

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

EDWARD B. ANDRADE,

CASE NO.: 2014-CA-002431-O

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,
Regenia Newton, Hearing Officer.

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE MIHOK, TURNER, and UNDERWOOD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward B. Andrade (“Andrade”) 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 testimony, Arrest Affidavit, and other related documents presented at the formal review hearing on February 5, 2014, the facts are summarized as follows: On January 8, 2014, Deputy Jason Sagel of the Orange County Sheriff's Office was dispatched to a call in reference to a vehicle stuck on the railroad tracks. The train inspector was the complainant and stated that the driver could be possibly intoxicated. Upon arrival, the deputy observed a Nissan SUV parked over the entire railroad tracks that hindered the passing of the train.

Deputy Sagel then made contact with the driver, identified by his driver's license as Andrade, who was lying down in a grassy area on his back, thirty feet from the vehicle located on the tracks. The deputy could smell an obvious odor of alcohol coming from Andrade's exhaled breath. The deputy also observed that Andrade's eyes were bloodshot, red, glassy, and watery. The deputy asked Andrade multiple times if he wanted to stand up and he refused. Eventually, Andrade decided to stand up but was unable to do so without falling over. After making multiple attempts to stand up, Andrade required the deputy's help to get to his feet. Also, Deputy Sagel testified at the formal review hearing that the purpose of asking Andrade to stand up was to make sure he was okay and to determine if there was any type of medical emergency.

Further, as Andrade spoke, Deputy Sagel observed that Andrade's speech was slurred and at times incomprehensible. The deputy then asked Andrade basic questions such as his name and date of birth. In response, Andrade stared at the deputy blankly and mumbled incoherent phrases. When asked if English was his first language, Andrade replied as if he had food in his mouth, stating "You are doing an exceptional job." Andrade also told the

deputy that he had driven down the road and tried to go somewhere but when asked if he was driving the subject vehicle, he would not respond. When asked who owned the vehicle, Andrade responded that it was his mother's car. Andrade later stated that he drove over the railroad tracks and got stuck. He also stated that he was coming from the Rachel's strip club and that he had three or four glasses of wine.

Also, at the scene, Deputy Sagel spoke with the train inspector, William Mills, who told him that he was riding on the train and noticed a vehicle on the tracks. The inspector stated that he stopped to check to see if he could clear the vehicle without hitting it and that was when he saw Andrade appear from a bush near the vehicle. The inspector also stated that after calling dispatch and waiting for law enforcement, he observed Andrade trying to push the vehicle and that Andrade asked him not to call the police. Further, the inspector stated that Andrade became antsy and removed his belt so the inspector asked dispatch to expedite the law enforcement response time. Lastly, the inspector stated that Andrade tried to touch the train, was not making sense, and seemed to be under the influence.

Deputy Sagel then asked Andrade if he had any weapons on his person and he replied "No, you can search me." The deputy then proceeded to search Andrade for weapons and located the keys to the vehicle in Andrade's front left pocket. At that point, based on how the vehicle was parked and his initial contact with Andrade as described above, the deputy began to interview Andrade to determine drug or alcohol impairment versus a possible medical condition and asked Andrade a series of medical questions. Andrade responded to all medical questions with a no answer except that he does take anxiety medication and he is seeing a psychiatrist. Based on the observations of the vehicle, his contact with Andrade, and the

responses received, the deputy asked Andrade if he would perform the field sobriety exercises. Andrade refused to perform the exercises.

Based on the totality of Deputy Sagel's observations, he developed probable cause to believe that Andrade was operating or in actual physical control of the vehicle while under the influence of alcohol, drugs, or a combination of both to the point that Andrade's normal faculties were impaired. The deputy then placed Andrade under arrest for DUI and inventoried the subject vehicle. During the search of the vehicle, the deputy found a bottle of prescription Clonazepam containing .5mg tablets in the glove box with instructions stating "Alcohol may intensify this effect. Use care when operating a car or dangerous machinery."

Before and during transport to the Orange County Breath Testing Center, Andrade threw up six times in the back of the patrol vehicle and then fell asleep. At the Testing Center, Deputy Sagel attempted to clean some of the vomit from Andrade's sweater and Andrade spontaneously uttered to the deputy, "No, don't touch me, I'm inebriated." Andrade was observed for twenty minutes and began to argue with the breath technician and refused to answer any of the technician's questions. Andrade was then taken into the testing room, read the Implied Consent Warning, and asked to submit to a breath test. Andrade refused to submit to a breath test resulting in the suspension of his driver's license.

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. (2014).

Arguments

In the Petition, Andrade argues that the Hearing Officer's decision to sustain his license suspension is not supported by competent substantial evidence that he was lawfully detained or that he was lawfully arrested for DUI. Specifically, he argues that: 1) The facts known to Deputy Sagel at the time he decided to detain him for a DUI investigation were insufficient to support reasonable suspicion that he was driving or in actual physical control of a motor vehicle and 2) There was no evidence of damage to any vehicles for the Hearing Officer to conclude that Deputy Sagel had reasonable suspicion to believe that he had committed a DUI in connection with a traffic crash. Thus, he concludes that his continued detention and arrest were unlawful and violated the Fourth Amendment.

Analysis

First argument: Deputy Sagel's observations of Andrade leading up to when he began the DUI investigation were: 1) Andrade was lying down in a grassy area on his back, thirty feet from the vehicle located on the tracks; 2) The deputy could smell an obvious odor of alcohol coming from Andrade's exhaled breath; 3) Andrade's eyes were bloodshot, red, glassy, and watery; 4) Andrade was unable to stand up without falling over and required the deputy's help to get to his feet; 5) Deputy Sagel's purpose of asking Andrade to stand up was to make sure he was okay and to determine if there was any type of medical emergency; 6) Andrade's speech was slurred and at times incomprehensible as if he had food in his mouth; 7) When asked basic questions, Andrade stared at the deputy blankly and mumbled incoherent phrases; 8) Andrade's statement that he drove over the railroad tracks and got stuck; 9) Andrade's statement that he was coming from the Rachel's strip club and that he had three or four glasses of wine; and 10) Upon searching Andrade as part of the well-being safety check for weapons, the deputy located the keys to the vehicle in Andrade's front left pocket.

This Court finds that these observations provided competent substantial evidence for the Hearing Officer to find that the detainment of Andrade for the DUI investigation including requesting that Andrade perform the field sobriety exercises was lawful. Further, the totality of Deputy Sagel's observations and Andrade's responses including his statement that he was taking anxiety medication provided competent substantial evidence for the Hearing Officer to find that Deputy Sagel had probable cause to believe that Andrade was operating or in actual physical control of the subject vehicle while under the influence of alcohol, drugs, or a combination of both to the point that Andrade's normal faculties were impaired; thus the arrest was lawful.

Second argument: In Andrade’s second argument he claims that because there was no evidence of damage to any vehicles, there was no reasonable suspicion for the Hearing Officer to find that he had committed a DUI in connection with a traffic crash. This argument is misplaced. First, in the Hearing Officer’s decision in this case, she did not mention a “traffic crash” when determining that Deputy Sagel had probable cause to believe that Andrade was driving or in actual physical control of the vehicle. Second, section 322.2615(7)(b)1., Florida Statutes, does not require finding that a traffic crash occurred. As stated above, the statute requires a hearing officer to find that “[t]he 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.” Lastly, it would be reasonable to find that the subject vehicle being stuck on the railroad tracks and hindering the passing of the train was an imminent danger to the public safety and warranted the immediate dispatch of law enforcement to the scene.

Conclusion

Based on the foregoing, this Court finds that Andrade 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 Hearing Officer’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).

Lastly, in this case, the Department filed its "Motion to Tax Attorney's Fees and for Sanctions Pursuant to Section 57.105(1), Florida Statutes", arguing that Andrade's Petition and Appendix are improper and frivolous by not being in compliance with administrative and appellate rules and case law. Upon review of said Motion and Andrade's Response, this Court finds that granting said Motion is not warranted in this case and thus, must be denied.

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. Petitioner, Edward B. Andrade's Petition for Writ of Certiorari is **DENIED**.
2. "The Department's Motion to Tax Attorney's Fees and for Sanctions Pursuant to Section 57.105 Florida Statutes" filed April 15, 2014 is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 4th day of August, 2014.

/S/

A. THOMAS MIHOK
Presiding Circuit Judge

TURNER and UNDERWOOD, 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 Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 4th day of August, 2014.

/S/

Judicial Assistant