

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

GREGORY HARR,

Petitioner,

CASE NO.: 2006 - CA - 004539-O

WRIT NO.: 06 - 44

v.

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

Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before Mihok, Latimore and Thorpe, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioner, Gregory Harr (“Petitioner” or “Harr”), timely filed this petition seeking certiorari review of a Final Order of the Florida Department of Highway Safety and Motor

Vehicles's ("the Department"). The Department's Final Order of License Suspension sustained the suspension of Petitioner's driving privileges pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath-alcohol test. (Pet. Cert 1.) This Court has jurisdiction. §§ 322.2615, 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

II. FACTS

Lieutenant Nancy Cannon ("Cannon"), a paramedic with the Orange County Fire/Rescue Department ("OCFR"), observed a pick-up truck, with its lights off, stopped in a right turn lane. Cannon approached the vehicle and saw the Petitioner slumped over the steering wheel. Cannon activated the warning lights on her vehicle and approached the truck. She tapped on the window but when that elicited no response from Harr, Cannon opened the door and shook him. Upon opening the car door, Cannon noticed a strong odor of alcohol. The engine of the vehicle was running and the transmission was in neutral. Cannon turned off the engine and took the keys. Harr, the lone occupant of the pick-up, awoke and asked Cannon where he was. He also stated that he did not need medical attention but was simply tired. Petitioner went on to tell Cannon that he had too much to drink and asked her to allow him to drive home. A deputy from the Orange County Sheriff's Office arrived in response to a call from OCFR. Cannon handed Petitioner's keys to Deputy Roland Hernandez ("Hernandez") who, at a distance of about two feet from Harr, "detected a very strong odor of alcoholic beverages on his breath and from the passenger compartment of the vehicle itself." (App. Ex. B.) Hernandez observed an unopened bottle of beer on the passenger side of the car. Harr denied to Hernandez that he had been drinking any alcohol. Hernandez asked Harr to submit to the Standard Field Sobriety Tests. Petitioner did so and "performed poorly on all tests administered." (App. Ex. B.) Harr was

placed under arrest and brought to the DUI Testing Center where, after being read the implied consent warning, he refused to submit to an Intoxlyzer Breath Alcohol Content test.

Harr's license was suspended pursuant to section 322.2615, Florida Statutes (2005). He then requested a formal hearing pursuant to that same statute and chapter 15A-6, Florida Administrative Code. A hearing was held before Hearing Officer Linda Labbe ("the Hearing Officer") at which the following documents were received into evidence:

- DDL-1 Florida Uniform Traffic Citation #083826-X;
- DDL-2 Petitioner's Florida Class E Driver's License;
- DDL-3 Orange County Sheriff's Office Charging Affidavit with a narrative and Witness Sheet;
- DDL-4 Orange County Sheriff's Office Statement from Lt. Nancy Cannon;
- DDL-5 Orange County Sheriff's Office Witness Statement from Jennifer Mosley;
- DDL-6 DUI worksheet - Cover Sheet; and
- DDL-7 Affidavit of refusal to submit to breath, urine or blood test.

(App. Ex. A; Admin. Hearing Tr. 5, May 4, 2006.)

Following the conclusion of the hearing, the Hearing Officer rendered a written decision addressing the issues required to be reviewed by section 322.2615(7)(b), Florida Statutes (2005), and found that:

1. The arresting law enforcement officer did have probable cause to believe that [Harr was] driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
2. [Harr was] lawfully arrested and charged with a violation of section 316.193, Florida Statutes.
3. [Harr was] informed that if [he] refused to submit to a breath, blood or urine test, [his] driving privileges would be suspended for a period of one year, or in the case of a second or subsequent refusal for a period of 18 months.

4. [Harr] refuse[d] to submit to a blood, breath or urine test after being asked to take the test by a law enforcement officer.

(App. Ex. D.)

Hearing Officer Labbe affirmed the one year suspension of Harr's driving privileges.

III. STANDARD OF REVIEW

A circuit court's review of the decisions of lower tribunals "is limited to a determination of whether procedural due process has been accorded, whether the essential requirements of law have been observed, and whether the decision is supported by substantial competent evidence."

Campbell v. Vetter, 392 So. 2d 6, 7-8 (Fla. 4th DCA 1980).

IV. PARTIES' ARGUMENTS

Harr repeats the same basic arguments which were rejected by the Hearing Officer.

Petitioner contends that his warrantless arrest was illegal because all the elements of the chapter 316 violation were not committed in the presence of the arresting officer. Specifically, Harr claims that his arrest was improper because Hernandez "never actually witnessed the element of Petitioner driving or in actual physical control of the automobile." (Pet. Cert. 3.)

The Department counters that "totality of the circumstances" provide substantial evidence for the Hearing Officer's conclusion that Harr was lawfully arrested for DUI and refused a Breathalyzer. (Resp. Pet. Cert. 7.)

V. DISCUSSION

The Legality of The Warrantless Arrest - Actual Physical Control of Vehicle

A license suspension for refusal to submit to a breath test cannot be predicated on a refusal which is not incident to lawful arrest. *Dep't Highway Safety & Motor Vehicles v.*

Pelham, 979 So. 2d 304, 305 (Fla. 5th DCA 2008). Harr raises as a threshold issue whether his arrest for DUI was lawful. He contends it was not. We disagree.

A law enforcement officer may lawfully arrest someone for drunk driving if he or she observes all the elements of a prima face DUI case. *Steiner v. State*, 690 So. 2d 706, 708 (Fla. 4th DCA 1997) (*citing* §901.15(1), Fla. Stat. (1993)). The material elements of driving under the influence are: 1) that the defendant was driving or in actual physical control of the vehicle; 2) that the defendant was under the influence of an alcoholic beverage or a controlled dangerous substance; and 3) that the defendant was affected to the extent that his normal faculties were impaired. *State v. Tagner*, 673 So. 2d 57, 58 n. 2 (Fla. 4th DCA 1996).

Harr contends that because Hernandez did not observe him in actual physical control of the pick-up, the Deputy did not observe all the elements of drunk driving and therefore the arrest was illegal.

Petitioner's argument focuses exclusively on the actions of Hernandez at the expense of any analysis of his initial encounter with Lieutenant Cannon, the EMT paramedic. While Cannon was not a law enforcement officer, a private citizen has a "right to arrest a person who commits a misdemeanor in their presence when said misdemeanor amounts to breach of the peace." *Clinton v. State*, 421 So. 2d 186, 188 (Fla. 2d DCA 1982). In *State v. Furr*, 723 So. 2d 842 (Fla. 1st DCA 1999), the First District Court of Appeal held that drunk driving was a breach of peace such as would entitle a citizen to make an arrest. *Id.* at 844.

"In order to effectuate a citizen's arrest, not only must a [breach of the peace] be committed in the presence of the private citizen, but there must be an arrest - that is a deprivation of the suspect's right to leave." *Steiner v. State*, 690 So. 2d at 708.

Here, Cannon, the paramedic, arrested Harr by taking his keys. Her arrest of Harr was proper as she had witnessed all the material elements of a DUI offense. She certainly had probable cause to believe that Harr was under the influence and was impaired. He reeked of alcohol, had passed out at the wheel while still on the roadway and admitted he had been drinking to excess. Even if Petitioner is correct to argue that Deputy Hernandez did not witness him in actual, physical control of the vehicle (an issue we do not reach), the same cannot be said of Lieutenant Cannon, the paramedic who had the first contact with Harr.

“[W]hether or not an individual is in actual physical control of a motor vehicle [while under the influence] is fact specific and must be determined on a case-by-case basis.” *Krivanek v. Dep’t of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 702a (Fla. 6th Cir. Ct. June 19, 2003). Central to the resolution of this case is the recognition that a DUI

defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had “actual physical control” of the vehicle within the meaning of the statute.

Griffin v. State, 457 So. 2d 1070, 1072 (Fla. 2d DCA 1984) (emphasis added).

Courts look to a combination of factors when determining whether an individual is in actual physical control of a motor vehicle for purposes of DUI. For example, in *Jones v. State*, 510 So. 2d 1147 (Fla. 1st DCA 1987), the court found that operability of the motor vehicle is a factor to consider when determining whether an individual was in actual physical control. Other factors which courts have considered are the location of the vehicle, the location of the keys to the vehicle and the location of the driver within the vehicle. *Griffin v. State*, 457 So. 2d at 1071-

72.

In *Griffin*, the defendant was found at 2:30 a.m. in the driver's seat of a vehicle, which was sitting in a traffic lane facing the wrong direction. *Griffin v. State*, 457 So. 2d at 1071. The engine was not running but the lights were on, the keys were in the ignition and defendant's foot was on the footbrake. *Id.* at 1071. Based on those facts, the *Griffin* court determined that there was sufficient circumstantial evidence that the defendant was in actual physical control of the vehicle. *Id.*

Similarly, in *Fieselman v. State*, 537 So. 2d 603 (Fla. 3d DCA 1988), the defendant moved to dismiss a DUI charge and asserted that he was not in actual physical control of a vehicle. *Id.* at 604. The trial court agreed and granted his motion to dismiss. *Id.* The undisputed facts showed that the defendant was found alone and asleep in the front seat of his car. *Id.* The car was located in a parking lot. *Id.* The keys were in the ignition and the lights were on but the engine was not running. *Id.* The car's gear shift was in the "park" position. *Id.* While the appellate court recognized that a person "found sitting behind the wheel of a vehicle is a circumstance heavily supporting a finding that the defendant was exercising control over the vehicle," it also stated that "sleeping in a prone position in the front seat of a vehicle parked in a parking lot, the engine of which is not running, is not itself sufficient to establish actual physical control of a vehicle" *Id.* at 606. The court then analyzed "whether the presence of the car key in the ignition is a significant fact from which the fact finder could infer that the defendant was -- within a reasonable time before being found and while intoxicated -- in actual physical control of the vehicle." *Id.* The court determined that a reasonable inference could be drawn that the defendant "placed the keys in the ignition and thus was at least at that moment in actual

physical control of the motor vehicle while intoxicated.” *Id.*

In *Department of Highway Safety & Motor Vehicles v. Prue*, 701 So. 2d 637 (Fla. 2d DCA 1997), an officer found Prue asleep in her van at 1:45 a.m. Prue’s vehicle, and the trailer she was towing, were parked on the shoulder of the road; however, the trailer protruded about one foot into the roadway. *Id.* at 637. The van and trailer did not have any lights on and there were no other people in the van with Prue. *Id.* After waking up Prue, the officer determined that she was drunk and placed her under arrest. *Id.* at 638. The keys to the van were either in the ignition or on the floor of the van. *Id.* The circuit court found that there was no competent substantial evidence that Prue was in actual physical control of a motor vehicle. *Id.* On appeal, however, the district court disagreed. *Id.* It concluded that there was competent substantial evidence that Prue was in actual physical control of the van where she was the only person in the van and the keys were accessible so that she could have started the vehicle and driven away at any moment. *Id.* See also *Krivanek v. Dep’t of Highway Safety Motor Vehicles*, 10 Fla. L. Weekly Supp. 702a (Fla. 6th Cir. Ct. June 19, 2003) (finding competent substantial evidence of actual physical control where the driver was found alone and unconscious in his vehicle parked in the emergency lane with no headlights on, with the engine not running and with the car keys on the center console); *Fox v. Dep’t of Highway Safety & Motor Vehicles*, 9 Fla. L. Weekly Supp. 733b (Fla. 9th Cir. Ct. Sept. 27, 2002) (finding competent substantial evidence of actual physical control where the driver was found passed out behind the wheel of his vehicle which was parked in the driveway of a parking lot with an open container in plain view and an admission by the driver that he had been driving).

Here, Petitioner’s truck was stopped, in a turn lane, with its lights off, when passing

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: 1) **Stuart I. Hyman, Esquire**, 1520 East Amelia Street, Orlando, Florida 32803; and 2) **Heather Rose Cramer, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, Lake Mary, Florida 33467 on the 22nd day of September, 2009.

_____/S/_____
Judicial Assistant