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
APPELATE DIVISION

STEPHEN TYCO NISSEN,
Petitioner,

v.

Ref. No.: 09-000052AP-88B
UCN: 522009AP000052XXXCV

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the Court on a Petition for Writ of Certiorari filed by Petitioner Stephen Tyco Nissen on October 23, 2009. The Department of Highway Safety and Motor Vehicles ("DHSMV") filed a response, to which Petitioner filed a reply. Upon consideration, this Court finds that the Petition for Writ of Certiorari is hereby denied.

At approximately 11:00 p.m. on August 12, 2009, Officer Robbie Arkovich arrived at Petitioner's location and followed Petitioner's vehicle in response to a caller's report that a drunk driver was weaving and swerving in traffic. Officer Arkovich did not observe Petitioner commit any traffic violations while he was following the vehicle, but he alleges that Petitioner stumbled and staggered as he exited the vehicle. According to Officer Arkovich, he asked Petitioner how much he had to drink, asked for Petitioner's driver's license, read Petitioner his *Miranda* rights, and continued to question Petitioner, who admitted to drinking three beers. Officer Arkovich allegedly detected the odor of an alcoholic beverage on Petitioner's breath, slurred and mumbled speech, bloodshot and watery eyes, and Petitioner performed poorly on field sobriety tests. The officer placed Petitioner under arrest for DUI and brought him to a mobile breath-testing unit, where an Officer Weiskopf read Petitioner the implied consent warnings. Petitioner refused to

provide a breath sample, and his driver's license was suspended in accordance with Florida Statutes section 322.2615.

Petitioner requested administrative review of his license suspension. A hearing officer conducted an administrative hearing on September 16, 2009, and found by a preponderance of the evidence that (1) the law enforcement officer had probable cause to believe that Petitioner was driving a motor vehicle while under the influence of alcohol; (2) Petitioner refused to submit to a breath test after being requested to do so; and (3) Petitioner was told that his refusal would result in a suspension of his driver's license for a period of one year or, in the case of a second refusal, for a period of eighteen months. Petitioner contends there is not competent substantial evidence to show probable cause to believe he was impaired, to stop him, or to request a lawful breath sample. Petitioner also contends his procedural due process rights were violated when the hearing officer did not consider the lawfulness of his arrest.

In reviewing the DHSMV's order, this Court is limited to determining (1) whether procedural due process has been accorded (2) whether the essential elements of the law have been observed, and (3) whether the administrative findings are supported by competent, substantial evidence. *Vichich v. Dept. of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1073 (Fla. 2nd DCA 2001). It is not the job or function of the circuit court to reweigh evidence and make findings when it undertakes a review of an administrative decision. *Dept. of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). The hearing officer assigned to hear the case by the department is "the trier of fact and in the best position to evaluate the evidence." *Dept. of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995).

Petitioner argues Officer Arkovich did not have competent substantial evidence to develop probable cause to deem he was impaired, though he concedes there was competent substantial evidence to support Officer Arkovich's belief alcohol was consumed. However,

Petitioner argues that the odor of alcohol alone is not sufficient to develop probable cause to form the belief he was impaired. *State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000).

Petitioner first argues that no competent substantial evidence in the record supports a finding that law enforcement had probable cause to believe he was driving a motor vehicle while he was impaired. More specifically, Plaintiff cites to *State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000), and argues that circumstances merely suggesting alcohol consumption does not justify an arrest. "[T]he presence of an odor of alcohol alone is generally not considered an accurate and reliable measure of impairment and, thus, is rarely deemed sufficient for a finding of probable cause. Usually, the odor of alcohol must be combined with the other factors." *State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000). In this instance, however, Officer Arkovich testified to more than the mere odor of alcohol. He also testified that Petitioner had a blank and uncomprehending expression, had a flushed face and bloodshot and watery eyes, displayed slurred and mumbled speech, stumbled and swayed, performed poorly on field sobriety tests, and admitted to drinking beer. Under *Kliphouse*, these are the types of "components central to developing probable cause." *Id.* at 23, *quoted in Stellar v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 152a (Fla. 6th Cir. Ct. Dec. 10, 2009). "[P]robable 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 Favino*, 667 So. 2d at 308. From the reasonable inferences drawn from the surrounding circumstances and Officer Arkovich's observations, competent substantial evidence supports the hearing officer's finding of probable cause.

Petitioner also is he was not afforded procedural due process in the administrative hearing because the hearing officer did not hear evidence regarding the lawfulness of the arrest.

Under § 322.2615(7)(b), the hearing officer is not permitted to review evidence regarding the lawfulness of the arrest in a license suspension hearing. The Second District Court of Appeals has held that the statute must be given its plain and obvious meaning, and the scope of review is limited to (1) determining whether the officer had probable cause to determine if the Petitioner was in control of a motor vehicle while under the influence of alcohol, (2) whether the Petitioner refused to submit to a breath test, and (3) whether the Petitioner was told if they refused to submit to a breath test their license would be suspended. *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 2 So. 3d 988 (Fla. 2d DCA 2008).

Upon consideration, the hearing officer's decision that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages is supported by substantial competent evidence, and the hearing officer did not depart from the essential requirements of law by sustaining Petitioner's license suspension for his refusal to submit to a breath test under Florida Statute section 322.2615.

Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby DENIED.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida, this 23rd day of July 2010.

Original order entered on July 23, 2010 by Circuit Judges Jack Day, Peter Ramsberger, and Pamela A.M. Campbell.