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

Bruce R. Edwards, CASE NO.: 2015-CA-10909-O

Petitioner,

v.

State of Florida, Department of Highway Safety and Motor Vehicles, Bureau of Administrative Reviews,

Respondent.
_____/

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

Christi Leigh McCullars, Esq., for Petitioner.

Stephen D. Hurm, General Counsel, and Jason Helfant, Senior Assistant General Counsel, for Respondent.

Before SCHREIBER, J. RODRIGUEZ, and CARSTEN, J.J.

PER CURIAM.

ORDER GRANTING MOTION FOR REHEARING AND DENYING PETITION FOR WRIT OF CERTIORARI

THIS MATTER comes before the Court on the Department of Highway Safety and Motor Vehicles' Motion for Rehearing, filed on February 22, 2016. We grant the motion for rehearing, withdraw the prior Order entered on February 19, 2016, and substitute this Order in its place.

Petitioner Bruce R. Edwards seeks certiorari review of his driver's license suspension for refusing to take a breath test. We have jurisdiction. § 322.2615(13), Fla. Stat. (2015); Fla. R. App.

P. 9.030(c)(3). Certiorari is denied because the trooper made an objectively reasonable mistake of law that provides reasonable suspicion necessary to support the traffic stop. Additionally, Edwards failed to preserve his argument for appellate review that there was no reasonable suspicion justifying a request to perform field sobriety exercises, he was sufficiently told that there would be adverse consequences for refusing to perform the field sobriety exercises, and his due process rights were not violated regarding the hearing officer's approach to the video he presented that would not play during the hearing.

On September 27, 2015, at 1:25 a.m., a Florida Highway Patrol trooper observed Edwards stop at a stop sign, make a wide right turn into the far travel lane, then swerve to the right and then back to the left. The trooper then initiated a traffic stop for making an improper right turn under Florida Statute section 316.151(1)(a), based on the trooper's belief that it is illegal to make a wide right turn, and Edwards's one instance of weaving.

During the stop, the trooper observed signs of impairment and asked Edwards to perform field sobriety exercises. When Edwards refused, the trooper told him that by refusing, the trooper would have to make a decision regarding whether he was driving while impaired based on what the trooper had previously seen. The trooper then placed Edwards under arrest for DUI and asked Edwards to take a breath test. Edwards refused the breath test, and his license was suspended. The trooper also issued a citation for making an improper right turn under Florida Statute section 316.151(1)(a).

Edwards requested a formal hearing to review his license suspension. At the hearing, the trooper testified that Edwards was stopped for making an improper right turn. The trooper believed that, under section 316.151(1)(a), the driver must go to the first immediate lane of travel when completing a right turn, which Edwards did not do. The trooper did not believe that Edwards was

impaired when he turned right, and the trooper did not remember the traffic conditions. During the trooper's testimony, Edwards tried to play a video of the breath test observation period that he obtained from the State Attorney's office, but the video did not work.

At the end of the hearing, Edwards moved to suppress the stop on the basis that because there was no traffic violation and no erratic driving pattern, the trooper lacked a well-founded suspicion justifying the stop. Edwards also argued that he was not adequately informed of the adverse consequences of refusing to perform field sobriety exercises. The hearing officer upheld the license suspension. Edwards then filed this petition for writ of certiorari to review the hearing officer's decision.

A. Standard of Review

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal's decision was supported by competent substantial evidence, whether it departed from the essential requirements of the law, and whether procedural due process was accorded. *Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008).

B. The Stop

Edwards argues that the hearing officer applied the wrong standard to justify the trooper's stop. At the hearing, the trooper testified that he stopped Edwards for making an improper right turn under Florida Statute section 316.151(1)(a), and because he weaved once. The trooper believed that the driver must go to the first immediate lane of travel when completing a right turn. He also testified that he did not believe Edwards was impaired when Edwards turned right.

For the traffic stop to be valid under the Fourth Amendment, there must be facts giving rise to a reasonable suspicion that the person is breaking the law. *Heien v. North Carolina*, 135 S. Ct.

530, 536 (2014). An objectively reasonable mistake of law can provide the necessary reasonable suspicion. *Id.*

Section 316.151(1)(a) states, "The driver of a vehicle intending to turn at an intersection shall do so as follows: . . . Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway." Even if the trooper made a mistake of law in stopping Edwards for making a wide right turn, that mistake was objectively reasonable. Based upon an objective review of the facts, which includes the wide right turn and the weaving following the turn, the trooper had a reasonable suspicion of a traffic violation, and therefore the stop was valid.

C. Field Sobriety Exercises

1. Request to do field sobriety exercises

Edwards asserts that there was no reasonable suspicion justifying the trooper asking him to perform field sobriety exercises. This argument was not presented in the only motion Edwards made to the hearing officer regarding the field sobriety exercises, however. Thus, Edwards is precluded from arguing that issue here. *Dep't of Highway Safety & Motor Vehicles v. Marshall*, 848 So. 2d 482, 485 (Fla. 5th DCA 2003) (issue waived and should not be considered by circuit court on certiorari review when it was not presented to hearing officer).

2. Failure to inform of adverse consequences

Edwards's second argument regarding the field sobriety exercises is that he was not informed of the adverse consequences of refusing to do them, and therefore the hearing officer should not consider Edwards's refusal.

In *State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995), the defendant argued that his refusal to perform the field sobriety exercises was inadmissible. Although the defendant was not told that

the exercises were mandatory, the police officer did tell the defendant that if the defendant refused to do them, then the officer would use what he had observed to determine whether the defendant was impaired. *Id.* The Supreme Court of Florida held that the defendant's refusal was admissible. *Id.* at 703-04. Even though the officer did not tell the defendant that the "refusal could be used against him in court, he did explain the purpose of the tests and told him of possible adverse consequences, i.e., he could be arrested based on the available evidence." *Id.* at 704. Additionally, the refusal was probative of the defendant's guilt because the defendant "was aware of the circumstances surrounding the officer's request; he knew the purpose of the tests; and he had ample warning of possible adverse consequences attendant to refusal." *Id.* The court pointed to the defendant's prior experience with DUIs, as he had two DUI convictions and discussed whether he should take field sobriety tests with his attorney. *Id.* The defendant knew that there would be adverse consequences in refusing to take the test, and "[h]is refusal thus is relevant to show consciousness of guilt." *Id.* The court concluded by stating that nothing would prevent the defendant from giving the court an innocent explanation of his refusal. *Id.*

Edwards distinguishes *Taylor* by arguing that, unlike the defendant in *Taylor*, there is no evidence that Edwards is familiar with DUIs and knew of any adverse consequences. Although there is no evidence that Edwards is as familiar with DUIs as the *Taylor* defendant, in both cases the police officers gave the drivers the same warning regarding refusing to participate in the field sobriety exercises: that a decision regarding impairment would be made based on what the officers had seen thus far.

Edwards claims that he is more like the defendant in *Menna v. State*, 846 So. 2d 502 (Fla. 2003). In *Menna*, the police officers asked the defendant to take a gunshot residue test, but did not tell her that the test was mandatory or that a refusal could be used against her in court. *Id.* at 503.

The officers' request implied that the test was voluntary. *Id.* The court found that the refusal was too ambiguous to be probative of guilt, and thus was inadmissible. *Id.* at 507. This was based on the defendant being told that the test was brief and noninvasive, "given the impression that the test was optional[,]" and that "she was not told of any adverse consequences of her refusal to take the test . . . ." *Id.*

Edwards, however, was told that there would be adverse consequences to refusing the test, just like the defendant in *Taylor*, and not like the defendant in *Menna*. Also, there is no indication that the trooper implied that the field sobriety exercises were optional. Therefore, *Taylor* is more analogous to this case than *Menna*, and the Court rejects Edwards's argument that the hearing officer could not consider his refusal to perform the field sobriety exercises.

D. Hearing officer's failure to view video

Edwards argues that his due process rights were violated when the hearing officer did not view the video of the breath test observation period that he submitted into evidence. Edwards obtained the video from the State Attorney's Office and brought it to the hearing. During the hearing, the video would not play. Edwards's attorney asked the hearing officer to review the video later, before making her ruling. Then, the following exchange occurred:

> MS. ROBINSON: Okay. If it's not working on this computer, it won't work on any of the department computers --
> MR. LOTTER: Okay.
> MS. ROBINSON: -- at this point. So I don't know if it's a defect DVD or not, but --
> MR. LOTTER: Okay.
> MS. ROBINSON: -- we all have the same system. All right. Continue, Counsel.

(Hr'g Tr. 28:6-15.) No other mention of the video was made during the hearing, and Edwards did not move for a continuance to ensure that the video would be viewed before the hearing officer

issued her ruling. In the order affirming the license suspension, the video is listed as being admitted into evidence, but there is no other mention of it.

The Court rejects Edwards's argument for four reasons. First, it is not clear that the hearing officer did not view the video before issuing her ruling. She did not affirmatively state that she would not view it, and nothing in the order upholding the suspension indicates that she refused to watch it. Second, it was Edwards that procured the video, but then did not ensure that it would play at the hearing. Third, Edwards did not ask for a continuance so that the video could be played later. Fourth, and finally, Edwards did not argue to the hearing officer that his due process rights would be violated if she did not view the video before ruling. Therefore, Edwards failed to establish that his due process rights were violated regarding the video.

The trooper had a reasonable suspicion that Edwards was committing a traffic violation, and therefore the stop did not violate Edwards's Fourth Amendment rights. Edwards did not preserve for certiorari review the issue of whether the trooper had reasonable suspicion to request that Edwards perform field sobriety exercises, and he was sufficiently informed of the adverse consequences of refusing to do so. Finally, Edwards did not establish that his due process rights were violated regarding the video of the breath test observation period.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Department of Highway Safety and Motor Vehicles' Motion for Rehearing is **GRANTED**.

2. The Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 3rd day of June, 2016.

/S/
MARGARET H. SCHREIBER
Circuit Judge

J. RODRIGUEZ, J., concurs.

CARSTEN, J., dissents with opinion.

CARSTEN, J., dissenting.

Although I agree that the motion for rehearing should be granted, the articulated observations of the officer upon which the vehicle stop was based, and the mistake of law in this case, by this trooper, falls short of "objectively reasonable." Therefore, I respectfully dissent.

At the hearing, the trooper testified that he stopped Edwards for making an improper right turn under Florida Statute section 316.151(1)(a), and because he weaved once. The trooper believed that the driver must go to the first immediate lane of travel when completing a right turn. He also testified that he did not believe Edwards was impaired when he turned right.

For the traffic stop to be valid under the Fourth Amendment, there must be facts giving rise to a reasonable suspicion that the person is breaking the law. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). An objectively reasonable mistake of law can provide the necessary reasonable suspicion. *Id.*

Section 316.151(1)(a) states, "The driver of a vehicle intending to turn at an intersection shall do so as follows: . . . Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway." The evidence before the hearing

officer was that the trooper stopped Edwards because the trooper believed it was illegal to make a right turn into the far travel lane. The trooper testified that an improper right turn is one in which the driver does not turn into the first immediate lane of travel.

The trooper did not testify, nor did the Arrest Affidavit state, that it was practicable for Edwards to turn into the nearest travel lane. There was also no description of the surrounding area. The trooper specifically stated that he did not remember the traffic conditions that night. In *State v. Noss*, the Ohio Court of Appeals held that the phrase "as close as practicable" in a right-turn statute identical to Florida's does not require a right turn into the nearest right lane in all circumstances. No. WD-00-016, 2000 WL 1752797, *3-4 (Ohio Ct. App. Nov. 30, 2000). Because section 316.151(1)(a) requires a right turn to be made as close as practicable to the right-hand edge of the roadway, not that it be made into the nearest travel lane, the trooper made a mistake of law in stopping Edwards for turning into the far travel lane without an indication as to whether it was practicable for Edwards to turn into the nearest travel lane.

In *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014), the United States Supreme Court held that an objectively reasonable mistake of law can provide the reasonable suspicion justifying a traffic stop. In *Heien*, the driver was pulled over because only one brake light was working. *Id.* This was not a violation of North Carolina law, however. *Id.* at 535. After discussing that an officer needs only a reasonable suspicion for a traffic stop to be valid under the Fourth Amendment, the Court held that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." *Id.* at 536. That being said, the mistake of law "must be *objectively* reasonable." *Id.* at 539. "[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Id.* at 539–40. The Court held that the officer's mistake of law was objectively reasonable, and thus the stop was valid, because various North Carolina statutes

indicated that if a car has more than one "stop lamp," then all of the stop lamps must be working. *Id.* at 540.

Courts have subsequently interpreted *Heien* to mean that an objectively reasonable mistake of law turns on whether the statute is ambiguous. If the statute is ambiguous, then the officer's mistake of law in interpreting the statute is objectively reasonable. If the statute can be interpreted according to its plain meaning, however, then the officer's mistake of law is unreasonable. Many of these courts cite Justice Kagan's concurrence, which states:

> A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point at oral argument, the statute must pose a "really difficult" or "very hard question of statutory interpretation." And indeed, both North Carolina and the Solicitor General agreed that such cases will be "exceedingly rare."

Id. at 541 (Kagan, J., concurring) (citations omitted).

One of the cases citing Justice Kagan's concurrence is *State v. Hurley*, 2015 VT 46, ¶¶ 20-21, 117 A.3d 433, 441. In *Hurley*, the defendant was stopped because he had "a pine-tree-shaped air freshener hanging from the defendant's rearview mirror." *Id.* at ¶ 3, 117 A.3d at 435. The officer believed that this violated Vermont's statute prohibiting items being placed on or over a car's windshield or hanging any object in back of the windshield. *Id.* at ¶ 6, 117 A.3d at 435. After stopping the defendant, the officer determined that he was driving while under the influence of alcohol. *Id.* at ¶ 2, 117 A.3d at 435. The defendant moved to suppress, and the Supreme Court of Vermont was faced with the issue of whether the officer's mistake of law could provide reasonable suspicion supporting the stop. *Id.* at ¶ 20, 117 A.3d at 441.

The court noted that the *Heien* decision "held that reasonable suspicion sufficient to justify an investigatory stop may exist even when the suspicion is based on a mistake of law . . . , as long as that mistake is objectively reasonable." *Id.* The windshield-obstruction statute was ambiguous, and there was a split among the Vermont courts regarding its interpretation. *Id.* at ¶ 21, 117 A.3d at 441. Thus, the officer's mistaken interpretation of the statute was objectively reasonable, and the Fourth Amendment therefore did not require excluding "the evidence gathered from the traffic stop . . . ." *Id. See also State v. Houghton*, 2015 WI 79, ¶¶ 68, 70, 71, 364 Wis. 2d 234, 265-66, 868 N.W.2d 143, 158-59 (2015) (officer's interpretation of statute in air freshener case objectively reasonable where statute was never interpreted before and analysis regarding meaning of statute was a close call); *State v. Dopslaf*, 356 P.3d 559, 563-64 (N.M. Ct. App. 2015) (holding that if officer made a mistake of law, it was a reasonable one, based on ambiguity in applying statute to facts), *cert. denied* (N.M. 2015); *United States v. Diaz*, 122 F. Supp. 3d 165, 173-76 (S.D.N.Y. 2015) (officer's belief was objectively reasonable where courts were divided on interpretation of phrase in statute).

In contrast, in *United States v. Stanbridge*, 813 F.3d 1032, 1037-38 (7th Cir. 2016), the statute the officer relied on to stop the defendant was unambiguous, and thus the Seventh Circuit held that the officer's mistake of law was not objectively reasonable. "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute." *Id.* at 1037. Because the mistake of law was not objectively reasonable, it could not support the seizure, and the motion to suppress should have been granted. *Id.* at 1038. *See also United States v. Flores*, 798 F.3d 645, 649 (7th Cir. 2015) (officer's mistake of law was unreasonable when statute had been interpreted a particular way for decades); *United States v. Mota*, No. 1:15-cr-00254-GHW, 2016 WL 110527, *10 (S.D.N.Y. Jan. 8, 2016) (finding that

mistake of law was not objectively reasonable where statute's plain meaning required two stop lamps, and officer thought three were required); *United States v. Black*, 104 F. Supp. 3d 997, 1007, 1008 (W.D. Mo. 2015) (although there were no Missouri cases on issue of material hanging from rearview mirror, ordinance was not ambiguous and no other jurisdictions with similar statutory language found it confusing or ambiguous, so it was not objectively reasonable for officer to believe air fresheners violated ordinance); *United States v. Sanders*, 95 F. Supp. 3d 1274, 1285 (D. Nev. 2015) (officers' belief not objectively reasonable because earlier case interpreting identical statute held air freshener hanging from rearview mirror did not violate statute regarding obstructing windshield).

Edwards asserts that the trooper's belief that making a right turn requires turning into the nearest travel lane is unreasonable because it distorts the plain language of section 316.151(1)(a). Edwards contends that "the Legislative inclusion of 'practicable' in [the statute] allows for occasions when a driver will not be able to turn into the most immediate lane of travel, and if traffic is unaffected there should be no violation." (Pet. Writ Cert. 8.)

Section 316.151(1)(a) states, "Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway." Although Florida courts have not ruled on whether this statute is ambiguous, other state courts with identical right-turn statutes have done so. The Idaho Court of Appeals considered the statute in *In re Beyer*, 304 P.3d 1206, 1211 (Idaho Ct. App. 2013), a case substantially similar to this one. The driver in *Beyer* failed a breath alcohol test after being stopped for making an illegal right turn. *Id.* at 1208. He argued that the officer did not have reasonable suspicion justifying the stop because the right-turn statute, which is identical to Florida's right-turn statute, "does not require a driver to turn into the right, or nearest lane, rather than drive directly into the left lane of a four-lane road consisting of

two lanes in each direction." *Id.* at 1210. The Idaho court disagreed, holding that the statutory "language unambiguously requires that a driver turn into the right, or nearest lane, rather than drive across the nearest lane and directly into the left lane of a four-lane road consisting of two lanes in each direction." *Id.* at 1211.

The driver in *Beyer* did not argue that there was no evidence that it was practicable for him to drive into the nearest travel lane, as Edwards does in this case. This distinction is emphasized due to the decision by the same Idaho court two years later in *State v. Hunter*, No. 42233, 2015 WL 5011131, *2 (Idaho Ct. App. Aug. 25, 2015). In *Hunter*, the court once again stated that the statute unambiguously requires drivers to turn into the nearest lane, but this time the issue was the practicability of doing so. *Id.* The driver argued that his wide right turn was legal under the statute because of his plan to make a left turn soon after completing the right turn. *Id.* Thus, he argued, it was not practicable for him to turn into the nearest travel lane. *Id.* The court rejected this argument, holding that practicability is determined by objective factors, like road blockage, not subjective factors, like the defendant's driving plans. *Id*. *See also State v. Lang*, 2015 WL 904118, *2 (Ariz. Ct. App. Mar. 4, 2015) (holding that reasonable interpretation of statute is that "practicable" refers to physical barriers, and not to driver's plans to turn after the right turn, so officer's alleged mistake of law still provides reasonable suspicion under *Heien*). Therefore, *Hunter* demonstrates that the Idaho court interprets the statute as requiring turning into the nearest travel lane when practicable and reaffirms that the statute is unambiguous.

Only one case interpreting a right-turn statute identical to Florida's has held that the statute is ambiguous. In *State v. Morse*, No. A14–1202, 2015 WL 3822833, *5 (Minn. Ct. App. June 22, 2015), *review granted* (Minn. 2015), the Minnesota Court of Appeals held that "practicable" is ambiguous and vague. The officer stopped the driver because the officer determined that the driver

violated the right-turn statute, even though the driver remained in the nearest travel lane upon completing the turn. *Id.* at *4-5. Contrary to the Idaho court, the Minnesota court stated that "'as close as practicable' is not measurable by some objective standard . . . ." *Id.* at *5. Instead, "the statute permits police officers to decide, subjectively, when a turn is not 'as close as practicable' to the curb . . . ." *Id.* The court then construed the statute narrowly to hold that the driver did not violate the statute when he turned right and stayed within the nearest travel lane. *Id.*

In contrast, the California Court of Appeals held that the phrase "as practicable" in the right-hand turn statute is not unconstitutionally vague. *People v. Trulock*, No. E052471, 2011 WL 4479084, *3 (Cal. Ct. App. Sept. 28, 2011). The court held that an officer can stop a driver for making a wide right turn where it was practicable to turn closer to the curb. *Id.*

Although these cases come to different conclusions regarding whether there was a violation of the right-turn statute, none of them hold that the statute requires turning into the nearest travel lane under all circumstances. The only case that appears to have that holding did not include a defendant arguing that there was no evidence that it was practicable for him to turn into the nearest travel lane, as Edwards does here. *See In re Beyer*, 304 P.3d at 1211. Additionally, all of the cases interpreting identical right-turn statutes held that those statutes are unambiguous, save one. And in that one case, the issue was whether the driver's plan to make a left turn soon after the right turn rendered it impracticable for the driver to turn closer to the right edge of the road. *State v. Morse*, No. A14–1202, 2015 WL 3822833, at *5. Even that case, which is currently on review with the Minnesota Supreme Court, recognizes that the statute does not require turning into the nearest travel lane at all times, as it discussed whether the driver violated the law by not doing so when he was about to make a left turn after the right turn, rather than decreeing that the driver violated the law simply by turning into the far travel lane. *Id.*

Most cases that have considered whether the right-turn statute is ambiguous have held that it is not, and none of those cases hold that a right turn must be made into the nearest travel lane under all circumstances. Therefore, the trooper's belief that Edwards violated the right-turn statute by turning into the far travel lane, without a determination of whether it was practicable for him to turn into the nearest travel lane, was an objectively unreasonable mistake of law. Thus, it did not provide the reasonable suspicion necessary for the stop to be valid under the Fourth Amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Christi Leigh McCullars, Esq.**, Trial Lawyer Team, pllc, 501 N. Magnolia Avenue, Orlando, FL 32801; and **Stephen D. Hurm, General Counsel, and Jason Helfant, Senior Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 540609, Lake Worth, FL 33454, on this 3rd day of June, 2016.

/S/
Judicial Assistant