

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

ZACHARY MILLER,
Petitioner,

CASE NO.: 2009-CA-8606
WRIT NO.: 09-07

vs.

**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,
Donna Petty, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

James K. Fisher, Assistant General Counsel,
for Respondent.

Before POWELL, LUBET, MACKINNON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Zachary Miller 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 322.2615, Florida Statutes. This Court has jurisdiction pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. This Court has carefully

reviewed and considered Petitioner's petition and appendix, the Department's response, and Petitioner's reply.

On January 17, 2009, at approximately 10:08 p.m., Officer Easterbrook of the Winter Park Police Department responded to a hit and run "be-on-the-lookout" (BOLO) dispatch from the Winter Park Police Department, which originated from Officer Williams, also of the Winter Park Police Department. The location of the offense was reported to be within the city limits of Winter Park. The suspected vehicle was described as a silver Nissan pickup truck being followed by a white SUV. Shortly after receiving the second dispatch stating that the vehicle was traveling on Fairbanks Avenue, Officer Easterbrook, who was also on Fairbanks Avenue, observed a silver Nissan pickup truck shaking violently due to front end damage. After Officer Easterbrook made a u-turn, the white SUV changed lanes and Officer Easterbrook drove immediately behind the suspected vehicle until it stopped due to other police officers stopping traffic ahead.

Upon making contact with the driver, Petitioner, Officer Easterbrook detected a moderate odor of alcohol emitting from Petitioner's breath and observed Petitioner's slow, slurred speech, and unsteady movements. Based on Petitioner's poor performance on the field sobriety exercises, Petitioner was arrested and transported to the testing center. After being read the implied consent warnings, Petitioner refused to submit to a breath-alcohol test. As a result of Petitioner's refusal, the Department suspended his driving privileges. Petitioner requested and was granted a formal review hearing pursuant to section 322.2615, Florida Statutes.

On February 18, 2009, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on two grounds: (1) failure of the record to contain a refusal affidavit and (2) no probable cause to

stop and detain Petitioner. Petitioner also moved to strike the horizontal gaze nystagmus test as being scientifically unreliable. On February 27, 2009, the hearing officer entered an order denying Petitioner's motions to invalidate and granting Petitioner's motion to strike. The hearing officer sustained the suspension of Petitioner's driver's license finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; that Petitioner refused to submit to a breath-alcohol test after being requested to do so; and that Petitioner was told that if he refused to submit to such test his 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.

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).

Petitioner's one and only contention is that there existed no probable cause to stop Petitioner's vehicle; therefore, the hearing officer erred in denying Petitioner's motion to invalidate the suspension.

The stopping of a motorist is reasonable where an officer has probable cause to believe a traffic violation has occurred. *Hurd v. State*, 958 So. 2d 600, 602 (Fla. 4th DCA 2007). In determining whether an officer has probable cause, a court must look to the totality of the

circumstances. *Pye v. State*, 551 So. 2d 1237, 1238 (Fla. 1st DCA 1989). Factors to be considered when the stop is based on a BOLO report include: (1) the source of the BOLO information; (2) the amount of time since the offense; (3) the distance from the offense; (4) the specificity of the description of the suspect vehicle; (5) the behavior of the vehicle; and (6) anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge. *State v. Wise*, 603 So. 2d 61, 63 (Fla. 2d DCA 1992). Probable cause can be a conclusion drawn from reasonable inferences based upon established facts. *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995).

Contrary to Petitioner's argument, we conclude that it is of no legal significance whether it was Officer Easterbrook or another officer who directed Petitioner to pull over and get out of his vehicle. We further conclude that is also of no legal significance whether the other officers were in radio communication with Officer Easterbrook or why the other officers were stopping traffic. Officer Easterbrook continuously followed and immediately pulled behind Petitioner's vehicle when Petitioner was ordered to exit the vehicle. We find that Officer Easterbrook, based on the two radio dispatches from the Winter Park Police Department coupled with his own personal observations, had probable cause, before the stop occurred, to believe that Petitioner had committed the traffic offense of leaving the scene of an accident with property damage. Accordingly, we hold that Petitioner's stop and detention was lawful, the hearing officer afforded Petitioner due process, the hearing officer did not depart from the essential requirements of the law, and the hearing officer had competent substantial evidence to support her findings and decision.

