

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

**CASE NO.: 2008-CA-9353
WRIT NO.: 08-31**

BRUCE NORDABY,

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,
Donna Petty, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before O’KANE, MCDONALD, and G. ADAMS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce Nordaby (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).

On February 29, 2008, at approximately 1:34 a.m., Trooper Hawkins of the Florida Highway Patrol conducted a traffic stop on a vehicle driving over 50 mph in a posted 40 mph speed zone. Upon pulling the vehicle over, Trooper Hawkins made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from the vehicle. Trooper Hawkins also observed that Petitioner's eyes were bloodshot and watery, his speech was slurred, and his face was flushed. Petitioner admitted to consuming three or four alcoholic drinks. Based on Petitioner's poor performance on the field sobriety exercises, Trooper Hawkins arrested Petitioner and transported him to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .177 and .174. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On March 25, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on seven grounds: (1) that the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Tanya Shrum, and Kelly Melville; (2) that the Intoxilyzer 8000 was not properly approved for use in the State of Florida; (3) that Trooper Hawkins did not have probable cause to stop or arrest Petitioner; (4) that Trooper Hawkins lacked probable cause to believe that Petitioner was impaired by alcohol; (5) that the hearing officer wrongfully limited Petitioner's inquiry into whether there was probable cause for the stop and arrest; (6) that there is no March 2008 agency inspection report in the record; and (7) that there is no uniform method of administering breath tests. On March 28, 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 and that he had an unlawful breath-alcohol level of 0.08 or higher.

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 an unlawful breath-alcohol level, "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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), 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 inherent to section 322.2615, Florida Statutes, is a requirement that the hearing officer consider whether Petitioner was illegally stopped by Trooper Hawkins. Petitioner also argues that the hearing officer's failure to issue subpoenas for State

personnel involved in the administration, inspection, and approval of the Intoxilyzer 8000 deprived him of due process of law. He further asserts that the breath test results are not properly approved because the samples were obtained by using an unreliable method of administration and an unapproved testing machine. Lastly, Petitioner asserts that there is no probable cause to believe his normal faculties were impaired.

With respect to Petitioner's argument regarding the lawfulness of the stop, the Department filed a motion to remand 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). With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department filed a motion to dismiss but reserved its right to respond pending the Court's disposition of the motion. Following the briefing phase of this appeal, the Department filed another motion to abate and remand citing the Second District's decision in Yankey v. Department of Highway Safety and Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009)(finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in the document). On October 8, 2009, this Court entered an order denying the Department's motion to dismiss and motions to remand. The Department did not seek to file any further argument following the Court's disposition of the motion to dismiss.

In Pelham, the petitioner urged that the 2006 amendments to section 322.2615, Florida Statutes, negated lawfulness of the arrest as a precondition to the administrative suspension of

one's license. 979 So. 2d 304, 306. The Fifth District rejected the petitioner's reasoning holding that a lawful arrest must precede the administration of a breath test and despite the statutory amendments, a hearing officer still has authority to consider the lawfulness of a motorist's arrest. Id. at 305- 08.

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** and the hearing officer's Final Order of License Suspension is **QUASHED**. We **DISPENSE** with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
13th day of _January_, 2010.

/S/
JULIE H. O'KANE
Circuit Judge

/S/
ROGER J. MCDONALD
Circuit Judge

/S/
GAIL A. ADAMS
Chief 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**, 1520 E. Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the __13th__ day of __January_____, 2010.

_ /S/ _____
Judicial Assistant