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

DONALD GEARITY,
Petitioner,

Case No.: 15-000044AP-88A
UCN: 522015AP000044XXXXCI

v.

STATE OF 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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Attorney for Respondent

PER CURIAM.

Donald Gearity 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 ("DHSMV") entered on June 8, 2015. The Decision affirmed the order of suspension of Mr. Gearity 's driving privileges. The Petition is denied.

Statement of Case

On March 13, 2015, Deputy Kaselak responded to a restaurant parking lot after receiving an anonymous tip that an apparently intoxicated older white male stumbled out of the restaurant and got into a white truck. When Deputy Kaselak arrived, another

deputy was already looking into the white truck at Mr. Gearity, who was seated in the driver's seat and appeared to be asleep. Deputy Kaselak knocked on the window to wake Mr. Gearity. He then opened his eyes, which were glassy and bloodshot, and looked around in a seemingly dazed and confused manner. Deputy Kaselak spoke to Mr. Gearity through the window, but had difficultly hearing his responses. When Deputy Kaselak told Mr. Gearity that he could not hear him, Mr. Gearity opened his door without being asked. After the door was opened, Deputy Kaselak noticed the odors of alcohol and urine; he saw that the crotch of Mr. Gearity's pants were wet. Mr. Gearity stated that he did not have any medical reason to be asleep and declined medical attention. His mumbled and slurred his words. Mr. Gearity was unsure where his vehicle keys were located and neither deputy had yet seen his keys. While speaking with Mr. Gearity, Deputy Kaselak noticed two box cutters in the driver's door pocket. He became concerned that Mr. Gearity may have another box cutter in his pocket and asked Mr. Gearity if he could pat him down and he agreed. When Mr. Gearity got out of the driver's seat for the search, Deputy Kaselak saw that the keys had been underneath him on the seat. At this point, Deputy Kaselak began a DUI investigation and Mr. Gearity agreed to cooperate. Deputy Kaselak administered several sobriety exercises, including the HGN, walk and turn, and leg stand tests. Deputy Kaselak read Mr. Gearity his *Miranda* rights, which he did not seem to understand, drove him to Central Breath Testing, observed him for 20 minutes, and, with Mr. Gearity's consent, administered an Intoxilyzer 8000 breath test with results of .228 g/210L and .233 g/210L, respectively. Mr. Gearity requested a DHSMV formal review hearing, at which the Hearing Officer affirmed the suspension. He then filed the instant Petition for Writ of Certiorari.

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).

Analysis

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes. The hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. When an individual's license is suspended for driving with an unlawful blood-alcohol level in violation of section 316.193, Florida Statutes, the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain the license suspension and the issues shall be limited to: 1) whether the arresting officer had probable cause to believe that the individual was driving or in actual physical control of a motor vehicle while under the influence of alcohol; 2) whether the person was lawfully arrested for violation of section 316.193; and 3) whether, pursuant to section 316.193, the person had an unlawful blood alcohol level. See § 322.2615(7)(a), Fla. Stat.; Dep't of Highway Safety and Motor Vehicles v. Mowry, 794 So. 2d 657, 657-58 (Fla. 5th DCA 2001). The driver must be afforded the opportunity to challenge the lawfulness of the stop of his or her vehicle. See Carrizosa v. Dep't of Highway Safety and Motor Vehicles, 124 So. 3d 1017, 1023 (Fla. 2d DCA 2013); Rudolph v. Dep't of Highway Safety and Motor Vehicles, 107 So. 2d 1129, 1131 (Fla. 2d DCA 2012).

"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).

Mr. Gearity raises three arguments in the instant Petition for Writ of Certiorari:

1. **"Whether there is competent and substantial evidence that the Petitioner submitted to a breath test incident to a lawful arrest?"**

Mr. Gearity argues that the Hearing Officer's Decision is not supported by competent substantial evidence because he was not properly detained and therefore, did not submit to a lawful breath test.

a. "Law enforcement unlawfully detained the Petitioner after he was found asleep inside his vehicle without knowledge that he was in actual physical control of the vehicle."

Mr. Gearity contends that Deputy Kaselak illegally detained him when he opened his door because, he asserts, Deputy Kaselak requested or ordered him to open the door. However, this argument is without merit as Deputy Kaselak neither requested nor ordered Mr. Gearity to open his door; instead, Mr. Gearity opened his door without provocation. At the DHSMV hearing and in the Petition, Mr. Gearity cites to Danielewicz v. State, for the proposition that "whether characterized as a request or an order," a law enforcement officer cannot direct a party to exit his or her vehicle without reasonable suspicion of criminal activity. 730 So. 2d 363, 364 (Fla. 2d DCA 1999). While this is true, it is inapplicable here.

Here, Deputy Kaselak specifies in the Offense Report that Mr. Gearity opened the door of his vehicle voluntarily and without being asked. Mr. Gearity contended at the hearing that Deputy Kaselak was deceptive and disingenuous in the Offense Report, since Mr. Gearity only opened the door when Deputy Kaselak said that he could not hear him, and this signifies that Deputy Kaselak was trying to persuade Mr. Gearity to open the door. After reviewing the evidence, the Hearing Officer found that Mr. Gearity opened his door without being asked. Thus, the Hearing Officer's Decision that Petitioner was not unlawfully detained because he opened his door without request by Deputy Kaselak is supported by competent substantial evidence.

b. "Law enforcement unlawfully detained and searched the Petitioner for weapons without reasonable suspicion that he was armed and dangerous."

Mr. Gearity contends that Deputy Kaselak illegally detained and searched him when he conducted a pat search because Deputy Kaselak did not have reasonable suspicion to believe that Mr. Gearity was armed. Deputy Kaselak requested a pat search after seeing box cutters in the driver's door pocket and becoming concerned that Mr. Gearity may have a box cutter in his pocket. Mr. Gearity further argues that his behavior during the entire interaction was not sufficient to allow deputies to search him.

To conduct a valid pat down search, an "officer must have a reasonable belief that the individual is armed and dangerous. Routine patdown searches based on general concerns for officer safety are not constitutionally permitted." McNeil v. State,

995 So. 2d 525, 526 (Fla. 2d DCA 2008) (internal citations omitted). Reasonable belief is based on the totality of the circumstances "when viewed in light of the officer's training and experience." State v. Cruse, 121 So. 3d 91, 96 (Fla. 3d DCA 2013); Premo v. State, 610 So. 2d 72, 74 (Fla. 2d DCA 1992). The reasonableness of an officer's decision to conduct a pat down search is also based on the officer's "articulable suspicions that the person they have stopped may be armed with a dangerous weapon." Richardson v. State, 599 So. 2d 703, 705 (Fla. 1st DCA 1992).

Here, Deputy Kaselak noticed two box cutters in the door pocket of Mr. Gearity's vehicle. He became concerned that Mr. Gearity might have another box cutter in his pocket, so he asked him if he could conduct a pat down search and Mr. Gearity consented. Deputy Kaselak articulated specific facts regarding his concern that Mr. Gearity was armed, which formed the requisite reasonable belief to conduct a pat down search. Based on the record, there is competent substantial evidence that supports the Hearing Officer's Decision that Mr. Gearity was not unlawfully searched.

2. "Whether there is competent and substantial evidence that the Petitioner submitted to an approved breath test?"

Mr. Gearity argues DHSMV's Decision is not supported by competent substantial evidence because Mr. Gearity did not submit to a lawful breath test. However, this argument is also without merit as the breath test must only be performed "*substantially* according to the pertinent statutes and the methods approved" by the Florida Department of Law Enforcement ("FDLE"). Dep't of Highway Safety & Motor Vehicles v. Berne, 49 So. 3d 779, 782 (Fla. 5th DCA 2010) (emphasis added); see also Dep't of Highway Safety & Motor Vehicles v. Alliston, 813 So. 2d 141, 144 (Fla. 2d DCA 2002).

Under section 316.1932(1)(a)1, Florida Statutes, people who operate a motor vehicle within Florida automatically consent to alcohol intoxication tests if such tests are incident to a lawful arrest. To be considered valid under section 316.1932(1)(b)2, a person's breath analysis "must have been performed substantially according to methods approved by [FDLE]. . . . Any insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid." Florida Administrative Code Rule 11D-8.004 sets forth FDLE regulations for department inspection and registration of breath test instruments. Specifically in contention is 11D-8.004(2), which states that "[a]ny evidentiary breath test instrument

returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument's approval for evidentiary use."[1] (Emphasis added).

The Intoxilyzer 8000 breath test machine at issue had a department inspection in Tallahassee. Between the time it was returned to the agency, Pinellas County Sheriff's Office ("PCSO"), and the time Mr. Gearity submitted to a breath test, the machine was inspected by the agency (PCSO) but not the department (FDLE). Mr. Gearity contends that under 11D-8.004(2), FDLE had to inspect the machine after it was returned to PCSO and prior to it being placed back into evidentiary use. Previously, in Torrence, this Court opined that despite the language of 11D-8.004(2), the court would defer to the DHSMV hearing officer's interpretation of the rule— namely, that the FDLE does not need to conduct an inspection between the machine's return and placement into evidentiary use —unless that interpretation was clearly erroneous. Torrence v. Fla. Dep't of Highway Safety & Motor Vehicles, 19 Fla. L. Weekly Supp. 698a (Fla. 6th Cir. Ct. May 14, 2012).

Although Mr. Gearity recognizes Torrence, he argues that the holding in Torrence is not applicable here because of a 2005 FDLE memorandum that Mr. Gearity introduced at the hearing. Allegedly, the memorandum is from a FDLE alcohol testing program manager and reminds FDLE inspectors to inspect machines after their return and prior to placement for evidentiary use to be in compliance with 11D-8.004(2). Despite the FDLE memorandum, the Hearing Officer interpreted 11D-8.004(2) consistently with Torrence and found that the instant breath test was lawful. This Court may overturn the Hearing Officer's interpretation only if it is clearly erroneous. See Sch. Dist. Of Martin Cnty. v. Public Employees Relations Comm'n, 15 So. 3d 42, 44-45 (Fla. 4th DCA 2009). However, this Court should defer to the Hearing Officer's interpretation of the memorandum and 11D-8.004(2) that the breath test must only be substantially compliant with rules and procedures, because his interpretation is not clearly erroneous.

3. **"Whether the Respondent departed from the essential requirements of law by failing to grant the Petitioner's motion to exclude the results of the Horizontal Gaze Nystagmus (HGN) exercise?"**

[1] Although the language was amended in July 29, 2015, the amendment occurred after Mr. Gearity's conduct, so the earlier language is applicable here.

Mr. Gearity argues DHSMV's Decision to overrule Mr. Gearity s motion to exclude the HGN test from consideration is not supported by competent substantial evidence that Deputy Kaselak was properly trained to administer the test. Since there is no record evidence that Deputy Kaselak was properly trained and qualified to administer the HGN test, this argument succeeds. However, the record evidence is sufficient to support a DUI arrest, so exclusion of the HGN does not change the propriety of DHSMV's Decision affirming suspension. See Dep't of Highway Safety & Motor Vehicles v. Rose, 105 So. 3d 22, 23-24 (Fla. 2d DCA 2012) ("A determination of probable cause to arrest for DUI is based on several factors. . . .[w]hile the odor of alcohol on a driver's breath is considered a critical factor, other components central to developing probable cause may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.") (Internal citations omitted).

HGN testing constitutes scientific evidence and "should not be admitted as lay observations of intoxication," even if it is relevant, because of the danger of unfair prejudice. State v. Meador, 674 So. 2d 826, 836 (Fla. 4th DCA 1996). HGN test evidence should be excluded unless the "traditional predicates of scientific evidence are satisfied," such as the qualifications of test administrators and technicians. Id.; see State v. Strong, 504 So. 2d 758, 760 (Fla. 1987). In contrast, law enforcement officers may make lay observations about psychomotor testing, such as the walk-and-turn, one-leg stand, balance, and finger-to-nose tests, because these tests do not constitute scientific evidence and the probative value is not outweighed by the danger of unfair prejudice. Meador, 674 So. 2d at 832.

Here, once Deputy Kaselak saw that Mr. Gearity was sitting on his keys, he began a DUI investigation. During the investigation, he conducted the walk-and-turn, one-leg stand, and HGN tests. After the tests, he arrested Mr. Gearity for DUI and took him to Central Breath Testing. Mr. Gearity contends that Deputy Kaselak was not properly trained and qualified to administer the HGN test. The only indication of Deputy Kaselak's status as a proper DUI investigator is the legend used next to his name on the Offense Report, which, in its entirety, states "KASELAK, STEPHEN G DEP (57470/DUI-SEU/PINELLAS COUNTY SHERIFF'S OFFICE)." However, there is no

indication that the Hearing Officer considered this. Since the record is essentially devoid of any evidence of his training or qualification, the Hearing Officer's Decision to not exclude the HGN test from consideration was not supported by competent substantial evidence.

Therefore, this Court concludes that the Hearing Officer's consideration of the HGN test departed from the essential requirements of law. However, this Court also finds that admissible proof existed to demonstrate the legality of Deputy Kaselak's detainment and arrest of Mr. Gearity, regardless of the HGN test.

Conclusion

There is substantial, competent evidence to support a determination as a matter of law that Deputy Kaselak did not unlawfully detain Mr. Gearity and that Mr. Gearity submitted to a lawful breath test. Accordingly, it is

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

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 30th day of March, 2016

Original Order entered on March 30, 2016, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Keith Meyer.

Copies furnished to:

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