

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

DANIEL B. IACHELLO,

Petitioner,

v.

**CASE NO.: 2010-CA-20034-O
WRIT NO.: 10-71**

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

Respondent.

Petition for Writ of Certiorari.

Rebecca Sonalia, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE ARNOLD, LAUTEN, ADAMS, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Daniel B. Iachello (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of his driver’s license. This Court has jurisdiction under

section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

The arrest affidavit of Deputy Kristopher Lott with the Orange County Sheriff's Office states that, on July 1, 2010 at approximately 3:30 a.m., he was dispatched to the intersection of Michigan Street and Woods Avenue in Orlando, Florida in reference to a man down service call. Upon arrival, he observed a Black Lexus sedan bearing the tag number LFV954 facing west and parked in the roadway on the north side of the intersection. The driver, later identified as Petitioner, was slumped over the steering wheel passed out. He was unresponsive and he had the distinct odor of alcohol on his person. After several attempts were made to wake up Petitioner, he eventually woke up and staggered outside the vehicle. He appeared disoriented and stated that he was on his way home from the Makos bar where he had two drinks. When asked if he would consent to field sobriety exercises to insure that he was okay to drive, he agreed and performed poorly. Consequently, he was arrested for driving under the influence. He was then taken to the DUI testing facility, read the implied consent warning, and submitted two breath samples. The results from the samples were 0.146 at 4:14 a.m. and 0.135 at 4:17 a.m.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on August 3, 2010. On August 6, 2010, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension for a period of one year. Petitioner now seeks certiorari review of this order.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there

was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In cases where the individual’s license is suspended for an unlawful breath-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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)(a), Fla. Stat. (2010).

In the Petition for Writ of Certiorari, Petitioner argues that his due process rights were violated because the hearing officer departed from being a neutral arbiter by finding that Petitioner was in actual physical control of a motor vehicle despite the fact that the record was completely devoid of any evidence or testimony on that issue. He claims that the arrest affidavit only states that the Petitioner was found asleep in a vehicle. There was no indication whether the vehicle was on, whether the keys were in the ignition or whether or not the Petitioner had possession of the keys. Merely being found sleeping in a vehicle does not rise to actual physical control. There must be some additional exercise of dominion or control over the vehicle beyond being physically located inside the car.

Petitioner relies heavily on the case *Heath v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 1058a (Fla. 9th Cir. Ct. July 20, 2006) where the court noted that the petitioner's presence in the driver's seat, without more, was insufficient for the hearing officer to conclude that probable cause existed for the officer to believe that the petitioner was in actual physical control of his motor vehicle. Lastly, Petitioner requests that he be awarded \$5,000 for attorney's fees and \$400 for the filing fee.

Conversely, the Department argues that the hearing officer properly sustained the suspension as competent substantial evidence existed to support the hearing officer's decision. This Court concurs with the Department in its Response to the Petition as follows: The arrest affidavit of Deputy Lott provides competent substantial evidence that he had probable cause to believe Petitioner was in actual physical control of a motor vehicle while under the influence of alcohol. Further, Petitioner did not appear at the administrative review hearing and offered no evidence to rebut the competent substantial evidence in the record. The key evidence that supports the hearing officer's findings and distinguishes the instant case from *Heath* is that: 1) Petitioner's vehicle was parked in the middle of the roadway at nearly 4 a.m. (Heath's car was parked in a closed city park at 9:00 p.m.); 2) Petitioner was alone in his vehicle (Heath was not alone in vehicle); 3) Petitioner was found by Deputy Lott passed out in the driver's seat and slumped over the steering wheel (Heath was not); 4) Petitioner told Deputy Lott that he was on his way home from the Makos bar and he was wearing a wrist band from the bar; (Heath admitted to drinking, but did not make statement that indicated he had been driving).

This Court finds that the evidence considered by the hearing officer constitutes competent substantial evidence upon which she could base her finding that the arresting officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle at the time of his arrest. Further, this Court concurs with the Department's detailed Response that addresses Petitioner's arguments in their entirety. Thus, the Department's Response to the Petition is incorporated herein by reference.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED** and the hearing officer's Final Order of License Suspension is **AFFIRMED**. Accordingly, Petitioner's request for an award of attorney's fees and the filing fee is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 7th day of July, 2011.

/S/ _____
C. JEFFREY ARNOLD
Circuit Court Judge

/S/ _____
FREDERICK J. LAUTEN
Circuit Court Judge

/S/ _____
JOHN H. ADAMS, SR.
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Rebecca Sonalia, Esquire**, Musca Law, 2650 Airport Road, S., Suite H, Naples, FL 34112 and to **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 7th day of July, 2011.

_____/S/_____
Judicial Assistant