

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

ANDRIX JOHNSON,
Petitioner,

CASE NO.: 20-CA-5394

v.

DIVISION: H

STATE DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This case is before the court on Petition for Writ of Certiorari filed July 1, 2020. The petition is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. He contends that his detention amounted to a de facto arrest that was both unlawful and requires invalidation of the suspension. The court has reviewed the petition, response, appendices, and relevant case law. Petitioner did not file a reply. Based upon the parties' submissions, the court determines that where law enforcement personally observed Petitioner parked on a limited access roadway in potential violation of § 316.1945(1)(a)11, Florida Statutes, and where Petitioner was asleep behind the wheel and initially unresponsive, law enforcement had a reasonable basis to further investigate to determine if it were, in fact a violation, and perform a welfare check. Based on investigation, which revealed that the vehicle was not disabled, and that Petitioner was wearing a wristband customarily used in bars and clubs, there was vomit on the armrest, the odor of alcoholic beverage, multiple inconsistent statements and poor performance of field sobriety exercises, probable cause for arrest developed. For that reason, the detention, arrest, and resulting request that Petitioner submit to a breath test were lawful, and the suspension is upheld. The petition is, therefore, denied.

This court reviews the administrative decision upholding the suspension to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). In this case, Petitioner does not assert that he was denied due process. Rather, he contends the hearing officer departed from the essential requirements of law in concluding that law enforcement had probable cause to detain Petitioner. Because Petitioner contends that the alleged departure invalidated his refusal of a breath test, he adds there is no competent, substantial evidence to uphold the suspension.

Trooper Sheinberg of the Florida Highway Patrol testified that emergency medical services personnel (EMS) were checking on Petitioner's welfare on the side of Interstate 4 at about midnight on February 15, 2020 when he approached Petitioner's parked vehicle from the rear. Tpr. Sheinberg went to the rear passenger side of the vehicle and observed the driver asleep in the driver's seat with the key in the ignition. He observed the driver use low-toned speech in speaking with the EMS attendants, that he had lethargic movements, and noted regurgitation on the armrest between the front driver and passenger seats. The driver told the EMS attendants that he was sleeping due to "working" and did not require medical attention.

After EMS cleared Petitioner medically, Tpr. Sheinberg continued his welfare check of the driver. He noted, along with the previous observations, that Petitioner had a paper wrist band consistent with those used at bars and clubs. He also detected the odor of alcohol coming from the driver's vehicle. On questioning, Petitioner gave conflicting and nonsensical accounts of his travel and whether he had consumed alcohol that evening. Tpr. Sheinberg returned to his patrol vehicle to check Petitioner's driver license and vehicle registration. Upon returning to Petitioner's vehicle, he smelled a strong "cover odor" consistent with the smell of cologne that had not been present before. He requested Petitioner to exit his vehicle; Petitioner complied. Tpr. Sheinberg noted Petitioner was unbalanced upon exiting his vehicle.

After the arrival of an additional backup unit, Tpr. Sheinberg requested Petitioner to perform field sobriety exercises, to which request Petitioner consented. Because of safety concerns, however, Tpr. Sheinberg transported Petitioner to another location away from Interstate 4, to perform the exercises. Petitioner performed poorly on the field sobriety exercises and was arrested for driving under the influence. Petitioner refused Tpr. Sheinberg's request that Petitioner submit to a breath alcohol test. After this refusal his driving privilege was administratively suspended for a year.

Petitioner requested a formal administrative review of the suspension. In proceedings to determine whether to uphold an administrative suspension of a person's driving privilege for driving under the influence (DUI), the hearing officer must determine whether three elements have been established by a preponderance of the evidence: 1) whether law enforcement had probable cause to believe that the person whose license was suspended was in actual physical control of a motor vehicle in this state while under the influence of drugs or alcohol; 2) whether the person whose license was suspended refused to submit to a test of his or her blood alcohol level after being requested to do so by law enforcement; and 3) whether the person was advised that refusal to submit to a test would result in the suspension of his or her driving privileges for one year. See §322.2615(7), Florida Statutes.

At the formal review Petitioner argued that he was unlawfully detained and arrested. In the order that followed on July 1, 2020, the hearing officer found that Tpr.

Sheinberg's initial contact with Petitioner was not an unlawful detention as he was entitled to conduct his own welfare check after EMS completed theirs because he had observed "lethargic movements" and "low-toned speech." It is not clear whether the hearing officer considered the presence of regurgitation on the armrest, but the hearing officer determined that the detection of the odor of alcohol Tpr. Sheinberg observed when he made contact with Petitioner at the window provided reasonable suspicion to detain Petitioner. The hearing officer further concluded that Petitioner was not placed under arrest until he completed the field sobriety exercises. The resulting order determined that the arrest was lawful and upheld the suspension of Petitioner's driving privileges.

Petitioner now contends the hearing officer departed from the essential requirements of law when the order upholding the suspension concluded the detention and ensuing arrest were lawful. Petitioner argues the Fourth Amendment requires that police officers articulate some minimal level of objective justification for an investigatory stop. *Santiago v. State*, 133 So. 3d 1159, 1163 (Fla. 4th DCA 2014). Petitioner contends that was not done here. As he did in the hearing below, Petitioner again contends that he was unlawfully detained from the moment EMS left because EMS determined that Petitioner needed no medical attention, leaving nothing more for law enforcement to investigate. Petitioner additionally argues that Tpr. Sheinberg's observation of regurgitation on the armrest should be disregarded because it was improperly obtained when the trooper leaned inside the vehicle's window with a flashlight to make the observation. Finally, he argues that Petitioner should not have been transported away from the scene of the stop because it was an arrest for which probable cause had not been developed.

This case is very similar to the recently decided *Michael Devere Lester v. State Department of Highway Safety and Motor Vehicles*, 28 Fla. L. Weekly Supp. 200a, Fla. (13th Judicial Circuit [Appellate] April 20, 2020). In *Lester*, the driver was pulled over on the side of the interstate after law enforcement received a call about a vehicle matching the description of his vehicle being operated recklessly. While stopped, law enforcement was alerted by two citizens that Lester's vehicle was involved in a hit and run accident. Also during the stop, law enforcement observed signs of impairment. Lester was transported to a location off of the interstate to perform field sobriety tests. In *Lester*, wherein the driver made similar arguments to those presented here, the court determined that § 316.1932(1)(a), Florida Statutes, deems a driver to have consented to a breath test if the person is lawfully arrested for *any offense* (not necessarily DUI) allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcohol.

Here, the objective facts establish, among other things, a violation of s. 316.1945(1)(a)11., Florida Statutes, which prohibits parking on the shoulder of a limited access roadway unless a vehicle is disabled. See also *Fulmer v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014)(a

vehicle parked on the shoulder of I-4 was both illegally parked in violation of the statute regardless of whether the stop was initiated for that purpose, and also warranted a welfare check). Moreover, where, as here, a driver is asleep in a vehicle on the side of a roadway with the keys in the ignition, a welfare check is warranted. *Bachiochi v. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 215b (Fla. 6th Cir. Ct. Mar. 14, 2017). That EMS cleared Petitioner medically did not negate the need for the welfare check Tpr. Sheinberg conducted, where the respective goals of EMS and law enforcement diverge. The role of EMS is to determine whether an individual has an immediate need for medical assistance. Law enforcement is tasked with determining whether there is a danger to the driver or general public because a driver is incapable of safely operating a motor vehicle for medical or other reasons. Tpr. Sheinberg acted appropriately when he continued with his welfare check due to continued concerns as to whether Petitioner's condition was due to fatigue or impairment. It was, therefore, not an improper seizure for Tpr. Sheinberg to look in the open rear window to assess Petitioner's condition. *Florida v. Harmon*, 24 Fla. L. Weekly Supp. 278a (Fla. 17th Cir. Ct. Feb. 26, 2016)(opening of car door was a continuation of welfare check). During the welfare check, Tpr. Sheinberg made observations as required by *Santiago*, 133 So. 3d at 1163, including the wristband, odor of alcohol, and later, cover odor, that supported further investigation. Once vehicle has been lawfully stopped, police officers may order drivers to get out of vehicle without violating Fourth Amendment's proscription of unreasonable searches and seizures. *State v. Bernard*, 650 So.2d 100, 102 (Fla. 2nd DCA 1995). This is particularly true if there is a danger, where, as here, there remained a risk that Petitioner might attempt to regain control of his vehicle and drive away. It was, therefore, not improper for Tpr. Sheinberg to ask Petitioner to exit his vehicle.

It was also not improper to transport Petitioner to another, safer location to perform field sobriety exercises. *Lester*, 28 Fla. L. Weekly Supp. 200a; *Weaver v. Dep't of Highway Safety & Motor Vehicles*, 10 Fla. L. Weekly Supp. 161a (Fla. 13th Cir. Ct. Jan. 8, 2003). Because Petitioner performed poorly on those tests, he was properly placed under arrest. When he refused to take a breath test under these circumstances, the suspension of his driving privilege was proper.

In consideration of the foregoing, the petition is DENIED on the date imprinted with the Judge's signature.

Electronically Conformed 1/25/2021

Emmett L. Battles

EMMETT L. BATTLES, Circuit Court Judge

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