

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

SCOTT FORTUNE,
Petitioner,

v.

**CASE NO.: 2009-CA-17848-O
WRIT NO.: 09-65**

**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.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE EVANS, O’KANE, G. ADAMS, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Scott Fortune (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension.¹ Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of his driver’s license. The Court has jurisdiction under section 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.

¹ The Petition was filed with the Civil Clerk but was not forwarded to the Appellate Clerk as is normal procedure until March 2012. Therefore, the case was not assigned to an appellate panel to be timely reviewed until March 2012.

Findings of Fact

As gathered from the charging affidavit and testimony of Officer Ryan Quinn, and other related documents provided at the formal review hearing, the facts were as follows: On March 19, 2009, Officer Ryan Quinn of the Eatonville Police Department was traveling eastbound on Kennedy Boulevard through the intersection of Lake Destiny Drive in Orange County when he observed a truck operated by Petitioner sitting stationary facing westbound at the intersection. The light was a steady green, but the truck did not move. Upon further investigation, Officer Quinn observed Petitioner seated in the driver's seat with his head slumped over to the side towards the middle of the truck's cab. According to Officer Quinn, it appeared to him that Petitioner's eyes were closed. Based on his observations, Officer Quinn turned his marked patrol vehicle around, drove up behind Petitioner's truck, activated his lights, and chirped his siren to initiate a traffic stop. At that time, Petitioner then picked his head up and began to drive westbound through the intersection travelling two blocks on West Kennedy Boulevard where he pulled over and stopped.

Upon making contact with Petitioner, Officer Quinn asked him for his driver's license, registration, and proof of insurance. In response, Petitioner pulled out two cards from his pants pocket along with money. He shuffled the cards and money through his hands then stuffed the items between his legs, before placing his hands on the steering wheel. Officer Quinn asked him again for his driver's license and Petitioner again shuffled the items and placed them back between his legs. Officer Quinn then asked Petitioner where he was coming from. Petitioner responded that he was going home to Altamonte Springs. Officer Quinn asked him a second time where he was coming from and he stated at a very slow rate that he was coming from Maitland. Officer Quinn could smell a strong odor of alcoholic impurities emanating from

Petitioner. When asked if he had consumed alcoholic beverages and how much, Petitioner admitted to drinking 4 to 5 shots of alcohol and 1 to 2 beers within the last 3 to 4 hours prior to driving. Officer Quinn observed that Petitioner's eyes were glassy and his speech was very slow and slurred. Petitioner was then asked to exit the vehicle and when he did so, his gait was unsteady and he used his truck to stabilize himself.

Based on his training and experience, Officer Quinn had reason to believe that Petitioner was driving while under the influence. Officer Quinn then explained to Petitioner that he believed Petitioner was impaired. Officer Quinn asked Petitioner, for his safety, if he would be willing to submit to field sobriety exercises and Petitioner stated that he would not. Officer Quinn then placed Petitioner under arrest for DUI and transported him to the DUI Testing Center. Petitioner was read the Implied Consent Warning and was asked to submit to a breath-alcohol test. Petitioner refused to submit to the breath-alcohol test whereupon his privilege to operate a motor vehicle was suspended.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on April 30, 2009. On May 4, 2009, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this order.

Standard of Review

"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 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 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).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that there was no probable cause to stop Petitioner's vehicle, to require that Petitioner perform field sobriety exercises, nor to arrest Petitioner. Conversely, the Department argues that the hearing officer properly sustained the suspension of Petitioner's driver's license where there was competent and substantial evidence in the record to support his decision, the essential requirements of law were met, and Petitioner was afforded procedural due process.

Court's Analysis and Findings

The Court finds that a determination must be made as to whether competent substantial evidence existed that the traffic stop and arrest were lawful. In *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), the Fifth District Court of

Appeal held that a license suspension cannot be sustained under section 322.2615, Florida Statutes, if the licensee was not lawfully arrested.²

In the instant case, competent substantial evidence existed supporting Officer Quinn's decision to initiate a traffic stop including his observations that Petitioner's truck was sitting stationary at a green light for an extended amount of time and Petitioner was seated in the driver's seat with his head slumped over to the side towards the middle of the truck's cab appearing to have his eyes closed. Therefore, competent substantial evidence existed that Officer Quinn was concerned for the safety of Petitioner and any other persons Petitioner may come in contact with while driving. "The courts of this state 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." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992).

Further, upon making contact with Petitioner, Officer Quinn observed several signs of Petitioner's impairment that surfaced before he asked Petitioner to exit his vehicle and to perform the field sobriety exercises. The signs of impairment were: (1) When Petitioner was asked to produce his driver's license, proof of insurance, and registration, he shuffled his cards and money through his hands then stuffed the items between his legs and repeated this behavior again when asked a second time to produce the items; (2) Petitioner had difficulty answering questions as to where he was coming from; (3) Officer Quinn smelled a strong odor of alcoholic

² See *Dep't of Highway Safety & Motor Vehicles v. Hernandez and Dep't of Highway Safety & Motor Vehicles v. McLaughlin*, 74 So. 3d 1070 (Fla. 2011), where the Florida Supreme Court addressed both cases applying *Pelham* and ruled that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal is not incident to a lawful arrest and also ruled that the issue of whether the refusal was incident to a lawful arrest is within the allowable scope of review of the Department's hearing officer.

impurities emanating from Petitioner; (4) Petitioner admitted to consuming 4 to 5 shots of alcohol and 1 to 2 beers within the last 3 to 4 hours prior to driving; (5) Petitioner's eyes were glassy and his speech was very slow and slurred; and (6) When Petitioner exited his truck his gate was unsteady and he used his truck to stabilize himself. Accordingly, the totality of Officer Quinn's observations, including Petitioner's signs of impairment were sufficient factors to justify requesting that the Petitioner perform the field sobriety exercises and then to arrest him when he refused to perform the exercises.

Therefore, upon review of the hearing officer's order in conjunction with the charging affidavit, transcript from the formal review hearing, and the other documents in the court record, competent substantial evidence existed that the traffic stop and arrest were lawful in this case. Accordingly, this Court finds that Petitioner was provided due process of law and the hearing officer's decision to sustain Petitioner's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Scott Fortune's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 18th day of June, 2012.

/S/
JULIE H. O'KANE
Circuit Court Judge

/S/
ROBERT M. EVANS
Circuit Court Judge

/S/
GAIL A. ADAMS
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, Florida 32803 and **Kimberly A. Gibbs**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 18th day of June, 2012.

/S/ _____
Judicial Assistant