

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

FRANK ACIERNO,
Petitioner,

CASE NO.: 2012-CA-9191-O
WRIT NO.: 12-43

v.

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

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

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE TURNER, KOMANSKI, LATIMORE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Frank Acierno (“Acierno”) seeks certiorari review of Respondent, the 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 record, specifically the ICJIS Arrest Affidavit, University of Central Florida (“UCF”) Police Department Incident Report, Breath Alcohol Test Affidavit, Affidavit of Refusal to Submit to Breath, Urine, or Blood Test, and the testimony provided at the formal review hearing, the facts were as follows: On March 22, 2012, at approximately 2:30 a.m., Officer Matheus Flores with the University of Central Florida (“UCF”) Police Department was stopped at the red traffic light at Alafaya Trail and Research Parkway, waiting to turn left onto Research Parkway. A silver Nissan Sentra driven by Acierno pulled up on the right side of Officer Flores’ patrol vehicle. Officer Flores noticed that Acierno’s vehicle did not have the headlights turned on as they both turned left onto Research Parkway. While they drove on Research Parkway, Officer Flores observed that Acierno’s vehicle swerved side to side and almost hit the right curb of the road several times. Officer Flores initiated a traffic stop of Acierno’s vehicle at the AT&T parking lot located near the intersection of Research Parkway and Technology Parkway.

Officer Flores then made contact with Acierno and explained to him the reason for the stop. Acierno was asked to produce his driver’s license, vehicle registration, and proof of insurance. Officer Flores noticed the strong smell of alcohol impurities coming from inside Acierno’s vehicle and that Acierno had trouble retrieving the requested documents. Acierno then gave the officer multiple vehicle insurance cards and was stumbling with his documents and could not get a good hold of them. Acierno’s eyes were bloodshot red, glassy, and watery. Officer Flores then asked Acierno to step out of the vehicle and he did. Officer Flores asked Acierno if he recently drank any alcoholic beverages, and he replied “I had two or three”. The officer also asked him where he was coming from and he answered “from dropping off some

friends, and we just came from the Knight's Library". Acierno was wearing a bracelet commonly given at bars and clubs with purple dots printed on it. When asked where he got the bracelet, Acierno responded "from my house". Acierno was asked when he started drinking, and he stated "11:00 p.m.". He was also asked when was the last time he drank alcohol and he stated "12:30 a.m."

At that point, Officer Flores asked Acierno if he was willing to undergo a series of standardized field sobriety tests, which consisted of Horizontal Gaze Nystagmus, Walk and Turn, and the One Leg Stand. Acierno refused to take the field sobriety tests. Based on Acierno's driving pattern, his admission to drinking alcohol, his demeanor, and the odor of alcohol coming from his breath, Officer Flores placed Acierno under arrest for Driving under the Influence.

Officer Flores then transported Acierno to the Orange County DUI Center where he was observed for the twenty-minute period and was read the implied consent warnings. Acierno was given two opportunities to give a breath example, but he could not make a decision on both occasions, as the breath machine device timed out. Officer Flores explained to Acierno that if he does not provide a breath sample, before the breath machine times out, he will consider it a refusal. The instrument timed out and his lack of cooperation was taken as a refusal.

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 for Writ of Certiorari, Acierno argues that: 1) He was illegally stopped by a University of Central Florida police officer who did not have jurisdiction to stop his vehicle and to arrest him; 2) The evidence in the record fails to establish that Officer Flores had the reasonable suspicion necessary to detain him for a DUI investigation; 3) There was no evidence that he was ever informed of any adverse consequence of refusing to submit to field sobriety exercises, therefore the hearing officer erred in failing to strike all testimony and evidence relating to his alleged refusal to submit to the field sobriety exercises and there was insufficient evidence that he was under the influence of alcohol to the extent that his normal faculties were impaired at the time he was placed under arrest.

Analysis

Jurisdiction for the Traffic Stop and Arrest of Acierno

Acierno argues that Officer Flores did not have jurisdiction to stop and arrest him because the stop and arrest occurred off of UCF's campus. Acierno is correct that, as evidenced by Officer Flores' incident report and his testimony presented at the formal review hearing, the stop and arrest occurred off campus. However, Officer Flores was not questioned further as to whether the locations where he pursued, stopped, and arrested Acierno were inside or outside of his jurisdiction. Officer Flores' statement that the stop and arrest occurred off campus does not conclusively mean that he did not have jurisdiction to do so.

Section 316.640(a)(1)(b), Florida Statutes (2012), provides:

University police officers may enforce all of the traffic laws of this state when **violations occur on or within 1,000 feet of any property or facilities that are under the guidance, supervision, regulation, or control of a state university**, a direct-support organization of such state university, or any other organization controlled by the state university or a direct-support organization of the state university, or when such violations occur within a specified jurisdictional area as agreed upon in a mutual aid agreement entered into with a law enforcement agency pursuant to s. 23.1225(1). **Traffic laws may also be enforced off-campus when hot pursuit originates on or within 1,000 feet of any such property or facilities**, or as agreed upon in accordance with the mutual aid agreement. (Emphasis added)

Officer Flores' arrest affidavit and incident report state that he was at the traffic light at Alafaya Trail and Research Parkway, waiting to turn left onto Research Parkway when he first observed that Acierno's vehicle did not have its headlights turned on. Further, while they drove on Research Parkway, Officer Flores observed that Acierno's vehicle swerved side to side and almost hit the right curb of the road several times. The UCF campus directly abuts Alafaya Trail and Research Parkway. Accordingly, it would be reasonable for the hearing officer as the trier of fact to conclude that Officer Flores' observations of Acierno's vehicle leading to the stop

occurred within 1,000 feet of the UCF campus. It is also possible that the stop and arrest may have occurred within 1,000 feet of the UCF campus as the location of the AT & T parking lot is in close vicinity of the campus. Accordingly, this Court finds that the arrest affidavit and incident report provided competent substantial evidence for the hearing officer to find that Officer Flores had jurisdiction to pursue, stop, and arrest Acierno per section 316.640(a)(1)(b), Florida Statutes. *See Dep't of Highway Safety & Motor Vehicles v. McClane*, 891 So. 2d 596 (Fla. 5th DCA 2004); *See also* section 901.25, Florida Statutes (2012); *Goren v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 751b (Fla. 9th Cir. Ct. 2001) (holding that UCF police officer had the same rights as a private citizen to make a citizen's arrest outside of his jurisdiction where person in his presence commits a felony or breach of the peace).

Reasonable Suspicion for Detaining Acierno for DUI Investigation

Acierno argues that the evidence in the record fails to establish that Officer Flores had the reasonable suspicion necessary to detain him for a DUI investigation. This Court finds that competent evidence was provided from the arrest affidavit, incident report, and testimony addressing Acierno's erratic driving pattern and his signs of impairment for the hearing officer to find that Officer Flores had sufficient reasonable suspicion to detain Acierno and pursue the DUI investigation. Acierno's signs of impairment included: 1) the strong smell of alcohol impurities coming from inside Acierno's vehicle; 2) trouble retrieving the requested documents including giving the officer multiple vehicle insurance cards and stumbling with his documents and not being able to get a good hold of them; 3) bloodshot red, glassy, and watery eyes; 4) admission to drinking alcohol; and 5) his inconsistent answers he gave as to where he was coming from and his bracelet. *Smart v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 867a (Fla. 9th Cir. Ct. 2006).

Arrest of Acierno for DUI

First, Acierno points out that there was no evidence that he was ever informed of any adverse consequence of refusing to submit to field sobriety exercises and thus, any evidence that he refused to submit to the field sobriety exercises was not admissible. Therefore, he argues that the hearing officer erred in failing to strike all evidence relating to his alleged refusal to submit to the field sobriety exercises. Acierno then argues that there was insufficient evidence that he was under the influence of alcohol to the extent that his normal faculties were impaired at the time he was placed under arrest. Thus, he concludes that Officer Flores did not have probable cause to arrest him for DUI.

This court concurs with Acierno that the hearing officer should have stricken any evidence as to his refusal to submit to the field sobriety exercises. *Smart v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 867a. However, notwithstanding that error, there was competent substantial evidence to support the hearing officer's findings that sufficient reasonable suspicion existed to stop and detain Acierno for the DUI investigation and that there was probable cause for the arrest as evidenced by Acierno's erratic driving pattern combined with his signs of impairment as addressed above. *Id.* Therefore, while the hearing officer erred in failing to exclude the Petitioner's refusal to submit to field sobriety testing, this was harmless error. *See Dep't of Highway Safety & Motor Vehicles v. Chamizo*, 753 So. 2d 749 (Fla. 3d DCA 2000) (finding that when a hearing officer commits an error and the error is harmless, the circuit court should affirm).

Based on the foregoing, procedural due process was followed, the hearing officer followed the essential requirements of the law, and there was competent substantial evidence to support the hearing officer's findings and decision. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Frank Acierno's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 9th day of January, 2013.

/S/ _____
THOMAS W. TURNER
Circuit Judge

/S/ _____
WALTER KOMANSKI
Circuit Judge

/S/ _____
ALICIA L. LATIMORE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Matthew P. Ferry, Esquire**, Law Office of Warren W. Lindsey, P.A., 1150 Louisiana Avenue, Suite 2, Winter Park, FL 32789 and **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, FL 32857, kimgibbs@flhsmv.gov, on this 9th day of January, 2013.

/S/ _____
Judicial Assistant