

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

JEFFREY SOUTH,

**CASE NO.: 2013-CA-004858-O
WRIT NO.: 13-31**

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,
Linda Labbe, Hearing Officer.

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE BLACKWELL, JOHNSON, and DAVIS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey South (“South”) 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 and the ICJIS Arrest Affidavit, testimony, the In-Car DVD, and other related documents presented at the formal review hearing on January 17 and 25, 2013 and February 26, 2013, the facts are summarized as follows: On December 13, 2012 at 11:09 p.m., Officer Christopher Chaplin with the Orlando Police Department was driving west on 1-4 in the area of Ivanhoe Boulevard and observed a vehicle traveling in the right lane at a slow speed. Several other vehicles were going around the subject vehicle to avoid hitting it. Officer Chaplin then got behind the subject vehicle to observe the driving pattern as he feared that the driver was having a medical emergency, a mechanical problem, or was under the influence of drugs or alcohol. While driving westbound, Officer Chaplin observed the vehicle drift over to the left onto the dashed line that separates the lanes. The vehicle then entered slightly with the left tires into the lane and continued in this manner causing the other vehicles to maneuver around it. After passing the Colonial Drive exit, the vehicle drifted to the right, crossing over the solid white line on the shoulder of the roadway. Again fearing for the safety of the driver and the motoring public, Officer Chaplin initiated a traffic stop of the subject vehicle.

Upon making contact with the driver, later identified as South, Officer Chaplin immediately smelled the distinct odor of alcoholic beverages coming from the vehicle. South and his wife were the only occupants in the vehicle. South stated that he was coming from dinner and heading home. When asked about his driving pattern, South stated that he was handing his phone to his wife. South then produced his license and registration that had expired in September 2011. Officer Chaplin asked South for proof of a more recent registration that was not expired, but South could not provide such proof. Officer Chaplin observed that South's eyes

were bloodshot and glassy and his actions and responses appeared lethargic. Officer Chaplin then returned to his patrol vehicle to check the status of South's driver's license. Also at that point, another officer, Sergeant Van Wagner, arrived on the scene. Officer Chaplin then returned to South and explained his observations and concerns. Further, according to Officer Chaplin, South told him that his wife could drive, indicating that she had less to drink and would be okay to drive.

Officer Chaplin then requested South to exit the vehicle and to walk to the rear of the vehicle. South walked slowly. Officer Chaplin asked South if he would be willing to perform the field sobriety exercises and explained to South that performing the exercises would help him determine if he was okay to drive. South agreed to perform the exercises. Officer Chaplin then asked South questions as to his medical condition and South stated that he had tendonitis in his left heel. South was also asked other routine questions. When asked if he felt like he was functioning at 100 percent of his ability to operate a vehicle, South mumbled an answer and then said yes. When asked what the current time was, South did not know the current time. South was also asked what time he arrived at dinner and answered that his dinner reservation was for 7:30 p.m. Lastly, when the officer asked South how he rated himself on a scale of 1 to 10, with 1 being sober and 10 being drunk, South answered a 1. While South was answering the questions, Officer Chaplin could smell the odor of alcohol coming from his breath.

Officer Chaplin then explained to South that they were now going to do the exercises and instructed South to stand facing him with his back towards the guard rail. However, South stood with no response and after a moment, he asked the officer if he meant now and the officer answered yes. Officer Chaplin then began the instructions for the horizontal gaze nystagmus exercise ("HGN"). South stated that he was not good with left and right and stated that he was

better with cardinal directions. Officer Chaplin then asked South if he knew his left and right and he answered yes, but he was slow at it. During the HGN exercise, South moved his head once and swayed slightly.

Accordingly to Officer Chaplin, during the field sobriety exercises he observed that South had trouble following the instructions and while demonstrating the Walk and Turn exercise, South stepped from the instructional stance. Officer Chaplin asked South if he understood the exercise and South said nothing at first and then asked if the incident was being recorded. Officer Chaplin said yes and South looked straight ahead. South then stated it was windy and the officer agreed. Officer Chaplin then asked South if he was now refusing to perform the exercises and advised him that his refusal could be used against him in court. Officer Chaplin further advised South that he would have to base his decision to arrest him on his observations of South thus far. South responded that he felt he was being forced and needed to speak to an attorney to perform the exercises. The officer again asked South if he was refusing to perform the exercises and South stated again that he wanted to speak to an attorney.

At that point, Officer Chaplin placed South under arrest for DUI and transported him to the DUI Center. While transporting South, Officer Chaplin smelled the strong odor of alcoholic beverages coming from South. At the DUI Center, South was observed for the 20 minute period and read the Implied Consent Warnings. South then asked for an attorney and Officer Chaplin read him the Third District Court of Appeal ruling.¹ South said he understood, but he wanted an attorney and stated he was not refusing. Officer Chaplin then explained to South that the instrument would be started and when it was ready South could take the test if he chose to.

¹ Although the Third District Court of Appeal ruling referred to in Officer Chaplin's Arrest Affidavit is not cited in the record, this Court notes the case, *State v. Hoch*, 500 So. 2d 597 (Fla. 3d DCA 1986) (holding that a person has no Sixth Amendment right-to-counsel before being required to submit to a breath test and the results of such test are physical evidence and not testimonial; thus, a suspect has no Fifth Amendment right to consult with an attorney prior to deciding whether to submit to the test).

Further, Officer Chaplin advised South that if he did not follow the directions it would be considered a refusal. South stated that he understood, but he did not provide an answer. The breath test instrument was started and instructions for the test were given to South, but he made no effort to provide a sample and instead, turned his head away. After the instrument timed out, Officer Chaplin called the refusal. Officer Chaplin then issued South a notice of license suspension for refusing to submit to a lawful breath test and citations were issued for DUI and for the original infraction for failure to drive in a designated lane.

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).

Arguments

In the Petition, South argues: 1) The Hearing Officer's decision to sustain his license suspension is not supported by competent substantial evidence that his vehicle was lawfully stopped; 2) His license suspension is not supported by competent substantial evidence that the arresting officer had reasonable suspicion to detain him for a DUI investigation and to request that he perform field sobriety exercises; and 3) The Hearing Officer's decision to sustain his license suspension is not supported by competent substantial evidence that he was lawfully arrested for DUI.

Analysis

Argument I – South argues that the Hearing Officer's decision to sustain his license suspension is not supported by competent substantial evidence that his vehicle was lawfully stopped:

From review of the record, Officer Chaplin's observations of South's driving pattern leading up to when he initiated the traffic stop included: 1) South's vehicle traveling in the right lane at a slow speed causing several other vehicles to drive around the vehicle to avoid hitting it; 2) While driving westbound, South's vehicle drifted over to the left onto the dashed line that separates the lanes; 3) South's vehicle then entered slightly with the left tires into the lane and continued in this manner causing the other vehicles to maneuver around it; and 4) After passing the Colonial Drive exit, South's vehicle drifted to the right, crossing over the solid white line on the shoulder of the roadway.

First, this Court finds that Officer Chaplin's observations of South's erratic driving as discussed above provided competent substantial evidence for the Hearing Officer to find that

Officer Chaplin had an objectively reasonable basis to make the stop based on the infraction for failing to drive in a designated lane. In addition, ample case law exists that in order to have a valid stop for driving under the influence, the officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that persons detained in the stop of a vehicle have committed, are committing, or are about to commit a violation of the law. Thus, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *See State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987).

Further, this Court finds that Officer Chaplin's observations of South's erratic driving pattern also provided competent substantial evidence for the Hearing Officer to conclude that Officer Chaplin was justified in stopping South's vehicle based on a legitimate concern for the safety of South as well as for the safety of any other persons South could come in contact with while driving. "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 Ndow v. State of Florida*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (holding that a police officer who observes a motor vehicle operating in an unusual manner may be justified to make a stop even when there is no violation of vehicular regulations and no citation is issued; and in determining whether such an investigatory stop was justified, the courts must look to the totality of the circumstances); *see also Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009) (addressing a law enforcement officer's community caretaking duties).

Argument II – South argues that his license suspension is not supported by competent substantial evidence that the arresting officer had reasonable suspicion to detain him for a DUI investigation and to request that he perform field sobriety exercises:

From review of the record, among Officer Chaplin's observations of South after initiating the traffic stop and prior to when he detained South for the DUI investigation including the field sobriety exercises, were the following: 1) Upon making contact with South, Officer Chaplin immediately smelled the distinct odor of alcoholic beverages coming from the vehicle; 2) South then produced his license and registration that had expired in September 2011 and he was not able to provide more recent proof of registration that was not expired; 3) South's eyes were bloodshot and glassy and his actions and responses appeared lethargic; and 4) When Officer Chaplin returned to South's vehicle and explained his observations and concerns, South told the officer that his wife could drive, indicating that she had less to drink and would be okay to drive.

This Court finds that the totality of Officer Chaplin's observations provided competent substantial evidence for the Hearing Officer to conclude that Officer Chaplin's detainment of South for a DUI investigation, including the field sobriety exercises, was lawful. *See Amanda Re v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 963a (Fla. 9th Cir. Ct. 2010) (holding that where the officer had reasonable suspicion that he or she was driving while under the influence of alcohol or drugs, the officer had the right to temporarily detain the driver, conduct a reasonable inquiry, including field sobriety exercises, in order to confirm or deny that probable cause existed to arrest the driver for driving while under the influence of alcohol or drugs.)

Argument III – South argues that the Hearing Officer’s decision to sustain his license suspension is not supported by competent substantial evidence that he was lawfully arrested for DUI:

From review of the record, among Officer Chaplin’s observations of South when the field sobriety exercises began and prior to being placed under arrest for DUI, were the following: 1) When asked what the current time was, South did not know the current time; 2) While South was answering the questions, Officer Chaplin could smell the odor of alcohol coming from his breath; 3) When Officer Chaplin explained to South that they were now going to do the exercises and instructed South to stand facing him with his back towards the guard rail, South stood with no response and after a moment, he wanted to know if the officer meant now and the officer answered yes; 4) When Officer Chaplin began the instructions for the HGN exercise, South stated that he was not good with left and right and that he was better with cardinal directions; 5) When Officer Chaplin asked South if he knew his left and right, he stated yes, but he was slow at it; 6) Also, during the HGN test, South moved his head once and swayed slightly; 7) South had trouble following the instructions; and 8) While the officer demonstrated the Walk and Turn exercise, South stepped from the instructional stance.

This Court finds that the totality of Officer Chaplin’s observations provided competent substantial evidence for the Hearing Officer to conclude that South’s arrest for DUI was lawful. Further, upon review of the record, specifically the Arrest Affidavit, the Breath Alcohol Test Affidavit, and the Affidavit of Refusal to Submit to Breath Test, competent substantial evidence existed for the Hearing Officer to sustain the suspension of South’s driver’s license for refusing to submit to a lawful breath test.

Conclusion

Based on the foregoing, this Court finds that South 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. Because 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, this Court's review cannot go further to reweigh the evidence presented and as long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this Court's job is ended. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

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

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 10th day of January, 2014.

/S/ _____
ALICE L. BLACKWELL
Presiding Circuit Judge

JOHNSON and DAVIS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order 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**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, richardcoln@flhsmv.gov, marianneallen@flhsmv.gov on this 13th day of January, 2014.

/S/ _____
Judicial Assistant