

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

ZACHARY SEYBOLD,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, BUREAU OF DRIVER
LICENSE,

Respondent.

CASE NO.: 2013-CA-7154-O

Writ No.: 13-45

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Donna Petty, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE HIGBEE, MUNYON, MCDONALD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Zachary Seybold (“Seybold”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

As stated in the arrest affidavit, on February 16, 2013 Officer Graham was on routine patrol when he observed an SUV parked on the side of W. New England Street near South Park Avenue. The headlights and taillights were on and the vehicle was running. He saw the sole occupant of the vehicle, Seybold, in the driver's seat with his head slumped down to the front of his chest and the windows were up. He approached the driver's side of the vehicle to check on the well-being of the driver. He knocked several times on the driver's side window and door before Seybold opened his eyes. Seybold opened his door and the officer immediately smelled the odor of alcoholic beverages emanating from the passenger side of the vehicle. He asked Seybold if he was physically and medically ok and he stated, "Yes." He then asked Seybold if he could turn off his vehicle and Seybold shook his head as if he understood but instead attempted to adjust the radio. The officer had to ask him to turn off the vehicle six times before he complied. During this time, he noticed that Seybold's face was flushed, his eyes were watery and glassy, and he smelled the odor of alcohol coming from Seybold's facial area. He then asked Seybold to step out of the vehicle.

Officer Graham noted that Seybold swayed from front to back while standing. The officer requested his license several times and he instead tried to give him a handful of cash. He had difficulty locating his license after looking in his wallet several times but the officer immediately located his license after Seybold allowed him to look through his wallet. When the officer asked him how much he had to drink he replied, "Are you serious?" Seybold initially agreed to perform field sobriety exercises but failed to follow the directions although the officer repeated the instructions. He then refused to continue the exercises. The officer explained that he could be arrested if he refused to perform the exercises, and Seybold repeatedly stated he did not understand after the officer repeated the instructions again. He was then placed under arrest for driving under the influence. Seybold was read the implied consent warning, refused to take

breath test, and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and hearings were held on March 26, 2013 and April 29, 2013. On April 29, 2013, the hearing officer entered a written order sustaining Seybold's license suspension.

“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. Where the driver license was suspended for driving with 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 arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages 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 § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2013).

Seybold argues that (1) there was no founded suspicion of criminal activity or probable cause to order him to open his door and exit his vehicle because he was lawfully sleeping in a legally parked vehicle, and (2) there was no probable cause to arrest him because the surveillance and booking videos shows no signs of impairment prior to and after his arrest.

Officer Graham testified that when Seybold opened his eyes he was still uncertain whether he was in medical distress at that time and requested that Seybold open the door. Therefore, Officer Graham's well-being check was not complete when Seybold opened his eyes and the officer could lawfully continue to assess Seybold's well-being until he was satisfied that he was not in medical distress. *See Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013) (deputy's request for a driver to roll down his window and the act of opening the driver's door did not transform the consensual encounter into investigatory stop because the deputy's concern for the driver's safety had not yet been alleviated); *Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) (an officer making contact with a driver of a parked vehicle was a consensual encounter and an officer is not required to negate each and every possible act or circumstance that might transform a consensual encounter into an investigatory stop). When Seybold opened the door and the officer continued to assess his well-being, the officer observed the following signs of impairment: watery glassy eyes, flushed face, strong odor of alcohol coming from Seybold's facial area, and his inability to follow directions. After he exited the vehicle, the officer observed that he was unable to locate his license, he swayed while standing, and he was unable to follow the directions to perform field sobriety exercises.

After reviewing the submitted evidence, including the videos submitted by Seybold, the hearing officer determined that all the elements necessary to sustain the suspension for refusal to submit to a breath test were supported by a preponderance of the evidence. The circuit court on certiorari review is prohibited from reweighing the evidence reviewed by the hearing officer. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So.2d 838, 845 (Fla. 2001); *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006). Based on the record,

the Court finds that there was competent substantial evidence to support the hearing officer's decision to sustain the license suspension.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. Petitioner's Motion to Assess Attorney's Fees and Court Costs, Petitioner's Motion to Assess Attorney's Fees Pursuant to Section 57.105, and Respondent's Motions to Tax Attorney's Fees and for Sanctions are **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 30th day of June, 2014.

/S/
HEATHER L. HIGBEE
Presiding Circuit Judge

MUNYON and MCDONALD J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 30th day of June, 2014 to: **Stuart I. Hyman, Esq.**, 1520 E. Amelia Street, Orlando, Florida 32803; **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857.

/S/
Judicial Assistant