

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

**DEREK A. KOBEL,
Petitioner,**

**Case No.: 15-000014AP-88A
UCN: 522015AP000014XXXXCI**

v.

**FLORIDA DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.**

Opinion Filed _____/

Petition for Writ of Certiorari from
Decision of Hearing Officer
Bureau of Administrative Reviews
Department of Highway Safety
and Motor Vehicles

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PER CURIAM.

Derek A. Kobel seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles entered on January 21, 2015. The Decision affirmed the order of suspension of Mr. Kobel's driving privileges. This Court dispensed with oral argument. See Fla. R. App. P. 9.320. The petition is denied.

Statement of Case

The formal review hearing was conducted in this matter on December 18, 2014, and continued on January 21, 2015. The Hearing Officer admitted documentation into

evidence without objection. The Complaint/Arrest Affidavit of St. Petersburg Police Officer Arkovich indicates that on October 11, 2014, at approximately 1:54 a.m., a call was received that a man "passed out asleep in his running vehicle" had been found by security guards of the Parking Garage of the Baywalk Midcore Shopping Plaza in St. Petersburg, Florida. (App. 21; Tr. 12/18/14, p. 7). At the January 21, 2015, continued formal hearing, St. Petersburg Police Sergeant Gerardo confirmed that the police department had been notified by the Baywalk security that "there was a subject unresponsive in the vehicle." The establishments in the vicinity were still open for business and Mr. Kobel's vehicle was legally parked. Sgt. Gerardo testified that when he arrived at the parking garage, two other police officers were at the location:

And as we approached the vehicle, you could see that there was a male sitting in the driver's seat, and he was either asleep or [in] some sort of medical distress or something like that. He was not responding as people were trying to get his attention; the security guys and then myself and the other officers.

So we essentially went from there trying to figure out what the problem was.

Well, first we, kind of, just tried banging on the window just to get his attention. And like I said, he was obviously not conscious and was not responding to any type of stimulus or attempt to wake him up, and was, I would say again, in like a [slouched] position in the driver's seat of the car.

So we were trying to knock on the window. Knock with [my], you know, just with my – with my knuckle and tapped on it with my flashlight trying to – trying to elicit some sort of response just to make sure that the guy was okay at first.

(Tr. 01/21/15, p. 6-7). Sgt. Gerardo further described the manner in which Mr. Kobel was seated in the vehicle:

He was – my recollection of it, he was actually kind of seated canted [sic] would have been counter-clockwise in the seat. So his legs would have been closer to the door than the center of the driver's compartment of the car, and he was kind of – his back would have been over to the right-hand side of the seat, kind of, pointed towards the center console of the vehicle, kind of reclining back over the side of the – where maybe the armrest of the driver's seat of the vehicle, if that makes sense.

I recall his head actually being in a – like a back-tilted position, like this. So it was obvious that he was, kind of, out.

(Tr. 01/21/15, p. 7-8). Sgt. Gerardo continued to attempt to awaken Mr. Kobel. The sergeant testified:

He was completely unresponsive to any type of attempt to rouse him from outside the vehicle. The vehicle was running this entire time, that should be noted. Had been since, obviously, since security found him.

So next I checked to see if the car was locked, wanting to get inside and make sure the guy was okay. The car was not locked. So I opened the driver's door and, again, tried to kind of "hey, buddy; you all right?" You know just rouse him somehow.

I believe I tried, you know shaking his left arm. I may have even attempted a sternal rub on him, and didn't get any response.

....
My next action was actually, at that point, I was concerned that when he came to he would, you know be startled. You know, it was – once I got into the vehicle it was pretty evident that he was intoxicated. You can smell alcohol coming off his person inside the car.

So I was concerned that once we're able to rouse him, he's in a somewhat incoherent state; he could possibly, you know, be startled and try to put the vehicle in gear and either hurt himself, hurt one of the security guys out there or may[be] one of my officers. So I reached in under the steering column, turned the vehicle off and then just, kind of, let him sit there until, I believe, Officer Arkovich got there.

(Tr. 01/21/15, p. 8-9). Sgt. Gerardo testified that Off. Arkovich was called to conduct a Driving Under the Influence ("DUI") investigation because "it was pretty clear at that point that [Mr. Kobel] had been – the subject had been drinking." (Tr. 01/21/15, p. 10).

On December 18, 2014, at the formal review hearing, Off. Arkovich testified to his observations of Mr. Kobel when he arrived on the scene:

[Mr. Kobel] was still inside his vehicle, passed-out asleep. The officers had already been trying to wake him up, and he wasn't waking up. They had taken the keys out of the vehicle and shut the vehicle off; the vehicle was running so they shut it off and took the keys out for his and everybody else's safety.

....
Then I tried to wake him up myself. And I, you know, just tried calling out to him at first and nothing was working to wake him up. And then I used a sternal rub, which still took a while, but he finally woke up.

(Tr. 12/18/14, p. 10-11). Mr. Kobel was described by Off. Arkovich as sitting in the driver's seat, a little slumped over to his right, "kind of towards the passenger side,

yeah. Not a whole lot, but just that direction." (Tr. 12/18/14, p. 12-13). The driver's seat was reclined "a little bit, if I remember correctly." (Tr. 12/18/14, p. 13). When he became conscious, Mr. Kobel "woke up pretty violently, and was swinging and grabbing He woke up sort of, like, you know, he thought he was, like, he was being bothered and was trying to shoo me away from him." (Tr. 12/18/14, p. 13). Off. Arkovich found that "once he woke up he was awake" and Mr. Kobel understood what was happening and that Off. Arkovich was a police officer. (Tr. 12/18/14, p. 13-14).

The Incident/Investigation Report prepared by Off. Arkovich documents this testimony. The report states in part:

Several other officers and I tried to wake Kobel up. I used a sternal rub on his chest to wake him up but it was still difficult. Kobel finally woke up and stepped out of the vehicle. I asked him if he was sick or injured or in any need of paramedics. He said he was fine. I asked him the same question several minutes later just to confirm. I also confirmed with him that he was awake, knew who I was, and knew what was going on.

I obtained Kobel's personal and health information. He said he was in good health, was not taking any medications and did not have any physical problems I needed to be aware of.

(App. 8).

After further investigation, Mr. Kobel was arrested for DUI and taken to the St. Petersburg Police Station breath testing center. Mr. Kobel refused to supply a sample for breath-alcohol testing.

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 law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento, 989 So. 2d 692, 693 (Fla. 4th DCA 2008). This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. Dep't of Highway Safety & Motor Vehicles v. Stenmark, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006).

A formal review of a driver's license suspension is conducted pursuant to section 322.2615(1)(b)3, Florida Statutes (2011). The hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The Department cannot suspend a driver's license under section 322.2615 for refusal to submit to a breath test under section 316.1932, Florida Statutes (2011), if the refusal is not incident to a lawful arrest. Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1076 (Fla. 2011).

Analysis

Only one issue is raised on appeal: Did the Hearing Officer depart from the essential requirements of law in finding that Mr. Kobel was lawfully arrested and does substantial, competent evidence support such a finding.

Counsel for Mr. Kobel asserts that by opening the door and turning off the engine to the vehicle, Sgt. Gerardo escalated the citizen encounter into an investigatory stop and detention. There must be a reasonable suspicion of criminal activity to initiate a detention.

It is noted that the vehicle was not illegally parked, Mr. Kobel was not committing a traffic infraction, and nearby businesses were still open. In the initial brief, counsel indicates, "The only other reported observation was that the Petitioner was either sleeping or in medical distress and would not respond to attempts to get his attention." (Initial Br. p. 8).

Counsel argues that Mr. Kobel had no duty to acquiesce to the authority of a police officer who is approaching him when there was no illegal activity and no reasonable suspicion for detention. In support of this statement, counsel directs this Court to numerous opinions from the appellate divisions of circuit courts in cases challenging the denial of motions to suppress in criminal convictions. These cases involved conscious individuals who refused to acquiesce, or unwillingly acquiesced, to a law enforcement officer's commands to open the door or window of a vehicle. See Cieslak v. State, 19 Fla. L. Weekly Supp. 681b (Fla. 6th Cir. App. Ct. April 12, 2012); Buchanan v. State, Case No. 2010-AP-35CVC (Fla. 4th Cir. App. Ct. Dec. 16, 2010); Ganger v. State, Case No. 2008-AP-52CVC (Fla. 4th Cir. App. Ct. Dec. 8, 2008); see also State v. Birchfield, 19 Fla. L. Weekly Supp. 1093a (Fla. 20th Jud. County Ct. Sept.

7, 2012). These cases are distinguishable on their facts from the present case in that Mr. Kobel initially had no response to the officers' attempts to bring him to consciousness. Only after numerous unsuccessful attempts had been made, before and after the door to the vehicle was opened, was Mr. Kobel awakened by Off. Arkovich's sternal rub.

The same distinguishing facts are present in the appeals from the denials of motions to suppress in the criminal convictions in Danielewicz v. State, 730 So. 2d 363 (Fla. 2d DCA 1999)(noting officer did not testify he was concerned for driver's personal health) and Greider v. State, 977 So. 2d 789 (Fla. 2d DCA 2008)(officer initially concerned for occupant's welfare, but that concern dispelled when he initially spoke to occupant).

Mr. Kobel's reliance on the Fourth Judicial Circuit Court appellate decision in Kamau v. State of Florida, Department of Highway Safety and Motor Vehicles, 22 Fla. L. Weekly Supp. 418a (Fla. 4th Cir. App. Ct. Dec. 8, 2014), cert. pend'g, Case No. 1D15-497 (Fla. 1st DCA), is equally misplaced. The Kamau case involved an anonymous tip concerning an "unresponsive" person in a vehicle at a specified location. Upon arriving at the scene, the deputy blocked Mr. Kamau's vehicle with his patrol car and then opened the door of Mr. Kamau's vehicle. The deputy immediately turned off the engine, removed the keys, and placed the keys on the roof of the vehicle. Only after the deputy was able to awaken Mr. Kamau and they were involved in conversation did the deputy detect the odor of alcohol.

Based on these facts, the circuit appellate court found that at the time the deputy turned off the engine of the vehicle, the officer did not have a reasonable suspicion of criminal activity or specific concern for the health and safety of Mr. Kamau or others. It concluded that the seizure was based solely on an anonymous tip. The Kamau case is factually distinguishable from the present case. See also Gentles v. State, 50 So. 3d 1192 (Fla. 4th DCA 2011)(reversing denial of motion to suppress because "the record is devoid of facts showing that the officer's instruction to shut off the car was reasonably based on concerns for the defendant's safety or was necessary to determine if he needed any aid or assistance. Officer Horn testified that he issued the order immediately after approaching the vehicle and awakening the defendant. The order to

shut off the car was given *after* the defendant was awakened and *before* the officer had developed any facts indicating whether the defendant was in difficulty or distress."); State v. Willers, 18 Fla. L. Weekly Supp. 620b (Fla. 4th Jud. County Ct. April 13, 2011)(granting motion to suppress because officer immediately turned off the vehicle and placed keys on roof of car without any prior indication of driver's intoxication).

Sgt. Gerardo repeatedly testified that he was concerned that Mr. Kobel was in need of medical attention and that is why he opened the door to the vehicle. Concern for the occupant's safety and welfare prompted the law enforcement officer's action in the present case just as in Dermio v. State, 112 So. 3d 551 (Fla. 2d DCA 2013). "It is well recognized that police officers may conduct welfare checks and that such checks are considered consensual encounters that do not involve constitutional implications." Id. at 555. The Dermio court noted:

Yet, even though the initial stop was consensual, that does not end our analysis because the deputy went on to ask Dermio to roll down the window on multiple occasions and the deputy eventually opened the door to Dermio's car. This court has repeatedly held that where an officer orders an individual to exit a vehicle, an investigatory stop occurs. See, e.g., State v. Jimoh, 67 So. 3d 240, 241–42 (Fla. 2d DCA 2010); Parsons v. State, 825 So. 2d 406, 408 (Fla. 2d DCA 2002); Danielewicz v. State, 730 So. 2d 363, 364 (Fla. 2d DCA 1999). We have extended that principle to situations where an officer commands an occupant of a car to roll down the window. See Greider [v. State], 977 So. 2d [789,] 792–93 [(Fla. 2d DCA 2008)].

However Greider does not control this case because there, during the officer's initial welfare check, the officer's concern for the occupant's safety had subsided and the officer testified he "didn't think any criminal activity had occurred or was about to occur." Id. at 792. In contrast, the deputy's concern for Dermio's safety in this case had not yet been alleviated because Dermio continued to be incoherent and "out of it." Consequently, the deputy's requests for Dermio to roll down the window did not transform the consensual encounter into an investigatory stop.

Dermio, 112 So. 3d at 556.

When Sgt. Gerardo opened the door of the vehicle and smelled the odor of alcohol, Mr. Kobel still was unresponsive to the officer's attempt to awaken him. Due to the fact that he had detected the odor of alcohol, Sgt. Gerardo turned off the engine to the vehicle and removed the keys. When Mr. Kobel finally became conscious, Off. Arkovich immediately asked if he was sick or injured or in any need of paramedics.

In evaluating the validity of a traffic stop, this Court is to determine if the law enforcement officer had an objectively reasonable basis to effectuate the initial stop. See Dobrin v. Fla. Dep't of Hwy. Safety & Motor Vehicles, 874 So. 2d 1171 (Fla. 2004). In order to effectuate a valid stop, the deputy need only have a "founded suspicion" of criminal activity. State, Dep't of Hwy. Safety & Motor Vehicles v. DeShong, 603 So. 2d 1349, 1351 (Fla. 2d DCA 1992). "[A] legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." Id. at 1352; Shively v. State, 61 So. 3d 484, 486 (Fla. 2d DCA 2011).

In these instances, law enforcement officers are engaging in "community caretaking functions." Id. In keeping with such community caretaking responsibilities, law enforcement officers may properly check on a driver's status and condition to determine if he or she is in need of assistance or aid. "This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens." Gentles, 50 So. 3d at 1198-99.

In summary, after repeatedly, unsuccessfully attempting to awaken Mr. Kobel, Sgt. Gerardo opened the door to the vehicle, smelled the odor of alcohol, and found it was "evident" that Mr. Kobel was intoxicated. At that time, Sgt. Gerardo turned off the engine in Mr. Kobel's vehicle and removed the keys from the ignition. Testimony was presented that this action was taken to prevent any possible future injury to the still unconscious Mr. Kobel or to officers or citizens in the immediate vicinity. Such an action has been found to be permissible as part of the officer's community caretaking responsibilities.

Conclusion

The Hearing Officer is required to determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. "The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not Substantial evidence has been defined as evidence 'which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be

somewhat less than a preponderance.' " State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

"Probable cause" or "reasonable cause" exists "where the facts and circumstances, as analyzed from the officer's knowledge . . . and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." Dep't of Highway Safety & Motor Vehicles v. Silva, 806 So. 2d 551, 554 (Fla. 2d DCA 2002)(quoting Dep't of Highway Safety & Motor Vehicles v. Favino, 667 So. 2d 305, 308 (Fla. 1st DCA 1995)). The facts and circumstances surrounding the incident should be examined. "It has been said that probable cause is a conclusion often drawn from 'reasonable inferences.'" Id. The Court should not ignore all "obvious implications" and reasonable inferences to be drawn from the surrounding circumstances and the arresting officer's observations. See id. (citing Favino, 667 So. 2d at 308).

The Court is not to reweigh the evidence, but is to determine if competent, substantial evidence supports the Hearing Officer's findings and Decision. Stenmark, 941 So. 2d at 1249. This Court concludes that there is competent, substantial evidence in the record to support the Hearing Officer's finding that the initial detention of Mr. Kobel was lawful. The Hearing Officer did not depart from the essential requirements of law in affirming the suspension of Mr. Kobel's driving privileges.

The petition for writ of certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 30th day of April, 2015.

Original Order entered on April 30, 2015, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Keith Meyer.

Copies furnished to:

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