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

BENJAMIN VERLANDER,

Petitioner,

v.

CASE NO.: 2009-CA-4217-O
WRIT NO.: 09-64

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

Respondent.
____/

Petition for Writ of Certiorari.

William R. Ponall, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE G. ADAMS, EVANS, THORPE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Benjamin Verlander ("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 the six month suspension of his driver's license. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

As gathered from the hearing officer's findings of fact, on November 27, 2008, Officer Gill of the Maitland Police Department observed Petitioner parked in the roadway with the vehicle lights on. Officer Gill shined his spot light and started to approach the vehicle when it drove off. Officer Gill made contact with Petitioner who stated he was sorry he drank too much and pulled over to rest. Officer Gill detected vomit on Petitioner's clothing and the odor of an alcoholic beverage emitting from his breath. His eyes were red and glassy and his balance was unsteady. Petitioner admitted to drinking three shots of vodka and three twelve ounce beers prior to driving. He performed the field sobriety exercises with poor results. During the vehicle inventory, Officer Railey of the Maitland Police Department discovered a green leafy substance and a pipe commonly used and known to ingest illegal narcotics into the body. Petitioner was read the implied consent warning and submitted to the breath test with results of .112 and .101. Petitioner's privilege to operate a motor vehicle was suspended for six months for driving with an unlawful breath alcohol level.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on December 31, 2008. On January 12, 2009, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension for a period of six months. Petitioner now seeks certiorari review of this order.

"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. In cases where the individual's license is suspended for an unlawful breath-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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. (2008).

In the Petition for Writ of Certiorari, Petitioner argues that 1) The hearing officer's decision to sustain Petitioner's license suspension is not supported by competent substantial evidence that Petitioner was lawfully stopped or arrested and 2) The hearing officer's decision to sustain Petitioner's license suspension is not supported by competent substantial evidence that Petitioner's breath test was conducted in substantial compliance with the applicable administrative rules. Conversely, the Department argues that the hearing officer properly sustained the suspension as competent substantial evidence existed to support the hearing officer's decision.

Argument I: The hearing officer's decision to sustain Petitioner's license suspension is not supported by competent substantial evidence that Petitioner was lawfully stopped or arrested. Petitioner argues that the evidence before the hearing officer failed to establish that his vehicle was lawfully stopped, and thus, failed to establish that he was lawfully arrested. Petitioner points out that the arrest affidavit relied upon by the hearing officer merely indicated that Officer Gill observed that Petitioner's vehicle was temporarily parked on the roadway prior to making the

traffic stop. However, no evidence was provided that Petitioner's vehicle blocked or interfered with traffic.

Petitioner cites in his Petition, *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), where the Fifth District Court of Appeal held that a license suspension cannot be sustained under section 322.2615, Florida Statutes, if the licensee was not lawfully arrested.[1] The Department, in its Response to the Petition, argues that *Pelham* only applies to cases where the driver refuses to submit to a breath test, unlike in the case at hand where Petitioner submitted to the breath test. Therefore, the Department concludes that *Pelham* is not applicable and thus, the hearing officer properly declined to consider the lawfulness of the stop in this case.

This Court finds that not withstanding the factual difference, *Pelham* applies to the instant case. Part of the Fifth District Court of Appeal's reasoning in *Pelham* was that in order to establish probable cause as required under § 322.2615, Florida Statutes, the arrest and stop must be lawful. Section 322.2615, Florida Statutes, requires a finding of probable cause both in cases where a driver refuses to take a breath test and where a driver submits to a breath test with results above .08. Therefore, it would be illogical and contrary to the statute to find that because a driver agreed to the breath test, a finding of probable cause via a lawful stop or arrest is not necessary. See previous decisions from the Ninth Judicial Circuit that applied *Pelham* to cases where the drivers submitted to breath tests, *Faulkner v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 255a (Fla. 9th Cir. Ct. October 1, 2010 & rehearing December

[1] See *Dep't of Highway Safety & Motor Vehicles* v. *Hernandez and Dep't of Highway Safety & Motor Vehicles v. McLaughlin,* 2011 WL 2224791 (Fla. June 9, 2011), where the Florida Supreme Court addressed both cases applying *Pelham* and ruled that a driver's license cannot be suspended for refusal to submit to a breath test if the refusal is not incident to a lawful arrest and also ruled that the issue of whether the refusal was incident to a lawful arrest is within the allowable scope of review of the Department's hearing officer.

20, 2010); *Gonzalez v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 513a (Fla. 9th Cir. Ct. April 19, 2010); *Nordaby v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 321a (Fla. 9th Cir. Ct. January 13, 2010); *Drozd v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 77a (Fla. 9th Cir. Ct. November 18, 2009); and *Pelto v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 74a (Fla. 9th Cir. Ct. October 26, 2009).

Accordingly, this Court concurs with Petitioner that *Pelham* applies to the instant case and a determination must be made whether competent substantial evidence existed showing that the traffic stop and arrest were lawful. Among the cases cited by Petitioner in support of his argument that the traffic stop was unlawful, is *L.J.S v. State*, 905 So. 2d 222, 225 (Fla. 2d DCA 2005) where the Second District Court of Appeal held that the mere potential to block or interfere with traffic is insufficient to justify a stop for a traffic violation. Also cited by Petitioner is *Underwood v. State*, 801 So. 2d 200 (Fla. 4th DCA 2001) where the Fourth District Court of Appeal held that a traffic stop for parking on a roadway is not valid unless there is evidence that the vehicle blocked or interfered with traffic.

In the instant case, Officer Gill stated in his arrest affidavit, DDL-3, the following facts that led up to the traffic stop:

> On November 27, 2008, at approximately 0127 hours, I was driving westbound on Sandspur Road and observed a 2007 four door black Audi bearing FL tag DJX62 parked in the roadway of Covewood trail with the lights activated. I made a U-turn to travel eastbound, and when I turned on Covewood trail I observed the vehicle still in the roadway. I shined the spot light of my fully marked patrol car on the driver's side of the vehicle and began to approach the vehicle. The driver, later identified by FL DL as Benjamin Michael Verlander (A1), began to drive the vehicle southbound. I reentered my patrol car and activated my siren and emergency lights, and the vehicle then stopped.

Upon review of the transcript from the formal review hearing, Officer Gill did not testify and provide any additional reasons for the traffic stop. Further upon review of the hearing officer's order and other documents in the court record, it appears that the arrest affidavit was the primary evidence relied upon by the hearing officer as to her findings of fact leading up to the traffic stop. However, there were no facts presented in the arrest affidavit nor in any other documents, if any, considered by the hearing officer showing that Petitioner, by parking in the roadway, interfered or blocked traffic that would have made the traffic stop lawful. Therefore, competent substantial evidence was lacking to show that the traffic stop and arrest were lawful in this case.

Accordingly, this Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of the law and was not based on competent substantial evidence. Because Petitioner's argument I is dispositive, the Court finds it unnecessary to address his other argument.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Benjamin Verlander's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 26th day of October , 2011.

/S/
GAIL A. ADAMS
Circuit Court Judge

/S/
ROBERT M. EVANS
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 has been furnished via U.S. mail or hand delivery to **William R. Ponall, Esquire,** Kirkconnell, Lindsey, Snure and Ponall, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32789 and to **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 28th day of October , 2011.

_/S/________________________
Judicial Assistant