

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

**CASE NO.: 2008-CA-3830-O
WRIT NO.: 08-14**

TIMOTHY O'SHAUGHNESSY,

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Linda Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before ARNOLD, APTE and LUBET, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy O'Shaughnessy (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (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 pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure

9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On December 28, 2007, Sergeant Berrios of the Winter Park Police Department responded to a disturbance call at a nearby bar and advised all surrounding units to look for a black Range Rover that was leaving the scene. Officer Davison observed the vehicle pulling out of the parking lot and followed it. Officers Davison and Owen stopped the vehicle and identified Petitioner as the driver of the vehicle. Officer Davison observed that Petitioner's eyes were bloodshot and watery. Officer Davison also observed the strong odor of alcohol on Petitioner's breath. Upon request, Petitioner completed three field sobriety exercises: walk and turn, one-leg stand, and horizontal gaze nystagmus. Based on Petitioner's performance on the field sobriety exercises, Officer Davison arrested Petitioner and transported him to the Winter Park Police Department. Following a twenty-six minute observation period, Officer Davison read the implied consent warning and Petitioner refused to submit to a breath-alcohol test. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615, Florida Statutes, Petitioner requested a formal review of his license suspension. On January 22, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on four grounds: (1) that Officer Davison's failure to bring the subpoenaed training manuals constituted a violation of due process; (2) that the law enforcement officers lacked probable cause to believe that Petitioner was impaired; (3) that there was no probable cause to stop Petitioner's vehicle; and (4) that the implied consent warning given to Petitioner was improper. At the review hearing, the hearing officer said that the lawfulness of the stop was not an issue for her to consider because it was outside the scope of review. On January 25, 2008, the

hearing officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; that Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer; and that Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended.

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 cases 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, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007). The hearing officer's scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended 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 18 months.

§ 322.2615(7)(b), Fla. Stat. (2007).

At issue in the instant case is whether the hearing officer deprived Petitioner of procedural due process of law by finding that the lawfulness of the stop was outside the scope of the review hearing. Petitioner argues that the lawfulness of a stop must be determined before an individual's driver's license can be suspended in an administrative license suspension hearing and, in this case, probable cause to justify stopping Petitioner's vehicle did not exist. Petitioner also argues that the hearing officer's failure to require Officer Davison to provide field sobriety testing manuals deprived Petitioner of due process of law. He further asserts that there was no probable cause to believe that his normal faculties were impaired.

With respect to Petitioner's argument regarding the lawfulness of the stop, the Department filed a motion to abate citing the Fifth District's decision in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So. 2d 304 (Fla. 5th DCA 2008)(finding that hearing officer reviewing license suspension after motorist's refusal to take breath test had authority to consider lawfulness of arrest even though statute providing for such review did not include lawfulness of arrest as one of the issues within the scope of review).¹ With respect to Petitioner's other arguments, the Department contends that Petitioner's due process rights were not violated by the absence of the field sobriety testing manual because Petitioner had the opportunity to cross-examine Officer Davison about his administration of the field sobriety exercises. Alternatively, the Department asserts that Petitioner should have sought enforcement of the subpoena for the manual pursuant to section 316.1932(6)(c), Florida Statutes. The

¹ On or about May 9, 2008, this Court entered an order denying the Department's motion to abate finding that abatement is not appropriate in the instant case because it does not involve the same parties as *Pelham*.

Department further maintains that Officer Davison's probable cause affidavit along with his testimony provided competent substantial evidence to support the hearing officer's determination that there was probable cause to believe that Petitioner was driving while under the influence.

The Court acknowledges that the Fifth District's opinion in Pelham is binding upon it and the instant case. Therefore, the Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of law when the hearing officer declined to consider Petitioner's argument that the stop and arrest was unlawful. In light of this conclusion, the Court also finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**; the hearing officer's Final Order of License Suspension is **QUASHED**; and the Department is directed to reinstate Petitioner's driving privilege.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
27th day of _____ October _____, 2009.

/S/
C. JEFFERY ARNOLD
Circuit Judge

/S/
ALAN S. APTE
Circuit Judge

/S/
MARC L. LUBET
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 **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, 6081 Lake Worth Road, Suite 230, Lake Worth, FL 33467, on the 27th day of October, 2009.

/S/ _____
Judicial Assistant