

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

MATTHEW LECONCHE,
Petitioner,

CASE NO.: 2007-CA-001181-O
WRIT NO.: 07-9

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,
M. Varnadore, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before THORPE, PERRY and J. ADAMS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew LeConche 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 November 30, 2006, at approximately 10:56 p.m., Officer Harris of the Maitland Police Department was dispatched to 1787 Bobtail Drive. Officer Harris was advised that the complainant observed a yellow Lexus "in her driveway with two white

males passed out in it.” Subsequently, Officer Harris observed a yellow Lexus “in the driveway of 1787 Bobtail Drive.” Officer Harris observed that the car’s “headlights were on and the engine was running.” Officer Harris further observed two males passed out and sleeping in the vehicle, one male was observed in the driver’s seat and the other in the passenger seat. Officer Harris also observed the driver “place his right hand on the automatic shift lever located on the center console.” Officer Harris identified the driver as the Petitioner by his Florida driver’s license. Officer Harris opened the Petitioner’s door wherein she “immediately smelled the heavy odor of an alcoholic beverage emanating from the interior of the car.” Officer Harris further detected a strong odor of alcoholic beverages on the Petitioner’s breath. The Petitioner was unsteady, unable to maintain his balance, and stumbled backwards. In addition, the Petitioner’s eyes were glassy and his speech was slurred. When asked whether he consumed alcohol or prescription medication, the Petitioner replied, “just alcohol.”

Officer Harris then asked the Petitioner to submit to field sobriety exercises. Petitioner refused to submit to field sobriety exercises. “The incident was recorded on videotape with the use of an in-car video camera system.” Petitioner was subsequently arrested and transported to the Orange County DUI Center where the Petitioner refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on January 3, 2007, Petitioner was granted a formal review held by Department Hearing Officer Varnadore. Petitioner was not present, but was represented by counsel. At the hearing, Petitioner moved to set aside the suspension on the following grounds: 1) “that there was no probable cause to open the car door of this particular vehicle and remove [Petitioner] from the vehicle,” 2) that a determination as to whether there was no probable cause to open the Petitioner’s car door and remove him was within the hearing officer’s scope of review, 3) “illegal detention,” 4) there exists no competent evidence of probable cause that Petitioner was the driver, 4) there exists “no probable cause to establish that [Petitioner] was driving or in actual physical control of an automobile based on the fact that the vehicle wasn’t driven and [Petitioner] was not operating the vehicle,” 5) “the reports in this case were illegally signed in violation of the notary statute,” 6) “that there was no probable cause to arrest [Petitioner],” and 7) “that

there was no probable cause that [Petitioner] was under the influence of alcohol.” On January 3, 2007, the hearing officer entered a Final Order of License Suspension denying Petitioner’s motions and sustaining the suspension of Petitioner’s 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 hearing officer deprived Petitioner of procedural due process of law by failing to consider whether Petitioner was illegally stopped by the arresting officer” and 2) “the arrest report and refusal affidavit relied upon by the hearing officer were improperly notarized and sworn to.” Thus, Petitioner contends that: 1) “the hearing officer’s refusal to determine whether there was an unreasonable search and seizure in this case violated Petitioner’s rights under the Fourth and Fourteenth Amendment to the United States Constitution” and 2) “the arrest report or refusal affidavit was not properly executed to warrant a belief by the hearing officer that there existed probable cause that Petitioner was under the influence of alcohol.”

The Department responds by asserting that the hearing officer properly sustained the suspension of Petitioner’s driver’s license because: 1) the law enforcement officer had probable cause that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcohol or controlled substances, 2) Petitioner refused to submit to a breath test after being requested to do so by law enforcement, and 3) Petitioner was informed that if he refused to submit to such testing, his privilege to operate a motor vehicle would be suspended. Furthermore, the Department asserts that the arrest and refusal affidavits were properly notarized by law enforcement and considered by the hearing officer. Petitioner responded by reiterating his arguments contained in his “Petition for Writ of Certiorari.”

Petitioner filed a “Motion for Expedited Review” and in support of his motion provided this Court with 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 January 3, 2007, failed to consider the lawfulness of Petitioner's stop and subsequent arrest. Accordingly, pursuant to *Pelham*, it appears that 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 17 day of April , 2009.

_____/S/_____
JANET C. THORPE
Circuit Judge

_____/S/_____
BELVIN PERRY, JR.
Chief Judge

_____/S/_____
JOHN H. ADAMS, SR.
Circuit Judge

