

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION**

**KELLY BOBER,**  
Petitioner,

v.

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

Ref. No.: 14-000077AP-88B  
UCN: 522014AP000077XXXXCV

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**ORDER AND OPINION**

Petitioner challenges a final order of the Department of Highway Safety and Motor Vehicles suspending her license under §322.2615, Fla. Stat., for being in actual physical control of a motor vehicle while having an unlawful breath-alcohol level. Petitioner contends that the Department's order was not supported by competent substantial evidence that Deputy Gauthier had probable cause to believe that she was in actual physical control of a motor vehicle while under the influence at the time of her arrest.

**Facts and Procedural History**

On August 30, 2014, Deputy Gauthier responded to a complaint by Mr. Mariano Alvarez describing two females arguing while driving in a white jeep with a black top that was "all over the place," almost hitting a group of pedestrians. Responding to Mr. Alvarez's call, Deputy Gauthier pulled up behind the parked Jeep and approached the vehicle. Deputy Gauthier asked Petitioner (sitting in the driver's seat) what was going on, and Petitioner stated that they were arguing over what they were going to eat. The person sitting in the passenger seat, Ashley, stated that Petitioner was angry because Ashley was driving at first but could not drive stick. Deputy Gauthier could not see where the keys to the vehicle were at this time. While speaking with Petitioner, Deputy Gauthier detected a strong odor of alcohol on her breath, and noticed that her eyes were watery and bloodshot and her speech was slurred. Deputy Gauthier asked Petitioner for her driver's license. Petitioner asked if she could open her car door, but Deputy Gauthier told her to remain in her seat unless her license was somewhere else in the car. After being asked four times, Petitioner provided her driver's license and Deputy Gauthier returned to his vehicle to run the license through the Florida Crime

Information Center database. Another deputy, Deputy Tzoucalis, stayed with Petitioner and the Jeep during this time.

While Deputy Gauthier was running the licenses, the citizen informant, Mr. Alvarez, approached him and described what he had seen. Mr. Alvarez stated that he saw the Jeep driving south on Gulf Blvd. He said that the vehicle was “all over the place,” and almost hit a group of pedestrians. Mr. Alvarez said the jeep locked its gears, at which point Petitioner and Ashley switched seats. Mr. Alvarez continued to watch as Petitioner drove erratically over to the yard, and stated that Petitioner and Ashley continued to argue up to the point when the deputies arrived.

After speaking with Mr. Alvarez, Deputy Gauthier returned to the Jeep to speak with Petitioner and Ashley again. Deputy Gauthier explained to Petitioner that based on his observations up to that point, he wanted to test her eyes for Horizontal Gaze Nystagmus to see if she was too impaired to drive. Deputy Gauthier asked Petitioner to step out of the vehicle to talk to him, and asked if she was willing to perform any FSEs, to which Petitioner responded “no,” and added “I don’t have to do anything you say.” Deputy Gauthier told Petitioner to get out of the vehicle, to which she responded “I’m not listening to you or any of your bullshit.” Deputy Gauthier established control of Petitioner’s arm to pull her out of the vehicle, but Petitioner pulled her arm away. Deputy Tzoucalis and Deputy Gauthier then had to physically remove Petitioner from the driver’s seat. As Petitioner was being pulled out of the Jeep, the car keys fell from underneath her legs and onto the car’s floorboard. At this point, Deputy Gauthier arrested Petitioner for DUI based on his observations of her condition and the fact that she was sitting in the driver’s seat with the car keys underneath her legs. Petitioner was also arrested for resisting an officer without violence under §843.02, Fla. Stat. Petitioner refused to submit to a breath test, and her driver’s license was suspended. After a formal review, her suspension was upheld, and Petitioner filed the instant petition for writ of certiorari.

### **Discussion**

Petitioner argues that (1) a warrantless arrest for the misdemeanor offense of DUI requires that an officer personally witness all elements of the crime; (2) Deputy Gauthier did not witness Petitioner in actual physical control of a vehicle because the engine was off and he did not see any keys to the vehicle until he pulled Petitioner out of the car; (3) because the engine was off and the keys were out of sight there was no probable cause for Petitioner’s arrest; and therefore 4) Petitioner’s refusal should be overturned as not incident to a lawful arrest.

Petitioner reasons that when she was pulled out of the vehicle, she became detained under the 4th amendment, and since any detention must be lawful for evidence from the seizure to be



admissible, the keys that were discovered after her seizure should not be used to establish probable cause of her actual physical possession of the vehicle. Furthermore, the observations of Petitioner's erratic driving by Mr. Alvarez, a non-law enforcement officer, could not be imputed to a law enforcement officer pursuant to the fellow officer rule to establish probable cause for the misdemeanor arrest. Without the observations of Mr. Alvarez, Petitioner argues that Deputy Gauthier did not have probable cause that she was in actual physical control of the vehicle at the time he pulled her from the car and discovered the car keys. As explained below, Petitioner's arguments are specious.

#### Consensual Encounter, Investigatory Stop, Arrest

There are essentially three levels of police-citizen encounters. *Popple v. State*, 626 So. 2d 185 (Fla. 1993). The first level is considered a consensual encounter and involves only minimal police contact. During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The second level of police-citizen encounters involves an investigatory stop as enunciated in *Terry v. Ohio*, 92 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. §901.151 Fla. Stat. (1991). In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop. *Carter v. State*, 454 So.2d 739 (Fla. 2d DCA 1984). The third level of police-citizen encounters involves an arrest which must be supported by probable cause that a crime has been or is being committed. *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); § 901.15, Fla. Stat. (1991).

When Deputy Gauthier told Petitioner to stay in her seat, demanded Petitioner give him her identification, and returned with it to run it through the police system, the consensual encounter became a stop for fourth amendment purposes. See *Perko v. State*, 874 So. 2d 666 (Fla. 4th DCA 2004) (Klein, J., concurring specially). Prior to demanding Petitioner's driver's license, there is nothing in the record to suggest that Petitioner had been stopped under the fourth amendment. Deputy Gauthier's walking up to the parked Jeep was a consensual encounter. The Jeep was already parked on the grass with its engine turned off when Deputy Gauthier arrived, and nowhere in the record does it state, nor does Petitioner contend on appeal, that Deputy Gauthier used his siren or any flashing lights when he approached Petitioner. The evidence supports the conclusion that at the time

deputy Gauthier approached Petitioner on foot, it was nothing more than a consensual encounter. Only when Deputy Gauthier demanded that Petitioner give him her driver's license did the encounter change from a consensual encounter to a stop.

Deputy Gauthier's telling Petitioner to remain seated and taking her license is considered a stop, and therefore, Deputy Gauthier was required to have a reasonable suspicion that crime was afoot. After speaking with Petitioner and Ashley, Deputy Gauthier observed that Petitioner showed several signs of impairment, including alcohol on her breath, bloodshot and watery eyes, and slurred speech. Ashley, sitting in the passenger seat, told him that Petitioner was angry because Ashley was driving at first but couldn't drive a stick shift. Deputy Gauthier's own observations of impairment in Petitioner sitting in the driver's seat, combined with Ashley's statement confirming what Mr. Alvarez had told him about driving stick and switching seats, gave Deputy Gauthier reasonable suspicion for an investigatory stop.

Because there was reasonable suspicion for the stop, Deputy Gauthier was authorized to order Petitioner out of the vehicle. (*Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 98 S.Ct. 330, 332-33, 54 L.Ed. 2d 331, 336-37 (1977)). When Petitioner was forcefully removed from her car, she was seized, but was not yet under arrest. *See Popple v. State*, 626 So. 2d 185 (Fla. 1993) (Police officer's direction for occupant of legally parked car to exit his vehicle was "seizure" of occupant requiring that officer have reasonable suspicion to detain occupant). Because Petitioner was not under arrest at the time the keys were discovered, Petitioner's argument that the location of the keys should be suppressed as a fruit of a search pursuant to an unlawful arrest is without merit. In addition, even if the Petitioner was considered under arrest at this point, a search of the car would be authorized as incident to the lawful arrest of resisting an officer without violence.

#### Fellow Officer Rule

Under the "fellow officer rule," the collective knowledge of officers investigating a crime is imputed to each officer, and one officer may rely on the knowledge and information possessed by another officer to establish probable cause. *State v. Bowers*, 87 So. 3d 704 (Fla. 2012). The rule does not, however, impute the knowledge of a citizen informant to an officer. *Sawyer v. State*, 905 So. 2d 232 (Fla. 2d DCA 2005). Petitioner argues that since Mr. Alvarez is not a law enforcement officer, Deputy Gauthier could not rely on Mr. Alvarez's observations to show that Petitioner was driving or had actual physical possession of a vehicle while under the influence.

While it is true that Deputy Gauthier could not rely on Mr. Alvarez's statements to establish probable cause to arrest Petitioner for driving under the influence under the fellow officer rule, the



rule does not prohibit an officer from relying on credible information from a citizen informant in developing a reasonable suspicion for a stop. *DHSMV v. Ivey*, 73 So. 3d 877 (Fla. 5th DCA 2011) (“A founded or reasonable suspicion necessary to support an investigatory stop is a suspicion that would warrant a man of reasonable caution to believe that a stop was appropriate. More importantly, for purposes of this case, a reasonable suspicion can be based solely on information provided by an ordinary citizen.”) That is what happened in the instant case. Deputy Gauthier did not rely on Mr. Alvarez’s statement to develop probable cause; he developed probable cause only after observing Petitioner’s physical state himself and seeing her in possession of the keys when she was being removed from the car. To the extent Deputy Gauthier relied on Mr. Alvarez’s observations, it was only to conclude that there was a reasonable suspicion to stop Petitioner to further investigate. Clearly, Mr. Alvarez’s detailed information concerning Petitioner’s erratic driving, in addition to Deputy Gauthier’s personal observations while speaking with Petitioner that she had blood-shot watery eyes, slurred speech, and her breath smelled of alcohol, provided Deputy Gauthier with reasonable suspicion for an investigatory stop to determine if Petitioner was in actual physical control of a motor vehicle while under the influence.

#### Actual Physical Control

Petitioner’s final argument is that since Deputy Gauthier did not know where the keys were, there was not probable cause to arrest her for being in actual physical possession of a vehicle under the influence. However, as explained above, the deputy became aware that the keys were under Petitioner’s lap before the arrest for DUI was made. The observation of Petitioner’s physical state, along with the keys being in her control and within immediate grasping distance, provided Deputy Gauthier with probable cause of actual physical control for the arrest. This is so without relying on any statements by Mr. Alvarez at all.<sup>1</sup> Because Deputy Gauthier personally observed Petitioner showing signs of intoxication while sitting in the driver’s seat with the car keys within her immediate

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<sup>1</sup> See *State v. Prue*, 701 So. 2d 637 (Fla. 2d DCA 1997) (“We conclude that there was competent substantial evidence before the hearing officer to conclude that Prue was in actual physical control of her vehicle...Case law supports the hearing officer’s findings under the facts of this case where Prue was the only one in the vehicle and the keys to the vehicle were either in the ignition or near enough for Prue to use them to start the vehicle and drive away.”); *State v. Fitzgerald*, 63 So. 3d 75 (Fla. 2d DCA 2011) (there was a legitimate inference to be drawn that defendant placed herself behind the wheel and at any time could have started the car and driven away, where defendant was sitting in the driver’s seat and the keys were close enough for defendant to use them to start the car and drive away.); *Durham v. DHSMV*, 17 Fla. L. Weekly Supp. 993 (Fla. 14th Cir. Ct. March 2, 2007 (officer had probable cause for DUI arrest where defendant, sole occupant of vehicle, was passed out behind vehicle, keys were in the vehicle but not in the ignition, and defendant smelled of alcohol and had bloodshot eyes.)

possession, he personally observed all the elements of the offense as required for a warrantless arrest for misdemeanor DUI.

### **Conclusion**

Because Deputy Gauthier had reasonable suspicion to suspect Petitioner of being in actual physical control of a vehicle while under the influence at the time he initiated the investigatory stop, and in the course of executing the stop saw the car keys fall from under Petitioner's legs to the floor, there was competent substantial evidence that Deputy Gauthier had probable cause to arrest Petitioner for being in actual physical control of a vehicle while intoxicated.

Accordingly, it is

**ORDERED AND ADJUDGED** that the above-styled petition for writ of certiorari is DENIED.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, on this 12 day of May 2015.

Original Order entered on May 12, 2015, by Circuit Judges Amy Williams, Jack Day, and Pamela A.M. Campbell.

Copies furnished to:  
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