

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

ARIAN NIKJEH,
Petitioner,

CASE NO.: 2007-CA-002608-O
WRIT NO.: 07-16

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,
R. Owes, Hearing Officer.

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before EVANS, RODRIGUEZ and LUBET, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Arian Nikjeh 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. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

On December 29, 2006, at approximately 12:47 a.m., Officer Moore of the Orange County Sheriff's Office, while off-duty, observed a black SUV "break so hard ... the [SUV] actually skidded." Officer Moore "pulled up behind the vehicle and conducted

a traffic stop.” Officer Moore observed “[t]he driver step[] out and almost [fall].” Officer Moore approached the driver and “could smell alcohol coming from him.” Officer Moore further observed that the driver “talked with a thick tongue and slurred his words.” When Officer Moore asked the driver where he was coming from, the driver replied, “Scoop[’]s bar.” Officer Moore identified the driver as the Petitioner by his Florida driver’s license.

Officer Gardiner, assisting Officer Moore, asked Petitioner to “stand up.” Officer Gardiner observed Petitioner stand up and fall to the right. Officer Gardiner also asked Petitioner where he was coming from, Petitioner replied, “Scoop[’]s.” While talking with Petitioner, Officer Gardiner detected a strong odor of alcoholic beverages on the Petitioner’s breath. When Officer Gardiner asked Petitioner how much alcohol he had to drink at Scoop’s, he replied, “I could tell you two beers which is the norm, but I had about 4-5 drinks.”

Officer Gardiner then asked Petitioner to submit to field sobriety exercises. Petitioner agreed to submit to field sobriety testing. Petitioner was subsequently arrested and transported to the Orange County DUI Center where Petitioner refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on January 31, 2007, Petitioner was granted a formal review held by Department Hearing Officer Owes. Petitioner was not present, but was represented by counsel.

At the hearing, counsel for the Petitioner moved to set aside the suspension on the following grounds: 1)“lack of competent substantial evidence that the arresting officer had probable cause to believe that [Petitioner] was driving or in actual physical control of a motor vehicle,” 2)“declare [s]ection 322.265[, Florida Statutes,] as recently amended unconstitutional on its face, and as applied to [Petitioner],” 3) the stop was unlawful, and 4) pursuant to section 316.1932, Florida Statutes, “[b]ecause there [w]as no lawful stop, there[] [was] no lawful arrest, [thus there was] no refusal.” On February 6, 2007, the hearing officer entered a Final Order of License Suspension denying Petitioner’s motions and sustaining the suspension of Petitioner’s 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. (2005). The hearing officer's scope of review is limited to the following issues:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
2. Whether the person was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person 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 eighteen months.

§ 322.2615(7)(b), Fla. Stat. (2005).

Petitioner argues that his license suspension was not supported by competent substantial evidence because the hearing officer failed to determine whether Petitioner's vehicle was lawfully stopped. Thus, Petitioner contends that he was not lawfully arrested for DUI wherein he was not lawfully stopped by the police.

The Department responds by asserting that the hearing officer properly sustained the suspension of Petitioner's driver's license where there was competent substantial evidence that: 1) Officer Moore had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical substances; 2) Petitioner refused to submit to the breath test after requested by law enforcement or a correctional officer; and 3) Petitioner was informed that if he refused to submit to such a test, his privilege to operate a motor vehicle would be suspended for a period of one year, or a period of eighteen months in the case of a second or subsequent refusal. Petitioner responded by reiterating his arguments contained in his "Petition for Writ of Certiorari."

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). Subsequently, the Department filed a "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings" wherein it admitted that the hearing officer did not consider the lawfulness of Petitioner's stop and arrest. Petitioner filed a response arguing that this Court should not remand the case for further proceedings, but should grant the "Petition for Writ of Certiorari."

The Fifth District's opinion in *Pelham* is binding upon this Court. Petitioner in this case, like the petitioner in *Pelham*, argues that his license suspension was not supported by competent substantial evidence because the hearing officer failed to make a determination as to whether Petitioner was lawfully stopped or arrested. *Id.* at 305. In *Pelham*, the Fifth District concluded that a license suspension could not be based on an individual's refusal to take a breath test following an unlawful arrest. *Id.* at 306-07. Furthermore, the Fifth District held that an administrative hearing officer, who reviews the suspension of a motorist's driver's license after the motorist refused to take a breath test, following his arrest for driving under the influence, had the authority to determine whether the request for said test was incident to a lawful arrest. *Id.* at 308. Here, Petitioner argues and the Department conceded, in its motion, that the hearing officer, on January 31, 2007, failed to consider the lawfulness of Petitioner's stop and subsequent arrest. Accordingly, pursuant to *Pelham*, it appears that the hearing officer's decision was not supported by competent substantial evidence.

