

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

JENNIFER BROWN,

Petitioner,

v.

CASE NO.: 2008-CA-11307-O

Writ No.: 08-39

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

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE M. SMITH, LATIMORE, AND MIHOK, JJ.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Jennifer Brown (“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 suspension of her driver’s license for refusal to submit to a breath, blood, or urine test. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On March 4, 2008, Trooper William S. McKenzie was called to the scene of a hit and run accident at John Young and Oak Ridge. The victim stated that he was struck in the rear upon stopping for a red traffic light and that the other vehicle fled the scene, leaving behind wreckage from that vehicle. According to Trooper McKenzie’s report, during the time he was completing

the crash report for the accident he received word that the Orange County Sheriff's Office was out with the possible hit and run vehicle. After completing the crash report, Trooper McKenzie arrived at the location where Officer Melvin Huggins had found the possible hit and run vehicle and the Petitioner. Both Trooper McKenzie and Officer Huggins noticed the smell of alcohol emanating coming from the Petitioner, slurred speech, unsteady balance, and bloodshot, watery eyes. The Petitioner refused to perform field sobriety exercises after being repeatedly asked to perform them. Trooper McKenzie proceeded to place the Petitioner under arrest for DUI and transported her to the Orange County Breath Test Center where she refused to submit to a breath alcohol test.

Pursuant to section 322.2615, Florida Statutes, and Chapter 15A-6, Florida Administrative Code, a formal review hearing was held by Department Hearing Officer Petty on April 9, 2008. During the course of the hearing the Petitioner raised numerous arguments contesting her license suspension. Following the hearing, on April 14, 2008, the hearing officer entered a Findings of Fact, Conclusions of Law and Decision denying all of the Petitioner's motions and sustaining the suspension of her driver's license.

"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 refusing to submit to a breath-alcohol test, 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 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 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. (2008).

The Petitioner argues in her Petition for Writ of Certiorari that there existed no competent evidence in the record that would establish that Petitioner was driving or in actual physical control of an automobile; there existed no probable cause to detain Petitioner; and Petitioner was read an improper implied consent warning. In response the Department argues that the Department's order sustaining Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence; and the Hearing Officer properly sustained the license suspension of Petitioner where there was competent and substantial evidence to support the Hearing Officer's decision, the essential requirements of law were met, and Petitioner was afforded procedural due process.

To support her argument, the Petitioner relies on *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). The hearing officer had this decision available as binding authority during the instant hearing. In response the Department filed their "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings." In their motion the Department claims, "[t]he hearing officer below did not consider the lawfulness of the stop and arrest as it was the Department's position that the July 1, 2006 amendment to s. 322.2615, eliminated consideration of the lawfulness of the arrest from the hearing officer's scope of review." The Petitioner has filed a response to this motion to abate in which she opposes such an action.

As noted by numerous appellate panels within our circuit, this Court finds that the *Pelham* decision completely controls the outcome of this instant case. Our sister panels have repeatedly stated:

In *Pelham*, the Fifth District concluded that 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, 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 subsection 316.1932(1)(a), Florida Statutes. *Pelham*, 979 So. 2d at 305-08. Here, Petitioner argues

that the hearing officer failed to consider the lawfulness of his stop and subsequent arrest during his formal review hearing, wherein Petitioner had also argued that he did not consent to the breath test that was administered to him. An examination of the formal review hearing transcript and the Final Order of License Suspension, denying Petitioner's motions and sustaining the suspension of his driver's license, reveals that the hearing officer failed to determine whether Petitioner was lawfully stopped and arrested.

Pursuant to *Pelham*, this Court finds that the hearing officer's decision to sustain 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.

Portnoy v. DHSMV, 16 Fla. L. Weekly Supp. 1014a, (Fla. 9th Cir. Ct. August 10, 2009); *See also Foster v. DHSMV*, 16 Fla. L. Weekly Supp. 1011a, (Fla. 9th Cir. Ct. August 18, 2009). The instant case follows exactly as outlined in *Pelham* and the above cases. The hearing officer failed to consider the lawfulness of the stop and arrest, and therefore the decision to sustain the Petitioner's suspension departed from the essential requirements of law.

In light of this conclusion, this Court finds it unnecessary to address the additional arguments made by the Petitioner and the Department.

Based upon the foregoing, 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**. It is **FURTHER ORDERED** that 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, this
__2nd__ day of __June_____, 2010.

_____/S/_____

MAURA SMITH
Circuit Court Judge

_____/S/_____

ALICIA LATIMORE
Circuit Court Judge

_____/S/_____

A. THOMAS MIHOK
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 **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803; and to **Jason Helfant, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454, on this 2nd day of June , 2010.

_____/S/_____

Judicial Assistant