

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

MICHAEL SAPIENZA,

Petitioner,

v.

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

Respondent.

CASE NO. 2013-CA-10125-O
Writ No. 13-68

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

David S. Katz, Esq,
for Petitioner.

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

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

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Sapienza seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license for driving under the age of 21 with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2616(14), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

Following a traffic stop on June 6, 2013, Petitioner was issued a Notice of Suspension by Trooper J. Evans for driving under the age of 21 with an unlawful breath alcohol level. Petitioner requested a formal review hearing pursuant to section 322.2616, Florida Statutes. A

hearing was held on July 3, 2013 and the hearing officer entered a written order sustaining the license suspension on July 5, 2013

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008).

In a formal review of an administrative license suspension, the burden of proof is on the Department to demonstrate its validity. Where the license was suspended for driving with an unlawful breath alcohol level under the age of 21, the hearing officer must find that the following have been proved by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person was under the age of 21 and was driving or in actual physical control of a motor vehicle in this state with any blood-alcohol or breath-alcohol level or while under the influence of alcoholic beverages.
2. Whether the person was under the age of 21.
3. Whether the person had a blood-alcohol or breath-alcohol level of 0.02 or higher.

§ 322.2616(8)(a), Fla. Stat. (2013).

Use of an Approve Device

The breath test affidavit reviewed by the hearing officer showed Petitioner's test results to be .157 and .169 (DDL#4). Petitioner argues that there was no proof on the record that the breath tests were administered on a device appearing on the U.S. Department of Transportation list of approved devices. He asserts that it cannot be determined that the "Alco-Sensor" named in the trooper's breath test affidavit is one of the various models of Alco-Sensor on the approved list.

To consider breath test results, the Department must show that the tests were performed substantially according to the methods approved by the Department as reflected in the administrative rules and statutes. *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001). Once the Department meets its burden, the contesting party must demonstrate noncompliance by the Department. *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

Section 322.2616(17), Florida Statutes, states a breath test may be conducted “by a breath-alcohol test device listed in the United States Department of Transportation’s conforming-product list of evidential breath-measurement devices. The reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section.” Trooper Evans’ breath test affidavit (DDL#4) states that the breath test device used, Alco-sensor FST serial number 056774, “is listed in the U.S. Department of Transportation’s conforming products list, and has been calibrated and checked in accordance with the manufacture’s and/or agency’s procedures.” The affidavit also states that the officer administered the breath test “in accordance with § 322.2616.”

Based on this document, there was substantial competent evidence supporting the conclusion that the tests were performed on an approved device and that Petitioner’s blood alcohol level was .02 or higher. Petitioner presented no evidence that the device used by the trooper was not an approved device.

Lawfulness of the Traffic Stop

Petitioner contends that the hearing officer did not have a record basis for determining that the traffic stop resulting in his license suspension was lawful. The Department argues that the hearing officer is not required to make that determination and that the lawfulness of the stop is not an element subject to review at a hearing under section 322.2616, Florida Statutes.

Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070 (Fla. 2011) held that a driver who refused to take a breath test may contest the lawfulness of his arrest at a license suspension hearing conducted pursuant to section 322.2615, Florida Statutes. This case has been extended to apply as well to drivers who took and failed a breath test. *Carrizosa v. Dep't of Highway Safety & Motor Vehicles*, 124 So. 3d 1017 (Fla. 2d DCA 2013). The Department contends that this line of cases is not relevant to hearings held under section 322.2616, relating to underage drinkers.

Section 322.2616(19) reads, in relevant part: “A violation of this section is neither a traffic infraction nor a criminal offense, nor does being detained pursuant to this section constitute an arrest.” Since there is no arrest under this statute, then it makes little sense to find that the hearing officer should look at whether the arrest is lawful.

However, even in the absence of an actual arrest, the lawfulness of a traffic stop remains an issue for a person accused of underage drinking and driving. The only opportunity that person has to contest the constitutional validity of the stop is at the administrative hearing and it would be a denial of due process to allow license suspensions to be imposed in the absence of evidence that the traffic stop which resulted in the suspension was lawful.

In this case, the trooper’s report (DDL#3) stated that he observed Petitioner’s car

weaving back and forth within the outside lane. The vehicle drifted over and the right tires touched the white line. The vehicle would then drift back to the center of the lane and weave back and forth. The vehicle made a right turn onto Turbine Drive and then did not come to a complete stop before turning left onto Collegiate Way...

Probable cause is not required for a traffic stop, only reasonable suspicion, a less demanding standard. *Dep't of Highway Safety & Motor Vehicles v. Ivey*, 73 So. 3d 877, 880 (Fla. 5th DCA 2011). Even absent a traffic infraction, an officer may conduct a stop where he observes a vehicle being operated in an unusual manner, regardless of whether other traffic is

interfered with. *State v. Rodriguez*, 904 So. 2d 594, 598 (Fla. 5th DCA 2005); *Ndow v. State*, 864 So. 2d 1248 (Fla. 5th DCA 2004). “Unusual operation” may include drifting and weaving. *State v. Proctor*, 39 Fla. L. Weekly D415, n. 2 (Fla. 5th DCA 2014). See, also, *Harrington v. Dep't of Highway Safety & Motor Vehicles*, 39 Fla. L. Weekly D273 (Fla. 2d DCA 2014), concurring opinion by Judge Alterbrand:

Even when a vehicle manages to stay within a single lane, there are patterns of driving that an experienced officer may rely upon to establish reasonable suspicion that the driver is impaired. That suspicion allows the officer to conduct a brief traffic stop to determine whether the officer has probable cause to arrest the driver for DUI.

Trooper Evans reported several incidents of weaving, drifting, and line-touching. While he did not specify that the failure to come to a complete stop occurred at a stop sign or traffic signal, it seems more than reasonable to assume that it did. There would otherwise be no reason for the officer to note the failure to stop. Based on these facts, the hearing officer could conclude that a preponderance of the evidence demonstrated the stop was lawful.

Age of the Driver

Petitioner contends there was no record evidence that the officer had reason to believe he was under the age of 21. This argument is without merit. The trooper did not have to know the driver's age before he stopped him. That he then discovered the driver's age by looking at Petitioner's license is obvious from the record. The trooper issued a notice of suspension (DDL#1) containing Petitioner's driver's license number. This document also reports Petitioner's date of birth, as does DDL#3. This is more than sufficient evidence to conclude that the trooper had grounds for believing Petitioner was under 21; the trooper did not need to write out, “I believe the driver is under 21 because. . .” as Petitioner argues.

Conclusion

Based on the foregoing, the hearing officer did not depart from the essential requirements of the law, Petitioner was not deprived of due process, and there was competent substantial evidence to support the hearing officer's decision.

Accordingly, 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 June, 2014.

/S/ _____
JOHN MARSHALL KEST
Presiding Circuit Judge

HIGBEE and ROCHE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **David S. Katz, Esq.**, Katz & Phillips, P.A., 509 West Colonial Drive, Orlando, Florida 32804; and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 2nd day of June, 2014.

/S/ _____
Judicial Assistant