

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLOFUDA.**

APPELLATE DIVISION (CIVIL)
CASE NO: 502007CA016857XXXXMB
DIVISION: "AY"

JOSE SARMIENTO,

Petitioner,

Appealed from the Department of
Highway Safety and Motor Vehicles

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

Respondent.

_____/

Opinion filed: **FEB 14 2008**

✓ **Appealed from the Department of Highway Safety and Motor Vehicles.**

✓ For Petitioner: John H. Lipinski, Esq., P.O. Box 848068, Pembroke Pines, FL 33084.

✓ For Respondent: Heather Cramer, Esq., Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road #230, Lake Worth, FL 33467.

PER CURIAM.

This Petition for Writ of Certiorari seeks review of an order entered by the Florida Department of Highway Safety and Motor Vehicles, Bureau of Administrative Reviews affirming the suspension of Jose Sarmiento's ("Sarmiento") driver's license for refusal to submit to a breath test. Petitioner asserts that the suspension of his license was invalid because the motor vehicle he was occupying was inoperable. While the hearing officer found that the arresting officer had probable cause to believe the vehicle was operable at the time of arrest, a

finding not seriously disputed by Petitioner, it was undisputed at the hearing that the vehicle was, in fact, inoperable.

Florida Statute § 316.1932(1)(a) provides, in pertinent part, as follows:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, and infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages (emphasis added).

It is clear that the statute implies consent to a breath test when any person accepts the privilege of operating a motor vehicle in Florida. However, the statutorily created implied consent only applies if the person is arrested while driving or while in actual physical control of a motor vehicle.

To be in control of a motor vehicle, the vehicle must be operable. *Jones v. State*, 510 So. 2d 1147, 1149 (Fla. 1st DCA 1987) (finding a lack of actual physical control where vehicle was found to be inoperable so that it could not be moved except by an outside agency). The record establishes that the vehicle at issue was inoperable. Therefore, the statutory implied consent contained in Florida Statute § 316.1932(1)(a) does not apply and the suspension of the petitioner's license must be set aside.

The Petition for Writ of Certiorari is GRANTED. The action is remanded to the hearing officer with direction to vacate the driver's license suspension.

KELLEY, CROW and MAASS, JJ., concur.

