

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

DAVID PEYTON,

CASE NO.: 2006-CA-2388-O

Petitioner,

WRIT NO.: 06-30

v.

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

Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before GRINCEWICZ, TURNER, and FLEMING, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner David Peyton (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 his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction. 322.2615, 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

On February 4, 2006, at approximately 2:48 a.m., Deputy Regan of the Orange County Sheriff's Department observed a white Ford Expedition "driving in an unusual manner which was consistent with driver impairment." (App. B at 2.) Deputy Regan observed the vehicle "traveling in more than one lane at a high rate of speed. The vehicle came to a stop a full vehicle length beyond the stop bar at W. Colonial and Bluford." (App. B at 2.) Deputy Regan also observed the vehicle "traveling East bound on W. Colonial with its two drivers (sic) side tires in the median and several times corrected over to both tires crossed [the] lane divider." (App. B at 2.) Deputy Regan initiated a traffic stop to check on the driver's well being.

Upon stopping the vehicle, Deputy Regan ordered the driver to step out of the vehicle with his driver's license. Deputy Regan observed that the driver was unsteady and leaned on his vehicle. Deputy Regan identified the driver as the Petitioner by his Florida driver's license. Deputy Regan detected a strong odor of alcoholic beverages on the Petitioner's breath. The Petitioner swayed while standing up and leaned on his vehicle. In addition, the Petitioner's eyes were glassy, red, bloodshot and watery. Deputy Regan also observed that the Petitioner's clothes were soiled and that it appeared that the Petitioner had urinated on himself. When asked how much he had had to drink, the Petitioner replied, "[a] [f]ew." (App. B at 2.)

Deputy Regan then asked the Petitioner to submit to field sobriety exercises. Petitioner agreed and submitted to the HGN test; the walk and turn test; and the one leg stand test. The Petitioner performed poorly on the tests. Deputy Regan arrested the Petitioner for DUI and transported him to the breath test center where the Petitioner refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on March 1, 2006, the Petitioner was granted a formal review held by Department Hearing Officer Kuritz. The Petitioner was present at the hearing and represented by counsel. At the hearing, the Petitioner moved to set aside the suspension on the following grounds: (1) that the stop was unlawful; and (2) that there was no probable cause for the arrest. The Petitioner also moved to strike the horizontal gaze nystagmus test. On March 3, 2006, the hearing officer entered a Final Order of License Suspension denying the Petitioner's motions and sustaining the suspension of the Petitioner's driver's license. This petition followed.

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 there was no probable cause for the stop because Deputy Regan did not provide an asserted basis for the stop. The Petitioner asserts that Deputy Regan issued a courtesy notice for failure to obey a traffic control device but failed to indicate that there was a traffic control device or a traffic signal associated with the stop bar. Thus, the Petitioner contends that there was no probable cause to stop him for violation of a traffic control device based upon the record facts. In addition, Petitioner maintains that Deputy Regan's observation that the driver's side tires were in the median does not support probable cause for the stop.

The Department responds by asserting that Deputy Regan lawfully stopped the Petitioner for violation of a traffic control device. In addition, the Department argues that Deputy Regan also had the authority to stop based on the Petitioner's erratic driving pattern.

In order “to conduct a lawful investigatory stop or detention, an officer [need only] have an articulable, reasonable suspicion that the [person] detained has committed or is about to commit a crime.” Brown v. State, 719 So. 2d 1243, 1245 (Fla. 5th DCA 1998). In reviewing the lawfulness of the stop of the Petitioner, this Court must determine whether the evidence indicates “an objectively reasonable basis for making the stop.” Dobrin v. Dep’t of Highway Safety & Motor Vehicles, 874 So. 2d 1171, 1174 (Fla. 2004). If the facts “provide any objective basis to justify the stop . . . the stop is constitutional.” Dep’t of Highway Safety & Motor Vehicles v. Utley, 930 So. 2d 698, 698 (Fla. 1st DCA 2006) (Hawkes, J., concurring).

A driver need not commit a traffic violation in order to justify a stop for driving under the influence. Dep’t of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). Erratic driving can establish a founded suspicion to justify the stop. Id. Florida courts have recognized that concern for the motoring public can warrant a stop “to determine whether a driver is ill, tired, or driving under the influence” Id.

In Dobrin, an officer observed the petitioner driving at a high rate of speed and drifting to the right and correcting himself in a quick manner on several occasions. 874 So. 2d at 1172. He was stopped and ticketed for failure to maintain a single lane, and subsequently arrested for driving under the influence. Id.

The court held that the correct standard to be applied “is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop.” Id. at 1174. It reiterated the objective test set forth in Whren v. United States, 517 U.S. 806 (1996), which was previously adopted by the court in Holland v. State, 696 So.

2d 757 (Fla. 1997). Id. The court quashed the decision of the Fifth District Court of Appeal because it applied a subjective “reasonable officer” test, and directed reinstatement of the circuit court’s order. Id. The court held that the circuit court properly applied the objective test when it quashed the hearing officer’s order sustaining the suspension of the petitioner’s driver’s license. Id.

The court agreed with the circuit court’s finding that the facts contained in the officer’s report did not provide probable cause for failing to maintain a single lane because the report did not state that Dobrin crossed either line of the traffic lane. Id. at 1173. The circuit court rejected the Department’s argument that the stop was justified because he was speeding, reasoning that the stop could not be upheld based on what the officer could have done, where the only reason stated for the stop was for failing to maintain a single lane. Id. It also rejected the argument that the stop was justified to determine whether the petitioner was ill, tired, or under the influence because there was no indication in the officer’s report that impairment was the reason for the stop. Id. Because the circuit court applied the correct law in considering whether the arrest report provided an objective basis for the stop, the court directed reinstatement of the circuit court’s order quashing the suspension. Id.

The facts in this case provide competent substantial evidence that Deputy Regan had an objectively reasonable basis for making the stop. Unlike the stop in Dobrin, Deputy Regan stated that he observed the Petitioner driving in an unusual manner that was consistent with driver impairment and that he stopped the Petitioner to check on Petitioner’s well-being. Deputy Regan’s belief that the Petitioner was driving in a manner that was consistent with driver impairment was based on his observations of the

Petitioner’s driving pattern, which included observing the Petitioner driving with his “two drivers side tires in the median and several times corrected over to both right tires crossed [the] lane divider.” (App. B at 2.); See Bourcier v. Dep’t of Highway Safety & Motor Vehicles, 12 Fla. L. Weekly Supp. 287a (Fla. 9th Cir. Ct. Sept. 10, 2004) (finding that officer who believed driver was possibly impaired based on his observations of driver weaving and failing to maintain a single lane had an objectively reasonable basis for stop); see also Yanes v. State, 877 So. 2d 25, 26 (Fla. 5th DCA 2004) (traffic stop justified where the driver crossed the “fog line” on three occasions within a mile); Ndow v. State, 864 So. 2d 1248 (Fla. 5th DCA 2004) (“If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is not violation of vehicular regulations and no citation is issued.”). Therefore, there is some evidence in the record that supports the hearing officer’s finding of a lawful stop. Thus, this Court will not re-weigh the evidence.

Based on the foregoing, 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 on this the 21 day of August , 2008.

 /S/
DONALD E. GRINCEWICZ
Circuit Judge

 /S/
THOMAS W. TURNER
Circuit Judge

 /S/
JEFFREY M. FLEMING
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 **Judson Chapman, 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 21 day of August , 2008.

_____/S/_____
Judicial Assistant