

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

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MIRANDA FAULKNER,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES, DIVISION OF LICENSES,

Respondent.

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WRIT NO.: 08-63

Case No.: 2008-CA-027874-O

Petition for Writ of Certiorari  
from the Florida Department of  
Highway Safety and Motor Vehicles,  
Darrin Bowen, Hearing Officer

David H. Novack, Esq.,  
for Petitioner.

Jason Helfant, Esq.,  
for Respondent.

Before Grincewicz, Kirkwood, Thorpe, JJ.

PER CURIAM.

**ORDER DENYING MOTIONS FOR REHEARING**

Both the Petitioner, Miranda Faulkner (“Petitioner” or “Faulkner”) and the Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, Division of Licenses, (“Respondent” or “Department”) move for rehearing of the Court’s order granting Faulkner’s petition for a writ of certiorari.

This case arises out of Faulkner's refusal to submit to a breath test following her arrest for DUI. We granted certiorari relief based upon the decision of the Fifth District Court of Appeal in *Department of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008).

We have reviewed the Department's motion for rehearing, all of the papers submitted in connection with Faulkner's petition<sup>1</sup> and our Order granting that petition from which the Department now seeks rehearing. We discern nothing in the Department's motion for rehearing which we overlooked or which the Department did not previously raise or could not have previously raised. Fla. R. App. P. 9.330( a). *See also Ayala v. Gonzalez*, 984 So. 2d 523 (Fla. 5th DCA 2008). The Department again contends that the hearing officer complied with *Pelham* because, the Department contends, he addressed whether Faulkner's arrest was lawful. The Department has never referred us to any page in the record to support this contention.

The Department's motion for rehearing is denied.

#### **FAULKNER'S MOTION FOR REHEARING**

Faulkner seeks rehearing of our order granting her petition for a writ of certiorari. She contends that we erred in remanding this matter rather than simply reversing the hearing officer's decision. As with our decision on the merits, our remand of this case was consistent with prior decisions of this court in these breathalyser refusal matters. Those decisions are based upon the Fifth District Court of Appeal decision in *Department of Highway Safety & Motor Vehicles v. Icaza*, 37 So. 3d 309, 310 (Fla. 5th DCA 2010). In *Icaza*, the court of appeal remanded a case

such as this where a hearing officer did not apply *Pelham*. We did the same. Faulkner contends that we overlooked and misapprehended that the reason for the remand in *Icaza* no longer obtained at the time of the hearing in this matter. We agree. The *Icaza* Court stated that:

Because the hearing officer did not have the benefit of *Pelham*, he relied on the provisions of section 322.2615(7), which limits the scope of review to enumerated issues that do not include the lawfulness of the arrest. Therefore, the Department did not address that issue at the hearing. After *Pelham* was rendered, the Department sought remand so it could have the opportunity to comply with that decision, but its motion was denied. Every party should have a fair opportunity to be heard, and under the circumstances of this case, the Department was deprived of that opportunity and denied procedural due process.

*Dep't of Highway Safety & Motor Vehicles v. Icaza*, 37 So. 3d at 312 (Fla. 5th DCA 2010).

The Florida Supreme Court denied review in *Pelham* on May 19, 2008. The hearing in this matter took place on September 12, 2008. Thus, unlike *Icaza* where the administrative hearing predated *Pelham*, in the matter *sub judice* the hearing officer had the benefit of *Pelham*. Indeed, Faulkner's attorney brought *Pelham* to the attention of the hearing officer. Further, the Department had every opportunity to address *Pelham* at the hearing. It did not even appear.<sup>2</sup>

Faulkner's motion for rehearing is granted.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

- 1) the Motion for Rehearing of the Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, Division of Licenses, be and hereby is **DENIED**, and
- 2) the motion for Rehearing of the Petitioner, Miranda Faulkner, be and hereby is

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<sup>1</sup> This includes the Amended Petition for Writ of Certiorari and Department's response thereto.

<sup>2</sup> A lawyer from the State Attorney's office was at the hearing "solely as an observer." (Tr. 6:2).

**GRANTED;** and

3) the Hearing Officer's Final Order of License Suspension be and hereby is

**QUASHED.**

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this the  
\_\_\_\_20th\_\_\_\_ day of \_\_\_\_December\_\_\_\_\_, 2010.

\_\_\_\_/S/\_\_\_\_\_  
**DONALD E. GRINCEWICZ**  
Circuit Court Judge

\_\_\_\_/S/\_\_\_\_\_  
**LAWRENCE R. KIRKWOOD**  
Circuit Court Judge

\_\_\_\_/S/\_\_\_\_\_  
**JANET C. THORPE**  
Circuit Court 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: 1) **David H. Novak, Esq.**, JAEGER & BLANKNER, P.A., 217 East Ivanhoe Boulevard, Orlando, Florida 34741; and 2) **Jason Helfant, Esq., Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV Legal Office, P.O. Box 540609, Lake Worth, Florida 33135 on the \_\_20th\_\_ day of \_\_December\_\_\_\_\_, 2010.

\_\_\_\_/S/\_\_\_\_\_

Judicial Assistant