

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

WILLIAM HALE KELLY,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-14569-O

Writ No.: 13-102

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

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE ROCHE, HIGBEE, J. KEST, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, William Kelly (Petitioner), seeks certiorari review of the Department of Highway Safety and Motor Vehicles' (Department) final order sustaining the suspension of his driver's license for refusing to submit to a breath-alcohol test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

As stated in the arrest affidavit submitted at the hearing, on October 13, 2013 at approximately 2:34 a.m., Officer Guy observed a vehicle traveling North on SR 600 approaching the intersection of Horatio Avenue in the curb lane. He observed the vehicle make a right turn on Horatio and almost hit the inside curb then accelerate at a high rate of speed. He observed the vehicle passenger side tires enter the right bike lane by approximately eight inches for about five seconds and then reenter its lane of travel. The vehicle then veered to the left and straddled the median line with both left tires for approximately ten seconds before entering back into its lane. The vehicle's right tires entered the bike lane again for three seconds. Officer Moore, who was driving the patrol vehicle, pace clocked the vehicle traveling 60 miles per hour in a 35 miles per hour zone. Officer Guy activated the emergency lights and the vehicle continued another 150 yards passing an intersection before stopping.

Officer Guy made contact with Petitioner who was the sole occupant and identified him by his Florida driver's license. While speaking with Petitioner, Officer Guy noticed an odor of alcoholic beverage coming from the vehicle, a case of 18 Coors Light beers on the passenger side floor, and a firearm lying next to Petitioner's foot. For officer safety, he asked Petitioner to step out of the vehicle. As Petitioner exited the vehicle, the officer noticed that he stumbled and was uneasy on his feet. He also smelled the odor of alcoholic beverages coming from Petitioner's breath, but Petitioner denied drinking any alcohol. He also observed that Petitioner had bloodshot glassy eyes, his speech was slow and mumbled, and he had a noticeable orbital sway while standing. Petitioner agreed to perform field sobriety exercises and the officer explained the exercises. Petitioner stated that he had a bad back from the military but exercises regularly. Petitioner performed the exercises poorly and was arrested for driving under the

influence (DUI). He was transported to the DUI testing center and refused to provide a breath sample.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearing was held on November 12, 2013. The hearing officer entered a written order sustaining Petitioner's license suspension on November 13, 2013.

“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).

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 refusal 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. (2013).

Lawful Stop

Petitioner argues that the record before the hearing officer fails to contain competent substantial evidence that he was lawfully stopped. He claims that Officer Moore's testimony failed to establish probable cause that he was lawfully stopped for speeding.

Officer Moore testified that Petitioner made a sharp turn almost hitting the curb, traveled six to eight inches into the bike lane twice, and straddled the median lane. He stated that he paced Petitioner's vehicle at 60 miles per hour for approximately half to three-fourths of a mile and Petitioner's vehicle was still pulling away from him. He also testified that his vehicle was calibrated at Maitland Police Department on September 30, 2013. Officer Guy testified that Petitioner was stopped for speeding and his driving pattern of almost hitting the curb while turning at an excessive rate of speed, traveling six to eight inches into the bike lane twice, and straddling the median lane a few times. He stated that because of Petitioner's driving pattern, he wanted to make sure that he was not having a medical emergency.

A legitimate concern for public safety can warrant an investigatory stop to determine the reason for an erratic driving pattern. *Bailey v. State*, 319 So. 2d 22 (1975) (stop of driver weaving within her own lane of traffic and driving at a slow speed was justified to determine reason for unusual operation of vehicle); *State v. Carrillo*, 506 So. 2d 495, 496 (Fla. 5th DCA 1987) (vehicle weaving within lane more than five times for a quarter mile justified stop for driving under the influence); *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (observation of driver using lane markers to position vehicle and abruptly slowing from 55 to 30 miles per hour then rapidly accelerating justified stop to determine cause of erratic driving). Therefore based on the record and the officers' testimonies,

there was competent substantial evidence to support the hearing officer's decision that Petitioner was lawfully stopped.

Lawfully Detained for DUI Investigation and Field Sobriety Exercises

Petitioner argues that the evidence from the detention and field sobriety exercises should not have been considered by the hearing officer because there was no evidence that the officer had reasonable suspicion to detain him for a DUI investigation or request he perform field sobriety exercises.

In order to detain a person to investigate for driving under the influence and perform field sobriety exercises, there must be reasonable suspicion that the driver committed the offense of driving under the influence. *Dep't of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999). The odor of alcohol combined with other factors may be sufficient to establish reasonable suspicion to detain a driver to determine whether he or she was driving under the influence. *See State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000); *Carder v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 547a (Fla. 9th Cir. Ct. Sept. 4, 2007). Based on the combination of the officers' observations of Petitioner's driving pattern, bloodshot glassy eyes, slow and mumbled speech, unsteadiness on his feet, odor of alcohol on his breath, and orbital sway while standing, there was competent substantial evidence to support the hearing officer's decision that Petitioner was lawfully detained for a DUI investigation and to perform field sobriety exercises.

Lawful Arrest for DUI

Petitioner argues that there was not competent evidence that he was lawfully arrested for DUI. He claims that the officer's observations of bloodshot glassy eyes, slow and mumbled speech, and orbital sway are just as consistent with innocent behavior and without more does not

establish that Petitioner was impaired by alcohol. Petitioner also argues that Officer Guy testified that he was not a drug recognition expert and therefore, the results of the horizontal gaze nystagmus exercise (HGN) should not have been considered.

Based on the facts contained within the arrest affidavit, the officers' testimonies about Petitioner's driving pattern, their observations after he was stopped, and his poor performance on the field sobriety exercises; there was competent substantial evidence to support the hearing officer's decision that Petitioner was lawfully arrested for driving under the influence even without considering the HGN test results.

Accordingly, there was competent substantial evidence to support the hearing officer's decision to sustain the license suspension.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 2nd day of September, 2014.

/S/ _____
RENEE A. ROCHE
Presiding Circuit Judge

HIGBEE and J. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 2nd day of September, 2014 to: **Matthew P. Ferry, Esq.**, Law Office of Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790; **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857.

/S/ _____
Judicial Assistant