

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

ADAM SMITH,

**CASE NO.: 2012-CA-006367-O
WRIT NO.: 12-27**

Petitioner,

v.

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

Respondent.

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

Anton J. Nace, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE LATIMORE, TURNER, and HIGBEE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Adam Smith (“Smith”) 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, Statement, and other related documents presented at the formal review hearing on March 14, 2012, the facts are summarized as follows: On February 9, 2012 at approximately 2:30 a.m., Deputy Hartline of the Orange County Sheriff's Department was traveling eastbound approaching the intersection of Lake Underhill Road and Fieldstream Boulevard when he observed a vehicle, later identified as being driven by Smith, veer off the roadway on Lake Underhill Road and travel westbound on the grassy median on the side of the road. Deputy Hartline then made a u- turn and began to follow the vehicle as it made a right turn heading northbound on Fieldstream Boulevard. Deputy Hartline observed that the vehicle accelerated to an estimated speed of 40 miles per hour in a posted 25 mile per hour zone. Deputy Hartline followed the vehicle until it pulled into a driveway, later determined to be Smith's residence. Deputy Hartline then observed Smith jump out of the vehicle and fall to the ground. Deputy Hartline observed that Smith was unsteady on his feet, had trouble standing, and spoke with slurred speech. Deputy Hartline further observed that Smith's eyes were glassy and he could smell the strong odor of an alcoholic beverage. At that point, Deputy Hartline requested that a DUI unit respond to the scene.

Deputy Giardiello responded to the scene and made contact with Deputy Hartline, who advised him of his observations and the reason for the stop. Deputy Giardiello observed that Smith was leaning against his vehicle. Deputy Giardiello then walked over to Smith and requested that he step away from his vehicle, observing that he was unsteady on his feet without support. Deputy Giardiello also observed that Smith's speech was slurred, his eyes were glassy and bloodshot, and that the odor of an alcoholic beverage was emanating from his person.

Based upon his personal contact with Smith and Deputy Hartline's observations, Deputy Giardiello believed that Smith may be under the influence of alcoholic beverages or chemical or controlled substances to the extent that his normal faculties were impaired and decided to investigate further with field sobriety exercises. Deputy Giardiello first asked Smith a series of questions as to his medical condition and other questions. When asked if he had been drinking, Smith admitted to consuming six or seven beers prior to driving. Smith was then requested several times to perform the field sobriety exercises and ultimately refused.

At that point, Smith was placed under arrest for DUI and transported to the Orange County Sheriff's Office Breath Test Center where he was observed for the 20 minute period, read the Implied Consent Warning, and requested to submit to a breath test. Smith submitted to the test and provided one valid sample of .205, but then refused to provide a second sample. Deputy Giardiello explained the consequences of a refusal to Smith and he still refused to provide a second sample. Smith's privilege to operate a motor vehicle was suspended for the refusal and he was also cited for violating a traffic control device and for failing to carry registration.

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, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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. (2012).

Arguments

In the Petition, Smith argues that the Hearing Officer's decision to sustain his license suspension is not supported by competent substantial evidence that his vehicle was lawfully stopped because: 1) There was nothing indicated in the Arrest Affidavit or Deputy Hartline's Statement that his driving onto the grass was anything less than necessary or that an innocent explanation did not exist; 2) There was nothing suggesting the other traffic was impacted or that he failed to ascertain whether such a driving maneuver could have been made safely; 3) There was nothing stated in the Arrest Affidavit and Statement as to concern for the well-being of the driver or fear of impairment prior to the stop; and 4) Deputy Hartline's statement that the vehicle accelerated to approximately 40 miles per hour in a posted 25 mile per hour zone was a conclusory statement as the deputy's vantage point is not entirely clear and there is no indication that this conclusion was based on a visual estimation or based on the deputy pacing the vehicle with his patrol unit and if so, for how long of a duration.

Conversely, the Department argues: 1) Smith's administrative review hearing adhered to the essential requirements of the law; 2) Competent substantial evidence in the record supports the Hearing Officer's decision sustaining Smith's license suspension; and 3) Deputy Hartline had a lawful basis to stop Smith's vehicle because he observed the vehicle commit the traffic infractions of failing to maintain a single lane and speeding, in violation of sections 316.089(1) and 316.189(1), Florida Statutes, and he had a legitimate concern for the safety of the motoring public sufficient to justify the stop of the erratically-operated vehicle.

Analysis

From review of the record, Deputy Hartline's observations of Smith's driving pattern leading up to when he initiated the traffic stop included that: 1) he observed Smith's vehicle veer completely off the roadway and travel westbound on the grassy median on the side of the road and 2) after following Smith into an area with a posted 25 miles per hour speed limit, the deputy stated that Smith's vehicle accelerated away from his vehicle at approximately 40 miles per hour.

At the hearing, Smith's counsel first moved to invalidate the license suspension based on no probable cause for the traffic stop arguing that Smith drove on the grass but that no other traffic had been affected by this pattern and that the deputy did not articulate any concern for the driver's safety or medical concerns. The Hearing Officer reserved ruling on this motion and subsequently in the Order denied the motion finding that Smith was cited for violation of a traffic control device as it is illegal to drive off the roadway.

This Court finds that Deputy Hartline's observations of Smith's erratic driving as discussed above provided competent substantial evidence for the Hearing Officer to find that the deputy had an objectively reasonable basis to make the stop based on the infraction for violating

a traffic control device i.e. driving on the grass off the roadway; thus, failing to drive in a designated lane. In addition, to have a valid stop for driving under the influence, a law enforcement officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that a person detained in the stop of a vehicle has committed, is committing, or is about to commit a violation of the law. Thus, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *See State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987).

Further, this Court finds that Deputy Hartline's observations of Smith's erratic driving pattern also provided competent substantial evidence for the Hearing Officer to conclude that the deputy was justified in stopping Smith's vehicle based on a legitimate concern for the safety of Smith as well as for the safety of any other persons he could come in contact with while driving. "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); *see Ndow v. State of Florida*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004)(holding that a police officer who observes a motor vehicle operating in an unusual manner may be justified to make a stop even when there is no violation of vehicular regulations and no citation is issued; and in determining whether such an investigatory stop was justified, the courts must look to the totality of the circumstances); *see also Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009)(addressing a law enforcement officer's community caretaking duties).

Lastly, this Court addresses the portion of Smith's argument that Deputy Hartline failed to articulate how he reached the conclusion that Smith was speeding. At the hearing, Smith's

counsel also moved to invalidate the license suspension because while Deputy Hartline cited in his report that Smith was traveling at an estimated speed of 40 miles per hour in a 25 mile per hour zone, he did not articulate how he reached that conclusion; thus, counsel argued that competent substantial evidence was lacking to justify the traffic stop. In support of this argument, counsel cited *Roberts v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 27a (Fla. 9th Cir. Ct. 2005)(holding that reasonable suspicion for the traffic stop was lacking because the trooper's charging affidavit stating that the driver was observed traveling at 71 miles per hour in a 45 miles per hour speed limit area and when he pulled up behind the driver and attempted to pull him over he traveled for approximately another tenth of a mile before pulling over, was insufficient as there were little or no specific facts about the trooper's vantage point when he reached the conclusion that the driver was speeding). Subsequently, the circuit court's decision in *Roberts* was upheld by the Fifth District Court of Appeal in *Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, 514 (Fla. 5th DCA 2006). The Hearing Officer in the instant case denied Smith's motion to invalidate based on this argument, finding that the deputy articulated that he estimated the vehicle's speed while following it, thereby providing a means of measurement and vantage point; thus, meeting case law standards.

Law enforcement officers have the legal authority to stop a driver for speeding based upon the officer's visual and aural perceptions as to the estimated speed. *See State v. Allen*, 978 So. 2d 254, 255-256 (Fla. 2d DCA 2008); *State v. Joy*, 637 So. 2d 946, 947-948 (Fla. 3d DCA 1994). However, applying the *Roberts* case to the instant case, Smith's argument as to the speeding issue has merit because Deputy Hartline's Statement provides little or no specifics about his vantage point when he reached the conclusion that Smith was speeding. But

notwithstanding the merit of Smith's argument as to the speeding issue, his erratic driving pattern by driving on the grass alone provided competent substantial evidence to justify the traffic stop.

Conclusion

Based on the foregoing, this Court finds that Smith was provided due process and the Hearing Officer's decision to sustain his license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence. Because the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decision, this Court's review cannot go further to reweigh the evidence presented and as long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this Court's job is ended. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Adam Smith's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 24th day of February, 2014.

/S/

ALICIA L. LATIMORE
Presiding Circuit Judge

TURNER and HIGBEE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Anton J. Nace, Esquire**, Dicembre & Nace, 200 E. Robinson Street, Suite 1150, Orlando, Florida 32801, anton@dicembrelaw.com and **Kimberly A. Gibbs, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kingibbs@flhsmv.gov, marianneallen@flhsmv.gov on this 24th day of February, 2014.

/S/

Judicial Assistant