

**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**

**TATE FOSTER,  
Petitioner,**

**Case No.: 16-000021AP-88A  
UCN: 522016AP000021XXXXCV**

**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

N. Anthony Palumbo, Esq.  
Attorney for Petitioner

Christie Utt, Gen. Counsel  
Jason Helfant, Sr. Asst. Gen. Counsel  
Attorneys for Respondent

**PER CURIAM.**

Tate Foster 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 April 7, 2016. The Decision affirmed the order of suspension of Mr. Foster's driving privileges. The Amended Petition for Writ of Certiorari is denied.

### **Statement of Case**

A Pinellas County Sheriff's Office Offense Report was prepared by Pinellas County Sheriff Deputy Persaud, the arresting deputy. A Supplement to the Report was prepared by Pinellas County Sheriff Deputy Bassous, the deputy who conducted the initial traffic stop.

Deputy Bassous' report states that on January 24, 2016, he observed a silver pickup truck commit a traffic violation by failing to stop at a stop sign. Deputy Bassous stopped the vehicle that was being driven by Mr. Foster. The report states that upon making contact with the driver, Deputy Bassous

noticed Tate Foster to have a strong, distinct odor of an alcoholic beverage coming from his mouth and person. Tate had watery, glassy and bloodshot eyes. While speaking with Tate, he showed further signs of impairment and mumbled his words.

Based on his observations, Deputy Bassous requested a Driving Under the Influence (DUI) investigator be dispatched to the scene.

At the March 1, 2016, formal hearing, Deputy Bassous was questioned by Mr. Foster's attorney concerning his observations. Deputy Bassous confirmed the statements made in his report and indicated that based on those observations it was clear from the deputy's experience that Mr. Foster was intoxicated and impaired. (03/01/2016 Hrg. Trans., p. 8-16). The deputy acknowledged that a person could be intoxicated and under the influence of alcohol, but not impaired. He explained that impairment is when motor skills are diminished as compared to a sober person. (03/01/2016 Hrg. Trans., p. 16-19). Deputy Bassous theorized that Mr. Foster's watery, glassy, bloodshot eyes appeared to be evidence of impaired vision because apparently Mr. Foster did not see the stop sign. However, the deputy could not remember if that was Mr. Foster's explanation for the traffic infraction. (03/01/2016 Hrg. Trans., p. 20-21).

Deputy Persaud's Report indicates that when he made contact with Mr. Foster there was a strong odor of alcoholic beverage on Mr. Foster's person that became stronger as he spoke. Mr. Foster's eyes were observed to be bloodshot and watery. Deputy Persaud noted that Mr. Foster's speech was slurred. The deputy asked Mr. Foster if he could "check his eyes" and Mr. Foster agreed and exited his vehicle.

Deputy Persaud's report states: "As Tate walked to my vehicle, I observed him staggering." When Deputy Persaud attempted to conduct a Horizontal Gaze Nystagmus test, Mr. Foster indicated that he had been advised by law enforcement officers he knew not to participate in the test. Mr. Foster refused to take the Horizontal Gaze Nystagmus test or any Standard Field Sobriety Exercises.

The report states that based on his observations, Deputy Persaud concluded that Mr. Foster was operating his vehicle under the influence of alcohol, chemical, or controlled substances and he was placed under arrest. After being read his Miranda<sup>1</sup> rights, Mr. Foster stated he did not wish to speak to the deputy without an attorney present. Mr. Foster was transported to Pinellas County Central Breath Testing where he refused to provide a breath sample.

At the review formal hearing, Deputy Persaud testified and confirmed the statements contained in his report. The deputy stated, "I could smell alcohol coming from his person, which became stronger with his exhaled breath. His eyes were bloodshot, watery. His speech was slurred." (03/01/2016 Hrg. Trans., p. 31). When questioned, Deputy Persaud agreed that observations of Mr. Foster made up to the time Mr. Foster was asked to exit the vehicle were consistent with consumption of alcohol, but not necessarily impairment. (03/01/2016 Hrg. Trans., p. 32).

Counsel for Mr. Foster asked Deputy Persaud why he had not simply arrested Mr. Foster rather than requesting the field sobriety tests. Deputy Persaud responded: "Well, because we, we have to go through the investigative process. We don't just arrest people based on the odor, on the eyes alone as well as, you know, slurred speech. We go through the investigative process." (03/01/2016 Hrg. Trans., p. 33). Once more, the deputy stated that he did not have reason to believe Mr. Foster was impaired based on his observations of Mr. Foster exiting his vehicle. (03/01/2016 Hrg. Trans., p. 33-34). Counsel for Mr. Foster then summarized the evidence, stating that allegedly the only additional observation made by Deputy Persaud after Mr. Foster exited his vehicle was that Mr. Foster would not submit to field sobriety testing. In

---

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

response the deputy stated:

Well, I, I did note in my report that he was staggering as he walked to my vehicle. I was parked across the street in a nearby parking lot so I could safely do standardized field sobriety exercises if he did consent.

(03/01/2016 Hrg. Trans., p. 38). The staggering was not captured on the dash cam video because Deputy Persaud's vehicle was facing away from the scene of the initial stop. The deputy testified that the arrest was made "[b]ased on the totality of the circumstances, his driving pattern, my contact with him, and then once he refused FST's, he invoked Miranda. I had to base my observations – I had to base his impairment solely off of what I could see so far." (03/01/2016 Hrg. Trans., p. 39).

At the request of counsel for Mr. Foster the hearing was continued to allow counsel to obtain a copy of the dash cam video from January 24, 2016. The DVD of the video was admitted into evidence at the continued hearing on April 5, 2016, and the Hearing Officer entered his decision on April 7, 2016.

#### **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 (2016). The hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. 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 (2016), 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).

Mr. Foster raises one ground of error in the Amended Petition: Does competent and substantial evidence support the hearing officer's finding that the Petitioner was lawfully arrested. He presents two arguments in support of quashing the Hearing Officer's Decision:

"(a) This court may consider the objective video evidence to the exclusion of the subjective documentary and testimonial evidence without reweighing the evidence;" and

"(b) The hearing officer erred because there was a lack of competent and substantial evidence that the Petitioner was lawfully arrested for DUI."

Mr. Foster's position is that the objective video evidence in this case conclusively refutes the documentary and testamentary evidence presented to the Hearing Officer concerning the lawfulness of his arrest. Therefore, without reweighing the evidence, this Court may conclude that competent, substantial evidence does not support the Hearing Officer's Decision upholding the suspension of his driver's license.

#### **Hendry and Wiggins**

In support of his arguments, Mr. Foster cites to the Thirteenth Judicial Circuit Appellate Court opinion in Hendry v. State of Florida, Department of Highway Safety and Motor Vehicles, 21 Fla. L. Weekly Supp. 992b (Fla. 13th Jud. Cir. App. Ct. June 5, 2015). The facts of the case are that the Hearing Officer made a finding that Hendry was arrested as a result of a valid traffic stop as he was observed operating a motor vehicle without headlights. However, one videotape admitted into evidence shows that in fact, Mr. Hendry's lights were illuminated.

The Hendry circuit court sitting in its appellate capacity stated, "It should be unreasonable as a matter of law for a hearing officer to reject the objective nature of videotape evidence (which credibility is not in question) in favor of the subjective opinion of a witness, who is mistaken in his/her understanding of the facts." In granting the petition for writ of certiorari and quashing the hearing officer's decision, the Hendry court concluded that the dashboard video "conclusively refutes" the subjective testimony of

the arresting officer. The Department did not appeal the circuit appellate court's decision. Mr. Foster asserts that Hendry still is a valid decision.

As noted by Mr. Foster in the Amended Petition, the Hendry opinion relied upon and followed the rationale and reasoning of the Fourth Judicial Circuit Appellate Court in Wiggins v. Department of Highway Safety and Motor Vehicles. The Wiggins circuit appellate court opinion quashing the hearing officer's decision was the subject of a petition for writ of certiorari pending in the First District Court of Appeal at the time Hendry was issued. Thereafter, the First District Court of Appeal in State of Florida, Department of Highway Safety and Motor Vehicles v. Wiggins, 151 So. 3d 457 (Fla. 1st DCA 2014), granted the Department's petition, quashed the circuit appellate court opinion, and remanded with directions. However, the First District Court of Appeal also certified to the Florida Supreme Court a question of great public importance for possible review.

At the time Mr. Foster filed his Amended Petition for Writ of Certiorari, the Florida Supreme Court had accepted jurisdiction of the Wiggins case; however, a decision had not been issued. Thereafter, the Supreme Court issued the opinion in Wiggins v. Florida Department of Highway Safety and Motor Vehicles, 209 So. 3d 1165 (Fla. 2017)(mandate issued Feb. 24, 2017), in which it rephrased the certified question as follows:

WHETHER A CIRCUIT COURT CONDUCTING FIRST-TIER CERTIORARI REVIEW UNDER SECTION 322.2615, FLORIDA STATUTES, APPLIES THE CORRECT LAW BY REJECTING OFFICER TESTIMONY AS COMPETENT, SUBSTANTIAL EVIDENCE WHEN THAT TESTIMONY IS CONTRARY TO VIDEO EVIDENCE

and answered it:

We answer the rephrased certified question in the affirmative and hold that in this context of section 322.2615 first-tier review, a circuit court must review and consider video evidence of the events which are of record as part of its competent, substantial evidence analysis. Further, we hold in this limited context that evidence which is totally contradicted and totally negated and refuted by video evidence of record, is not competent, substantial evidence.

Id. at 1166 (emphasis added). Additionally, the Supreme Court ruled that while there is a policy of deference to the agency fact-finder in special areas such as zoning or policy

decisions that require a certain level of expertise, "the same does not hold true for the questions of constitutional law that arise under section 322.2615." Id. at 1172.

Although expressing its respect for the authority of law enforcement officers, the Supreme Court acknowledged that human recollection and report may be contrary to that which actually happened as evinced in the real time video. Therefore, "a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result." Id. In reviewing the evidence in Wiggins, the Supreme Court found that the officer's testimony concerning reasonable suspicion to stop Mr. Wiggins' vehicle due to erratic driving "was flatly contradicted and refuted by video evidence in the record." Id.

The Supreme Court concluded that, contrary to the holding of the First District Court of Appeal, the circuit court appellate panel did not improperly reweigh the evidence, but rather, made the determination that the contradicted testimony of the officer was not sufficient to amount to competent, substantial evidence. Id. at 1173. "Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent, substantial evidence must be reasonable and logical." Id. (citing Gonci v. Panelfab Prods., Inc., 179 So. 2d 856, 858 (Fla. 1965)).

The Supreme Court summarized its ruling:

Accordingly, we hold that in the limited context of section 322.2615 first-tier review of a DUI license suspension, a circuit court applies the correct law by rejecting officer testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence. That which is found by an Article V judge in this context to be totally refuted by objective, neutral real-time video evidence cannot be deemed competent, substantial evidence

Id. at 1175.

### **Evidence in the present case**

Mr. Foster asserts that the record in the present case lacks competent, substantial evidence that he was lawfully arrested as the video evidence allegedly conclusively refutes the reports and the testimony on discrete factual issues. Specifically, (1) Deputy Bassous' and Deputy Persaud's characterization of Mr. Foster

has having slurred speech; and (2) Deputy Persaud's allegation that Mr. Foster had balance issues.

It is argued that Deputy Bassous observed no driving pattern that would indicate Mr. Foster was impaired as he only ran a stop sign. Further, it is asserted that the only evidence suggestive of impairment in this case was the odor of alcohol; bloodshot, glassy eyes; and a single incident in which, while out of camera range, Mr. Foster was staggering while walking toward Deputy Persaud's cruiser.

Evidence of consumption of alcohol alone does not give rise to reasonable suspicion that a driver is impaired by alcohol. State v. Kliphouse, 771 So. 2d 16 (Fla. 4th DCA 2000). However, Mr. Foster does acknowledge that cases have found a combination of speeding with the odor of alcohol, bloodshot and glassy eyes is sufficient to conduct a DUI investigation. See State v. Amegrane, 39 So. 3d 339 (Fla. 2d DCA 2010).

The existence of probable cause to arrest for DUI requires an examination of the totality of the circumstances. Mathis v. Coats, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010). The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information. Id.

### **Conclusion**

The Florida Supreme Court stated in Wiggins that a circuit court in its appellate capacity is not reweighing the evidence and applies the correct law by rejecting documentary and testamentary statements of a law enforcement officer as being competent, substantial evidence when such evidence is "totally contradicted and totally negated and refuted by video evidence of record." Wiggins, 209 So. 3d 1166.

The DVD of the January 24, 2016, dash cam video admitted into evidence before the Hearing Officer has been submitted to this Court in the Appendix as Exhibit #5<sup>2</sup>. Upon review of the dash cam video of the DUI investigation, this Court concludes that the deputies' reports and testimony is not totally contradicted, is not totally negated, and is not refuted by video evidence. Competent, substantial evidence supports the Hearing

---

<sup>2</sup> The DVD Exhibit #5 contains two separate videos. The first is the dash cam observations of the DUI investigation. The second is video of the backseat of Deputy Persaud's cruiser while Mr. Foster is being transported to the Pinellas County Central Breath Testing. The first video is the only relevant video that has been reviewed by this Court.

Officer's decision to sustain the suspension of Mr. Foster's driving privileges.

The Amended Petition for Writ of Certiorari is denied.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this  
6 day of June, 2017.

Original Order entered on June 6, 2017, by Circuit Judges Linda R. Allan,  
Keith Meyer, and Patricia A. Muscarella.

Copies furnished to:

N. Anthony Palumbo, III, Esq.  
306 East Tyler St., 2nd Floor  
Tampa, FL 33602

Christi Utt, Gen. Counsel  
Jason Helfant, Sr. Asst. Gen. Counsel  
P.O. Box 540609  
Lake Worth, FL 33454