

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

ALEXANDER WESTBY,

Petitioner,

v.

CASE NO.: 2011-CA-2928

WRIT NO.: 11-23

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

Petition for Writ of Certiorari.

William R. Ponall, Esquire and
Michael J. Snure, Esquire
for Petitioner.

Richard M. Coln, Assistant General Counsel
for Respondent.

BEFORE ARNOLD, O’KANE, WHITEHEAD, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Alexander Westby (“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 suspension of his driver’s license. 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 arrest affidavit, testimony, and the hearing officer's findings of fact, on December 24, 2010, Deputy Robert Knight of the Orange County Sheriff's Office observed a vehicle stopped at a traffic light approximately twenty feet past the stop line and blocking the crosswalk or intersection at Conroy Windermere and Turkey Lake Road in violation of section 316.2061, Florida Statutes. Deputy Knight then observed the vehicle slowly accelerate from the stationary position and drift over the center lane line four to six times, and at times driving with the right side tires outside the white solid lane line.

Concerned that the driver may be under the influence and concerned for public safety, Deputy Knight initiated a traffic stop. When he made contact with Petitioner who was the driver, he smelled the strong smell of an alcoholic beverage emanating from Petitioner's vehicle.

Deputy Knight then called for backup. Deputy Knight also provided a sworn statement in the arrest packet.

Approximately ten minutes after Deputy Knight called for backup, Deputy Brandon Mattson arrived on the scene in response to the backup call. Deputy Knight informed Deputy Mattson of the observations he made concerning the driving pattern. Upon making contact with Petitioner, Deputy Mattson smelled the odor of alcohol coming from the vehicle and asked Petitioner to step out of the vehicle. Deputy Mattson observed that Petitioner had difficulty maintaining his balance as he walked and that his speech was slurred. He also observed that Petitioner's eyes were bloodshot, red, and glassy. Deputy Mattson then asked Petitioner to perform field sobriety exercises. Petitioner agreed to perform the field sobriety exercises and he performed them poorly.

Based on the totality of the circumstances, Deputy Mattson placed Petitioner under arrest for driving under the influence. Petitioner agreed to submit to the breath test and the results were .170 and .163. Lastly, stated in Deputy Mattson's arrest affidavit, (although not stated in the hearing officer's findings of fact portion of his order), when Deputy Mattson conducted the inventory search of Petitioner's vehicle, he found an open can of beer; a cup in the console that contained a dark colored liquid that smelled of alcohol; and an open bottle of vodka in the back seat floorboard.

Petitioner's privilege to operate a motor vehicle was suspended for driving with an unlawful blood alcohol level. Petitioner then requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on January 25, 2011. On February 3, 2011, 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." *Dept. 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. In cases where the individual's license is suspended for an unlawful breath-alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2010).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's decision to sustain his license suspension was not supported by competent substantial evidence that he was lawfully detained following his initial traffic stop.

Conversely, the Department argues the hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain the suspension of Petitioner's license and he properly resolved each of the statutory issues against Petitioner, including whether or not Petitioner was lawfully stopped and detained.

Court's Analysis and Findings

The sworn statement from Deputy Knight included in Deputy Mattson's arrest affidavit was among the evidence from the formal review hearing that was considered by the hearing officer. In Deputy Knight's statement he describes in detail the basis for making the traffic stop including his observations of Petitioner's erratic driving pattern. He further states that Petitioner's erratic driving pattern caused him to believe that Petitioner may have been operating his vehicle while under the influence of alcohol and therefore, he feared that Petitioner may be a danger to other motorists. Also, in the arrest affidavit and testimony at the formal review hearing, Deputy Mattson stated that when he arrived at the scene, Deputy

Knight informed him that he had smelled the strong odor of an alcoholic beverage emanating from Petitioner's vehicle.

Unlike the cases presented by Petitioner, in the instant case he was not stopped for an unrelated traffic offense, but instead, he was stopped and detained based upon Deputy Knight's reasonable suspicion that he was driving under the influence of alcohol. Deputy Mattson was called to the scene to assist Deputy Knight with the investigation of Petitioner for DUI for which reasonable suspicion had already been established. Therefore, the detention of Petitioner for ten minutes until backup arrived to assist in the investigation was reasonable and lawful. *See State v. Taylor*, 648 So. 2d 701 (Fla. 1995) (holding that law enforcement may temporarily detain a driver for a DUI investigation based upon a reasonable suspicion and the purpose of such investigation is to determine whether probable cause exists for a DUI arrest); *see also Andrews v. State*, 13 Fla. L. Weekly Supp. 1164a (Fla. 6th Cir. Ct. October 5, 2006) (holding that the evidence was sufficient to justify further detention of defendant/appellant where the officer had reasonable suspicion that he was driving under the influence and ruling that the officer was entitled to further investigation to determine whether or not probable cause existed for the arrest).

In the instant case, Petitioner does not cite, nor has this Court found, any case law holding that a delay of ten minutes for a backup officer to arrive and assist with a DUI investigation is unreasonable or unlawful. Also, among the cases cited by Petitioner are cases where the driver was not observed driving erratically or unusual unlike in the instant case.

In conclusion, Deputy Mattson's arrest affidavit, Deputy Knight's sworn statement, and the testimony provided by Deputy Mattson at the formal review hearing provides competent substantial evidence that 1) Petitioner was lawfully stopped for suspicion of driving under the influence; 2) detaining Petitioner for the DUI investigation was lawful; and 3) probable cause existed to arrest Petitioner for DUI. *Dep't of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163 (Fla. 5th DCA 2003).

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, Alexander Westby's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this

 1st day of February , 2012.

 /S/
C. JEFFERY ARNOLD
Circuit Court Judge

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

 /S/
REGINALD K. WHITEHEAD
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 **William R. Ponall, Esquire and Michael J. Snure, Esquire**, Kirkconnell, Lindsey, Snure and Ponall, P.A., P.O. Box 2728, Winter Park, Florida 32790 and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, Florida 32857, on this 1st day of February , 2012.

 /S/
Judicial Assistant