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

JOYCE E. NORD,
Petitioner,

vs.

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

Ref. No.: 18-0044AP-88B
UCN: 522018AP000044XXXXCI

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 the stop, detention, and arrest of Petitioner were lawful. 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 March 3, 2018[,] Deputy Kaselak conducted a traffic stop on a 2006 BMW to check on the wellbeing of the driver after observing it stop in a crosswalk and fail to maintain a single lane of travel.
>
> Deputy Kaselak made contact with the driver, who was identified by her Florida driver license as Joyce E. Nord, the Petitioner. Deputy Kaselak found the Petitioner to have slurred, mumbled speech, bloodshot, glassy eyes, a flushed face and an odor of an alcoholic beverage on her breath. The Petitioner refused to provide breath samples after being read Implied Consent.

Based on Petitioner's refusal to provide a breath sample, her 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, pro se, raises various issues throughout her initial brief. She is essentially alleging that the stop, the continued detention for a DUI investigation, and the arrest were not lawful. In addition, she asserts that there is no proof that she refused her breath test, and she challenges various aspects of the administrative hearing process.

The stop

Petitioner incorrectly contends that competent, substantial evidence does not 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) (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). "Generally, 'the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'" *State v. Arevalo*, 112 So. 3d 529, 531 (Fla. 4th DCA 2013) (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)). However, an officer may also 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.*

"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) (internal quotations omitted). Considering the totality of the circumstances "allows officers 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 an untrained person." *State v. Marrero*, 890 So. 2d 1278, 1282 (Fla. 2d DCA 2005) (citations omitted). 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 v. State*, 784 So. 2d 1124, 1126 (Fla. 3d DCA 1999). "Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop." *DeShong*, 603 So. 2d at 1352. "Reasonable suspicion can exist even though the suspicious activity is consistent with innocent activity." *Hernandez*, 784 So. 2d at 1126.

Here, the Complaint/Arrest Affidavit indicates that Petitioner was stopped shortly before 1:00 am on a Saturday. The officer described the reason for the stop as:

> I observed the Defendant pulling out of the parking lot of the Brown Boxer restaurant/bar in Madeira Beach and begin to travel eastbound on 150th ave. As she continued eastbound, her vehicle was drifting back and forth, touching the right lane line several times and crossing the right lane line twice between the parking lot and 113th St. When she stopped at the red [light] at 113th St.[,] she stopped with her front tires in the crosswalk. As she turned northbound on 113th St.[,] she made a wide turn, starting in the median lane and finishing in the outside lane where I was also turning. The vehicle continued drifting in the roadway, again touching the right lane line several times.

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, the Court may usually only decide "whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). However, "[e]vidence that is confirmed untruthful or nonexistent is not competent, substantial evidence." *Wiggins*, 209 So. 3d at 1173 (holding that "a circuit court applies the correct law by rejecting officer testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence"). Therefore, in DUI cases, determining if competent, substantial evidence exists requires a review of any video evidence.

A review of the video in this case supports the officer's recitation of events. Petitioner drifts some within her lane, touches the lane lines several times, appears to cross the lane line twice, stops inside the crosswalk, and turns from the median lane to the outer lane in which the officer is also turning. In addition, when the officer walks up to her window, the first thing he does is ask her if everything is alright or if she is sick or injured. He tells her she was all over the road so he

wanted to make sure she was not sick or injured. He then states he stopped her because she was drifting in the road, touching the line, crossing the line, driving a little below the speed limit and then a little above it, "so I'm stopping you to make sure you are alright."

Because the officer's statement of events is not "totally contradicted and totally negated and refuted by video evidence," the Court must determine only if competent, substantial evidence supports the Hearing Officer's decision. Considering the totality of the circumstances, competent, substantial evidence supports a finding that the stop was lawful. *See Bailey v. State*, 319 So. 2d 22, 26 (Fla. 1975) (holding reasonable suspicion existed where the car was "proceeding at only 45 miles per hour [on the Florida Turnpike] and was weaving, although not so much as to move out of its lane on one side or the other"); *State v. Davidson*, 744 So. 2d 1180, 1180 (Fla. 2d DCA 1999) (upholding the stop of a vehicle driving "40 and 50 m.p.h. [in a 70mph zone], [that] continually drifted across the line and then jerked back in the opposite direction in a correcting manner" where "the deputy testified that he pulled [the driver] over because these actions are characteristic of an impaired driver"); *Roberts v. State*, 732 So. 2d 1127, 1128 (Fla. 4th DCA 1999) (holding that "continuous weaving, even if only within her lane, . . . presented an objective basis for suspecting that she was under the influence").

Continued detention

Petitioner next asserts that she was improperly detained for a DUI investigation without reasonable suspicion of impairment. "In order to detain someone for a DUI investigation, the officer must have reasonable suspicion that the detainee committed the offense." *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). 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, 181 (Fla. 1st DCA 1993). Here, when the officer first approaches Petitioner and begins to ask her questions, he states that Petitioner is talking low and mumbling. He asks her if she has had anything to drink and she replies "not really." Petitioner is upset and argumentative. The whole encounter from stop to arrest is only seven minutes. After four minutes, the officer requests that Petitioner submit to field sobriety exercises so he can be satisfied that the

signs of impairment are due to innocent causes.[1] When she refuses, he explains that he will have to make his decision of whether to arrest her based on what he has observed so far: bloodshot, glassy eyes, odor coming off the breath, leaving a bar, driving all over the road, and being argumentative. Based on the totality of the circumstances, competent, substantial evidence supports the Hearing Officer's determination that the officer had reasonable suspicion to detain Petitioner for a DUI investigation.

The arrest

Although not listed as a separate issue, Petitioner also argues that probable cause did not exist to arrest her for DUI. 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) (internal citations omitted). Like reasonable suspicion, the analysis considers the totality of the circumstances. *Id.* "The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information." *Id.* In addition to the evidence from the video discussed above, the Hearing Officer also considered the Complaint/Arrest Affidavit and the Field Sobriety Test Form. The Complaint/Arrest Affidavit states that Petitioner's breath odor was "distinct" and her eyes were bloodshot and glassy. The Field Sobriety Test Form indicates that Petitioner's attitude was argumentative, there was a distinct odor of an alcoholic beverage on her breath, her eyes were bloodshot and glassy, her speech was slurred and mumbling, and her face was flushed. Based on the totality of the circumstances, competent, substantial evidence supports the Hearing Officer's determination that the officer had probable cause to arrest Petitioner for a DUI.

Remaining arguments

Petitioner makes various other arguments that have no merit. She asserts that because the video does not show her refusing the breath test and she never signed anything saying she refused, there is not competent, substantial evidence that she refused. The Hearing Officer properly held there was a valid request and refusal based on the Affidavit of Refusal to Submit to Breath Test. See. § 322.2615(2)(b), Fla. Stat. ("Materials submitted to the department by a law enforcement agency . . . shall be considered self-authenticating and shall be in the record for consideration by the hearing officer."). Petitioner also raises multiple issues with the administrative hearing

[1] Petitioner asserted the erratic driving was caused by her checking her phone, and the bloodshot eyes were from swimming and crying.

process—time constraints, bias, difficulty obtaining the video—most of which were not preserved by being raised below. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (discussing that "in order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation"). The one argument she did preserve by addressing it before the Hearing Officer was her attempt to suppress the evidence against her because it was obtained when she was illegally stopped and detained. As discussed above, the stop and detention were lawful.

Conclusion

Because competent, substantial evidence supports the Hearing Officer's decision to uphold Petitioner's license suspension, 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 11 day of July, 2019.

Original Order entered on July 11, 2019, by Circuit Judges Amy M. Williams, Pamela A.M. Campbell, and Linda R. Allan.

Copies furnished to:
JOYCE E. NORD
6000 66TH TERRACE NORTH
PINELLAS PARK, FL 33781

MARK L. MASON. ESQ.
DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES 2900 APALACHEE PARKWAY, A-432
TALLAHASSEE FL 32399-0504