

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

JACQUELINE L. WALDMAN,

CASE NO.: 2012-CA-11266-O

Writ No.: 12-56

Petitioner,

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,
Mary Varnadore, Hearing Officer.

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE GRINCEWICZ, THORPE, MIHOK, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacqueline L. Waldman (“Waldman”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of her driver’s license for driving with an unlawful breath alcohol level. The Court has jurisdiction pursuant to 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 hearing officer's findings of fact from the arrest affidavit and other related documents presented at the formal review hearing on May 29, 2012, the facts were as follows: On April 22, 2012, Officer Sarah Van Hook of the Maitland Police Department observed a vehicle fail to maintain a single lane on three occasions. Officer Van Hook conducted a traffic stop and the driver was identified as Waldman. While speaking with Waldman, the officer observed the following signs of impairment exhibited by Waldman: 1) her eyes were red and glassy; 2) her speech was slurred; 3) she admitted consuming alcoholic beverages before driving; and 4) the odor of alcohol impurities coming from her breath.

Officer Van Hook then requested that Waldman submit to field sobriety exercises. Waldman agreed and performed the exercises poorly by: 1) having trouble following instructions; 2) raising her arms for balance; 3) exhibiting a noticeable orbital sway; and 4) she was unsteady on her feet. Waldman was arrested for DUI and transported to the Orange County Breath Testing Center where the 20 minute observation period was conducted. Waldman was then requested to submit to the breath test and she provided two breath samples with results of 0.162 and 0.161. Waldman's privilege to drive was suspended for six months for driving with an unlawful alcohol level.

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 license was suspended for driving with an unlawful breath alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2012).

Analysis

At the formal review hearing, Waldman’s counsel moved to set aside the license suspension arguing that the stop was unlawful. Waldman’s counsel first presented a memorandum from the Chief of the Bureau of Administrative Reviews (“Bureau”), Kathy Jimenez-Morales, to the Bureau dated March 23, 2012. The memorandum cited *Dep’t of Highway Safety and Motor Vehicles v. Escobio*, 6 So. 3d 638 (Fla. 2d DCA 2009) and stated that in cases involving unlawful blood or breath alcohol levels, the hearing officers should not determine the lawfulness of the arrest, but should base their decisions on the current scope as set forth in section 322.2615, Florida Statutes. Waldman’s counsel argued that contrary to the memorandum, the determination of whether a stop is lawful is within the scope of the hearing officer’s review based on *Dep’t of Highway Safety and Motor Vehicles v. Pelham*, 979 So.2d

304, 305-306 (Fla. 5th DCA 2008) (holding that under the Implied Consent law, a lawful arrest must precede the administration of a breath test).

Next, Waldman's counsel argued that evidence was lacking to show that the stop was lawful because the arrest affidavit did not include sufficient facts about Waldman's driving pattern to constitute a traffic violation for failure to maintain a single lane such as the amount of distance her vehicle drifted or facts showing that her driving caused any endangerment to or interfered with any other vehicles. The hearing officer reserved ruling and then in her order denied the motion.

Argument I – Lack of Competent Substantial Evidence that the Stop was Lawful

In the Petition for Writ of Certiorari, Waldman first argues that the hearing officer's determination that her vehicle was lawfully stopped is not supported by competent substantial evidence because it is only based on a conclusion without any facts to support that conclusion as discussed above. The Court concurs with Waldman that per *Pelham* the determination of whether a stop is lawful is within the scope of the hearing officer's review. Part of the Fifth District Court of Appeal's reasoning in *Pelham* was that in order to establish probable cause as required under section 322.2615, Florida Statutes, the arrest and stop must be lawful. Section 322.2615, Florida Statutes, requires a finding of probable cause both in cases where a driver refuses to take a breath test and where a driver submits to a breath test with results above .08. Therefore, it would be illogical and contrary to the statute to find that because a driver submitted to the breath test, a finding of probable cause via a lawful stop or arrest is not necessary. *Blanchard v. Dep't of Highway Safety and Motor Vehicles*, Case No. 2011-CA-5602-O (Fla. 9th Cir. Ct. Oct. 27, 2011).

Accordingly, the Court's review is to determine whether competent substantial evidence existed that would support the hearing officer's determination that the stop was lawful. In this case, the record evidence as to the stop came solely from the arrest affidavit because no persons testified at the hearing. The arrest affidavit includes Officer Van Hook's observations leading up to the stop of Waldman's vehicle as follows:

On April 22, 2012, at approximately 0201 hours, I was eastbound on Horatio Avenue, approaching the intersection of Old Horatio Avenue. At that time, I observed a gold Toyota passenger car, also traveling eastbound, in front of my vehicle. The vehicle bore Florida Tag X78YGS. The vehicle was traveling in the curb lane.

At that time, I fell in behind the vehicle and began observing the driving pattern. The vehicle's right tires crossed over the solid white fog line at the intersection of Horatio Avenue and Old Horatio Avenue. As I continued to observe the vehicle, the right tires traveled over the solid white fog line at Mariner Way. As we approached the intersection of Seneca Trail, I observed the vehicle's left tires cross into the median lane of travel.

I continued to observe the vehicle, activating my emergency equipment at the intersection of Horatio Avenue and Thistle Lane. The vehicle then changed lanes, into the median lane. It then changed back into the curb lane. After having passed two locations in which to pull over (Thistle Lane and Howell Branch Road), the vehicle made a rapid right turn onto Venetian Way (Winter Park).

The arrest affidavit established competent substantial evidence for the hearing officer to conclude that the stop was lawful in that reasonable suspicion existed for Officer Van Hook to deem that Waldman was committing a traffic infraction, per section 316.089(1), Florida Statutes (2012), for failing to drive within a single lane. Waldman's driving pattern, consisting of the vehicle's right tires crossing over the white fog log on two occasions and the vehicle's left tires crossing into the median lane of travel, provided sufficient reasonable

suspicion for Officer Van Hook to find that a traffic infraction was being committed and to initiate the stop.

Further, notwithstanding whether sufficient evidence existed to establish a traffic infraction, there is ample legal authority that addresses the requirements for a valid stop for driving under the influence and provides that 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); *State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987).

Lastly, due to Waldman's driving pattern, Officer Van Hook, in light of public safety, had the legal authority to initiate the stop to determine whether Waldman was ill, tired, or driving under the influence. "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).

Waldman argues that the arrest affidavit lacked facts as to as the amount of distance her vehicle drifted or facts showing that her driving caused any endangerment to or interfered with any other vehicles. However, the Court cannot inquire further into the reasons why Officer Van Hook did not include more details in the affidavit as this would require that the Court exceed its scope of review by reweighing the sufficiency of the arrest affidavit. The

scope of the Court's review is limited to determining whether competent substantial evidence existed in support of the hearing officer's findings and decision and the review cannot go further to reweigh the evidence presented. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270, 1276 (Fla. 2001) (holding that once the reviewing court determines that there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end as the issue is not whether the hearing officer made the best, right, or wise decision, instead, the issue is whether the hearing officer made a lawful decision).

Argument II – Deprived of Due Process to a Meaningful Formal Review Hearing because the Hearing Officer was Instructed not to Consider the Lawfulness of the Stop and Arrest

Second, in the Petition, Waldman argues that she was denied a meaningful formal review hearing because the Bureau became a party to the formal review proceeding by instructing the hearing officer not to consider the lawfulness of the stop or her arrest as discussed above. First, while Waldman's counsel did address the Bureau's memorandum at the hearing, he did not argue that Waldman was deprived of due process as a result thereof. Accordingly, this Court concurs with the Department that this argument is barred from appellate review. Further, even if appellate review was not precluded, the memorandum was not case specific and the record, including the hearing transcript and hearing officer's order, is silent as to whether or not the hearing officer considered the memorandum when rendering her findings. Therefore, the Court's review cannot go further to determine the memorandum's impact, if any, in the case at hand. Lastly, the Court finds that there is nothing in the record showing that Waldman was not afforded due process.

Conclusion

Accordingly, 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 record, the Court finds that Waldman was provided due process and the hearing officer's decision to sustain her license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Jacqueline L. Waldman's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 7th day of February, 2013.

/S/ _____
DONALD E. GRINCEWICZ
Circuit Judge

/S/ _____
JANET C. THORPE
Circuit Judge

/S/ _____
A. THOMAS MIHOK
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., P.O. Box 505, Winter Park, Florida 32790, matt@warrenlindseylaw.com and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kimgibbs@flhsmv.gov on this 7th day of February, 2013.

/S/ _____
Judicial Assistant