

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

MARK WHITE,

Petitioner,

v.

**CASE NO.: 2012-CA-4158-O
WRIT NO.: 12-19**

**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.

Mark Lippman, Esquire and Danielle M. Harris, Esquire,
for Petitioner.

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

BEFORE ARNOLD, MCDONALD, LAUTEN, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Mark White (“White”), 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 from Officer Brent Fellows of the Orlando Police Department along with the ICJIS Arrest Affidavit, sworn statements, and other related documents provided at the formal review hearing held on February 7, 2012, the facts were as follows: On January 6, 2012, at 11:02 p.m., Officer Fellows responded to the scene of a crash to assist Officer Elizabeth English and Officer Frank Sikos. Officer Fellows met with Officer Sikos and witness Lauren Vernon who both provided sworn statements. Ms. Vernon stated that she was driving on Edgewater Drive when she saw a vehicle drive across the center median and continue across into eastbound traffic on Maury Road. The vehicle then left the roadway, drove up onto the sidewalk and continued on crashing into a tree. Ms. Vernon ran to the driver to see if he was okay. The driver exited the vehicle and fell into the bushes. Ms. Vernon then called for an ambulance. She identified the man the police arrested as the driver of the vehicle involved in the crash.

Officer Sikos stated he was first on scene and observed the man, identified as Mark White, standing beside the vehicle. White had difficulty standing, holding onto the railing to keep from falling. When asked for his license, registration and insurance, White shuffled through his wallet passing his license several times and Officer Sikos had to point it out to him. White's registration and insurance were in the vehicle. The vehicle was locked and White started digging through his pockets. Officer Fellows observed Officer English conducting the crash investigation and attempting to talk to White about the crash. White was unable to answer simple questions. White's speech was mumbled and slurred. Officer Fellows smelled the distinct odor of alcohol

impurities coming from White's breath. Officer English completed her crash investigation finding White at fault. The vehicle was registered and insured under White's name.

Officer Fellows then informed White that he was conducting a criminal DUI investigation. Officer Fellows read the Miranda rights to White who then invoked his rights. Officer Fellows asked White pre-screening medical questions. White replied that he had no injuries or medical issues. Officer Fellows continued to smell the odor of alcohol impurities coming from White's breath. White's balance was extremely unsteady, as shown on the video provided. When he tried to walk, he lost his balance, staggering and stumbling to the point he had to be caught and assisted with walking. Due to White's inability to stand or walk on his own without assistance, Officer Fellows was concerned for White's safety and determined that field sobriety exercises could not be done.

Based on the crash, his observations, training and experience, Officer Fellows determined that White was driving while under the influence to the extent his normal faculties were impaired and placed White under arrest for DUI. During transport to the DUI center, White fell over. Officer White sat him back up and applied the lap and shoulder belt. White then vomited and passed out. Officer Fellows had to assist White while walking into the DUI center where the twenty minute observation was conducted and the Implied Consent Warnings were read. White refused to take the breath test. Officer Fellows then issued White a notice of license suspension for refusing to submit to the breath test.

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. (2012).

Arguments

In the Petition for Writ of Certiorari, White argues that the hearing officer's decision to uphold his license suspension departed from the essential requirements of the law and was not supported by competent substantial evidence because: 1) the documentary evidence showed that he was violently ill during the investigation and during the subsequent twenty minute observation and 2) the auto body report showed that the crash was due to equipment failure. Conversely, the Department argues the hearing officer's order sustaining White's suspension conformed to the essential requirements of the law and was supported by competent substantial evidence in the record.

Analysis and Findings

Specifically, White claims that there were discrepancies with the evidence as to why the crash occurred. During the crash and DUI investigations, White informed the officers that he was not injured and did not have any medical issues. Also, the officers did not observe that he had any injuries. However, White argued at the formal review hearing that his vomiting and other signs of impairment were caused by a head injury he sustained from the crash as evidenced by medical records from his visit to the hospital after he was released from Orange County Corrections.

He also presented an auto body report stating that his vehicle had a fracture in the front inner tie rod and when the tie rod breaks, the wheel can turn uncontrollably causing loss of control. White argues that there was no evidence that he was observed operating his vehicle in a manner inconsistent with the vehicle's mechanical failure or evidence that he was driving incorrectly. Lastly, White argues that the Officer did not establish why field sobriety exercises

could not be completed, only that they were not done. White concludes that in the hearing officer's order, there were no findings made regarding the crash at the time of the offense or documentation provided that indicated the reason the crash occurred.

The scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the hearing officer's findings and decision and the review cannot go further to reweigh the evidence presented or to speculate as to the cause of the crash. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270, 1276 (Fla. 2001) (holding that once the reviewing court determines that there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end as the issue is not whether the hearing officer made the best, right, or wise decision, instead, the issue is whether the hearing officer made a lawful decision).

In cases where the driver of a crashed vehicle is suspected of driving under the influence, a law enforcement officer is permitted to arrest the driver pursuant to section 316.645, Florida Statutes (2012), as follows:

A police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash.

Further, *Perry-Ellis v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 942a (Fla. 9th Cir. Ct. 2006) provides guidance as it also involved a traffic crash that did not occur in the presence of law enforcement officers and the Court held that the officer's investigation, including his personal observations of Perry-Ellis after the accident, constituted competent substantial evidence to find that she was driving the vehicle while under the influence.

Also, in *Perry-Ellis*, the Court held that even without Perry-Ellis' admission, the reasonable inferences from the facts and circumstances of the case were sufficient to place her in apparent control of her vehicle. *See State v. Benyei*, 508 So. 2d 1258, 1259 (Fla. 5th DCA 1987) (holding that, although the vehicle may have been inoperable at the time the officer arrived at the scene, the circumstantial evidence was sufficient for the jury to find that the defendant was driving while intoxicated when her car went off the highway onto a median).

Upon review of the record, this Court finds that competent substantial evidence existed that White was driving the vehicle when it crashed as shown in Officer Fellows' testimony and Arrest Affidavit and the sworn statements from Lauren Vernon, Officer English, and Officer Sikos.¹ The evidence shows that: 1) Lauren Vernon observed the crash and identified White as the driver; 2) there were no other persons involved in the crash; and 3) the crashed vehicle was registered and insured under White's name.

Further, competent evidence was provided from Officer Fellows' testimony and Arrest Affidavit and Officer Sikos sworn statement that addressed White's signs of impairment showing that when he drove and crashed his vehicle, he was under the influence of alcohol to the extent his normal faculties were impaired including: 1) difficulty standing, losing his balance, staggering and stumbling to the point he had to be caught and assisted in walking; 2) difficulty retrieving his license, registration, and proof of insurance; 3) difficulty answering simple questions; 4) speech that was mumbled and slurred; 5) the continual distinct odor of alcohol

¹ The Department points out in their Response that White admitted that he was driving the vehicle and crashed it, as noted in Arrest Affidavit. At the hearing, White's counsel moved to strike, pursuant to the accident report privilege, any statements White made prior to being notified that Officer Fellows was conducting a DUI investigation. The hearing officer granted the motion. However, the Department argues that the hearing officer could have considered White's statements as the accident report privilege does not apply to White's admission that he was driving and crash reports became admissible after October 1, 2006 when section 322.2615(2), Florida Statutes, was amended allowing the Department's hearing officers to consider the statements made in a crash report by any party involved in the crash. Chapter 2006-290, § 45, Laws of Florida.

impurities coming from his breath; and 6) his inability to stand or walk on his own without assistance to the point that Officer Fellows determined that field sobriety exercises could not be done.

Lastly, the Affidavit of Refusal to Submit to Breath, Urine, or Blood Test and Officer Fellows' testimony and Arrest Affidavit provided competent substantial evidence that White refused to submit to a breath test after the twenty minute observation was conducted and being advised of the Implied Consent Warnings. Accordingly, upon review of the hearing officer's order in conjunction with the testimony, affidavits, transcript from the formal review hearing, and the other documents in the record, this Court finds that White 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, Mark White's Petition for Writ of Certiorari is **DENIED**.

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

/S/_____
C. JEFFERY ARNOLD
Circuit Court Judge

/S/_____
ROGER J. MCDONALD
Circuit Court Judge

/S/_____
FREDERICK J. LAUTEN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Mark Lippman, Esquire and Danielle M. Harris, Esquire**, Lippman Law Offices, P.A., 255 S. Orange Avenue, Suite 720, Orlando, FL 32801, filings@llopa.com, mlippman@llopa.com, dharris@llopa.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 4th day of February, 2013.

/S/ _____
Judicial Assistant