

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

JACOB A. KUPP,

Petitioner,

CASE NO.: 2013-CA-175-O

Writ No.: 13-2

v.

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

Respondent.

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

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE LEBLANC, MYERS, JR., S. KEST, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacob A. Kupp (“Kupp”), 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 of fact including the Charging Affidavit and other documents provided at the formal review hearing held on December 11, 2012, the facts were as follows: On November 7, 2012, at 1:08 a.m., Trooper J.C. Ramirez with the Florida Highway Patrol was traveling eastbound on Gore Street, east of Orange Blossom Trail in Orange County when he observed a Ford pick-up truck in the right through lane with its load protruding more than 6 inches on the left side of the truck. After getting closer to the truck, the trooper observed a stop sign and several street signs in the bed of the truck with the poles from these signs protruding more than 6 inches on the left side of the truck. Trooper Ramirez then conducted a traffic stop. Also, Florida Highway Patrol dispatch advised the trooper that the Orlando Police Department had received calls on the truck as it was driving around with street signs in the truck bed and the occupants of the truck were yelling racial slurs at pedestrians.

After making the traffic stop, the driver of the truck was identified by his license as Kupp. Kupp then opened the driver door and the trooper gave him verbal commands to exit the truck and walk back to him. Trooper Ramirez observed that Kupp staggered as he walked and that his eyes were glassy, red, and bloodshot. Trooper Ramirez also smelled the obvious and distinct odor of an alcoholic beverage coming from Kupp's breath. When asked where he was coming from, Kupp stated that he was coming from a bar and drank two beers between 8:00 p.m. and 10:00 p.m. Trooper Ramirez then contacted the Florida Highway Patrol for routine backup. When asked where the signs were located, Kupp stated he found the street signs on the ground near the railroad tracks and was taking them to the police station on John Young Parkway. However, Trooper Ramirez observed that Kupp's truck had been heading away from that road.

Once backup arrived, Trooper Ramirez continued the DUI investigation and upon request, Kupp agreed to perform the field sobriety exercises. Trooper Ramirez then asked Kupp questions including whether if he was taking medication and Kupp answered that he takes medication for depression. Trooper Ramirez, who is also a Drug Recognition Expert, then administered the exercises including the Horizontal Gaze Nystagmus, Walk and Turn, One Leg Stand, and the Rhomberg Balance. During the exercises additional indicators of impairment were observed including that Kupp did not follow directions, he swayed throughout the exercises, and he was unable to complete the exercises as instructed and demonstrated. At the conclusion of the exercises Kupp was placed under arrest for DUI, read his Miranda rights, and invoked his right to remain silent.

Trooper Ramirez then spoke to both passengers, Austin Bowen (“Bowen”) and David Hatmaker (“Hatmaker”), who were both read their Miranda rights. Bowen then stated that Kupp and Hatmaker removed the signs by jumping on them and then placed them into the truck bed. Bowen also stated that he was responsible for taking the Obama sign only. Hatmaker then stated that all of them were drinking at the bar and it was Kupp’s idea to take the signs. Hatmaker also stated that all of them were in on removing the signs and putting them in the truck bed. Lastly, Hatmaker stated that it must have been Bowen who was responsible for yelling racial slurs using the PA system in the truck. Further, upon inspection, the following signs were found in the pick-up truck including a Parramore Avenue and Harding Street sign with a stop sign attached, a Columbia Street and Westmoreland Drive sign with a stop sign attached, a street sign from Lee Avenue and Citrus Street, a Lynx bus stop sign, a daycare loading and unloading zone only sign,

several “Obama” signs, and a mailbox ripped from its support. Bowen and Hatmaker were placed under arrest and transported by Troopers Gonzalez and Mints to the Orange County Jail.

Trooper Ramirez then transported Kupp to the DUI Center and smelled the obvious odor of alcoholic beverage within the patrol car. Upon arriving at the DUI Center, the 20 minute observation of Kupp was conducted and he was read the Implied Consent Warnings. A breath test was also requested. Kupp provided a sample with a result of 0.202. Kupp then refused to provide a second sample and was advised of the consequences for refusing to complete the breath test. Kupp stated that he understood the consequences, but he still refused to provide a second sample. Trooper Ramirez then issued Kupp 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).

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).

Argument

In the Petition for Writ of Certiorari, Kupp argues that the hearing officer's decision to sustain his license suspension was not supported by competent substantial evidence that he was lawfully stopped. Specifically, Kupp argues that the Charging Affidavit failed to establish that his vehicle was lawfully stopped based on the traffic infraction of "projecting loads on passenger vehicles" and that the hearing officer's conclusion that his vehicle was lawfully stopped was unsupported by facts.

Analysis

At the formal review hearing, there were no persons in attendance who testified. Among the motions made by Kupp's counsel, was a motion to invalidate the suspension based on an unlawful stop. Counsel argued that the sole basis for the stop was Trooper Ramirez's observation of a load protruding more than 6 inches on the left side of the truck. Counsel stated that per section 316.510, Florida Statutes, the truck was not a passenger vehicle subjecting it to the statute. He also argued that per the statute, the vehicle's load has to extend beyond the fenders on the left side of the vehicle or extend more than 6 inches beyond the line of the fenders on the right side thereof. He further argued that the Charging Affidavit only stated that the load was

“protruding 6 inches from the truck”, but it didn’t state “protruding from the fenders of the truck”. The hearing officer reserved ruling on this motion.

Section 316.510, Florida Statutes (2012), addresses projecting loads on passenger vehicles and states:

No passenger type vehicle shall be operated on any highway with any load carried thereon extending beyond the fenders on the left side of the vehicle or extending more than 6 inches beyond the line of the fenders on the right side thereof. A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

Subsequently, the hearing officer issued her order denying this motion. First in addressing this motion, the hearing officer noted that it was unknown whether Kupp’s truck had wide extending fenders. She then discussed the facts gathered from the Charging Affidavit that supported her finding that Trooper Ramirez had reasonable suspicion to conduct the traffic stop including that: 1) There were three occupants in the truck, the driver and two passengers; therefore, she found that the truck was a passenger type vehicle; 2) Trooper Ramirez observed that the truck had a load protruding more than 6 inches on the left side of the vehicle; and 3) After getting closer to the truck, the trooper observed a stop sign and several street signs in the bed of the truck with the poles from these signs protruding more than 6 inches on the left of the vehicle.

Upon review of the Charging Affidavit, Trooper Ramirez states:

I took notice of the vehicle as its load was protruding more than six inches on the left side of the vehicle. As I got closer to the vehicle, I observed that there was a visible “Stop” sign and several street signs in the bed of the truck. The objects protruding were the poles on which the signs were affixed to. I conducted a traffic stop of the vehicle by activating the emergency lights and siren in my clearly marked Florida Highway Patrol vehicle.

Based on Trooper Ramirez's statements of the events prior to the traffic stop, this Court finds that notwithstanding his omission of the word "fender(s)" describing the load protruding from the truck, it was reasonable for the hearing officer to find that competent substantial evidence existed that Trooper Ramirez had reasonable suspicion to conduct the traffic stop for possible violations such as a violation of section 316.510, Florida Statutes, or a violation of section 812.014(2)(c)11., Florida Statutes, addressing theft of a stop sign.

Also, this Court on review cannot go further to reweigh the evidence of the trooper's statement as to whether or not the load was protruding from the truck's fender(s). The hearing officer as the finder of fact was responsible for weighing the evidence. "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). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001); *see Paras v. Dep't of Highway Safety & Motor Vehicles*, 7 Fla. L. Weekly Supp. 490a (Fla. 9th Cir. Ct. 2000). Lastly, "the construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight, and the court generally will not depart therefrom except for the most cogent reasons and unless clearly erroneous." *Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585, 587 (Fla. 1968).

Conclusion

Based on the foregoing, procedural due process was followed, the hearing officer followed the essential requirements of the law, and there was competent substantial evidence to support the hearing officer's findings and decision.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Jacob A. Kupp's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 10th day of June, 2013.

/S/

BOB LEBLANC
Circuit Judge

/S/

DONALD A. MYERS, JR.
Circuit Judge

/S/

SALLY D. M. KEST
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Matthew P. Ferry, Esquire**, Law Office of Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790, matt@warrenlindseylaw.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, marianneallen@flhsmv.gov on this 10th day of June, 2013.

/S/

Judicial Assistant