

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA
GENERAL CIVIL DIVISION

SHANE VOSHELL,
Petitioner,

CASE NO.:20-CA-8114

v.

DIVISION: D

STATE DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Petition for Writ of Certiorari filed October 15, 2020, and perfected with an amended petition filed November 30, 2020. The petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. He contends that the hearing officer departed from the essential requirements of law on two matters. Petitioner contends the first departure arose when the hearing officer admitted the result of Petitioner's horizontal gaze nystagmus (HGN) test, and the second from the hearing officer's failure to determine that the allegedly prolonged detention was illegal. These errors rendered the request for a breath test unlawful. The court has reviewed the briefs, appendices, and applicable law. Having done so, the court determines that Petitioner is correct that the hearing officer erred in failing to exclude the results of the HGN test. But Petitioner's driving without headlights provided law enforcement with reasonable suspicion to initiate a traffic stop. From there, where Petitioner smelled of alcohol, had slurred speech, admitted to drinking and trying hard to "sober up," probable cause to summon a DUI investigator was developed. Therefore, the stop, detention, arrest, and resulting request that Petitioner submit to a breath test were lawful, such that the petition must be denied and the suspension upheld.

FACTS AND PROCEDURAL HISTORY

On July 31, 2020, at about 3:00 a.m., Officer Degarmo saw Petitioner's silver pickup truck driving north on Howard Avenue with its headlights off and effected a traffic stop. Five other passengers were inside Petitioner's vehicle. Officer Degarmo detected the odor of alcohol coming from the vehicle's interior. In addition, Officer Degarmo observed Petitioner to have glassy eyes and slow speech, and that he wore a bar bracelet. A case of beer lay at the front passenger's feet, but neither Officer Degarmo, nor his partner Officer Bishop, observed any open containers. Petitioner told the officer he was coming from the SOHO Saloon. Petitioner admitted to drinking. In response to questioning about Petitioner's address, the officer asked Petitioner how long ago he had moved. In response, Petitioner replied nonsensically "just tomorrow." Officer Degarmo summoned a DUI unit. Within 13 minutes Officer Baden responded to conduct the DUI investigation.

When Petitioner exited the vehicle, Officers Baden and Degarmo detected an odor of alcohol from Petitioner. Officer Baden also observed Petitioner wearing a bar bracelet. After being asked to perform field sobriety exercises, Petitioner, without being questioned, offered that he knew he was driving without headlights but was committed to getting his passengers home safely. He added that he had tried hard to sober up. Thereafter, Petitioner performed the exercises, and did so poorly. Petitioner was then arrested for DUI. Petitioner refused law enforcement's request that he submit to a breath test to determine his blood alcohol level; as a result, Petitioner's driving privilege was administratively suspended.

Petitioner requested a formal review of the administrative suspension. A hearing was held September 3, 2020. At the formal review a hearing officer is to determine whether the law enforcement had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to a breath test after being requested to do so by a law enforcement officer, and whether Petitioner was told that if he refused to submit to a test his driving privilege would be suspended for a year, or, 18 months in the case of a second or subsequent refusal. The hearing officer determined that the fact that Petitioner was operating a motor vehicle without headlights at night provided justification for the stop. In addition, Petitioner's glassy eyes,

slurred speech, odor of alcohol, along with his admission to drinking, efforts to sober up, and his performance on field sobriety exercises provided probable cause to arrest and for law enforcement to request a breath test. Because significant indicators of impairment were already present, the hearing officer concluded that the time between Officer Degarmo's request for a DUI unit and its arrival was not an unlawful detention. Moreover, the hearing officer admitted the results of the HGN test to the extent it provided additional evidence regarding the decision to arrest, not that it showed any particular degree of impairment. The hearing officer rendered a written order on September 15, 2020; this timely petition followed.

STANDARD OF REVIEW

This court reviews the administrative decision upholding the suspension to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

DISCUSSION

Petitioner does not assert that he was denied due process. Rather, he contends the hearing officer departed from the essential requirements of law in concluding that the detention by law enforcement was reasonable and by failing to exclude the results of the HGN test. In light of these alleged departures, Petitioner contends there is no competent, substantial evidence to sustain the suspension. Petitioner first argues that an otherwise lawful traffic stop became unlawful when it was prolonged for 13 minutes while awaiting an officer to conduct the DUI investigation, in violation of *Underhill v. State*, 197 So. 3d 90 (Fla. 4th DCA 2016). In *Underhill*, law enforcement pulled over the defendant for failing to wear a seatbelt. *Id.* at 90-91. Because the defendant seemed nervous, law enforcement asked for consent to search the car, which the defendant denied. *Id.* at 91. Law enforcement then called a dog to the stop to sniff around the car. The dog alerted law enforcement to the presence of contraband, and the defendant was arrested. *Id.* The *Underhill* court emphasized that the question is not what the objectively reasonable length is to complete a traffic stop, but whether the dog sniff in this particular stop adds time to the stop. *Id.* at 92. It found the

original traffic stop for the seatbelt violation was prolonged by the dog sniff because law enforcement had all the information they needed to write the traffic citation and complete the stop. *Id.* As a result, the court reversed the defendant's conviction and sentence. *Id.* In this case, unlike in *Underhill*, law enforcement observed signs of impairment immediately upon effecting the traffic stop. *Underhill* determined that a mere display of nervousness did not provide law enforcement reasonable suspicion to conduct any other proceeding than writing a traffic ticket. Here, however, Petitioner emitted an odor of alcohol, had slurred speech, wore a bar bracelet, had just left an establishment that served alcohol, and admitted to drinking enough such that he had to *try to sober up*. These factors provided sufficient basis to justify summoning a DUI investigator.

Petitioner next argues that the hearing officer's refusal to exclude the results of the HGN test departed from the essential requirements of law in the absence of evidence that the law enforcement officer conducting the test is a certified drug recognition expert as required by law. The court agrees. *Department of Highway Safety and Motor Vehicles v. Rose*, 105 So.3d 22, 24 fn 1 (Fla. 2d DCA 2012), citing *State v. Meador*, 674 So.2d 826, 835 (Fla. 4th DCA 1996) (absence of evidence of law enforcement officer's qualification to administer the test merits against admission of HGN test result). The court notes that even excluding the HGN result, the record contains ample other evidence to support upholding the suspension.

Petition DENIED.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 10/14/2021
Emily A. Peacock

EMILY A. PEACOCK, Circuit Court Judge

Electronic Copies Provided Through JAWS