

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

JAMES BAGWELL,

Petitioner,

v.

CASE NO.: 2008-CA-572-O

Writ No.: 08-04

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

_____ /

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE O’KANE, MCDONALD, and ADAMS, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

James Bagwell (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On November 16, 2007, Petitioner was placed under arrest for DUI and transported to the breath testing facility. Petitioner submitted breath samples of .198 and .176. Petitioner's driver's license was suspended for driving with an unlawful blood alcohol of .08 or higher.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on December 10, 2007. At the hearing, Petitioner moved to set aside the suspension arguing that the evidence failed to establish that he was lawfully arrested. Additionally, Petitioner moved to invalidate his license suspension on the hearing officer's failure to issue subpoenas for Kelly Melville, Roger Skipper, and Laura Barfield. On December 11, 2007, the hearing officer entered a written order denying Petitioner's motions and sustaining Petitioner's license suspension. Petitioner now seeks certiorari review of this order.

"The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for driving with an unlawful blood alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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 whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2008).

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer improperly refused to consider whether Petitioner was lawfully arrested. Additionally, Petitioner argues that the hearing officer's refusal to issue subpoenas constituted a violation of Petitioner's right to due process. Conversely, the Department argues that the Department's order is supported by competent substantial evidence, comports with the essential requirements of the law, and did not result in a denial of due process.

After the Department filed its Response to the Petition for Writ of Certiorari, it filed a motion to abate and remand the case, as to the subpoena issue. Additionally, the Department filed a motion to abate and remand the case, as to the lawfulness of the stop issue. The motions to abate are currently pending along with the Petition.

To support his argument, Petitioner cites to *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). This case is controlling authority on the issue of whether a hearing officer must consider lawfulness of the stop in light of the amendments to section 322.2615(7). Additionally, the Department cites *Pelham* in its motion to abate and remand. In *Pelham*, the Fifth District analyzed 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. *Id.* The Fifth District concluded that the statutory amendment 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 section 316.1932(1)(a), Florida Statutes. *Id.* at 305-8.

Here, Petitioner argues that the hearing officer failed to consider the lawfulness of his stop and subsequent arrest during his formal review hearing. Upon a careful review of the record, it is apparent that Petitioner argued to the hearing officer that the evidence failed to establish that he was lawfully arrested in this case. Petitioner argued that he was unlawfully arrested without an arrest warrant, because the officer never observed him driving or in actual physical control of a motor vehicle, and did not perform an investigation at the scene of the crash. At the hearing, after hearing Petitioner's arguments and motions, the hearing officer specifically noted that the stop was no longer within the scope of review and refused to rule on the motion.

Pursuant to the reasoning set forth in the *Pelham* decision, the Court finds that the hearing officer's decision to sustain the Petitioner's license suspension departed from the essential requirements of the law, wherein the hearing officer declined to consider Petitioner's arguments that the arrest was unlawful, although a lawful arrest is necessary to support an order for license suspension. Because this argument is dispositive, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Bagwell's 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, filed June 9, 2008, is **DENIED**.

3. The Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 25, 2009, is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__30th__ day of __April_____, 2010.

_____/S/_____
JULIE H. O'KANE
Circuit Court Judge

_____/S/_____
ROGER J. MCDONALD
Circuit Court Judge

_____/S/_____
GAIL A. ADAMS
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esq.**, Kirkconnell, Lindsey, Snure, & Yates, P.A., P.O. Box 272, Winter Park, FL 32790; and to **Heather Rose Cramer, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 540609, Lake Worth, FL 33454-0609, on this __30th__ day of __April_____, 2010.

_____/S/_____
Judicial Assistant