

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

TED PIZIO,

Petitioner,

v.

CASE NO.: 2011-CA-12994-O

WRIT NO.: 11-85

**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,
Chisara Okehi, Hearing Officer.

Thomas B. Feiter, Esquire,
for Petitioner.

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

BEFORE HIGBEE, WALLIS, JOHNSON, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Ted Pizio (“Pizio”), 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 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 testimony, Arrest Affidavit, Sworn Statement, and other related documents provided at the formal review hearing held on September 2, 2011, the facts are summarized as follows: On June 26, 2011 at approximately 4:27 a.m., Sergeant James Parker with the Orlando Police Department was on patrol and observed a vehicle stopped along the curb side, not moving in the northbound lane of travel on John Young Parkway. The vehicle did not have any hazard lights flashing. The vehicle then began to move slowly and reached the intersection at Columbia Street where the light was green and remained stopped at the green light for approximately two minutes. The vehicle then progressed to the next intersection and stopped in the left turn lane. When the light cycled to green the driver made a U-turn, drove over the curb traveling around twenty five miles per hour. Sergeant Parker then initiated a traffic stop and the driver was identified as Pizio. Sergeant Parker observed that Pizio appeared to be lethargic and had glassy eyes. Sergeant Parker then began issuing Pizio a traffic citation for careless driving and Officer Brent Fellows was called to the scene to conduct a DUI investigation.

When Officer Fellows arrived at the scene Sergeant Parker relayed to him his observations of Pizio's driving pattern and signs of impairment. When Officer Fellows made contact with Pizio, the sole occupant, he smelled the odor of alcohol impurities coming from the vehicle and noticed that Pizio's speech was slurred and thick tongued. At that point, Sergeant Parker completed the traffic citation paperwork and asked Pizio to exit the vehicle to sign the citation. Officer Fellows observed that Pizio exited the vehicle in an unsteady manner and stumbled to his left toward the vehicle. While standing in front of Sergeant Parker, Officer Fellows observed Pizio swaying in a slight orbital and front to back manner.

When Sergeant Parker finished explaining the citation to Pizio, Officer Fellows informed Pizio that the traffic stop had been concluded and based on Sergeant Parker's and his observations, training, and experience, he believed that Pizio was under the influence of alcohol and or drugs and he was going to conduct a DUI investigation. While speaking with Pizio, Officer Fellows detected a distinct odor of alcohol impurities coming from Pizio's breath and again noticed Pizio swayed in an orbital and front to back manner. Officer Fellows also observed that Pizio's eyes were red, bloodshot, and watery and his speech was slurred and thick tongued. At that point, Officer Fellows asked Pizio if he would complete the field sobriety exercises and he agreed.

In the Arrest Affidavit, Officer Fellows noted in detail the difficulty Pizio had with performing the field sobriety exercises including failing to follow instructions for several of the exercises, failure to maintain his balance, raising his arms for balance, stepping off the line several times, stumbling and pausing during the turn exercise, hopping, and failing to count out loud as instructed. Sergeant Parker also noted in his Sworn Statement that during the DUI investigation he was able to see Pizio having difficulty maintaining his balance while standing and performing the field sobriety exercises.

Based on Pizio's driving pattern, Officer Fellows' personal observations, training, experience, and Pizio's poor performance of the field sobriety exercises, Pizio was placed under arrest for DUI and transported to the DUI Center where he was observed for twenty minutes by Officer Fellows and the DUI Technician, read the Implied Consent Warning, and was requested to submit to a breath test. Pizio refused to submit to the breath test and his driver's license was suspended for a period of one year.

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). “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 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, blood, or urine 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, Pizio argues that the hearing officer erred in sustaining the suspension of his driver's license because the stop of the vehicle was unlawful as Sergeant Parker did not observe him commit any traffic infractions nor develop reasonable suspicion that he was intoxicated or impaired. Specifically, Pizio argues that from Sergeant Parker's testimony and the Arrest Affidavit, the stop of Petitioner's vehicle was conducted solely because he hit a curb. He argues that based on Sergeant Parker's testimony, the area where he hit the curb was mostly wooded with very little traffic. Therefore, he claims that his driving pattern and hitting the curb did not affect any other traffic and did not constitute a danger to him, others or property and thus, he did not commit a careless driving infraction. Further, Pizio argues that, the evidence obtained subsequent to this unlawful stop including the officers' observations, the observations of the Breath Technician, any video of him, and his refusal must be suppressed as being fruit of the poisonous tree. Pizio also seeks attorney's fees and costs.

Conversely, the Department argues that the hearing officer adhered to the essential requirements of the law, afforded Pizio proper due process, and competent substantial evidence in the record supports the hearing officer's decision sustaining the license suspension.

Analysis

The Stop

Section 316.1925, Florida Statutes (2011), addresses careless driving as follows:

- (1) Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances, so as not to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.
- (2) Any person who violates this section shall be cited for a moving violation, punishable as provided in chapter 318.

From a plain meaning of the statute, a person shall drive in a careful and prudent manner so as not to endanger the life, limb, or property of any person. It is reasonable to conclude that in this case any person would include Pizio himself regardless of whether his driving affected in other persons or property. Further, “the construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight, and the court generally will not depart therefrom except for the most cogent reasons and unless clearly erroneous.” *Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585, 587 (Fla. 1968).

The testimony and Sworn Statement from Sergeant Parker included his detailed observations of Pizio’s driving pattern that: 1) the vehicle was stopped fifty to seventy five yards south of the intersection; 2) the vehicle then began moving forward and stopped again when the light was still green and remained stopped at the green light for two minutes; and 3) the vehicle hit the curb when making the U-turn where there was plenty of space to make the turn without hitting the curb. Accordingly, it was reasonable for the hearing officer to find that Sergeant Parker was justified in initiating the traffic stop having reasonable suspicion that Pizio’s driving pattern was erratic and sufficiently constituted careless driving.

In addition, notwithstanding whether Pizio committed a careless driving infraction, a person’s driving pattern does not have to rise to the level of a traffic infraction to justify a stop. “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); *See Ndow v. State of Florida*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (holding that if a police officer observes a motor vehicle operating in an unusual manner, there

may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued and in determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances). Also, while Sergeant Parker's Sworn Statement did not specifically state safety concerns for initiating the traffic stop, he did testify at the hearing that due to Pizio's driving pattern he could have had a medical problem and was concerned for his safety.

Accordingly, competent substantial evidence existed due to Pizio's erratic driving pattern for the hearing officer to conclude that Sergeant Parker had reasonable suspicion to make the stop based on careless driving and/or a legitimate concern for the safety of Pizio as well as for the safety of any other persons Pizio could come in contact with while driving.

Evidence obtained from the Stop, Detainment, and Arrest of Pizio

Pizio also argues that the evidence obtained from the stop and thereafter should have been suppressed. As discussed above, Sergeant Parker lawfully stopped Pizio, therefore, the evidence leading up to the stop was gathered lawfully. Second, the totality of Sergeant Parker's and Officer Fellows' observations provided competent substantial evidence for the hearing officer to conclude that the detainment of Pizio for a DUI investigation, including the field sobriety exercises, was lawful. The observations included: 1) Pizio's erratic driving pattern; 2) his lethargic appearance; 3) his red, bloodshot, and glassy/watery eyes; 4) the odor of alcohol impurities coming from the vehicle and from his breath; 5) his slurred and thick tongued speech; 6) his exiting the vehicle in an unsteady manner and stumbling to his left toward the vehicle; and 7) his swaying in a slight orbital and front to back manner. Accordingly, because the detainment was lawful, the evidence obtained from the detainment was lawful.

Lastly, Pizio's erratic driving pattern, signs of impairment combined with his poor performance of the field sobriety exercises provided competent substantial evidence for the hearing officer to find that Officer Fellows had probable cause to believe that Pizio was driving or in actual physical control of a motor vehicle while under the influence of alcohol. Accordingly, the evidence gathered upon Pizio's arrest and thereafter, including the evidence from the observations of the Breath Technician, any video of him, and the Affidavit of Refusal to Submit to Breath Test were obtained lawfully. "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Conclusion

Accordingly, this Court finds that Pizio was provided due process of law and the hearing officer's decision to sustain his 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, Ted Pizio's Petition for Writ of Certiorari is **DENIED** and his request for attorney's fees and costs is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 1st day of May, 2013.

/S/ _____
HEATHER L. HIGBEE
Circuit Court Judge

/S/ _____
F. RAND WALLIS
Circuit Court Judge

/S/ _____
ANTHONY H. JOHNSON
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Thomas B. Feiter, Esquire**, The Fighter Law Firm, P.A., 1100 E. Robinson Street, Orlando, Florida 32801 and Payas, Payas & Payas, LLP, 1018 E. Robinson Street, Orlando Florida 32801¹ and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kimgibbs@flhsmv.gov on this 7th day of May, 2013.

/S/ _____

Judicial Assistant

¹ Certificate of Service includes second address for attorney, Thomas Feiter that was stated in the Notice of Filing of the amended appendix dated December 22, 2011, although according to The Florida Bar Directory Mr. Feiter's address is still at the first location.