

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

SCOTT BLANCHARD,

Petitioner,

v.

CASE NO.: 2011-CA-5602-O

WRIT NO.: 11-35

**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 MCDONALD, BRONSON, THORPE, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Scott Blanchard (“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 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 arrest affidavit and the hearing officer's findings of fact, on March 2, 2011, Officer Steve Adams of the Orlando Police Department was cycling on his police mountain bike in the left lane of eastbound traffic on Robinson Street approaching Palmetto Street when he observed a vehicle stopped on Palmetto Street at the Robinson Street intersection, traveling northbound. Officer Adams then observed the vehicle turn right onto Robinson Street into the left lane directly in front of him causing him to brake to avoid hitting the vehicle. When Officer Adams observed the vehicle come to a stop at the intersection of Robinson Street and Rosalind Avenue he rode his bicycle next to the vehicle and observed that Petitioner's eyes were glassy and red. He then ordered the driver, identified as Petitioner, to stop the vehicle.

During the traffic stop, Officer Adams made contact with Petitioner and smelled the odor of alcohol coming from the vehicle. When Petitioner exited the car he was unsteady on his feet. When Officer Adams asked Petitioner if he had been drinking, he admitted to consuming two drinks. The odor of alcohol from Petitioner's breath increased as he spoke and his speech was sometimes slurred. Officer Adams explained to Petitioner his observations and the reason for making the traffic stop and Petitioner in response stated that he didn't see him. Officer Adams asked Petitioner if he would consent to performing field sobriety exercises. Petitioner agreed to do so and performed the exercises poorly. Officer Adams also asked Petitioner several questions about his medical condition including questions about his vision. He stated that he wore soft contacts and answered no to the other questions.

Officer Adams, applying his training and experience, placed Petitioner under arrest for driving under the influence and transported him to the DUI Center where he read Petitioner

the Implied Consent Warning. Petitioner submitted to the breath test with results of .136 and .130 whereupon Petitioner's driver's license was suspended 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 March 30, 2011. On April 7, 2011, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. 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. (2011).

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's decision to sustain his license suspension is not supported by competent substantial evidence that he was lawfully stopped or arrested because the arrest affidavit failed to contain sufficient factual detail, such as facts about who had the right of way, to establish that Officer Adams observed him commit a traffic infraction or engage in any type of erratic driving. Further, Petitioner argues that there was insufficient evidence making it was impossible for the hearing officer to conclude that Officer Adams was in the intersection lawfully.

Conversely, the Department argues that the lawfulness of the traffic stop is not an issue that is properly before the hearing officer in an administrative suspension review hearing brought pursuant to section 322.2615(7)(a), Florida Statutes (driving with an unlawful breath alcohol level). Further, the Department argues that the hearing officer's determination that Petitioner's motor vehicle was properly stopped is supported by competent substantial evidence.

Petitioner's Argument that Pelham Applies

Petitioner cites *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. 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, applying *Dep't of Highway Safety & Motor Vehicles v. Escobio*, 6 So. 3d 638 (Fla. 2nd DCA 2009), concludes that

Pelham is not applicable and thus, the hearing officer properly declined to consider the lawfulness of the stop in this case.¹

Court's Finding that Pelham Applies

Part of the Fifth District Court of Appeal's reasoning in *Pelham* was that in order to establish probable cause as required under section 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. Accordingly, this Court finds that *Pelham* is applicable to the instant case and a determination must be made as to whether competent substantial evidence existed that the traffic stop and arrest were lawful. 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 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.

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. Also, the Department has requested clarification from the Florida Supreme Court as to whether the Court's holding applies only to refusal cases.

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).

Lawfulness of Traffic Stop and Arrest

The Department, in its Response, cites ample case law that provides in order to have a valid stop for driving under the influence, the officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that persons detained in the stop of a vehicle have committed, are committing, or are about to commit a violation of the law. Thus, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *Terry v. Ohio*, 392 U.S.1, 88 S. Ct. 1868 (1968), *State v. Carrillo* 506 So.2d 495 (Fla. 5th DCA 1987); and *Weems v. State*, 492 So. 2d 1139 (Fla. 1st DCA 1986). "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2nd DCA 1992).

In the instant case, the hearing officer provided in his order the basis for denying Petitioner's motion to set aside the licensee suspension claiming the illegality of the traffic stop. The hearing officer when denying the motion stated, "Officer Adams was on bicycle patrol and as a result is to be afforded the same safety consideration as any cyclist. It is this Hearing Officer's opinion that Officer Adams' stop of Mr. Blanchard was justified based upon what he considered an unsafe driving pattern by nearly causing a crash."

Court's Findings as to Lawfulness of Traffic Stop and Arrest

This Court finds that it is reasonable to infer that that Officer Adams had the right of way based upon the statements provided by Officer Adams' in the arrest affidavit including that it was Petitioner, not Officer Adams, who made the turn onto Robinson Street from Palmetto Street where it is common knowledge that only a stop sign exists with no traffic lights. Also, Officer Adams' statements support that he possessed a reasonable suspicion that Petitioner was driving in an unsafe manner due to the close distance between Petitioner's vehicle and his bike when Petitioner made the turn causing him to brake to avoid a possible collision. Further, as Officer Adams stated in the arrest affidavit, Petitioner admitted that he did not see Officer Adams when he made the turn onto Robinson Street.

While Petitioner was not specifically cited for other traffic violations in addition to driving under the influence, the Department points out in its Response that Officer Adams had an objective basis to stop Petitioner's vehicle after Petitioner failed to maintain his vehicle as close as practicable to the right side of the roadway when making the right turn onto Robinson Street. Therefore, it was reasonable to suspect that Petitioner violated section 316.151(1)(a), Florida Statutes, that requires drivers to approach and make a right turn as close as practicable to the right-hand curb or edge of the roadway. Also, reasonable suspicion is warranted that Petitioner may have violated section 316.123(2)(a), Florida Statutes, by failing to yield to right-of-way traffic.

Upon review of the hearing officer's order in conjunction with the arrest affidavit, transcript from the formal review hearing, and the other documents in the court record, competent substantial evidence existed 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 did not depart from the essential requirements of the law and was based on competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Scott Blanchard's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 27th day of October, 2011.

/S/
ROGER J. MCDONALD
Circuit Court Judge

/S/
THEOTIS BRONSON
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 27th day of October, 2011.

/S/
Judicial Assistant