

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

CASE NO.: 2021-AP-000002

TIMOTHY M. SHENUSKI, JR.,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,

Respondent.

Petition for Writ of Certiorari
from the decision of the Department
of Highway Safety and Motor Vehicles
Kenneth Russell, Hearing Officer.

Stuart I. Hyman, Esquire, for Petitioner.

Mark L. Mason, Esquire, for Respondent.

Before KRAYNICK, CARSTEN, and YOUNG, J.J.

Petitioner seeks review of the Final Order issued by a hearing officer of the Department of Highway Safety and Motor Vehicles (“DHSMV”) which affirmed an order suspending Petitioner’s driving privilege for driving with an unlawful breath or blood alcohol level under section 322.2615, Florida Statutes (2021). The Court, having reviewed the Petition, the Response of DHSMV, and Petitioner’s Reply, and being otherwise advised of the premises, finds as follows:

STANDARD OF REVIEW

The Court’s certiorari review of the administrative decisions of a DHSMV hearing officer requires a three-prong determination. The Court must determine “whether (1) procedural due process has been accorded; (2) the essential requirements of law have been observed; and (3) the

administrative findings and judgment are supported by competent, substantial evidence.” *Nader v. Dep’t of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012).

ANALYSIS

In the instant case, Petitioner does not question whether he was afforded procedural due process in the context of his administrative hearing before the hearing officer. However, Petitioner does make several due process arguments related to the length of his detention, the existence of reasonable suspicion and probable cause, and the admission of the blood alcohol test affidavit. With respect to these arguments, Petitioner argues that the hearing officer departed from the essential requirements of law by affirming DHSMV’s suspension and that the hearing officer’s decision was not supported by competent, substantial evidence. For the reasons discussed below, the Court finds that hearing officer did not depart from the essential requirements of law and that the hearing officer’s decision was supported by competent, substantial evidence.

Reasonable Suspicion and the Length of Detention

Petitioner alleges that Sgt. Griffin lacked reasonable suspicion of impairment and that accordingly, the sixteen minutes between the time Sgt. Griffin completed the traffic citation and Deputy Whobrey began the DUI investigation amounted to an unreasonably long detention. Petitioner cites to numerous cases in which courts in this State have held that detentions of lengths varying from ten minutes to as much as forty-five minutes have been deemed unreasonable and illegal. *See State v. Swick*, 24 Fla. L. Weekly 543a (Cty. Ct. 7th Jud. Cir. 2016), *State v. Morros*, 27 Fla. L. Weekly 827b (Cty. Ct. 6th Jud. Cir. Pasco County 2013), *State*

v. Van Winkle, 27 Fla. L. Weekly Supp. 827 (Cty. Ct. 6th Jud. Cir. Pinella County 2016), *State v. Nicholson*, 21 Fla. L. Weekly Supp. 582b (Cty. Ct. 12th Jud. Cir. Sarasota County 2013).¹

Both Petitioner and Respondent cite to the decision of the United States Supreme Court in *Rodriguez v. State*, 135 S. Ct. 1609 (2015). In *Rodriguez*, the Supreme Court found that a driver cannot be detained for any longer than necessary to issue a traffic citation without probable cause or a founded suspicion of criminal activity for a continued detention. Florida appellate courts have also maintained that the duration of a traffic stop should be limited to the preparation of a citation unless an officer “possesses a reasonable or well-founded suspicion of criminal activity so as to justify an investigatory stop.” *State v. Pye*, 551 So. 2d 1237 (Fla. 5th DCA 1989).

Accordingly, the question of whether the sixteen minutes Petitioner was detained after Sgt. Griffin completed the traffic citation was unreasonably long turns on whether Sgt. Griffin had reasonable suspicion sufficient to warrant an extended detention for investigatory purposes. According to the affidavits and testimony of Sgt. Griffin, he observed Petitioner making a turn at a high rate of speed, accelerating quickly to seventy miles per hour in a fifty mile per hour zone, following too closely, failing to signal a change of lane causing another vehicle to hit its brakes, and failing to stay in one lane. Sgt. Griffin further indicated that Petitioner took longer than normal to pull over after he initiated lights and sirens. Sgt. Griffin testified that he identified the driver of the vehicle as Petitioner, that Petitioner’s eyes were glassy and bloodshot, his movements were somewhat slow and exaggerated, and that he smelled a moderate to strong odor of alcohol on Petitioner’s breath. Sgt. Griffin testified that he asked Petitioner if he had had

¹ The Court notes that these cases cited by Petitioner each originated in the County Court, rather than being on first-tier certiorari review in the Circuit Court.

anything to drink and that Petitioner at first responded no but when confronted with the officer's observations responded that he did drink alcohol but it had been hours before.

The hearing officer concluded on the basis of the testimony and reports made by Sgt. Griffin that the duration of the initial stop was reasonable. The Court agrees. While Petitioner has cited to numerous cases in which stops of duration ranging from ten minutes to an hour or more were held to be unreasonable, the overriding holding in these cases indicate that the question of reasonability is not determined by the duration alone. As opposed to cases cited by Petitioner which found traffic stops to be unreasonable where the only evidence of potential impairment was bloodshot eyes or an admission to drinking many hours earlier in isolation, in the instant case Petitioner had also been observed speeding, erratically changing lanes, and drifting between lanes. These observations, along with the further observations regarding the odor of alcohol, bloodshot eyes, and an admission to drinking, made by both Sgt. Griffin and eventually confirmed by Dep. Whobrey, satisfy the reasonable suspicion standard required to justify Petitioner's detention pending Dep. Whobrey's DUI investigation.

Probable Cause and the Video Evidence

Upon Deputy Whobrey's arrival, Dep. Griffin updated him regarding the observed driving patterns which led to the stop. Dep. Whobrey then made contact with Petitioner and himself observed the odor of alcohol and bloodshot-watery-glassy eyes. Dep. Whobrey asked Petitioner to step out of the vehicle for a field sobriety test and Petitioner complied. Dep. Whobrey testified at the hearing consistent with his investigatory report that Petitioner, while not falling over, exhibited certain indicators of impairment during the course of the field sobriety test. These indicators included missing the center line on a couple steps during a heel to toe walking exercise, struggling to complete the one-leg-stand exercise, and missing the tip of his nose on multiple instances during a finger to nose exercise. Dep. Whobrey also noted a lack of

convergence with Petitioner's eyes when tasked with following a pen light. Dep. Whobrey ultimately arrested Petitioner for DUI. The hearing officer concluded, based on the testimony and reports of Dep. Whobrey that he had established probable cause to effect the arrest of Petitioner for DUI.

Petitioner claims that the video evidence wholly contradicts the documentary evidence relied upon by the hearing officer. Petitioner relies heavily on the Florida Supreme Court's decision in *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017). In that case, the Florida Supreme Court concluded that where evidence is "totally contradicted and totally negated and refuted by video evidence of record" it does not qualify as competent, substantial evidence. *Id.* at 1166. However, the instant case is easily distinguished from *Wiggins*. The Court in *Wiggins* was primarily concerned with the rationale for the initial traffic stop. The video evidence in *Wiggins* completely contradicted the purported existence of traffic violations which were included in the police report and testified to by the officer on-scene.

However, there are no such clear contradictions present between the video evidence and the documentary evidence in the instant case. In fact, the video evidence tends to corroborate Sgt. Griffin's testimony and report regarding the erratic driving and speeding which led to the initial stop. Further, the video does not clearly contradict Dep. Whobrey's testimony regarding Petitioner's performance during the field sobriety exercises. Key portions of the video are partially obscured, however, certain details of Dep. Whobrey's recounting are visible. While it is true that the video does not show Petitioner to be "falling over drunk" it does not so clearly refute the documentary evidence such that the hearing officer's decision was based on a lack of competent, substantial evidence. Further, short of falling within the *Wiggins* holding of clear refutation, the law clearly does not allow this Court to substitute its judgment for the hearing

officer by wholly re-weighing the evidence in the case. *See Melick v. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 429 b (Fla. 4th Cir. Ct. June 19, 2019).

Breath Test Results

Finally, Petitioner argues that the admission of the breath test results which were conducted at the Osceola County Jail subsequent to Petitioner's arrest was improper in the absence of a proper predicate under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Petitioner argues that Respondent did not introduce a scientific predicate for the admission of the breath results test as required by Section 90.702, Florida Statutes. However, the rules of evidence "do not strictly apply in administrative proceedings." *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142, 1146 (Fla. 2017). In fact, circuit courts across the state including the Ninth Circuit, have consistently rejected Petitioner's argument requiring a scientific predicate for consideration of breath test results in these hearings. *See Scanlon v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 83a (Fla. 9th Cir. Ct. Aug. 6, 2014), *Torrence v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 37a (Fla. 9th Cir. Ct. July 8, 2014).

Instead, Section 322.2615(2)(b), Fla. Stat., states that "[m]aterials submitted to the department by a law enforcement agency or correctional agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer." Florida law requires only that an affidavit be submitted attesting to the type of test administered and procedures followed, the time of the collection of the breath sample, the numerical results of the test, the type and status of any permit issues to the law enforcement entity which performed the test, and the date of the most recent required maintenance of the instrument. *See* § 316.1934(5), Fla. Stat. In the instant case, the report was accompanied by an affidavit including all of the information required by this statute. Accordingly, the hearing officer did not err by relying on

the result of Petitioner's breath tests which provided numerical results of 0.102g/210L and 0.100g/210L, respectively, in concluding that Petitioner had an unlawful blood-alcohol level of 0.08 or higher and thereby sustained the suspension of Petitioner's driving privilege under Section 322.2615, Fla. Stat.

Based on the foregoing, the Court **DENIES** Petitioner's Petition for Writ of Certiorari, filed May 10, 2021.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 15TH day of February, 2024.



eSigned by Michael Kraynick 02/15/2024 12:01:36 bPawncd0

MICHAEL KRAYNICK
Presiding Circuit Judge

CARSTEN and YOUNG, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Stuart I. Hyman, Esq., Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803 at shymanlaw@aol.com; Michael Lynch, Esq., Assistant General Counsel, Dept. of Highway Safety & Motor Vehicles, 2900 Apalachee Parkway, #A-432, Tallahassee, FL 32399 at MichaelLynch@flhsmv.gov and VirginiaCroft@flhsmv.gov, on this 15TH day of February, 2024.

Anita Berrios
Judicial Assistant