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

APPELLATE DIVISION (CIVIL): AY
CASE NO: 2014-CA-010131

JOSEPH D. DELUCE,
Petitioner,

v.

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

Opinion filed: FEB 26 2015

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

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PER CURIAM.

Defendant/Petitioner, Joseph Deluce, was arrested for driving under the influence and had his driver's license suspended for refusing to submit to a breath-alcohol test. At a formal administrative review of his license suspension, Petitioner moved to invalidate the suspension on grounds that Petitioner was unlawfully arrested. Florida Department of Highway Safety and Motor Vehicles ("DHSMV") Hearing Officer Diana George found that Petitioner was lawfully arrested and issued an Order affirming Petitioner's license suspension. Petitioner filed a Petition

for Writ of Certiorari seeking review of that Order, alleging that his license suspension should not have been affirmed because he was subjected to an unlawful arrest. We agree and grant the petition for writ of certiorari.

Factual Background

On the night of June 1, 2014, Petitioner turned his car into the entrance of a gated community in Greenacres, Florida. Petitioner was driving behind Ricardo Forero, a security guard at the community. Mr. Forero drove in a circle around the security guard booth in front of the entrance to the community, and Petitioner continued to follow Mr. Forero. Petitioner got out of the car, at which point the on-duty security guards noticed that Petitioner appeared to be intoxicated: Petitioner smelled strongly of alcohol, slurred his words, and could not maintain his balance. Petitioner would not leave the entrance to the community, so a security guard called the Greenacres Police Department.

Officer D'Orsi of the Greenacres Police Department arrived at the scene and saw Petitioner standing outside of his vehicle, leaning on the driver-side door. Officer D'Orsi approached Petitioner and noticed that he smelled of alcohol, had glassy, bloodshot eyes, had slurred speech, and could barely stand up on his own. Officer D'Orsi then attempted to conduct two field sobriety exercises: (1) the pen light test and (2) the walk-and-turn. Petitioner refused to perform the walk-and-turn exercise, at which point Officer D'Orsi placed Petitioner under arrest and took him to the Breath Alcohol Testing ("BAT") Facility at the Palm Beach County Jail. At the BAT Facility, Officer D'Orsi read Petitioner the implied consent instructions, and Petitioner refused to submit to a breath-alcohol test.

Following his arrest, Petitioner's driver's license was suspended for refusing to submit to a breath test. Petitioner requested a formal administrative review of his license suspension

pursuant to section 322.2615, Florida Statutes, and, on July 22, 2014, an evidentiary hearing was held before Hearing Officer Donna George. At the hearing, counsel for Petitioner moved to invalidate the suspension on grounds that Petitioner was unlawfully arrested. On July 23, 2014, DHSMV issued an Order affirming Petitioner's license suspension. In the Order, Hearing Officer George determined that sufficient cause existed to sustain Petitioner's license suspension, and concluded that Petitioner was placed under lawful arrest for driving under the influence. Petitioner filed a petition for writ of certiorari seeking review of that Order.

Analysis and Ruling

A driver may appeal a DHSMV order suspending his or her driver's license through a petition for writ of certiorari to the circuit court. § 322.31, Fla. Stat. (2013); Fla. R. App. P. 9.030(c)(2). In evaluating such a petition, the circuit court's review is limited to a three-prong test: (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. *Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982); *DHSMV v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). The Court cannot reweigh evidence or substitute its judgment for that of the agency. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989).

Petitioner contends that he was unlawfully arrested because Officer D'Orsi did not have a valid basis for conducting a warrantless misdemeanor arrest. "DHSMV cannot suspend a driver's license under section 322.2615 for refusal to submit to a breath test under section 316.1932 if the refusal is not incident to a lawful arrest." *DHSMV v. Hernandez*, 74 So. 3d 1070, 1076 (Fla. 2014); *see also* § 316.1932, Fla. Stat. (2014) ("The chemical or physical breath test must be incidental to a lawful arrest . . . ."). The issue of whether the refusal to submit to a

breath test was incident to a lawful arrest is within the allowable scope of review of a DHSMV hearing officer in a proceeding to determine if sufficient cause exists to sustain the suspension of a driver's license. *Hernandez*, 74 So. 3d at 1076. Accordingly, Petitioner argues that there is not competent, substantial evidence that supports Hearing Officer George's finding that he was placed under lawful arrest for driving under the influence, and that the suspension order therefore also departs from the essential requirements of law.

There are three circumstances in which a warrantless misdemeanor arrest can occur. *Steiner v. State*, 690 So. 2d 706, 708 (Fla. 4th DCA 1997). First, 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. (2014). Second, a police officer may arrest a driver of a vehicle involved in a traffic crash when the officer makes an investigation at the scene of a traffic crash and, based upon personal investigation, the officer develops reasonable and probable grounds to believe that the person has committed" certain enumerated offenses in connection with the crash. § 316.645, Fla. Stat. (2014).[1] Third, an officer may make an arrest "where one officer calls upon another for assistance, the combined observations of the two or more officers may be united to establish the probable cause to arrest." *Steiner*, 690 So. 2d at 708 (citing *State v. Eldridge*, 565 So.2d 787 (Fla. 2d DCA 1990)).

Petitioner's arrest does not meet the criteria for the first or third circumstance in which an officer may conduct a warrantless misdemeanor arrest because Petitioner did not commit the offense in the presence or view of Officer D'Orsi or any other police officer. A person is guilty of the offense of driving under the influence if the person is driving or in actual physical control

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1 Based on the plain meaning of the term "traffic crash" and the First District Court of Appeal's interpretation in *DHSMV v. Williams*, 937 So. 2d 815, 817 (Fla. 1st DCA 2006), there was no "traffic crash" on the night of Petitioner's arrest. Accordingly, this exception cannot support Petitioner's warrantless arrest.

of a vehicle within this state and:

> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
>
> (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
>
> (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

§ 316.193, Fla. Stat. (2014). 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*, 690 So. 2d at 709.

In a similar case, the Fourth District Court of Appeal found that a police officer who responded to a call about a disturbance at a condominium complex did not witness the essential elements of driving under the influence. *Id.* In *Steiner*, the security guard at a condominium complex observed a vehicle stopped in the driveway near the complex's security guardhouse. The driver was attempting the start the vehicle, which was emitting smoke from under the hood. The security guard, thinking the car was on fire, helped the driver away from the car and took him to the guardhouse. The guard noticed that the driver was "swinging from side to side," so he called 911. The first officer to the scene was not a deputized police officer but a community service aide. Smelling alcohol on the driver's breath, the aide called for another officer to conduct a DUI investigation. Neither the aide nor the DUI investigator saw the driver in control

of the car. However, the DUI investigator smelled alcohol on the driver's breath and placed the driver under arrest for driving while intoxicated.

The trial court in *Steiner* concluded that "no 'accident' occurred . . . , as such term is commonly recognized to the general public." *Id.* at 708. Finding no other basis for supporting a warrantless misdemeanor arrest, the trial court granted the driver's motion to suppress breath-alcohol test results and dismissed the State's case. An appellate panel of the circuit court reversed. The driver then sought certiorari relief from the Fourth District Court of Appeal, which granted certiorari and reversed the circuit court's decision. The Fourth District Court of Appeal found that the Petitioner was unlawfully arrested because the DUI investigator did not witness one of the essential elements of the crime—the control of the vehicle by the driver. In support of its decision, the court reasoned that

> [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 the instant case, Officer D'Orsi did not observe Petitioner either driving or possessing actual physical control of the vehicle. Rather, at the time Officer D'Orsi arrived on the scene, Petitioner was standing outside of his car leaning against the door. Officer D'Orsi testified that he could not recall if the vehicle's engine was on or off and could not recall where the keys to the vehicle were at the time of the arrest. Moreover, the officer testified that he never saw the Petitioner in actual physical control of the vehicle.

The only people who observed the Petitioner in actual physical control of the car were the

security guards, and it is undisputed that they are not police officers. As such, their observations cannot combine with the arresting officer's observations to form probable cause. *Steiner*, 690 So. 2d 706 (declining to impute private security guard's observations to a deputized police officer under the Fellow Officer Rule); *M.W. v. State*, 51 So. 3d 1220 (Fla. 2d DCA 2011) (noting that a private security guard does not fall within the scope of the Fellow Officer Rule). Furthermore, the security officers did not perform a citizen's arrest, as they were encouraging Petitioner to leave the premises rather than restraining him. (Pet. Ex. A-2 at 31). Because the security guards did not effectuate a citizen's arrest based upon their observations, their observations could not later form the basis of Officer D'Orsi's arrest. *Steiner*, 690 So. 2d at 708 ("In order to effectuate a citizen's arrest, a misdemeanor must not only 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.").

The dissent contends that Petitioner was lawfully arrested because he was in "actual physical control" of the vehicle at the time Officer D'Orsi arrived at the gated community. Although there is no evidence as to where the Petitioner's car keys were at the time, the dissent reasons that Petitioner was in actual physical control of the car because he was leaning against the driver's side door at the time Officer D'Orsi arrived on the scene. According to the standard jury instructions for driving under the influence, "'actual physical control of a vehicle' means the defendant must be physically in or *on* the vehicle and have the capability to operate the vehicle, regardless of whether [he][she] is actually operating the vehicle at the time." Fla. Std. Jury Instr. (Crim.) 28.1 (emphasis added). This Court, like the Seventh Judicial Circuit Court, "is not aware of any cases, except for the personal accident investigation exception cases, where a Florida court has found a defendant to be in actual physical control of a vehicle when the defendant was

not observed by an officer inside the vehicle." *State v. Alfson*, 21 Fla. L. Weekly Supp. 343a (Fla. 7th Cir. Ct. Oct. 24, 2013). Furthermore, there is no evidence that Petitioner had the capability of operating the vehicle as there is no indication as to the location of the car keys. Accordingly, Petitioner was not in "actual physical control" of the vehicle at the time Officer D'Orsi arrived on the scene.

We cannot consider the facts as set forth in the Petition for Writ of Certiorari to the exclusion of the record as evidence in determining whether the hearing officer departed from the essential requirements of the law. Rather, we can only review the transcript of the proceedings under review. If Petitioner were found leaning up against his vehicle and the vehicle were running, we would agree that he was in actual physical control of the vehicle. Further, if Petitioner were leaning up against his vehicle and had the car keys in his pocket or in the ignition, we would agree that he was in actual physical control. Here, however, Officer D'Orsi testified that he did not know if the car's engine was running or not and that he was not aware of the location of the car keys. Because Officer D'Orsi did not see Petitioner driving the vehicle or in actual physical control of the vehicle, we find it is not a lawful arrest.

Without any personal observations by Officer D'Orsi that Petitioner was in actual physical control of the vehicle, the facts in this case appear to be indistinguishable from those in *Steiner*. The offense was not committed in the presence of the officer and therefore this cannot provide a basis for a warrantless misdemeanor arrest.

Petitioner also requests the Court to direct DHSMV to remove the suspension from his driving record. The Court cannot provide such a specific directive to the DHSMV. The only two options available to the circuit court on first-tier certiorari review are to either deny the petition, or grant it and quash the order at which the petition is directed. *See City of Atlantic*

Beach v. Wolfson, 118 So. 3d 993 (Fla. 1st DCA 2013) (concluding that the circuit court applied the incorrect law when it remanded the case for the entry of an order approving the subject variance).

Conclusion

Hearing Officer George's finding that Petitioner was placed under lawful arrest for driving under the influence does not conform with the essential requirements of law. None of the three exceptions to the arrest-warrant requirement for misdemeanors are applicable in the instant case: (1) the offense was not committed in the presence of the police officer, (2) there was no traffic crash pursuant to § 316.645, Florida Statutes, and (3) the Fellow Officer Rule is inapplicable. Accordingly, Petitioner was subject to an illegal arrest. As a refusal to submit to a breath test must be incident to a lawful arrest, the Hearing Officer's findings did not conform with the essential requirements of law in affirming the Petitioner's license suspension. Therefore, we GRANT the petition for writ of certiorari and QUASH the order affirming the suspension.

KEYSER and BURTON, JJ., concur. COX, J., dissents with an opinion.

COX, J., dissenting.

I respectfully dissent from the majority opinion. The hearing officer's decision should be affirmed.

Any analysis must start out with our very limited scope of review. This is not a de novo appeal, and the statute specifically reminds this Court that the Petition for Writ of Certiorari is limited to a review of procedural due process, the observation of the essential requirements of law, and whether the decision is supported by competent and substantial evidence. *See* § 322.2615(13), Fla. Stat. (2014).

This Court must also be reminded that it is not the function of the circuit court to reweigh the evidence. *DHSMV v. Allen*, 539 So. 2d 20 (Fla. 5th DCA 1989).

The July 23, 2014 finding of fact, conclusions of law and decision, confirm that Hearing Officer George found that Petitioner was placed under lawful arrest for DUI and that there was probable cause to believe that Petitioner was driving or *in actual physical control of the motor vehicle* while under the influence of alcoholic beverages. The hearing officer limited the issues to whether, pursuant to Section 322.2615 of the Florida Statutes, the law enforcement officer had probable cause.

The question then becomes, based on the totality of the evidence, was there substantial, competent evidence to support the finding. In the majority's opinion of the evidence, there was not. But reweighing of the evidence is not a basis upon which the petition can be granted.

The statement of facts relied on by Petitioner clearly shows that the hearing officer correctly ruled that there was probable cause.

The following are undisputed facts from Petitioner's own statement of the facts.

On June 2, 2014, around mid-night, Petitioner drove his car into a housing development in Greenacres, Florida and stopped near a guard booth located at the entrance. Officer D'Orsi responded to the call and observed a car located in a U-turn area near a guard shack. He also observed a man standing outside that car leaning against the driver-side door. The officer smelled an unknown alcoholic beverage, he saw Petitioner's eyes were bloodshot and glassy, Petitioner's speech was slurred and Petitioner had difficult standing. Petitioner completed one of the road-side sobriety tasks, but then refused to do anymore. The Officer arrested Petitioner for being under the influence of alcohol.

Petitioner's recitation of the facts is sufficient to demonstrate that the hearing officer had

substantial competent evidence to find probable cause.

Did Officer D'Orsi see Petitioner drive the car? No. Was Petitioner in the driver seat behind the wheel? No. Can Officer D'Orsi rely on the statements of the security guards? No. So how can the hearing officer be correct? Because Hearing Officer George had before her the testimony of Officer D'Orsi, and based on the preponderance of the evidence, she made a finding that Petitioner was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.

The fact that the transcript reflects when asked "did you ever see him in actual physical control of the vehicle," Officer D'Orsi said no, is of no moment. Officer D'Orsi testified that Petitioner was in the U-turn area, standing outside *his* vehicle leaning against the door of *his* vehicle, the driver door of his car. That testimony is unrebutted. It is also unrebutted in the transcript that the hearing officer heard Officer Sentmanat, a police officer present at the scene, testify that he believed the car keys were in the ignition but did not know if the car was on or not.

The hearing officer also had in evidence Officer D'Orsi's probable cause affidavit which confirmed his testimony. The majority's analysis relies in part upon the case of *Steiner v. State*, 690 So. 2d 706 (Fla. 4th DCA 1997). The fact that this case is factually similar does not make it controlling law. In *Steiner*, not only did the police officer not see the petitioner in the car, he did not see the petitioner on the car. When Officer D'Orsi approached Petitioner, he was leaning on the car, fully able and capable of climbing in, starting the car, and driving away. The majority's analysis regrettably ends with the case of *Steiner*. But the analysis should not end there.

Consider *State of Florida v. Fitzgerald*, 63 So. 3d 75 (Fla. 2d DCA 2011). Factually, *Fitzgerald* is somewhat different in that Fitzgerald was physically in the vehicle. The officer testified that he saw a Pontiac stopped at an intersection around mid-night. The car lights were

on. He saw a pair of legs hanging out an open passenger door which caused him some concern. The officer stopped and approached, and he observed that Ms. Fitzgerald was sitting in the driver's seat. She claimed she was not driving the car, so the State proceeded on the theory of actual physical control. To prove this element the defendant must be physically in or on the vehicle and have the capability to operate the vehicle regardless of whether he or she is actually operating the vehicle at the time. Fla. Std. Jury Instr. (Crim.) 28.1

The *Fitzgerald* Court observed that the State intends to punish the intentional act of placing oneself in actual possession or control of a motor vehicle, which furthers the legitimate governmental interest of protecting the public from the danger of an impaired person who places himself behind the wheel or could at any time and without difficulty start the car and drive away. Relying upon *State v. Alfson*, 21 Fla. L. Weekly Supp. 343a (Fla. 7th Cir. Ct. Oct. 24, 2013), which is nothing more than a trial court's interlocutory order on a motion to suppress, is no precedent. Plus, *Alfson* is factually distinguishable because, unlike *Alfson*, here there is testimony that the keys were in the ignition.

So applying the majority opinion, what is a police officer to do? Petitioner was leaning up against his car, and he admits in his Petition that he drove to the location where he first encountered the police officer. Officer D'Orsi came upon Petitioner who was in a grossly drunken state. Petitioner was so drunk, he didn't know where he was and he was lost. He was conscious and could have placed himself behind the wheel, started the car, and driven away at any time.

This opinion tells the police, walk away. Sorry, but the hearing officer got it right and this case should be affirmed.