

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

TRAVIS FOSTER,

Petitioner,

v.

CASE NO.: 2009-CA-036013-O
WRIT NO.: 09-50

**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,
Mary Varnadore, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

Before S. KEST, EGAN, and MUNYON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Travis Foster (“Foster”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Findings of Fact, Conclusions of Law and Decision,” sustaining the suspension of his driver’s license pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath-alcohol test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule

of Appellate Procedure 9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

On September 2, 2009, Deputy Hammack, of the Orange County Sheriff's Office, observed Foster driving a motor vehicle westbound on the 408 expressway. There were no other vehicles in the immediate area. Deputy Hammack observed that Foster's vehicle weaved across multiple lanes, made several speed fluctuations, and, for approximately fifty yards, straddled the lane dividers. Based on fear for the safety of other drivers, Foster's failure to maintain a single lane, and fear that Foster may have a medical condition, Deputy Hammack signaled Foster to stop.

Upon making contact with Foster, Deputy Hammack observed that Foster swayed back and forth, emitted an odor of alcohol, had watery and glassy eyes, and was speaking slowly. Foster stated that he was coming from "downtown," and he admitted to drinking three beers while he was "downtown." Based on Foster's driving pattern, odor of alcohol, unsteadiness, and confusion, Deputy Hammack believed that Foster was impaired by alcohol. Therefore, Deputy Hammack arrested Foster for DUI and transported him to the DUI Testing Center.

At the testing center, Foster initially consented to a breath-alcohol test. However, both Deputy Hammack and the breath test operator attested that Foster was uncooperative, did not follow instructions, and did not blow hard or long enough to consistently supply a sufficient volume of breath to reach a reliable result. In his Arrest Affidavit, Deputy Hammack attested that "Foster was not breathing into the tube as directed and was blowing air out of his nose and the side of his mouth." He went on to state that Foster was given directions several times, and Foster confirmed that he understood the directions. Though Foster testified, on his own behalf, claiming

that he followed the law enforcement officials' instructions, the hearing officer found his testimony to be unpersuasive.

During the DUI testing, the breath test operator made four attempts to gather reliable samples from Foster. The first attempt rendered a result of "Volume Not Met," indicating that Foster did not supply a sufficient volume of breath. The Intoxilyzer instrument recorded a breath-alcohol content of 0.205, but indicated, "Breath Sample Not Reliable to Determine Breath Alcohol Level." On the second and third attempts, the Intoxilyzer instrument recorded breath-alcohol levels of 0.190 and 0.212. However, these two readings could not be accepted as a valid test result, because they failed to meet the legal requirement of "two results within 0.020 g/210L." The fourth attempt again rendered a result of "Volume Not Met," with an unreliable breath-alcohol content reading of 0.182. Therefore, the testing was stopped, and Foster was deemed to have refused submitting to a breath-alcohol test. Thus, the Department suspended his driving privilege.

Pursuant to section 322.2615, Florida Statutes, Foster requested a formal review of his license suspension. On October 8, 2009, Hearing Officer Mary Varnadore held a formal review at which Foster appeared and was represented by counsel. At the hearing, Foster moved to strike any testimony alleging that he refused to perform field sobriety exercises. Furthermore, Foster moved to invalidate the license suspension on five grounds: 1) lack of evidence that Foster's vehicle was lawfully stopped; 2) lack of probable cause to believe that Foster was under the influence; 3) lack of competent, substantial evidence that Foster actually refused to provide a breath test sample; 4) the Breath Alcohol Test Affidavits establish that Foster provided two valid samples; and 5) lack of evidence that the Intoxilyzer instrument was working properly. The hearing officer reserved ruling on all six motions. On October 16, 2009, the hearing officer

entered an order denying all six motions and sustaining the suspension of Foster's driver's license.

Discussion of Law

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. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (citing 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 refusing 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, amend, or invalidate the suspension." §322.2615(7), Fla. Stat. (2009). The hearing officer's scope of review is limited to the following issues:

1. Whether the 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 chemical 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. (2009).

Foster argues that his license suspension is not supported by competent, substantial evidence that his arrest was incident to a lawful traffic stop. Foster further argues that his license suspension is not supported by competent, substantial evidence that he actually refused to submit to a breath test.

Lawful Traffic Stop

A law enforcement officer is legally permitted to stop a motor vehicle when it is traveling at varying rates of speed, drifting from one edge of a lane of traffic to the opposite edge, eventually crossing into the passing lane, and the officer reasonably believes that the driver may have been dozing off, not paying attention, under the influence of alcohol, or experiencing mechanical difficulty with the automobile. State v. Frederick, 525 So. 2d 516, 516 (Fla. 4th DCA 1988) (citing Esteen v. State, 503 So. 2d 356 (Fla. 5th DCA 1987)). Furthermore, a traffic stop can be valid, although no vehicular regulation has been violated, when a vehicle is traveling at a rate of speed far below the speed limit, while it weaves within one lane, without crossing into another lane. Esteen, 503 So. 2d at 357 (citing Bailey v. State, 319 So. 2d 22 (Fla. 1975)). Finally, “[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.” Ndow v. State, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (citing State, Dep’t of Highway Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992)).

Deputy Hammack observed Foster’s vehicle make several speed fluctuations, weave between lanes, and straddle a lane divider. Deputy Hammack signaled Foster to stop based on his fear for the safety of other drivers, Foster’s failure to maintain a single lane, and fear that Foster may have a medical condition. Foster argues that, because no other vehicles were in the

immediate area, Deputy Hammack could not have reasonably believed that Foster was endangering other drivers. However, the law does not require the actual, immediate endangerment of a specific driver. Rather, the law requires only a concern for the safety of the motoring public. A law enforcement officer is not required to wait until another vehicle is actually in immediate danger before stopping a suspicious vehicle to prevent that danger. Considering Deputy Hammack's observations, his concerns were legitimate. Therefore, there is competent, substantial evidence supporting the finding that Deputy Hammack executed a lawful traffic stop, and Foster's arrest was incident to that lawful stop.

Refusal to Submit to a Breath Test

Florida Administrative Code Rule 11D-8.002(12) defines an "Approved Breath Alcohol Test" with the following language:

[A] minimum of two samples of breath collected within fifteen minutes of each other, analyzed using an approved breath test instrument, producing two results within 0.020 g/210L, and reported as the breath alcohol level. If the results of the first and second samples are more than 0.020 g/210L apart, a third sample shall be analyzed. Refusal *or failure* to provide the required number of valid breath samples constitutes a refusal to submit to the breath test. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.

(Emphasis added).

Foster argues that neither Rule 11D-8.002(12) nor FDLE/ATP Form 37—the Intoxilyzer 8000 operational procedures—make any mention of low volume samples or "Volume Not Met" indications. Thus, he reasons, an indication of "Volume Not Met" must be meaningless, and the first sample he provided was valid. Therefore, under this theory, his first sample of 0.205 and his second sample of 0.190 constitute an "Approved Breath Alcohol Test" because they consist of two samples which satisfy the 0.020 g/210L agreement requirement.

In support of this argument, Foster relies upon Wilson v. State, Dep't of Highway Safety & Motor Vehicles, 13 Fla. L. Weekly Supp. 1143a (Fla. 7th Cir. Ct. April 30, 2001). In Wilson, a licensee was arrested for DUI, and she consented to a breath-alcohol test. Id. She provided two breath samples resulting in readings of .206 and .187 breath-alcohol content, but they also registered as low volume samples. Id. The arresting officer asked her to provide additional breath samples, and she refused, stating that she already provided samples. Id. Therefore, the officer suspended her driving privileges for refusing to submit to a breath-alcohol test. Id.

At the review hearing, the officer testified that the two low volume samples were “valid breath tests.” Id. During testimony, he explained that he requested additional samples because he was instructed to do so by a State Attorney. Id. He further explained that, while the two samples were actually valid, a low volume sample in a prior case had been damaging at trial. Id. Therefore, he asked for additional breath samples to “cover [them]” at trial. Id.

The hearing officer sustained the suspension, but the circuit court granted certiorari and quashed the order. Id. The court reasoned that the arresting officer “testified numerous times that the two breath samples obtained from [the licensee] were valid and, in his opinion, they were otherwise sufficient to proceed.” Id. Furthermore, “[i]mplied consent does not require that a person continue to provide breath samples until the most incriminating sample can be achieved so that the State can benefit by having stronger evidence at trial.” Id.

The holding in Wilson does not apply to the facts in the present case, and Foster’s argument is not persuasive. Unlike Wilson, there was no testimony in the present case that the “Volume Not Met” samples were valid or reliable. Furthermore, there was no testimony that Deputy Hammack or the breath test operator believed that a valid breath-alcohol test was accomplished. Also unlike Wilson, there is no evidence that additional tests were requested to

gather stronger, more incriminating evidence. To the contrary, the breath test operator testified that he requested additional samples merely because he had not yet accomplished a complete, valid test pursuant to Rule 11D-8.002(12). Unlike the present case, the Wilson opinion fails to mention any evidence that the low volume samples were “Not Reliable to Determine Breath Alcohol Level.” Finally, unlike the present case, the opinion in Wilson fails to mention any evidence that the licensee was not cooperating or not following instructions.

On the other hand, we find the facts in the present case to be more like Underwood v. Dep’t of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 299a (Fla. 4th Cir. Ct. January 15, 2008). In Underwood, a licensee was arrested for DUI, and he initially consented to a breath-alcohol test. Id. According to a law enforcement officer’s testimony, the licensee did not follow instructions and was not supplying a sufficient volume of breath. Id. The breath test instrument registered two samples, both indicating “Volume Not Met.” Id. It was determined that the licensee was not making a good faith effort, and his actions were deemed a refusal. Id. The Department suspended his driving privilege, and the hearing officer sustained the suspension. Id. The circuit court denied certiorari, reasoning that the printout from the breath test instrument designated the samples as “Volume Not Met” and indicated that “both samples were not reliable to determine breath alcohol level.” Id. The court further stated, “The refusal *or failure* to provide two *reliable* samples constitutes a refusal to take the breath test. Id. (emphasis added).

In the present case, two law enforcement officials testified that Foster was uncooperative and did not follow instructions. Foster contends that his first and second sample satisfied the 0.020 g/210L agreement requirement, and thus they constitute an “Approved Breath Alcohol Test.” However, the first sample was designated “Volume Not Met,” and the Intoxilyzer report indicated that it was “Not Reliable.” We find that the “Volume Not Met” and “Breath Sample

Not Reliable” indications are far from meaningless. Foster failed to provide two reliable samples that satisfy the 0.020 g/210L agreement requirement. There is competent, substantial evidence to support the finding that Foster was uncooperative and did not follow instructions, and the hearing officer did not commit error in finding that his actions were properly deemed a refusal.

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 14th day of June , 2010.

 /S/
SALLY D. M. KEST
Circuit Judge

 /S/
ROBERT J. EGAN
Circuit Judge

 /S/
LISA T. MUNYON
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: **William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Esq., Department of Highway Safety and Motor Vehicles**, Post Office Box 570066, Orlando, Florida 32857 on the 14th day of June , 2010.

 /S/
Judicial Assistant