

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

HARMON GRIFFIN,
Petitioner,

CASE NO.: 2007-CA-007572-O
WRIT NO.: 07-37

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,
D. Bowen, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Thomas C. Mielke, Assistant General Counsel,
for Respondent.

Before T. SMITH, DAVIS and BLACKWELL, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Harmon Griffin 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 May 8, 2007, Lieutenant Schardine of the Maitland Police Department had been dispatched to the Steak and Ale restaurant in Maitland because of an alleged unruly customer. Upon arrival, Lieutenant Schardine observed the subject customer exit the restaurant and “stagger” to his vehicle; Lieutenant Schardine further observed the customer enter the driver’s side of a black Acura. Lieutenant Schardine followed the black Acura and observed the vehicle swerve between traffic lanes. Lieutenant Schardine stopped the vehicle. The driver was identified as the Petitioner by his Florida driver’s license. Officer Stitt of the Maitland Police Department performed the field sobriety exercises. The Petitioner was arrested and transported 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 12, 2007, Petitioner was granted a formal review held by Department Hearing Officer Bowen.

At the hearing, Petitioner moved to set aside the suspension on the basis that: 1) there was no probable cause to believe Petitioner was under the influence or impaired and 2) any field sobriety exercises administered, were a result of illegal coercion. On June 13, 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 or arrested by the arresting officer and 2) there did not exist competent substantial evidence to support the hearing officer’s determination that there existed probable cause to believe Petitioner was under the influence of alcohol. 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, the essential requirements of law were met, and Petitioner was afforded due process and 2) competent substantial evidence supported the hearing officer's determination that probable cause existed to believe that Petitioner was under the influence of alcohol.

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,

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**, 1520 East Amelia Street, Orlando, Florida, 32803 and **Thomas C. Mielke, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler Street, Miami, Florida 33135 on the 18 day of May , 2009.

_____/S/_____
Judicial Assistant