

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

JAISEN WILLIAMS,

Petitioner,

v.

**CASE NO.: 2009-CA-29617-O
WRIT NO.: 09-34**

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

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

James K. Fisher, Esquire,
for Respondent.

BEFORE LAUTEN, SHEA, MIHOK, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Jaisen Williams (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of her driver’s license for refusing to submit to the

breath-alcohol test. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

The charging affidavit of Trooper Jacob Vaughn with the Florida Highway Patrol states that on July 10, 2009, he was traveling southbound on SR 600 (Orlando Avenue), south of Webster Street, when he observed Petitioner's vehicle traveling northbound in the inside lane at a high rate of speed. He made an independent visual estimation of the speed of the vehicle to be approximately 50 to 55 mph where the posted speed limit in that area was 35 mph. He then activated the front antenna on his radar unit and received a solid audio Doppler tone that was consistent with the speed readout of 51 mph. The patrol speed indicated on the radar unit matched the speed indicated on his calibrated speedometer.

Upon determining the rate of speed, he turned around and pursued Petitioner. While following her, he observed her enter the outside left turn lane at the intersection with Lee Road. He caught up to Petitioner after she stopped at a red light signal. When the light turned green Petitioner made an extremely wide left turn and instead of turning into the outside westbound lane on Lee Road, she traveled towards the curb on the northwest corner of the intersection. Prior to striking the curb, Petitioner abruptly corrected to the left and entered the merging lane for traffic turning west on Lee Road from southbound Orlando Avenue. Prior to reaching the 7-Eleven convenience store at the corner of Lee Road and Lewis Drive, Trooper Vaughn initiated the traffic stop by activating the emergency blue lights on his marked patrol vehicle. Petitioner pulled into the parking lot of the 7-Eleven store and came to a stop in the handicapped parking space.

When Trooper Vaughn made contact with Petitioner, she stated that she pulled into the 7-Eleven due to problems with her contact lenses. When he asked her if she pulled over because of the blue lights, she looked blankly ahead and then flicked the headlights on her vehicle. Once Petitioner was able to get her contact lenses back in her eyes, Trooper Vaughn asked for her driver's license, proof of insurance, and registration. As she opened her wallet, her fingers fumbled having trouble grasping at the items in the wallet. It took four attempts for her to remove the driver's license from the sleeve. She retrieved her insurance card, but had to be reminded to provide the registration card which she was having difficulty locating.

Trooper Vaughn observed that Petitioner exhibited signs of impairment, including bloodshot and watery eyes, dilated pupils, breath that smelled of alcohol, and poor and sluggish coordination. She first denied that she had drank alcohol, but then made a statement that she had consumed one drink at about 5:00 pm or 6:00 pm and then ate dinner, but with no more alcohol. However, when Trooper Vaughn asked her what she had been drinking, she stated that she had two glasses of red wine. When he asked her if she was on any medication, she informed him that she was taking medications for depression.

Next, Trooper Vaughn asked Petitioner to perform field sobriety exercises. While performing the exercises she had trouble following instructions, raised her arms for balance, and swayed in a side to side manner. Trooper Vaughn then placed Petitioner under arrest and read her the implied consent warnings. He transported her to the breath

test center where she refused the breath-alcohol test. Accordingly, Petitioner's privilege to drive was suspended for one year.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on August 19, 2009. On August 20, 2009, the hearing officer entered a written order denying Petitioner's motion and sustaining her driver's license suspension for a period of one year. Petitioner now seeks certiorari review of this order.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a breath-alcohol test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting 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 controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended 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)(b), Fla. Stat. (2009).

In the Petition for Writ of Certiorari, Petitioner argues that (1) the Hearing Officer improperly refused to set aside the suspension based on the failure of the arresting officer, Trooper Vaughn, to comply with the Florida Highway Patrol's written policy concerning video and audio taping in violation of Petitioner's rights to due process of law; (2) no probable cause existed to stop Petitioner's vehicle for speeding; and (3) no probable cause or reasonable suspicion existed to require Petitioner to submit to field sobriety exercises and there was no probable cause for the arrest. Conversely, the Department argues that the hearing officer properly sustained the suspension where there was competent substantial evidence to support the hearing officer's decision.

Argument I - The Hearing Officer improperly refused to set aside the suspension based on the failure of the arresting officer, Trooper Vaughn, to comply with the Florida Highway Patrol's written policy concerning video and audio taping in violation of Petitioner's rights to due process of law:

Petitioner argues that Trooper Vaughn, as the arresting officer, failed to comply with the Florida Highway Patrol's written policy pertaining to its vehicles equipped with video recording devices. The purpose of the policy was to provide accurate documentation of events, review arrest procedures, review officer and suspect interaction, and enhance the officer's reports and recollection of evidence for testifying in court. Also, per the policy,

law enforcement officers were required to immediately report equipment failure to their supervisor and make arrangements for repairs.

Per Trooper Vaughn's testimony, he did not activate the video equipment prior to making the traffic stop because the audio portion of the equipment was malfunctioning. It was not until Trooper Vaughn turned on his blue lights to make the traffic stop that the video equipment was automatically turned on. Therefore, there was no video footage of Petitioner's driving behavior until Trooper Vaughn initiated the traffic stop. Further, the wireless audio portion of the equipment did not work at all. Although video footage was obtained when the process of the traffic stop began through the field sobriety exercises and arrest, there was no audio recording until Petitioner was placed inside the patrol vehicle.

Petitioner fails to present applicable legal authority or legal precedent via statutes, rules of procedure, or case law in support of her argument that the failure to follow FHP procedure justifies setting aside the suspension. While Petitioner cites several cases where the Courts have held that the arresting officer's failure to adhere to the written policies concerning video and audio taping violated the defendant's due process rights, these cases are not controlling and require a showing of bad faith by the officer.

This Court, finds persuasive the opinion in *State v. Betts*, 659 So. 2d 1137 (Fla. 5th DCA 1995) where the Fifth District Court of Appeal answered in the negative the certified question:

If there is an established police policy of videotaping field sobriety tests, is it a violation of defendant's rights if no tape is produced because of the mechanical failure of the video camera?

In *Betts*, the officer attempted to videotape the roadside sobriety test but the camera malfunctioned. Thus, no tape was created nor preserved. The Fifth District found that the failure to produce a tape was not an intentional policy decision and the equipment's failure to operate, without more, does not constitute a violation of the defendant's due process rights. However, the Fifth District did note that had the officer intentionally caused the malfunction in order to avoid the Department's policy of videotaping, a different result might have been required.

Upon review of the record in the instant case, there is no evidence that Trooper Vaughn intentionally caused the malfunction of the audio portion of the equipment in order to avoid the Florida Highway Patrol's policy of video and audio taping. Accordingly, this Court finds that this argument is without merit.

Argument II - No probable cause existed to stop Petitioner for speeding:

Petitioner argues that while Trooper Vaughn's report alleged a visual estimation of speed while traveling in the opposite direction, no facts were articulated as to the location of Trooper Vaughn at the time of his alleged observation nor the time period or distance over which he made the visual estimation. Trooper Vaughn was traveling in the opposite direction of Petitioner's vehicle, so Petitioner claims that the fact that his radar unit speed matched the speed indicated on his calibrated speedometer bore no relevance to the speed at which Petitioner's vehicle was traveling. Petitioner stresses that while Trooper Vaughn's vehicle may have been traveling at a patrol speed of 51 miles per hour as corroborated by his calibrated speedometer, there was no evidence that the speed of Petitioner's vehicle was ever recorded on the radar device. Lastly, Petitioner argues that

the merging lane for traffic turning west on Lee Road from southbound Orlando Avenue was lawfully available to her after making the left hand turn.

This Court finds that the hearing officer's finding that the stop was lawful was supported by competent substantial evidence in the record. To confirm Trooper Vaughn's visual observation that Petitioner was traveling in excess of the posted speed limit, he activated the front antenna on his radar unit and received a solid audio Doppler tone that was consistent with the speed readout of 51 mph. The patrol speed indicated on the radar unit matched the speed indicated on his calibrated speedometer. Accordingly, this Court finds that this argument is without merit.

Argument III - No probable cause or reasonable suspicion existed to require Petitioner to submit to field sobriety exercises and there was no probable cause for the arrest:

Petitioner argues that the evidence including Trooper Vaughn's testimony, his report, and the video tape fail to establish probable cause or reasonable suspicion to require Petitioner to submit to field sobriety exercises. Petitioner claims that the portion of her driving that was video recorded shows that she was driving in a normal fashion when she turned and parked in the parking lot at the 7-Eleven store. Petitioner also argues that during the traffic stop, she exited the vehicle and walked to the rear of her vehicle with no difficulty or impairment and there was nothing out of ordinary about her speech or speech pattern when the audio was finally activated after she was placed inside the patrol vehicle.

Trooper Vaughn's charging affidavit reveals that he noticed that Petitioner exhibited physical signs of impairment, including bloodshot and watery eyes, dilated pupils, breath that smelled of alcohol, trouble retrieving her driver's license and proof of

insurance and registration. Also, stated in the affidavit were Petitioner's inconsistent statements about how much alcohol she consumed and her ultimately admitting to drinking two glasses of wine. The affidavit also noted that when Petitioner performed the field sobriety exercises, she had trouble following instructions, raised her arms for balance, and swayed in a side to side manner.

This Court finds that there was competent substantial evidence to support the hearing officer's decisions that there was reasonable suspicion to require Petitioner to submit to field sobriety exercises and probable cause for the arrest. Accordingly, this Court finds that this argument is without merit.

Conclusion: This Court finds that procedural due process was followed; the essential requirements of law were followed; and the hearing officer's administrative findings and judgment were supported by competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED** and the hearing officer's Final Order of License Suspension is **AFFIRMED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _____ 11th _____ day of ___May_____, 2011.

_____/S/_____
FREDERICK J. LAUTEN
Circuit Court Judge

_____/S/_____
TIM SHEA
Circuit Court Judge

_____/S/_____
A. THOMAS MIHOK
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803 and to **James K. Fisher, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, on this _____11th_____ day of ___May_____, 2011.

_/_S/_ _____
Judicial Assistant