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

WILLIAM HILL,

Petitioner,

CASE NO.: 2006-CA-000223-O
WRIT NO.: 06-01

vs.

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 Hyman, Esquire,
for Petitioner.

Jason Helfant, Assistant General Counsel,
for Respondent.

Before Lauten, Roche, McDonald, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, William Hill ("petitioner" or "Hill"), timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles's ("the Department") Final Order of License Suspension, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes, for refusing to submit to the breath-

alcohol test. This Court has jurisdiction. §§ 322.2615, 322.31, Fla. Stat. (2005); Fla. R. App. P. 9.030(c)(3); 9.100. We dispense with oral argument. Fla. R. App. P. 9.320.

On November 12, 2005, Mark Kinnon, a Road Ranger observed a white jeep with a flat tire partially blocking the right lane of South Street in Orange County. Kinnon approached the vehicle and asked the driver, Hill, to remove his vehicle from the roadway so the flat could be replaced with a spare. When Hill and Kinnon were changing the flat, Kinnon noticed that Hill "could not speak very well and . . . was stumbling . . . ." (Pet. Writ Cert. Ex. C.) Kinnon then called the lead Road Ranger, Glenn McNally, who relayed the information given to him by Kinnon to the Florida Highway Patrol. A trooper responded to the scene in about five minutes. Trooper Lotter approached Hill's vehicle and noted that Hill was asleep or passed out behind the wheel. Lotter knocked on the vehicle window and awakened a startled Hill who opened it and responded to Lotter's inquiry about progress towards getting the spare onto the car. After smelling alcohol emanating from Hill and viewing his eyes, Lotter asked him for his driver's license. Hill fumbled in his wallet looking for his license which his wife ultimately retrieved from her purse. Lotter then asked Hill to participate in a field sobriety test. Hill did so and when he performed poorly he was placed under arrest and taken to the Orange County Breath Test Center in order for his breath to be tested for blood alcohol content. After being read the implied consent warning, Hill refused to take the breath test. His license was suspended pursuant to section 322.2615, Florida Statutes (2005). Hill 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 at which the following documents were moved into evidence:

DDL-1 Florida Uniform Traffic Citation #2852-XAP;

DDL-2 Petitioner's Florida Driver's License;
DDL-3 Florida Highway Patrol Charging Affidavit, Narrative and Witness Sheet;
DDL-4 Florida Witness Interview Sheet
DDL-5 Affidavit of Refusal
DDL-6 FHP DUI Packet - Cover Sheet

Following the conclusion of the hearing, the Hearing Officer rendered a written decision in which she concluded that:

> 1. The arresting law enforcement officer did have probable cause to believe that [Hill was] driving or in actual physical control of a motor vehicle in this state while under the fluence of alcoholic beverages or controlled substances.
>
> 2. [Hill was] lawfully arrested and changed with a violation of section 316.193, Florida Statutes.
>
> 3. [Hill 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. [Hill] refuse[d] to submit to a blood, breath or urine test after being asked to take the test by a law enforcement officer.

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

STANDARD OF REVIEW

A circuit court's review of the decisions of an administrative agency "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).

PARTIES' ARGUMENTS

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

First, Hill 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.

Second, Hill asserts that neither the Road Rangers nor Trooper Lotter had probable cause to detain him.

Third, Hill argues that there was no probable cause to require him to submit to field sobriety tests.

Fourth and finally, Hill claims that there was no competent, substantial evidence that he was in actual, physical control of a car.[1]

The Department counters that the Hearing Officer correctly concluded that Trooper Lotter observed Hill in control of the vehicle and that his arrest for DUI was proper based upon Lotter's observations, including the results of the field sobriety tests, for which the Department maintains there was probable cause to administer.

DISCUSSION

The Legality of The Warrantless Arrest

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*, No. 5DO-07-2737, 33 Fla. L. Weekly D765 (Fla. 5th DCA March 14, 2008). Hill raises as a threshold issue whether his arrest for DUI was lawful. He contends it was not. We

[1]Hill's first argument (the arrest was illegal) and his fourth argument (there was no substantial competent evidence that he was in actual physical control of the car) are interrelated. Hill contends that the illegality of the arrest springs from the failure of the arresting officer to observe one of the material elements of DUI, viz. actual physical control of the vehicle.

agree. Thus, it is not necessary for us to address Hill's other arguments.

An officer may arrest a person for misdemeanor DUI in three circumstances: (1) "the officer witnesses each element of a prima facie case," (2) the "officer is investigating an 'accident' [and] develop[s] probable cause to charge DUI," or (3) "one officer calls upon another for assistance [and] the combined observations of the two or more officers [are] united to establish the probable cause to the arrest." *Steiner v. State,* 690 So. 2d 706, 708 (Fla. 4th DCA 1997) (*citing* §§ 316.645, 901.15(1), Fla. Stat. (1993)). *See also State v. Eldridge,* 565 So. 2d 787 (Fla. 2d DCA 1990). The third circumstance is also known as the "fellow officer" doctrine. *Horsley v. State,* 734 So. 2d 525, 526 (Fla. 2d DCA 1999).

Taking in reverse order these three enumerated justifications for a misdemeanor DUI arrest, the Court agrees with Hill that the Road Rangers were not "fellow officers" of the arresting trooper. Indeed, the Department does not contend otherwise. Therefore, the observations and knowledge of the Road Rangers may not be imputed to Trooper Lotter.

The second instance where a driver may be lawfully arrested for DUI is when an officer is responding to an accident. Here, the Trooper was not called to the scene to investigate an accident. Rather, Trooper Lotter was responding to a call about a driver whom a Road Ranger believed to be drunk.

Finally, a law enforcement officer may lawfully arrest someone for drunk driving if he or she observes all the elements of a prima facie case. 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 facilities were

impaired. *State v. Tagner*, 673 So. 2d 57, 58 n. 2 (Fla. 4th DCA 1996). Hill contends that because Trooper Lotter did not observe him in actual physical control of the car he did not observe all the elements of drunk driving and therefore, the arrest was illegal. We agree and conclude that the Hearing Officer's conclusion that Hill was "driving or in actual physical control" (Pet. Writ Cert., Ex D at 2) of a car lacked competent, substantial evidentiary support.

"[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 the case sub judice 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).

Our task is to determine from the facts presented (i.e. that Hill was asleep while seated in an upright position behind the steering wheel in a vehicle in which he was not the sole occupant and was found to be intoxicated) whether a reasonable inference can be drawn that Hill, while intoxicated, placed the keys in the ignition and thus was at least at that moment in actual physical control of the vehicle. *Fieselman v. State*, 537 So. 2d 603, 606-7 (Fla. 3d DCA 1988). The Department cites no case, and the Court is aware of none, in which the lone occupant of a stationary vehicle is found to have "actual physical control" of that vehicle where there has been no accounting for the whereabouts of the ignition key or evidence of some kind that the vehicle

had recently been operated. The record in this case is barren of such evidence. There is no evidence of keys in the ignition or otherwise within Hill's control. There is no indication that the engine was running or warm. The record discloses that Hill was not alone in the vehicle.

This Court has addressed much the same scenario in *Heath v. Department of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 1058a (Fla. 9th Cir. Ct. July 20, 2006). There, the arresting officer's

> charging affidavit states that the Petitioner was seated in the driver's seat of a vehicle parked in a closed city park. It contains no information about whether the vehicle's engine was running or whether the keys were in the ignition. In fact, there is no mention of the vehicle's keys in the charging affidavit. While the charging affidavit states that [the arresting officer] saw headlights in the park; it does not indicate whether the headlights of the Petitioner's car were on. Furthermore . . . Petitioner was not alone; he had a female companion in the vehicle with him. As stated above, the Petitioner's presence in the driver's seat, without more, is insufficient for the hearing officer to conclude that probable cause existed for [the arresting officer] to believe that the Petitioner was in actual physical control of his motor vehicle. Accordingly, the hearing officer's decision was not supported by competent substantial evidence.

Id.

Case law does not support a finding of actual physical control of a vehicle based solely upon a lone occupant's mere presence in the driver's seat. *Ben-Asher v. Dep't of Highway Safety & Motor Vehicles,* 12 Fla. L. Weekly Supp. 630c (Fla. 11th Cir. Ct. April 5, 2005). Rather, courts take into account 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 first district court of appeal found that operability of the motor vehicle is a factor to consider when determining whether an individual was in actual

physical control. Other factors 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.

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. *Id.* at 1071. The engine was not running but the lights were on, *the keys were in the ignition* and his foot was on the footbrake. *Id.* Based on those facts, the court determined that there was sufficient circumstantial evidence that the defendant was in actual physical control of the vehicle. *Id*. at 1072.

Similarly, in *Fieselman v. State,* 537 So. 2d 603 (Fla. 3d DCA 1988), the defendant was charged with DUI. He moved to dismiss asserting that he was not in actual physical control of the 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 factfinder 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.* Again, the court noted that the key in the ignition "does not inexorably lead to the conclusion that the defendant was in actual control of the vehicle." *Id.* at 607. Rather, the court determined that the keys in the ignition were a fact to be considered, along with the defendant's presence behind the wheel, in determining whether he was in actual physical control of a motor vehicle while intoxicated. *Id*. Accordingly, the court found that the facts "preclude[d] the conclusion that *as a matter of law* the defendant was not in actual physical control of the vehicle . . . ." *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 van, and the trailer she was towing, were parked on the shoulder of the road with the trailer protruding about one foot into the roadway. *Id*. at 637. The van and trailer did not have any lights on. *Id. There were no other people in the van with Prue*. *Id*. After waking up Prue, the officer determined that she was DUI 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.* The district court, however, 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 that 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, the charging affidavit contains no information about whether the vehicle's engine was running or whether the keys were in the ignition. In fact, there is no mention at all in the charging affidavit of the vehicle's keys or whether the headlights were on or whether the engine was warm. There is no mention of an open alcoholic beverage container nor did Hill admit to operating the vehicle. Furthermore, unlike several of the above cited cases, Hill was not alone. His wife was in the vehicle with him. In sum, there is nothing in this record to support so much as an inference that Hill could have driven away the car at any moment or that he had been operating the vehicle. Hill's mere presence in the driver's seat, without more, is insufficient for the Hearing Officer to infer that the Hill was in "actual physical control" of the jeep. Thus, the Hearing Officer's decision was not supported by competent substantial evidence. The petition for a writ of certiorari is therefore granted and the order of suspension quashed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that George Hill's Petition for Writ of Certiorari be and hereby is **GRANTED** and the Hearing Officer's Final Order of License Suspension be and hereby is **QUASHED.** This matter is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___14_____ day of ___November_____, 2008.

_/S/_____
FREDERICK J. LAUTEN
Circuit Court Judge

__/S/_____
RENEE A. ROCHE
Circuit Court Judge

__/S/_____
ROGER J. McDONALD
Circuit Court Judge

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) Jason Helfant, **Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 West Flagler Street, Miami, Florida 33135 on the ____14__ day of____November_____, 2008.

____/S/_____
Judicial Assistant