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

TAMMY CARDER,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2006-CA-276-O
WRIT NO.: 06-02

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

Stuart I. Hyman, Esquire,
for Petitioner.

Enoch J. Whitney, General Counsel and
Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before J. KEST, EVANS and MACKINNON, J.J.

PER CURIAM.

FINAL ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF CERTIORARI

Petitioner Tammy Carder (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the Department) Final Order of License Suspension, sustaining the suspension of her driver's

license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction. 322.2615, 322.31, Fla. Stat. (2003); Fla. R. App. P. 9.030(c)(3); 9.100.

On September 20, 2005, at approximately 1:50 a.m., Trooper Vaughn, of the Florida Highway Patrol, was operating a laser speed measuring device in the median of state route 400. He observed a vehicle traveling at a high rate of speed. He visually estimated the speed of the vehicle as 90 to 95 miles per hour. He then activated his laser speed measuring device, which indicated that the vehicle was traveling at 91 miles per hour. As the vehicle passed Trooper Vaughn, he identified it as a black BMW convertible. He exited the median and began pursuing the vehicle. He observed that the vehicle was in the outside center lane and was drifting over both lane lines. He continued to observe the BMW almost rear end a slower moving vehicle before it changed lanes. Trooper Vaughn was behind the BMW and traveling at 110 miles per hour when he activated his lights and siren. The BMW abruptly hit the brakes and pulled over to the side of the road.

Upon making contact with the driver, Trooper Vaughn identified her as the Petitioner by her Florida driver's license. Trooper Vaughn observed that the Petitioner's eyes were bloodshot and watery and that her speech was slurred. When asked where she was going, the Petitioner stated that her brother had attempted suicide and that she was going to the behavioral center. Trooper Vaughn detected the odor of alcohol impurities on her breath as she spoke. When asked if she had consumed any alcohol, the Petitioner stated that she had consumed two glasses of wine. The Petitioner also had difficulty in locating her driver's license and registration when requested to do so by Trooper Vaughn.

At this point, Trooper Vaughn asked the Petitioner to step out of the vehicle and noticed that the Petitioner was wearing high-heeled shoes. Trooper Vaughn asked the Petitioner whether she had any other shoes and she responded, "I am not going to walk your line." (App. E at 2.) Trooper Vaughn requested the Petitioner to submit to field sobriety tests. The Petitioner refused. Trooper Vaughn placed the Petitioner under arrest for DUI and transported her to the breath test center. During the ride the breath test center, the Petitioner repeated the same statements over and over and continued to have slurred speech. The Petitioner subsequently refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on October 26, 2005, the Petitioner was granted a formal review held by Department Hearing Officer Atkinson. The Petitioner was present at the hearing and represented by counsel. Trooper Vaughn was also present and testified at the hearing. This hearing was continued until December 9, 2005, at which time the Petitioner testified and presented her motions to the hearing officer.

The Petitioner moved to set aside the suspension on the basis that there was no probable cause for the stop. The Petitioner asserted that Trooper Vaughn could not establish whether the speed measuring device he used complied with section 316.1905, Florida Statutes, and with Florida Administrative Code 15B-2.015. She also argued that there was no probable cause for field sobriety tests. Next, the Petitioner contended that there was no record evidence of a prior refusal, and therefore, there was no competent substantial evidence to support an eighteen month suspension. Lastly, the Petitioner asserted that she was not fully informed that she would not be eligible for a work permit if she refused to take the breath test and thus, the refusal was not willful. On December

13, 2005, the hearing officer entered a Final Order of License Suspension denying the Petitioner's motions and sustaining the suspension of her driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual's license is suspended for refusal to submit to a breath, blood, or urine test, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension." § 322.2615(7), Fla. Stat. (2005). The hearing officer's scope of review is limited to the following issues:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
>
> 2. Whether the person was placed under lawful arrest for a violation of s. 316.193.
>
> 5. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 4. Whether the person 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 eighteen months.

§ 322.2615(7)(b), Fla. Stat. (2005).

The Petitioner argues that the hearing officer erred by not striking the evidence of speed because there was no evidence that the Trooper complied with section 316.1905 and Florida Administrative Code 15B-2.015 and 15B-2.007(2). In addition, the Petitioner contends that there was no evidence that the Trooper's speedometer complied with Florida Administrative Code 15B-2.011. The Petitioner also asserts that there was no probable cause for the traffic stop and no probable cause for field sobriety tests. Lastly, the Petitioner argues that there was no competent substantial evidence in the record that she had a previous refusal and therefore, her driver's license should not have been suspended for eighteen months.

The Department asserts that there was competent substantial evidence for the stop and that the Trooper had reasonable suspicion to stop Petitioner's vehicle based on the Trooper's visual estimate of speed, the laser speed measuring device and the Trooper's speedometer. The Department further notes that the hearing officer is not required to determine whether the Petitioner was actually speeding. The Department maintains that the Trooper also had reasonable suspicion to request field sobriety tests.

Issue I: Whether the hearing officer erred in not striking evidence of the Petitioner's speed and in finding that there was probable cause for the stop.

The Petitioner asserts that the correct standard in determining whether she was lawfully stopped is probable cause relying on Whren v. United States, 517 U.S. 806, 810 (1996), which held that, in general, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."

Petitioner also cites to Dobrin v. Department of Highway Safety and Motor Vehicles, 874 So. 2d 1171 (Fla. 2004) in support of this argument as well.

However, Dobrin does not specifically state that the standard in determining the lawfulness of traffic stops is probable cause. Rather, Dobrin states that "[t]he correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." 874 So. 2d at 1174. Dobrin does not state that an officer must have probable cause to make a lawful traffic stop. Additionally, the Supreme Court of Florida did not mention or disapprove of the Fourth District's opinion in Ellis v. State, 755 So. 2d 767 (Fla. 4th DCA 2000), which specifically found that despite the language in Whren, the supreme court did not intend to change the reasonable suspicion standard an officer needs to effectuate a DUI stop. 755 So. 2d at 768 n. 1.[1] Accordingly, the Petitioner's argument that the Trooper Vaughn needed probable cause to stop her is without merit.

Here, Trooper Vaughn indicates that he observed the Petitioner traveling at a high rate of speed and visually estimated her speed to be 90 to 95 miles per hour. His laser speed measuring device indicated that her speed was 91 miles per hour. The speed limit for the area was 55 miles per hour. Speed is a direct violation of Florida law. § 316.183, Fla. Stat. (2005). Therefore, the charging affidavit provided competent substantial evidence that Trooper Vaughn had reasonable suspicion for stopping the Petitioner for speeding and thus, the stop was lawful.

Next, the Petitioner asserts that there was no evidence that Trooper Vaughn's laser speed measuring device complied the section 316.1905, Florida Statues; Florida

[1] This Court has previously addressed this argument. See Hunley v. Dep't of Highway Safety & Motor Vehicles, 12 Fla. L. Weekly Supp. 26a (Fla. 9th Cir. Ct. Aug. 24, 2004); Smith v. Dep't of Highway Safety & Motor Vehicles, 11 Fla. L. Weekly Supp. 390a (Fla. 9th Cir. Ct. Feb. 3, 2004).

Administrative Code 15B-2.015; or that his speedometer complied with Florida Administrative Code 15B-2.011. However, these arguments are not relevant under the circumstances because a hearing officer is not required to find that a driver violated the speed limit in order to validate the stop. Paras v. Dep't of Highway Safety & Motor Vehicles, 7 Fla. L. Weekly Supp. 490a (Fla. 9th Cir. Ct. March 22, 2000) quoting Solomon v. Dep't of Highway Safety & Motor Vehicles, 2 Fla. L. Weekly Supp. 133 (Fla. 7th Cir. Ct. July 28, 1993). An officer may stop a vehicle suspected of speeding based on the officer's visual and aural perceptions. Cheatham v. Dep't of Highway Safety & Motor Vehicles, 7 Fla. L. Weekly Supp. 154b (Fla. 9th Cir. Ct. Nov. 30, 1999) (citation omitted).

Trooper Vaughn's charging affidavit is not so devoid of factual information that the hearing officer could not find competent substantial evidence to support Trooper Vaughn's perception that the Petitioner was speeding. The affidavit states that Trooper Vaughn observed the Petitioner's vehicle traveling at a high rate of speed, which he estimated was 90 to 95 miles per hour. His laser speed measuring device indicated that the vehicle was traveling 91 miles per hour. Lastly, he states that he traveled in excess of 100 miles per hour to catch up to Petitioner's vehicle.

Issue II. Whether Trooper Vaughn had sufficient cause to request the Petitioner to submit to field sobriety tests.

Petitioner asserts that there was no probable cause to require her to submit to field sobriety tests. She argues that the odor of alcohol and bloodshot eyes are insufficient to establish probable cause and cites to State v. Kliphouse, 771 So. 2d 16 (Fla. 4th DCA 2000) and A.N.H. v. State, 832 So. 2d 170 (Fla. 3d DCA 2002), in support of her position. The Petitioner's reliance on these cases in misplaced.

In the Petitioner's case, Trooper Vaughn detected the odor of alcohol, bloodshot, glassy eyes and slurred speech. He did not rely on the odor of alcohol or bloodshot eyes alone, but relied upon a combination of factors in determining whether to administer field sobriety tests. In the cases that the Petitioner relies on, it appears that only one of these factors was present. See Kliphouse, 771 So. 2d at 23 (finding that the odor of alcohol must be combined with other factors); A.N.H., 832 So. 2d at 172 (finding that bloodshot eyes and unusual behavior does not give rise to reasonable grounds to suspect criminal activity). Additionally, the standard for compelling roadside field sobriety tests is reasonable suspicion. State v. Haskins, 752 So. 2d 625, 627 (Fla. 2d DCA 1999) (finding that section 901.151(2), Florida Statutes, permits an officer to request field sobriety tests based on a reasonable suspicion that a DUI is being committed). Based on Trooper Vaughn's observations, there was competent substantial evidence that he lawfully requested the Petitioner to submit to field sobriety tests.[2]

Issue III. Whether there was competent substantial evidence in the record to support a determination that the Petitioner's driver's license should be suspended for eighteen months.

Section 322.2615(8)(a), Florida Statutes, provides that the driver's license of any person who has had his driver's license suspended for a previous refusal to submit to a lawful breath, blood or urine test shall be suspended for a period of eighteen months. In this case, there is no record that the Department admitted the Petitioner's driving record into evidence at the hearing. Therefore, the Department cannot rely on the Petitioner's driving record as evidence of a prior suspension. *Boston v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 674a (Fla. 9th Cir. Ct. 2005) (finding

[2] The Petitioner asserts that the videotape of the arrest shows that her speech was not slurred. However, there is no audio on the videotape. In any event, there was competent substantial evidence to support Trooper Vaughn's request even if the Petitioner's speech was not slurred.

petitioner's due process violated where licensee's driving record establishing that her license had previously been suspended for driving with unlawful blood alcohol level was not admitted or introduced into evidence at hearing). Because the driving record establishing a prior refusal was not admitted into evidence, there was not competent substantial evidence supporting the hearing officer's determination that this was a second refusal. Thus, a suspension of eighteen months was not appropriate.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED** as to Issues I and II and **GRANTED** as to Issue III.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___4__ day of ____September_____, 2007.

___/S/_____
JOHN MARSHALL KEST
Circuit Judge

___/S/_____
ROBERT M. EVANS
Circuit Judge

___/S/_____
CYNTHIA Z. MACKINNON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Stuart I. Hyman, Esquire,** 1520 East Amelia Street, Orlando, Florida, 32803 and **Enoch J. Whitney, General Counsel and Heather Rose Cramer, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, Suite 230, Lake Worth, Florida 33467 on the __4____ day of_____September_____, 2007.

___/S/_____
Judicial Assistant