

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

JEFFREY HEARD,
Petitioner,

CASE NO.: 2007-CA-012443-O
WRIT NO.: 07-54

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.

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 Jeffrey Heard 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 July 19, 2007 at approximately 01:55 a.m., Trooper Hall, with the Florida Highway Patrol, observed Petitioner's vehicle traveling at a high rate of speed, visual estimation of 65 miles per hour in a posted 55 mile per hour zone. Trooper Hall further

observed that Petitioner failed to move his vehicle over into the outside lane, which was free and clear of other vehicles, or slow the vehicle down, wherein an emergency vehicle was present, pursuant to section 316.126(1)(b), Florida Statutes. Trooper Hall's vehicle caught up to Petitioner's vehicle on SR 50 (Colonial Drive) and Fricke. Trooper Hall made contact with Petitioner, who was the sole occupant of the vehicle.

Upon making contact with Petitioner, Trooper Hall observed that Petitioner's eyes were watery and red. Trooper Hall further observed that Petitioner's breath smelled of alcoholic beverages. Trooper Hall asked Petitioner to exit his vehicle and requested that he submit to field sobriety testing. Petitioner participated in the field sobriety testing. Trooper Ramirez, assisting Trooper Hall, conducted the field sobriety testing of Petitioner. Trooper Ramirez subsequently arrested and transported Petitioner to the Orange County DUI testing facility, wherein he refused to submit to a lawful breath, blood, or urine test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on August 22, 2007, Petitioner was granted a formal review held by Department Hearing Officer Ows.

At the hearing, Petitioner moved to invalidate his license suspension based on the Florida Highway Patrol's failure to comply with a subpoena duces tecum for production of the in-car police videotape. On August 29, 2007, the hearing officer denied Petitioner's motion and sustained 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 argues that: 1) the failure of the Florida Highway Patrol to comply with a properly served subpoena duces tecum, and the hearing officer's decision to sustain Petitioner's license suspension deprived Petitioner of his right to procedural due process and 2) Petitioner's license suspension was not supported by competent substantial evidence that Petitioner was lawfully stopped or arrested. Thus, Petitioner contends that: 1) the erroneous conduct of the Florida Highway Patrol deprived Petitioner of his right to a meaningful formal review hearing scheduled on August 22, 2007 and 2) Petitioner's alleged refusal to submit to a breath test should not have been used to support a license suspension.

The Department responds by asserting that: 1) Petitioner's due process rights were not violated based upon Petitioner's failure to seek enforcement of the subpoena issued and served upon the videotape custodian; 2) Petitioner's license suspension was supported by competent substantial evidence, it comports with the essential requirements of the law, and did not result in a denial of due process; 3) certiorari review is not the

proper procedural vehicle to challenge the constitutionality of a statute or ordinance; and even if the lawfulness of the arrest should have been addressed by the hearing officer, remand is the proper remedy. Petitioner responds that the Department's contention that Petitioner was required to seek enforcement of a properly served subpoena duces tecum is in error.

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, Petitioner argues and the Department conceded, in its motion, that the hearing officer, on August 22, 2007, failed to consider the lawfulness of Petitioner's stop and subsequent arrest. Accordingly, pursuant to *Pelham*, 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 Petitioner and the Department.

Accordingly, it is hereby

ORDERED AND ADJUDGED that:

1. The "Petition for Writ of Certiorari" is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.
2. The Department's "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings" is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida
on this 23 day of April , 2009.

 /S/
DANIEL P. DAWSON
Circuit Judge

 /S/
MAURA T. SMITH
Circuit Judge

 /S/
DONALD E. GRINCEWICZ
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 **Heather Rose Cramer**, Assistant General Counsel, 6801 Lake Worth Road, #230, Lake Worth, Florida 33467 on the 23 day of April , 2009.

 /S/
Judicial Assistant