

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502018CA000714XXXMB

JAMES N. WADE,
Petitioner,

v.

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

Opinion filed: JUL 06 2018

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

For Petitioner: Ira D. Karmelin, Esq.
3897 North Haverhill Road, Suite 127
West Palm Beach, FL 33417
DUI-HELP@comcast.net

For Respondent: Mark L. Mason, Esq.
2900 Apalachee Parkway, A-432
Tallahassee, FL 32399
markmason@flhsmv.gov

PER CURIAM.

Petitioner, James N. Wade (“Petitioner”), filed a Petition for Writ of Certiorari challenging a Florida Department of Highway Safety and Motor Vehicles (“DHSMV”) hearing officer’s order affirming the suspension of Petitioner’s driver license for driving with an unlawful breath alcohol level.

On the night of November 16, 2017, Deputy Hernandez and Corporal Walton of the Palm Beach County Sheriff’s Office responded to The Villas in Palm Springs, Florida, in regards to a witness’ call about a possibly intoxicated man driving his vehicle. After arriving at The Villas,

both Deputy Hernandez and Corporal Walton met with the witness, who informed the officers that he had observed Petitioner in a black Chevy Impala swerve all over the road, stop at the traffic light intersection while the light changed five times, and turn into the entrance of The Villas. After talking with the witness, Deputy Hernandez and Corporal Walton headed in Petitioner's direction of travel.

Deputy Hernandez and Corporal Walton found Petitioner sitting in the driver's seat of a parked black Chevy Impala with the interior lights on, the front driver's side door open, and the taillights illuminated. Once Petitioner was ordered out of the car, Deputy Hernandez observed that Petitioner moved slowly, staggered as he stood up, had trouble obeying commands, and slurred his speech. Corporal Walton then placed Petitioner under arrest with the assistance of Deputy Crawford and Deputy Hernandez.¹ Petitioner was then transported to the Breath Alcohol Testing ("BAT") facility where he had breath test results of .169g/210L and .164g/210L.

Following his arrest, Petitioner's driver license was suspended for driving with an unlawful breath alcohol level. Petitioner requested a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes, and on December 20, 2017, an evidentiary hearing was held before DHSMV Hearing Officer Donna George. Petitioner moved to invalidate the suspension based on (1) an unlawful traffic stop, (2) lack of identification of Petitioner, (3) no actual physical control, and (4) an unlawful arrest. On December 22, 2017, Hearing Officer George determined that sufficient cause existed to sustain Petitioner's license suspension and entered an Order denying Petitioner's motion and affirming Petitioner's license suspension. Petitioner filed a Petition for Writ of Certiorari seeking review of that Order.

¹ Several deputies later appeared at the scene, including Deputy Crawford, who assisted with the arrest.

A driver may appeal a DHSMV hearing officer's order suspending his or her driver's license through a petition for writ of certiorari to the circuit court. § 322.31, Fla. Stat. (2017); Fla. R. App. P. 9.030(c)(2). In evaluating such a petition, the circuit court's review is limited to a three-prong determination: (1) whether DHSMV afforded the petitioner procedural due process; (2) whether DHSMV observed the essential requirements of law; and (3) whether DHSMV's findings and judgment are supported by competent, substantial evidence. *DHSMV v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008); *DHSMV v. Cherry*, 91 So. 3d 849, 854 (Fla. 5th DCA 2011). The court cannot "reweigh the evidence [or] substitute its judgment for that of the hearing officer." *DHSMV v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) (quoting *DHSMV v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995)); *see also DHSMV v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989) (finding that a circuit court may not reweigh evidence, as it is the hearing officer's responsibility to act as the trier of fact, assess witness credibility, and resolve conflicts in the evidence).

In a formal review hearing under section 322.2615, Florida Statutes, the hearing officer must determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the license suspension. § 322.2615, Fla. Stat. (2017). Under this statute, the scope of the hearing is limited to the following issues:

- (a) If the license was suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher:
 - 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7), Fla. Stat. (2017). The issue of whether a breath test was incident to a lawful arrest is also within the scope of the hearing officer's review. *Carrizosa v. Dep't of Highway Safety & Motor Vehicles*, 124 So. 3d 1017 (Fla. 2d DCA 2013).

In evaluating a hearing officer's determination that the arrest was lawful, a circuit court's review is limited to whether DHSMV's finding is supported by competent substantial evidence. *Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982). "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" *Duval Util. Co. v. Florida Pub. Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957)).

Petitioner was cited under section 316.193, Florida Statutes, which makes it a crime for a person to be "driving or in actual physical control of a vehicle within this state" while under the influence of alcohol. § 316.193(1)(a), Fla. Stat. (2017). An officer may conduct a warrantless misdemeanor arrest when that officer witnesses each element of a prima facie case. *Id.*; § 901.15(1), Fla. Stat. (2017). "An offense is committed in the presence or view of an officer, within the meaning of the rule authorizing an arrest without a warrant, when the officer receives knowledge of the commission of an offense in his presence through any of his senses, or by inferences properly to be drawn from the testimony of the senses, or when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case." *Steiner v. State*, 690 So. 2d 706, 709 (Fla. 4th DCA 1997) (citation omitted). Thus, an officer may rely on circumstantial evidence to determine whether a person was in actual physical control of a vehicle while driving under the

influence of alcohol. *See State v. Boynton*, 556 So. 2d 428, 429-30 (Fla. 4th DCA 1989); *see also Fieselman v. State*, 537 So. 2d 603, 605-06 (Fla. 3d DCA 1988).

We find the instant facts to be analogous to those in *Steiner* and *Deluce*. *See Steiner*, 690 So. 2d at 709; *see also Deluce v. DHSMV*, 22 Fla. L. Weekly Supp. 890a (Fla. 15th Cir. Ct. Feb. 26, 2015). In *Steiner*, the Fourth District Court of Appeal considered whether enough circumstantial evidence was present to justify the officer's arrest of the petitioner for DUI. *Steiner*, 690 So. 2d at 707. In that case, the security guard at the condominium complex noticed an automobile stopped in the driveway near the complex's guardhouse. *Id.* As the petitioner was attempting to start the vehicle, the security guard observed that smoke was coming out from under the hood of the car. *Id.* The security guard became alarmed and attempted to assist the petitioner out from the car. *Id.* Upon doing so, the security guard found the petitioner swinging from side to side, causing the security guard to place the petitioner in a chair outside the guardhouse. *Id.* The security guard then called 911 and a community aide appeared at the scene. Smelling alcohol on the petitioner's breath, the community aide called for an officer. *Id.* When the officer arrived at the scene, he detected alcohol on the breath of the petitioner and arrested him for DUI. *Id.*

The trial court in *Steiner* found no basis to support a warrantless misdemeanor arrest for DUI, granted the petitioner's motion to suppress his breath test results, and dismissed the case. *Id.* at 708. The appellate panel reversed and the petitioner sought certiorari relief from the Fourth District Court of Appeal. *Id.* Ultimately, the Fourth District Court of Appeal found that the DUI investigating officer did not witness the control of the vehicle by petitioner, reasoning:

[i]f we were to permit the security guard's observations which were relayed to the police as sufficient to constitute the officer's knowledge of an essential element of a crime, then as to misdemeanors there would be no point in the statutory requirement that the misdemeanor be committed in the officer's presence. Any

citizen could walk up to an officer and relate the commission of a misdemeanor by someone, and the officer would have probable cause to arrest. This is clearly inconsistent with the statutory requirements.

Id. at 709.

In *Deluce*, this Court, sitting in its appellate capacity, revisited the Fourth District Court of Appeal's decision in *Steiner* when it considered whether a petitioner's suspension of his driver license for refusal to submit to a breath test should be upheld where the officer's probable cause for the DUI arrest was in question. *Deluce*, 22 Fla. L. Weekly Supp. 890a (Fla. 15th Cir. Ct. Feb. 26, 2015). In *Deluce*, the petitioner was following a security guard in a gated community. *Id.* The petitioner proceeded to follow the security guard to the security booth at the front of the community. *Id.* At that point, the petitioner got out of the car and one of the on-duty security guards noticed that the petitioner appeared to be intoxicated as he smelled strongly of alcohol, slurred his words, could not maintain his balance, and would not leave the entrance to the community. *Id.* The security guard then called an officer to the scene. *Id.* Upon arrival, the officer found the petitioner leaning up against the driver's side door of the vehicle, but the vehicle was not running and there was no indication as to the location of his car keys. *Id.* This Court reasoned that these facts were indistinguishable from those in *Steiner* and held that the offense was not committed in the presence of the officer so as to provide a basis for a warrantless misdemeanor arrest because the officer did not observe (1) the petitioner behind the driver's seat, (2) whether the engine was running or not, and (3) the location of petitioner's car keys. *Id.*

Just as the arresting officer in *Steiner* and *Deluce* did not observe the petitioner in actual physical control of the vehicle, Deputy Hernandez, Corporal Walton, and Deputy Crawford, here, did not observe Petitioner either driving or possessing actual physical control of the vehicle. Rather, upon their arrival to the scene, the officers observed Petitioner sitting in the

driver's seat with the front driver's side door open. But, as in *Deluce*, the officers did not testify as to whether the engine was on or off upon their arrival to the scene nor did they testify as to the location of Petitioner's keys to the vehicle at the time of arrest.

While we acknowledge that the officers here provided additional testimony indicating the interior lights and taillights of Petitioner's vehicle were illuminated, we nonetheless find that such testimony is not conclusive on whether Petitioner was exercising control over the vehicle without more detailed observation. *Cf. Griffin v. State*, 457 So. 2d 1070, 1071 (Fla. 2d DCA 1984) (finding that the officer's observation of the brake light, which was illuminated when the officer approached the car *and went off when the petitioner got out of the car*, was circumstantial evidence that petitioner was exercising control over the vehicle). Had the officers made an observation about the location of Petitioner's keys to the vehicle or whether the vehicle's engine was running, we could find that Petitioner was in actual physical control of the vehicle. No such observation was made here. Thus, we find that the officers did not personally observe all elements necessary for a misdemeanor arrest. As such, the arrest was unlawful. The *only* relevant circumstantial evidence is the officers' observation of Petitioner sitting in the driver's seat of a parked vehicle with the front driver's side door open.

Based upon the reasoning in *Steiner* and *Deluce* and considering the facts in the record, we find that there was not enough circumstantial evidence present to support a finding that Deputy Hernandez, Corporal Walton, and Deputy Crawford personally observed Petitioner in actual physical control of a motor vehicle while under the influence of alcohol. Accordingly, Hearing Officer George's finding that Petitioner was placed under lawful arrest for driving with an unlawful breath alcohol level in the suspension Order was not supported by competent, substantial evidence.

The Petition for Writ of Certiorari is GRANTED and the order affirming Petitioner's suspension is QUASHED.

FRENCH, CURLEY, and BLANC, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
Case No.: 502018CA000714XXXMB

JAMES N. WADE,
Petitioner,

Opinion/Decision filed: **JUL 06 2018**

v.

Petition for Writ of Certiorari from the
Department of Highway Safety and Motor Vehicles

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

Petition filed: January 19, 2018

_____/_____
DATE OF PANEL: MAY 14, 2018

PANEL JUDGES: FRENCH, CURLEY, BLANC

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:)
	)	With/Without Opinion	)	With/Without Opinion)
5/22/18 <u>[Signature]</u>)))
J. )	)	J. )	)	J.))
6/26/18 <u>[Signature]</u>)))
J. )	)	J. )	)	J.))
7/6/18 <u>[Signature]</u>)))
J. )	)	J. )	)	J.))