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

JOEL FELICIANO,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER'S LICENSES,

Respondent.
_____ /

CASE NO.: 2017-CA-002566-O

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

Stuart I. Hyman, Esquire, for Petitioner.

Christie S. Utt, General Counsel, and
Jason Helfant, Senior Assistant General Counsel,
for Respondent.

Before THORPE, CRANER, and O'KANE, J.J.

PER CURIAM.

Petitioner Joel Feliciano timely seeks certiorari review of the hearing officer's Findings of Fact, Conclusions of Law and Decision, which sustained the Florida Department of Highway Safety and Motor Vehicles' (Department) administrative suspension of his driver's license for driving with an unlawful breath alcohol level. We have jurisdiction. § 322.2615(13), Fla. Stat.; Fla. R. App. P. 9.030(c)(3). We grant his Petition for Writ of Certiorari and quash the hearing officer's Decision.

Facts

As gleaned from the hearing officer's findings, including the testimony, arrest affidavit and other related documents provided at the formal review hearing, the facts are as follows. On December 31, 2016, at about 3:34 a.m., Corporal Michael Perales of the Orlando Police Department responded to an unspecified "general disturbance" that involved a white Nissan SUV. Upon arrival, Corporal Perales observed the vehicle signaling to make a left turn from Dowden Road onto Narcoossee Road. Corporal Perales followed the vehicle southbound on Narcoossee Road to Northlake Parkway. The traffic light turned red. At the intersection, Corporal Perales saw the front tires of the vehicle cross over the solid white line "completely" before coming to a stop. As a result, he activated his emergency lights and siren to initiate a traffic stop.

Corporal Perales had to use the siren "several times" before the vehicle would come to a stop. Once the vehicle came to a stop, he approached the driver's side window and knocked on the window twice to signal the driver to lower the window. The driver lowered the window and Corporal Perales asked for his driver's license. While in contact with the only occupant of the vehicle, later identified by his Florida driver's license as Joel Feliciano, Corporal Perales noticed that he had to fumble through his wallet for several moments before locating his driver's license, even though it was in plain view. Corporal Perales could smell the odor of alcohol coming from Feliciano's facial area. Feliciano's eyes were "glassy" and the whites of his eyes were "reddish." Feliciano stated that he had drunk two or three vodka tonics.

Corporal Perales asked Feliciano to step out of the vehicle. When Feliciano exited the vehicle, he lost his balance and almost fell. He had to use the open driver's door to keep himself from falling. Based on these observations, Corporal Perales suspected that Feliciano had been driving a motor vehicle while under the influence of alcohol, and asked him if he would consent

to field sobriety exercises. Feliciano consented, and performed poorly on the horizontal gaze nystagmus, walk and turn, and one-leg stand exercises. As a result, Corporal Perales determined that Feliciano had been operating a motor vehicle under the influence of alcohol to the extent his normal faculties were impaired, and arrested him for DUI.

Feliciano was transported to the Orange County DUI testing center, where he received the implied consent warning and provided two breath samples. Testing of the breath samples yielded readings over the legal limit. As a result, the Department suspended Feliciano's driver's license. He requested an administrative review of his license suspension pursuant to section 322.2615, Florida Statutes.

The Department hearing officer conducted a formal review hearing on February 6, 2017 and February 27, 2017. Notably, on questioning from Feliciano's counsel, Corporal Perales testified that when Feliciano's vehicle came to a stop, its front tires were completely over the white line, but he could not say "for sure" how far the front tires were over the white line, and also could not say "for sure" whether the vehicle was in the crosswalk. Corporal Perales indicated that the basis for the stop was that the front tires were over the white line.

Feliciano's counsel moved to invalidate the license suspension on the basis that there was no probable cause for the stop, pointing out that Corporal Perales could not say for sure whether Feliciano's vehicle was in the crosswalk when it stopped at the red light. However, the hearing officer's Decision denied the motion. Feliciano's counsel also moved to invalidate the license suspension on the basis that Corporal Perales as an Orlando police officer required Feliciano to submit to a breath test at the Orange County DUI testing center, which was "located outside of his jurisdiction." The hearing officer's Decision denied this motion as well. The hearing officer's Decision went on to uphold the Department's suspension of Feliciano's driver's license.

Standard of Review

In a certiorari proceeding, the circuit court is limited to determining (1) whether procedural due process was accorded, (2) whether there was a departure from the essential requirements of law, and (3) whether the lower tribunal's decision was supported by competent substantial evidence. *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *City of Deerfield Bch. v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Analysis

In the instant Petition, Feliciano advances two arguments. First, he argues that the hearing officer's determination that the stop was valid constituted a departure from the essential requirements of law and was not supported by competent substantial evidence. Second, he argues that Corporal Perales of the Orlando Police Department improperly used the "color of his office" to require Feliciano to submit to a breath test at a facility outside of the Orlando city limits and therefore outside of Corporal Perales's jurisdiction.

Feliciano in his first argument points out that the "only reason" Corporal Perales gave for the stop was that when Feliciano's vehicle came to a stop at the red light, the front tires were over the white line. However, Corporal Perales could not say with any certainty how far the front tires were over the white line, or whether the vehicle was in the crosswalk. Citing to case law including *Holland v. State*, 696 So. 2d 757 (Fla. 1997), Feliciano then points out that when a stop is based on a traffic violation, the officer must have probable cause to believe that a traffic violation was committed. He urges there was no evidence that he was driving his vehicle in "anything but a safe manner," and that he was stopped "only for an alleged traffic violation that did not exist."

In the instant case, the hearing officer upheld the traffic stop of Feliciano's vehicle on the following basis:

> The Corporal noticed that the white Nissan's front tires had stopped completely over the solid white line and activated his emergency equipment, lights and siren. Based on DHSMV v. DeShong, the driving behavior need not reach the level of a traffic violation in order to justify a DUI stop, and reasonable suspicion may exist in incidences where no traffic violation was committed.

As noted, Corporal Perales indicated that the basis for the stop was that the front tires were over the white line, but he could not say with any certainty how far the front tires were over the white line, or whether the vehicle was in the crosswalk. There was no testimony that Feliciano was driving his vehicle in an unsafe manner prior to the stop.

Under Florida law, even if there is no traffic violation, an officer may conduct a stop on safety grounds if the officer observes a driver operating a vehicle in an unusual or erratic manner, and as a result has a reasonable suspicion that the defendant was driving while under the influence or otherwise impaired. *Dep't of Highway Safety and Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1350, 1352 (Fla. 2d DCA 1992). *See also Ndow v. State,* 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (citing *DeShong*). An officer may also conduct a stop if the officer has probable cause that the driver committed a traffic violation. *Holland v. State*, 696 So. 2d 757 (Fla. 1997). *See also State v. Proctor*, 161 So. 3d 409 (Fla. 5th DCA 2014) (citing *Holland*). As will be explained, the stop in the instant case cannot be sustained under *DeShong* or *Holland*.

In *DeShong*, the law enforcement officer saw that the driver "seemed to be using the lane markers to position his vehicle" and, "for no apparent reason, abruptly slowed from 55 to 30 miles per hour and then accelerated rapidly." *DeShong*, 603 So. 2d at 1350. Thus, the officer stopped the vehicle, finding this driving behavior "erratic." *Id*. The officer was concerned that the driver was impaired or that the vehicle was malfunctioning. *Id*. In upholding the stop, *DeShong* explained, "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." *Id*. at 1352. Thus, while the "driving behavior need not reach the level of a traffic violation" under *DeShong*, as the hearing officer stated in her Decision, it is otherwise evident that *DeShong* requires evidence of an unusual or erratic driving pattern to give the officer a reasonable suspicion that the defendant was driving while under the influence or otherwise impaired. Nothing in *DeShong* purports to allow an officer to conduct a stop based on the officer's reasonable suspicion that a traffic violation was committed, as the hearing officer's Decision appears to reason. As *Holland* makes clear, if the basis for the stop is a traffic violation, the officer must have *probable cause* that a traffic violation took place.

In contrast to *DeShong*, in the instant case there was no evidence that prior to the stop, Feliciano was driving in an erratic or unusual matter, so that Corporal Perales would have had a reasonable suspicion that he was under the influence or otherwise impaired. As indicated, Corporal Perales initiated the stop solely on the basis that the front tires were over the white line when his vehicle came to a stop. However, for purposes of *DeShong*, mere evidence that the front tires were over the white line simply does not amount to evidence that Feliciano was driving in an erratic or unusual matter, so that Corporal Perales would have had a reasonable concern that Feliciano was under the influence or otherwise impaired.

Accordingly, the Court determines that the hearing officer's decision to sustain the traffic stop on authority of *DeShong* was not supported by competent substantial evidence, as there was no evidence of erratic or unusual driving. The Court further determines that the hearing officer departed from the essential requirements of law in applying *DeShong* to the instant facts, as *DeShong* clearly does not apply when there is no evidence of unusual or erratic driving.

Since there was no evidence of erratic or unusual driving in the instant case, Corporal Perales only would have been justified in stopping Feliciano's vehicle if he had probable cause that Feliciano had committed a traffic violation pursuant to *Holland*. In applying the reasonable suspicion standard of *DeShong* instead of the probable cause standard of *Holland*, it is clear that the hearing officer departed from the essential requirements of law in that respect. It is also clear that even if the probable cause standard of *Holland* had been applied, there was no competent substantial evidence that a traffic violation was even committed in the instant case.

The instant circumstances are similar to those in *Catlett v. State*, 17 Fla. L. Weekly Supp. 1168a (Fla. 7th Cir. Ct. Aug. 5, 2010), cited by Feliciano. In *Catlett*, the defendant approached an intersection with a red light directing him to stop. He stopped his vehicle before reaching the crosswalk, but the front of his vehicle came to rest several feet past the white line. He was stopped for violating section 316.074, Florida Statutes, on the basis that he had failed to stop before reaching the white line. He was subsequently charged with misdemeanor DUI. He filed a motion to suppress evidence with respect to the misdemeanor DUI on the basis that the stop was improper. However, the county court's order found that the traffic stop was lawful.

On appeal, *Catlett* reversed, determining that under the applicable statutes, the defendant did not violate section 316.074, Florida Statutes. *Catlett* noted that section 316.074(1) provides, "The driver of any vehicle shall obey the instructions of any official traffic control device *applicable thereto*. . . ." (Emphasis added.) According to *Catlett*, the white line was not "applicable" to the defendant for purposes of section 316.074(1) in view of section 316.075(1)(c)1., which provides, "Vehicular traffic facing a steady red signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection and shall remain standing until a green indication is shown. . . ." Thus, according to

Catlett, section 316.074(1) "did not require [the defendant] to stop before reaching the stop line." *Catlett* acknowledged that this statute is "in marked contrast" to section 316.123(2)(a), which pertains to stop signs: "Every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection. . . ." *Catlett* aptly observed,

> The legislature obviously understood that red lights and stop signs are not the same; it established motorists' duties with respect to each in separate statutes. It is equally obvious that when it enacted these statutes, the legislature was cognizant of the existence of "stop lines," as it specifically required stopping before reaching these lines in certain instances. If the legislature had intended to require a driver approaching a steady red light to stop at a painted stop line, it knew how to require that. It did not do so. (Footnote omitted.)

See also State v. Pasha, 20 Fla. L. Weekly Supp. 827a (Fla. 18th Cir. Ct. May 15, 2013) ("plain reading" of section 316.075 "does not require motorist facing a steady red signal to stop behind a stop line). *Compare State v. Owens*, 20 Fla. L. Weekly Supp. 991b (Fla. 7th Cir. Ct. June 11, 2013) (stop valid when defendant's vehicle went past stop bar on red light, pulled into the intersection and stopped before making a right turn).

State v. Robinson, 756 So. 2d 249 (Fla. 5th DCA 2000) and *Brown v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 970 (Fla. 13th Cir. Ct. Aug. 1, 2008), which are cited by the Department, are factually distinguishable from the instant case. In *Robinson*, the traffic stop was upheld because the defendant failed to stop at the stop line at an intersection that had a stop sign, and the statute pertaining to stop signs requires stopping before reaching the stop line. *Robinson*, 756 So. 2d at 249. However, in contrast to *Robinson*, the instant case involves a red light and not a stop sign. As *Catlett* explained, the statute pertaining to traffic lights is in "marked contrast" to the statute pertaining to stop signs, as the statute pertaining to traffic lights

does not require stopping before reaching the stop line. Because the instant case involves a red light and not a stop sign, *Catlett* is controlling and *Robinson* is inapplicable.

Next, while *Brown* involved a red light, it is otherwise factually distinguishable. In *Brown*, the defendant's vehicle went through a red light and stopped in the middle of the intersection under the traffic lights, and the traffic stop was sustained. *Brown*, 15 Fla. L. Weekly Supp. 970. However, in the instant case there was no evidence that Feliciano's vehicle was similarly stopped in the middle of the intersection. Rather, there was only evidence that the front tires stopped in front of the stop line, as Corporal Perales could not additionally say with any certainty how far the front tires were over the white line, or whether the vehicle was in the crosswalk.

In short, the hearing officer's determination that the stop was valid constituted a departure from the essential requirements of law and was not supported by competent substantial evidence. Because Feliciano's first argument is dispositive, the Court finds it unnecessary to address his second argument.

Based upon the foregoing, it is hereby ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is GRANTED, and the hearing officer's Findings of Fact, Conclusions of Law and Decision is QUASHED.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this _____ day of _____, 2018.

/S/_____
JANET C. THORPE
Presiding Circuit Judge

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Order was furnished to Stuart I. Hyman, Esquire, Stuart I. Hyman, P.A., 1520 E. Amelia St., Orlando, FL 32803; Christie S. Utt, General Counsel, Department of Highway Safety and Motor Vehicles, P. O. Box 540609, Lake Worth, FL 33454; and Jason Helfant, Senior Assistant General Counsel, Department of Highway Safety and Motor Vehicles, P. O. Box 540609, Lake Worth, FL 33454, on this _____ day of _____, 2018.

_____
Judicial Assistant