IN THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Joseph Charles Xuereb, Jr.,

Petitioner,

v.

State of Florida,
Department of Highway
Safety and Motor
Vehicles,

Respondent.
_____/

CASE NO.: 20-CA-6968

DIVISION: E

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Joseph Charles Xuereb, Jr. seeks certiorari review of a hearing officer's decision to affirm the suspension of his driving privileges. This Court has jurisdiction. Because the hearing officer did not depart from the essential requirements of the law, the petition must be denied.

I. STANDARD OF REVIEW

When a circuit court reviews local administrative agency action on a petition for certiorari, it functions as an appellate court and is not entitled to reweigh the evidence or substitute its judgment for that of the agency. Haines City Cmty. Dev't v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). Instead, its analysis is confined to whether (1) procedural due process was given; (2) the essential requirements of the law were

observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. Id.

II. FACTS AND PROCEDURAL HISTORY

Mr. Xuereb was arrested for driving under the influence on June 5, 2020, when law enforcement officers stopped to provide assistance to him on the side of I-10 in Gadsden County. The first officer stopped to determine if the vehicle was disabled and Mr. Xuereb informed her that he had run out of gas. The second officer then detected the strong odor of alcohol on Mr. Xuereb's breath and learned that Mr. Xuereb believed that he was parked in front of his subdivision in Navarre, Florida—roughly 169 miles away. Mr. Xuereb informed one officer that his wife had just left home to bring him some gas and was only a few minutes away.

The first-responding officer noted that Mr. Xuereb's eyes were bloodshot and watery, his speech was slightly slurred, and his breath smelled of alcohol. Mr. Xuereb denied that he consumed any alcohol after he ran out of gas. He agreed to perform field sobriety exercises, during which additional indicators of impairment were observed. Based on the observations of and information obtained by the two officers, Mr. Xuereb was arrested and transported to Gadsden County Jail. Upon arrival at the jail, Mr. Xuereb twice refused to submit to a breath test. His driver's license was then suspended.

Mr. Xuereb sought review of the suspension at a hearing held on July 24, 2020. At the hearing, he argued that his arrest was unlawful and therefore the suspension should be invalidated. The hearing officer concluded that the arrest was lawful because the officers had probable cause as to each element of the crime. He further concluded that the suspension was proper because Mr. Xuereb refused to submit to a breath test and had been informed that refusal of the test would result in a license suspension. The hearing officer affirmed the suspension in an order dated July 30, 2020.

Mr. Xuereb asks for certiorari review of that order.

III. ANALYSIS

When considering whether a driver's license was properly suspended for failure to submit to a test pursuant to section 322.2615, Florida Statutes, a hearing officer must determine "whether the test was administered incident to a lawful arrest." Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1079 (Fla. 2011). If the arrest was not lawful in the first place, then the suspension of the driver's license must be invalidated. Id. at 1076; Arenas v. Dep't of Highway Safety & Motor Vehicles, 90 So. 3d 828, 834 (Fla. 2d DCA 2012).

Driving under the influence ("DUI") is a crime delineated in section 316.193, Florida Statutes. A person is guilty of DUI when he or she is found to have been "driving or in actual physical control of a vehicle within this state and . . . under the

influence of alcoholic beverages . . . when affected to the extent that the person's normal faculties [were] impaired." § 316.193(1)(a), Fla. Stat.

Section 901.15, Florida Statutes provides a legal basis for warrantless arrest under specified circumstances. Under that statute, an officer may arrest a driver without a warrant if a violation of chapter 316 is committed "in the presence of the officer." § 901.15(5), Fla. Stat.

An offense is committed in the presence of the officer when:

> the officer receives knowledge of the commission of an offense in his presence through any of his senses, or by inferences properly to be drawn from the testimony of the senses, or when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that [an offense is committed].

State v. Englehardt, 465 So. 2d 1366, 1368 (Fla. 4th DCA 1985) (quoting 6A C.J.S. Arrest § 18).

A violation has been "committed in the presence of the officer" if the suspect admits to an essential element of the crime when making a statement to the arresting officer. U.S. v. Svaib, 924 F. Supp. 137, 139 (M.D. Fla. 1996) (holding "[a] suspect's admission as to an essential element of a crime satisfies" the presence requirement). For that reason, Mr. Xuereb's arrest was lawful if the facts and circumstances observed gave the officer probable cause to believe that Mr. Xuereb was (1) driving or in actual physical control of the vehicle and (2) under the

influence of alcoholic beverages to the extent that his normal faculties were impaired. Actual physical control "means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether he/she is actually operating the vehicle at the time." Hughes v. State, 943 So. 2d 176, 193 (Fla. 3d DCA 2006) (quoting Fla. Std. Jury Instr. (Crim.) 28.1) (internal quotations omitted).

The hearing officer's decision does not stray from these requirements. The hearing officer found that there was sufficient evidence to establish probable cause to arrest Mr. Xuereb for DUI. The hearing officer emphasized that Mr. Xuereb's statements to the law enforcement officers gave rise to a reasonable inference that he was driving the vehicle while impaired when the vehicle ran out of gas. In addition, the record indicates that every observation made at the scene before Mr. Xuereb's arrest was made solely by the officers, which is within the requirements of section 901.15(5), Florida Statutes.

Mr. Xuereb asserts that as a matter of law he could not have been in actual, physical control of the vehicle because it was out of gas and inoperable when the officers arrived. But Mr. Xuereb confuses the standard for a lawful arrest with the availability of a defense to DUI. It was not necessary for the arresting officer to find that the vehicle was operable before finding probable cause to arrest Mr. Xuereb because operability is not an element of DUI. State v. Fitzgerald, 63 So. 3d 75, 78

(Fla. 2d DCA 2011) ("In Florida, a vehicle's inoperability is a defense rather than an element."); see also Fla. Std. Jury Instr. (Crim.) 28.1 (identifying inoperability as a defense to, not an element of, DUI and recognizing that inoperability "is not a defense if the defendant was driving under the influence before the vehicle became operable."); Jones v. State, 510 So. 2d 1147 (Fla. 1st DCA 1987) (holding that the State is not required to prove that the vehicle "is capable of immediate self-powered mobility" as an element of actual physical control); State v. Benyei, 508 So. 2d 1258 (Fla. 5th DCA 1987) (car may have been inoperable when the officer arrived on the scene, but the evidence was sufficient for the jury to find that the driver was intoxicated when the car went off the highway onto a median); State v. Boynton, 556 So. 2d 428 (Fla. 4th DCA 1989) (inoperability defense not available to a defendant who was driving under the influence at the time the car became inoperable).

Mr. Xuereb's arguments relying on Steiner v. State, 690 So. 2d 706 (Fla. 4th DCA 1997), and Sawyer v. State, 905 So. 2d 232 (Fla. 2d DCA 2005) are unpersuasive. Steiner involved a petition for writ of certiorari to the Fourth District Court of Appeal after the circuit court reversed the county court's grant of a motion to suppress. 690 So. 2d at 708. A condominium complex security guard observed the petitioner attempting to start a vehicle that was stopped in a driveway near the guardhouse. Id. at 707. After the guard observed smoke coming from the car and the

petitioner swaying, the guard assisted the petitioner to a chair and called 911. Id. A community service aide arrived first and spoke with the petitioner who admitted that "he was attempting to restart his vehicle when the guard removed him from the car." Id. The aide, after smelling alcohol on the petitioner's breath, "called for another officer to conduct a DUI investigation." Id. When speaking with the petitioner, the DUI investigator smelled alcohol on the petitioner's breath and proceeded to arrest the petitioner for DUI. Id. "Petitioner moved to suppress the evidence alleging that his arrest was illegal," which the county court granted because there was no evidence to support a warrantless misdemeanor arrest. Id. at 708. The circuit court subsequently reversed, relying on cases involving distinguishable facts and issues. The Fourth District Court of Appeal concluded that when the circuit court decided the issue based on distinguishable cases, it departed from the essential requirements of the law. Id.

In Mr. Xuereb's case, the officer did not rely on the observations of non-officers in finding probable cause. Probable cause was based on the observations and information obtained by law enforcement officers who both responded to the scene. This is permitted under section 901.15, Florida Statutes. Further, the officer observed Mr. Xuereb in the vehicle and requested that he exit the vehicle to conduct field tests. Moreover, Mr. Xuereb told the officer he ran out of gas and had not consumed any alcoholic beverages since then. It was reasonable for the officer to

conclude that Mr. Xuereb, who the officer observed to be impaired, was out of the gas on the side of I-10 because he was driving the vehicle under the influence when it ran out of gas.

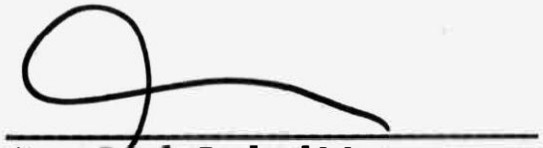
Sawyer is similarly unhelpful. In that case, the petitioner requested certiorari relief from the Second District Court of Appeal after the circuit court affirmed the county court's denial of a motion to suppress evidence. 905 So. 2d at 233. The officer received information from two citizens that petitioner was driving erratically, then exited the vehicle and staggered to a nearby convenience store. Id. After receiving this information the officer approached petitioner outside the store, conducted field sobriety tests, and then arrested petitioner for DUI. Id. After the arrest, the officer searched petitioner and found marijuana, which petitioner subsequently moved to suppress arguing that the search was conducted after an unlawful arrest. Id. The circuit court affirmed the county court's denial of the motion, holding that the citizens' observations combined with the officer's observations and field tests established probable cause to arrest petitioner. Id. The Second District Court of Appeal granted certiorari because the officer incorrectly relied on the citizens' observations and otherwise never observed Sawyer in control of a vehicle. Id.

Those facts are materially different from Mr. Xuereb's situation. The officers who arrested him found him in the vehicle and they relied on their own observations to establish probable cause.

IV. CONCLUSION

The petition is denied.

DONE and ORDERED in Tampa, Florida on this 17th day of March, 2022.



Anne-Leigh Gaylord Moe
Circuit Court Judge

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