

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

KENNETH FULMER

CASE NO. 2013-CA-9573-O

Writ No. 13-61

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES,**

Respondent.

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

Stuart Hyman, Esq.
Attorney for Petitioner.

No Appearance by Respondent.

Before TURNER, WHITEHEAD, DAWSON

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license for refusing to submit to a breath test following a lawful arrest. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Florida*

Dept. of Highway Safety & Motor Vehicles v. Luttrell, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008). Where a driver's license has been suspended for refusal to submit to a breath alcohol test, the hearing officer must make a finding that the traffic stop resulting in the request for a breath test was a lawful stop. *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011).

Petitioner was parked and asleep in his car at 2:00 a.m. on May 9, 2013 on the shoulder of Interstate 4 when he was approached by Maitland police officers. One of the officers opened Petitioner's unlocked car door and roused him. A DUI investigation ensued. Petitioner contends that the officers illegally seized him by opening his car door, when the officer had no reasonable suspicion of illegal activity at that point in time.

Testimony and Hearing Officer's Findings of Fact

Maitland Police Officer Moore testified that he saw a car parked on the shoulder of I-4 with its flashers on. He said he stopped to check whether the vehicle was disabled. The driver (Petitioner) appeared to be asleep. Moore knocked on the window at least twice but could not rouse Petitioner. He opened the door, which was not locked, and had to shake Petitioner and yell to awaken him. Upon opening the door, Moore said he immediately smelled both alcohol and burnt cannabis. He testified that Petitioner's speech was slurred and that he had droopy, bloodshot, and glassy eyes. He saw an open can of beer in the console. He asked the driver to exit the car and a DUI investigation ensued.

Officer Walker arrived as a backup. He testified at the hearing that he could detect the odor of alcohol emanating from Petitioner from five feet away. He said he also observed red, bloodshot, glassy eyes.

In addition to the testimony, the hearing officer also reviewed a videotape of the stop and the officers' arrest reports. The hearing officer concluded that the stop and ensuing DUI investigation were lawful based on the findings that the car was not legally parked (since it is illegal to park on the shoulder on the interstate), that Moore was conducting community caretaker duties by stopping to check on the driver's well-being, and that once he managed to wake Petitioner, he smelled alcohol and cannabis. Along with the officers' observations of slurred speech and glassy, bloodshot eyes, there were sufficient indicia of possible impairment to initiate a DUI investigation.

Lawfulness of DUI Investigation

The hearing officer correctly found that Petitioner appeared to be unlawfully parked on the shoulder of the interstate. Under section 316.1945(1)(a)11, Florida Statutes, it is unlawful to park

On the roadway or shoulder of a limited access facility, except as provided by regulation of the Department of Transportation, or on the paved portion of a connecting ramp; except that a vehicle which is disabled or in a condition improper to be driven as a result of mechanical failure or crash may be parked on such shoulder for a period not to exceed 6 hours.

It was certainly lawful for the officer to approach the car to find out whether it was disabled and whether the driver was in need of assistance or was simply illegally parked. *A.F. v. State*, 850 So. 2d 667 (Fla. 4th DCA 2003). Although Moore did not cite the possible traffic infraction as the basis for initiating his investigation, where the testimony and "the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer," the stop is lawful. *State, Dept. of Highway Safety & Motor Vehicles v. Jones*, 935 So. 2d 532, 534 (Fla. 3d DCA 2006).

When the officer could not rouse the driver after several attempts, opening the door to check on his well-being was part of his community care-giving responsibility, *Dermio v. State*, 112 So. 3d 551 (Fla. 2d DCA 2013), and he had the right to attempt to contact the driver to investigate the possible traffic infraction of illegal parking. He could even have asked the driver to exit the car at that point. *Faulkner v. State*, 834 So. 2d 400, 402 (Fla. 2d DCA 2003). Despite several efforts, Moore could not get Petitioner's attention except by opening the door.

As soon as he opened the car door, Moore smelled both alcohol and burnt cannabis. While the smell of alcohol in and of itself may not be a sufficient indicator to create reasonable suspicion of impairment, cannabis is an illegal substance; the officer could detain Petitioner to investigate that crime based on the officer's recognition of the smell. *State v. Williams*, 967 So. 2d 941, 944 (Fla. 1st DCA 2007). Moore testified that as soon as Petitioner began speaking, Moore observed slurred speech and red, bloodshot, glassy eyes; he also saw an open can of beer. These, coupled with the odors emanating from Petitioner and the lateness of the hour, were more than sufficient to create reasonable suspicion allowing the officers to request field sobriety and breath tests. *State v. Ameqrane*, 39 So. 3d 339 (Fla. 2d DCA 2010).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 23rd day of July, 2014.

/S/ _____
THOMAS W. TURNER
Presiding Circuit Judge

WHITEHEAD and DAWSON, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to and **Stuart I. Hyman, Esq.**, 1520 East Amelia Street, Orlando, Florida 32803, and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 23rd day of July, 2014.

/S/ _____
Judicial Assistant