

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

COREY SWEARINGEN,

Petitioner,

CASE NO.: 2011-CA-2010-O

WRIT NO.: 11-16

v.

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

Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE WALLIS, JOHNSON, O'KANE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Corey Swearingen (“Swearingen”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

Facts and Procedural History

As gathered from the record, specifically the Orange County Arrest Affidavit and University of Central Florida (“UCF”) Police Department Incident Report, the facts were as follows: On October 23, 2010 at approximately 1:58 a.m., UCF police officer Alan Elliot, was travelling northbound on Alafaya Trail approaching Strategy Boulevard in Orange County when he observed Swearingen’s vehicle turn northbound onto Alafaya Trail in front of him from this intersection heading away from the UCF campus. Swearingen’s vehicle was traveling fast while making the turn and barely maintained to stay in the inside lane of travel. There was another vehicle traveling northbound in the center lane at this same time that braked and veered slightly to the right while Swearingen’s vehicle was making this turn. Swearingen’s vehicle then proceeded to drift to the left, crossing over the yellow line marking almost striking the raised concrete curb of the median. His vehicle corrected, proceeded back into its lane of travel, and then changed two lanes to the right to be in the outside lane. While traveling in this lane, his vehicle crossed over the white line marker and crossed over into the bike lane. His vehicle then corrected and proceeded back into its lane of travel. Also, Officer Elliot twice observed litter coming out of the passenger window of Swearingen’s vehicle.

Based upon his training and observations including Swearingen’s careless driving, failure to maintain a single lane, driving on a bicycle path, and litter coming from his vehicle while Swearingen travelled between Strategy Boulevard and McCulloch Road in Orange County, Officer Elliot initiated the traffic stop of Swearingen’s vehicle. Upon making the traffic stop, Swearingen’s vehicle was slow to stop. The final stopping location was on Palm Valley Road in Seminole County.

Upon making contact with Swearingen, Officer Elliot explained the reasons for the stop. Swearingen had no explanation and said he did not know where he was going since he was not familiar with the area. Officer Elliot then asked Swearingen for his license and registration. While Swearingen was retrieving those items, Officer Elliot determined that one of the passengers in Swearingen's vehicle was responsible for the littering. Officer Elliot observed Swearingen's eyes to be glassy and his face was pale and he could smell the odor of alcohol impurities emitting from inside the vehicle. Swearingen's speech was quick, raspy, and he repeated himself a lot. Officer Elliot then asked Swearingen where he was coming from and heading to. Swearingen said he was heading to his friend's dorm and was coming from the Knight's Library, a local bar. Also during this encounter, Officer Elliot observed a 1.75 liter bottle of vodka inside Swearingen's vehicle.

Officer Elliot then asked Swearingen if he would exit the vehicle to speak with him and Swearingen said yes. Upon exiting the vehicle, Swearingen walked without difficulty but stood still with an orbital sway. While speaking to Swearingen, Officer Elliot was able to localize the smell of alcohol impurities as coming from Swearingen's face. Officer Elliot then informed Swearingen that he would like to ensure he was not impaired and was safe to drive and asked Swearingen if he would consent to perform the field sobriety exercises. Swearingen agreed to perform the exercises. Swearingen also admitted to consuming three eight ounce beers. Swearingen then performed the exercises poorly.

Based Officer Elliot's observations, including Swearingen's driving pattern, his personal contact with Swearingen, and Swearingen's poor performance of the field sobriety exercises, he was arrested for DUI and transported to the Orange County DUI Testing Center.

At the Testing Center, the 20 minute observation period was observed, Swearingen was read the implied consent warning, and he provided two breath samples with results of 0.101 at 3:49 a.m. and 0.102 at 3:52 a.m. Swearingen's license was suspended and a formal review hearing was held on November 29, 2010 and January 21, 2011.

At the formal review hearing, Swearingen's counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of FDLE Inspector Roger Skipper from a formal review hearing in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about Intoxilyzer software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates from 2006 and 2007; and subpoenas for Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On January 25, 2011, the hearing officer entered a written order sustaining Swearingen's license suspension.

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. (2010).

Arguments

In the Petition for Writ of Certiorari, Swearingen 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 hearing officer deprived him of procedural due process of law due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan and Laura Barfield along with the documents requested in the subpoena duces tecum; 3) The breath test results were not properly approved because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 4) The breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; and 5) The Intoxilyzer 8000 machine was improperly evaluated for approval.

Analysis - Argument I

Swearingen argues that the evidence established that when Officer Elliot made his observations of Swearingen's vehicle he was located off the UCF campus. Further he argues that that there was no competent substantial evidence in the record showing that Officer Elliot

was located within 1,000 feet of the boundary line of UCF. Lastly, he points out that his vehicle was stopped in Seminole County. Therefore, Swearingen concludes that Officer Elliot did not have jurisdiction to stop his vehicle and to arrest him, thus, the stop and arrest were unlawful.

Swearingen's argument is without merit as follows: On May 1, 2009, the Combined Operational Assistance and Voluntary Cooperation Mutual Aid Agreement ("Agreement") entered into between the Orange County Sheriff's Office ("OCSO") and the UCF Police Department went into effect with a termination date of December 31, 2012. This Agreement was admitted as evidence at Swearingen's formal review hearing and provides under the third paragraph in section II B of the Agreement:

If a UCF police officer passing through the unincorporated county observes a driver engaging in a pattern of conduct that constitutes an imminent danger to the motoring public and reasonable suspicion of driving under the influence in violation of Florida law, the officer, representing his or her agency, is empowered to take such law enforcement action as is immediately necessary to protect the community from the perpetrator of said crime, without first obtaining permission from the OCSO, in accordance with the law and this Agreement...

On October 23, 2010 the Agreement was in effect and provided Officer Elliot with jurisdiction when he made his observations and pursuit of Swearingen's vehicle.¹ Although Officer Elliot's observations of Swearingen's vehicle may have been off the UCF campus, the

¹ In support of his argument, Swearingen cites two cases from our Circuit, *Harwood v. Dep't of Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly Supp. 914a (Fla. 9th Cir. Ct. 2009) and *Charlotin v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 907a (Fla. 9th Cir. Ct. 2005). From review of the opinions in *Harwood* and *Charlotin*, this Court finds that both cases are distinguishable from the instant case. In *Harwood*, the stop and arrest occurred in 2006 and in *Charlotin* the stop and arrest occurred in 2004. In neither opinion is there any mention of an agreement in place on the date that the stop and arrest occurred that provided UCF police officers with jurisdiction outside of the UCF campus, unlike in the instant case where such an agreement existed.

observations and pursuit occurred while Swearingen and Officer Elliot were traveling on Alafaya Trail between Strategy Boulevard and McCulloch Road still within Orange County. Further, per the fresh pursuit doctrine, the fact that Swearingen's vehicle was ultimately stopped in Seminole County does not remove Officer Elliot's authority to make the traffic stop and to arrest Swearingen as his observations and pursuit of Swearingen's vehicle began in Orange County where he had jurisdiction. Section 901.25, Florida Statutes (2010); *Dep't of Highway Safety & Motor Vehicles v. McClane*, 891 So. 2d 596 (Fla. 5th DCA 2004); *Dep't of Highway Safety & Motor Vehicles v. Swegheimer*, 847 So. 2d 545 (Fla. 5th DCA 2003); *Dep't of Highway Safety & Motor Vehicles v. Leonard*, 718 So. 2d 314 (Fla. 5th DCA 1998); *Goren v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 751b (Fla. 9th Cir. Ct. 2001)(also holding that UCF police officer had 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). Accordingly, competent substantial evidence existed for the hearing officer to find that the stop and arrest were lawful.

Analysis - Arguments II through V
Addressing Administration, Inspection, Approval, and Evaluation of Breath Testing Machine

In *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-19788, Writ 10-70 (Fla. 9th Cir. Ct. Sept. 10, 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012), this Court addressed identical arguments and denied the petitions seeking writs of certiorari. Accordingly, for the reasons stated in *Klinker* and *Morrow*, the Court finds that Swearingen was not deprived of due process and the hearing officer properly admitted the breath tests results.

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, Corey Swearingen's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 26th day of October, 2012.

/S/

F. RAND WALLIS
Circuit Judge

/S/

ANTHONY H. JOHNSON
Circuit Judge

/S/

JULIE H. O'KANE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 26th day of October, 2012.

/S/

Judicial Assistant