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

JOHN BARTHOLOMEW MCLEMORE,
Petitioner,

Case No.: 14-000074AP-88A
UCN: 522014AP000074XXXXCI

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.

John Bartholomew McLemore 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 October 10, 2014. The Decision affirmed the order of suspension of Mr. McLemore's driving privileges. The petition is granted.

Statement of Case

The ACISS PCSO Offense Report prepared by Pinellas County Sheriff Deputy MacKail was admitted into evidence before the Hearing Officer at the October 8, 2014, formal review hearing. The Incident Report states in part:

> On 08/31/2014 at 0422 hours I made contact with an intoxicated person parked in his car while it was running at a business.
>
> Prior to making contact with the subject, I observed a red mustang parked on the east side of the building. After observing the vehicle, I drove south on 131 St. N, turned around, and drove north on 131 St. N. When I was approaching Walsingham Rd., I observed the red mustang was now parked on the south side of the building. Due to the time of night I drove into the parking lot. When I drove into the parking lot, I pulled parallel to the mustang and observed a male sitting in the seat. I asked him what he was doing and he advised nothing. At that point, I noticed his eyes were bloodshot, his eyes were glossy, and his skin was red. I advised him to remain there while I get out.

(App. F, DDL5 at p. 7). Mr. McLemore was parked at a gasoline station that was open for business. (App. J, p. 9). The Complaint/Arrest Affidavit prepared by Dep. MacKail also was admitted into evidence before the Hearing Officer. The Affidavit states in part: "Reason for stop The defendant was located with his car running in the parking lot of an open business. . . . On the stated date and time, the defendant was in his parked car with the car running while parked in a business." (App. F, DDL4). At the Pinellas County Sheriff's Office Central Breath Testing facility, Mr. McLemore refused to supply a breath sample to determine his breath-alcohol content. (App. F, DDL5, p. 10).

Mr. McLemore testified at the formal review hearing:

> Q: [By defense counsel] Mr. McLemore, when the deputy told you to remain there or stay there, or whatever the exact language he used, did you feel that you could at that point safely leave?
>
> A: [Mr. McLemore] No.
>
> Q. What do you think would have happened if you had attempted to drive away?
>
> A: Been arrested.
>
> Q: And do you feel that you had been ordered, based on his statement to you, to remain there, stay there, not to leave to –
>
> A: Yes.
>
> Q: – remain present.
>
> A: Yes, sir.

(App. J, p. 10-11). There were no other witnesses and no other documentary evidence presented addressing the initial stop of Mr. McLemore.

At the formal review hearing, Counsel for Mr. McLemore moved to invalidate the suspension based on the unlawful seizure of Mr. McLemore. (App. J, p. 12-17). In an order entered on October 10, 2014, the Hearing Officer summarily denied the motion. The suspension of Mr. McLemore's driving privileges was affirmed.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been 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 & 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 and Decision. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes (2014). 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)(b), Fla. Stat. Additionally, the Department cannot suspend a driver's license under section 322.2615 for refusal to submit to a breath test under section 316.1932, Florida Statutes (2014), if the refusal is not incident to a lawful arrest. Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1076 (Fla. 2011).

Petition for Writ of Certiorari

In the petition, Mr. McLemore argues that the Hearing Officer erred in sustaining the driver's license suspension. It is asserted that there must be sufficient evidence that Deputy MacKail had a reasonable and articulable suspicion (1) that criminal activity was occurring (2) to justify the seizure of Mr. McLemore by the deputy in ordering him to "remain there" while the deputy exited his vehicle.

In reviewing the evidence, the Hearing Officer made the following findings of fact in the October 10, 2014, order:

Findings Of Fact

I find that the following facts are supported by a preponderance of the evidence:

On August 31, 2014 Deputy MacKail observed a red Mustang parked on the east side of a building and a short time later saw it parked on the south side of the building, due to the time Deputy MacKail pulled alongside of the vehicle and spoke to the driver.

Deputy MacKail observed the driver to have bloodshot, glassy eyes and red skin and advised him to remain there while he exited his vehicle. Deputy MacKail then identified the driver as John Bartholomew McLemore by his Florida driver license. Deputy MacKail saw an open case of beer on the front seat and asked the Petitioner if he had been drinking and the Petitioner said he had. Deputy MacKail requested the Petitioner perform Field Sobriety tasks and the Petitioner agreed. The Petitioner performed the Field Sobriety Tasks poorly and was arrested for DUI. The Petitioner refused to provide breath samples after being read Implied Consent.

Based on the forgoing I find that the Petitioner was placed under lawful arrest for DUI.

(App. 1, p. 3). The order did not address the issue of whether there had been an unlawful seizure of Mr. McLemore by the deputy. In ruling on pending motions, the Hearing Officer merely made held:

Motion:	To Invalidate the suspension due to there being an unlawful seizure when the Petitioner was told to stay in his vehicle by the Deputy.
Decision:	Denied.

(App. 1, p. 3).

Analysis

In evaluating the validity of a stop, this Court is to determine if the law enforcement officer had an objectively reasonable basis to effectuate the initial stop. See Dobrin v. Fla. Dep't of Highway Safety & Motor Vehicles, 874 So. 2d 1171 (Fla.

2004). To effectuate a valid stop, the officer need only have a "founded suspicion" of criminal activity. State, Dep't of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1351 (Fla. 2d DCA 1992). 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 and decision. Stenmark, 941 So. 2d at 1249.

In Duke v. State, 82 So. 3d 1155 (Fla. 2d DCA 2012), the appellate court reviewed the decision of the circuit court acting in its appellate capacity reversing a criminal county court order. Duke filed a motion to suppress on the basis that the traffic stop was not supported by reasonable suspicion. It was asserted the arresting officer did not have probable cause to believe Duke had committed a traffic violation. The county court granted the motion based on a review of the evidence. The circuit court on review held that the order was not based on competent, substantial evidence and in effect reweighed the evidence and found there was probable cause to stop Duke.

On certiorari review before the Second District Court of Appeal, the State unsuccessfully argued that the circuit court properly corrected the county court's "misapplication of the law relating to what constitutes reasonable suspicion." Id. at 1158. The appellate court held:

> We agree that if the county court's order had been based solely on the finding that what the officer observed could not, as a matter of law, give rise to reasonable suspicion, such a finding could have been subject to reversal by the circuit court. See Beahan v. State, 41 So. 3d 1000, 1002 (Fla. 1st DCA 2010) (holding that issue of whether facts supported finding that officer had reasonable suspicion is a question of law which may be reviewed de novo); Ikner v. State, 756 So. 2d 1116, 1118 (Fla. 1st DCA 2000) (same). However, the record reveals that the county court's decision was based on a weighing of the evidence and a credibility determination, both of which are exclusively within the province of the county court. See Maurer [v. State, 668 So. 2d 1077], 1078–79 [(Fla. 5th DCA 1996)](citing State v. Polak, 598 So. 2d 150, 152 (Fla. 1st DCA 1992)).

Discussion:

In the present case, in the "Findings of Fact, Conclusions of Law and Decision," the Hearing Officer as a matter of law summarily denied Mr. McLemore's motion in which he sought to invalidate the suspension based on an unlawful seizure at the time the officer directed Mr. McLemore to "stay there."

First, in reviewing this matter, this Court is to determine whether the action of the deputy in directing Mr. McLemore to "stay there" was a restraint on his freedom that constituted a seizure. See Terry v. Ohio, 392 U.S. 1 (1968)(seizure occurs where one's freedom of movement has been restrained, either by physical force or show of authority, so that surrounding circumstances demonstrate reasonable person would not have felt free to leave). Analysis of whether there has been a seizure does not depend on what the particular suspect believed, but on whether the deputy's words and actions would have conveyed to a reasonable, innocent person that he was not free to leave. Caldwell v. State, 41 So. 3d 188, 196-97 (Fla. 2010). It is an objective test. In reviewing the totality of the circumstances in this case, this Court concludes that a reasonable person would believe he was not free to leave after the deputy stated "stay there" while the deputy exited his vehicle. The deputy's action was a seizure.

Second, in reviewing the seizure of an individual, this Court is to determine if the deputy had an objectively reasonable basis to effectuate the detention based on a "founded suspicion" of criminal activity.

The evidence before the Hearing Officer is set out above. In summary, at 4:22 a.m., Mr. McLemore was parked in front of gasoline station that was open for business to the public. Mr. McLemore moved his vehicle from the east side of the building to the south side of the building and the car's engine was running. The deputy pulled his vehicle parallel to Mr. McLemore's car and observed him in the driver's seat. The deputy asked Mr. McLemore what he was doing. Mr. McLemore responded, "Nothing." The deputy stated in his Incident Report, "At that point, I noted his eyes were bloodshot, his eyes were glossy, and his skin was red." (App. F, DDL5 at p. 7). The observations made after the deputy told Mr. McLemore to "stay there" are not to be considered in evaluating whether there was founded suspicion of criminal activity to support the detention. The deputy did not state any other basis for directing Mr. McLemore to "stay there."

Conclusion

This Court concludes there is no substantial, competent evidence to support a determination as a matter of law that the deputy had a reasonable, founded suspicion of

criminal activity. There was no objectively reasonable basis for the deputy to detain Mr. McLemore at the time the deputy told him to "stay there."

The Hearing Officer departed from the essential requirements of law when he determined as a matter of law that Mr. McLemore was not unlawfully seized and denied the motion to invalidate. This court is not reweighing the evidence as there is no conflicting evidence to be evaluated.

The petition for writ of certiorari is granted. If he is otherwise eligible, the Department of Highway Safety and Motor Vehicles shall reinstate John Bartholomew McLemore's driving privilege and remove from John Bartholomew McLemore's permanent driving record any entry that reflects the administrative suspension sustained by the October 8, 2014, Decision of the Hearing Officer. See e.g. Dobrin, 874 So. 2d at 1175 (ruling of Florida Supreme Court directing the reinstatement of circuit court order in Dobrin v. Dep't of Highway Safety & Motor Vehicles, 9 Fla. L. Weekly Supp. 355a (Fla. 7th Cir. App. March 8, 2002), that quashed Dobrin's license suspension and directed the Department to remove the driver's license suspension from Dobrin's driving record).[1]

Petition for Writ of Certiorari granted; "Findings of Fact, Conclusions of Law and Decision" quashed; and matter remanded the Department of Highway Safety and Motor Vehicles to comply with the directives of this opinion.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 2nd day of March, 2015.

Original Order entered on March 2, 2015 by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Keith Meyer.

[1] The petition for writ of certiorari in the present case is granted on the Hearing Officer's departure from the essential requirements of law, not on the denial of due process as in Department of Highway Safety and Motor Vehicles v. Futch, 142 So. 3d 910 (Fla. 5th DCA 2014), cited by the Department. The Futch case is inapplicable.

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