

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

DONALD F. VARGO,

**CASE NO.: 2012-CA-19131-O
WRIT NO.: 12-88**

Petitioner,

v.

**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.

Lyle B. Mazin, Esquire,
for Petitioner.

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

BEFORE EGAN, ROCHE, LUBET, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Donald F. Vargo (“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 hearing officer's findings of fact, Arrest Affidavit, and other related documents presented at the formal review hearing on October 24, 2012, the facts are summarized as follows: On September 21, 2012 at approximately 11:34 p.m., Deputy Gordon King of the Orange County Sheriff's Office was on patrol in his marked patrol vehicle facing westbound in the parking lot of the Marriott Hotel waiting for traffic to clear so he could leave the parking lot. Deputy King also stated in the Arrest Affidavit that at that time the weather had cleared up after raining very hard all night and the roads were wet and slick. He then stated that he noticed a vehicle, later identified as being driven by Vargo, traveling southbound on International Drive and then attempting to turn into the parking lot. He then observed Vargo's vehicle make the left turn and he visually estimated its speed at thirty five to forty miles per hour. Also, he observed that the vehicle's tires appeared to lose traction and squeal loudly. Next, he observed that Vargo's vehicle began to travel directly towards his patrol vehicle until it jerked towards the right to avoid a collision. At that point, in the best interest of public safety, Deputy King initiated a traffic stop of Vargo's vehicle at International Drive and Central Florida Parkway.

After making the stop, Deputy King called out to Vargo 3 times to exit his vehicle before Vargo complied. Deputy King observed that Vargo staggered as he walked back to the patrol vehicle. Deputy King then introduced himself and explained to Vargo the reason for the traffic stop and requested Vargo's license and vehicle documents. Deputy King noted that Vargo's speech was slurred and incomprehensible to the point where he had to ask Vargo to repeat himself several times. Deputy King also asked Vargo if he had any speech impediment or any physical disability that would cause his speech to be slurred and so difficult to understand. Vargo answered "no" to the question. As Vargo spoke, Deputy King could smell the strong odor

of alcoholic impurities emitting from his breath. Deputy King also observed that Vargo's face was flushed and his eyes were red, bloodshot, watery, and he appeared to have difficulty keeping his eyes open. Also, Vargo admitted that he consumed 2 yard long beers prior to driving and he had a bar entry wristband on his right wrist.

Deputy King then requested Vargo to perform the field sobriety exercises and he complied, performing poorly and exhibiting further clues of impairment including: 1) moving his head to follow the stimulus; 2) a lack of smooth pursuit and nystagmus in both eyes during the horizontal gaze nystagmus exercise; 3) stepping from the starting position during the instructions; 4) using his arms for balance; 5) failing to touch heel-to-toe on 6 steps; 6) stepping off the line twice and performing an incorrect turn during the walk-and-turn exercise; 7) using his arms for balance; 8) not raising his foot 6 inches as instructed; and 9) hopping while balancing and putting his foot down during the one-legged stand exercise.

Based on the totality of the circumstances including Deputy King's observations of Vargo's vehicle in motion, Vargo's statements and actions, and Vargo's performance of the field sobriety exercises, Deputy King determined that Vargo's normal faculties were impaired by alcohol, drugs or both and placed Vargo under arrest for driving under the influence. Vargo was then transported to the DUI Testing Center. At the DUI Testing Center, Vargo was observed for the 20 minute period, read the Implied Consent Warning, and was requested to submit to a breath test. Vargo submitted to the test with results of .153 and .151. Vargo's driver's license was suspended for driving with an unlawful breath alcohol level.

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).

Because the scope of the Court’s review is limited to determining whether competent substantial evidence existed in support of the hearing officer’s findings and decision, the Court’s review cannot go further to reweigh the evidence presented. *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 a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver license was suspended for driving with 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. (2012).

Arguments

Vargo argues that the hearing officer's decision to sustain his license suspension was not supported by competent substantial evidence that he was lawfully seized and detained for purposes of a DUI investigation. Specifically, he argues that the Arrest Affidavit only indicates that he was stopped for public safety and without more details about whether his driving pattern affected other traffic or if the turn could have been made in a more reasonable manner the description is insufficient to support a valid traffic stop. He also argues that there was no evidence nor did the deputy articulate that he committed any traffic infraction or that criminal activity was afoot. Further, Vargo claims that Deputy King did not articulate that he had reason to believe that he was ill, tired or impaired. Lastly, Vargo concludes that the evidence is only based on Deputy King's conclusion without any facts to support that conclusion.

Conversely, the Department first argues that the hearing officer is only required to consider the lawfulness of the traffic stop in cases where the driver's license is suspended for refusing to submit to the breath test unlike in the instant case where Vargo provided breath samples and his driver's license was suspended for driving with an unlawful breath alcohol level. Second, the Department argues that although the lawfulness of the traffic stop need not be considered, the hearing officer in this case did consider this issue and there was competent substantial evidence in the record supporting the hearing officer's decision.

Analysis

Issue as to Whether Lawfulness of the Stop Must be Considered in this Case

In support of his argument that the traffic stop was not lawful, Vargo cites *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), where the Fifth District Court of Appeal held that a license suspension cannot be sustained under section

322.2615, Florida Statutes, if the licensee was not lawfully arrested. The Department, in its Response to the Petition, citing *Dep't of Highway Safety & Motor Vehicles v. Escobio*, 6 So. 3d 638 (Fla. 2d DCA 2009), argues that *Pelham* only applies to cases where the driver refuses to submit to a breath test, unlike in the case at hand where Vargo submitted to the breath test.¹

This Court concurs with Vargo and finds that per *Pelham* the issue as to lawfulness of the stop applies in this case. Part of the Fifth District Court of Appeal's reasoning in *Pelham* was that in order to establish probable cause as required under section 322.2615, Florida Statutes, the arrest and stop must be lawful. Section 322.2615, Florida Statutes, requires a finding of probable cause both in cases where a driver refuses to take a breath test and where a driver submits to a breath test with results above .08. Therefore, it would be illogical and contrary to the statute to find that because a driver submitted to the breath test, a finding of probable cause via a lawful stop or arrest is not necessary. Accordingly, this Court finds that *Pelham* is applicable to the instant case and a determination must be made as to whether competent substantial evidence existed that the traffic stop and arrest were lawful. See *Waldman v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 460a (Fla. 9th Cir. Ct. 2013); *Nordaby v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 321a (Fla. 9th Cir. Ct. 2010);

Lawfulness of the Traffic Stop

In this case, the record evidence as to the stop came solely from the Arrest Affidavit because no persons testified at the hearing. Deputy King's observations leading up to the stop of Vargo's vehicle included: 1) On the night while on patrol, the weather had cleared up after

¹ See *Dep't of Highway Safety & Motor Vehicles v. Hernandez and Dep't of Highway Safety & Motor Vehicles v. McLaughlin*, 74 So. 3d 1070 (Fla. 2011), where the Florida Supreme Court addressed both cases applying *Pelham* and ruled that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal is not incident to a lawful arrest and also ruled that the issue of whether the refusal was incident to a lawful arrest is within the allowable scope of review of the Department's hearing officer. Subsequently, the Department moved for clarification as to whether the Court's holding only applied to refusal cases. The Florida Supreme Court denied the motion for clarification without opinion.

raining very hard all night and the roads were wet and slick; 2) While he waiting for traffic to clear to exit the Marriott Hotel, he noticed Vargo's vehicle traveling southbound on International Drive and then attempting to turn into the parking lot; 3) He then observed Vargo's vehicle make the left turn and visually estimated its speed at thirty five to forty miles per hour; 4) Also, the tires of Vargo's vehicle appeared to lose traction and squeal loudly.; and 5) Vargo's vehicle began to travel directly towards his patrol vehicle until Vargo jerked the vehicle towards the right to avoid a collision.

In addressing Vargo's motion to set aside the license suspension based on the illegality of the traffic stop, the hearing officer considered the lawfulness of the stop and denied the motion stating:

Deputy King attested in his affidavit that Mr. Vargo attempted to make a left-hand turn at the excessive speed of thirty-five to forty miles per hour. This was performed on wet roads and caused the vehicles tires to squeal and a momentary loss of vehicle control for Mr. Vargo. Deputy King attested that he conducted a traffic stop in the best interest of public safety. This Hearing Officer finds that the threat to public safety as articulated by the deputy justified the traffic stop.

This Court finds that although Vargo was not specifically cited for other traffic violations in addition to driving under the influence, the Arrest Affidavit established competent substantial evidence for the hearing officer to conclude that the stop was lawful in that reasonable suspicion existed for Deputy King to make the traffic stop. As the Department correctly argues in its Response, there is ample legal authority that addresses the requirements for a valid stop for driving under the influence and includes that 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 also Ndow v. State*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (holding that if a police officer observes a 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 issued). Accordingly, due to Vargo's driving pattern combined with the wet and slick condition of the roads and parking lot he was driving on, Deputy King, had the legal authority to initiate the stop to determine whether Vargo was ill, tired, or driving under the influence based on his public safety concerns.

Further, as the Department points out in its Response, if the facts contained in the Arrest Affidavit provide any objective basis for the traffic stop, even if it is not the same basis stated by the officer, the stop is constitutional and thus, the subjective knowledge, motivation, or intention of the officer, if any, is wholly irrelevant. *Dep't of Highway Safety & Motor Vehicles v. Jones*, 935 So. 2d 532 (Fla. 3d DCA 2006). In this case, the facts detailed in the Arrest Affidavit provided an objective basis to support the stop.

Lawfulness of Vargo's Detainment, DUI Investigation, and Arrest

As for the detainment and investigation of Vargo for DUI, Deputy King's observations upon making contact with Vargo included: 1) his failure to exit the vehicle until after being asked 3 times to do so; 2) staggering as he walked back to the patrol vehicle; 3) his slurred speech that was incomprehensible to the point where the deputy had to ask Vargo to repeat himself several times; 4) the strong odor of alcoholic impurities emitting from his breath; 5) his flushed face; 6) his red, bloodshot, watery eyes and difficulty keeping his eyes open; 7) his admission to consuming 2 yard long beers prior to driving and a bar entry wristband on his right wrist. This Court finds that these observations provided competent substantial evidence for the

hearing officer to find that Deputy King was justified in detaining and investigating Vargo for DUI.

Lastly, as for the arrest of Vargo for DUI, Deputy King stated in his arrest affidavit that based on the totality of the circumstances including his observations of Vargo's vehicle in motion, Vargo's statements and actions, and Vargo's performance of the field sobriety exercises, he determined that Vargo's normal faculties were impaired by alcohol, drugs or both and placed Vargo under arrest for driving under the influence. From review of the record, this Court finds that Deputy King's observations of Vargo including his driving pattern, signs of impairment, and poor performance the field sobriety exercises provided competent substantial evidence for the hearing officer to find that Deputy King had probable cause to arrest Vargo for DUI.

Conclusion

Accordingly, upon review of the record, this Court finds that Vargo was provided due process 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, Donald F. Vargo's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 27th day of June, 2013.

/S/ _____
ROBERT J. EGAN
Circuit Court Judge

/S/ _____
RENEE A. ROCHE
Circuit Court Judge

/S/ _____
MARC L. LUBET
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Lyle B. Mazin, Esquire**, Mazin Law, Inc., 1217 E. Robinson Street, Orlando, Florida 32801, lyle@mazinlaw.com and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kimgibbs@flhsmv.gov on this 28th day of June, 2013.

/S/ _____

Judicial Assistant