

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, STATE OF FLORIDA
APPELLATE DIVISION**

**BETHANY LYNN SLOVINAC,
Petitioner,**

**REF: 19-000053AP
UCN: 522019AP000053XXXXCI**

-vs-

**FLORID 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

J. Kevin Hayslett, Esq.
Attorney for Petitioner

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

PER CURIAM.

ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles (“DHSMV”) sustaining the suspension of her driving privilege for refusing to submit to a breath test pursuant to § 322.2615, Florida Statutes. Petitioner contends that the DHSMV’s final order was not supported by competent, substantial evidence demonstrating that Petitioner

was lawfully stopped. Upon consideration of the Petition, Response and Reply, the Petition for Writ of Certiorari is denied.

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).

Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

See, § 322.2615, Fla. Stat.

The Court, on first tier certiorari, 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)

Statement of Facts

The formal review hearing was conducted in this matter on August 1, 2019. Petitioner did not attend the hearing but was represented by counsel. In the DHMV's final order, the Hearing Officer found the following facts to be supported by a preponderance of the evidence:

"On June 16, 2019, Deputy L. Blake observed a vehicle pulling out from an alley onto a roadway without stopping, turning wide crossing both lanes rather than turning to the first land (sic) and nearly striking the curb. Based on the testimony, Deputy L. Blake concluded that "putting everything together, it warranted looking into it further" since he felt the driving pattern "may be indicative of an impaired driver, it may be indicative so somebody having an medical emergency" or other event. Based on those observations, Deputy L. Blake conducted a traffic stop. Petitioner pulled over without incident.

Upon first contact with the Petitioner, Deputy L. Blake saw Petitioner use her hand to move a towel over an open cup in the center console of pink liquid with a lime inside. Petitioner exhibited bloodshot, watery eye, dilated pupils and slightly slurred speech. Deputy L. Blake is a trained Drug

Recognition Expert (DRE) and based on his observations he asked Petitioner to step out of the car to conduct some Standardized Field Sobriety Exams (SFSE). She complied with no issues. Deputy L. Blake moved Petitioner to well-lit area to perform SFSE's. Initially she was uncertain if she would, then decided to consent to the exercises. Deputy L. Blake conducted the Horizontal (sic) Gaze Nystagmus test. Afterward, Petitioner insisted she wanted to go home and did not continue with any additional tasks. Deputy L. Blake read Petitioner the Miranda Rights and Implied Consent. Petitioner indicated she understood and elected not to continue. Based on his training, observations, facts and circumstances at the scene, Deputy L. Blake placed Petitioner under arrest for DUI.

Petitioner was transported to the jail facility where she was observed for twenty minutes and then asked to provide a breath sample to determine her breath alcohol level. She seemed uncertain. Implied Consent was read to her and she was asked again. Petitioner stated she understood but was not willing to take a breath sample."

Based on Petitioner's refusal to provide a breath sample, her driving license was suspended. After an administrative review hearing, the driver license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Discussion

Petitioner asserts that the Hearing Officer's final order was not supported by competent substantial evidence. Specifically, Petitioner maintains the evidence at the hearing failed to establish that the officer had a reasonable suspicion to initiate a traffic stop; hence the suspension of her license for refusal to submit to an alcohol breath test was not incident to a lawful arrest.

Petitioner contends that the basis for the stop was unlawful as Petitioner did not violate §316.151, Florida Statutes (2019). Petitioner's argument that she did not violate §316.151 nor charged with a violation of §316.151 is without merit. This matter does not involve an appeal of a traffic violation. 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 495).

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 S0.2. 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). Considering the totality of the circumstances "allows an officer to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude and untrained person." *State v. Marrero*, 890 So.2d 1278, 1282 (Fla. 2d DCA 2005). Factors to consider include, "(t)he time; the day of the week; the location; . . . the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge." *Hernandez*, 784 So.2d at 1126. Deputy Blake testified that Petitioner pulled into the road from the alley and she was completing her turn, she almost struck the middle median. In response to counsel's question that almost striking a median is not a violation, Deputy Blake responded "Correct, but it could be indicative of an impaired drive or it might be indicative of somebody having a medical emergency." T-Pg.16 L. 8-10. The arrest report, which was submitted into evidence without objection as DDB#8, states:

"REASON FOR STOP: FAILING TO YIELD FROM ALLEY, CROSSING OVER A LANE OF TRAFFIC WITHOUT SIGNAL, FAILING TO SIGNAL DURING TURN, ALMOST STRIKING CURB."

Deputy Blake's observation of Petitioner's driving provided the objectively reasonable criteria to perform an investigatory stop. *Dobrin* at 1174.

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 a reasonable suspicion that the individual is driving under the influence. *State v. Ameqrane*, 39 So.3d 339, 341 (Fla. 2d DCA 2010). For an arrest to be lawful, the initial stop that led to that arrest must also be lawful. *State, Department of Safety & Motor Vehicles v. Pipkin*, 927 So.2d 901,903 (Fla. 3d DCA 2005). Petitioner argues that her arrest was unlawful because the initial stop was unlawful. However, as discussed above, the initial stop was lawful based on the objectively reasonable criteria of Petitioner's driving. Deputy Blake stopped Petitioner based on the above described driving of Petitioner. Upon making contact with Petitioner, Deputy Blake noticed Petitioner's eyes were bloodshot and watery and her pupils dilated. Petitioner's breath emitted an odor of an alcoholic beverage and she was having trouble locating her documents. Petitioner admitted she had been drinking. Accordingly, reasonable suspicion existed to detain Petitioner for a DUI investigation, and Petitioner's due process rights were not violated.

The hearing officer, tasked only with determining whether there was a reasonable suspicion to warrant the initial stop, is required to limit the review to the objective facts, rather than the subjective beliefs of the arresting officer. The hearing officer found

"The courts 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 required for other types of criminal behavior. *State Dept't of Highway Safety and Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). As revealed by testimony, the deputy's

observations of Petitioner's driving provided him with the founded suspicion necessary to conduct a stop."

"Under the community caretaking doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare" *Majors v. State*, 70 So. 3d 665, 661-662 (Fla. 1st DCA 2011). "In keeping with such community caretaking responsibilities, [an officer] could properly check the [driver's] status and condition to determine whether he needed any assistance or aid. This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens." *State, Department of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). "If a police officer observes a motor vehicle operated in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued." *State v. Gentry*, 57 So.3d 245, 247-248 (Fla. 5th DCA 2011). In *State, Department of Highway Safety and Motor Vehicles v. Maggert*, 941 So.2d 431 (Fla. 1st DCA 2006) the court held that the "absence of a statement in the arrest report, indicating Officer Fucci initiated the stop for suspicion of impairment, does not operate to negate the objective existence of probable cause." The fact that Deputy Blake did not state in the arrest affidavit that the basis for the stop was to determine if the driver had a medical emergency is not relevant.

As the initial stop of Petitioner was lawful, so to was her arrest for driving while under the influence. As such, the request to submit to a breath test was incident to a lawful arrest and the Hearing Officer's sustaining the suspension of Petitioner's driver license was supported by competent substantial evidence.

Conclusion

In reviewing all the evidence of record as detailed above, the Court concludes that the Hearing Officer's final order was supported by competent substantial evidence that the initial stop, arrest, and request for breath 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 in Clearwater, Pinellas County, Florida, this 19th day of August, 2020.

TRUE COPY

Original Order entered on August 19, 2020, by Circuit Judges Jack R. St. Arnold, Keith Meyer, and Sherwood Coleman.

Copies furnished to:

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