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

MICHAEL SASSO,

Petitioner,
v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES,

Respondent.
_____/

CASE NO. 2014-CA-1853-O

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

William W. Lindsey, Esq.
Attorney for Petitioner

Richard M. Coln, Esq.
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
Attorney for Respondent

Before HIGBEE, LUBET, MCDONALD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner seeks review of a final order of the Department of Highway Safety and Motor Vehicles sustaining the suspension of his driver's license following an arrest for driving under the influence. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). The Court's review is limited to a determination of whether procedural due process was accorded, whether the essential requirements of law were observed, and whether the administrative order is supported by

competent substantial evidence. *Florida Dept. of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008). The Court does not reweigh the evidence but reviews it only to only to determine whether it supports the hearing officer's findings. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

Factual Background

Agent Smith was an officer of the Altamonte Springs Police Department assigned to the Seminole County Sheriff's Department. He testified at the Department hearing on January 24, 2014 that, at about 3:00 a.m. on December 21, 2013, he saw Petitioner's car driving on the 417 in Orange County. He observed it straddling lanes; it then suddenly moved across two lanes and almost struck Smith's car. It repeatedly wove to the right and left over a length of one-half mile as Smith followed it. Although he was off duty and out of his jurisdiction, Smith decided to stop the car on suspicion that the driver might be ill, injured or impaired. He testified that upon contacting Petitioner, he saw that Petitioner's eyes were bloodshot and watery, his speech was slurred, his face was flushed, his movements were lethargic and he emitted an odor of alcohol. Smith contacted the Orange County Sheriff's Department and Deputy King arrived within ten minutes.

A witness subpoena had been issued for Deputy King to appear at the hearing, but it was returned for non-service with a notation on it that King would not be available until after February 7, 2014. The hearing officer offered to continue the hearing so that King's appearance could be secured. Petitioner's attorney declined a continuance.

Deputy King's report stated that Petitioner staggered when exiting his car and that his balance was unstable. King also noted bloodshot, droopy eyes and the odor of alcohol. King asked Petitioner to perform field sobriety exercises and he refused. King told him that, if he

refused, King would have to make a decision whether to arrest him based on what he had observed so far, but Petitioner still refused. Petitioner was arrested for DUI and he declined to take a breath test.

Based on this evidence, the hearing officer upheld the license suspension.

Issue One: Failure to Accept Subpoena as Due Process Violation

Petitioner argues that his due process rights were violated when the Orange County Sheriff's Office refused to accept the subpoena issued to Deputy King. He cites to the Rule 15A-6.012(3), Florida Rules of Administrative Procedure, which provides only three instances in which a law enforcement agency can refuse to accept service of a Department subpoena on behalf of one of its officers: if the officer is no longer employed there, if the officer is not scheduled to work prior to the hearing date, or if the hearing is within seven days. He also cites to *Curle v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 676a (Fla. 9th Cir. Ct. 2006), holding that, where an agency erroneously failed to accept a subpoena on behalf of an officer, the Department's license suspension was a violation of due process even though the Department had offered a continuance to remedy the problem. *Curle* held that Section 322.2615(6)(a), Florida Statutes (2006), entitled a driver to a hearing within 30 days of his request and a continuance to secure the officer would have pushed the hearing beyond the 30 days.

However, the language of section 322.2615(6)(a) has been amended since *Curle.* Effective July 1, 2013, it was amended to read as follows:

> (a) If the person whose license was suspended requests a formal review, the department must schedule a hearing ~~**to be held**~~ within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.

By striking "to be held," the legislature has determined that the hearing does not have to be conducted within 30 days of a driver's request, but only scheduled. Extensions beyond the 30 days do not per se result in due process violations. In *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So. 3d 616, 623 (Fla. 5th DCA 2014), the Fifth District Court of Appeal briefly addressed the issue of whether due process is violated when a subpoenaed witness fails to appear at a hearing and the driver cannot enforce the subpoena within the 30-day period for administrative review. It summarily concluded, "If the argument had been raised, we would not have hesitated in answering the question in the negative." *Id.* at n. 3. Neither the failure of a witness to appear or the failure of a subpoena to be properly served should entitle a driver to an automatic dismissal of his case, not for the first time the problem arises, and not where a continuance is available and the matter can be remedied promptly.

Also, the Department hearing officer noted that he had been informed that Deputy King was on vacation and would be available after February 7, 2014. The hearing officer concluded:

> The language used by the process server [on the affidavit on non-service] states that the deputy would not be available until after February 7, 2014. A reasonable person would assume that the deputy was already on vacation with no specific information to the contrary. Counsel was offered a continuance to re-subpoena and re-serve the deputy to elicit his testimony, but declined.

The hearing officer's surmise that the deputy was already on vacation when service was attempted was a reasonable one supported by the affidavit of non-service. Therefore, the agency's refusal to accept the subpoena would fall within Rule 15A-6.012(3)'s exception that service could be refused where the officer was not scheduled to work prior to the hearing date. Absent a violation of the rule, there was no due process problem created by the non-service

Issue Two: Allegedly Illegal Stop by Out-of-Jurisdiction Officer.

Petitioner asserts that Agent Scott had no authority to conduct a traffic stop since he was out of his jurisdiction and off-duty. An off-duty officer outside of his or her jurisdiction has the same but no greater authority to conduct an arrest than any other citizen. *State v. Price*, 74 So. 3d 528, 530 (Fla. 2d DCA 2011). A citizen may conduct an arrest when he or she observes a person commit any felony, or a misdemeanor if that misdemeanor constitutes a breach of the peace. *Roberts v. Dep't of Highway Safety & Motor Vehicles*, 976 So. 2d 1241 (Fla. 2d DCA 2008). See also, *Edwards v. State*, 462 So. 2d 581, 582 (Fla. 4th DCA 1985): "At common law, a private citizen may arrest a person who in the citizen's presence commits a felony or breach of the peace."

Driving under the influence may be a felony or a misdemeanor depending upon circumstances not necessarily known to an officer at the time he or she makes the stop. Whether it is a felony or misdemeanor, DUI has been held by Florida courts to constitute a breach of the peace, even where the driver is not immediately impacting other traffic. *State v. Furr*, 723 So. 2d 842 (Fla. 1st DCA 1998). DUI is a breach of the peace because it endangers the public with actual or threatened violence; an off-duty officer is not obligated to wait for a suspected DUI driver to run vehicles off the road or worse before intervening. *Id.* See also, *State v. Edwards*, 462 So.2d 581 (Fla. 4th DCA 1985).

This Court recently found that, even absent any direct impact on traffic, DUI is a breach of the peace allowing a stop where an out-of-jurisdiction officer had made sufficient observations supporting a reasonable possibility that the driver was impaired. *State v. Schenck*, 22 Fla. L. Weekly Supp. 30a (Fla. 9th Cir. Ct. 2014). Similarly to *Schenck*, the out-of-jurisdiction officer here observed Petitioner driving erratically for some period of time, including

straddling lane lines, weaving across lines and onto the right shoulder and even causing the officer to take evasive action to avoid a collision. The officer had good reason to believe Petitioner might be ill, impaired or injured; his stop of the car was legal because the possible DUI was a breach of the peace with a great potential for public harm. Smith did not formally arrest Petitioner but lawfully detained him until Deputy King arrived within 10 minutes and took charge of the investigation.

Issue Three: Lack of Probable Cause to Arrest

Petitioner argues that Deputy King lacked probable cause to arrest him for DUI. He particularly objects to the fact that the hearing officer heard evidence regarding Petitioner's refusal to submit to the field sobriety exercises. He contends that such evidence was inadmissible since he was not advised by the deputy that his refusal would have consequences. However, while an officer cannot misinform an individual about his or her rights, an officer has no duty to inform the individual that field sobriety tests are voluntary and that the individual has a right to refuse; the driver need not be informed of the consequences of a refusal or the consequences of failing the tests. *Persis v. Department of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 1015b (Fla 9th Cir. Ct. 2009). The driver's refusal is admissible evidence. No Fifth Amendment protection bars the State from presenting evidence about a driver's refusal as demonstrating consciousness of guilt. *Morris v. State*, 988 So. 2d 120, 123 (Fla. 5th DCA 2008).

In this case, while the evidence does not demonstrate that the deputy advised Petitioner that his refusal could be used against him, Petitioner does not claim that he was affirmatively misled on this issue. The hearing officer could consider his refusal as part of the overall evidence supporting probable cause to arrest.

Even if the Court were to find that consideration of Petitioner's refusal was in error, the error would be harmless. *Smart v. Dep't of Highway Safety and Motor Vehicles,* 13 Fla. L. Weekly Supp. 865 (Fla. 9th Cir. Ct. 2006). See also, *Dep't of Highway Safety & Motor Vehicles v. Chamizo,* 753 So. 2d 749 (Fla. 3d DCA 2000) (when a hearing officer commits an error and the error is harmless, the circuit court should affirm). Disregarding the refusal, there was significant other evidence of DUI reported by the officers: the erratic driving pattern, and Petitioner's physical state, which included bloodshot and watery eyes, a flushed face, slurred speech, lethargic movement, staggering, unstable balance, and the odor of alcohol emanating from his breath. There is substantial competent evidence on the record supporting the hearing officer's finding of probable cause and the Court would exceed its jurisdiction by making an independent probable cause determination, *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 6th day of January 2015.

/S/
HEATHER HIGBEE
Presiding Circuit Judge

LUBET and MCDONALD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to ; and **Richard M. Coln, Esq,** Assistant General Counsel, Department of Highway Safety and Motor Vehicles, P.O. Box 9, Ocoee, FL 34761, on this 6th day of January, 2015.

/S/
Judicial Assistant