

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

HILDI WANDA SCHENCK,

CASE NO.: 2014-CA-006777-O

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,
Donna J. Robinson, Hearing Officer.

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE MUNYON, EGAN, and H. RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Hildi Wanda Schenck (“Schenck”), 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 suspension of her driver’s license for refusing to submit to a breath test. This Court has jurisdiction under 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 arrest affidavit, other documents, and testimony, provided at the formal review hearing held on May 8, 2014 and continued on May 23, 2014, the facts are summarized as follows: On April 8, 2014, in Maitland, Florida, Officer Andrew Moore with the Maitland Police Department observed a red Ford Edge vehicle traveling directly in front of his patrol vehicle. The vehicle quickly approached another vehicle ahead of it and then changed into the median lane without signaling. The vehicle drifted within its lane at least five times between Horatio Avenue and Sybella Avenue. It swerved to the left and crossed over the yellow fog line, almost striking the raised concrete median twice and then drifted to the right triggering another vehicle to brake. Based on the subject vehicle's driving pattern, Officer Moore initiated a traffic stop.

Officer Moore then made contact with the driver, later identified by her driver's license as Schenck, who was the only occupant in the vehicle. The officer also noticed that Schenck had a blank stare on her face and the odor of an alcoholic beverage was emitting from the interior of the vehicle. The officer then asked Schenck if she was okay and she replied no. When asked what's wrong, Schenck told the officer that she had two alcoholic beverages at Rangetsu on an empty stomach and possibly had too much alcohol to drive. While speaking with Schenck, Officer Moore also noticed that Schenck's eyes were bloodshot, glassy, her movements were slow, she had slurred speech, and her eyelids were droopy.

Officer Moore then requested a back-up officer. Officer Justin LaFavers arrived at the scene and Officer Moore informed him about his concerns for Schenck's ability to safely operate her vehicle. Schenck was unable to retrieve her registration and proof of insurance documents and at that point, Officer Moore asked Schenck to exit the vehicle and she complied. When

Schenck exited the vehicle, the officers observed that she was uneasy on her feet and her steps were shuffled and staggered. After further questions and answers ensued regarding Schenck's consumption of alcohol and medication, Officer Moore advised her of his concerns regarding her ability to operate her vehicle safely and he asked her if she would complete field sobriety exercises to help alleviate his concern. Schenck responded repeatedly that she didn't know if she should complete the exercises because "they would only hurt her". She then asked if she could call her attorney. Officer Moore told her that she could not contact her attorney at that time and again explained the purpose of the exercises and that he would have to base the investigation on his observations thus far, and her refusal to perform the exercises could be used against her in court. Consequently, Schenck refused to perform the exercises.

Based on the totality of the circumstances, Officer Moore then placed Schenck under arrest for DUI. Schenck asked Officer Moore to retrieve her purse, cellphone, and wallet from her vehicle. As a result of this request, three prescription bottles were located inside her purse that contained various medications. Subsequently, Schenck was transported to the Orange County DUI Center where she was observed for 20 minutes and was requested to submit to a breath test. Schenck was read the implied consent warning and again she requested to meet with her attorney. At that point she was read the Third District Court of Appeal's ruling¹ and refused to provide a breath sample resulting in the suspension of her driver's license.

¹ Although the name of the case for the Third District Court of Appeal decision referred to in Officer Moore's arrest affidavit is not cited in the record, this Court notes the case, *State v. Hoch*, 500 So. 2d 597 (Fla. 3d DCA 1986) (holding that a person has no Sixth Amendment right-to-counsel before being required to submit to a breath test and the results of such test are physical evidence and not testimonial; thus, a suspect has no Fifth Amendment right to consult with an attorney prior to deciding whether to submit to the test).

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). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum.” *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver’s license was suspended for refusing to submit to a breath, blood, or urine test, 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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended 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. (2014).

Arguments and Analysis

Schenck argues that the Hearing Officer's decision was not supported by competent substantial evidence that her vehicle was lawfully stopped and the Hearing Officer failed to follow the essential requirements of the law. The crux of Schenck's arguments center on the Hearing Officer's ruling that stated: "I find from the record which is supported by the officers' testimony that competent substantial evidence was presented to support reasonable suspicion for the traffic stop due to the vehicle's distinguishable driving pattern that clearly established the subsequent probable cause to arrest petitioner for driving under the influence."

Specifically, Schenck argues that in the arrest affidavit, Officer Moore did not indicate what civil infraction she was alleged to have committed such as a violation under section 316.089(1), Florida Statutes, for failing to drive within a single lane.² She also argues that in the arrest affidavit, Officer Moore did not indicate that he stopped her vehicle because he believed she was ill, tired, or driving under the influence of alcohol. Instead, the only basis alleged by Officer Moore for stopping Schenck's vehicle was her vehicle's driving pattern.

Schenck also claims that the Hearing Officer's reliance on the reasonable suspicion standard to justify the traffic stop was a misapplication of the law because in order for a traffic stop that is based on a traffic infraction to be lawful, an officer must have probable cause to believe that a traffic violation has occurred. Schenck concludes that the Hearing Officer erred because she did not rule that she committed a specific civil traffic infraction nor was there evidence that her driving pattern created a danger to herself or to other traffic.

² Section 316.089(1), Florida Statutes (2014), requires that whenever any roadway has been divided into two or more clearly marked lanes for traffic, a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Proper standard for the stop: First, this Court finds that Schenck's argument that probable cause is required for a traffic stop is misplaced. While probable cause is required for ultimately making a lawful arrest, only reasonable suspicion is required to initiate a lawful traffic stop. Accordingly, in order to have a valid stop for driving under the influence, the law enforcement officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that a person detained in the stop of a vehicle has committed, is committing, or is about to commit a violation of the law. *Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, 514 (Fla. 5th DCA 2006); *see Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Carrillo*, 506 So. 2d 495, 496 (Fla. 5th DCA 1987) (holding that an officer can stop a driver based upon a founded suspicion that he is driving while under the influence and thereafter, an investigation may establish probable cause for arrest).

Observations leading to the stop: Officer Moore's observations of Schenck's driving pattern leading to the stop of her vehicle were: 1) The vehicle quickly approached another vehicle ahead of it and then changed into the median lane without signaling; 2) The vehicle drifted within its lane at least five times between Horatio Avenue and Sybella Avenue; and 3) The vehicle swerved to the left and crossed over the yellow fog line, almost striking the raised concrete median twice and then drifted to the right triggering another vehicle to brake. In addition to Officer Moore's observations stated above, he testified at the hearing that from his experience, Schenck's driving pattern was consistent with someone possibly being involved in a physical altercation in the vehicle and also consistent with impaired drivers who are trying so hard to keep the vehicle in the center of the lane that they start to drift the vehicle over and then jerk the vehicle really hard.

Stop for traffic violation: Although the Hearing Officer's ruling did not specifically state that Schenck's driving pattern constituted a traffic violation, this Court finds that Officer Moore's observations of Schenck's erratic driving pattern provided competent substantial evidence to find that he was justified in initiating the traffic stop as his observations provided reasonable suspicion that Schenck's driving pattern sufficiently constituted a violation for failure to maintain driving in a single lane under section 316.089(1), Florida Statutes.

Stop for well-being or safety concerns: Further, notwithstanding that Schenck was not cited for a traffic infraction, her driving pattern did not have to rise to the level of a traffic infraction to justify the stop. "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); *Ndow v. State of Florida*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (holding that if a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued and in determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances); *see Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009) (addressing a law enforcement officer's community caretaking duties).

This Court concurs with the Hearing Officer's ruling and finds that Officer Moore's observations of Schenck's erratic driving pattern provided competent substantial evidence to support that he had an objectively reasonable basis to stop Schenck's vehicle to determine if she was ill, tired, in danger, or driving under the influence. Thus, Schenck's arguments lack merit.

Conclusion

Based on the foregoing, this Court finds that Schenck 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. Because the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decision, this Court's review cannot go further to reweigh the evidence presented. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this Court's job is ended. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Hildi Wanda Schenck's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 12th day of January, 2015.

/S/

LISA T. MUNYON
Presiding Circuit Judge

EGAN and H. RODRIGUEZ, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Matthew P. Ferry, Esquire**, Law Office of Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790 and **Kimberly A. Gibbs, Senior Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 9, Ocoee, Florida 32857, on this 12th day of January, 2015.

/S/

Judicial Assistant