

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

HORACE OWENS,

CASE NO.: 2012-CA-009182-O

Petitioner,

WRIT NO.: 12-42

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT**

Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

Before GRINCEWICZ, THORPE, and MIHOK, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Horace Owens (“Owens”) 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 for refusing to submit to a breath test. 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 ICJIS Arrest Affidavit, Statement, and other documents submitted at the formal review hearing on March 1, 2012, the facts are summarized as follows: On January 27, 2012, at approximately 11:16 p.m., Officer Alex Martinez of the Orlando Police Department observed a vehicle taking the exit ramp from 1-4 onto Colonial Drive traveling southbound at a high rate of speed and crossed the intersection as the light was turning red. The car continued traveling at a high rate of speed heading south on Hughey Avenue. Officer Martinez then began to follow the car and observed the vehicle turn left onto Livingston Street without activating its signal. Officer Martinez also observed that there was other vehicle traffic in the area at that time. At that point, Officer Martinez conducted a traffic stop and made contact with the driver identified as Owens. Officer Martinez observed that Owens made slow body movements and when asked if he had been drinking, Owens answered yes. According to Officer Martinez, due to the reckless manner of Owens' driving and responses to his questions, he called Officer Christopher Chaplin for assistance.

When Officer Chaplin arrived at the scene Officer Martinez informed him of his observations of Owens. Upon making contact with Owens, who was still seated in the driver's seat, Officer Chaplin immediately smelled, based on his training and experience, to be the distinct odor of alcoholic beverages. He also observed that Owens' eye lids were heavy and his eyes were glassy, red, and bloodshot. Further, Officer Chaplin observed that Owens was slow and lethargic in both his responses and actions and that Owens had a white chalky paste on the corners of his mouth.

At that point, Officer Chaplin asked Owens to exit the vehicle and walk to the rear of the vehicle. Officer Chaplin then observed that when Owens exited the vehicle, he had trouble

maintaining his balance and had a noticeable sway. Also, according to Officer Chaplin, Owens stood very close into what most people would consider personal space. Officer Chaplin then asked Owens a series of questions about his medical condition and how much alcohol he had consumed. Thereafter, Officer Chaplin asked Owens if he would perform the field sobriety exercises. Owens ultimately agreed to perform the exercises and during the exercises, he had trouble following instructions. Owens was then arrested for DUI and transported to the DUI center.

At the DUI center, Officer Chaplin observed that Owens was stumbling while walking to the door and he still smelled the odor of alcoholic beverages coming from Owens' breath. The observation period was conducted, Owens was read the Implied Consent Warning, and a breath test was requested. Owens refused to submit to the breath test. Officer Chaplin then reiterated the consequences of refusing to submit to the test. Owens still refused to submit to the breath test and his privilege to drive was suspended for six months for driving with an unlawful alcohol level. Owens was issued a citation for DUI and for the original infraction.

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). “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 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 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 for Writ of Certiorari, Owens argues: 1) There existed no probable cause to stop his vehicle; 2) There existed no probable cause or reasonable suspicion to detain him longer than necessary to issue a traffic citation; and 3) The Hearing Officer improperly failed to set aside the suspension when Officer Chaplin repeatedly failed to appear pursuant to a lawfully served subpoena. Conversely, the Department argues: 1) Owens' administrative refusal suspension and review hearing adhered to the essential requirements of the law; 2) The Hearing Officer's decision is supported by competent substantial evidence; 3) Owens had a meaningful opportunity to be heard and was afforded due process in the formal review hearing; and 4) Owens' argument that his suspension should be invalidated because Officer Chaplin failed to appear at the hearing was not properly preserved on appeal as Owens did not seek enforcement

of the subpoena in the circuit court per section 322.2615(6)(c), Florida Statutes, despite being offered the opportunity to do so by the Hearing Officer.

Analysis

Argument I – addressing the stop of Owens’ vehicle: Officer Martinez’s observations of Owens vehicle leading up to the stop included: 1) Owens’ vehicle, while taking the exit ramp from 1-4 onto Colonial Drive, traveled at a high rate of speed; 2) Owens’ vehicle crossed the intersection as the light was turning red; 3) Owens’ vehicle continued traveling at a high rate of speed on Hughey Avenue; and 4) Owens’ vehicle then turned left onto Livingston Street without activating the left turn signal where there was other vehicle traffic in the area at that time.

This Court first addresses the observation of Owens’ vehicle traveling at a high rate of speed. Owens argues that Officer Martinez offered no specific or articulated facts in his Statement as to the speed limit in the area or whether Owens’ vehicle was even exceeding the speed limit. Further, Owens argues that there are no facts as to how the officer determined that his vehicle was traveling at a high rate of speed such as by operating a speed measuring device or facts stating a vantage point. Thus, he concludes that due to the limited facts, there was no reasonable suspicion or probable cause that he was driving at a high rate of speed. In support of this argument, counsel cited *Dep’t of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, 514 (Fla. 5th DCA 2006)(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 stating that 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).

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, Owens' argument as to the speeding issue has merit because Officer Martinez's Statement does not provide facts about the speed limit in the area, his vantage point when he reached the conclusion that Owens was speeding, or the use of a speed measuring device.

Next, this Court addresses the observation that Owens vehicle crossed the intersection as the light was turning red. Owens argues that Officer Martinez's Statement does not include facts that would support a conclusion his driving violated any law. According to Officer Martinez, the light did not turn red until after Owens crossed the intersection. Section 316.075(1)(b)1., Florida Statutes (2012) provides:

Vehicular traffic facing a steady yellow signal is thereby warned that the related green movement is being terminated or that a red indication will be exhibited immediately thereafter and ***vehicular traffic shall not enter the intersection.*** [Emphasis added]

This Court concurs with Owens that per the statute his vehicle lawfully entered the intersection on presumably a yellow or green light and as such did not violate the aforesaid statute.

Lastly, this Court addresses the observation that Owens' vehicle turned left onto Livingston Street without activating the left turn signal where there was other vehicle traffic in the area at that time. Section 316.155(1), Florida Statutes (2012) states:

No person may turn a vehicle from a direct course or move right or left upon a highway unless and until such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner hereinafter provided, ***in the event any other vehicle may be affected by the movement.*** [Emphasis added]

This Court finds that Officer Martinez's observation of Owens' vehicle turning left without the turn signal when there was other vehicle traffic in the area provided competent substantial evidence for the Hearing Officer to find that Officer Martinez had an objectively reasonable basis to make the stop based on the infraction per section 316.155(1), Florida Statutes, for failure to use a turn signal as the other vehicle traffic in the area may have been affected. 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 Officer Martinez' observations of Owens' driving pattern also provided competent substantial evidence for the Hearing Officer to conclude that the officer was justified in stopping Owens' vehicle based on a legitimate concern for the safety of Owens 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). Accordingly, notwithstanding that Owens' argument has merit as to the observations of his vehicle traveling at a high rate of speed and crossing the intersection as the light was turning red, his driving pattern by turning left without using the turn signal when there was other vehicle traffic in the area, alone provided competent substantial evidence for the Hearing Officer to find that the traffic stop was lawful.

Argument II - addressing the detainment of Owens: In addition to his observations of Owens' driving behavior, Officer Martinez's other observations of Owens leading to his detainment for further investigation included that Owens made slow body movements and when asked if he had been drinking, Owens answered yes. This Court finds that the totality of Officer Martinez's observations provided competent substantial evidence for the Hearing Officer to find that the detainment of Owens was lawful.

Argument III - addressing the failure of Officer Chaplin to appear at the formal review hearing: Lastly, Owens argues that the Hearing Officer violated his right to due process by failing to set aside the suspension after Officer Chaplin failed to appear at the hearing on two occasions. Owens contends that it would be improper to continue the hearing to enforce the subpoena because he would not have been able to have a meaningful hearing within 30 days pursuant to section 322.2615, Florida Statutes, if he attempted to enforce the subpoena.

Officer Chaplin who was properly subpoenaed to appear at the formal review hearing on March 1, 2012 did not appear. The Officer then provided the Hearing Officer with a timely excuse for not appearing due to emergency home repairs. Accordingly, the Hearing Officer reserved ruling on Owens' motions presented and the hearing was continued to April 20, 2012. Officer Chaplin again did not appear at the April hearing and the Hearing Officer informed

Owens' counsel that she again would give the officer two days to provide her with an excuse for not appearing and if the officer fails to do so then she would contact Owens' counsel to let him know and to find out whether Owens would be seeking enforcement of the subpoena.

Subsequently, on May 2, 2012, a hearing was held telephonically where Owens' counsel confirmed with the Hearing Officer that Owens would not be seeking enforcement of Officer Chaplin's subpoena in the circuit court. In response, the Hearing Officer informed Owens' counsel that there would be no more continuances of the hearing and she was prepared to hear any additional motions. At that point, Owens' counsel and the Hearing Officer reviewed the previously presented motions and upon determining that there were no additional motions to present, the hearing was concluded.

Section 322.2615(6)(a), Florida Statutes (2012) states:

If the person whose license was suspended requests a formal review, the department must schedule a hearing to be held within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.

Section 322.2615(6)(c), Florida Statutes (2012) states:

A party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged.

The formal review hearing was first held on March 1, 2012, only 34 days after Owens was arrested for DUI and from review of the record, Owens has not demonstrated that the hearing was not held within 30 days from when the Department received the hearing request. Further, Owens did not seek enforcement of the subpoena in the circuit court per the statute, despite being offered the opportunity to do so by the Hearing Officer. Therefore, Owens has not demonstrated that he was deprived of due process.

Conclusion

In conclusion, Owens was provided due process of law 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, Horace Owens' Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 17th day of February, 2014.

/S/

DONALD E. GRINCEWICZ
Presiding Circuit Judge

THORPE and MIHOK, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803, shymanlaw@aol.com and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, richardcoln@flhsmv.gov, marianneallen@flhsmv.gov on this 17th day of February, 2014.

/S/

Judicial Assistant