

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

JOHN MOORE,
Petitioner,

CASE NO.: 2007-CA-7571-O
WRIT NO.: 07-36

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 DAWSON, M. SMITH and GRINCEWICZ, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner John Moore 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.

At approximately 8:06 p.m. on May 10, 2007, Commander Rollins of the Orange County Sheriff's Office observed the driver traveling at a high rate of speed, following vehicles too closely, and changing lanes in traffic without using a turn signal in the area of 5570 South Orange Blossom Trail in Orange County. Upon making contact with the driver, Commander Rollins observed that the driver's eyes were watery, glassy, and bloodshot. Officer Moyer, assisting Commander Rollins, observed that the driver had a "moderate odor from the impurities of alcohol" on his breath. The driver was identified as the Petitioner by his Florida driver's license. Officer Moyer observed the Petitioner unable to maintain his balance and that the Petitioner had an "orbital sway." Officer Moyer asked the Petitioner how much he had to drink, the Petitioner replied, "one glass of red wine;" Officer Moyer asked Petitioner to submit to field sobriety testing. Petitioner participated in the field sobriety testing. Officer Moyer subsequently arrested and transported Petitioner to the DUI testing center where he refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on June 13, 2007, Petitioner was granted a formal review held by Department Hearing Officer Labbe.

At the hearing, Petitioner moved to set aside the suspension on the basis that: 1) there was no willful refusal to submit to breath testing, 2) no probable cause to believe Petitioner's normal faculties were impaired, and 3) no probable cause for Petitioner's stop or arrest. On June 14, 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. (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 asserts that: 1) the hearing officer deprived Petitioner of procedural due process of law by failing to consider whether Petitioner was illegally stopped, 2) the hearing officer deprived Petitioner of procedural due process of law by failing to consider whether Petitioner was illegally arrested by the arresting officer, 3) Petitioner was misled into refusing to submit to a breath test as a result of incorrect advice provided by the arresting officer and the breath technician, and 4) there did not exist competent substantial evidence in the record to support the suspension of Petitioner's driver's license for a period of eighteen months. On the other hand, the Department contends that: 1) competent substantial evidence supports the hearing officer's determination that Petitioner was properly informed of the penalties for refusal and 2) the Department's order of license suspension is supported by competent substantial evidence.

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

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, 6801 Lake Worth Road, #230, Lake Worth, Florida 33467 on this ___18___ day of ___May_____, 2009.

_____/S/_____
Judicial Assistant