

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

RICHARD FOSTER,
Petitioner,

CASE NO.: 2006-CA-010813-O
WRIT NO.: 06-94

v.

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

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Division of Driver Licenses,
L. Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before THORPE, PERRY and T. SMITH, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Foster timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the Department) Final Order of License Suspension, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction. §§ 322.2615, 322.31, Fla. Stat. (2006); Fla. R. App. P. 9.030(c)(3); 9.100.

The facts are as follows based on the Final Order of License Suspension: Officer Gillespie observed Petitioner make an improper turn. Officer Gillespie further observed the following signs of impairment after making contact with Petitioner: a strong odor of alcohol, slurred speech, unsteady exit from vehicle, swayed while standing, and Petitioner admitted to drinking beer. Petitioner performed field sobriety exercises, wherein he demonstrated poor balance and trouble following directions. Officer Gillespie arrested Petitioner for DUI. Petitioner agreed to take a breath test; the results of the test were .136 and .123. Petitioner's driving privilege was suspended for six (6) months for driving with an unlawful alcohol level.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on November 15, 2006, Petitioner was granted a formal review, held by Department Hearing Officer Linda Labbe, during which Petitioner moved to invalidate the suspension of his driver's license, wherein Petitioner argued: no probable cause for Petitioner's stop and arrest; Petitioner's breath test was illegally coerced and should be inadmissible; section 322.2615, Florida Statutes, is unconstitutional on its face and as applied to Petitioner; the breath test was scientifically unreliable; and the Department failed to prove by a preponderance of the evidence that Petitioner had an unlawful breath alcohol level.

On November 16, 2006, the hearing officer entered a Final Order of License Suspension, denying Petitioner's motions and sustaining the suspension of his driver's license.

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the

essential requirements of the law were observed; and 3) whether the decision was supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum.” *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual's license is suspended for refusal to submit to a breath, blood, or urine test, “the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain . . . the suspension.” § 322.2615(7), Fla. Stat. (2006). The hearing officer's scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7), Fla. Stat. (2006).

Petitioner asserts that: 1) the hearing officer deprived Petitioner of due process of law when the suspension of Petitioner's driver's license was not set aside due to the failure of the hearing officer to issue subpoenas for Kelly Melville, Roger Skipper, Tanya Shrum, and Laura Barfield to appear along with the documents requested in the subpoena duces tecum; 2) the breath test results obtained from Petitioner were not properly

approved pursuant to F.D.L.E. Rule 11D-8.003 and provided scientifically unreliable results; 3) the breath test results in the instant case were illegally coerced by the use of an implied consent warning to require Petitioner to submit to a breath test; and 4) the hearing officer deprived Petitioner of procedural due process of law by failing to consider whether Petitioner was illegally stopped by the arresting officer.

On the other hand, the Department contends that: 1) the Department established substantial compliance with FDLE rules to render Petitioner's breath test results admissible; 2) Petitioner's breath test was not illegally coerced; and 3) the hearing officer properly sustained the suspension of Petitioner's license, pursuant to section 322.2615(7), Florida Statutes, wherein there existed competent, substantial evidence.¹ Petitioner filed a reply to the Department's response, wherein Petitioner reiterated his earlier arguments.

Subsequently, Petitioner filed a notice of supplemental authority, thus giving this Court notice of the Fifth District's decision in *Dep't of Highway Safety and Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). The Department filed a second motion to abate the Petition for Writ of Certiorari and remand for further proceedings, wherein it conceded that the hearing officer failed to consider the lawfulness of Petitioner's stop and arrest. Subsequently, Petitioner also filed a second notice of supplemental authority, citing *State v. Atkins, et al.*, No. 48-2008-CT-673-E (Fla. Orange Cty. Ct. 2008).

¹ The Department filed a motion to dismiss or abate issue one (1) contained in Petitioner's Petition for Writ of Certiorari; said motion was simultaneously filed with the Department's Response to the Petition for Writ of Certiorari. The Department argued, in its motion, "[t]hat a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance." *See Miami-Dade v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003). Petitioner filed a response to the Department's motion, wherein Petitioner argued that "[a] Petition for Writ of Certiorari is the appropriate vehicle to seek review." The Court entered an order, on April 17, 2007, wherein the Court granted the Department's motion to dismiss; the Court ordered that "[a]rgument [one] of the Petition for Writ of Certiorari is [s]tricken." Further, the Court denied the Department's motion to abate.

The Fifth District's opinion in *Pelham* is binding upon this Court. In *Pelham*, the Fifth District concluded that the July 1, 2006 amendment to section 322.2615, Florida Statutes, that eliminated consideration of a lawful arrest from the hearing officer's scope of review, did not relieve the hearing officer, in a refusal to submit to a "lawful" breath, blood, or urine test case, from making a determination that the request for a test was made incidental to a lawful arrest in accordance with subsection 316.1932(1)(a), Florida Statutes. *Pelham*, 979 So. 2d at 305-08. Here, Petitioner argues that the hearing officer failed to consider the lawfulness of his stop and subsequent arrest during his formal review hearing, wherein Petitioner had also argued that he did not consent to the breath test that was administered to him. An examination of the formal review hearing transcript and the Final Order of License Suspension, denying Petitioner's motions and sustaining the suspension of his driver's license, reveals that the hearing officer failed to determine whether Petitioner was lawfully stopped and arrested.

Pursuant to *Pelham*, this Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of the law, wherein the hearing officer declined to consider Petitioner's arguments that the arrest was unlawful, although a lawful arrest is necessary to support an order for license suspension.

In light of this conclusion, this Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on
this __18th__ day of _____ August _____, 2009.

_____/S/_____
JANET C. THORPE
Circuit Judge

_____/S/_____
BELVIN PERRY, JR.
Chief Judge

_____/S/_____
THOMAS B. SMITH
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer**, Assistant General Counsel, DHSMV-Legal Office, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on the __18th__ day of _____ August _____, 2009.

_____/S/_____
Judicial Assistant