

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

ALBERTO CORREA,

Petitioner,

v.

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

Respondent.

CASE NO.: 2011-CA-176-O

WRIT NO.: 11-01

Petition for Writ of Certiorari.

Robert L. Sirianni, Jr., Esquire and
Paetra T. Brownlee, Esquire,
for Petitioner.

Richard M. Coln, Esquire,
for Respondent.

BEFORE WALLIS, JOHNSON, O’KANE, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Alberto Correa (“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 suspension of his driver’s license. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

Findings of Fact

As gathered from the arrest affidavit, testimony, and other related documents provided at the formal review hearing, the facts were as follows: On November 6, 2010 at approximately 3:00 a.m., Deputy Brandon Mattson of the Orange County Sheriff's Office was parked in the Checkers' restaurant parking lot on West Colonial Drive in Orange County awaiting a tow truck for a previous call. Deputy Mattson had his patrol vehicle rear emergency lights activated with directional arrows illuminated to inform drivers to pass his vehicle on the left side. He then observed a vehicle operated by Petitioner pull up behind his vehicle and park. After Petitioner's vehicle had remained in that position for approximately five minutes, Deputy Mattson waived to Petitioner to go around his vehicle. Petitioner failed to move and Deputy Mattson then walked to Petitioner's vehicle to find out if he needed assistance.

Upon making contact, Petitioner rolled down his window, became belligerent, and asked Deputy Mattson what right he had to approach his vehicle. Deputy Mattson informed Petitioner that he was concerned for Petitioner's safety and told him to drive around his patrol vehicle and continue to his destination. While speaking with Petitioner, Deputy Mattson detected the strong odor of alcohol and observed that his eyes were red, bloodshot and glassy. The deputy also observed that Petitioner's speech was thick, slurred, labored, and at times difficult to understand. Based upon his observations, Deputy Mattson decided to perform a DUI investigation and asked Petitioner for his driver license. Petitioner continued his hostile behavior and the deputy radioed for backup.

Sergeant Chris Ecklund¹ arrived on the scene for backup and Petitioner still refused to cooperate. After several minutes of being ordered to provide his driver license, Petitioner

¹ The person's last name is spelled "Eklund" in the arrest affidavit and in the hearing officer's order, but is spelled "Ecklund" in the transcript from the formal review hearing.

reluctantly obliged. Deputy Mattson asked Petitioner to exit his vehicle and when he did so, Deputy Mattson observed that Petitioner had an orbital sway while standing. Petitioner admitted to drinking one glass of wine prior to driving. Petitioner was asked to perform field sobriety exercises several times and refused to perform them. When Deputy Mattson explained the consequences of not performing the exercises, Petitioner repeatedly refused to do so. Petitioner was then placed under arrest for DUI and transported to the DUI Testing Center. Petitioner was read the Implied Consent Warning and was asked to submit to a breath-alcohol test. Petitioner refused to submit to the breath-alcohol test whereupon his privilege to operate a motor vehicle was suspended.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on December 7, 2010. On December 8, 2010, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this order.

Standard of Review

"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. Where the driver's license was suspended for refusing to submit to a breath-alcohol test, 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. (2010).

Arguments

In the Petition for Writ of Certiorari, Petitioner argues that 1) the hearing officer's decision to sustain his license suspension is not supported by competent substantial evidence that he was lawfully stopped or arrested and 2) Petitioner was denied due process of law as the refusal to take the breath-alcohol test was not incident to a lawful arrest. Petitioner claims that there was insufficient evidence to establish that he was legally stopped because the arrest affidavit and Deputy Mattson's testimony contain no detail about the method the deputy used to establish that Petitioner violated any laws.

Conversely, the Department argues that the hearing officer properly sustained the suspension of Petitioner's driver's license where there was competent and substantial evidence in the record to support his decision, the essential requirements of law were met, and Petitioner was afforded procedural due process.

Court's Analysis and Findings

This Court finds that a determination must be made as to whether competent substantial evidence existed that the traffic stop and arrest were lawful. In *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), the Fifth District Court of Appeal held that a license suspension cannot be sustained under section 322.2615, Florida Statutes, if the licensee was not lawfully arrested.²

This Court concurs with the Department in its Response that Petitioner's initial interaction with Deputy Mattson was a consensual encounter. Per Deputy Mattson's testimony at the formal review hearing, he first waived to Petitioner to go around his vehicle. Petitioner failed to move. Deputy Mattson then approached Petitioner's vehicle to find out if he needed assistance and upon making contact with Petitioner, he told him to drive around his patrol vehicle and continue to his destination. There is no evidence in the record or testimony presented at the formal review hearing that Petitioner was restrained or prevented from leaving the scene at that point.

The encounter became an investigative stop when several indicators of Petitioner's impairment surfaced and before he was asked to exit his vehicle and to perform the field sobriety exercises. The signs of impairment included his belligerent and hostile behavior, his red, bloodshot and glassy eyes, the strong odor of alcohol, and his thick slurred and labored speech. In addition, Deputy Mattson testified at the formal review hearing that Petitioner was screaming

² See *Dep't of Highway Safety & Motor Vehicles v. Hernandez and Dep't of Highway Safety & Motor Vehicles v. McLaughlin*, 2011 WL 2224791 (Fla. June 9, 2011), where the Florida Supreme Court addressed both cases applying *Pelham* and ruled that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal is not incident to a lawful arrest and also ruled that the issue of whether the refusal was incident to a lawful arrest is within the allowable scope of review of the Department's hearing officer.

at him. These indicators of impairment established a well-founded suspicion that Petitioner was or was about to become involved in criminal activity by driving under the influence.

Ample case law exists addressing the requirements for a valid stop for driving under the influence and a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. "An officer must possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that those detained in the stop of a vehicle have committed, are committing, or are about to commit a violation of the law." *Weems v. State*, 492 So. 2d 1139, 1139-1140 (Fla. 1st DCA 1986). See also *Terry v. Ohio*, 392 U.S.1 (1968) and *State v. Carrillo* 506 So. 2d 495 (Fla. 5th DCA 1987). "The courts of this state have recognized that 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." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992).

Further, upon exiting the vehicle, Petitioner had a noticeable orbital sway when he stood, admitted that he had been drinking, and refused to perform the field sobriety exercises. Accordingly, there was competent substantial evidence in the record for the hearing officer's determination that Deputy Mattson had probable cause to arrest Petitioner for DUI. Probable cause to arrest may be lawfully based on the officer's observations during the standard procedures following a traffic stop. *State v. Carillo*, 506 So. 2d 495, 496 (Fla. 5th DCA 1987).

In the instant case, the hearing officer, as stated in his order, denied Petitioner's motion to invalidate the license suspension based upon the testimony provided by Deputy Mattson in his arrest affidavit and at the formal review hearing including that 1) it is not uncommon for a driver needing assistance to stop behind or in the vicinity of a deputy and wait for the deputy to make

first contact; 2) he was concerned for Petitioner's welfare; and 3) the odor of alcohol was not the only reason Petitioner was placed under arrest for DUI as the totality of Deputy Mattson's observations of Petitioner (bloodshot, glassy eyes, slurred speech, hostile attitude, admission of drinking prior to driving) were sufficient factors to justify the arrest.

Upon review of the hearing officer's order in conjunction with the arrest affidavit, transcript from the formal review hearing, and the other documents in the court record, competent substantial evidence existed that the traffic stop and arrest were lawful in this case. Accordingly, this Court finds that Petitioner was provided due process of law and the hearing officer's decision to sustain Petitioner's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Alberto Correa's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 9th day of January, 2012.

/S/

F. RAND WALLIS
Circuit Court Judge

/S/

ANTHONY H. JOHNSON
Circuit Court Judge

/S/

JULIE H. O'KANE
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 **Robert L. Sirianni, Jr., Esquire and Paetra T. Brownlee, Esquire**, Brownstone, P.A., 400 North New York Avenue, Suite 215, Winter Park, Florida 32789 and **Richard M. Coln, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 11th day of January, 2012.

/S/
Judicial Assistant