

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

MARTIN PORTNOY,
Petitioner,

CASE NO.: 2008-CA-001253-O
WRIT NO.: 08-8

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**
Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Division of Driver Licenses,
R. Owes, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before WATTLES, STRICKLAND and SHEA, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Martin Portnoy timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (the 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. §§ 322.2615, 322.31, Fla. Stat. (2007); Fla. R. App. P. 9.030(c)(3); 9.100.

On November 11, 2007, at approximately 02:20 a.m., Lieutenant Schardine, of the Maitland Police Department, observed Petitioner in actual physical control of a vehicle. Lieutenant Schardine further observed that Petitioner's eyes were watery and bloodshot, Petitioner's speech was slurred, and that the odor of alcohol emitted from Petitioner's breath. Petitioner performed poorly on the field sobriety exercises. The Implied Consent Warning was read to Petitioner; Petitioner refused to submit to a breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on December 14, 2007, Petitioner was granted a formal review, held by Department Hearing Officer Owes, during which Petitioner raised several arguments that the traffic stop was unlawful.

On December 31, 2007, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of his driver's license.

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 a case 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 . . . 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), Fla. Stat. (2007).

Petitioner asserts that: 1) the hearing officer improperly refused to consider Petitioner's motion to set aside the suspension for lack of probable cause or jurisdiction to stop Petitioner's vehicle; 2) Officer Stitt lacked jurisdiction to require Petitioner to perform field sobriety exercises, arrest Petitioner, and require Petitioner to submit to a breath, blood, or urine test; 3) Officer Stitt lacked probable cause to believe Petitioner was under the influence of alcohol to the extent that his normal faculties were impaired; and 4) Petitioner was read an improper Implied Consent Warning. Thus, Petitioner argues that the stop and arrest were unlawful and therefore, the hearing officer's decision departed from the essential requirements of the law.

On the other hand, the Department contends that: 1) the lawfulness of Petitioner's arrest was not an issue to be addressed at Petitioner's formal review; 2) Deputy Stitt had

the authority to conduct Petitioner's DUI investigation, read the Implied Consent Warning to Petitioner, and ask Petitioner to submit to a breath test; 3) competent, substantial evidence supports the hearing officer's determination that the arresting officer had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle under the influence; and 4) the hearing officer's Final Order of License Suspension is supported by competent, substantial evidence, and complies with the essential requirements of the law. Petitioner filed a reply to the Department's response, wherein Petitioner reiterated his arguments made in the Petition for Writ of Certiorari.

Additionally, Petitioner filed a notice of supplemental authority, thus giving this Court notice of the Fifth District's decision in *Dep't of Highway Safety and Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). The Department filed a Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, wherein the Department concedes that the hearing officer failed to consider the lawfulness of Petitioner's stop and subsequent arrest. The Department requests this Court abate these proceedings, and remand this matter to the Department for consideration of the lawfulness of Petitioner's stop and arrest. Petitioner filed a response to the Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, wherein Petitioner requested this Court deny the Department's motion.

The Fifth District's opinion in *Pelham* is binding upon this Court. 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, wherein he refused to submit to a breath, blood, or urine test.

A review of 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, at the hearing, whether Petitioner was lawfully stopped and arrested, after Petitioner had refused to submit to a breath, blood, or urine test. Accordingly, 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.

In light of this conclusion, this Court 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**. The Department (Respondent) is directed to reinstate Petitioner's driving privilege.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on
this 10 day of Aug , 2009.

 /S/
BOB WATTLES
Circuit Judge

 /S/
STAN STRICKLAND
Circuit Judge

 /S/
TIM SHEA
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, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on the 10 day of Aug , 2009.

 /S/
Judicial Assistant