

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

PAUL RODDY,

Petitioner,

v.

CASE NO.: 2006-CA-3267-O

Writ No.: 06-38

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

Respondent.

_____ /

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE MUNYON, WATTLES, and M. SMITH, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Paul Roddy (“Petitioner”) 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 eighteen-month suspension of his driver’s license for refusing to submit to the breath-alcohol test. This Court has jurisdiction under sections 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.

On January 2, 2006, the trooper observed the Petitioner driving a motorcycle above the posted speed limit and passing several vehicles. The trooper then conducted a traffic stop. The trooper noticed the odor of alcohol emitting from the Petitioner's breath when he approached the trooper. The trooper also noticed that the Petitioner was "swaying slightly in an orbital manner as he stood in front of [the trooper's] patrol vehicle." (Pet'r App. DDL-3.) The trooper asked the Petitioner to remove his tinted riding glasses and observed that the Petitioner's eyes were glassy and bloodshot. The Petitioner also admitted that he had drinks about 2.5 hours ago. The trooper then asked the Petitioner to perform field sobriety exercises. The Petitioner performed poorly on the exercises and was placed under arrest. The trooper then transported Petitioner to the breath test center where he refused the breath test.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on March 17, 2006. At the hearing, Petitioner moved to set aside the suspension arguing that the trooper did not have a reasonable suspicion to administer field sobriety tests to the Petitioner and lacked probable cause for the DUI arrest. On March 21, 2006, the hearing officer entered a Final Order of License Suspension denying Petitioner's motion and sustaining the suspension of his driver's license.

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. In order to uphold the suspension of a driver's license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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 a violation of s. 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person 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. (2006).

The Petitioner argues that the trooper did not have the necessary reasonable suspicion to ask him to perform field sobriety exercises. Thus, the Petitioner asserts that the trooper did not have probable cause to believe that he was driving while under the influence. According to the documents before the hearing officer, the trooper observed the Petitioner speeding and passing other vehicles. Once the trooper pulled the Petitioner over, the trooper smelled an odor of alcohol on the Petitioner and noticed that the Petitioner had a slight orbital sway. In addition, the Petitioner's eyes appeared glassy and slightly bloodshot.

A police officer may “stop a driver and request that the driver perform field sobriety tests based on a reasonable suspicion that the crime of driving while intoxicated is being committed.” *Dep’t of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999). “A reasonable suspicion ‘is one which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer’s knowledge and experience.’” *Origi v. State*, 912 So. 2d 69 (Fla. 4th DCA 2005), *citing State v. Davis*, 849 So. 2d 398, 400 (Fla. 4th DCA 2003).

In *Origi*, the trooper observed the defendant speeding. *Origi*, 912 So. 2d at 72. Once the defendant was pulled over, the trooper smelled alcohol and saw the defendant’s bloodshot eyes. *Id.* “These circumstances gave rise to a reasonable suspicion sufficient to justify detaining [the defendant] for a DUI investigation.” *Id.* *See also State v. Sookdeo*, 13 Fla. L. Weekly Supp. 872a (Fla. 17th Cir. Ct. May 22, 2006) (circuit court sitting in its appellate capacity found “that officer’s observation of Appellee driving the wrong way down the street, a strong odor of an alcoholic beverage, and bloodshot eyes gave the officer reasonable and articulable suspicion to believe that the Appellee was driving under the influence.”).

In this case, the trooper observed the Petitioner speeding and passing other vehicles on the interstate. Then, after the Petitioner was stopped, the trooper smelled an odor of alcohol on the Petitioner, and the Petitioner admitted to consuming alcoholic drinks 2.5 hours before the traffic stop. Furthermore, the trooper noticed the Petitioner’s glassy, bloodshot eyes, and a slight orbital sway. In this case there are several indicators, that, when considered together, give rise to a reasonable suspicion that the Petitioner was driving while under the influence. Thus, the Court finds that the trooper did have a reasonable suspicion to request that the Petitioner submit to field sobriety exercises.

Once the Petitioner performed poorly on the field sobriety exercises, the trooper did have probable cause to believe that he was driving while under the influence, as the poor performance was an additional factor to add to the factors of speeding and passing other vehicles, an odor of alcohol, glassy, bloodshot eyes, a slight orbital sway, and the admission of consuming alcoholic drinks 2.5 hours prior. *See Mendez v. State*, 678 So. 2d 388, 390 (Fla. 4th DCA 1996) (after defendant performed poorly on field sobriety exercises, officer had probable cause to arrest him for DUI); *Dep't of Highway Safety & Motor Vehicles v. Silva*, 806 So. 2d 551 (Fla. 2d DCA 2002) (probable cause existed to arrest motorcycle rider for DUI where rider was found near damaged motorcycle with odor of alcohol on his breath, bloodshot eyes, and he performed poorly on the field sobriety exercises). Therefore, the Court finds that there was substantial competent evidence that probable cause existed for the trooper to believe that the Petitioner was driving while under the influence of alcohol.

The Petitioner argues that there is no evidence in the record establishing that Petitioner's driver's license has previously been suspended for refusing to submit to a breath, blood, or urine test. Therefore, Petitioner argues that a suspension of one year, not eighteen months is the appropriate suspension.

Section 322.2615(8)(a), Florida Statutes, provides that the driver's license of any person who has had his driver's license suspended for a previous refusal to submit to a lawful breath, blood or urine test shall be suspended for a period of eighteen months. In this case, there is no record that the Department admitted the Petitioner's driving record into evidence at the hearing. In the Department's Response, it cites to the driving record, but there is no evidence that it was in the record before the hearing officer. Therefore, the Department cannot rely on the Petitioner's driving record as evidence of a prior suspension. *Boston v. Dep't of*

Highway Safety & Motor Vehicles, 12 Fla. L. Weekly Supp. 674a (Fla. 9th Cir. Ct. 2005)

(petitioner's due process violated where licensee's driving record establishing that her license had previously been suspended for driving with unlawful blood alcohol level was not admitted or introduced into evidence at hearing). Because the driving record establishing a prior refusal was not admitted into evidence, there was no competent substantial evidence supporting the hearing officer's determination that this was a second refusal. Thus, a suspension of eighteen months was not appropriate.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** as to Petitioner's second argument that the length of suspension was not supported by competent substantial evidence. The Department of Highway Safety and Motor Vehicles' order affirming the suspension of Petitioner's license is **QUASHED**, and the cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__3__ day of _____ August _____, 2007.

_____/S/_____
LISA T. MUNYON
Circuit Court Judge

_____/S/_____
BOB WATTLES
Circuit Court Judge

_____/S/_____
MAURA T. SMITH
Circuit Court Judge

