

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR THE STATE OF FLORIDA  
GENERAL CIVIL DIVISION

GERMAN SCHWEIZER,  
Petitioner,

CASE NO.: 22-CA-10820  
DIVISION: H

FLORIDA DEPARTMENT OF HIGHWAY SAFETY  
AND MOTOR VEHICLES  
Respondent.

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**ORDER DENYING PETIONER'S PETITION FOR WRIT OF CERTIORARI**

**THIS MATTER** is before the Court on German Schweizer's Petition for Writ of Certiorari. (Doc. 4). Petitioner contends that the order upholding the administrative suspension of his driving privilege should be quashed because the record lacks competent, substantial evidence that he was in actual physical control of his motor vehicle, and therefore, could not have violated section 316.193, Florida Statutes. The Court has reviewed the petition, response (Doc. 9), reply (Doc. 12), appendices, and applicable law. Because Petitioner was behind the wheel at the time of the stop, the keys were in the vehicle and accessible to Petitioner, and Petitioner offered to move the vehicle off the roadway, Petitioner was in actual, physical control of the vehicle. Accordingly, the petition is denied.

**Background**

Petitioner's driver's license was administratively suspended for a violation of section 316.193, Florida Statutes, for driving or being in actual physical control of a motor vehicle while having a breath-alcohol level of 0.08 or higher. A formal review hearing was held before Department Hearing Officer James Garbett. The suspension was upheld by order issued November 30, 2022, which found the following facts by a preponderance of the evidence:

- i. On October 16, 2022, Sgt. Kenney observed a pickup truck with an attached trailer parked diagonally, against the flow of traffic, and in such a way that other vehicles would be prevented from driving on the roadway. Two occupants who appeared to be asleep were in the front seats.
- ii. Sgt. Kenney knocked on the window and Petitioner, who was in the driver's seat, opened the door. After he exited the truck, Petitioner indicated that he would move the truck to clear the roadway. Sgt. Kenney observed that Petitioner's eyes were bloodshot and

glassy, his breath smelled like alcohol, his speech was slurred, and he had difficulty maintaining his balance. Petitioner admitted consuming alcohol earlier in the night.

- iii. Sgt. Kenney requested assistance from the DUI unit, and Deputy DiBiase responded to the call. Deputy DiBiase also observed that Petitioner's breath smelled like alcohol, his eyes were bloodshot and glassy, he was unsteady on his feet, and he admitted to drinking earlier in the evening. Deputy DiBiase observed that Petitioner showed additional signs of impairment while performing field sobriety exercises. Deputy DiBiase also observed that Sgt. Kenney had identified that the keys to the truck were in the vehicle and that the truck was operable. Thus, Deputy DiBiase arrested Petitioner for DUI. After a 20-minute observation period, Petitioner provided two breath samples with results of 0.094 and 0.096 BrAC.

### **Standard of Review**

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006). Courts are not entitled to reweigh the evidence but may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Id.*

### **Analysis**

It is undisputed that Petitioner had not been driving at the time he encountered law enforcement. That does not, however, preclude a finding that a driver had actual, physical control of a motor vehicle. Here, Petitioner argues that because the record "was devoid of any specific allegations as to Petitioner's possession of the keys to the vehicle, or that Petitioner had access to the keys to the vehicle," the hearing officer's conclusion that he was in actual, physical control of the vehicle was not supported by competent, substantial evidence. Under Florida law:

In a formal review hearing under subsection (6) . . . , the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of review shall be limited to the following issues:

- (a) If the license was suspended for driving with an unlawful blood-alcohol or breath-alcohol level of 0.08 or higher:

(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. 316.319.

§ 322.2615(7)(a)(1)–(2), Fla. Stat.

In its seminal case on the issue of being in “actual physical control” of a motor vehicle, while under the influence, the Second District explained that the Florida legislature’s intent in defining the crime of driving under the influence to include not only *driving* but also exercising *actual physical control* of a vehicle while under the influence was “to enable the drunken driver to be apprehended before he strikes.” *Griffin v. State*, 457 So. 2d 1070, 1072 (Fla. 2d DCA 1984) (quoting *Hughes v. State*, 535 P.2d 1023, 1024 (Okla. Crim. App. 1975)). Thus, “the real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers.” *Id.* (quoting *State v. Junczewski*, 308 N.W. 2d 316, 320 (Minn. 1981)).

Significantly, the *Griffin* court held that “an intoxicated person seated behind the steering wheel” is in actual physical control of the vehicle because a legitimate inference can be drawn that “he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away.” *Id.* (quoting *Hughes*, 535 P.2d at 1024) (emphasis added). Thus, while *Griffin* offers two additional reasons explaining its denial of the defendant’s writ, only one is necessary. *Baltrus v. State*, 571 So. 2d 75, 76 (Fla. 4th DCA 1990) (“the [*Griffin*] opinion implies that *each reason alone* would be sufficient to affirm the defendant’s conviction.”) (emphasis added). *See also Fieselman v. State*, 537 So. 2d 603, 606 (Fla. 3d DCA 1988) (“*Griffin* does not stand alone in emphasizing that evidence that the defendant was found sitting behind the wheel of the vehicle is a circumstance heavily supporting a finding that the defendant was exercising control over the vehicle.”). Indeed, the *Fieselman* court noted that “[o]ther courts reaching the same result as *Griffin* have similarly pointed to the defendant’s upright position behind the wheel as an important part of the calculus in determining the question of the defendant’s actual physical control over the vehicle.” *Id.*

Here, the record contains competent, substantial evidence supporting his conclusion that the arresting officer had probable cause to believe that Petitioner was under the influence and in actual physical control of a motor vehicle: he was found asleep in the driver's seat of an illegally parked pickup truck with an attached trailer blocking the roadway; the keys to the truck were inside of the vehicle, the truck was operable, Petitioner offered to move the truck to clear the roadway, he admitted drinking, and he exhibited multiple signs of being under the influence. After being lawfully arrested, Petitioner provided two breath samples with results of 0.094/0.096 BrAC. It is therefore

**ORDERED AND ADJUDGED** that Petitioner's petition for writ of certiorari is **DENIED** in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 5/4/2023  
Helene Daniel

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**HON. HELENE L. DANIEL**  
**CIRCUIT JUDGE**

Electronic copies provided to the parties through JAWS.