

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

**RICHARD KUNTZ,**

Petitioner,

v.

**CASE NO.: 2007-CA-3387-O**

**Writ No.: 07-21**

**STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY & MOTOR  
VEHICLES, DIVISION OF DRIVER  
LICENSES,**

Respondent.

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Petition for Writ of Certiorari.

William W. Lindsey, Esquire and  
William R. Ponall, Esquire, Kirkconnell,  
Lindsey, Snure and Yates, P.A.,  
for Petitioner.

Jason Helfant, Esquire, Assistant General Counsel  
Florida Department of Highway Safety and Motor Vehicles,  
for Respondent.

BEFORE THORPE, PERRY AND ADAMS, JJ.

**ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Richard Kuntz (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the one year suspension of her driver’s license for refusal to submit to a breath, blood, or urine test. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On January 15, 2007, Deputy Lowe of the Orange County Sheriff’s Office, observed the Petitioner in actual physical control of a motor vehicle. In the course of observing the Petitioner

the deputy smelled, “the odor of an alcoholic beverage on his breath, noticed his eyes were bloodshot/glassy, and noticed that his speech was slurred/thick.” The deputy asked if the Petitioner would perform field sobriety exercises, and the Petitioner agreed. After failing the exercises, the deputy arrested the Petitioner for DUI. The deputy then transported the Petitioner to the OCSO DUI center where he consented to a breath-alcohol test. His breath-alcohol samples were recorded at 0.218 and 0.213. Subsequently, the Petitioner’s license was suspended for driving with an unlawful breath-alcohol level of 0.08 or higher.

Pursuant to section 322.2615, Florida Statutes, and Chapter 15A-6, Florida Administrative Code, a formal review hearing was held by Department Hearing Officer Varnadore on February 15, 2007. The Petitioner made numerous motions to invalidate his suspension at the hearing, all of which were either denied or not ruled on by the hearing officer. Following the hearing, on February 23, 2007, the hearing officer entered a Findings of Fact, Conclusions of Law, and Decision, sustaining the suspension of the Petitioner’s driver’s license.

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver’s license for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting 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 controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193.

§ 322.2615(7)(a), Fla. Stat. (2007).

Petitioner argues that: 1) The license suspension is not supported by competent substantial evidence that the Petitioner was lawfully stopped or arrested; 2) the hearing officer's refusal to issue subpoenas for Kelly Melville, Roger Skipper, and Laura Barfield, pursuant to the amended version of section 322.2615, Florida Statutes, constituted a violation of the Petitioner's right to procedural due process; 3) the record before the hearing officer failed to contain the breath test result affidavit and agency inspection report checklist required by Rule 15A-6.013, Florida Administrative Code; and 4) the record before the hearing officer failed to establish that the intoxilyzer used to test the Petitioner's [breath-alcohol level] was subject to monthly agency inspections as required by Rule 11D-8.006, Florida Administrative Code.

Conversely, the Department argues that: 1) the hearing officer properly sustained the Petitioner's license suspension where there was competent and substantial evidence to show that the elements of section 322.2615(7)(a), Florida Statutes, were met by a preponderance of the evidence; 2) the hearing officer properly denied the Petitioner's request for subpoenas for persons not identified in the statute that provides the hearing officer the power to subpoena witnesses; and 3) the Department established substantial compliance with section 316.193, Florida Statutes (2006), and FDLE rules to render the Petitioner's breath test results admissible.

Since this writ was filed, the Fifth District Court of Appeal announced their decision in *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). As noted by numerous appellate panels within our circuit, this Court finds that the *Pelham* decision completely controls the outcome of this instant case. Our sister panels have repeatedly stated:

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.

*Portnoy v. DHSMV*, 16 Fla. L. Weekly Supp. 1014a, (Fla. 9th Cir. Ct. August 10, 2009); *See also Foster v. DHSMV*, 16 Fla. L. Weekly Supp. 1011a, (Fla. 9th Cir. Ct. August 18, 2009). The instant case follows exactly as outlined in *Pelham* and the above cases. Additionally, this Court notes that the hearing officer's decision clearly states that consideration of the Petitioner's motions regarding the lack of competent evidence to detain the driver and lack of basis to stop the driver were outside the scope of the hearing officer's review. The decision in *Pelham* clearly calls for such a consideration. This Court finds that the hearing officer failed to consider the lawfulness of the stop and arrest, and therefore the decision to sustain the Petitioner's suspension departed from the essential requirements of law.

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

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the hearing officer's order entitled, "Findings of Fact, Conclusions of Law, and Decision," is **QUASHED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this \_\_4th\_\_ day of \_\_\_\_\_December\_\_\_\_\_, 2009.

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**JANET C. THORPE**  
**Circuit Court Judge**

\_\_\_\_\_/S/\_\_\_\_\_  
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**BELVIN PERRY**  
**Circuit Court Judge**

\_\_\_\_\_/S/\_\_\_\_\_  
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**JOHN H. ADAMS**  
**Circuit Court Judge**

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esq.**, Kirkconnel, Lindsey, Snure and Yates, P.A. P.O. Box 2728, Winter Park, FL 32790; and to **Jason Helfant, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454, on this   4th   day of   December  , 2009.

\_\_\_\_\_/S/\_\_\_\_\_

Judicial Assistant