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

DAVID THOMAS COSPER,
Petitioner,
vs.

Ref. No.: 16-0006AP-88B
UCN: 522016AP000006XXXXCI

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

ORDER AND OPINION

Petitioner challenges a final order by the Department of Highway Safety and Motor Vehicles ("DHSMV") affirming the suspension of his driving privilege. Petitioner asserts that (1) the documentary evidence contains material discrepancies, which prevents a determination that Petitioner's refusal to submit to a breath test was incident to his lawful arrest; (2) Officer Craig lacked reasonable suspicion to detain Petitioner for a DUI investigation; and (3) Officer Cox did not have probable cause to arrest Petitioner for DUI. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

On October 15, 2015, Petitioner made a legal right turn on red but pulled within only several feet of Officer Craig's oncoming car. Officer Craig had to make an immediate stop to avoid a collision and subsequently pulled Petitioner over for careless driving. Petitioner made several statements about "the lights" being too bright. Officer Craig noticed bloodshot eyes and the odor of alcohol. Petitioner gave his license as requested but had difficulty finding the rental car's registration and asked the officer if the stereo manual was the right paperwork. Petitioner then asked Officer Craig to help look for the registration, at which time Officer Craig told Petitioner to step out of the car. Petitioner had poor balance and leaned on the car. When they stepped to the rear of the car, Petitioner appeared unable to stand upright on his own. Based on his observations, Officer Craig called the DUI unit, and Officers Cox and Clark arrived. Petitioner refused to perform field sobriety exercises ("FSE") and was arrested. He refused to take a breath test, and his license was suspended.

After an administrative hearing, the suspension was upheld. Petitioner filed the instant Petition for Writ of Certiorari.

Standard of Review

Orders from the DHSMV are examined "under a three-part standard of review: (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." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

Discussion

The suspension of a driver's license for failure to submit to a breath test requires that the refusal be subsequent to a lawful arrest and an implied consent warning. *Fla. Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1078 (2011). Petitioner contends that a "hopeless conflict" exists in the documents in the record concerning the times and dates of the arrest.[1] On the documents submitted to the Hearing Officer, the stop is consistently recorded as occurring at 9:54 pm on October 15. The arrest time appears on only two documents, and the times are significantly different. The Complaint/Arrest Affidavit states that Petitioner was arrested at 12:56 am on October 16. The Refusal to Submit to Breath, Urine, or Blood Test states that Petitioner was arrested at 10:26 pm, however, and both the request to submit to a breath test and the implied consent warning occurred at 10:40 pm. The Breath Alcohol Test Affidavit states Petitioner refused to provide a sample at 22:40 (10:40 pm). Based on the record, one arrest time is recorded as occurring properly before the implied consent warning and subsequent refusal, but the second arrest time recorded as occurring at 12:56 am would have been after the implied consent warning and refusal, which would make the refusal invalid.

Petitioner relies on *Dept. of Highway Safety & Motor Vehicles v. Trimble*, which upheld the circuit court's decision granting the petition for writ of certiorari because the timing of the arrest, implied consent warning, and refusal "could have rested as much on the flip of a coin as on the documentary evidence submitted." 821 So. 2d 1084, 1086 (Fla 1st DCA 2002). In 2014, however, the First District Court of Appeal held that *Trimble* only applies in cases consisting of a "wholly paper record." *State, Dep't of Highway Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 469 (Fla. 1st DCA 2014) review granted sub nom. *Wiggins v. Florida Dep't of Highway Safety & Motor*

[1] Petitioner lists several different police reports with conflicting times and dates in his Petition. However, the Court can only consider those that were part of the record below.

Vehicles, 168 So. 3d 231 (Fla. 2014). In the present case, three officers testified at the hearing, so *Trimble* is inapplicable. While none of the officers testified about the time of arrest, the arresting officer and the breath test operator each discussed the steps taken during the encounter. Officer Cox, the arresting officer, testified that he arrested Petitioner and then walked him to the DUI mobile unit and placed him in the custody of Officer Clark, the breath test operator. Officer Clark testified to substantially the same events. Furthermore, Officer Cox testified that his entire encounter with Petitioner from start to Miranda warning to arrest lasted only about ten minutes. The police report states that the Miranda warning was read at 10:20 pm. From the testimony, it appears that 10:26 pm is the correct arrest time, which is the time on the Refusal to Submit to Breath, Urine, or Blood Test. At a minimum, the Hearing Officer's finding that Petitioner was arrested before he was asked to submit to a breath test is supported by competent substantial evidence.

Next, Petitioner asserts he was illegally detained for the DUI investigation because Officer Craig did not have a reasonable suspicion that he was driving while impaired. Petitioner states that Officer Craig had three spotlights turned on (so the lights truly were bright), the car was a rental (so he was unfamiliar with where the registration was kept), and he has back problems (so he leaned, staggered, and was unsteady). A traffic stop cannot last longer than the time necessary to write a citation unless a reasonable suspicion of criminal activity justifies a continued detention. *See Cresswell v. State*, 564 So. 2d 480, 481-82 (Fla. 1990). Reasonable suspicion is based on the totality of the circumstances, and the facts as a whole can justify a detention even if the facts standing alone would not give rise to reasonable suspicion. *Sims v. State*, 622 So. 2d 180, 181 (Fla. 1st DCA 1993). Here, the Hearing Officer considered the testimony of both Office Craig and Petitioner, the police reports, and Petitioner's medical records, and he found that the detention was legal. 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. *See Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006). Competent substantial evidence supports the Hearing Officer's decision that a legal basis existed for detaining Petitioner for a DUI investigation.

Petitioner also argues that probable cause did not exist to arrest him for DUI. Probable cause for an arrest exists if "the facts and circumstances allow a reasonable officer to conclude that an offense has been committed." *Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) (internal citations omitted). Like reasonable suspicion, the analysis considers the totality of the circumstances. *Id.* "The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information." *Id.* Petitioner asserts that probable cause did not exist because if the detention was unlawful, the investigation leading to his arrest was fruit of the poisonous tree.

Alternatively, Petitioner alleges that Officer Cox's observations did not give rise to probable cause for an arrest. Within the lack of probable cause argument, Petitioner alleges that he should have been offered alternative FSE once he made Officer Cox aware of his extensive back problems.

Because the detention was lawful, the fruit of the poisonous tree argument has no merit. Furthermore, the Hearing Officer determined that a preponderance of the evidence supported Petitioner's arrest for DUI. Officer Cox noticed a strong odor of alcohol; blood shot, watery eyes; a blank, dazed expression; and slow, slurred speech. Petitioner maintained several times throughout the investigation that he did not want to incriminate himself. In addition, Petitioner explicitly refused all tests, so Officer Cox was not given an opportunity to offer alternative FSE. Therefore, although Petitioner did tell Officer Cox that he has six herniated disks, the Hearing Officer could have determined that Petitioner's refusal to perform FSE had everything to do with self-incrimination and nothing to do with a bad back. Accordingly, competent substantial evidence supports the Hearing Officer's determination that probable cause existed to arrest Petitioner for DUI.

Conclusion

Because the Hearing Officer's final order affirming the suspension of Petitioner's license is supported by competent substantial evidence, it is

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

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this 12 day of April 2016.

Original Order entered on April 12, 2016, by Circuit Judges Pamela A.M. Campbell, Amy M. Williams, and Thomas M. Ramsberger.

Copies furnished to:

J KEVIN HAYSLETT, ESQ.
250 NORTH BELCHER RD., SUITE 102
CLEARWATER, FL 34625

JASON HELFANT, ESQ.
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
P.O. BOX 540609
LAKE WORTH, FL 33454-0609