IN THE CIRCUITCOURT FOR THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

MATTHEW WEST,

Petitioner,

v.

CASE NO.: 2006-CA-0759-O
Writ No.: 06-08

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, DIVISION OF DRIVER LICENSES,

Respondent.
_____/

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE ADAMS, WHITEHEAD, and JOHNSON, JJ.

PER CURIAM.

FINAL ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF CERTIORARI

Matthew West ("Petitioner") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the eighteen-month suspension of his driver's license for refusing to submit to the breath-alcohol

test. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

At approximately 2 a.m. on November 16, 2005, the arresting officer, Corporal Hall, observed a vehicle driven by Petitioner fail to stop at a stop sign and accelerate to a high rate of speed. Additionally, Corporal Hall observed Petitioner come close to the rear of another vehicle and flash his headlights. Corporal Hall then conducted a traffic stop. Corporal Hall observed that Petitioner had a strong odor of alcohol, appeared to be off balance and dropped papers when stepping out of the vehicle, and stated that he had drinks earlier in the evening. The Petitioner agreed to submit to field sobriety exercises, and agreed to wait in front of his vehicle while Corporal Hall turned off his vehicle's strobe lights. However, Petitioner refused to obey Corporal Hall's instructions and returned to the driver compartment of his vehicle, at which point, Corporal Hall had to forcibly remove Petitioner from the vehicle. At that time, it appeared to Corporal Hall that Petitioner placed something into his mouth which he then ordered Petitioner to spit out. Petitioner refused to comply with Corporal Hall's requests and resisted his hold, and appeared to swallow the contents of his mouth. Corporal Hall then requested backup and ordered Petitioner to wait until the other officer arrived. After the other officer arrived, Petitioner agreed to submit to field sobriety exercises, performed poorly on the exercises, and was placed under arrest. Corporal Hall then transported Petitioner to the breath test center where he refused the breath test.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on December 21, 2005. At the hearing, Petitioner moved to set aside the suspension arguing that Petitioner was denied due process by Corporal Hall's failure to remember the other officer's identity. Additionally, Petitioner argued that there was insufficient

evidence that the arresting officer, at the time he requested the Petitioner perform field sobriety exercises, had the necessary reasonable suspicion to detain the Petitioner and request that he perform those exercises. Last, Petitioner argued that Petitioner was placed under unlawful arrest prior to the arresting officer obtaining probable cause. On December 25, 2005, the hearing officer entered a Final Order of License Suspension denying Petitioner's motion and sustaining the suspension of his driver's license.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver's license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

> 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 18 months.

§ 322.2615(7)(b), Fla. Stat. (2006).

Issue I: Whether there was competent substantial evidence that Petitioner was lawfully arrested for DUI.

Petitioner argues that he was placed under de facto arrest prior to the performance of field sobriety exercises. Therefore, Petitioner argues that the Officer lacked probable cause to arrest Petitioner for any offense. Conversely, Respondent argues that the Hearing Officer's order conforms to the essential requirements of the law and is supported by competent substantial evidence. Specifically, Respondent argues that Petitioner's DUI arrest was justified prior to performance of field sobriety exercises.

Corporal Hall's testimony at the hearing and in the charging affidavit provides the relevant details surrounding Petitioner's arrest. As stated in the charging affidavit and testimony, Corporal Hall observed that Petitioner failed to stop at a stop sign, was speeding, and exhibited signs of aggressive driving. Additionally, upon contact with Petitioner, Corporal Hall observed a strong odor of alcohol and noticed that Petitioner appeared off-balance and dropped papers. Finally, Petitioner remained un-cooperative and failed to follow instructions throughout his interactions with Corporal Hall.

Probable cause to justify an arrest exists where the "facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonably trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *City of Jacksonville v. Alexander*, 487 So. 2d 1144, 1146 (Fla. 1st DCA 1986). The Court finds that the facts and circumstances above

were sufficient for a reasonable person to reach the conclusion that Petitioner operated his motor vehicle under the influence of alcohol, and constituted competent substantial evidence to support the finding of the Hearing Officer that, even at the time of the purportedly *de facto* arrest, Corporal Hall had probable cause to arrest Petitioner for driving a motor vehicle while under the influence. *See Swanson v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 653a (Fla. 4th Jud. Cir. 2006) (court found probable cause to arrest existed based on officer's observations that Petitioner had odor of alcohol on breath, bloodshot and watery eyes, slurred speech, and slowed motor skills, despite alleged *de facto* arrest). That Petitioner "was not 'formally' placed under arrest until a later time after he performed field sobriety tests is immaterial." *Id.* (citing *State v. Rivas-Marmol,* 678 So. 2d 808 (Fla. 3d DCA 1996)).

Petitioner cites several cases to support his proposition that he was placed under *de facto* arrest; however, the Court finds that the facts in the cases cited by Petitioner are distinguishable from the facts in this case. *See Coney v. State*, 820 So. 2d 1012 (Fla. 2d DCA 2002); *A.C. v. State*, 630 So. 2d 1219 (Fla. 2d DCA 1994); *Adams v. State*, 830 So. 2d 911 (Fla. 2d DCA 2002); and *Grant v. State*, 596 So. 2d 98 (Fla. 2d DCA 1992). The conduct of Corporal Hall did not rise to the level of the conduct at issue in the cases cited by Petitioner. Also, Petitioner was already being detained by Corporal Hall for the traffic stop at the time of the alleged *de facto* arrest. In the cases cited by Petitioner, the act of the *de facto* arrest occurred independently and was the act that brought the suspect into custody. Additionally, cases cited by Petitioner deal with suppression of illegally obtained evidence during the alleged *de facto* arrests, none discuss whether a subsequent arrest after the initial detention was unlawful. Thus, the Court finds that Petitioner's argument is without merit. For the reasons stated above, the Court finds that there

was competent substantial evidence to support the hearing officer's determination that Petitioner was lawfully arrested for driving under the influence.

Issue II: Whether Petitioner was deprived of procedural due process because he was deprived of the opportunity to cross-examine the other officer present at the scene of Petitioner's arrest.

Petitioner argues that he was denied procedural due process by the arresting officer's failure to remember or record the name of the other officer present at the scene of the Petitioner's arrest. Conversely, Respondent argues that Petitioner was not denied due process and had an opportunity to cross-examine the arresting officer. As described above, during the traffic stop, Petitioner became increasingly uncooperative in response to Corporal Hall's requests. To ensure his safety, Corporal called for back-up. According to Corporal Hall's testimony, the back-up officer only assisted with Hall's protection and was not involved in the DUI investigation and administration of the field sobriety exercises.

In general, a quasi-judicial hearing meets "basic due process requirements if parties are provided notice of hearing and opportunity to be heard." *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). The parties "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Id.* (citing *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So. 2d 648, 652 (Fla. 3d DCA 1982). The driver in an administrative license suspension hearing has "the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." Fla. R. Admin. Code Rule 15A-6.013(5).

Here, there is no evidence that the back-up officer played any role in the arrest other than offering protection for Corporal Hall. Additionally, Petitioner had the opportunity to cross-examine the arresting officer and confront the documentary evidence and testimony presented

against him. There is no indication that the back-up officer would have provided any exculpatory evidence for Petitioner, as he had no direct role in the arrest and investigation. Petitioner cites *Shannon v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 21a (Fla. 11th Cir. Ct. 1998), for the proposition that Petitioner should be entitled to examine the back up officer on his or her personal observations surrounding the arrest. However, the Court finds that the facts in Petitioner's case are distinguishable from the facts in the present case. In *Shannon*, the backup officers in question were also in charge of videotaping the arrest, and the videotape was later lost or destroyed. *Id.* In the present case, there was no videotape and there was no indication that the back up officer made any personal observations regarding Petitioner's arrest. Furthermore, Petitioner had the opportunity to request a continuance from the hearing officer to ascertain the identity of the back-up officer and subpoena him, but Petitioner failed to do so. Accordingly, the Court finds that Petitioner's due process rights were not violated as he had the opportunity to present evidence and to cross-examine the witness against him.

Issue III: Whether there was competent substantial evidence to support hearing officer's decision to suspend Petitioner's driver's license for 18 months.

The Petitioner argues that there is no evidence in the record establishing that Petitioner's driver's license has previously been suspended for refusing to submit to a breath, blood, or urine test. Therefore, Petitioner argues that a suspension of one year, not eighteen months is the appropriate suspension.

Section 322.2615(8)(a), Florida Statutes, provides that the driver's license of any person who has had his driver's license suspended for a previous refusal to submit to a lawful breath, blood or urine test shall be suspended for a period of eighteen months. In this case, there is no record that the Department admitted the Petitioner's driving record into evidence at the hearing. In the Department's Response, it cites to the driving record, but there is no evidence that it was

in the record before the hearing officer. Therefore, the Department cannot rely on the Petitioner's driving record as evidence of a prior suspension. *Boston v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 909a (Fla. 9th Cir. Ct. 2005) (petitioner's due process violated where licensee's driving record establishing that her license had previously been suspended for driving with unlawful blood alcohol level was not admitted or introduced into evidence at hearing). Because the driving record establishing a prior refusal was not admitted into evidence, there was no competent substantial evidence supporting the hearing officer's determination that this was a second refusal. Thus, a suspension of eighteen months was not appropriate.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED** as to Issues I and II and **GRANTED** as to Issue III, Petitioner's argument that the length of suspension was not supported by competent substantial evidence. The Department of Highway Safety and Motor Vehicles' order affirming the suspension of Petitioner's license is **QUASHED**, as to Issue III and the cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this __27th__ day of _____July_____, 2009.

__/S/_____
JOHN H. ADAMS
Circuit Court Judge

_/S/_____
REGINALD K. WHITEHEAD
Circuit Court Judge

_/S/_____
ANTHONY H. JOHNSON
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esq.,** Kirkconnell, Lindsey, Snure, & Yates, P.A.,P.O. Box 2728, Winter Park, FL 32790-2728**;** and to **Heather Rose Cramer, Esq.,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Rd., #230, Lake Worth, FL 33467, on this _27th day of ____July_____, 2009.

__/S/_____
Judicial Assistant