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

GEORGE DENNIS KOSTILNIK,
Petitioner,

REF: 18-000047AP-88A
UCN: 522018AP000047XXXXCI

vs

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

Kevin Hayslett, Esq.
Attorney for Petitioner

Christine Utt, Gen. Counsel
Mark L. Mason, Asst. Gen. Counsel
Attorneys for Respondent

ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety & Motor Vehicles ("DHSMV") upholding the suspension of his driving privilege for refusing to submit to a breath test pursuant to § 322.2615, Florida Statutes. Petitioner contends that DHSMV's final order finding that the stop was lawful 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

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

> "On February 3, 29, 2018, Deputy Skalko with the Pinellas County Sheriff's observed the petitioner's vehicle drifting into the bike lane on at least two separate occasions. The vehicle stayed in the bike lane for an extended amount of time. Concerned that the petitioner might be impaired, have a medical issue or just be distracted, the deputy conducted a traffic stop and made contact with the petitioner.
>
> Upon contact with the petitioner the deputy noticed an odor of alcoholic beverage, bloodshot, water, glassy, red eyes and slurred speech. The petitioner admitted to consuming alcoholic beverages.
>
> The petitioner was asked to perform field sobriety exercises to which he refused. Based on the totality of the circumstances the petitioner was arrested for DUI.
>
> The petitioner was asked to submit to a lawful breath test to which he refused. The petitioner was read implied consent and still refused."

Based upon Petitioner's refusal to provide a breath sample, his license was suspended. After a Formal Review Hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Wirt of Certiorari.

Standard of Review:

[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining whether due process was accorded, whether the essential requirements of law were observed and whether the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Department of Highway Safety and Motor Vehicles*, 209 So.3d 1164, 1174 (Fla. 2017).

Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry*, 91 So. 3d 849 (Fla. 5th DCA 2011). The preponderance of the evidence standard is evidence which as a whole shows that the facts 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 that a preponderance." *State v. Edwards*, 536 So.2d 288, 292 (Fla. 1st DCA 1988)

Discussion

Petitioner argues that the stop was not lawful as the officer did not have probable cause for a traffic violation or reasonable suspicion of impairment. Petitioner states that there are three sub-issues within the issue of the stop: (1) the stop was not lawful as the officer stopped Petitioner for Careless Driving, but there was no interference with traffic or imperiling of others. (2) The stop was not lawful as the officer charged Petitioner with the general Careless Driving statute rather than the specific statute for a Bicycle Lane violation and (3) the stop was unlawful as it was made under a mistake of law due to the officer's lack of knowledge for a violation of the Careless Driving statute therefore there was not competent substantial evidence to support the Hearing Officer's finding that the stop was lawful.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007). 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. Department of Highway Safety and Motor Vehicles*, 874 So.2d 1171, 1174 (Fla. 2004). 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); *State v. Riehl*, 504 So.2d 798,800 (Fla. 2d DCA 1987). The existence of probable cause requires an examination of the totality of the circumstances. *Williamson*, 938 So.2d 985, 989 (Fla. 2d DCA 2006). The facts are to be analyzed from the "officer's knowledge, practical

experience, special training and other trustworthy information." *City of Jacksonville v. Alexander*, 487 So. 2d 1144, 1146 (Fla. 4th DCA 1986). "Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State*, 974 So.2d, 425, 426 (Fla. 2d DCA 2007).

In this case, at the Formal Review Hearing the officer testified

> A. Okay, I was traveling Northbound on Golf Boulevard and noticed that he was having a difficult time maintaining his lane. As we were going northbound, I'm not sure of his actual—first time I saw his car, I believe I was maybe in the median lane and he was in the curb lane and he was going northbound and there's a bike lane, a bike pass, on the right side of the curb lane, and I noticed that he was drifting into the bike lane for a few seconds and then he would turn back into his lane.
>
> . . .
>
> Q. And that was the basis for the traffic stop?
>
> A. Two separate times, yeah. The second time was when I saw him travel into the bicycle lane for several seconds, where-so, that about half of his car remained in the bicycle lane and then came back into the lane of travel.

In response to counsel's questions, "You wouldn't pull him over because he was on his cell phone, would you?" the officer testified:

> "No, he seemed distracted or possibly, you know, a medical issue, or whatever, I'm not really sure. He had a driving pattern similar to an impaired driver."

An officer may conduct an initial stop based upon a reasonable suspicion if the officer has "a legitimate safety concern for the safety of the motoring public". *Department of Highway Safety and Motor Vehicles v. DeShong*, 603 So.2d 1349 (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. The driving

behavior need not reach the level of a traffic violation in order to justify a DUI stop. *State v. Carrillo,* 506 So.2d 495 (Fla. 5th DCA 1987).

Petitioner first argues that in order for the officer to issue a citation for Careless Driving, the driver must endanger the life, limb or property of another and without this imperilment, the statute cannot be the basis for the stop. "If the language of a statue is clear and unambiguous, courts are to enforce the law according to its terms*." Florida Department of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 323 (Fla. 2001). "The terms of the statue indicate that if the life, limb or property of *any* person is affected by the driver's operation of the vehicle, then the driver's actions constitute careless driving. *Any* person can include pedestrians, other traffic, or the driver. ""[T]he legislature is presumed to know the meaning of words and the rules of grammar and the court will give the generally accepted construction to both the phraseology of the act and the manner in which it is punctuated." *Roldan v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp 175a (Fla. 4th Cir. Ct July 29, 2015) citing *Ward v. State,* 936 So. 2d 1143 (Fla. 3d DCA 2006). The court in *Roldan* found that based upon the plain meaning of the word *any*, the Legislature did not intend the word *any* person to mean someone other than the driver. There is no requirement that others be imperiled or placed in danger. "Despite the fact that no other traffic was present, the Petitioner' operation of the vehicle was not in a careful and prudent manner The Petitioner's actions endangered his own life, limb and property and therefore fell within the parameters of the careless driving statute". *Roldon* at 175a. "The courts of this state have recognized that a legitimate concern for the safety of the motoring public 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." *DeShong* at 135. Independent of the violation of the careless driving statute, the facts as stated in the arrest report

and Deputy Skalko's testimony that he was not sure if the driver was distracted or had a medical issue was sufficient to warrant an investigatory stop and provided an objective basis for the initial stop of Petitioner.

Petitioner's second argument is that because the officer cited Petitioner with Careless Driving rather than Failure to Maintain a Single Lane or Driving upon a Sidewalk or Bicycle Path, the stop was not lawful. Petitioner posits that because there is a specific statute prohibiting the actions of Petitioner, driving in the bicycle lane, the use of the general statute, Careless Driving, was illegal. The fact that a driver was not ultimately charged for the underlying traffic infraction leading to an arrest on suspicion of DUI is irrelevant. *State v. Potter*, 438 So. 2d 1085 (Fla. 2d DCA 1983). The legality of an arrest does not depend upon the conviction or the acquittal of the accused. *Canney v. State*, 298 So. 2d 495 (Fla. 2d DCA 1973). "The objective tests asks only whether any probable cause for the stop existed making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant. If, therefore, "the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional." *Department of Highway Safety and Motor Vehicles v. Utley*, 930 So.2d 698 (Fla. 1st DCA 2006).

Petitioner cites to *Pearson v. State,* 19 Fla. L. Weekly Supp. 962a (Fla. 17th Cir. Ct. App for Broward County, July 16, 2002) for the proposition that a vehicle crossing into a bicycle lane, alone, does not give an officer the necessary founded suspicion required to perform a traffic stop. *Pearson* is distinguishable from the facts of this case. In Pearson, the officer testified he only stopped the driver for crossing into the bicycle lane, not because the officer believed the driver was intoxicated or otherwise impaired. Additionally, the case involved a Motion to Suppress. It is well settled that a reviewing court must give great deference to the trial court's findings of fact,

and that the trial court's ruling comes with a presumption of correctness. *Connor v. State*, 803 So. 2d 598, 606 (Fla. 2001). The standard of review is whether there was competent, substantial evidence to support the Hearing Officer's findings that the officer had probable cause to stop the Petitioner. Here, the officer testified the Petitioner "seemed distracted or possibly, you know, a medical issue, or whatever, I'm not really sure. He had a driving pattern similar to an impaired driver".

The Petitioner's third argument is that there was no legal stop for Careless Driving, as it was made under a mistake of law. "An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. . . [W]hen an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment." *Heien v. North Carolina*, 135 S.Ct. 530, 535 (2014). "The Florida Supreme Court has recognized that an officer is justified in stopping a vehicle to determine the reason for the vehicle's unusual operation". *Bailey v. State*, 319 So.2d 22, 26 (Fla. 1975). Similarly, our Court has explained:

> "If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even where there is no violation of vehicular regulations and no citation is issued 'The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a drive is ill, tired, or driving under the influence in situations less suspicious that than required for other types of criminal behavior.' [*State, Dep't Highway Safety & Motor Vehicles v.] DeShong*, 603 So.2d [1349] at 1352 [(Fla. 2d DCA 1992]. In determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances. *Ndow v. State*, 864 So.2d 1248, 1250 (Fla. 5th DCA 2004)." *State v. Gentry*, 57 So.3d 245 (Fla. 5th DCA 2011)."

It is well established law in this state that a law enforcement officer does not have to observe any traffic violations where the officer observes a driving pattern that is sufficient to form a founded suspicion that the operator of the vehicle is impaired, *State v. Carillo*, 506 So.2d 495

(Fla. 5th DCA 1987); *Ndow V. State*, 864 So.2d 1248 (Fla. 5th DCA 2004). Here, although the officer issued a ticket for careless driving which was a mistake of law, the officer testified to an objective basis for the stop.

As the stop was lawful, the subsequent evidence derived from it is admissible. Upon contact with the Petitioner, the officer testified that he observed Petitioner to have the "odor of alcohol coming from his breath, when he spoke, you know, and red bloodshot watery eyes, and a little bit of a slurred speech was slurred a little bit. He seemed to be confused." Petitioner also admitted to the deputy that he had consumer alcoholic beverages. These observations and Petitioner's driving provided sufficient objective basis for the deputy to conduct a DUI investigation. Competent substantial evidence supports the Hearing Officer's finding that Petitioner was lawfully stopped based upon the deputy's testimony and report that he observed Petitioner driving into the bike lane as well as the concern that Petitioner might have a medical issue.

Conclusion

This Court must determine if the Hearing Officer's decision upholding the suspension is supported by competent, substantial evidence. In determining if competent, substantial evidence exists, this Court may only decide "whether the record contains the necessary quantum of evidence." *Lee County v. Sunbelt Equities, II, Limited Partnership*, 619 So.2d 996, 1003 (Fla. 2d DCA 1993). The Court cannot reweigh the evidence or substitute its own judgment for that of the hearing officer. *Department of Highway Safety and Motor Vehicles v. Wiggins*, 151 So. 3d 457, 463 (Fla. 1st DCA 2014). Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry*, 91 So. 3d 849 (Fla. 5th DCA 2011). "The preponderance of

the evidence standard [is] evidence which as a whole shows that the facts 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)

In reviewing all the evidence of record as detailed above, the Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's decision to sustain the suspension of Petitioner's driving privileges. Procedural due process has been accorded, the essential requirements of law have been observed and the Hearing Officer's Findings of Fact, Conclusions of Law and Decision are supported by competent substantial evidence. Accordingly, it is

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

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this _____ day of _____, 2020.

Original Order entered on August 31, 2020, by Circuit Judges Jack R. St. Arnold, Keith Meyer, and Sherwood Coleman.

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Copies furnished to:

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