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

BARRY WALLACE RIGBY,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2012-CA-3612-O
Writ No.: 12-14

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Isabel Gibson, Hearing Officer.

William R. Ponall, Esquire,
Tad A. Yates, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE DOHERTY, SCHREIBER, WHITE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Barry Rigby ("Rigby") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department") final order sustaining the suspension of his driver license for driving with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

On January 1, 2012, Rigby was arrested for driving under the influence. Rigby provided breath test results of 0.178 and 0.169 and his license was suspended. He requested a formal

review hearing pursuant to section 322.2615, Florida Statutes, and the hearing was held on January 31, 2012. On February 1, 2012, the hearing officer entered a written order sustaining Rigby's license suspension.

"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 license was suspended for driving with 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 arresting law enforcement officer had probable cause to believe that the person 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2012).

In the Petition for Writ of Certiorari, Rigby argues that there was not competent substantial evidence that he was lawfully detained and therefore, the breath test results should not have been admitted into evidence. The Department argues that the lawfulness of the detention is an issue to be considered by the hearing officer only when a driver refuses to submit to a breath test. To support its position, the Department cites *Dep't of Highway Safety & Motor Vehicles v. Escobio*, 6 So. 3d 638 (Fla. 2d DCA 2009) in which that court determined that the

lawfulness of the stop is not within the hearing officer's scope of review for a license suspended due to a breath-alcohol level of 0.08 or higher. Alternatively, the Department argues that the record supports the hearing officer's decision that Petitioner was lawfully detained and arrested.

Lawfulness of Arrest is Within the Scope of Review of Hearing Officer for Suspension Due to Unlawful Breath-Alcohol Level

Contrary to the Department's claim, when a license is suspended for a breath-alcohol level of 0.08 or higher, the hearing officer must consider the lawfulness of the stop as this Court has ruled in prior cases. *Blanchard v. Dept. of Highway Safety & Motor Vehicles*, No. 11-5602 (Fla. 9th Cir. Ct. Oct. 27, 2011); *Verlander v. Dept. of Highway Safety & Motor Vehicles*, No. 09-4217 (Fla. 9th Cir. Ct. Oct. 26, 2011); *Faulkner v. Dept. of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 255a (Fla. 9th Cir. Ct. Oct. 1, 2010); *Carpenter v. Dept. of Highway Safety & Motor Vehicles*, No. 08-5827 (Fla. 9th Cir. Ct. Apr. 30, 2010); *Bagwell v. Dept. of Highway Safety & Motor Vehicles*, No. 08-572 (Fla. 9th Cir. Ct. Apr. 30, 2010); *Gonzalez-Vega v. Dept. of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 971a (Fla. 9th Cir. Ct. Apr. 19, 2010); *Nordaby v. Dept. of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 321a (Fla. 9th Cir. Ct. Jan. 13, 2010). In *Dep't of Highway Safety & Motor Vehicles v. Hernandez* and *Dep't of Highway Safety & Motor Vehicles v. Pelham*, the Florida Supreme Court and the Fifth District Court of Appeal stated that the obligation to submit to a breath-alcohol test derives from section 316.1932 of the Florida Statutes, the Implied Consent Law. *Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011); *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304, 305 (Fla. 5th DCA 2008). Section 316.1932 states that a driver is deemed to have consented to testing to determine "the alcoholic content of his or her blood or breath if the person is *lawfully arrested* for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages[,]" and the "….test must be

incidental to a *lawful arrest*[.]" § 316.1932(1)(a)1.a., Fla. Stat. (2012) (Emphasis added.) Therefore, the Florida Supreme Court concluded, "the Legislature has authorized the administration of a breath test *only* if it is incident to a lawful arrest and based on probable cause to believe that the person driving was under the influence of alcoholic beverages." *Hernandez*, 74 So. 3d at 1076 (Emphasis added).

Section 322.2615, Florida Statutes authorizes a law enforcement officer to suspend the driving privilege of a driver who has a breath-alcohol level of 0.08 or higher. § 322.2615(1)(a), Fla. Stat. (2012). The Courts explained in *Pelham* and *Hernandez* that section 322.2615 does not establish an obligation by a driver to take a test upon the request by a law enforcement officer; it is section 316.1932 that creates and defines the scope of the obligation and requires that the test be incident to a *lawful arrest*. *Pelham*, 979 So. 2d at 307; *Hernandez*, 74 So. 3d at 1075 (Emphasis added). In addition, in license suspension proceedings for both breath-alcohol level of 0.08 or higher and for a refusal, the hearing officer is required to consider whether the arresting law enforcement officer had *probable cause* to believe that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages. § 322.2615(7)(a), Fla. Stat. (2012) (Emphasis added). The Fifth District and the Florida Supreme Court noted that probable cause is "inextricably intertwined" with the lawfulness of the detention. *Pelham*, 979 So. 2d at 307; *Hernandez*, 74 So. 3d at 1078. Therefore, the Florida Supreme Court determined that the only reading of section 322.2615 that avoids an unreasonable and unconstitutional result is to consider sections 322.2615 and 316.1932 *in pari materia* and allow the hearing officer to review whether the test was administered incident to a lawful arrest. *Id.* at 1079.

Furthermore, after *Hernandez*, the Second District Court of Appeal that decided *Escobio* held that when a license is suspended for a breath-alcohol level of 0.08 or higher, the driver must

have an opportunity to challenge the lawfulness of the stop. *Carrizosa v. Dep't of Highway Safety & Motor Vehicles*, 124 So. 3d 1017 (Fla. 2d DCA 2013); *Rudolph v. Dep't of Highway Safety & Motor Vehicles*, 107 So. 3d 1129 (Fla. 2d DCA 2012), *reh'g denied* (July 11, 2012). The Second District noted the Court's warning in *Hernandez* that the denial of the opportunity to challenge the lawfulness of the stop could subject the driver to a miscarriage of justice or unconstitutional treatment. *Carrizosa*, 124 So. 3d at 1023. The Court also held that the circuit court should determine the mechanism by which the lawfulness of the stop may be decided. *Id.*

Adopting the Department's interpretation of section 322.2615 or the holding in *Escobio* would result in "[a] reading of section 322.2615 to prohibit review of an unlawful license suspension [and] lead to an unreasonable result that would render the statutory scheme constitutionally infirm." *Hernandez*, 74 So. 3d at 1079. "Statutes, as a rule, 'will not be interpreted so as to yield an absurd result.'" *Id.* (citing *State v. Iacovone*, 660 So. 2d 1371, 1373 (Fla.1995), quoting *Williams v. State*, 492 So. 2d 1051, 1054 (Fla. 1986)). Therefore, this Court finds that the lawfulness of the stop is an issue to be determined by the hearing officer when a license is suspended for a breath-alcohol level of 0.08 or higher.

Hearing Officer's Decision Supported by Competent Substantial Evidence that Petitioner was Lawfully Detained and Arrested

As stated in the arrest affidavit, Officer Adam Stevens was in a 7-11 when he saw Rigby pull into a parking spot, drive into the parking stopper, then back up and park in the parking space. Rigby entered the store and the officer observed that his movements were slow, he was unsteady on his feet, his face was flushed, his eyes were glassy, and he smelled the odor of alcohol impurities. Officer Stevens asked Rigby for his license and to walk outside and Rigby complied. He asked Rigby how much he had to drink and he stated not that much. He then asked Rigby how old he was and Rigby replied that he was 20. The officer told him that he should not be drinking at all and noted that the odor of alcohol impurities increased as Rigby

spoke. He then asked Rigby to consent to field sobriety exercises and Rigby agreed. After Rigby performed the exercises, Officer Stevens placed him under arrest for operating a motor vehicle while under the influence of alcohol to the extent his normal faculties were impaired.

Rigby argues that there was not competent substantial evidence that he was lawfully detained for a driving under the influence investigation or lawfully requested to perform field sobriety exercises. Lawful detention requires reasonable suspicion of criminal activity. § 901.151, Fla. Stat. (2012); *see Terry v. Ohio*, 392 U.S. 1 (1968). In order to detain a person to investigate for driving under the influence, there must be reasonable suspicion that the driver committed the offense of driving under the influence. *Dep't of Highway Safety & Motor Vehicles v. Haskins*, 752 So. 2d 625, 627 (Fla. 2d DCA 1999). The odor of alcohol combined with other factors may be sufficient to establish reasonable suspicion to detain a driver to determine whether he or she was driving under the influence. *See State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000); *Carder v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 547a (Fla. 9th Cir. Ct. Sept. 4, 2007).

When Rigby entered the 7-11, the officer's observations that his movements were slow, he was unsteady on his feet, his face was flushed, his eyes were glassy, and he could smell the odor of alcohol impurities were indicators that provided the officer with reasonable suspicion to detain Rigby to investigate whether he committed the offense of driving while under the influence of alcohol. Rigby argues that there are innocent explanations for the officer's observations of his flushed face and glassy eyes. However, when conduct may be explained by both innocent and criminal inferences, an officer may detain an individual to resolve the ambiguity. *Illinois v. Wardlow*, 528 U.S. 119, 120 (2000); *Terry*, 392 U.S. at 30. Based on the facts contained within the arrest affidavit, the Court finds that there was competent substantial

evidence to support the hearing officer's decision that Rigby was lawfully detained to investigate whether he committed the offense of driving under the influence.

After Rigby was lawfully detained, the officer obtained additional information that provided reasonable suspicion to request Rigby perform fields sobriety exercises: the odor of alcohol impurities coming from Rigby as he spoke and Rigby's admission that he had consumed alcoholic beverages. That information in addition to the officer's previous observations was competent substantial evidence to support the hearing officer's decision that Rigby was lawfully requested to perform field sobriety exercises. *Haskins*, 752 So. 2d at 627 (reasonable suspicion necessary to request driver submit to field sobriety exercises).

Accordingly, there was competent substantial evidence to support the hearing officer's decision to sustain the license suspension.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 19th day of March, 2014.

/S/
PATRICIA A. DOHERTY
Presiding Circuit Judge

SCHREIBER and WHITE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 19th day of March, 2014 to: **William R. Ponall, Esq.**, Snure & Ponall, P.A., 425 W. New England Avenue, Ste. 200, Winter Park, Florida 32789; **Tad A. Yates, Esq.,** Law Office of Tad A. Yates, P.A., 734 Rugby Street, Orlando, Florida 32804; **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857.

/S/
Judicial Assistant