

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

KEVIN PRESCOTT,

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES,**

Respondent.

CASE NO.: 2012-CA-18336-O

Writ No.: 12-85

DATE: September 24, 2013

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

Amanda M. Sampaio, Esquire,
for Petitioner.

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

BEFORE WHITE, DOHERTY, SCHREIBER, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Prescott (“Prescott”), 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 Arrest Affidavit, testimony, and other documents provided at the formal review hearing held on October 4, 2012, the facts are summarized as follows: On June 12, 2012 at 2:11 a.m., Officer William Becton of the Orlando Police Department was called to respond to a traffic accident. Upon arriving at the crash scene, Officer Becton made contact with Officer Sam Cunningham who was conducting the accident investigation. Officer Cunningham advised Officer Becton that he believed one of the drivers, later identified as Prescott, was driving impaired. Also, from what this Court can discern from the record, specifically the transcript from the formal review hearing, Prescott testified about the events leading to the accident including that he was driving in the right lane and while he was making a right turn onto another road his vehicle was hit in the rear fender by another vehicle. Prescott also testified that he and the other driver agreed to call the police to report the accident. Further, he denied fault for the accident, stated that neither he nor the other driver was issued a citation, and stated that he was not found to be at fault. Lastly, it appears from the record that there was no death or serious bodily injury caused by the accident.

After the accident investigation was completed, Officer Becton advised Prescott that his purpose for being on the scene was to conduct a criminal investigation concerning the possibility that Prescott was driving impaired. Prescott was read his Miranda rights and stated that he was at the Cabaret on South Orange Blossom Trail to drop off a friend who worked at Cabaret and was heading home to Tavares via the Millennia Mall area. He indicated it was a route home he had taken many times in the past. He also stated that he drank one beer around 9:00 p.m. and then only consumed water between 10:00 p.m. to 2:00 a.m. While interviewing Prescott, Officer Becton smelled the odor of alcohol impurities and observed that Prescott's eyes were glassy,

bloodshot, and red. Also, Officer Becton thought that Prescott appeared to have lost his way home because of the route he said was taking.

Based on Officer Becton's observations, he then asked Prescott if he would submit to a series of field sobriety exercises. Prescott then asked Officer Becton if he had to perform the exercises and the officer responded that Prescott consented to the field sobriety exercises when he signed for his Florida driver's license. Prescott then agreed to perform the exercises consisting of the Horizontal Gaze Nystagmus, Walk and Turn, One Leg Stand and Finger to Nose. Prescott did poorly on the exercises.

Prescott was then placed under arrest for DUI and transported to the DUI Testing Center. At the DUI Center, Prescott was read the Implied Consent Warning and was requested to submit to a breath test. Prescott refused to submit to the breath test and his license was suspended for 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. (2012).

Arguments

In the Petition for Writ of Certiorari, Prescott argues that the hearing officer erred in sustaining his license suspension because: 1) Officer Becton unlawfully compelled him to participate in the field sobriety exercises (“FSEs”) by misinforming him that the exercises were mandatory and that he automatically consented to perform the exercises when he signed for his driver’s license; 2) Officer Becton did not have reasonable suspicion to request him to perform the FSEs; 3) He was detained and investigated without reasonable suspicion; and 4) Without the FSEs there was no probable cause to arrest him.

Conversely, the Department argues: 1) Prescott was afforded procedural due process, the hearing officer observed the essential requirements of law, and there was competent substantial evidence in the record to support the hearing officer’s decision sustaining Prescott’s license suspension and 2) Prescott failed to preserve for appeal his third argument that he was detained and investigated without reasonable suspicion.

Analysis

Arguments II and III that Officer Becton did not have reasonable suspicion to request him to perform the FSEs and he was detained and investigated without reasonable suspicion:

This Court first addresses Prescott's second and third arguments. There is no dispute that the initial traffic stop was lawful as it derived from the traffic crash. Next, upon review of the transcript from the formal review hearing, this Court concurs with the Department that Prescott failed to preserve for appeal his third argument that he was detained and investigated without reasonable suspicion as he did not make this argument at the hearing. Further, even if this argument was preserved for appeal, from review of the record there was competent substantial evidence in support of the hearing officer's finding that the officers had reasonable suspicion to justify Prescott's detainment and investigation including requesting that Prescott perform the field sobriety exercises due to the traffic accident combined with the officers' observations as follows:

First, according to Officer Becton's Arrest Affidavit and testimony, he was dispatched to the traffic scene based on Officer Cunningham's concerns that Prescott was possibly driving impaired. After Officer Becton arrived on the scene and upon Officer Cunningham informing him that the accident investigation was complete, he introduced himself to Prescott and told him that the purpose for being on the scene was to conduct a criminal investigation concerning the possibility that Prescott was driving impaired. Upon making contact with Prescott, Officer Becton observed Prescott's signs of impairment including the odor of alcohol impurities, glassy, bloodshot, and red eyes, his admission that he consumed one beer, and his appearance that he lost his way home. *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 Smart v. Dep't of Highway Safety & Motor Vehicles, 13 Fla. L. Weekly Supp. 867a (Fla. 9th Cir. Ct. 2006). Lastly, there was nothing in the record showing that Prescott was detained for an unreasonable amount of time.

Argument I that Officer Becton unlawfully compelled Prescott to participate in the field sobriety exercises (“FSEs”) by misinforming him that the exercises were mandatory and that he automatically consented to perform them when he signed for his driver’s license:

This Court finds that this argument has merit. Prescott asked Officer Becton if he had to perform the FSEs. Officer Becton answered that Prescott consented to the FSEs when he signed for his Florida driver’s license. Further, at the hearing, Prescott testified that based on Officer Becton’s statement, he believed that it was mandatory that he perform the FSEs. Officer Becton also testified at the hearing that FSEs technically are not voluntary.

Performing the FSEs is voluntary and the implied consent law only governs breath, blood, or urine tests incidental to a lawful arrest under section 316.1932, Florida Statutes, thus it does not apply to FSEs. While this Court acknowledges that law enforcement officers have no duty to inform a driver that the FSEs are voluntary, an officer cannot misinform a driver with statements that imply that the FSEs are mandatory. *See Persis v. Dep’t of Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly Supp. 1015b (Fla. 9th Cir. Ct. 2009); *Walker v. Dep’t of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 953a (Fla. 2006); *Peden v. Dep’t of Highway Safety & Motor Vehicles*, 11 Fla. L. Weekly Supp. 953a (Fla. 6th Cir. Ct. 2004). Therefore, Officer Becton’s statement did misinform Prescott and was significant enough to be coercive; thus, the hearing officer erred in considering the results of Prescott’s performance of the FSEs. *See Acierno v. Dep’t of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 313a (Fla. 9th Cir. Ct. 2013) (holding that hearing officer erred in refusing to suppress evidence

of licensee's refusal to submit to field sobriety exercises in absence of evidence that licensee was informed of the adverse consequences by refusing to perform the exercises).

Argument IV that without the FSEs there was no probable cause to arrest Prescott:

Because the hearing officer erred by considering the results of Prescott's performance of the FSEs in finding that probable cause existed for Prescott's arrest for DUI, this Court now reviews whether the error was harmless by determining whether competent substantial evidence existed that there was probable cause for Prescott's arrest without the results of the FSEs. The only remaining evidence for probable cause is the fact of an accident, odor of alcohol during the police interview, Prescott's glassy, red, bloodshot eyes, Prescott's admission he consumed one beer several hours earlier and Officer Becton's testimony that Prescott lost his way home based on Prescott's route. The Court finds that without the results of the FSEs the above evidence is not competent substantial evidence to support a probable cause finding that Prescott was operating his vehicle while under the influence of alcohol.

As stated above, Officer Becton's observations leading up to the FSEs first included the odor of alcohol impurities. However, this Court notes that while the hearing officer's findings of fact state "Prescott had the odor of alcohol coming from his person," neither the Arrest Affidavit nor Officer Becton's testimony indicate the odor of alcohol came from Prescott's breath or from his person. The only evidence presented was alcohol was smelled by the officer during the interview. Accordingly, without clarification or further details of the source of the odor this court finds such evidence is not competent substantial evidence¹ to support a finding of probable cause when considered individually or when considered in light of the other evidence.

¹ The terms "competent substantial evidence" have been variously defined, however, judicial interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient. A federal court said the substantial evidence rule is not satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent inferences. *Dept of Highway Safety and Motor Vehicles v.*

Officer Becton's other observations and considerations include the fact an accident occurred, for which Prescott was not cited or otherwise determined to be at fault; that Prescott had glassy, bloodshot, and red eyes, which Prescott explains were caused by fatigue; that Prescott admitted he consumed one beer several hours earlier; and that it appeared Prescott had lost his way home based on the route Prescott was taking, which Prescott controverts. Each of these items was controverted or explained by Prescott's testimony creating a conflict in the evidence.

There were no additional observations of Prescott to support a finding of probable cause, such as slurred speech during the interview or staggering or difficulty standing when he exited the vehicle. Nor was there any evidence that Prescott's driving pattern was erratic or that his behavior before, during, or after the traffic accident was belligerent or otherwise of a nature indicating he was impaired. *See State v. Brown*, 725 So. 2d 441, 443-444 (Fla. 5th DCA 1999) (stating that "under the influence" means that the driver's normal faculties were "impaired", not simply that the driver consumed alcohol); *see also Dep't of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163 (Fla. 5th DCA 2003).

The Court recognizes the accident combined with Officer Becton's observations provided competent substantial evidence that he had reasonable suspicion to detain and investigate Prescott for DUI, however, the Court finds that the accident and observations alone without the FSEs merely create a suspicion which give equal support to inconsistent references through vague, uncertain evidence which is not substantial enough to support a probable cause finding that Prescott was under the influence. Without the benefit of the FSEs the remaining evidence

Trimble, 821 So. 2d 1084 (Fla. 1st DCA 2002) *citing De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) and *Fla. Rate Conference v. Fla. Railroad. & Public Utilities Comm'n*, 108 So. 2d 601, 607 (Fla. 1959).

did not provide competent substantial evidence to support the hearing officer's finding that probable cause existed to arrest Prescott for DUI.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Kevin Prescott's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DOHERTY and SCHREIBER, J.J., concur.

WHITE, J., dissents without opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Amanda M. Sampaio, Esquire**, The Fighter Law Firm, 1018 E. Robinson Street, Orlando, Florida 32801, Amanda@fighterlaw.com and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, richardcoln@flhsmv.gov on this 25th day of September, 2013.

/S/ _____
Judicial Assistant