

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

JOHN SMITH,

**CASE NO.: 2013-CA-5550-O
WRIT NO.: 13-37**

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

DATE: October 14, 2013

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE MCDONALD, KOMANSKI, MUNYON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, John Smith (“Smith”) 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, testimony, ICJIS Arrest Affidavit, Florida Traffic Crash Report, and other related documents presented at the formal review hearing on April 2, 2013, the facts are summarized as follows: On March 4, 2013 at approximately 3:31 a.m., Trooper Jorge Pereyra with the Florida Highway Patrol ("FHP") was dispatched to the scene of a single-vehicle crash in the area of Clay Street and Par Street in Orange County. When he arrived at the scene he observed a Blue Volkswagen Jetta with front damage and a light pole with damage in the support section. The driver of the Blue Volkswagen later identified as Smith was sitting in the back seat of an Orlando Police Department ("OPD") patrol vehicle for his safety without handcuffs. The OPD officer advised Trooper Pereyra that initially he was dispatched to the location of the crash, but he later found out that the crash was not located in his jurisdiction and so he turned the crash over to FHP to handle. Per the Crash Report, Smith's vehicle was travelling south on Clay Street approaching the intersection of Par Street. For some unknown reason Smith's vehicle traveled in a southwesterly direction into the west shoulder side of Clay Street and the front right side of the vehicle struck a light pole. After the collision, the vehicle bounced off from the pole and turned counterclockwise coming to final rest facing south on Clay Street.

After speaking with OPD, Trooper Pereyra then made contact with Smith whose right eye was patched with a bandage. While Smith was speaking, Trooper Perreyra noticed a very strong odor of an alcohol beverage coming from his breath and that his left unpatched eye was red, bloodshot, and watery. Also, Trooper Alvarez with FHP arrived at the scene to assist Trooper Pereyra due to Smith's vehicle being disabled at the time.

At that point, Trooper Pereyra then advised Smith that he had finished the crash investigation and was now conducting an investigation for driving under the influence. Trooper Pereyra then read Smith his Miranda warnings and asked him where he was coming from. Smith answered that he was coming from a friend's house. Trooper Pereyra also asked Smith if he had anything to drink to which Smith stated that he only had 2 Corona beers earlier. Trooper Pereyra then explained to Smith that he would be conducting the field sobriety exercises. Smith agreed to perform the exercises. Trooper Pereyra then asked Smith if he was okay with performing the exercises regardless of his injured right eye to which he replied that he was okay. Smith performed the exercises poorly exhibiting further clues of impairment.

Based upon all of Trooper Pereyra's observations and his investigation, he determined that Smith was under the influence of alcohol or chemical or controlled substances to the extent that his normal faculties were impaired. He then placed Smith under arrest and transported him to the Orange County DUI Testing Center. Upon arrival at the Testing Center, Smith was observed for the 20 minute period, read the implied consent warning, and was requested to submit to a breath test. Smith refused to submit to the test and his driver's license was suspended. In addition to being cited for DUI with damage to property, Smith was also cited for careless driving and failure to provide proof of insurance.

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). Also, 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, this 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).

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. (2013).

Arguments

In the Petition, Smith argues: 1) There were no articulated facts establishing that OPD had jurisdiction, probable cause, or a well-founded suspicion of criminal activity to detain him; 2) There was no competent substantial evidence that Smith was driving or in actual physical control of an automobile and any statements made by him were immunized pursuant to the accident report privilege; and 3) There was no probable cause or reasonable suspicion for Trooper Pereyra to continue to detain him, to conduct a DUI investigation, and to arrest him.

Analysis

Argument I - There were no articulated facts establishing that OPD had jurisdiction, probable cause, or a well-founded suspicion of criminal activity to detain him:

At the formal review hearing, Smith's counsel moved to invalidate the license suspension arguing that there were no articulated facts as to why OPD detained him while they were out of their jurisdiction. The Hearing Officer denied the motion finding that when Trooper Pereyra arrived on scene he was informed by OPD that: 1) Smith was in the patrol vehicle without handcuffs for his own safety until Trooper Pereyra could arrive to conduct the crash investigation; 2) FHP had been notified as soon as the OPD officer realized that the crash was not in his jurisdiction; and 3) it was noted in the Crash Report that the crash disabled Smith's vehicle and that he had been treated for an injury by the paramedics. Thus, the Hearing Officer concluded that it would not have been consistent with the community caretaking duties of a police officer to allow an injured motorist to leave the scene of a crash prior to the crash investigation.

Under the community caretaking doctrine, an officer may initiate contact with a driver of a vehicle without reasonable suspicion of criminal activity if necessary for public safety and welfare. The purpose of initiating contact under the community caretaking doctrine is to ascertain whether the driver of the vehicle is in need of assistance due to illness, tiredness, or impairment and to protect the motoring public from harm. *See Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009); *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). An officer initiating contact with a driver as a community caretaking duty is totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. This Court finds that the Crash Report and Trooper Pereyra's Arrest Affidavit and testimony provided competent substantial evidence for the Hearing Officer

to find that OPD was justified in detaining Smith in the patrol vehicle without handcuffs due to Smith's injury and the need to conduct the crash investigation upon FHP's arrival.

Argument II - There was no competent substantial evidence that Smith was driving or in actual physical control of an automobile and any statements made by him were immunized pursuant to the accident report privilege:

At the hearing, Smith's counsel also moved to invalidate the license suspension arguing that there was no competent substantial evidence that Smith was driving the vehicle at the time of the crash. The Hearing Officer stated that he would not consider any of Smith's pre-Miranda statements, but he was required to consider the Crash Report per section 322.2615(2)(b), Florida Statutes (2013). Thereafter in his Order, the Hearing Officer denied Smith's motion finding: 1) The Crash Report listed Smith as the registered owner and sole occupant of the vehicle at the time of the crash and there was no evidence was presented to the contrary and 2) Smith admitted post-Miranda that he was coming from a friend's house. Thus, the Hearing Officer concluded that if Smith was the registered owner and sole occupant of the vehicle, he had to be driving.

This Court finds that the Crash Report and Arrest Affidavit revealing that the accident was a single-vehicle crash and that Smith was the sole occupant, and Smith's post-Miranda statement that he was coming from a friend's house provided competent substantial evidence for the Hearing Officer to find that Smith was driving or in actual physical control of the vehicle.

Argument III - There was no probable cause or reasonable suspicion for Trooper Pereyra to continue to detain Smith, to conduct a DUI investigation, and to arrest him:

At the hearing, Smith's counsel also moved to invalidate the license suspension arguing that there was an insufficient indicia of impairment to conduct a DUI investigation of Smith. The Hearing Officer denied the motion finding that Trooper Pereyra did not find that Smith's explanation of the crash to be satisfactory and cited him for careless driving. Further, the driving pattern and articulated indicia of impairment as well as Smith's later admission of alcohol

consumption prior to driving constituted sufficient reasonable suspicion of impairment to conduct a DUI investigation.

This Court finds that the nature of the crash as revealed in the Crash Report combined with Trooper Pereyra's observations including a very strong odor of an alcohol beverage coming from Smith's breath and Smith's left unpatched eye that was red, bloodshot, and watery provided competent substantial evidence in support of the Hearing Officer's finding that the continued to detainment of Smith and a DUI investigation were justified. Further, Smith's admission to consuming 2 Corona beers provided additional support to conduct the DUI investigation including requesting Smith to perform the field sobriety exercises.

Lastly, at the hearing, Smith's counsel also moved to invalidate the license suspension based on no probable cause to arrest Smith for DUI arguing that Smith performed well on the field sobriety exercises. The Hearing Officer denied the motion finding that Smith performed poorly on the exercises and that in conjunction with the careless driving and articulated indicia of impairment provided just cause for the arrest.

In his Petition, Smith specifically argues that he was arrested without probable cause as he performed well on the field exercises that he never stepped off the line on the walk and turn exercise and he only put his foot down 1 time during the one leg stand. Thus, he concludes that there was insufficient evidence that his normal faculties were impaired. However, this argument is contradicted by the Trooper Pereyra's statement in the Arrest Affidavit addressing the field sobriety exercises and summarized in the Hearing Officer's findings that Smith performed the field sobriety exercises poorly exhibiting further clues of impairment including: 1) swaying while standing; 2) a lack of smooth pursuit and nystagmus in the left eye; 3) moving his head to follow the stimulus during the HGN exercise; 4) unable to remain in the starting position during

the instructions; 5) starting too soon, using his arms for balance, not touching heel-to-toe on four of the return steps; 6) performing an incorrect turn and not counting aloud as instructed during the walk-and-turn exercise; and 7) swaying while standing and putting his foot down four times during the one-legged stand exercise. Accordingly, the Crash Report and Trooper Pereyra's observations and investigation of Smith as revealed in his Arrest Affidavit provided competent substantial evidence for the Hearing Officer to find that Trooper Pereyra had probable cause to arrest Smith for DUI.

Conclusion

Based on the foregoing, this Court finds that Smith 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. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, John Smith's Petition for Writ of Certiorari is **DENIED**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803, shymanlaw@aol.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, marianneallen@flhsmv.gov on this 14th day of October, 2013.

/S/ _____
Judicial Assistant