

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

STEPHEN SMITH,

Petitioner,

v.

CASE NO.: 2007-CA-13354-O

Writ No.: 07-60

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

Petition for Writ of Certiorari.

Shon Joseph Douctre, Esquire,
for Petitioner.

Damaris E. Reynolds, Esquire,
for Respondent.

BEFORE MIHOK, BRONSON, and FLEMING, JJ.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Stephen Smith (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of her driver’s license for refusal to submit to a breath, blood, or urine test. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On August 9, 2007, Officer Denicola of the Maitland Police Department was alerted to be on the look out for a possible impaired driver travelling along Maitland Boulevard. The officer observed a vehicle matching the dispatcher’s description and tag number, and proceeded to follow the vehicle. Officer Denicola pulled over the vehicle after observing erratic driving

behavior. In the charging affidavit, Officer Denicola reported that upon approaching the vehicle he noticed vomit on the Petitioner's clothes and in the vehicle, the smell of alcoholic beverages on Petitioner's person and breath, red and glassy eyes, unsteady balance, and slurred speech. Inside the vehicle the officer found an open, unfinished, cold beer. Initially the Petitioner agreed to perform the field sobriety exercises provided he was allowed to have an attorney present. The officers on the scene (Officer Denicola and his supervisor/assisting officer, Sergeant Harris) informed the Petitioner of his rights during a roadside DUI investigation, particularly that the presence of an attorney is not one of those rights. When the Petitioner continued to request an attorney and refused to perform the field sobriety exercises Officer Denicola placed him under arrest for DUI. At the Seminole County Jail the Petitioner was read the Implied Consent Warning and he was asked if he would submit to a breath test. Once again the Petitioner agreed to submit provided an attorney was present, and following the officer's explanation that the Petitioner was not entitled to an attorney prior to or during a breath test, Petitioner refused to submit without his attorney present. Petitioner's privilege to operate a motor vehicle was consequently suspended for refusal to submit to a breath test.

A formal review hearing was timely requested, pursuant to Florida Statute 322.2615, following the suspension of the Petitioner's license. The hearing occurred on September 11, 2007, before the DHSMV Hearing Officer. The Petitioner and his attorney were present, and the following exhibits were entered into evidence: 1) Florida DUI Uniform Traffic Citation 2176XDH; 2) the Petitioner's Florida driver's license; 3) the charging affidavit; 4) Affidavit of Refusal; 5) a map of the City of Maitland; and 6) a Google map. Following the proceedings, the Hearing Officer issued her "Findings of Fact, Conclusions of Law and Decision," denying the Petitioner's motions and affirming the suspension of the Petitioner's driving privilege. Thereafter, this petition was timely filed.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver's license for refusal to

submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting law enforcement officer had probable cause to believe that the person whose license was suspended 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 whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended 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 18 months.

§ 322.2615(7)(b), Fla. Stat. (2007).

Petitioner argues that the Hearing Officer's order departed from the essential requirements of law and denied the Petitioner procedural due process by finding: 1) that Officer Denicola had "probable cause to stop, detain for a DUI investigation, arrest, and request a breath test based on the evidence presented"; 2) that "the driver refused to submit to the breath test based on his denial of counsel"; 3) that "the driver's refusal to submit to the FSEs against him based on the evidence presented"; and 4) that "the driver refused to submit to the breath test based on his answers." Conversely, the Department argues that the Hearing Officer properly sustained the license suspension of the Petitioner where competent and substantial evidence existed to support the Hearing Officer's decision, the essential requirements of law were met, and the Petitioner was afforded procedural due process. Namely, 1) "the unrebutted records shows that Officer Denicola developed probable cause for a stop of Petitioner's vehicle within her jurisdiction"; 2) "[a] driver does not have a right to counsel before taking a breath test"; 3) "[a] driver does not have a right to counsel before refusing to take field sobriety exercises"; and 4) "[a] driver does not have a right to counsel before refusing to take a breath test."

In considering this petition, this Court must note that the Petitioner failed to cite any supporting case law during the course of presenting his arguments. In fact, the Petitioner is attempting to re-argue to the Court the exact evidentiary arguments presented to the hearing officer and ruled on in the order below.

It is neither the function nor the prerogative of the circuit court to reweigh evidence and make findings when it undertakes a review of a decision of an administrative forum. *State of Florida, Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20 (Fla. 5th DCA 1989). The appeal provided in the statute specifically states that it “shall not be construed to provide de novo appeal.” § 322.2615(13), Florida Statutes (2007). In reviewing an administrative action, the circuit court is prohibited from weighing or reweighing the evidence presented to the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30 (Fla. 1st DCA 1997).

In the interest of finality, this Court would reiterate the holding from *Dept' of Highway Safety & Motor Vehicles v. Leonard*, 718 So. 2d 314 (Fla. 5th DCA 1998), where a similar factual scenario was presented to the court on appeal. The court in *Leonard* stated:

[A]n arrest made outside an officer's jurisdiction is authorized by §901.25 where, as here, the officer is in fresh pursuit. *Cheatem v. State*, 416 So.2d 35 (Fla. 4th DCA 1982); *Edwards v. State*, 462 So.2d 581 (Fla. 4th DCA 1985). Fresh pursuit includes misdemeanor offenses. *Edwards*. Where there are signs of the offense continuing, the officer has authority to arrest a defendant outside her jurisdiction for committing the offense within the jurisdiction. *Edwards*.

Leonard, 718 So. 2d at 316. In the instant case, the Hearing Officer determined that the officer did not commit any unnecessary delay, had a continuous and interrupted pursuit, and there was a close temporal relationship between the commission of the offense and the apprehension of the Petitioner. Based on all of these factors, as outlined in *Porter v. State*, 765 So. 2d 76, 80 (Fla. 4th DCA 2000), the Hearing Officer correctly determined that Officer Denicola was in fresh pursuit of the Petitioner and therefore made a valid stop and arrest.

Finally, the Petitioner's remaining arguments concerning requests for assistance of counsel during various stages of the DUI investigation, arrest, and breath test administration are all without merit. The Fifth District Court of Appeals has previously stated that a routine traffic

stop, where an officer conducts a stop, asks for license and registration, and asks for the defendant to perform field sobriety exercises, does not trigger the requirement of *Miranda* warnings. See *State v. Burns*, 661 So. 2d 842, (Fla. 5th DCA 1995). Neither does he have the right to have an attorney present during roadside field sobriety exercises, as the exercises are merely part of the collection of physical evidence that occurs during every DUI case and they “do not constitute a crucial confrontation requiring the presence of defense counsel.” *Burns*, 661 So. 2d at 848. Additionally, a person arrested for DUI has no right to attorney prior to deciding whether or not to take a breath alcohol test, *Dep’t of Highway Safety & Motor Vehicles v. Farr*, 757 So. 2d 550, (Fla. 5th DCA 2000).

In this case, all of the findings were supported by competent substantial evidence in the record. The charging affidavit detailed the arresting officer’s observations of Petitioner upon contact with him roadside and during the course of the investigation. Based on these observations, the hearing officer had competent substantial evidence to support his findings that the arresting officer had probable cause to arrest the Petitioner for DUI. The Court cannot, on appeal, reweigh and resolve conflicts in evidence that were presented to, and resolved by the hearing officer below. Thus, the Court finds that the Department’s order sustaining Petitioner’s suspension conforms to the essential requirements of the law and is supported by competent substantial evidence. To evaluate the evidence further would put the Court in the impermissible position of reweighing the evidence presented in the administrative action.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Smith’s Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
10th day of ___Nov_____, 2009.

/S/

A. THOMAS MIHOK
Circuit Court Judge

/S/

THEOTIS BRONSON
Circuit Court Judge

/S/

JEFFREY M. FLEMING
Circuit Court Judge

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Shon Joseph Douctre, Esq.**, 733 W. Colonial Drive, Orlando, FL 32804; and to **Damaris E. Reynolds, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609 on this 12th day of Nov , 2009.

____/S/_____

Judicial Assistant