

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

**BRANDON DUSAN ROSE,**

Appellant,

v.

**STATE OF FLORIDA,**

Appellee.

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**CASE NO.: 2012-CV-000052-A-O**

Lower Case No.: 2012-TR-009966-A-E

Appeal from the County Court, for  
Orange County, Florida  
Carroll S. Barco, Traffic Court Hearing Officer

Brandon Dusan Rose, Esquire, Appellant.

Erin L. DeYoung, Esquire, for Appellee.

Before WHITEHEAD, HIGBEE, and O’KANE, J.J.

**PER CURIAM.**

**FINAL ORDER AFFIRMING LOWER COURT**

Appellant, Brandon Dusan Rose (“Rose”), timely files this appeal of the lower court’s “Determination of Infraction” entered on June 27, 2012. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

### *Summary of Facts and Procedural History*

On April 2, 2012, Rose was cited for failing to stop at a red light when making a right turn from Orlando Avenue onto Horatio Avenue in the City of Maitland. Rose challenged the citation and a hearing was held June 27, 2012 before Hearing Officer Carroll Barco. Rose and the City of Maitland's witness appeared and testified.<sup>1</sup> Upon conclusion of the hearing, Hearing Officer Barco entered a Determination of Infraction finding Rose guilty of the violation under section 316.075(1)(c)1, Florida Statutes. Rose then appealed the Determination of Infraction.

In the appeal proceedings, Rose filed a motion to direct the Maitland Police Department to supplement the record on appeal with a video of the traffic incident. On March 14, 2013, this Court denied Rose's motion because the video was not submitted into evidence and therefore was not part of the record on appeal.<sup>2</sup> However, this Court relinquished jurisdiction to the lower court for thirty days to permit the parties to submit statements of evidence regarding the contents of the video for settlement and approval in accordance with Florida Rule of Appellate Procedure 9.200(b)(4). Thereafter, the relinquishment period expired with no record of an approved statement of evidence. Accordingly, on May 2, 2013, this Court issued an Order to Show Cause directing Rose to serve the Initial Brief within fifteen days of the date of service of the Order.

On May 17, 2013, Rose filed a motion requesting that this Court relinquish jurisdiction to the lower court for an additional thirty days to consider his proposed statement of evidence. On June 10, 2013, this Court granted the motion and entered a second order relinquishing

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<sup>1</sup> The hearing transcript does not include a name for the City of Maitland's witness. This Court notes that on June 19, 2012 the City of Maitland filed its witness list stating Ashley Bettoncourt with Gatso USA, Inc. as its witness.

<sup>2</sup> On June 19, 2012 and June 26, 2012, the City of Maitland filed Notices of Intent to File 1) the Certification of CMA Consulting Services that provides services to Gatso USA, Inc. for Maitland's Red Light Camera Program; 2) the Uniform Traffic Citation and accompanying video and photographs of the Infraction; and 3) the vehicle registration record. However, the index of the record on appeal only states that the exhibit entered into evidence was the Notice of Violation with attachments (copy). The Notice of Violation included photographs of the Rose's vehicle making the right turn at the intersection and the vehicle's tag.

jurisdiction to the lower court granting an additional thirty days for settlement and approval of a statement of evidence. On June 25, 2013, Rose filed his statement of evidence in the lower court. However, to date, no settlement and approval of a statement of evidence was filed. Accordingly, this Court's review on appeal will not include the video or the statement of evidence.

### ***Arguments on Appeal***

Rose argues that the lower court erred as a matter of law in construing "careful and prudent" under subsections 316.0083(1)(a) and (2), Florida Statutes, as meaning that a driver must always come to an absolute complete stop because the driver does not know what other drivers may possibly do.

In Response, the State via the Maitland Police Department argues that: 1) Rose's Initial Brief does not comply with Florida Rules of Appellate Procedure 9.210 or 9.110 by being untimely filed and not stating the precise relief sought and 2) The Hearing Officer made a finding of fact after being presented with the evidence at hearing. Thus, the Appellate Court should not reweigh the evidence unless an abuse of discretion is found.

### ***Standard of Review***

According to section 318.33, Florida Statutes, appeals shall be based upon the record of the hearing before the hearing officer and shall not be hearings de novo. However, to the extent that Rose raises a pure question of law, the appropriate standard of review is de novo. *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012). Further, the standard of review applicable to a trial court decision based upon a finding of fact is whether the decision is supported by competent substantial evidence. *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976).

### *Analysis*

First, this Court addresses the Maitland Police Department's argument that Rose's Initial Brief was not timely filed. This Court's second order relinquishing jurisdiction to the lower court also gave Rose sixty days from the date of the order to file the Initial Brief. The order was entered on June 10, 2013, thus, the due date would have been August 9, 2013. Although, Rose's Initial Brief was not filed until August 14, 2013, it was still timely filed per Florida Rule of Appellate Procedure 9.420(e) that states that computation of time shall be governed by Florida Rule of Judicial Administration 2.514. Rule 2.514(b) provides five additional days for service by mail or e-mail when, as in this case, a party must act within a specified period of time.

Next, this Court addresses Rose's argument that the lower court erred as a matter of law in construing "careful and prudent" under subsections 316.0083(1)(a) and (2), Florida Statutes. From what this Court can discern from the hearing transcript, the person appearing on behalf of the Maitland Police Department testified as to Rose's red light violation and referred to the tag verification, photographs, and video of the violation. Rose then testified that when he made the right turn he was driving in a careful and prudent manner and argued that per subsections 316.0083(1)(a) and (2), Florida Statutes, he should not have been cited for failing to stop at the red light. These subsections of the statute state that a notice of violation and a traffic citation may not be issued for failure to stop at a red light if the driver is making a right-hand turn in a careful and prudent manner at an intersection where right-hand turns are permissible. The colloquy then proceeded as follows:

COURT: Are you aware whether you were prudent to do that?

ROSE: Yes, Your Honor. I am --

COURT: Are you aware of what "prudent" means?

ROSE: Prudent means “in a wise and careful manner.” I’m evaluating risk as I slow down. There are no risks. There are no pedestrians. The only traffic that presents any concern in that video is U-turns being made off of Horatio, because they are the only traffic that is in operation at that time.

COURT: (Indiscernible) -- to your left then you got two other lanes of traffic -- (indiscernible) up there. You don’t know whether somebody’s going to make a U-turn or not. You’re not slowing down. I don’t think that’s prudent. I find you guilty -- (indiscernible).

From what this Court can discern, Hearing Officer Barco applied subsections 316.0083(1)(a) and (2), Florida Statutes, to the instant case and made a factual finding that Rose was not driving in a prudent manner. Hearing Officer Barco as the trier of fact was in the best position to evaluate and weigh the evidence including the credibility and demeanor of the witness and Rose. *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998) (explaining that the trial judge as the trier of fact had the superior vantage point to see and hear the witnesses and to judge their credibility).

Further, due to the lack of video evidence for this Court’s review, this Court would have to speculate as to Rose’s driving pattern and the traffic condition when the incident occurred. Accordingly, this Court cannot go further to determine whether Rose was driving in a careful and prudent manner. Lastly, it is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983). In the absence of an adequate record, this Court has no alternative but to presume the decision is correct. *Applegate* at 1152.

Accordingly, is hereby **ORDERED AND ADJUDGED** that the lower court's "Determination of Infraction" entered against Brandon Dusan Rose on June 27, 2012 is **AFFIRMED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 11th day of December, 2013.

/S/  
**REGINALD K. WHITEHEAD**  
Presiding Circuit Judge

HIGBEE and O'KANE, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order was furnished to: **Brandon Dusan Rose, Esquire**, 1345 E. Red Bug Road, Oviedo, Florida 32765 and Smith & Rose, P.A., 2060 Winter Springs Blvd., Oviedo, Florida 32765-9347<sup>3</sup>, [info@esrose.com](mailto:info@esrose.com) and **Erin L. DeYoung, Esquire**, Maitland Police Department, 1837 Fennel Road, Maitland, Florida 32751, [edeyoung@maitlandpd.org](mailto:edeyoung@maitlandpd.org) on the 11th day of December, 2013.

/S/  
Judicial Assistant

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<sup>3</sup> The Certificate of Service includes two addresses for Brandon Rose because the documents in the record state the Red Bug Road location, but on The Florida Bar website Rose's address is stated at the Winter Springs Blvd. location.