

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER’S LICENSES – Suspension—On the DUI Supplement Report for the indication of "odor of breath," the law enforcement officer marked "undetected." In the Complaint/Arrest Affidavit, the officer marked "unknown" as to "Indication of Drug Influence" and "Indication of Alcohol Influence." These notations did not eliminate the cause of Petitioner's intoxication as being alcohol consumption. Competent, substantial evidence supports Hearing Officer's conclusion that, by a preponderance of the evidence, the officer had probable cause to believe Petitioner was under the influence of alcohol when officer asked Petitioner to take breath-alcohol test. Petition denied. *Kaymen v. Fla. Dept. of Highway Safety and Motor Vehicles*, No. 13-000054AP-88A (Fla. 6th Cir. App. Ct. April 24, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

SCOTT KAYMEN,
Petitioner,

Case No.: 13-000054AP-88A
UCN: 522013AP000054XXXXCI

v.

FLORIDA DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

_____ /

Opinion Filed _____

Petition for Writ of Certiorari from
Decision of Hearing Officer
Bureau of Administrative Reviews
Department of Highway Safety
and Motor Vehicles

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PER CURIAM.

Scott Kaymen seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered on July 17, 2013. The Decision affirmed the order of suspension of Mr. Kaymen's driving privileges. The petition is denied.

Statement of Case

Ten documents were admitted into the record by the Hearing Officer, including the "Complaint/Arrest Affidavit" and "Incident/Investigation Report" of Largo Police Officer Tindall. (App. 11-18; Resp. App. 8-11). Mr. Kaymen did not appear at the hearing and no witnesses were called.

The Incident/Investigation Report states that on June 12, 2013, Officer Tindall was approached by a citizen concerning a possible Driving Under the Influence ("DUI") violation. The citizen reported that a male driver hit several construction barriers and appeared to be passed out behind the wheel of the vehicle. As he approached the described intersection, Officer Tindall noted a silver Toyota truck stopped in the turn lane. The Report states:

The vehicle headlights were off and the hazard lights were activated. There was a large construction barrier in the lane next to the truck that appeared to be partially crushed. I watched the light cycle and the vehicle did not move. I proceeded through the intersection in order to get behind the vehicle. As I passed the vehicle, I could see a male in the driver[']s seat leaning against the driver[']s side door window.

I made a u-turn and activated my emergency lights and approached the vehicle. The male, later identified as Scott Kaymen, appeared passed out against the driver[']s door and there was a small dog in the back seat. Scott did not have his seat belt on. The vehicle was running with the keys in the ignition and the vehicle was in drive. Scott had his right foot on the brake.

I opened the driver[']s door to attempt to determine Scott's condition and whether medical attention was required. For safety reasons, I was able to reach across Scott and put the vehicle in park and turn the ignition off before he realized I was there. I identified myself and Scott opened his eyes and appeared completely disoriented. Scott started reaching for something on the passenger seat and had to be physically restrained and told several times to stop reaching into the

passenger seat. Scott was mumbling and his speech was incoherent. I asked Scott if he was OK, and he said he was on Suboxone.¹

(App. 14; Resp. App. 10). The fire department arrived to assess Mr. Kaymen's medical condition. Officer Tindall states in the Report that while the paramedics assessed him, Mr. Kaymen appeared to continually fall asleep.

The Incident/Investigation Report and the "Largo Police Department Statement Forms" admitted into the record before the Hearing Officer indicate that Officer Tindall made contact with two witnesses who were working on road construction when Mr. Kaymen approached. James reported to the officer, and documented in a written statement, that he observed Mr. Kaymen drive onto the sidewalk, make a u-turn, strike a construction barrier, and almost hit James' vehicle. James stated that he exited his vehicle to see if Mr. Kaymen needed assistance. Mr. Kaymen almost ran over James, then stopped at the red light, put on his hazard lights, and appeared to pass out. (App. 14, 22; Resp. App. 10). Another witness on the construction site, Robert, reported to the officer, and documented in a written statement, that he observed Mr. Kaymen almost hit James and then saw Mr. Kaymen stop at the red light and appear to "pass out." (App. 14, 23; Resp. App. 10).

At Officer Tindall's request, Mr. Kaymen agreed to perform field sobriety tests. The Complaint/Arrest Affidavit indicates that Mr. Kaymen failed all roadside Field Sobriety Tests. (App. 9; Resp. App. 9). The DUI Supplement report (App. 21; Supp. App. 12) details the results of the field sobriety testing that included the Horizontal Gaze Nystagmus, walk and turn, one leg stand, finger to nose, and Romberg Alphabet tests. The report notes that Kaymen's eyes were dilated, bloodshot, watery; his speech was slurred and mumbling; his face was flushed; his ability to understand was poor, he was emotional, profane, confused, crying; upon exiting his vehicle he was unsteady, staggering; walking to the roadside he was staggering, stumbling, in need of assistance; and while standing he was swaying. For the issue of "Odor of breath," the officer marked "undetected" on the DUI Supplement report. On the Complaint/Arrest Affidavit

¹ Suboxone contains a combination of buprenorphine and naloxone. Buprenorphine is an opioid medication. Naloxone is a special narcotic drug that reverses the effects of other narcotic medicines. <http://www.drugs.com/suboxone.html> (last visited 4/7/2014).

the officer marked as "unknown" the issues of "Indication of Drug Influence" and "Indication of Alcohol Influence."

Officer Tindall read Mr. Kaymen his Miranda² rights. Mr. Kaymen made not further statements and was transported to the Largo Police Department where he refused to supply a breath sample.

Analysis

In the petition for writ of certiorari, Mr. Kaymen raises a single argument. It is asserted that the driver's license suspension should be invalidated for refusal to submit to a breath-alcohol test because the police officer was not authorized under section 316.1932(1)(a)1a, Florida Statutes (2013), to request that Mr. Kaymen submit to a breath test. The Court is directed to the language in section 316.1932(1)(a)1a highlighted below. The statute states in part:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. **The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.** The administration of a breath test does not preclude the administration of another type of test. . . .

(Emphasis added). Mr. Kaymen argues that the evidence does not demonstrate that Office Tindall had reasonable cause to believe Mr. Kaymen was under the influence of alcoholic beverages. It is pointed out that there are no indications in the officer's narrative or in the documents admitted into the record before the Hearing Officer to demonstrate that Mr. Kaymen was impaired by alcoholic beverages. The DUI Supplement states that the odor of alcohol was "undetected" and there is no evidence that Mr. Kaymen admitted to consuming alcohol.

² Miranda v. Arizona, 384 U.S. 436 (1966).

Mr. Kaymen argues that, at best, it can be said that law enforcement did not know whether Mr. Kaymen was under the influence of alcohol. This, it is urged, falls well short of possessing the reasonable cause required by the statute to permit a request for a breath-alcohol test. Mr. Kaymen asks the Court to hold that substantial, competent evidence is not present when a police officer investigating a DUI does not detect the odor of alcohol on the driver and does not know at the conclusion of the DUI investigation whether the driver is under the influence of alcohol.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. State, Dep't of Highway Safety and Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

In a review hearing, the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to a determination of (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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer; and (3) whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of eighteen months. § 322.2615(7)(b), Fla. Stat. (2010).

Conclusion

The hearing officer is required to determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. "The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not Substantial evidence has been defined as evidence 'which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.' " State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

"Probable cause" or "reasonable cause" exists "where the facts and circumstances, as analyzed from the officer's knowledge . . . and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." Dep't of Highway Safety & Motor Vehicles v. Silva, 806 So. 2d 551, 554 (Fla. 2d DCA 2002)(quoting Dep't of Highway Safety & Motor Vehicles v. Favino, 667 So. 2d 305, 308 (Fla. 1st DCA 1995)). The facts and circumstances surrounding the incident should be examined. "It has been said that probable cause is a conclusion often drawn from 'reasonable inferences.'" Id. The Court should not ignore all "obvious implications" and reasonable inferences to be drawn from the surrounding circumstances and the arresting officer's observations. See id. (citing Favino, 667 So. 2d at 308).

In the present case there were clear indications of intoxication. The Complaint/Arrest Affidavit, Incident/Investigation Report, and DUI Supplement report document the observations and testing performed by Officer Tindall at the scene of Mr. Kaymen's arrest. Clearly, Mr. Kaymen was under the influence of alcohol or chemical or controlled substances. When viewed under the totality of the circumstances, the fact that the officer marked "undetected" on the DUI Supplement report did not negate the probability or possibility that Mr. Kaymen was under the influence of alcohol. By marking as "unknown" the question of "Indication of Drug Influence" and "Indication of

Alcohol Influence" in the Complaint/Arrest Affidavit, the officer did not eliminate the cause of the intoxication as being alcohol consumption.³

As noted above, this Court is not to reweigh the evidence, but only is to determine if competent, substantial evidence supports the hearing officer's decision. This Court concludes that competent, substantial evidence supports the Hearing Officer's conclusion that, by a preponderance of the evidence, Officer Tindall had probable cause to believe Mr. Kaymen was under the influence of alcohol when the officer requested that Mr. Kaymen take a breath-alcohol test.

Petition denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of _____, 2014.

Original order entered on April 24, 2014, by Circuit Judges Linda R. Allan, John A. Schaefer, and Jack R. St. Arnold.

Copies furnished to :

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³ This case is factually distinguishable from Department of Highway Safety and Motor Vehicles v. Carillon, 95 So. 3d 901 (Fla. 1st DCA 2012), in which the driver involved in a traffic crash had glassy eyes, slurred speech, and appeared disoriented, but stated that he had not hit his head, did not have any medical conditions, was not taking any medications, or illegal drugs. In that case, the driver refused to participate in field sobriety testing and refused to submit to a breath-alcohol test. On certiorari review, reversing the driver's license suspension, the circuit court found that "the record was devoid of any evidence that the impairment was due to consumption of alcohol." Id. at 902-03.