

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

TARA RANDALL,
Petitioner,

CASE NO.: 2006-CA-538-O
WRIT NO.: 06-06

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**
Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Division of Driver Licenses,
R. Owes, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Jason Helfant, Assistant General Counsel,
for Respondent.

Before STRICKLAND, DAWSON and G. ADAMS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Tara Randall timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the Department) Final Order of License Suspension, sustaining the suspension of her driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction. 322.2615, 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

At approximately 12:01 a.m. on November 05, 2005, Officer Ohalek of the Maitland Police Department observed Petitioner traveling eastbound on Maitland Boulevard in the area of 1301 at a speed of 65-68 miles per hour, pace clocked and visual

estimation, in a posted 50 mile per hour zone. Officer Ohalek also observed that Petitioner drifted from side to side within her lane (line to line) and she was gaining on a gas tanker truck that was in her lane wherein she failed to show any signs of slowing until she was approximately two car lengths from the truck's rear. Officer Ohalek followed Petitioner and initiated a traffic stop in the area of State Road 600 and Spartan Drive wherein Officer Ross was called in for assistance.

Upon making contact with Petitioner, Officer Ohalek observed that Petitioner's eyes were glassy, slightly bloodshot; Petitioner had slurred speech; Petitioner's movements were a little slow; and Petitioner had an obvious odor of alcoholic beverages coming from her person. Officer Ohalek inquired as to how much Petitioner had to drink and she stated that she had a few drinks with clients since 7:00 p.m., but that she believed that she had paced herself. Officer Ohalek asked Petitioner to exit her vehicle and requested that she submit to field sobriety testing. Petitioner participated in the field sobriety testing. Officer Ross subsequently arrested and transported Petitioner to Seminole County CBO for processing wherein she refused to submit to a lawful breath, blood, or urine test.

Pursuant to section 322.26158, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on December 13, 2005, Petitioner was granted a formal review held by Department Hearing Officer Owes.

At the hearing, Petitioner moved to set aside the suspension on the basis that: 1) Officer Ohalek did not have jurisdiction to stop and arrest Petitioner and 2) Officer Ohalek's witness statement was not properly notarized. Not a single witness testified during the hearing. On December 21, 2005, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of her driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a

decision of an administrative forum.” *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual’s license is suspended for refusal to submit to a breath, blood, or urine test, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension.” § 322.2615(7), Fla. Stat. (2005). The hearing officer’s scope of review is limited to the following issues:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
2. Whether the person was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person 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 eighteen months.

§ 322.2615(7)(b), Fla. Stat. (2005).

Petitioner argues that: 1) the hearing officer’s decision to sustain Petitioner’s license suspension was not supported by competent substantial evidence, because Officer Ohalek’s witness statement was not properly notarized and 2) the hearing officer’s decision to continue Petitioner’s license suspension was not supported by competent substantial evidence that Petitioner was lawfully arrested for DUI. Thus, Petitioner contends that: 1) there was no evidence in the record supporting the hearing officer’s conclusion that Petitioner’s vehicle was lawfully stopped and 2) Petitioner was not lawfully arrested for DUI by Officer Ross.

The Department responds by asserting that: 1) the charging affidavit was legally sufficient for the Department to consider in determining whether the Department

complied with the statutory guidelines for an administration suspension and 2) Petitioner was arrested within the jurisdiction of the Maitland Police Department; and even if the arrest had occurred outside of the Maitland Police Department's jurisdiction, it would nonetheless have been a lawful citizen's arrest.

Petitioner's first claim is without merit. The Fifth District's opinion in *Gupton v. Dep't of Highway Safety*, 987 So. 2d 737 (Fla. 5th DCA 2008) is binding upon this Court. Petitioner in this case, like the petitioner in *Gupton*, argues that because the attester's status was not specified on the probable cause affidavit, the document is not an affidavit as required by section 322.2615(2), Florida Statutes.¹ *Id.* at 738. In *Gupton*, the Fifth District concluded that an attester's failure to indicate on the probable cause affidavit whether the attester was a law enforcement officer or notary public did not result in the document not being an "affidavit." *Id.* at 738. Here, all three pages of Officers Ohalek's probable cause affidavit fail to specify whether the attester was a law enforcement officer or notary public. Accordingly, pursuant to *Gupton*, it appears that the lack of attester status does not render Officer Ohalek's probable cause affidavit invalid.

Petitioner's second claim is with merit. Generally, an officer has no official power to make an arrest outside his jurisdiction. *State v. Gelin*, 844 So. 2d 659 (Fla. 3d DCA 2003). However, an arrest outside the officer's jurisdiction can be validated in certain circumstances. *Id.* For instance, an officer may validly arrest outside his jurisdiction if in fresh pursuit of a felon, misdemeanor, or a violator of traffic laws. 901.25, Fla. Stat. (2004); *State v. Edwards*, 462 So. 2d 581 (Fla. 4th DCA 1985). Here, the hearing officer failed to make factual findings as to whether Officer Ohalek observed Petitioner within his jurisdiction. Furthermore, it is unclear, based on the evidence, whether Officer Ohalek was within his jurisdiction at the time he observed Petitioner commit the traffic infraction. Specifically, Officer Ohalek's witness statement provided that he observed Petitioner wherein he was traveling eastbound on Maitland Boulevard in the area of 1301. However, a review of the record reveals that there was no testimony provided during the hearing as to whether the area of 1301 is within Officer Ohalek's jurisdiction and the map provided fails to indicate exactly where the area of 1301 is located. Thus, it appears that there is no competent substantial evidence that Officer

¹ Petitioner does not challenge the authenticity of the document.

Ohalek was in his jurisdiction at the time of observation. Accordingly, the fresh pursuit exception is inapplicable. Consequently, that places Officer Ohalek in the same position as a private citizen.

Police officers, like private citizens, have a common law right to make citizen's arrests. *State v. Phoenix*, 428 So. 2d 262 (Fla. 4th DCA 1983). "At common law, a private citizen may arrest a person who in the citizen's presence commits a felony or breach of the peace, or a felony having occurred, the citizen believes this person committed it." *Edwards*, 462 So. 2d at 582. "A breach of the peace includes the violation of any law enacted to preserve the peace and good order." *Seay v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 312a (Fla. 9th Cir. Ct. Dec. 27, 2004) (citation omitted). Since traffic infractions and driving under the influence are not considered felonies under Florida law, it seems that in order for the arrest to be lawful, the Petitioner's actions must have constituted a breach of the peace.

Florida cases have held, in certain limited circumstances, that driving patterns can constitute a breach of the peace. For example, in *Edwards*, the court found the defendant's actions constituted a breach of the peace where an off-duty police officer followed the defendant for approximately five miles and observed him cross the center line three to seven times forcing other vehicles to take evasive action. *Edwards*, 462 So. 2d at 582. Similarly in *State v. Furr*, 723 So. 2d 842 (Fla. 1st DCA 1999), the court found breach of the peace where civilian witnesses reported erratic driving by the defendant and the officer observed the defendant cross the center line four to five times. *See also Seay v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 312a (Fla. 9th Cir. Ct. Dec. 27, 2004) (finding breach of peace where driver was asleep at the wheel in the middle of the street with the engine running); *Cortinas v. State*, 11 Fla. L. Weekly Supp. 416d (Fla. 17th Cir. Ct. Feb. 11, 2004) (finding breach of the peace where driver swerved into oncoming traffic and struck the median); *Overton v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 529a (Fla. 8th Cir. Ct. June 12, 2001) (finding breach of peace where driver ran two stop signs, failed to maintain a single lane, struck a curb, and ran off the road); *Kuse v. State*, 6 Fla. L. Weekly Supp. 473a (Fla. 11th Cir. Ct. May 28, 1999) (finding breach of the peace where driver swerved from lane to lane and drove onto the sidewalk on two occasions).

In the instant case, Officer Ohalek estimated Petitioner was driving approximately 65-68 miles per hour in a 50 mile per hour zone and observed that she drifted from side to side within her lane (line to line). Based on the facts and the above case law, it appears that the Petitioner's driving pattern did not rise to the level that would constitute a breach of peace. As a result, it appears that the hearing officer's decision that Petitioner was lawfully stopped and arrested is not supported by competent substantial evidence.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 1 day of April , 2009.

 /S/
STAN STRICKLAND
Circuit Judge

 /S/
DANIEL P. DAWSON
Circuit Judge

 /S/
GAIL ADAMS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure and Yates, P.A., Post Office Box 2728, Winter Park, Florida 32790 and **Jason Helfant, Assistant General Counsel**, 2515 West Flagler Street, Miami, Florida 33135 on the 2 day of April , 2009.

 /S/
Judicial Assistant