We note that by the time the circuit court struck the amended certiorari petition related to the February order, any further attempt by Mr. Parker to file the petition under a new case number would have been beyond the thirty-day time limit for doing so unless it related back to the date the amended petition was filed.

in original) (quoting *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003)). If such a departure constitutes a miscarriage of justice, issuance of a writ of certiorari is warranted.

Id.

Mr. Parker has alleged that the circuit court denied him due process that resulted in a miscarriage of justice in the treatment of his first-tier certiorari petition in multiple ways, many of which we need not address either because doing so would require this court to review the evidence in a way that is beyond the scope of this proceeding or because the circuit court has not yet reviewed the February final order of revocation in the first instance. Therefore, based solely on the due process issue created by the circuit court's failure to review the February 2020 order and the evidence presented at the DHSMV hearing related to that order, we grant the petition and quash the order denying him relief.

DHSMV correctly asserts that the records that postdated the filing of the original certiorari petition could not be used to reweigh or reconsider the factual determinations related to the original December order at the circuit court's level of review. The circuit court did not depart from the essential requirements of law or

otherwise err in concluding that it could not consider those records for the first time in that regard. However, both due process and express statutory language entitles Mr. Parker to a review of at least the February order if not a combination of the February and December orders, and the circuit court's denial order clearly has not afforded Mr. Parker that to which he is entitled.⁷

Specifically, section 322.31 affords Mr. Parker an opportunity to have DHSMV final orders reviewed through petition by the circuit court.

The final orders and rulings of the department wherein any person is denied a license, or where such license has been canceled, suspended, or revoked, shall be reviewable in the manner and within the time provided by the Florida Rules of Appellate Procedure only by a writ of certiorari issued by the circuit court in the county wherein such person shall reside, in the manner prescribed by the Florida Rules of Appellate Procedure,

⁷ We see no distinction in whether the circuit court should have elected to review the February 2020 order within the already pending certiorari proceeding by way of an amended petition or should have dismissed the original petition as premature and instituted an entirely new case to review the February 2020 final order following Mr. Parker's filing of the amended petition for writ of certiorari. What matters is that Mr. Parker filed an amended petition seeking review of the February order that was both subject to certiorari review and timely. In either aspect, the December order and related record and the February order and related record would have been available for the circuit court's review of the final February order.

any provision in chapter 120 to the contrary notwithstanding.

§ 322.31, Fla. Stat. The February 2020 order constituted such a final agency order subject to certiorari review. Once Mr. Parker filed a timely amended petition for writ of certiorari seeking to review that February order, then all of the records Mr. Parker introduced at that February hearing to overcome any presumption that the original DHSMV conviction record relied on to make the initial determination were properly before the circuit court for consideration in regard to any certiorari review of the February order. Mr. Parker has alleged a number of other additional arguments in his petition before this court, including that the February order was not supported by competent substantial evidence, that the circuit court erroneously relied on section 316.193(12) or other law to afford DHSMV a statutory presumption improperly, and that he was otherwise deprived of due process within the agency-level hearing. These are legitimate questions that might be asked during the first-tier of certiorari review related to the records presented during the DHSMV agency review hearing, but they are matters that have not yet been considered by the

circuit court in the first instance within the entitled review of the February order finally determining the revocation. *See generally Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) ("Although termed 'certiorari' review, review at this level is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal. The court must review the record and determine *inter alia* whether the agency decision is supported by competent substantial evidence. Competent substantial evidence is tantamount to legally sufficient evidence." (footnote omitted)).

Therefore, without reaching any conclusions on the potential merits of any of those or other underlying arguments, we necessarily limit our conclusion to the fact that Mr. Parker remains entitled, pursuant to section 322.31, to review of that February 2020 order and to have his related arguments considered within the scope of first-tier certiorari review. *See id.* at 1093–94 ("We decline to conduct our own review of the present record to determine whether the . . . decision is supported by competent substantial evidence, for to do so would perpetuate the . . . error and usurp the first-tier certiorari jurisdiction of the circuit court.").

IV.

Mr. Parker was deprived of the due process he is entitled to with respect to review of the February 2020 final agency order, and the circuit court departed from the essential requirements of the statute entitling him to that process when it denied his original petition and struck his amended one in a way that failed to afford him any review. We accordingly grant the petition for writ of certiorari and quash the order that precluded Mr. Parker from obtaining the review to which he remains entitled.

Petition granted; order quashed.

KHOUZAM, J., Concurs.

ATKINSON, J., Concurs in result only.

Opinion subject to revision prior to official publication.