

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

STEPHEN LAWRENCE LONG,  
Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES,

Respondent.

Ref. No.: 16-000004-AP-88B  
UCN: 522016AP000004XXXXCI

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**ORDER AND OPINION**

Petitioner appeals a final order of the Department of Highway Safety and Motor Vehicles (“DHSMV”) suspending his driving privilege for refusal to submit to a breath, blood, or urine test under § 322.2615, Florida Statutes. Petitioner contends that DHSMV’s order was not supported by competent substantial evidence because the initial stop of Petitioner’s vehicle was unlawful, so the arrest was unlawful and Petitioner had no duty to submit to a breath test. For the reasons set forth below, the Petition for Writ of Certiorari is granted.

**Facts and Procedural History**

In October 2015, Deputy Ortiz was responding to an unrelated call when he heard Petitioner blow an air horn from his lifted truck twice while in a parking space in front of a convenience store. Soon thereafter, Deputy Ortiz heard Petitioner blow the air horn four or five times while stopped at a red light with no other cars in front of him. Deputy Ortiz initiated a traffic stop for improper use of a horn and issued a traffic citation for the same reason pursuant to Florida Statute section 316.271(3). During the initial stop, he repeatedly asked Petitioner to exit his vehicle because Deputy Ortiz could not see Petitioner’s hands, and his multiple passengers were acting suspiciously. Deputy Ortiz then detained Petitioner based on his concerns about suspicious activity and Petitioner’s failure to follow his commands. During this detention,

Deputy Ortiz noticed the smell of alcohol coming from Petitioner<sup>1</sup> and called Deputy Cinelli for a DUI investigation. Deputy Cinelli arrived at the scene, made contact with Petitioner, read him his *Miranda*<sup>2</sup> rights, conducted field sobriety exercises, and placed him under arrest. Petitioner refused to submit to a breath, urine, or blood test and his license was suspended. He then sought a DHSMV Formal Review hearing on his license suspension. After the Hearing Officer affirmed the suspension, Petitioner filed the instant Petition for Writ of Certiorari.

### Standard of Review

On review of DHSMV orders, this Court must ascertain whether (1) DHSMV afforded Petitioner procedural due process, (2) the essential requirements of the law were observed, and (3) DHSMV's decision is supported by competent, substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551, 553 (Fla. 2d DCA 2002).

### Discussion

“The constitutional validity of a traffic stop depends on purely objective criteria. . . . The objective test asks only whether any probable cause for the stop existed.” *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007) (internal citations omitted). An officer must have probable cause to justify an initial traffic stop if it is based only on a traffic infraction. *Id.* In contrast, an officer must only have reasonable suspicion to justify an initial stop if the stop is based on the officer's “legitimate concern for the safety of the motoring public.” *State, Dept. of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). However, if there is no evidence that the initial stop was based on safety concerns, then a court may not properly rely on this basis to justify the stop. *See Agreda v. State*, 152 So. 3d 114, 116 (Fla. 2d DCA 2014).

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<sup>1</sup> Contrary to the Hearing Officer's findings of fact, the record shows that Deputy Ortiz did not smell alcohol on Petitioner or become suspicious of a DUI until after he detained Petitioner.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner correctly contends that the initial stop was unlawful under section 316.271(3) because subsection (3) does not prohibit the use of a horn in the manner in which Petitioner used his horn. Florida Statute section 316.271(1), Horns and warning devices, provides that “every motor vehicle . . . shall be equipped with a horn in good working order.” Prior to 2013, section 316.271(3) provided that “[t]he driver . . . shall, when reasonably necessary to ensure safe operation, give audible warning with his or her horn, *but shall not otherwise use such horn when upon a highway.*” (Emphasis added). However, effective January 2013, the italicized language was removed from the statute, so currently subsection (3) only requires that a “driver . . . shall, when reasonably necessary to ensure safe operation, give audible warning with his or her horn.” *Id.* at (3); see *Smith v. City of Davie*, 22 Fla. L. Weekly Supp. 201a (Fla. 17th Cir. Ct. Aug. 14, 2014) (holding that “one could no longer be in violation of the statute by *using* his or her horn. Rather, the revised section only *mandates* that the horn be used in particular situations, but no longer prohibits its use in other situations”) (emphasis in the original). Therefore, under the current statutory language, section 316.271(3) no longer prohibits horn use in certain situations.

Here, Deputy Ortiz stopped Petitioner under section 316.271(3).<sup>3</sup> There is no record evidence that concern for the public’s safety was a factor in stopping Petitioner.<sup>4</sup> Therefore, for the initial stop to have been lawful, Deputy Ortiz must have had probable cause that Petitioner committed a traffic violation. Petitioner correctly contends that the initial stop was unlawful because section 316.271(3) merely states proper horn usage, not a prohibition on the use of a horn in the manner in which Petitioner used his horn. Although Respondent argues that the

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<sup>3</sup> The Court notes that although subsection (3) does not prohibit horn use, subsection (2) prohibits horns that emit an unreasonably loud or harsh sound. There was no record evidence that Petitioner’s horn was unreasonably loud or harsh, so this Court may not consider this as a basis to affirm DHSMV’s order.

<sup>4</sup> Similarly, the Court notes that the record reflects reasonable suspicion based on Petitioner’s unusual behavior, which would have been competent substantial evidence that the initial stop was lawful if the record presented evidence that Deputy Ortiz’s initial stop was based on safety concerns.

Court should interpret section 316.271(3) broadly to mean that a driver shall not use his or her horn when it is not reasonably necessary to ensure safe operation, this argument is without merit.

In consideration of the 2013 language change to section 316.271(3), Petitioner's use of his horn was not prohibited by statute, and he did not violate section 316.271(3). Since the only basis for the stop was a violation of section 316.271(3), Deputy Ortiz did not have probable cause for the initial stop and the Hearing Officer's finding that the initial stop was lawful is not supported by competent substantial evidence. Furthermore, since the initial stop was not lawful, Petitioner's arrest was unlawful and he had no duty to submit to a breath test.

### **Conclusion**

Accordingly, because DHSMV's final order was not supported by competent substantial evidence that the initial stop was lawful, it is

**ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, this 30<sup>th</sup> day of March, 2016.

Original Order entered on March 30, 2016, by Circuit Judges Jack Day, Amy Williams, and Thomas Ramsberger.

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