IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIRCUIT CIVIL DIVISION

ROBERTO RODRIGUEZ,
Petitioner,

v.

STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

CASE NO.: 21-CA-296

DIVISION: G

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Roberto Rodriguez's Petition for Writ of Certiorari filed January 12, 2021, as amended January 29, 2021. The petition, which seeks review of the Department's December 14, 2020, final order, 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 advances three arguments in support of the petition: 1) that the hearing officer departed from the essential requirements of law when he did not exclude the results of the horizontal gaze nystagmus (HGN) test; 2) that the record lacked competent, substantial evidence of reasonable suspicion to justify the traffic stop; and 3) that the hearing officer displayed partiality toward the Department and violated Petitioner's right to due process when he recessed the hearing to locate Petitioner's file. The court agrees that the results of the HGN test were improperly admitted where no evidence suggests that the officer conducting it is a certified drug recognition expert as required by law. But where Petitioner was observed straddling the double yellow line and unable to maintain a single lane while driving, competent, substantial evidence supports the traffic stop. In addition, where the hearing officer was inadvertently provided with a case file of another driver bearing the same surname as that of Petitioner, the hearing officer's recess to locate the correct case file did not violate Petitioner's right to due process. Case law advanced by Petitioner are distinguishable. Accordingly, the petition is denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. Therefore, this court has jurisdiction to review the decision upholding the suspension of Petitioner's driving privilege.

STANDARD OF REVIEW

When, as here, a person's driving privileges are suspended for refusing to submit to a breath test to determine whether he is driving under the influence, the administrative hearing officer is to determine whether 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; and 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.. *See* §322.2615(7)(b)1-3, Fla. Stat.

This court's review of an administrative decision upholding the suspension is not de novo. §322.2615(13), Fla. Stat. Rather, this court must 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). In so doing, the court may not reweigh evidence or substitute its judgment for that of the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

FACTS AND PROCEDURAL HISTORY

On November 2, 2020 at 8:47 p.m. Deputy Miceli of the Hillsborough County Sheriff's Office was dispatched to a reckless driving call in her area. She positioned her vehicle to view traffic. There she observed Petitioner's vehicle, the subject of the call, cross through the intersection of Fissore Boulevard and Highway 672. Thereafter, she observed Petitioner straddle the center double-yellow line. She also observed Petitioner fail to maintain his lane and make quick over-correcting movements to return to his lane of travel. At this point, Deputy Miceli effected a traffic stop.

Upon making contact with Petitioner, Deputy Miceli noted that Petitioner's speech was slurred, and she detected an odor of alcohol about him. Petitioner admitted he had been at a sports bar and was close to home at the time of the stop. He said he was driving poorly because he was attempting to call his girlfriend. Deputy Miceli requested a DUI investigator. Deputy Thorne responded to the call. Upon making contact with Petitioner Deputy Thorne detected the odor of alcohol and bloodshot eyes. He Mirandized Petitioner before proceeding. Thereafter, Petitioner agreed to perform field sobriety exercises, which he performed poorly. In addition, Deputy Thorne's notes of Petitioner's performance indicate that Petitioner admitted to consuming four beers before the stop. Petitioner refused to submit to a breath test to determine his blood alcohol level, and, as a result, his driving privileges were administratively suspended. Thereafter, Petitioner sought formal review of the suspension in accordance with section 322.2615, Florida Statutes.

The formal review hearing was held December 8, 2020. From the start of the hearing, it became apparent that the hearing officer was referring to information concerning another driver who happened to have the same surname as Petitioner. Upon being alerted to the issue, the hearing officer took a brief recess to locate the correct file and resumed the hearing over strenuous objection by Petitioner's counsel. At the close of the hearing, Petitioner made a number of motions, three of which form the issues before the court in the petition: to exclude the HGN test, that a lack of evidence supported the traffic stop, and to exclude law enforcements' exhibits because the hearing officer's recess violated Petitioner's due process rights.

The motions were denied, and the suspension was upheld. Petitioner filed this timely petition to challenge the order upholding the suspension.

DISCUSSION

Petitioner first contends 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. Petitioner cites *Department of Highway Safety and Motor Vehicles v. Rose*, 105 So.3d 22, 24 fn 1 (2d DCA 2012) in support of this argument.[1] Although the footnote in *Rose* indicates that results of the HGN were properly excluded, it does not say why. Accordingly, this authority does not provide a legal basis for relief. The court notes that the hearing officer did not rely on the results of the test. Whether the hearing officer formally granted the motion to exclude the results or denied the motion but did not consider the evidence, the result is the same: the results were not a factor in the decision.

Petitioner next argues that no competent, substantial evidence provided probable cause for the traffic stop, citing *Peterson v. State*, 264 So.3d 1183, 1188 (2d DCA 2019) in support of that contention. Reasonable suspicion, rather than probable cause, is applicable to a traffic stop. *State, Dept. of Highway Safety and Motor Vehicles v. Deshong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (to effect a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity…driving need not rise to level of infraction to justify stop for DUI…probable cause needed to arrest or to suspend a license for DUI may be based upon evidence obtained during standard procedures following a valid traffic stop); *State, Dept. of Highway Safety and Motor Vehicles v. Maggert,* 941 So. 2d 431, 432 (Fla. 1st DCA 2006) (probable cause that motorist was impaired existed where officer observed the vehicle weaving in and out of its lane); *Roberts v. State*, 732 So.2d 1127, 1128 (Fla. 4th DCA 1999) (weaving several times within a single lane held sufficient to justify a stop where there was no evidence to show endangerment to others and where no traffic violation had occurred). *Cf. Peterson,* 264 So. 3d at 1189 (police can stop and briefly detain a person for investigative purposes if the officer has a *reasonable suspicion* supported by articulable facts that criminal activity

[1] Petitioner did not provide a pin cite or reference the footnote to direct the court's attention to it, but only the footnote contained any reference to the exclusion of the HGN test results.

"may be afoot," even if the officer lacks probable cause (internal citations omitted)). Here, where law enforcement observed Petitioner straddle the center double-yellow line, fail to maintain his lane, and make rapid over-corrections to return to his lane, law enforcement had reasonable suspicion to justify an investigatory stop.

Finally, Petitioner argues that he was denied due process when the hearing officer recessed the hearing to locate Petitioner's case file upon learning he had obtained the file of another driver with the same surname. Petitioner contends the hearing officer's actions deviated from his role as an impartial magistrate. In addition to the requirements of notice and a meaningful opportunity to be heard, due process requires that a hearing officer remain neutral. *See Dep't of Highway Safety & Motor Vehicles v. Griffin*, 909 So.2d 538, 542-43 (4th DCA 2005). Petitioner contends that in *Griffin,* the hearing officer recessed the formal review hearing for 10 minutes, searched for a missing document, found the missing document, returned to continue presiding over the hearing, and admitted the document as evidence in order to sustain the Griffin's driver's license suspension. The fourth district court of appeal agreed and affirmed the circuit court's ruling that the hearing officer departed from his neutrality and impartiality and as such violated Griffin's due process rights. *Id*. This court finds *Griffin* to be distinguishable from the instant case, however. In *Griffin,* a witness had been subpoenaed to bring a copy of a specific document—the registration certificate for the Intoxilyzer machine used to conduct the breath test for Griffin. While on the stand, the witness indicated that he did not have the certificate with him, and that had previously provided it to the hearing officer's staff. But the certificate was not in the Griffin file. The hearing officer questioned the witness about when and where he provided the certificate, which he alleged was likely to be found in a central "book" maintained by the hearing officer's staff. After apparently determining that the certificate should have been part of the record, the hearing officer informed Griffin and his counsel that she intended to look for the document and have it entered on the record. *Id.* Based on this, the circuit court, and, later, the fourth district court of appeal, determined that the hearing officer had acted as an advocate. *Id.* Even then, the district court suggested that a remand would have been appropriate, but that the issue had not been preserved for appellate review. *Id.*

Griffin is factually distinguishable from the instant case in that the hearing officer in *Griffin* recessed the hearing to obtain a single piece of

evidence that gave the appearance of benefitting one side of the controversy. Here, the hearing officer recessed the hearing to obtain the entire correct file in a case of mistaken identity, not to locate a single document benefitting one party over the other.

It is therefore ORDERED that the petition is DENIED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 8/3/2021
Christopher Nash
Christopher Nash, Circuit Court Judge

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