

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

JESSICA PELTO,

Petitioner,

CASE NO.: 2007-CA-6510

WRIT NO.: 07-30

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.

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Assistant General Counsel,
for Respondent.

Before MACKINNON, LEBLANC and KIRKWOOD, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Jessica Pelto 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.

On March 10, 2007, Sergeant Ohalek of the Maitland Police Department observed Petitioner make an illegal U-turn. Upon making contact with Petitioner, Sergeant Ohalek observed an odor of alcohol on Petitioner's breath and that her eyes were glassy. He inquired as to how much Petitioner had to drink, to which Petitioner responded that she had consumed three beers. Sergeant Ohalek requested that Petitioner submit to field sobriety testing, which she performed poorly on. As such, Sergeant Ohalek arrested Petitioner for DUI. Petitioner agreed to take a breath test, the results of which were .180 and .172. Petitioner's driving privilege was suspended for driving with an unlawful breath alcohol level.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on April 11, 2007, Petitioner was granted a formal review held by Department Hearing Officer Ows. Petitioner and her counsel were present. Thereafter, Hearing Officer Ows entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of her 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 unlawful breath alcohol level, "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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7), Fla. Stat. (2006).

Petitioner asserts that Hearing Officer Owes deprived Petitioner of due process of law by failing to set aside the suspension of her driver's license when: 1) Hearing Officer Owes failed to issue subpoenas for Kelly Melville, Roger Skipper, Tanya Shrum, and Laura Barfield to appear with documents requested in the subpoena duces tecum; 2) the breath test results obtained from Petitioner were unreliable because they were obtained by a machine not approved pursuant to F.D.L.E. Rule 11D-8.003; 3) the record failed to establish that the breath test results complied with the requirements of F.D.L.E. Rule 11D-8.003; and 4) Hearing Officer Owes failed to consider whether Petitioner was illegally stopped by Sergeant Ohalek.

On the other hand, the Department contends that: 1) Hearing Officer Owes properly denied Petitioner's request for subpoenas; 2) the Department established substantial compliance with F.D.L.E. rules to render Petitioner's breath test results admissible; 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. Petitioner filed a reply to the Department's response, wherein Petitioner reiterated her 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 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).

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 Hearing Officer Owes failed to consider the lawfulness of her stop and subsequent arrest during her formal review hearing. An examination of the formal review hearing transcript and the Final Order of License Suspension reveals that Hearing Officer failed to determine whether Petitioner was lawfully stopped and arrested.

Pursuant to *Pelham*, this Court finds that the Hearing Officer Owes' decision to sustain Petitioner's license suspension departed from the essential requirements of the law, wherein he declined to consider Petitioner's arguments that the arrest was unlawful.

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 26th day of October , 2009.

 /S/
CYNTHIA MACKINNON
Circuit Judge

 /S/
BOB LEBLANC
Circuit Judge

 /S/
LAWRENCE KIRKWOOD
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 **Jason Helfant**, Assistant General Counsel, 2515 West Flagler Street, Miami, Florida 33135 on this 26th day of October , 2009.

 /S/
Judicial Assistant