

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

ALEXANDER GOLDEN,

Petitioner,

CASE NO.: 2007-CA-002833-O

WRIT NO.: 07-20

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

Petition for Writ of Certiorari
From the Florida Department of
Highway Safety and Motor Vehicles,
B. Bowen, Hearing Officer.

Carlus L. Haynes, Esquire,
For Petitioner.

Jason Helfant, Assistant General Counsel,
For Respondent

Before A. BLACKWELL, T. SMITH, DAVIS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Alexander Golden (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (Department) Final Order of License Suspension, sustaining the suspension of his driver's license pursuant to section 322.2616, Florida Statutes, for refusing to submit to the breath-alcohol test. This Court has

jurisdiction pursuant to section 322.2616(14), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c).

On January 11, 2007, Deputy Aaron Wilson of the Orange County Sheriff's Office observed a vehicle driving with an open rear passenger door and weaving within the lane. Deputy Wilson made contact with the driver, Petitioner Alexander Golden, and observed the odor of alcohol on his breath. Petitioner produced his driver's license and Deputy Wilson determined that Petitioner was under the age of 21. According to the probable cause affidavit, after Deputy Wilson conducted the Horizontal Gaze Nystagmus (HGN) field sobriety exam and requested a breath test, Petitioner admitted to drinking alcohol. Deputy Wilson then explained the implied consent law and Petitioner refused to submit to the breath test. As a result of his refusal, Petitioner's driving privileges were suspended for a period of twelve (12) months.

Petitioner timely applied for a formal review hearing which was held on February 13, 2007. Petitioner was present but not represented by counsel at the review hearing. At the hearing, Petitioner testified that he was picking up some friends that needed a ride home and figured that he was fine to drive at 12:00 a.m. even though he drank some beer around 9:00 p.m. Petitioner further testified that the smell of alcohol was not on his breath, but rather on the kids that he was driving home. The hearing officer entered a Final Order of License Suspension suspending Petitioner's driving privileges for a period of one year effective January 11, 2007. The hearing officer concluded that Deputy Wilson had probable cause to believe that Petitioner was under the age of 21 and in actual physical control of a vehicle with any breath-alcohol level, that Petitioner refused to submit to a breath test after being asked to do so, and that Petitioner was told that if he refused to submit to the test his driving privileges would be suspended for a period of one year.

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 (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 test, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension.” §322.2616(8), Fla. Stat. (2007). The hearing officer’s scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.
2. Whether the person was under the age of 21.
3. Whether the person refused to submit to a breath 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 a breath 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.

§322.2616(8)(b), Fla. Stat. (2007).

At issue in the instant case is whether Deputy Wilson had reasonable suspicion to detain Petitioner and probable cause to order the breath test. Petitioner argues that Deputy Wilson did

not have reasonable suspicion to detain him for a DUI investigation and asserts that the only evidence tending to show a mere suspicion of intoxication was the odor of alcohol and the results of the HGN test, but neither is sufficient to establish probable cause to request him to take a breath test.

On the other hand, the Department asserts that Deputy Wilson's statement that Petitioner had a distinct odor of an alcoholic beverage on his breath coupled with his driving with an open rear passenger door was sufficient to satisfy the probable cause requirement in section 322.2616, Florida Statutes.

Section 322.2616(1)(b), Florida Statutes, states:

A law enforcement officer who has probable cause to believe that a motor vehicle is being driven by or is in the actual physical control of a person who is under the age of 21 while under the influence of alcoholic beverages or who has any blood-alcohol or breath-alcohol level may lawfully detain such a person and may request that person to submit to a test to determine his or her blood-alcohol or breath-alcohol level.

Florida 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 that required for other types of criminal behavior." Ellis v. State, 755 So. 2d 767, 768 (Fla. 4th DCA 2000)(citing Dept. of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992); see Hurd v. State, 958 So. 2d 600 (Fla. 4th DCA 2007)(noting that a traffic stop is permitted even without a traffic violation, so long as the stop is supported by a reasonable suspicion of impairment, unfitness or vehicle defects). A law enforcement officer may "stop a driver and request that the driver perform field sobriety tests based on a reasonable suspicion that the crime of driving while intoxicated is being committed." Dept. of Highway Safety & Motor Vehicles v. Haskins, 752 So. 2d 625, 627 (Fla. 2d DCA 1999). "A reasonable suspicion 'is one which has a factual

foundation in the circumstances observed by the officer, when those circumstances are interpreted in light of the officer's knowledge and experience.'" Origi v. State, 912 So. 2d 69 (Fla. 4th DCA 2005)(quoting State v. Davis, 849 So. 2d 398, 400 (Fla. 4th DCA 2003)).

In the instant case, the probable cause affidavit states that Petitioner was driving with an open rear passenger door and weaving within the lane. Therefore, there was competent substantial evidence that Deputy Wilson had reasonable suspicion to stop Petitioner in order to determine whether he was driving under the influence. See Roberts v. State, 732 So. 2d 1127, 1128 (Fla. 4th DCA 1999)(holding that driver's continuous weaving, even if only within her lane, during the time that she was being followed presented an objective basis for suspecting that she was under the influence and supported the stop).

The Ninth Judicial Circuit, in its appellate capacity, previously noted that "probable cause 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.'" Kovacs v. Dept. of Highway Safety & Motor Vehicles, 11 Fla. L. Weekly Supp. 185a (Fla. 9th Cir. Ct. Nov. 5, 2003)(citing Dept. of Highway Safety & Motor Vehicles v. Favino, 667 So. 2d 305, 309 (Fla. 1st DCA 1995)). Furthermore, it has been noted that "in administrative hearings held to determine whether an individual's license should be suspended for DUI, the courts have generally held that the circumstances surrounding the incident and the officer's general observations are sufficient to establish probable cause." Dept of Highway Safety & Motor Vehicles v. Whitley, 846 So. 2d 1163, 1166 (Fla. 5th DCA 2003).

Pursuant to the express language of the statute, a law enforcement officer may request a person to submit to a breath test if there is probable cause to believe that a person under the age

of 21 is driving a motor vehicle with *any* breath-alcohol level. § 322.2616(1)(b), Fla. Stat. (2007). The probable cause affidavit states that Petitioner was determined to be under the age of 21 by his driver's license, had a distinct odor of alcohol on his breath, and admitted to drinking alcohol. It is undisputed that the Petitioner refused to submit to a breath test after Deputy Wilson informed him of the implied consent law. Accordingly, based on the express language of the statute, the basis for the traffic stop, and the evidence presented, there was competent substantial evidence to support the hearing officer's conclusion that probable cause existed to request Petitioner to submit to a breath test.

Accordingly, 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 the ___14___ day of _____April_____, 2008.

_____/S/_____
ALICE BLACKWELL
Circuit Judge

_____/S/_____
THOMAS B. SMITH
Circuit Judge

_____/S/_____
JENIFER M. DAVIS
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: **Carlus L. Haynes, Esquire**, 550 Bumby Avenue, Suite 280, Orlando, Florida 32803 and **Jason Helfant, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 West Flagler Street, Miami, Florida 33135 on the ___16___ day of ___April_____, 2008.

_____/S/_____
Judicial Assistant