NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

JASEN DOUGLAS GENNINGER,
Petitioner,
v.

Ref. No.: 18-000020-AP-88B
UCN: 522018AP000020XXXXCI

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

ORDER AND OPINION

Petitioner challenges a final order of the Department of Highway Safety and Motor Vehicles ("DHSMV") that sustained his driver's license suspension for refusal to submit to a urine test under section 322.2615, Florida Statutes. On appeal, Petitioner contends that DHSMV's order was not supported by competent substantial evidence, violated due process, did not observe the essential requirements of law, and was fundamentally erroneous because the initial stop, arrest, and request for a urine test were unlawful. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

The Hearing Officer found the following facts to be supported by a preponderance of the evidence:

> On December 26, 2017, Corporal Miller observed a black BMW vehicle matching the description of the vehicle in a DUI BOLO (be on the lookout) where the driver was falling asleep behind the wheel and swerving. Corporal Miller followed the vehicle into a parking lot where he observed the driver park the vehicle taking up two parking spots, after striking the parking stop twice and readjusting back and forth two times. Corporal Miller parked his squad in the middle of the parking lot not blocking the path of the BMW and not activating the emergency lights or siren.

> Corporal Miller made contact with the driver of the BMW, identified as the Petitioner, and requested the Petitioner roll down his window. It took the Petitioner a few seconds to find the correct button to roll down his window. On making contact with the Petitioner, Corporal Miller observed the Petitioner's eyes to be droopy, watery and bloodshot and his speech was slurred. The Petitioner also had difficulty removing his driver license from his wallet and giving it to Corporal Miller. The Petitioner denied having a medical issue or taking any medications. Corporal Miller believed the Petitioner to be impaired and requested he exit the vehicle. When exiting the vehicle, Corporal Miller observed the Petitioner use the car door for support and was unsteady on his feet.
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> Officers Sutton, England and Roberts arrived on scene. Corporal Miller advised the officers he was concerned the Petitioner may be impaired. Officer Roberts made contact with the Petitioner and observed signs of impairment including pinpoint pupils, watery eyes and the Petitioner was swaying and unable to stand straight. Officer Roberts testified the Petitioner told him he was taking over the counter medication for a possible cold or flu. Officer Roberts testified he was not DRE.
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> Officer Roberts requested the Petitioner perform field sobriety tests which the Petitioner performed poorly. The Petitioner was placed under arrest for DUI. Officer Roberts requested the Petitioner submit to a breath test; the results were .000g210L and .000g/210L. Based on the signs of impairment, Officer Roberts requested the Petitioner submit to a urine test which the Petitioner refused after being read Implied Consent.

After the final order upholding the suspension was entered, Petitioner filed the instant Petition for Writ of Certiorari.

Standard of Review

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1174 (Fla. 2017).

Discussion

Initial Stop

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007) (internal citations omitted). "The correct test to

be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Dept. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004). An officer may conduct an initial stop based on reasonable suspicion if the officer has "a legitimate concern for the safety of the motoring public." *Dept. of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). Such concern "can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Id.* A detention "is reasonable if it is based on specific articulable facts." *Castella v. State*, 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007). "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

Additionally, an anonymous tip may provide the requisite reasonable suspicion necessary for an officer to lawfully conduct an initial stop if "its reliability [is] established by independent police corroboration." *Vitale v. State*, 946 So. 2d 1220, 1221 (Fla. 4th DCA 2007). Such corroboration should be detailed and specific and "often requires personal observations of suspicious activity to establish the required level of reliability." *Strong v. State*, 495 So. 2d 191, 193 (Fla. 2d DCA 1986).

Petitioner argues that the initial stop was unlawful because Corporal Miller did not possess the requisite reasonable suspicion to perform an investigatory stop based on Petitioner's commission of a crime. While this is true, Corporal Miller did possess reasonable suspicion necessary to perform a welfare stop based upon his concern for Petitioner's health, welfare, and safety and the tips received about Petitioner's driving. Prior to the initial stop, Corporal Miller received tips from two separate drivers that the driver of a BMW (including its license plate number) was sleeping at the wheel while driving and swerving into other lanes of traffic. The

tipsters indicated that the driver may be impaired or having a medical issue. Corporal Miller observed one of the tipster's vehicles driving past him at the same time as he saw the BMW with the identified license plate number. He then proceeded to follow the BMW into a parking lot.

While in the parking lot, Corporal Miller observed the vehicle attempting to park but hitting the parking bumper, readjusting several times, and eventually parking in two spaces over the white line. Corporal Miller independently verified that the vehicle and license plate matched the tipsters' description. According to the record, he then approached the vehicle to make contact with the driver, later identified as Petitioner, to determine if Petitioner was impaired or having a medical issue. In order to make contact, Corporal Miller requested Petitioner to roll down his window.[1] Corporal Miller's report indicates that it "took [Petitioner] a few seconds to find the correct button to roll the driver's window down." Once the window was rolled down, Corporal Miller observed that Petitioner had droopy, watery, bloodshot eyes, slurred speech, and difficulty locating his wallet and removing his license. Based upon his observations, Corporal Miller determined that Petitioner "was not suffering from a medical episode, but may be impaired." Thus, the record contains competent substantial evidence to support the Hearing Officer's finding that the initial stop was lawful as a welfare stop and to determine that the Hearing Officer did not depart from the essential requirements of law or violate Petitioner's due process rights.

Petitioner also argues that because Officer Roberts arrived on the scene after Corporal Miller, there were actually two stops, one each performed by Corporal Miller and Officer Roberts, thus requiring both Corporal Miller and Officer Roberts to have their own basis for initiating a lawful stop. This argument is based upon both Corporal Miller's and Officer Roberts's testimony at the hearing that their respective parts in this incident were independent.

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[1] Generally, a request to roll down the window transforms a consensual welfare check into an investigatory stop, but if the officer's concern for the occupant's safety has "not been alleviated," the request is" merely a continuation of the welfare check." *Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013).

However, this argument is without merit as it is clearly not supported by the record evidence. Corporal Miller's Patrol Supplement report states that he called for assistance based upon his belief that Petitioner was impaired. Corporal Miller's request for assistance was the reason for Officer Roberts's appearance at the location where he made contact with Petitioner. Furthermore, Corporal Miller informed Officer Roberts upon arrival that he believed Petitioner to be impaired. Thus, despite the testimony at the hearing to the contrary, Officer Roberts was merely continuing the interaction resulting from Corporal Miller's initial welfare stop of Petitioner. *Cf. Tripp v. State*, 251 So. 3d 982, 986 (Fla. 1st DCA 2018) (opining that because an appellate court "must review the facts from the perspective of an objectively reasonable law enforcement officer, the officer's testimony that he was not conducting a welfare check is not dispositive").

Arrest

For an arrest to be lawful, the initial stop that led to that arrest must also be lawful. *See State, Dep't of Highway Safety & Motor Vehicles v. Pipkin*, 927 So. 2d 901, 903 (Fla. 3d DCA 2005). Petitioner argues that his arrest was unlawful because the initial stop was unlawful. However, as discussed above, the initial stop was a lawful welfare check, during which Corporal Miller observed that Petitioner appeared to be impaired while operating his vehicle.

"Generally, probable cause sufficient to justify an arrest exists where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *State, Dep't of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) (internal quotations omitted). A determination of probable cause to arrest for DUI can be based on many factors, including not only the odor of alcohol, but also "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." *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) (citing *Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010)).

The Hearing Officer's determination that Officer Roberts had sufficient probable cause to arrest Petitioner for DUI is supported by competent substantial evidence because, despite Petitioner's passing of the breathalyzer test, probable cause arose from Petitioner's driving conduct, his droopy, watery, bloodshot eyes, poor performance on the field sobriety exercises, and impaired balance.

Urine test

Under section 316.1932(1)(a)1.b., Florida Statutes, people who operate a motor vehicle within Florida consent to submit to urine tests if such tests are incident to a lawful arrest. A urine test may only administered when "a law enforcement officer . . . has reasonable cause to believe [a] person was driving or was in actual physical control of a motor vehicle within this state while under the influence of chemical substances or controlled substances." § 316.1932(1)(a)1.b., Fla. Stat. "The administration of a urine test does not preclude the administration of another type of test." *Id.* Refusal to submit to a urine test will result in the suspension of the refusing party's driver's license. *Id.*

Petitioner argues that it was fundamental error for Officer Roberts to request Petitioner submit to a urine test because 1) Officer Roberts did not know that Petitioner was impaired by an illegal substance and 2) a urine test requires a warrant.[2] However, both of these arguments are without merit.

First, Officer Roberts did not need to know conclusively that Petitioner was impaired by illegal substances; rather, section 316.1932(1)(a)1.b., Florida Statutes, only requires Officer

[2] Petitioner acknowledges that this argument was not preserved, but argues that the Court may consider it as fundamental error, which does not require preservation.

Roberts to have "reasonable cause" to believe that Petitioner was driving while under the influence of chemical substances or controlled substances. The record establishes that Officer Roberts did indeed have such "reasonable cause" based on Petitioner's driving conduct, his , droopy, watery, bloodshot eyes, poor performance on the field sobriety exercises, and impaired balance.

Second, Officer Roberts did not need to possess a warrant to request a urine test from Petitioner. Clearly, section 316.1932(1)(a)1.b., Florida Statutes, states that by accepting the privilege to operate a vehicle, a person impliedly consents to submit to a urine test when appropriate. Petitioner relies on *Birchfield v. North Dakota*, which held in part that a warrantless "breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." 136 S. Ct. 2160, 2185 (2016). Petitioner likens urine tests to blood tests, and thus contends that urine tests require a warrant. However, this is wholly unsupported by case law. In fact, the Florida Supreme Court has noted that "blood testing . . . is more intrusive, and breath testing . . . is more complex, than urine testing." *State v. Bodden*, 877 So. 2d 680, 689 (Fla. 2004) (holding that it was not unconstitutional to treat urine tests differently from blood or breath tests when rulemaking).

Implied Consent for Urine Test

Petitioner argues that because a warrant was required for a urine test, the Implied Consent form that was read to Petitioner was "intentional misinformation," and thus, fundamental error.[3] However, as discussed in Section III, a warrant is not required for a urine test. Furthermore, the record supports that Officer Roberts properly read an Implied Consent form to Petitioner that informed him of his right of refusal. *See generally Dep't of Highway Safety & Motor Vehicles v. Farr*, 757 So. 2d 550, 552 (Fla. 5th DCA 2000) (holding that suspension of a driver's license for

[3] Petitioner also acknowledges that this argument was not preserved, but again argues that the Court may consider it as fundamental error.

refusal to take a breath test did not violate the driver's due process rights, since it stemmed from the agreement the driver entered into with the state under section 316.1932, Florida Statutes); *State v. Young*, 483 So. 2d 31, 33 (Fla. 5th DCA 1985) (holding that section 316.1032(1)(a), Florida Statutes, gives someone "the *option* to refuse to submit to the test," although penalties for refusal will attach) (emphasis in original). Therefore, the final order was not fundamentally erroneous.

Conclusion

Because the final order was supported by competent substantial evidence that the initial stop, arrest, and request for urine test were lawful, did not violate Petitioner's due process rights, observed the essential requirements of law, and was not fundamentally erroneous, 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 _____ day of _____, 2018.

Original Order entered on December 18, 2018, by Circuit Judges Jack Day, Pamela A.M. Campbell, and Amy M. Williams.

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