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

DEBORAH A. ROBINSON,

Petitioner,

v.

CASE NO.: 2011-CA-9403-O
WRIT NO.: 11-119

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,
Linda Labbe, Hearing Officer.

Laura K. Hargrove, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE BLACKWELL, SHEA, DAVIS, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Deborah A. Robinson ("Robinson") 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 suspension of her driver's license for refusing to submit to a breath test. This 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.

Findings of Fact

As gathered from the hearing officer's findings including the Arrest Affidavit, Affidavit of Refusal to Submit to Breath Test, video of the traffic stop, and other related documents submitted at the formal review hearing, the facts were as follows: On May 12, 2011, at approximately 11:30 pm, Deputy Christopher Gambrell with the Orange County Sheriff's Office was traveling west on Colonial Drive when he observed a truck make an illegal left turn from a parking lot on the eastbound side of Colonial Drive going left onto westbound Colonial Drive. Deputy Gambrell then caught up to the vehicle and initiated a traffic stop.

There were two occupants in the vehicle and the driver was identified as Robinson. Deputy Gambrell informed Robinson why she was stopped and smelled the odor of alcohol impurities coming from the vehicle. He observed that Robinson wore a bar wristband and her eyes were glassy. She handed the deputy an expired registration. Deputy Gambrell noted that Robinson spoke with slurred speech. He then asked Robinson to exit the vehicle with her registration. She complied with the request, but instead, handed over the registration for a trailer. Robinson then stated that she had the vehicle registration somewhere in the truck. Deputy Gambrell took note that Robinson's speech continued to be slurred and she had an odor of alcohol coming from her as she spoke. When asked if she had been drinking, Robinson admitted to consuming three beers.

Deputy Gambrell asked Robinson to submit to field sobriety exercises and she refused. The deputy advised Robinson that if she refused he could arrest her based on his observations, but she still refused to perform the exercises. Based on his training, experience, observations of Robinson, and her refusal to perform the field sobriety exercises, Deputy Gambrell placed Robinson under arrest for DUI. She was transported to the DUI Testing Center where the 20

minute observation was conducted and the implied consent warnings were read to Robinson. Robinson refused to submit to the breath test and her license was suspended. She was issued citations for DUI and for making an improper left turn.

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. (2011).

Arguments

In the Petition for Writ of Certiorari, Robinson argues that the hearing officer's order is not supported by competent substantial evidence and does not comport with the essential requirements of the law because the hearing officer denied her objections and motions to invalidate the suspension that were based on: 1) the improper jurat on the Affidavit of Refusal to Submit to Breath Test and Arrest Affidavit; (2) the improper stop of her vehicle; 3) no reasonable suspicion to request that she perform the field sobriety exercises; and 4) no probable cause to arrest or request her to submit to the breath test.

Conversely, the Department argues that: (1) The Affidavit of Refusal to Submit to Breath Test and Arrest Affidavit were properly executed and properly admitted and considered by the hearing officer at the formal review hearing; 2) The Department's order is supported by competent substantial evidence that the stop of Robinson's vehicle was lawful; and 3) The Department's order is supported by competent substantial evidence, does comport with the substantial requirements of the law, and did not result in a denial of due process.

Analysis and Findings

Argument I - the Affidavits

Robinson argues that the Affidavit of Refusal to Submit to Breath Test and Arrest Affidavit are defective because both documents lack the written declaration stating "Under penalties of perjury, I declare that I have read the foregoing document and that the facts stated in it are true." Therefore, Robinson claims that the Affidavits were not properly attested to as required by section 92.525, Florida Statutes.

Subsections 92.525(1), (2), and (4), Florida Statutes (2011), address the verification of documents and perjury by false written declaration, as follows:

(1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:

(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; **or**

(b) By the signing of the written declaration prescribed in subsection (2). [Emphasis added]

(2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

(4) As used in this section:

(a) The term "administrative agency" means any department or agency of the state or any county, municipality, special district, or other political subdivision.

(b) The term "document" means any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.

(c) The requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.

Accordingly, from a plain reading of the statute, in order to be valid, the Affidavits at issue could be either: a) sworn to under oath or affirmation before an officer authorized to administer oaths; or b) be in the form of a written declaration containing the written language set forth in the statute. Therefore, an affidavit does not need to comply with both subsections (2)(a) and (b) of the statute in order to be valid. Only compliance with one subsection is required. In the instant matter, both the Arrest Affidavit and the Refusal Affidavit indicate that they were sworn to under oath as required by section 92.252(1)(a), Florida Statutes.

In support of her argument, Robinson cites *Hill v. State of Florida, Department of Highway Safety and Motor Vehicles*, 15 Fla. Law Weekly Supp. 11a (Fla. 9th Cir. Ct.2007). However, *Hill* is distinguishable from the instant case as follows: In *Hill*, at the formal review hearing, the officer who notarized the affidavit testified and admitted that he did not administer an oath to the arresting officer who executed the affidavit. Based upon this flaw, the Court in *Hill* held that the affidavit was not admissible under subsection 92.252(1)(a), Florida Statutes. The Court then examined whether the charging affidavit might be admissible under subsection 92.252(1)(b), Florida Statutes, as a written statement and held that because the affidavit did not contain any of the language required by section 92.252(2), Florida Statutes, it was not a written statement and was therefore inadmissible under that subsection as well.

In the instant case, Deputy Gambrell's signature and printed name are located in the Arrest Affidavit, under the portion stating "I swear or affirm the above statements are correct and true" and the notary seal is complete and executed. Further, in the Refusal Affidavit, the swear/affirm language in located in the top portion after Deputy Gambrell's printed name and his signature is located below the sworn/affirmed statement along with the notary seal that again is complete and executed. Lastly, unlike in *Hill*, neither Officer Gambrell nor Osvaldo Caner (the Notary who administered the oath and notarized the forms) testified at the hearing and there was no other evidence that the Arrest and Refusal Affidavits were not properly executed in front of an officer authorized to administer oaths.

Accordingly, Robinson's argument fails as neither the Arrest Affidavit or the Refusal Affidavit were required to comply with requirements of section 92.252(1)(b), Florida Statutes, since they were in compliance with section 92.252(1)(a), Florida Statutes. *See Pearson v. Dep't of Highway Safety & Motor Vehicles*, 11 Fla. L. Weekly Supp. 521a (Fla. 9th Cir. Ct. 2004);

Holland v. Dep't of Highway Safety & Motor Vehicles, 13 Fla. L. Weekly Supp. 23a (Fla. 9th Cir. Ct. 2005).

Argument II – the Stop

Robinson argues that the traffic stop was illegal because Deputy Gambrell did not have reasonable suspicion or probable cause to believe that a traffic citation had been committed necessary to justify the stop of her vehicle. She bases this argument on the fact that the "Do Not Enter" sign was not mounted on the right side of the roadway, facing traffic that might enter the roadway or ramp in the wrong direction per traffic rule, section 2B.34 in the U.S. Dep't of Transportation, Federal Highway Administration's Manual on Uniform Traffic Control Devices.

This issue was raised at the formal review hearing and the hearing officer considered the legality of the stop of Robinson's vehicle. Robinson also testified at the hearing. Upon hearing Robinson's testimony and reviewing the photos submitted by Robinson, the hearing officer did not find Robinson's testimony persuasive and ruled that based on a preponderance of the evidence, Robinson did make an illegal left turn in violation of the two posted signs. As the basis for her ruling, she found that in addition to the signs: 1) There was an angled concrete median separation that allowed westbound traffic on Colonial Drive to make a left at the break in the median or cross eastbound Colonial Drive and 2) The same concrete median was angled so that eastbound traffic was allowed to make a left turn to cross westbound Colonial Drive, but Robinson's vehicle was prohibited from turning left to cross eastbound traffic to go westbound onto Colonial Drive.

From review of the photos admitted into evidence at the formal review hearing, there was a "Do Not Enter" and a "One Way" sign mounted in the concrete median separating eastbound and westbound Colonial Drive. From the parking lot exit where Robinson pulled out of to make

the left turn, the signs were located to the left facing the parking lot exit. While Robinson may have a valid point as to the location of the "Do Not Enter" sign, the Department correctly points out in its Response that Deputy Gambrell had more than ample reason to stop her based upon the objective test established by *Whren v. U.S.,* 517 U.S. 806 (1996) (holding that as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred).

Deputy Gambrell observed Robinson's vehicle make an illegal left turn onto eastbound Colonial Drive travelling against the one-way posted signs in order to turn left onto westbound Colonial Drive. The Arrest Affidavit provided competent substantial evidence for the hearing officer to conclude that Deputy Gambrell had reasonable suspicion that Robinson made the improper left turn and committed a traffic violation under subsection 316.151(1)(b), Florida Statutes, or possibly committed violations under subsections 316.074(1), .081(3), .088(2), .090(2), Florida Statutes, that include failure to obey a traffic control device; unlawful crossing of a median strip; unlawful driving on the left side of the roadway; or unlawful driving on one way street. A violation of any of those statutes would be sufficient to justify the stop a vehicle under *Whren*, even where the driver was not actually cited for a violation of these statutes. *See Department of Highway Safety and Motor Vehicles v. Favino,* 667 So.2d 305, 309 (Fla. 1st DCA 1995) (holding that probable cause exists where the facts and circumstances as analyzed from the officer's knowledge, special training, practical experience, and of which he has reasonably trustworthy information, are sufficient for a reasonable person to reach the conclusion that an offense has been committed).

Accordingly, in order to have a valid stop for driving under the influence, the law enforcement officer need only possess a well-founded, reasonable suspicion based upon

objective, specific, articulable facts that a person detained in the stop of a vehicle has committed, is committing, or is about to commit a violation of the law. *See Terry v, Ohio,* 392 U.S.1 (1968); *State v. Carrillo,* 506 So. 2d 495 (Fla. 5th DCA 1987). Lastly, as the Second District held in *Dep't of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2nd DCA 1992), courts recognize 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. Thus, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop.

Argument III - the Field Sobriety Exercises

Robinson argues that Deputy Gambrell did not have an articulable suspicion of criminal activity necessary to require that she submit to the field sobriety exercises based solely on the odor of alcohol when she spoke. At the hearing, Robinson contended that her speech was not slurred as evidenced by the video of the stop. The hearing officer upon considering Robinson's argument and reviewing the video of the stop concluded that based upon the record evidence, Deputy Gambrell did have reasonable suspicion and probable cause to conduct a DUI investigation of Robinson as he observed numerous indicators of impairment prior to requesting that she perform the field sobriety exercises.

From review of the Arrest Affidavit, the other signs of impairment in addition to the odor of alcohol exhibited by Robinson were slurred speech, glassy eyes, and her admission to drinking alcohol as confirmed in the video of the stop where she stated that she drank three beers. The hearing officer as the trier of fact was in the best position to review and weigh the evidence including the video of the stop in order to determine whether Deputy Gambrell had ample

reasonable suspicion to believe that Robinson was driving a motor vehicle while under the influence of alcohol and to request that she perform the field sobriety exercises.

"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). Accordingly, the Arrest Affidavit provided competent substantial evidence for the hearing officer to conclude that Deputy Gambrell was justified in requesting that Robinson perform the exercises. *See Carder v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 547a (Fla. 9th Cir.Ct.2007); *Fewell v. State*, 14 Fla. L. Weekly Supp. 704a (Fla. 9th Cir.Ct.2007).

Secondly, Robinson also argues that Deputy Gambrell did not advise her of the adverse consequences for not performing the exercises. However, in the Arrest Affidavit, Deputy Gambrell stated: "I then asked Robinson if she would submit to the Field Sobriety Exercises and she replied "no". I informed Robinson that if she refused I could arrest her for DUI based on my observations. Robinson still refused to submit to the FSE's." Accordingly this argument lacks merit.

Argument IV- Probable Cause for Arrest and Breath Test

Robinson argues that Deputy Gambrell did not have probable cause to arrest her based on the totality of the circumstances stated by the deputy. Therefore, she concludes that the request to submit to the breath test was unlawful. As discussed above, the Arrest Affidavit provided competent substantial evidence for the hearing officer to conclude that Deputy Gambrell developed probable cause to believe that Robinson was operating a motor vehicle while under

the influence of alcohol to the extent that her normal faculties were impaired and thus, was sufficient to arrest her for DUI and to request that she submit to a breath test.

Conclusion

In conclusion, Robinson was provided due process of law and the hearing officer's decision to sustain her license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Deborah A. Robinson's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 26th day of March, 2013.

/S/__________________________
ALICE L. BLACKWELL
Circuit Court Judge

/S/__________________________
TIM SHEA
Circuit Court Judge

/S/__________________________
JENIFER M. DAVIS
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Laura K. Hargrove, Esquire,** Gause & Hargrove, PLLC, 229 E. Main Street, Tavares, FL 32778, Lhargrove@ghlaw.com and to **Richard M. Coln, Assistant General Counsel,** Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, richardcoln@flhsmv.gov on this 26th day of March, 2013.

/S/__________________________
Judicial Assistant