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

CASE NO. 2006-CA-2799
WRIT NO. 06-33

SHAWN O'MALLEY,
Petitioner,

vs.

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

Petition for Writ of Certiorari from the
Department of Highway Safety and Motor
Vehicles, M. Varnadore, Hearing Officer

Stuart I. Hyman, Esquire, for Petitioner

Judson M. Chapman, General Counsel, and
Heather Rose Cramer, Assistant General
Counsel, for Respondent

Before O'Kane, Komanski, and Thorpe, J.J.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Shawn O'Malley (herein "Petitioner) seeks certiorari review of the Florida Department of Motor Vehicles (herein "DHSMV") final order sustaining the suspension of his driver's license. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c) and 9100; *see also* §§ 322.2615 and 322.31, Fla. Stat. (2005).

On January 27, 2006, Petitioner was arrested for DUI and his driver's license was

suspended based on his refusal of a breath, blood or urine test. He requested a formal review hearing pursuant to section 322.2615(1)(b)(3), Florida Statutes, which was conducted on March 1, 2006.

Florida Highway Patrol Trooper Jacob Vaughn observed Petitioner's vehicle on Orange Blossom Trail and followed it until after the vehicle got on I-4. He saw the vehicle start weaving "to the left and started straddling the line and came back to the right." When it went to the left, it crossed a solid white line for a short distance, about 50 feet. It drove normally for another 400 feet or so, then went to the left again as it approached the entrance to I-4. The vehicle went so far over the line to the left, it looked as if the driver was trying to change lanes, then just before coming up to the concrete grass median before the ramp breaks off, it swerved back to the right and got onto I-4. As he followed it up the ramp, it was drifting to both sides of the lane, and crossed the fog line "when it was going around the curve to the left as the ramp gets up on I-4." Just before he turned on his blue lights, it "straddled a lane that divides the two center lanes for an extended period of time," which he described as "a couple hundred feet." At that point, cars were coming up behind him, appeared to be planning to pass, then slowed down and did not do so.

Counsel argued several motions. First, he moved to set aside the suspension, arguing there was no probable cause for the stop in this case because Petitioner's vehicle never interfered with other vehicles and never left its lane in any significance except when it was approaching the I-4 entrance, where it was traveling under the posted speed

limit. Second, counsel moved to set aside the horizontal gaze nystagmus test because there was no showing that it was scientifically reliable. Third, counsel moved to set aside the suspension, arguing there was no probable cause or reasonable suspicion to administer field sobriety exercises. He also argued there was no probable cause for the arrest based on the field sobriety exercises administered. Finally, counsel moved to set aside the suspension based on "selective videotaping of DUI cases by the trooper," who had admitted he was not videotaping on the day in question. The hearing officer subsequently issued an order denying all motions and sustaining the suspension of his driver's license for one year.

Review of an administrative agency's decision is governed by a three-part standard: whether (1) whether the agency accorded procedural due process; (2) whether the agency observed the essential requirements of the law; and (3) whether competent, substantial evidence supported the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative" of the circuit court to re-weigh evidence and make findings of fact when reviewing such a decision." *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989). When a driver'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 scope of the hearing officer's review is limited to the following issues:

1. Whether the arresting law enforcement officer had probable cause to believe 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 section 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement 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), Fla. Stat. (2005).

Argument I

Petitioner alleges there was no probable cause to stop his vehicle based on Trooper Vaughn's report, which was admitted into evidence. He argues the trooper wrote that his vehicle left its lane of travel only once on Orange Blossom Trail and once on I-4, and never asserted the stop was based on a belief that the vehicle's driver was tired, sick or impaired. He also argues the trooper never gave any reason for the stop. He cites *Whren v. United States*, 517 U.S. 806 (1996), and *Holland v. State*, 696 So. 2d 757 (Fla. 1997), for the proposition that probable cause of a violation of law or traffic infraction is necessary before a vehicle may be stopped. He also cites *Dobrin v. Dep't. of Highway Safety & Motor Vehicles*, 874 So. 2d 1171 (Fla. 2004), which cites the objective test that must be applied in determining whether probable cause exists. Petitioner argues that without an asserted basis for the stop, the hearing officer had no facts upon which to make a decision that probable cause existed for the stop.

Respondent contends there was competent, substantial evidence supporting the

hearing officer's determination to sustain the license suspension, raising the following arguments: First, the trooper had authority to stop Petitioner for failure to maintain a single lane, drifting within the lane (driving erratically) and, at one point, exceeding the posted speed limit, as indicated in the sworn charging affidavit. In addition, Petitioner's argument conflicts with *Yanes v. State*, 877 So. 2d 25 (Fla. 5th DCA 2004), *rev. denied*, 889 So. 2d 73 (Fla. 2004), wherein the Fifth District Court of Appeal held that a driving pattern alone can be so erratic that it violates Florida Statute section 316.089(1), regardless of whether other traffic is affected. The driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). Trooper Vaughn's charging affidavit illustrates Petitioner's violations and erratic driving pattern. Finally, Respondent contends that Petitioner is asking the Court to apply a "magic words" requirement rather than an objective test, a point that is well-taken.

In his sworn report and his testimony, the trooper articulated several observations that support a finding under the objective test that probable cause existed for the stop: erratic driving and speeding. The hearing officer specifically noted the failure to maintain a single lane, swerving and almost striking a concrete and grass median, weaving, and changing lanes without signaling. The fact that the trooper did not specifically write or testify that he made the stop "because" of one or more of these observations should not be fatal to the determination that he had an objectively reasonable basis for doing so. The facts provide an objective basis to justify the stop under *Dobrin*, as well as the hearing

officer's finding that the stop was lawful. This Court will not re-weigh the evidence.

Discussion - Argument II

Petitioner alleges his due process rights were violated by the trooper's "selective videotaping." He argues the trooper had a video camera available for the purpose of gathering evidence, along with access to an unlimited number of tapes, but the officer "speciously testified" he obtains only one per week because additional tapes would take up too much room in his vehicle.

Respondent contends the trooper was not required to videotape Petitioner's stop and arrest. Petitioner acknowledges there is no constitutional duty to gather particular evidence but argues that certain duties arise once of a policy of gathering evidence through certain tests has been established, citing *State v. Powers,* 555 So. 2d 888 (Fla. 2d DCA 1990). Petitioner also cites *Smiddy v. State*, 627 So. 2d 1257 (Fla. 3d DCA 1993). In *Smiddy*, officers admitted arbitrarily videotaping individuals suspected of DUI. The county court determined the officers violated department policy by failing to videotape drivers and thereby avoid gathering exculpatory evidence; thus, the county court dismissed charges. The circuit court, appellate division, reversed based on findings, inter alia, that the department did not violate any due process rights and police had no duty to preserve evidence. The Third District Court of Appeal reversed, holding that the circuit court had re-weighed and re-evaluated the evidence.

The hearing officer did not state a reason for denying the motion to invalidate the suspension based on selective videotaping. However, because the license suspension was

justified based on competent, substantial evidence, there appears to be no basis to overturn the hearing officer's ruling on this matter. To do so would invite the very kind of re-weighing disapproved in *Smiddy*.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida on this ___23____ day of February 2009.

/S/
JULIE H. O'KANE
Circuit Judge

/S/
WALTER KOMANSKI
Circuit Judge

/S/
JANET C. THORPE
Circuit Judge

Certificate of Service

I hereby certify that a copy of the foregoing Order has been furnished this 23_____ day of February 2009 to Stuart I. Hyman, Esquire, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803; and Heather Rose Cramer, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, Florida 33467.

/S/
Judicial Assistant