

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

JESSIE MALEK,

Petitioner,

v.

CASE NO.: 2012-CA-4256-O

WRIT NO.: 12-20

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

Respondent.

Petition for Writ of Certiorari from the Florida
Department of Highway Safety and Motor Vehicles,
Ronald Barnes, Hearing Officer.

David S. Katz, Esquire,
for Petitioner.

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

BEFORE APTE, LEBLANC, J. RODRIQUEZ, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jessie Malek (“Malek”), 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 evidence submitted at the formal review hearing on February 7, 2012, specifically the sworn statement of Officer Douglas Cote with the Orlando Police Department and the arrest affidavit of Officer Christopher Chaplin also with the Orlando Police Department, the facts were as follows: On January 9, 2012 at approximately 10:00 p.m., Officer Cote was on bike patrol and observed a vehicle operated by Malek turn left against a solid red light without stopping and then change lanes over a solid white line. Officer Cote conducted a traffic stop and made contact with Malek, requesting his driver license, registration, and proof of insurance. Malek stated that the registration was in the glove box, which prompted Officer Cote to ask Malek if he had a gun. Malek stated that he had a gun. Officer Cote then drew his service weapon and instructed Malek and his passenger to keep their hands against their chests until backup arrived. Prior to the arrival of the backup officers, Officer Cote asked Malek if he had a permit for the gun and Malek responded that he did not. When the backup officers arrived both Malek and his passenger were removed from the vehicle and the gun was secured. While removing Malek from the vehicle, Officer Cote smelled the odor of alcohol impurities and observed that Malek's eyes were glassy and that his pupils were enlarged. Officer Cote then requested that a DUI unit report to the scene.

Officer Chaplin and Officer Lopez arrived on scene and made contact with Officer Cote, who advised them of his observations and the reason for the stop. Officer Chaplin then made contact with Malek who was sitting on the curb. Officer Chaplin could immediately smell the distinct odor of alcoholic beverages coming from Malek and observed that his eyes were red, bloodshot and glassy with pupils so enlarged that the officer could barely see the color of his eyes. Officer Chaplin asked Malek various prescreening medical questions including whether he

was ill or was on medication to which Malek replied that he was not. Officer Chaplin then asked Malek to stand up. When Malek started to stand, he immediately fell back onto his buttocks. When he stood up again, he was unsteady on his feet. Malek was then requested to perform the field sobriety exercises and complied, exhibiting further clues of impairment including: 1) while standing, he swayed left and right and had trouble maintaining his balance; 2) during the HGN exercise, his eyes lacked smooth pursuit and he kept moving his head; 3) during the walk-and-turn exercise, he overlapped several steps, performed an incorrect turn, and on one step he got tipsy and lost his balance; and 4) during the one-legged stand exercise, he used his arms for balance and put his foot down.

Malek was placed under arrest for DUI and transported to the DUI Testing Center. At the DUI Center Malek was stumbling while walking to the door and Officer Chaplain still smelled the odor of alcohol impurities coming from Malek. Malek was observed for the twenty-minute period and while sitting in the observation chair Malek was loud and asked several questions. Officer Chaplain could also see that his pupils were still large under the light. He was then read the Implied Consent Warning and was requested to submit to a breath test. Malek refused to submit to the test and his privilege to operate a motor vehicle was suspended for the refusal. Malek was also cited for failing to stop at a steady red light.

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, Malek 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) when Officer Cote pointed a gun directly at him and ordered him to place his hands on his chest, he was illegally detained as there was no reasonable suspicion to justify his detention; therefore, he argues that the routine traffic stop turned into an unlawful de facto arrest without probable cause and rendered all subsequent evidence inadmissible and 2) there was not sufficient reasonable suspicion to justify a DUI

investigation when Officer Cote removed him from the vehicle as the smell of alcohol, glassy eyes with enlarged pupils were not sufficient signs of impairment to show that he was under the influence of alcohol to request that he perform field sobriety exercises.

Conversely, the Department argues that: 1) the arrest affidavit and sworn statement clearly state the lawful basis for the traffic stop and for his detention for officer safety concerns and 2) based upon the observations of Malek's unlawful driving pattern and numerous indicators of impairment, Officer Chaplin had ample reasonable suspicion to believe that Malek was driving a motor vehicle while under the influence of alcohol sufficient to request that he submit to field sobriety exercises; moreover, these factors, when combined with Malek's poor performance on the field sobriety exercises, constituted probable cause for Malek's arrest for DUI.

Analysis and Findings

First, it is undisputed that Malek's vehicle was lawfully stopped and that he refused to submit to the breath test as evidenced by the arrest affidavit and affidavit of refusal to submit to the breath test. Accordingly, the issues this Court will address is whether the hearing officer's findings and decision were supported by competent substantial evidence and followed the essential requirements of the law when he ruled that Officer Cote's detainment of Malek was lawful and that sufficient reasonable suspicion existed for Officer Chaplain to pursue the DUI investigation including requesting Malek to perform the field sobriety exercises.

The Search and Malek's Detention as to the Firearm

In the hearing officer's order, he ruled that:

The actions of Officer Cote and the backup officers in the securing of a non-permitted weapon and the occupants of the vehicle in possession of that weapon were in the interest of officer safety and not relevant to the scope of this review. The traffic stop was justified and during the course of removing the occupants from the vehicle, Officer Cote detected indicia of impairment that led him to call

for a DUI investigation. Case law provided by counsel is not persuasive in this matter.

Upon review of the record, this Court finds that competent substantial evidence existed from Officer Cote's sworn statement and Officer Chaplin's arrest affidavit for the hearing officer to find that Officer Cote's actions were justified and lawful. Officer Cote actions derived from a lawful stop of Malek's vehicle for turning left at a steady red light and for changing lanes over a solid white line. The evidence supports that when he made the traffic stop and became aware that Malek had a firearm inside the vehicle, he had a reasonable belief that Malek was armed and could be dangerous. Therefore, it was reasonable for the hearing officer to conclude, for safety concerns, that Officer Cote could lawfully take the action he did in order to locate and secure the firearm and thus find that Malek's detention was lawful. 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 reasons for Officer Cote's actions. *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).

The DUI Investigation including Field Sobriety Exercises

Further, this Court finds that competent evidence was provided from the arrest affidavit and sworn statement addressing Malek's unlawful driving pattern and his signs of impairment for the hearing officer to find that the officers had sufficient reasonable suspicion to pursue the DUI investigation including requesting that Malek perform the field sobriety exercises. Malek's

signs of impairment included: 1) the odor of alcohol impurities when removing Malek from the vehicle; 2) red, bloodshot, and glassy eyes with severely dilated pupils; 3) Malek falling back onto his buttocks when attempting to stand up; and 4) when Malek stood up again after falling, he was unsteady on his feet. *See Fewell v. State*, 14 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. 2007) (concluding that there was sufficient reasonable suspicion to request that the defendant perform field sobriety tests based on the traffic violation, defendant's bloodshot eyes, sunburn, and a strong odor of an alcoholic beverage); *Carder v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 547a (Fla. 9th Cir. Ct. 2007).

Accordingly, upon review of the hearing officer's order in conjunction with the affidavits and the other documents in the record, this Court finds that Malek 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, Jessie Malek's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 30th day of January, 2013.

/S/_____
ALAN S. APTE
Circuit Court Judge

/S/_____
BOB LEBLANC
Circuit Court Judge

/S/_____
JOSE R. RODRIGUEZ
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **David S. Katz, Esquire**, Katz & Phillips, P.A., 121 S. Orange Avenue, Suite 1420, Orlando, FL 32801, dkatz@kplegalteam.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 30th day of January, 2013.

/S/ _____

Judicial Assistant