9 Fla. L. Weekly Supp. 354a

Licensing -- Driver's license -- Suspension -- Driving under influence -- Lawfulness of stop -- Erratic driving pattern -- Where licensee was driving down center of road, tapping his brakes, and stopping and going, road had no marked centerline and no lights, and there was no traffic in the vicinity, evidence fails to support conclusion that licensee's driving was sufficiently erratic to establish a founded suspicion to validate a traffic stop for suspected DUI -- Hearing officer's findings vacated

JEFFERY A. BELL, Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2001-32697-CICI, Division 32. April 10, 2002. J. David Walsh, Judge. Counsel: Flem K. Whited, III, Whited, Fuller & Miller, Daytona Beach, for Petitioner. Heather Rose Cramer, Asst. General Counsel, Lake Worth, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

THIS MATTER is before the Court upon Petitioner's Petition for Writ of Certiorari, pursuant to Sections 322.2615(13) and 322.31, Florida Statutes (2001), and the Court having considered the petition, the response, the Court file, and being otherwise fully advised in the premises, finds as follows:

On October 6, 2001, at approximately 2:29 a.m., Officer Kimberly McCraney of the Port Orange Police Department observed Jeffrey A. Bell, Petitioner, driving westbound on Farmbrook Road. McCraney testified at the administrative hearing that she first noticed Petitioner when he began tapping his brakes, stopping and going, and continuing to travel down the center of the road. McCraney testified that there was no centerline marked on the roadway but that if another vehicle were traveling eastbound, Petitioner would have been in their lane. McCraney observed that Petitioner appeared lost when he made an erratic swerve to the left into the eastbound lane, appearing to turn, and then drove back down the middle of the road. McCraney stopped Petitioner after he made a wide left turn onto Poincianna Avenue. McCraney testified that when making the turn, Petitioner made a big loop, veered over to the right and then turned left. McCraney stopped Petitioner to check on his well being. Upon contact with Petitioner, McCraney detected an odor of alcohol on his breath and noticed that his eyes were red and glassy. Petitioner told McCraney that he drank three or four drinks earlier at a bar.

Petitioner was asked to perform the field sobriety exercises and he agreed. The videotape of the exercises was submitted, however, it is of very poor quality, and therefore, it is very difficult to make accurate determinations of the results of these exercises. There is no audio and the screen is constantly jumping with static lines throughout. On the walk and turn exercise it did appear that Petitioner may have missed walking heel to toe on some steps, and there was some sway when he was standing on the one leg stand. Petitioner did appear to be swaying on the finger to nose exercise and did stop and open his eyes once. Petitioner was arrested for DUI, implied consent was read, and he agreed to submit to a breath test. Petitioner was transported to the Port Orange Police Department for processing and administration of the breath test in which the results were .099g/210L and .115g/210L.

An administrative hearing was conducted on December 5, 2001. Both McCraney and Petitioner testified at the hearing. Petitioner testified that he was unfamiliar with the Farmbrook Road area, and was looking for a friend's house. He further explained that he was in the middle of the road because it was narrow, dark, windy, had mailboxes on both sides, and appeared to be a ``safe place to be.'' He was ``startled'' by McCraney pulling up behind him, stating ``she was so close to the back of the car that when I looked in the rearview mirror, the

headlights were in line with the top of the trunk." Petitioner claimed that he was tapping his brakes, because he had missed the street to his friend's house and was looking for a place to turn around. At the close of the evidence, Petitioner moved to invalidate the suspension on the grounds that the evidence failed to sufficiently establish a reasonable, articulable suspicion of criminal activity to justify the stop based upon the driving pattern, that there was no legal basis for a stop based solely for a well-being check, and there was no probable cause for the DUI arrest. The hearing officer denied the motions. The hearing officer issued the final order of license suspension on December 7, 2001. Petitioner's driving privileges were suspended for six months effective October 6, 2001.

Petitioner filed his petition for writ of certiorari on December 21, 2001, arguing that the hearing officer departed from the essential requirements of law in which her finding that Petitioner was lawfully stopped is not supported by substantial competent evidence in the record. Respondent filed its response on February 25, 2002, claiming that the Department's order sustaining Petitioner's suspension conforms to the essential requirements of law and is supported by competent substantial evidence.

II. STANDARD OF REVIEW

The standard for review for this Court for a Petition for Writ of Certiorari is limited to the determination of: (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982)); *Philbrick v. County of Volusia*, 668 So. 2d 341, 342 (Fla. 5th DCA 1996). ``It is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, this Court should not overturn the agency's determination." *Cohen v. School Board of Dade County, Florida*, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). Orders of administrative boards are presumed correct and Petitioner has the burden on certiorari review of proving the opposite. *Henshaw v. Kelly*, 440 So. 2d 2, 6 (Fla. 5th DCA 1983), *rev. denied*, 450 So. 2d 486 (Fla. 1984).

In its review capacity, a circuit court may not reevaluate conflicts in the evidence to determine whether there is substantial competent evidence to support the decision of the lower tribunal. *Campbell v. Vetter*, 392 So. 2d 6, 8 (Fla. 4th DCA 1981). Such action would amount to an improper granting of a trial de novo. *Id.* ``It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings when he undertakes a review of a decision of an administrative forum." *Department of Highway Safety and Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989). Furthermore, this Court is not empowered to conduct an independent fact finding mission on the question of whether Petitioner's driver's license should have been reinstated. *See Dept. of Highway Safety and Motor Vehicles v. Smith*, 687 So.2d 30, 33 (Fla. 1st DCA 1997).

III. CONCLUSIONS OF LAW

This Court vacates the hearing officer's findings for the following reasons. Pursuant to Section 322.2615(7)(a), Florida Statutes (2001), in a formal review hearing, the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review, if the license was suspended for driving with an unlawful blood alcohol level, is limited to the following issues: 1) whether the arresting law enforcement officer had probable cause to believe that the person 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 was placed under lawful arrest for violation of Section 316.193, Florida Statutes (2001); and 3) whether the person had an unlawful blood alcohol level as provided in Section

316.193, Florida Statutes (2001).

This Court finds that the hearing officer's conclusions of law and fact are inconsistent with the record. There is simply no evidence in the record that McCraney had a founded suspicion that Petitioner was about to commit a crime, was committing a crime, or was about to commit a crime. Traditionally, a law enforcement officer may stop and investigate an individual only when there is a well-founded suspicion of criminal activity. *Kehoe v. State*, 521 So. 2d 1094 (Fla. 1988). Nor is there any evidence in the record to demonstrate that Petitioner's driving resembled a pattern of impairment. An inchoate and unparticularized suspicion or mere ``hunch'' is not adequate to justify a stop under *Terry v. Ohio*. *McCloud v. State*, 491 So. 2d 1164 (Fla. 2d DCA 1986). McCraney testified at the administrative hearing that she observed Petitioner traveling westbound on Farmbrook Road tapping his brakes, stopping and going, and continuing to travel down the center of a road which had no centerline marked on the roadway.

There was no traffic in the vicinity and the road did not have lights. At the hearing, when questioned by Petitioner's attorney concerning the traffic stop, McCraney stated that ``it looked like perhaps he was looking for a house or who knows what.'' McCraney agreed that ``during the entire driving, looking at everything you just told us about, there wasn't any, per se, traffic infraction that occurred during any of the things that you observed.'' Petitioner testified that he tapped his brakes because he was startled when the police car came very close behind him. Petitioner further testified that he was not familiar with Farmbrook Road and had missed the street to make a left turn in which he was looking for a street to turn around. Although Florida law, specifically *State, Dept. of Highway Safety and Motor Vehicles v. DeShong* and its progeny, holds that an individual's driving behavior need not reach the level of a traffic violation in order to justify a DUI stop, this Court finds that the evidence in this case fails to support the conclusion that Petitioner's driving was erratic to the point of being sufficient to establish a founded suspicion to validate a stop by Officer McCraney of Petitioner for suspected DUI. *Donaldson v. State*, 803 So. 2d 856 (Fla. 4th DCA 2002). This Court will not grant police officers blanket authority to conduct investigatory stops for DUI, by virtue of a ``well being check'', on motorists who simply are lost, unfamiliar with the vicinity, or pose no danger to surrounding traffic.

In conclusion, this Court finds that Respondent has not satisfied all procedural due process requirements consistent with the essential requirements of the law. The Court further finds that Respondent's findings and judgment are unsupported by competent substantial evidence. The Petitioner has demonstrated that his license suspension was not supported by substantial competent evidence.

The Hearing Officer's Findings Of Fact and Conclusions Of Law And Fact are not supported by the record, and it is

ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Certiorari is hereby GRANTED.

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