

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**

PAUL THOMAS NUSS,
Petitioner,

v.

Ref. No. 18- 000042AP-88B
UCN: 522018AP000042XXXXCI

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

_____/

ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles (“DHSMV”) upholding the suspension of his driver’s license for driving under the influence (“DUI”) pursuant to § 322.2615, Florida Statutes. Petitioner contends that his due process rights were violated and the DHSMV’s final order was not supported by competent, substantial evidence. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

In the DHSMV’s final order, the Hearing Officer found the following facts to be supported by a preponderance of the evidence:

On February 10, 2018, Officer Tupponce was conducting laser speed enforcement at the small bridge of Memorial Causeway Boulevard. Officer Tupponce observed a black Chrysler traveling in the eastbound curb lane at an estimated speed of 45 MPH. Officer Tupponce activated his radar and clocked the Petitioner’s vehicle traveling 46 MPH in a 30 MPH zone. Officer Reilly was Officer Tupponce’s back-up and stopped the Petitioner’s vehicle for speeding. Officer Reilly made contact with the Petitioner and noticed signs of impairment and requested a DUI unit to the scene.

Officer Negersmith arrived on scene, made contact with the Petitioner and noticed signs of impairment. The Petitioner’s eyes were bloodshot and glassy. The Petitioner also had an odor of an alcoholic beverage coming from his breath as he spoke. Officer Negersmith requested the Petitioner perform Field Sobriety Exercises which he agreed and performed poorly. Officer Negersmith requested the Petitioner submit to a breath test. The Petitioner agreed. The breath test was administered by Officer Negersmith with the results being 0.188g/210L and 0.187g/210L.

Based on Petitioner's unlawful breath-alcohol level, his license was suspended. After a hearing, the license suspension was upheld. Petitioner then 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

Petitioner raises two issues regarding the Hearing Officer's decision: first, whether Petitioner was unlawfully detained for a DUI investigation; and second, whether the testimony proves that Officer Negersmith conducted an improper twenty-minute observation and filed a false affidavit.

Continued detention

Petitioner first asserts that Officer Reilly improperly detained him for a DUI investigation without reasonable suspicion of impairment, which violated Petitioner's due process rights against unreasonable searches and seizures. He maintains that this improper detention led to an unlawful arrest that makes the subsequent breath alcohol test inadmissible.

In order to justify continued detention during a traffic stop and "request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane*, 39 So. 3d 339, 341 (Fla. 2d DCA 2010). Here, Officer Reilly stopped Petitioner for speeding, and he observed "an odor of an intoxicant coming out the window." Officer Reilly indicated that Petitioner's eyes were glassy and bloodshot, and Petitioner admitted he had consumed a beer at lunch. Accordingly, reasonable suspicion existed to detain Petitioner for a DUI investigation, and Petitioner's due process rights were not violated. *See id.* (holding reasonable suspicion for a DUI investigation existed where the defendant was speeding, smelled of alcohol, had glassy, bloodshot eyes, and admitted to consuming alcohol); *State v. Castaneda*, 79 So. 3d 41, 42 (Fla. 4th DCA 2011) (holding reasonable suspicion for a DUI investigation existed where the officer observed the defendant speeding, smelled an alcoholic beverage on the defendant's breath, and observed that the defendant's eyes were bloodshot and watery).

Twenty minute observation

Petitioner next asserts that competent, substantial evidence does not support the Hearing Officer's decision to uphold the license suspension because Officer Negersmith's testimony created a hopeless conflict in the record and demonstrated that he filed a false Breath Alcohol Test Affidavit ("Affidavit"). Evidence is not competent and substantial if it is "hopelessly in conflict and the discrepancies on critical facts are unexplained." *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1086 (Fla. 1st DCA 2002). Petitioner maintains that conflict exists between the Affidavit and Officer Negersmith's testimony concerning the twenty-minute observation of Petitioner prior to administration of the breath test. Specifically, Petitioner contends the "[t]estimony was contrary to [the Affidavit] stating that Negersmith continuously observed [Petitioner] for the necessary twenty minutes."

Here, the Affidavit, which is signed by Officer Negersmith, states that "[t]he subject was observed for at least twenty minutes prior to the administration of the breath test." In his testimony, Officer Negersmith indicated that he could not confirm the exact amount of time that he personally observed Petitioner because the observation was "shared" between himself and Officer Reilly. The law provides that "[t]he breath test operator, . . . arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test." Fla. Admin. Code R. 11D-8.007(3). The law does not require the observation to be conducted by only one individual. By signing the Affidavit, Officer Negersmith was only attesting to the fact that Petitioner was observed for at least twenty minutes, not that he personally observed him. Accordingly, a hopeless conflict does not exist in the record, and Officer Negersmith did not file a false affidavit.

Moreover, Officer Negersmith's Offense Supplement report, his testimony, and the Affidavit all indicate that Petitioner was observed for twenty minutes prior to being given the breath test. The Offense Supplement states that Officer Negersmith "placed [Petitioner] in the rear of Officer Reilly's patrol vehicle. [Officer Reilly] transported him to the CPD-Main Station where he was monitored for a twenty-minute observation period." Officer Negersmith testified that

at 14:58, that was the time that he was put into the booking area. When the officer was given specific instructions as to what he was to do and how to do and so on and so forth. When I get there, the observation continues. It's during that period of time, he didn't get the breath test for -- let's see, 20 minutes afterwards.

The Affidavit states that the observation period began at 14:58, and the first breath test sample was taken at 15:20. Accordingly, the Hearing Officer's decision is supported by competent, substantial evidence.

Conclusion

Because Petitioner's due process rights were not violated and the DHSMV's final order 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 _____ day of _____, 2018.

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

Copies furnished to:

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