

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

MICHAEL SCOMA,

**CASE NO.: 2013-CA-012757-O
WRIT NO.: 13-89**

Petitioner,

v.

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

Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE WHITEHEAD, DAWSON, and TURNER, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Scoma (“Scoma”) 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 Arrest Report, Breath Alcohol Test Affidavit, Agency Inspection Report, other related documents, and testimony presented at the formal review hearing on September 12, 2013, the Hearing Officer's findings of facts are summarized as follows: On August 25, 2013 at approximately 3:28 a.m., Officer Briscoe with the Orlando Police Department was on patrol in the parking lot at 50 West Washington Street when he observed a vehicle parked in the lot with its brake lights illuminated. Officer Briscoe also observed that there was a male driver, later identified by his driver's license as Scoma, sleeping in the driver's seat and a significant amount of vomit on the ground outside the driver's door. Officer Briscoe then knocked on the window in an attempt to wake Scoma who had his foot on the brake with the radio on. Also, the vehicle's ignition was on; however, the engine was not running. Scoma did not respond to the knocking so Officer Briscoe started announcing loudly that he was the police. Scoma then woke up and touched the ignition button to shut the vehicle off.

Next, Scoma opened the door and Officer Briscoe observed vomit in the door jamb and on Scoma. Officer Briscoe also immediately smelled the odor of alcohol impurities coming from Scoma and that he had red bloodshot eyes and slurred speech. Officer Briscoe then asked Scoma to step out of the vehicle to speak with him and observed that Scoma was wearing a green bar bracelet on his right wrist. Scoma became argumentative and attempted to get back into his vehicle and at that point, Officer Briscoe contacted Officer Peczinka with the DUI Unit to respond.

Upon arriving at the scene, Officer Peczinka was advised by Officer Briscoe of the events and his observations of Scoma. Officer Peczinka then made contact with Scoma and smelled the odor of alcohol impurities coming from Scoma's breath that grew stronger as Scoma spoke.

Also, Officer Peczinka noticed that Scoma's speech was slurred, he spoke very deliberate with a thick tongue, and his eyes were red, bloodshot, heavy, glassy, and watery, and he had a visibly dry mouth with white lips. Officer Peczinka also noticed the vomit on Scoma's shirt and on the door jamb and ground. During a series of questions, Scoma told the officer that he had consumed alcoholic beverages and that he absolutely would not perform field sobriety exercises. At that point, believing that Scoma's normal faculties were impaired and that Scoma was in actual physical control of the vehicle that was readily available to be driven on the roadway as the vehicle's key was in Scoma's right pants pocket and the vehicle's ignition was on, Officer Peczinka placed Scoma under arrest for DUI and transported him to the DUI Testing Center. At the Center, Scoma was observed for the 20 minute period, read the Implied Consent Warning, and provided samples of his breath with results of 0.132 and 0.128.

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 license was suspended for driving with an unlawful breath alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2013).

Arguments

In the Petition, Scoma argues: 1) There was no well-founded suspicion of criminal activity or probable cause for the investigatory stop; 2) The Hearing Officer improperly admitted into evidence the breath test results without a proper predicate showing that the results were based upon sufficient scientific facts or data and that the testimony in support of the results was the product of reliable scientific principles and methods that were applied to the facts of the case thus, violating section 90.702, Florida Statutes (2013) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*; and 3) The Hearing Officer deprived him of due process by preventing him from asking relevant questions about the scientific reliability of the breath test results and the Intoxilyzer 8000 breath testing machine, by failing to consider or allow him to proffer for appellate purposes various documents showing the scientific unreliability of the Intoxilyzer 8000 and the breath test results, and by failing to allow the issuance of subpoenas for relevant witnesses.

Analysis

Scoma's First Argument Addressing the Investigatory Stop

First, Officer Briscoe's initial observations leading up to when Scoma opened the driver's door were: 1) Scoma's vehicle was parked in the lot with its brake lights illuminated; 2) Scoma was sleeping in the driver's seat; 3) A significant amount of vomit was on the ground outside the driver's door; 4) Officer Briscoe then knocked on the window in an attempt to wake Scoma; 5) Scoma had his foot on the brake with the radio on and the vehicle's ignition was on, but the engine was not running; 6) Scoma did not respond to the knocking so Officer Briscoe started

announcing loudly that he was the police; and 7) Scoma then woke up and touched the ignition button to shut the vehicle off.

This Court finds that these observations provided competent substantial evidence for the Hearing Officer to find that the Officer Briscoe was justified in making contact with Scoma. To have a valid stop for driving under the influence, a law enforcement officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that a person detained in the stop of a vehicle has committed, is committing, or is 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, "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).

Next, Officer Briscoe's observations of Scoma after he woke up and opened the door included: 1) Vomit was in the door jamb and on Scoma; 2) The odor of alcohol impurities coming from Scoma; 3) Scoma had red bloodshot eyes; and 4) Scoma had slurred speech. At that point, the vomit, at a minimum gave Officer Briscoe just cause to continue the well-being check, and combined with the other observations i.e., smell of alcohol, red bloodshot eyes, and slurred speech, provided competent substantial evidence to initiate a DUI investigation.

The Hearing Officer as the finder of fact was responsible for weighing the evidence including the credibility of witnesses and documents. *See Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) *citing Dep't of Highway Safety*

& Motor Vehicles v. Marshall, 848 So. 2d 482 (Fla. 5th DCA 2003) and *Dep't of Highway Safety & Motor Vehicles v. Dean*, 662 So. 2d 371 (Fla. 5th DCA 1995) (explaining that the hearing officer was free to accept or reject testimony); *see also Rodriguez-Havlovic v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 536b (Fla. 9th Cir. Ct. 2006). Therefore, 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, this Court finds that the totality of Officer Briscoe's observations of Scoma provided competent substantial evidence for the Hearing Officer to find that pursuing the DUI investigation was justified.

Scoma's Second and Third Arguments as to the Scientific Reliability of the Breath Test Results and the Approval Process for the Intoxilyzer 8000 Machine

Scoma argues that the Hearing Officer improperly admitted the breath test results in violation of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Scoma claims that the Department is required to demonstrate that the breath test results are in compliance with section 90.702, Florida Statutes, and that the Department failed to show that the results are scientifically reliable under *Daubert*.

For an analysis of a person's breath to be considered valid, the Department must show that it was 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. Berne*, 49 So. 3d 779, 782 (Fla. 5th DCA 2010); *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001). The breath test affidavit is presumptive

proof of the results of an authorized test to determine alcohol content of the breath if the affidavit contains all the statutorily required information prescribed in section 316.1934(5), Florida Statutes (2013). *Berne*, 49 So. 3d at 783; *Gurry v. Dept. of Highway Safety*, 902 So. 2d 881, 884 (Fla. 5th DCA 2005).

In this case, the Department admitted the Breath Test Affidavit, DDL#4, and the Agency Inspection Report, DDL#5, that contained all the statutorily required information to establish that the Intoxilyzer 8000 machine used for Scoma's test was properly inspected and maintained, performed appropriately, and produced accurate and reliable test results. *See Berne*, 49 So. 3d at 783; *Russell*, 793 So. 2d at 1076; *Dep't of Highway Safety & Motor Vehicles v. Dehart*, 799 So. 2d 1079, 1081 (Fla. 5th DCA 2001). Therefore, the Breath Test Affidavit together with the Agency Inspection Report is presumptive proof of results of an authorized test and that the Department complied with the applicable statutes and rules. Scoma attempted to introduce documents about breath test results that were not his results, documents related to the 2002 approval study of the Intoxilyzer 8000, and other documents that were not relevant to the scope of the hearing. The Fifth District Court of Appeal held that challenges to the approval process of the Intoxilyzer machine are beyond the scope of a formal driver's license review proceeding and the Intoxilyzer 8000 is approved for evidentiary use in Florida. *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 841 (Fla. 5th DCA 2013), *review denied*, 123 So. 3d 558 (Fla. 2013). Therefore, the Hearing Officer correctly excluded Scoma's irrelevant evidence and the Breath Test Affidavit was properly admitted.

Scoma also argues that he was denied due process because the Hearing Officer prevented him from asking relevant questions, did not allow him to proffer for appellate purposes documents to show that the Intoxilyzer 8000 and the results were scientifically unreliable under *Daubert*, and did not issue subpoenas for witnesses who would have established that the breath test results were scientifically unreliable.

A hearing officer is permitted to regulate the course and conduct of a hearing and make decisions on the relevance and credibility of evidence presented. § 322.2615(6)(b), Fla. Stat. (2013); Fla. Admin. Code R. 15A-6.013(7). As stated in the foregoing, the documents Scoma's counsel attempted to proffer and the questions he attempted to ask regarding the approval process and the scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing. *Klinker*, 118 So. 3d at 841. Therefore, the Hearing Officer properly limited the questions and evidence to matters within the scope of the hearing. In addition, the Fifth District has determined that a driver is limited to subpoenas for individuals identified in documents required to be submitted by law enforcement pursuant to section 322.2615(2). *Id.* at 839. The subpoenas that were not issued by the Hearing Officer were for witnesses not identified in the documents required to be submitted. Therefore, Scoma was not deprived of due process.

Conclusion

Based on the foregoing, this Court finds that Scoma 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, Michael Scoma's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 23rd day of June, 2014.

/S/
REGINALD K. WHITEHEAD
Presiding Circuit Judge

DAWSON and TURNER, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman. P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Richard M. Coln, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 23rd day of June, 2014.

/S
Judicial Assistant