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

AARON KATZMAN,

Petitioner,

v.

CASE NO.: 2009-CA-10779-O
WRIT NO.: 09-30

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT

Respondent.
____/

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

Stuart I. Hyman, Esquire,
for Petitioner.

James K. Fisher, Esquire,
for Respondent.

Before STRICKLAND, LEBLANC, and KOMANSKI, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Aaron Katzman ("Katzman") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the "Department") "Final Order of License Suspension," sustaining the suspension of his driver's license pursuant to section 322.2616, Florida Statutes, for driving a motor vehicle with a breath-alcohol level of 0.02 or higher while under the age of twenty-one. This Court has jurisdiction pursuant to section

322.2616(14), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c).

On February 6, 2009, Officer Bryan Ricks ("Officer Ricks"), of the University of Central Florida Police Department, conducted a traffic stop on a vehicle operated by Katzman. In his Affidavit of Probable Cause, Officer Ricks attested that he stopped Katzman for "speeding 39 mph in a 25 mph zone." While speaking with Katzman, Officer Ricks could smell "the odor of alcohol impurities emanating from [Katzman's] face area," and Katzman admitted that he "had a few drinks earlier in the evening." Officer Ricks determined that Katzman was under the age of twenty-one by examining Katzman's Florida Driver License. Katzman submitted to Officer Ricks's request for a breath test, with results of 0.28 and 0.28 breath-alcohol level. Therefore, the Department suspended Katzman's driving privilege.

Pursuant to section 322.2616, Florida Statutes, Katzman requested a formal review of his license suspension. On March 5, 2009, Hearing Officer Mary Varnadore held a formal review at which Katzman appeared and was represented by counsel. At the hearing, Katzman moved to invalidate the license suspension on five grounds: 1) the record lacked evidence to support a suspension effective February 5, 2009; 2) Officer Ricks lacked probable cause to conduct the traffic stop; 3) the record lacked evidence that Katzman was in a motor vehicle; 4) the record lacked evidence that Katzman consumed any alcoholic beverages; and 5) the record lacked evidence that Officer Ricks determined Katzman was under twenty-one before requesting submission to the breath test. The hearing officer denied the first motion, regarding the effective date of the suspension, but she reserved ruling on the last four motions. On March 13, 2009, the hearing officer entered an order denying all remaining motions and sustaining the suspension of Katzman's driver's license.

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 a blood-alcohol or breath-alcohol level of 0.02 or higher while under the age of twenty-one, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2616(8), 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 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 had a blood-alcohol or breath-alcohol level of 0.02 or higher.

§ 322.2616(8)(a), Fla. Stat. (2008).

In his petition, Katzman argues that the hearing officer erred by denying his motion to invalidate the license suspension based on Officer Ricks's lack of probable cause to conduct the traffic stop. He argues that the record evidence fails to demonstrate specific articulable facts that establish how Officer Ricks determined that Katzman's vehicle was traveling at thirty-nine miles per hour. Conversely, the Department argues that a license suspension under section 322.2616, Florida Statutes, need not be incident to a lawful traffic stop.

While Officer Ricks did not need probable cause to stop Katzman's vehicle, the law required Officer Ricks to have a reasonable suspicion before conducting the stop. See Bryson v. State, Dep't of Highway Safety & Motor Vehicles, 11 Fla. L. Weekly Supp. 520a (Fla. 9th Cir. Ct. Feb. 17, 2004) (citing Dep't of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1351-52 (Fla. 2d DCA 1992)).[1] "The stop by police of an occupied automobile for a traffic violation constitutes a 'seizure' of 'persons' within the Fourth Amendment." Dep't of Highway Safety & Motor Vehicles v. Roberts, 938 So. 2d 513, 514 (Fla. 5th DCA 2006) (citing Whren v. U.S., 517 U.S. 806, 809-10 (1996)). "[T]o justify a warrantless stop, an officer must have an articulable, reasonable suspicion that a violation of the law has occurred." Id. (citing Brown v. State, 719 So. 2d 1243, 1245 (Fla. 5th DCA 1998)).

In Roberts, the Department chose to meet its burden of demonstrating reasonable suspicion for the traffic stop by relying solely upon the law enforcement officer's charging affidavit, which, in material part, stated: "[Observed the licensee] violate F.S.S. 316.187(1) by traveling at 71 mph in a 45 mph speed limit area. When I pulled up behind the [licensee] and attempted to pull him over he traveled for approximately another tenth of a mile before pulling over." Id. The court found that the affidavit provided "little or no specifics about the officer's vantage point when he reached the conclusion that [the licensee] was speeding." Id. at 515. Although the affidavit stated that the officer followed the licensee for one-tenth of a mile while attempting to stop him, the officer did not assert that the licensee was still speeding at that point or that the officer "pace-clocked"[2] the vehicle. Id. "Absent such an assertion, the duration of the

[1] See also Golden v. State, Dep't of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 590b (Fla. 9th Cir. Ct. Apr. 16, 2008), and Hill v. State, Dep't of Highway Safety & Motor Vehicles, 9 Fla. L. Weekly Supp. 287a (Fla. 9th Cir. Ct. Mar. 14, 2002), for two other decisions of the Ninth Judicial Circuit Court applying the reasonable suspicion standard to traffic stops in section 322.2616 cases.

[2] "When an officer 'pace-clocks' a motorist, the officer follows the motorist for a sufficient distance at the same speed and, using the speedometer on the police vehicle, judges the speed of the motorist." Roberts, 938 So. 2d at 515.

pursuit is not probative of speed." Id. Therefore, the court concluded that the officer lacked a reasonable suspicion. Id.

In the present case, the Department chose to rely solely upon Officer Ricks's Affidavit of Probable Cause to meet its burden of demonstrating reasonable suspicion for the traffic stop. The affidavit states, in material part: "I stoped [sic] Mr. Katzman for speeding 39 mph in a 25 mph zone." Officer Ricks's affidavit fails to mention his vantage point when he reached the conclusion that Katzman was speeding, and it fails to describe how Officer Ricks determined Katzman's speed. In fact, the affidavit fails to state whether Officer Ricks followed Katzman's vehicle for any distance or how he stopped Katzman. Officer Ricks's Affidavit of Probable Cause provides fewer and far less specific facts than the charging affidavit analyzed in Roberts. If the affidavit in Roberts failed to demonstrate an articulable reasonable suspicion, then *a fortiori*, Officer Ricks's affidavit in the present case is insufficient as well. Therefore, we find that the hearing officer's decision is not supported by competent substantial evidence that Officer Ricks had the requisite reasonable suspicion to conduct the traffic stop on Katzman.

Attorney's Fees and Court Costs

Katzman timely filed a Motion to Assess Attorney's Fees and Court Costs pursuant to Florida Rule of Appellate Procedure 9.400 and section 57.105, Florida Statutes. We do not find that the Department's argument was frivolous or made in bad faith, nor do we find that the Department or its attorney knew or should have known that its argument was not supported by the material facts or the law. Therefore, we deny Katzman's motion for attorney's fees.

Florida Rule of Appellate Procedure 9.400(a) provides, in material part: "Costs shall be taxed *by the lower tribunal* on motion served within 30 days after issuance of the mandate." (Emphasis added). Therefore, we deny Katzman's motion for court costs.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**; the hearing officer's "Findings of Fact, Conclusions of Law and Decision" is **QUASHED**; and the Petitioner's "Motion to Assess Attorney's Fees and Court Costs" is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _____30th_____ day of _____June_______________, 2010.

__/S/__________________________
STAN STRICKLAND
Circuit Judge

_/S/______________________________
BOB LEBLANC
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: **Stuart I. Hyman, Esq., Stuart I. Hyman, P.A.**, 1520 East Amelia Street, Orlando, Florida 32803 and **James K. Fisher, Esq., Department of Highway Safety and Motor Vehicles – Legal Office,** 133 South Semoran Boulevard, Suite A, Orlando, Florida 32807 on the ___30th_______ day of ___June_________________, 2010.

_/S/__________________________
Judicial Assistant