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

HELEN PATRICIA BERRY ,

CASE NO.: 2014-CA-3639-O

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES,

Respondent.

_____/

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

Leon B. Cheek, III, Esquire,
for Petitioner.

Richard M. Coln, Esquire,
for Respondent.

Before DOHERTY, SCHREIBER, and LATIMORE, J.J.

PER CURIAM.

ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

Helen Patricia Berry ("Petitioner") timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") "Findings of Fact, Conclusions of Law and Decision." Pursuant to section 322.2615, Florida Statutes (2014), the order sustained an eighteen month suspension of her driver's license for refusal to submit to a

breath, blood, or urine test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On February 12, 2014, the arresting officer, Matthew Reinhardt, observed Petitioner's vehicle parked perpendicular and halfway in the northbound lane of traffic on Hawthorne Avenue in Apopka, Florida, wherein the rear end of the vehicle was in the roadway, partially blocking the northbound lane of traffic. He observed that the engine of the vehicle was not running, and Petitioner was behind the wheel of the vehicle and was unresponsive. Officer Reinhardt indicated that the keys to the vehicle were in her right hand.

Officer Reinhardt shook Petitioner's shoulder, which made her drop her keys. He asked her if she knew where she was, to which she replied Forest City; the incident actually occurred in Apopka, Florida. Officer Reinhardt then asked for Petitioner's license, and she told him that it was in her purse, which she could not find; Officer Reinhardt observed her purse in the passenger seat, right next to her. He testified it took Petitioner six to seven minutes to retrieve her license, and she was parked in the northbound lane for that entire time.

When Officer Reinhardt was speaking with Petitioner, he smelled a mild odor of alcoholic beverage. When she was getting out her driver's license, he observed that Petitioner had slurred speech, red eyes, and an inability to focus on the task that she was asked to complete. Officer Reinhardt was able to smell the alcoholic beverage emanating from Petitioner when he asked her to exit the vehicle. When Petitioner did exit the vehicle, she fell into him, almost knocking him down. At that point, Officer Reinhardt requested that she submit to field sobriety exercises, to which she replied that she was not being arrested for a DUI because she was not driving, as her car was parked. Officer Reinhardt informed her that if she did not submit to the exercises, her license could be suspended, and she would be placed under arrest for DUI.

Petitioner began arguing with Officer Reinhardt, and he again requested she submit to field sobriety exercises, to which she refused. Officer Reinhardt then placed Petitioner under arrest.

Petitioner was transported to Apopka Police Department, where the observation period started. Petitioner was read the implied consent warning, refused to complete a breath test, and her license was suspended. Petitioner refused to sit down at the police department and fell over, hit her elbow, and landed on her wrist. The Apopka Fire Department was called, and Petitioner was asked how much she had to drink, to which she replied, a bottle of wine. At that point, Petitioner was taken to Florida Hospital, Apopka and then transported to the Orange County Jail.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on March 6, 2014. On March 6, 2014, the hearing officer entered his "Findings of Fact, Conclusions, of Law and Decision," sustaining the suspension of Petitioner's driver's license.

"The duty of the circuit court on 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 the 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); *see also Education Development Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a breath test, 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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2014).

For this certiorari review, Petitioner argues that the law enforcement officer did not have probable cause to believe that she was driving or in actual physical control of a motor vehicle, and that she did not refuse to submit to a breath, blood, or urine test under section 322.2615 of the Florida statutes. Specifically, Petitioner argues that because the vehicle was not running, and the keys were not in the ignition, these facts preclude a finding of probable cause that she was in actual physical control of the vehicle. Petitioner contends that this is significant because there was no evidence that she was impaired when she lawfully parked the vehicle. Petitioner cites to section 316.195(1), Florida Statutes (2014), for the proposition that she was lawfully parked. ("Except as otherwise provided in this section, every vehicle stopped or parked upon a two-way roadway shall be so stopped or parked with the right-hand wheels parallel to and within 12 inches of the right-hand curb or edge of the roadway."). However, as indicated *supra*, Petitioner's vehicle was blocking the roadway; this is not the lawful parking contemplated by the statute. In addition, Petitioner cites no supporting facts or law to support her position that she did not refuse the breath test. Conversely, the Department argues that Petitioner's arguments are not preserved for review, the evidence before the hearing officer was sufficient to support the

finding that Petitioner was in actual physical control of her vehicle, and the evidence before the hearing officer was sufficient to support the finding that Petitioner was read the implied consent warning and still refused to submit to a breath test.

Petitioner did not make any objection, motion, or argument concerning the sufficiency of the evidence of her being in actual physical control of the vehicle or whether she understood the implied consent warnings, or any other issue related to her DUI suspension. Because there was no specific objection made to apprise the lower tribunal of any alleged error, Petitioner failed to preserve these issues for intelligent review on appellate review. *See Cornwell v. State*, 425 So. 2d 1189, 1190 (Fla. 1st DCA 1983) (determining that the appellant's motion failed to specify the error made by the lower tribunal, thus failing to adequately bring the error to the attention of the lower tribunal and thereby not property preserving the issue for appeal); *Bohannon v. State*, 546 So. 2d 1081, 1082 (Fla. 3d DCA 1989) (indicating that "[t]o meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to appraise the trial judge of the putative error and to preserve the issue for intelligent review on appeal"). Her arguments can be denied on this basis alone.

Even if the arguments were preserved for review, Petitioner's contention that the law enforcement officer did not have probable cause to believe that she was driving or in actual physical control of a motor vehicle, and that she did not refuse to submit to a breath, blood, or urine test under section 322.2615 of the Florida statutes is without merit. In reviewing an administrative action, the circuit court is prohibited from weighing or reweighing the evidence presented to the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30 (Fla. 1st DCA 1997).

In this case, all of the findings were supported by competent substantial evidence in the record. Officer Reinhardt initially observed Petitioner's vehicle parked in a lane of traffic, with Petitioner behind the wheel of the vehicle with the keys in her hand. *See Dep't of Highway Safety & Motor Vehicles v. Prue*, 701 So. 2d 637, 638 (Fla. 2d DCA 1997) (concluding that "there was competent substantial evidence before the hearing officer to conclude that [the petitioner] was in actual physical control of her vehicle" because the petitioner was the only one in the vehicle, and the keys were either in the ignition or near enough to the petitioner for her to use them to start the car and drive away); *Baltrus v. State*, 571 So. 2d 75, 75-6 (Fla. 4th DCA 1990) (finding that there could have been enough evidence to determine that the driver was in actual physical control of the vehicle where the driver was slumped over the steering wheel of his parked vehicle, with the keys to the vehicle in his hand). He also noticed that Petitioner had difficulty retrieving her license from her purse, which was directly next to her. Officer Reinhardt also observed Petitioner's slurred speech, red eyes, and the smell of alcoholic beverages emanating from her person when she exited the vehicle. When Petitioner was transferred to Apopka Police Department, Officer Reinhardt testified that Petitioner was read the implied consent warning, yet refused to complete a breath test.

Based on the record and testimony, the hearing officer had competent substantial evidence to support her findings that the arresting officer had probable cause to arrest Petitioner for DUI and that Petitioner refused to submit to a breath test. Thus, the Court finds that the Department's order sustaining Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence. To evaluate the evidence further would put the Court in the impermissible position of reweighing the evidence presented in the administrative action.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Amended Petition for Writ of Certiorari is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 7th day of January, 2015.

/S/
PATRICIA A. DOHERTY
Presiding Circuit Judge

SCHREIBER and LATIMORE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to **Leon B. Cheek, III, Esq.,** 1600 East Robinson Street, Suite 300, Orlando, Florida 32803; and **Richard M. Coln, Esq.,** Assistant General Counsel, Department of Highway Safety & Motor Vehicles—Legal Office, P.O. Box 570066, Orlando, Florida 32857, on the 7th day of January, 2015.

/S/
Judicial Assistant