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

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

FRANK CARL KUNNEN, III,
Petitioner,

Case No.:19-000003AP-88A
UCN: 522019AP000003XXXXCI

v.

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

Opinion Filed: _____

Petition for Writ of Certiorari from
Decision of Hearing Officer from
Bureau of Administrative Reviews
Department of Highway Safety and
Motor Vehicles

Kevin Hayslett, Esq.
Attorney for Petitioner

Christie Utt, Esq., General Counsel
Mark L. Mason, Esq., Asst. General Counsel
Attorneys for Respondent

PER CURIAM

Mr. Kunnen, III ("Petitioner") 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 of Safety and Motor Vehicles ("DHMSV") entered December 17, 2018. Petitioner contends that the DHSMV's final order finding that the stop was lawful was not supported by competent substantial evidence. For the reasons set for 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 September 28, 2018 Officers Gonzalez and Medlin observed two vehicles stopped at a traffic light and the driver of one of the vehicles was out of their vehicle and next to the driver's window of the other. The driver that was out of the vehicle, later identified as Ashley Eggleston, then got back in her vehicle and the two vehicles went into the parking lot of the Best Buy store. Thanking that there may have been an accident the officers pulled into the parking lot to assist. Officer Gonzales made contact with Ashley Eggleston and Officer Medlin made contact with the other driver identified as Frank Carl Kunnen III, the Petitioner. Officer Medlin observed the Petitioner exhibiting indicators of impairment and the officers called for a traffic unit.
>
> Officer Reed made contact with the Petitioner and found him to have an odor of al *(sic)* alcoholic beverage on his breath, bloodshot, glassy eyes and poor balance. The Petitioner performed filed sobriety tests poorly and was arrested for DUI. The Petitioner submitted breath samples of .210g/210L and .213g/210L.
>
> Based on the foregoing, I find that the Petitioner was placed under lawful arrest for DUI.

Petitioner requested a formal administrative review of his drivers license suspension pursuant to Fla. Stat. 322.2615, Fla. Stat. (2019). The Formal Review Hearing was held on November 2, 2018 and continued to December 12, 2019 for additional testimony. After the Formal Review Hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

"(U)pon the 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." *Moore v. Department of Highway Safety and*

Motor Vehicles, 169 So. 3d 216, 219 (Fla. 2nd DCA 2015). "It is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination." *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla 3d DCA 1984). "[I]t is neither the function nor the prerogative of a circuit judge to reweigh the evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." *Department of Highway Safety and Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

Discussion

"As an initial matter, the [c]ourt notes the limited scope of its review. It must only determine whether competent substantial evidence existed in support of the hearing officer's findings and final decision." *Garcia v. Department of Highway Safety and Motor Vehicles*, 27 Fla. Law Supp. 670b citing *Dusseau v. Metro Dade Cty. of Cty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) (holding that once the reviewing court determines there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end, because the issue is not whether the hearing officer made the best, right, or wise decision, but whether the hearing officer made a lawful decision).

Petitioner asserts that competent substantial evidence does not support the hearing officer's finding that the stop was lawful because the officers failed to initiate a legal stop of Petitioner, the subsequent arrest was unlawful. "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). 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). A reasonable suspicion "has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *McMaster v. State*, 780 so. 2d 1026 (Fla. 5th DCA 2001).

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 that 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 posits that once Recruit Gonzales turned on the safety lights on the patrol vehicle, the stop of Petitioner became an investigatory stop rather than a consensual encounter. The Complaint Affidavit and the testimony of the Deputy Medlin and Recruit Gonzales indicates that they were patrolling the area on Drew Street when they observed a white Cadillac stopped in the right curb lane on a green light. Another vehicle was in the center lane. They both observed a female exit the vehicle in the center lane and approach Petitioner's vehicle, knock on the window, and speak with Petitioner. At this time, both cars were still in the roadway. The female then walked back to her vehicle and pulled into a parking area. The white Cadillac pulled behind the second vehicle and also stopped in the parking lot. The testimony was that the scene appeared to be a possible traffic crash and the law enforcement stopped to assist. At the Formal Review Hearing, Deputy Medlin testified that "At that point I was thinking it was a rear end, little rear end crash, so we pulled in behind them." In response to counsel's question the deputy testified that he

and the recruit were 50 to 75 feet from the vehicles. Recruit Gonzales was driving and upon witnessing two vehicles stopped in the roadway activated the safety lights. Gonzales testified that the lights were used as a safety measure. At the Formal Review Hearing Gonzales testified:

> "As we came up and saw that they were at the light. The light was green, nobody's moving, I put the flashers on so anybody that's coming up would know, have caution up here. . . to swerve or, you know to pull off in the street."
>
> "[w]e would have had our flashers on regardless because what are they doing in the middle of the street with the light being green? Nobody's moving."

Gonzales also testified that he was only checking on the two drivers to see if they needed assistance and "If not, we're going, hey, we're out of here." There was no traffic stop because Petitioner's vehicle was already parked. When a vehicle is not legally parked, or is parked in an emergency lane, highway, or some other place that would give an objective indication that a driver may need assistance, "a reasonable person in such circumstances would not necessarily perceive the officer's use of emergency lights as a show of authority." *Smith v. State*, 87 So.3d 84, 88 (Fla. 4th DCA 2012). "The activation of police lights is one important factor to be considered in a totality-based analysis as to whether a seizure has occurred. Lieutenant Cunningham's decision to activate his blue emergency lights when he parked behind Petitioner is not dispositive of the assertion that law enforcement had illegally detained Petitioner. Not only were there traffic safety concerns, but Petitioner had activated her emergency flashers, giving the indication that she may need aid, and increasing the likelihood that law enforcement would stop and attempt to render assistance." *Salazar v. Dep't of Highway Safety and Motor Vehicles*, 24 Fla. L. Weekly Supp. 216b (Fla. 12th Cir. Ct. June 24, 2016). "This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens." *Lightbourne v. State*, 438 So.2d 380, 388 (Fla. 1983). The testimony established that law enforcement was acting in a community care

function to determine whether someone needed assistance or if a traffic accident had occurred. The use of the patrol vehicle's safety lights were to alert other drivers of the two stopped cars in the roadway.

Petitioner argues that the testimony of Recruit Gonzales indicates that the stop was based upon a "hunch". In response to counsel's question "So the sole basis of turning the lights on, making contact with the individuals, is your wanted to find out if it was an accident; is that correct?" Recruit Gonzales answer "That's right." The constitutional validity of a traffic stop depends on purely objective criteria. *Whren v. United States*, 517 U.S. 806, 813 (1996). This 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." *Holland v. State*, 696 So.2d 757, 759 (Fla. 1997). 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). Deputy Medlin testified to the objective basis for the stop which was that they pulled in behind to two vehicles in the parking lot to investigate if there had been a traffic accident. Recruit Gonzales testimony is relevant only as to his personal observations, his subjective beliefs are not relevant. "[A] police officer's subjective belief regarding the existence or non-existence of probably cause for a warrantless arrest is neither dispositive of, nor generally relevant to, this issue." *Hawxhurst v. State*. 159 So.3d 1012 (Fla. 3d DCA 2015).

"To 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). "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.'" *Maldonado v. State*, 992 So. 2d 839, 843 (Fla. 2d DCA

2008) (internal citations omitted). "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). "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, 018 (Fla. 4th DCA 1993). Here, Deputy Medlin testified that upon making contact with Petitioner he observed that Petitioner's eyes were bloodshot and glassy. He could smell an odor of alcohol on Petitioner's breath. When Petitioner was asked to step out of the vehicle, he had to use the door to get himself out of the car and the deputy observed Petitioner had urinated on himself. Deputy Medlin had a reasonable suspicion that Petitioner was driving under the influence.

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, LL Ltd Partnership, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). It is the hearing officer's duty to determine whether the objective facts established in the documentary evidence and testimony constituted a lawful stop. 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). The

hearing officer's findings that the initial stop was lawful and the arrest was legal was supported by competent substantial evidence.

Conclusion

In reviewing all the evidence of record as detailed above, the Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's finding that the stop of Petitioner's vehicle was lawful and that Petitioner was placed under lawful arrest for DUI 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. The Petition for Writ of Certiorari is denied.

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 21st day of August, 2020.

TRUE COPY

Original Order entered on August 21, 2020, by Circuit Judges Jack R. St. Arnold, Keith Meyer, and Sherwood Coleman.

Copies furnished to:
Christie Utt, Esq., General Counsel
Mark L. Mason, Esq., Asst. General Counsel
Florida Department of Highway Safety and Motor Vehicles General Counsel
2900 Apalachee Pkwy, A432
Tallahassee, FL 32399

Kevin Hayslett, Esq.
Law Offices of Carlson Meissner Hart & Hayslett
250 North Belcher Road, Suite 102
Clearwater, FL 34625