NOT FINAL UNTIL DISPOSITION
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. 2020-132-AP-01

JAMES ROBERT McMULLIN,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,

Respondent.
_____/

LOWER CASE NO.: A76RAVE

Opinion filed:

On Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles

Charles D. Barnard, Esq., Charles D. Barnard, P.A., for Appellant.

Mark L. Mason, Assistant General Counsel, Office of General Counsel, Department of Highway Safety and Motor Vehicles, for Appellee.

Before: TRAWICK, WALSH and SANTOVENIA, JJ.

TRAWICK, J.

Petitioner challenges the suspension of his driver's license for violating Florida's implied consent law, §322.2615, Fla. Stat. He contends that the officer who approached his parked vehicle lacked probable cause for a stop, thereby invalidating the license suspension. He also contends the officer's post-stop observations did not provide the basis for a request that Petitioner submit to a breath test. Finally, Petitioner argues that there is no substantial competent evidence that he was in actual physical control of the vehicle at the time of the stop.

On April 5, 2020 at about 1:35 a.m., Trooper Meghan Vargo of the Florida Highway Patrol performed a check on a car parked on the shoulder of the Florida Turnpike. Upon approaching the vehicle, Trooper Vargo observed Petitioner asleep in the backseat of the car. Through a window, which was cracked open, she woke Petitioner. When he was aroused, Petitioner responded by saying "I'm in here." Trooper Vargo noticed that when Petitioner responded, he was moving around "excessively."[1] Concerned by her observations, she asked him to get out of

[1] It appears that Petitioner only provided a partial copy of the transcript. It is interesting to note that the partial transcript did not include any mention of the Petitioner's movements in the vehicle, an important fact which interestingly was potentially averse to Petitioner's position. Of course, it is the Petitioner's burden to provide a complete record of proceedings below. *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla.1979). Despite this omission, the hearing officer referenced Petitioner's movements in her findings. Neither party takes issue with this portion of her findings, and this Court accepts those findings as conclusively established.

the car because "I didn't feel comfortable with him being in the backseat, and me not knowing who he was or what was inside the vehicle at that time." Petitioner responded by "kind of fumbling out of the vehicle" by climbing out through the front passenger door. Trooper Vargo also noticed that there was a "key fob" on the front right passenger floorboard "in plain view." After Petitioner exited the vehicle, she detected an odor of alcohol emitting from his "facial area." According to Trooper Vargo, he had "bloodshot glassy eyes, slurred speech and unsteadiness on his feet." Trooper Vargo performed a field sobriety test, which Petitioner failed to perform satisfactorily. She then placed Petitioner under arrest for DUI. Petitioner later refused a request to submit to a breath test. He was read an implied consent warning but maintained his refusal to submit to the test. As a result, his driver's license was suspended. After a formal review hearing, the hearing officer sustained the suspension. It is from that decision that this petition comes before this Court.

Section 316.1945(1)(a)(11), Fla. Stat., provides, in pertinent part, that it is unlawful for a person to park a vehicle

> On the roadway or shoulder of a limited access facility, except as provided by regulation of the Department of Transportation, or on the paved portion of a connecting ramp; except that a vehicle which is disabled or in a condition improper to be driven as a result of mechanical failure or crash may be parked on such shoulder for a period not to exceed 6 hours.

Further, §316.194(1), Fla. Stat., states:

> Upon any highway outside of a municipality, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave the vehicle off such part of the highway; but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles, and a clear view of the stopped vehicle shall be available from a distance of 200 feet in each direction upon the highway.

Clearly, the record supports the conclusion that Petitioner was in violation of both of the above statutes. Petitioner was parked on the shoulder of a major thoroughfare, the Florida Turnpike, at 1:35 a.m. At the very least this gave rise to reasonable suspicion for Trooper Vargo to approach Petitioner's parked car to investigate. *See Fulmer v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014). Although reasonable suspicion for such a stop is sufficient and the heightened standard of probable cause is not necessary, we find that probable cause was also present when Trooper Vargo observed Petitioner's vehicle. *See State v. Hernandez,* 718 So. 2d 833 (Fla. 3d DCA 1998) (driver's commission of traffic infraction provided probable cause for lawful stop and detention of the vehicle).

Additionally, on these facts, Trooper Vargo was justified in conducting a welfare check on Petitioner's vehicle. A police officer may conduct such a search when there is a reasonable concern that a driver may be in need of aid. *Dermio v.*

State, 112 So. 3d 551, 555 (Fla. 2d DCA 2013); *Fulmer,* 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014). We therefore reject Petitioner's argument that a lack of probable cause invalidated Petitioner's license suspension.

Petitioner next contends that Trooper Vargo's post-stop observations did not give rise to a reasonable basis for her to request that Petitioner submit to a breath test. In particular, he disputes the conclusion that Petitioner was moving around excessively. Even if this was true, he maintains that this conclusion, coupled with Trooper Vargo's subjective feeling that she wasn't comfortable with Petitioner being in the backseat of the car, was an insufficient basis to ask him to get out of the car. We do not agree. First, these facts, when considered with where the car was parked, the time of day and his being asleep in the backseat, support Trooper Vargo asking Petitioner to get out of the car as part of a welfare check. Second, once a vehicle is lawfully stopped, a police officer may ask an occupant to exit the vehicle without further justification. *See Maryland v. Wilson,* 519 U.S. 408 (1997) (police officer may, as a matter of course, order passengers of a lawfully stopped car to exit the vehicle). Third, these facts give rise to reasonable suspicion that were heightened, not dispelled, by Petitioner's erratic behavior. Further

investigation was therefore justified.[2] As a result, for all of these reasons, Trooper Vargo's direction that Petitioner exit his vehicle was appropriate.

Petitioner's final argument is that there was no substantial competent evidence presented to the hearing officer to establish that he was in actual physical control of the vehicle at the time of the stop. This argument is also unavailing. The Petitioner was in the vehicle alone. The vehicle did not magically appear on the roadside of the Turnpike. A key fob was on the front right passenger floorboard.[3] Although the Petitioner would have had to either climb over the backseat (which he did when Trooper Vargo told him to get out of the car) or get out of the car and re-enter through a front door to take hold of the key and start the car, this was enough for the Petitioner to be considered in control of the vehicle. *See State of Florida Dept. of Hwy Safety and Motor Vehicles v. Prue,* 701 S.2d 106 (Fla. 4th DCA 1989) (defendant was the only person in the vehicle and keys were

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[2] In considering the merits of this conclusion, a comparison of these facts with those in *Popple v. State,* 626 So. 2d 185 (Fla. 1993), relied upon by Petitioner, is instructive. In *Popple,* the defendant was seated in a legally parked car in a desolate area in the middle of the day. When a sheriff's deputy approached the car as part of an unrelated investigation, he observed the defendant "acting in a nervous manner, reaching under the seat and 'flipping' about in the car." The deputy asked the defendant to get out of the car, after which he saw a cocaine pipe in plain view on the car's floorboard. The Supreme Court found that in the context of a consensual encounter with no suspicion of criminal activity, the actions of the defendant failed to provide cause for the deputy to direct him to exit his vehicle. In contrast, here Petitioner's awkward behavior during an investigatory stop premised upon reasonable suspicion or probable cause of a statutory violation warranted Trooper Vargo's request that Petitioner exit the vehicle. *See also Popple,* 626 So. 2d at 188 (Overton, J. dissenting).

[3] Petitioner asserts that it was not clear that the "key fob" was in fact a key which would start the car. On these facts, this argument is incongruous, and we reject it out of hand.

near enough for him to use them to start the vehicle and drive away); *Fieselman v. State,* 537 So. 2d 603 (Fla. 3d DCA 1988) (location of keys and defendant's presence asleep in vehicle are factors to be considered in determining whether defendant was in actual physical control of vehicle); *Harris v. State,* 18 Fla. L. Weekly Supp 713a (Fla. 19th Cir. Ct. Mar. 18, 2011) (driver passed out in back seat of vehicle with keys inside of vehicle sufficient to conclude driver was in actual physical control). As the Second District Court of Appeal noted in *State v. Fitzgerald,* 63 So. 3d 75, 77 (Fla. 2d DCA 2011), quoting *Hughes v. State,* 535 P. 2d 1023, 1024 (Oka. Crim. App. 1975):

> [A]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving the vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the statute.

We therefore find that Petitioner was in actual physical control of the vehicle.

For the reasons indicated herein, the petition for writ of certiorari is DENIED.

WALSH and SANTOVENIA, JJ., concur.

Copies furnished to all parties