

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

PHILLIP GORDON,
Petitioner,

CASE NO.: 2007-CA-002863-O
WRIT NO.: 07-17

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.

Damaris E. Reynolds, Assistant General Counsel,
for Respondent.

Before WATTLES, LAUTEN and G. ADAMS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Phillip Gordon 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. (2007); Fla. R. App. P. 9.030(c)(3); 9.100. We dispense with oral argument. Fla. R. App. P. 9.320.

On January 1, 2007, at approximately 01:06 a.m., Lieutenant Krout, of the Maitland Police Department, observed Petitioner's vehicle fail to maintain a single lane and speeding. Lieutenant Krout stopped Petitioner's vehicle wherein it was observed that Petitioner's eyes were pink and glassy, Petitioner's speech was slow and slurred, and an odor of alcohol emitted from Petitioner's breath. Petitioner performed poorly on the field sobriety exercises. The Implied Consent Warning was read to Petitioner; Petitioner refused to submit to a breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on February 1, 2007, Petitioner was granted a formal review held by Department Hearing Officer Ows.

At the hearing, Petitioner moved to invalidate the suspension for the following reasons: 1) the alleged refusal was not incident to a lawful arrest, and 2) section 322.2615, Florida Statutes, is unconstitutional both on its face and as applied to Petitioner. On February 9, 2007, 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. (2007). 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. (2007).

Petitioner asserts that he was arrested outside of the arresting officer's jurisdiction, and the arresting officer was not in fresh pursuit. Thus, Petitioner argues that the stop and arrest were unlawful and therefore, the hearing officer's decision was not supported by competent substantial evidence. On the other hand, the Department contends that: 1) the hearing officer properly sustained the license suspension of Petitioner wherein there existed competent substantial evidence to support the hearing officer's decision as required by section 322.2615, Florida Statutes, and 2) Sergeant Harris had authority to arrest Petitioner under the doctrines of fresh pursuit and the fellow officer rule.

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 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 that the hearing officer failed to consider the lawfulness of Petitioner's stop and subsequent arrest. A review of 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. Accordingly, pursuant to *Pelham*, it appears that the hearing officer's decision was not supported by competent substantial evidence.

In light of this conclusion, this Court finds it unnecessary to address the additional arguments made by 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 13th day of August , 2009.

 /S/
BOB WATTLES
Circuit Judge

 /S/
FREDERICK J. LAUTEN
Circuit Judge

 /S/
GAIL ADAMS
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 **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure and Yates, P.A., Post Office Box 2728, Winter Park, Florida 32790 and **Damaris E. Reynolds**, Assistant General Counsel, DHSMV-Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609, on the 13th day of August , 2009.

 /S/
Judicial Assistant