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

BANNER LEE THOMAS,

Petitioner,

v.

CASE NO.: 2008-CA-025830-O
WRIT NO.: 08-56

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,
Darrin Bowen, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

Before LEBLANC, RODRIGUEZ, and KOMANSKI, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Banner Thomas ("Thomas") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the "Department") Findings of Fact, Conclusions of Law and Decision, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes, for driving a motor vehicle with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida

Statutes, and Florida Rule of Appellate Procedure 9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

On July 19, 2008, Officer Mainguth, of the Maitland Police Department, observed a vehicle operated by Thomas as it struck a median curb, causing the front driver's side tire to deflate on impact. Officer Mainguth followed Thomas' vehicle to lend assistance. Thomas continued to drive for three-quarters of a mile on the deflated tire before Officer Mainguth signaled him to stop. Thomas stopped and exited the vehicle. Officer Mainguth observed that Thomas was unsteady and swayed as he stood. Officer Mainguth then called his shift supervisor to request assistance.

Officer Lawson, also of the Maitland Police Department, responded to Officer Mainguth's request for assistance. He observed that Thomas was of unsteady balance and almost stumbled as he walked. Thomas was unable to stand in one place, had an orbital sway as he stood, and rocked back and forth causing his feet to leave the ground. Thomas had to be held several times to prevent him from falling to the ground. Officer Lawson further observed that Thomas had red, watery, glassy eyes, and the odor of alcohol was emitting from Thomas' breath.

Thomas admitted that he had been drinking alcohol, and he stated that he believed he was over the legal limit. He agreed to perform field sobriety exercises, but they had to be terminated for his safety, as Thomas was unable to stand without falling. Thomas was placed under arrest and transported to the Orange County DUI testing center.

Breath Test Operator Michael Rodriguez ("BTO Rodriguez") conducted the twenty-minute observation, and Officer Lawson read Thomas the implied consent warnings. Thomas submitted to the breath test, which resulted in readings of .325 and .310 BAC. Therefore, the

Department suspended Thomas' driving privilege.

Pursuant to section 322.2615, Florida Statutes, Thomas requested a formal review of his license suspension. On August 26, 2008, Hearing Officer Darrin Bowen held a formal review at which Thomas did not appear but was represented by counsel. Thomas moved to invalidate the suspension on four grounds: 1) the evidence does not support the finding that BTO Rodriguez had the authority to administer Thomas' breath test; 2) Thomas' arrest resulted from an unlawful traffic stop; 3) the Intoxilyzer used to test Thomas' breath is not properly approved and may not be listed on the "Conforming Products List," as required by Florida Administrative Code Rule 11D-8.006; and 4) Officer Lawson lacked the authority to read implied consent warnings or request a breath test because the test center is located outside of his territorial jurisdiction. The hearing officer reserved ruling on the first motion, concerning BTO Rodriguez's authority to administer the breath test, but he denied the other three motions. On August 27, 2008, the hearing officer entered an order denying the only remaining motion and sustaining the suspension of Thomas' driver's license.

Discussion of Law

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. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (citing 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 driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2008). 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 whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in [section] 316.193.

§ 322.2615(7)(a), Fla. Stat. (2008).

Thomas argues that the hearing officer's decision to sustain his license suspension was improper because it is not supported by competent, substantial evidence that he was lawfully stopped or arrested. He further argues that the hearing officer departed from the essential requirements of the law because Officer Lawson lacked the authority to read Thomas implied consent warnings and request that Thomas submit to a breath test. Finally, Thomas argues that the hearing officer's decision was not supported by competent, substantial evidence that BTO Rodriguez was authorized to administer Thomas' breath test. Conversely, the Department asserts that the hearing officer's decision to sustain Thomas' license suspension is supported by competent, substantial evidence and conformed to the essential requirements of the law.

Lawful Traffic Stop and DUI Arrest

In a license revocation proceeding pursuant to section 322.2615, Florida Statutes, findings of probable cause and lawful arrest may be based upon the written documents and reports generated by law enforcement officers. Dep't of Highway Safety v. Dean, 662 So. 2d

371, 372 (Fla. 5th DCA 1995) (citing § 322.2615(11), Fla. Stat. (1993)). "If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation issued." Ndow v. State, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (citing Bailey v. State, 319 So. 2d 22, 26 (Fla. 1975)). "[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." Id. (citing State, Dep't of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992)). When a motorist exhibits erratic driving, an odor of alcohol on the breath, glassy eyes, slurred speech, and he admits that he had too much to drink, these facts and circumstances are sufficient for a reasonable person to reach the conclusion that the observed individual was driving under the influence of alcohol, and thus they amount to probable cause for a DUI arrest. State, Dep't of Highway Safety & Motor Vehicles v. Whitley, 846 So. 2d 1163, 1165-1166 (Fla. 5th DCA 2003).

Officer Mainguth's sworn arrest report provided evidence to support the finding that he observed Thomas operating his vehicle in an unusual manner and was justified in stopping Thomas out of concern for the safety of the motoring public. Furthermore, Officer Lawson's charging affidavit provided evidence to support the finding that Thomas was unsteady on his feet, almost stumbled as he walked, had "red, watery, glassy eyes," had an odor of alcohol on his breath, and admitted to drinking enough alcohol to be over the legal limit. The hearing officer did not abuse his discretion in relying upon the officers' sworn statements. Therefore, we find that there is competent, substantial evidence to support the conclusion that Thomas was lawfully stopped and arrested for DUI.

Authority to Read Implied Consent Warnings and Request Submission to Breath Test

The law does not require that "implied consent warnings" be given within the arresting officer's territorial jurisdiction. Crawley v. State, Dep't of Highway Safety & Motor Vehicles, 3 Fla. L. Weekly Supp. 13a (Fla. 9th Cir. Ct. 1994) (citing Putt v. Dep't of Highway Safety & Motor Vehicles, 1 Fla. L. Weekly Supp. 255c (Fla. 9th Cir. Ct. 1991)). Furthermore, an arresting officer is authorized to request a breath, urine, or blood test as part of the officer's continuing investigation of a DUI offense that originated in the officer's territorial jurisdiction, even if the request is made at a DUI testing facility that is located outside of the officer's territorial jurisdiction. See Brown v. State, Dep't of Highway Safety & Motor Vehicles, 2 Fla. L. Weekly Supp. 135a (Fla. 9th Cir. Ct. 1993).

Thomas argues that the above stated rules of law should not be applied in the present case pursuant to the Fourth District Court of Appeal's decision in State v. Sills, 852 So. 2d 390 (Fla. 4th DCA 2003) (applying the holding in State v. Phoenix , 428 So. 2d 262 (Fla. 4th DCA 1982), approved, 455 So. 2d 1024 (Fla. 1984)). However, both Sills and Phoenix are substantially and materially different from the previously cited cases, as well as the present case. Sills and Phoenix were criminal prosecutions in which the defendants sought suppression of evidence under the exclusionary rule.[1]

The exclusionary rule should not be applied to administrative license suspension cases. Cf. Valdez v. Dep't of Revenue, 622 So. 2d 62 (Fla. 1st DCA 1993) (exclusionary rule did not apply in administrative proceeding to challenge tax assessment); State v. Scarlet, 800 So. 2d 220, 221 (Fla. 2001) ("The exclusionary rule . . . is incompatible with the traditionally flexible administrative procedures of parole revocation"); State v. Atkinson, 755 So. 2d 842, 844 (Fla.

[1] The exclusionary rule provides that evidence secured during an unlawful search or seizure, in violation of the Fourth Amendment of the United States Constitution, is subject to exclusion (i.e., suppression) in both federal and state criminal proceedings. 22 Michael E. Allen, West's Florida Practice Series, Criminal Procedure § 4:1 (2010).

5th DCA 2000) ("[T]he purpose of the statute providing for revocation of a driver's license upon conviction . . . for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender"); see also Nevers v. State, Dep't of Administration, 123 P.3d 958, 964 (Alaska 2005) (holding that the exclusionary rule is inapplicable to search and seizure violations in administrative driver's license proceedings). Therefore, we reject Thomas' argument that the holdings in Sills and Phoenix control in this matter.

Officer Lawson arrested Thomas within the Maitland Police Department's territorial jurisdiction, and the subject matter of Officer Lawson's investigation originated within his department's territorial jurisdiction. He then transported Thomas to the Orange County DUI testing center. The Maitland Police Department regularly uses this facility to conduct DUI testing in cooperation with the Orange County Sheriff's Department, a law enforcement agency within the territorial jurisdiction of which the facility is located. There, Officer Lawson read Thomas the implied consent warnings and requested Thomas' submission to the breath test, a test to which Thomas had already impliedly consented under Florida law. See § 316.1932, Fla. Stat. (2008). Therefore, we find that the hearing officer did not depart from the essential requirements of the law in approving Officer Lawson's authority to read the implied consent warnings and request Thomas' submission to the breath test.

Breath Test Operator's Valid and Current License

In this argument, Thomas invokes the third prong of the Court's standard of review. When applying the third prong of the standard of review, "the court should review the record to determine simply whether the [administrative agency's] decision is *supported* by competent, substantial evidence." G.B.V. Int'l, 787 So. 2d at 846 (emphasis in original). "[T]he circuit

court's task is to review the record for evidence that *supports* the agency's decision, not that *rebuts* it—for the court cannot reweigh evidence." Id. (emphasis in original).

In the Breath Alcohol Test Affidavit, BTO Rodriguez attested that he held a valid Breath Test Operator permit issued by the Florida Department of Law Enforcement. Furthermore, the affidavit demonstrates that BTO Rodriguez administered the test in accordance with chapter 11D-8, Florida Administrative Code. As stated above, the hearing officer is permitted to make findings of fact based upon written documents and reports generated by law enforcement officials. Dean, 662 So. 2d at 372. Therefore, we find that the hearing officer had before him competent, substantial evidence that BTO Rodriguez had a valid and current Breath Test Operator license and he administered the test in compliance with the Administrative Code.

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 the _13th___ day of _____May_____, 2010.

__/S/_____
BOB LEBLANC
Circuit Judge

_/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

_/S/_____
WALTER KOMANSKI
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, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **Jason Helfant, Esq., Department of Highway Safety and Motor Vehicles,** Post Office Box 540609, Lake Worth, Florida 33454 on the ___13th_____ day of _____May_____, 2010.

__/S/_____
Judicial Assistant