

**County Criminal Court: CRIMINAL LAW**—Evidence. Trial court properly denied motion for judgment of acquittal. The evidence available to officers at the time of arrest was sufficient to demonstrate probable cause that Appellant was driving under the influence of alcohol. The refusal to submit to a breath alcohol test was incidental to a lawful arrest. Affirmed. *Mark Sulkowski v. State of Florida*, No. 13-CF-4118-WS (Fla. 6th Cir. App. Ct. December 15, 2014).

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED**

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY  
APPELLATE DIVISION**

**MARK SULKOWSKI,**  
Appellant,

UCN: 512013CF004118A000WS  
Appeal No: CRC1304118CFAWS  
L.T. No: 12-6192-MM-WS

v.

**STATE OF FLORIDA,**  
Appellee.

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On appeal from County Court,

Honorable Marc Salton,

Bruce H. Denson, Esquire,  
J. Andrew Crawford, Esquire,  
for Appellant,

Kyle Rea, Esquire,  
Office of the State Attorney,  
for Appellee.

**ORDER AND OPINION**

Based on this Court's review of the record and applicable law, we find no error with the trial court's denial of Appellant's motion for judgment of acquittal. We find Appellant's refusal to submit to a breath test was incidental to a lawful arrest based on probable cause that Appellant was in actual physical control of a motor vehicle. The trial court is affirmed.

## **STATEMENT OF THE CASE AND FACTS**

Appellant was arrested for driving under the influence in violation of § 316.193, Fla. Stat. Appellant refused to submit a breath test after being read the implied consent provisions of § 316.1932. A trial was had in the matter and Appellant was found guilty by the trial court of refusing to submit to a breath test in violation of the statute, but was acquitted by a jury of charges related to the DUI offense. The facts are as follows.

On September 8, 2013, around 10:00 p.m., Detective Pascalli of the New Port Richey Police Department observed a truck driving with a trailer attached. The Detective pulled the truck over due to a lack of lighting on the attached trailer, out of safety concerns. The vehicle came to a stop in a nearby parking lot, and as the Detective approached the vehicle he observed that the windows were darkly tinted and rolled up, and the engine was no longer running. The Detective testified that he observed a cab light turn on inside the truck and saw a large individual exit through the front passenger side of the vehicle. The Detective drew his weapon and ordered the individual back into the vehicle and called for back-up. Another police officer, Officer Pedrero, arrived on the scene shortly, and Appellant, the individual who had attempted to exit the vehicle previously, was detained. Another individual, Barrett Brown, was lying in the back seat of the vehicle and according to the officers was non-responsive when ordered to exit the vehicle. According to the officers, Mr. Brown awoke after being shaken by one of the officers, was observed to be groggy and slow to respond, and was not wearing his shoes, which were found on the floorboard below the front passenger seat. The officers also observed that the front seat was pushed far back from the steering wheel. Detective Pascalli observed both individuals to show signs of impairment, that Appellant had a dazed expression and bloodshot, watery eyes, had an odor of alcohol, staggered when he walked, acted lethargic and admitted to having a "little bit" to drink. Detective Pascalli testified that both individuals denied having driven the vehicle, but that Mr. Brown explained that he became sick and then Appellant had to drive.

Based on these factors the Detective determined Appellant was the driver of the vehicle, and began a DUI investigation, but Appellant refused to perform field sobriety exercises, was arrested for DUI, and refused to submit to a breath test after being read

the implied consent provisions. The Detective testified that Appellant stated he would not submit to testing because he was not driving the vehicle.

At trial in the matter, Appellant testified that the interior of the truck had a center console with four cup-holders between the two front seats, and that because he was six feet tall and weighed approximately 260 pounds, it would have been very difficult for him to have moved over from the driver's side to the passenger's side of the vehicle after the Detective pulled the vehicle over. Appellant testified that earlier in the evening he consumed three alcoholic beverages over the course of three hours. Appellant testified that initially he was driving the vehicle, but that at some point before entering Pasco County, Appellant began to feel impaired and Mr. Brown took over driving. Mr. Brown testified that he had been driving the vehicle that evening, but had jumped into the back seat of the vehicle after being pulled over, pretended to be asleep, and that he did not admit to officers that he was driving the vehicle because he was afraid. At the close of the evidence, Appellant moved for a judgment of acquittal on both charges, and also challenged venue, based on Appellant's testimony that he was never in control of the vehicle in Pasco County. The court denied the motions. The charge of failure to submit to testing was presented to the trial court, which found Appellant guilty of the charge, and sentenced Appellant to pay a fine, perform community service, and also imposed a one year driver's license suspension. The charge of driving under the influence was submitted to the jury, which found Appellant not guilty of the DUI charge. Appellant now contests the trial court's denial of the motion for judgment of acquittal, and also challenges venue on appeal.

### **STANDARD OF REVIEW**

This Court's standard when reviewing a trial court's denial of a motion for judgment of acquittal is de novo. *Delgado-George v. State*, 125 So. 3d 1031, 1033 (Fla. 2d DCA 2013). As to the question of whether venue is proper, there must be sufficient evidence in the record from which the court could reasonably infer that the offense was committed in the county where the case is filed. *State v. Crider*, 625 So. 2d 957, 959 (Fla. 5th DCA 1993); *State v. Katz*, 417 So. 2d 716, n.1 (Fla. 2d DCA 1982).

## LAW AND ANALYSIS

Appellant claims it was error to deny the motion for judgment of acquittal, because the officers did not have a reasonable belief that Appellant was in actual physical control of a motor vehicle while under the influence, and therefore the arrest was unlawful. Section 316.193, Fla. Stat., provides that a violation of the statute occurs when a “person is driving or in actual physical control of a vehicle” and is under the influence of alcohol or other intoxicants. Section 901.151(4) requires that an arrest for violation of the statute be supported by probable cause. Appellant claims it was not apparent that he was driving the vehicle at the time it was stopped, based on the testimony presented at trial. Appellant also claims that Mr. Brown is five feet and seven inches tall, whereas Appellant is approximately six feet tall, and that it would have been easy for Mr. Brown to jump into the back seat, but difficult for Appellant to jump over the console and into the passenger’s seat. The testimony from the Detective was that the driver’s seat appeared to be set in a position to accommodate a larger person.

The record contains substantial, competent evidence to support the trial court’s finding that Appellant violated § 319.1932, Fla. Stat., by refusing to consent to a breath test, and that the refusal was incident to a lawful arrest. Further, based on the evidence in the record venue was appropriate in Pasco County.

“Probable cause is a fluid concept that deals in probabilities, which include common sense conclusions by law enforcement officers.” *Williams v. State*, 731 So. 2d 48, 50 (Fla. 2d DCA 1999). See *State v. Catt*, 839 So. 2d 757 (Fla. 2d DCA 2003). Probable cause existed for the arrest based on the facts in this case. Detective Pascalli testified that Appellant was observed in the front passenger seat, awake and responsive, and that Mr. Brown was observed lying down in the backseat, appeared to be sleeping, was not wearing shoes and was non-responsive to officers until he was woken up. Despite Mr. Brown’s testimony to the contrary at trial, the Detective testified that at the time of the incident Mr. Brown denied that he had been driving the vehicle. Further, the Detective testified that although Appellant denied driving the vehicle as well, he did not disclose any additional facts to the officers at that time, including the testimony at trial that Mr. Brown had been driving and quickly jumped into the backseat

and was pretending to be asleep. Based on the officers' knowledge at the time of the incident, and the reasonable inferences drawn from the circumstances, the record demonstrates sufficient evidence to support probable cause to arrest Appellant for driving under the influence, and therefore the refusal to submit to the breath test was incident to a lawful arrest.

"Probable cause" is different from the "beyond a reasonable doubt" standard the State is required to meet in criminal cases, and "the facts constituting probable cause need not meet the standard of conclusiveness and probability required of circumstantial facts upon which conviction must be based." *Williams*, 731 So. 2d at 50. Appellant's claims that at the time of the arrest it was not conclusively apparent to the officers that Appellant, rather than Mr. Brown, had been driving, do not demonstrate that the officers lacked probable cause to conclude based on the circumstances that Appellant was driving the vehicle and arrest him on that basis. Further, the Detective testified that Appellant appeared to be intoxicated, that he exhibited a dazed expression, had bloodshot, watery eyes, an odor of alcohol, staggered while walking, appeared lethargic and admitted to drinking a "little bit."

Appellant's claims based on venue appear not to be based on the location of the stop, which Detective Pascalli testified occurred in Pasco County, but on the contention that State failed to demonstrate Appellant was in actual physical control of a motor vehicle and refused a breath test incident to a lawful arrest in Pasco County, based on arguments previously raised by Appellant. Venue is not an element of the crime, but there must be sufficient evidence such to permit a reasonable inference by the jury "that the crime was committed in the county in which the defendant was charged." *McClellion v. State*, 858 So. 2d 379, 381 (Fla. 4th DCA 2003). We find sufficient evidence in the record to demonstrate that venue was proper in Pasco County, and therefore denial of the motion to dismiss based on lack of venue was proper.

### **CONCLUSION**

Based on the facts apparent to the officers at the time of arrest, there is sufficient evidence to support probable cause that Appellant was driving while under the influence

and refused to submit to a breath test as required by law. The arrest was therefore lawful. There is sufficient evidence in the record to support a finding of proper venue. The trial court is AFFIRMED.

It is therefore ORDERED that the order of the trial court is hereby AFFIRMED.

Done and ordered in Chambers at New Port Richey, Pasco County, Florida this 15th day of December, 2014.

Original order entered on December 15, 2014 by Circuit Judges Stanley R. Mills, Shawn Crane and Daniel D. Diskey.