

IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA  
CIRCUIT CIVIL DIVISION

EUGENE ZENTKO,  
Petitioner,

CASE NO.:21-CA-3877

v.

DIVISION: G

STATE DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,  
Respondent.

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ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This matter is before the Court on Petition for Writ of Certiorari filed May 10, 2021. The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P.; and §322.31, Fla. Stat. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner contends that the Department lacked the competent, substantial evidence necessary to find that Petitioner was lawfully arrested because the initial encounter with law enforcement was coercive and not a consensual encounter/welfare check. Upon review of the petition, response, reply, appendices, and relevant case law, the Court finds that where law enforcement had an ongoing concern for Petitioner's wellbeing, the Department did not err in relying on documentation of the officer's observations as competent, substantial evidence of a lawful encounter.

STANDARD OF REVIEW

The Court reviews an administrative decision to determine whether Petitioner received procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The Court may not reweigh the evidence contained in the record. *Dep't of*

*Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012).

## FACTS AND PROCEDURAL HISTORY

On February 22, 2021, the Tampa Police Department (TPD) received a call advising that a man, appearing to be impaired, had struggled to walk to his car, described as a white Mercedes Benz, urinated on his car, and had been sitting in his car for an hour with the ignition on. TPD Officer Barlaug responded to the call and found Petitioner parked as the caller had described. Officer Barlaug made contact with Petitioner to determine his state of wellbeing. Petitioner was confused upon waking up and had difficulty responding to Officer Barlaug's request to roll down the window. When Petitioner opened the door, Officer Barlaug observed multiple indicators of alcohol consumption, including bloodshot eyes, flushed face, slurred speech, and the distinct odor of alcohol on his breath. When asked for his driver's license, Petitioner provided a debit card. Petitioner admitted to consuming alcohol, exhibited difficulty answering the officer's questions, and performed poorly on the Field Sobriety Exercises (FSEs). Petitioner was arrested and transported to Central Breath Testing (CBT) where he provided breath samples with breath-alcohol level results of 0.217 and 0.226.

A formal review hearing of the administrative suspension was held March 31, 2021. When reviewing a suspension that is the result of a driver's unlawful breath-alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, and whether Petitioner had a breath-alcohol level of 0.08 or higher. §322.2615(7)(a), Fla. Stat.

## DISCUSSION

Petitioner contends that the Department departed from the essential requirements of law in finding that Petitioner was lawfully seized or detained. Specifically, Petitioner argues that Officer Barlaug's attempts to initiate an encounter were coercive and that the Department lacked competent substantial evidence for its finding.

The hearing officer in this case found that Officer Barlaug's contact with Petitioner was a lawful, consensual encounter/welfare check. Although individuals are permitted to refuse to engage with law enforcement officers during a welfare check, an officer is permitted to continue contact where the officer's concern for the individual's safety is not alleviated. *Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013) (law enforcement's request that defendant roll down his window was not transform consensual welfare check into an investigator stop where there was an ongoing concern for his safety). Petitioner argues that his hand gestures in response to Officer Barlaug constituted a refusal to engage. But this overlooks that Petitioner voluntarily opened his car door when he was unable to comply with the officer's request to roll down the window, and voluntarily stepped out of his vehicle. The hearing officer found that Petitioner's confusion and difficulty responding to Officer Barlaug's request were the basis of the officer's ongoing concern for Petitioner's welfare. Pursuant to the continuance of Officer Barlaug's welfare check, reasonable suspicion, and, ultimately, probable cause that Petitioner was DUI were established.

It is therefore ORDERED that the petition is DENIED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 2/15/2022  
Christopher Nash

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CHRISTOPHER C. NASH, Circuit Court Judge

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