

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

STANLEY DROZD,

Petitioner,

v.

**CASE NO.: 2007-CA-3016--O
Writ No.: 07-18**

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

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE TURNER, THORPE, AND SHEA, JJ.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Stanley Drozd (“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 one year suspension of her driver’s license for refusal to submit to a breath, blood, or urine test. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On November 30, 2006, Officer Buffkin, of the Orlando Police Department, observed the Petitioner in actual physical control of a motor vehicle. During his investigation, the officer observed slurred speech and the odor of alcohol on the Petitioner’s breath. When asked, the Petitioner agreed to perform field sobriety exercises and performed poorly on them. Following

his failure of the field sobriety exercises, the Petitioner was arrested for DUI and transported to the Orange County DUI testing facility. Petitioner agreed to and provided breath test samples of 0.210 and 0.202. Subsequently, the Petitioner's license was suspended for driving with an unlawful breath-alcohol of 0.08 or higher.

Pursuant to section 322.2615, Florida Statutes, and Chapter 15A-6, Florida Administrative Code, a formal review hearing was held by Department Hearing Officer Owes on January 3, 2007, and February 16, 2007. During the course of the hearing days the Petitioner raised numerous arguments contesting his license suspension. Following the hearing, on February 20, 2007, the hearing officer entered a Final Order of License Suspension denying a majority of the Petitioner's motions and sustaining the suspension of his driver's license.

"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 order to uphold the suspension of a driver's license for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, 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 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 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 section 316.193.

§ 322.2615(7)(a), Fla. Stat. (2007).

Petitioner argues that: 1) The hearing officer denied the Petitioner due process of law by not setting aside his suspension after failing to issue subpoenas to certain individuals identified by the Petitioner; 2) the breath test results were obtained from the Petitioner were not properly

approved since they were obtained by use of a breath testing machine that had not been properly approved pursuant to FDLE Rule 11D-8.003 and provided scientifically unreliable results; and 3) the hearing officer deprived the Petitioner of procedural due process of law by failing to consider whether the Petitioner was illegally stopped by the arresting officer.

Conversely, the Department argues that: 1) the hearing officer properly denied the Petitioner's request for subpoenas for persons not identified in the statute that provides the hearing officer the power to subpoena witnesses; 2) the Department's order sustaining the Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence; and 3) the hearing officer properly sustained the Petitioner's license suspension where there was competent and substantial evidence to show that the elements of section 322.2615(7)(a), Florida Statutes, were met by a preponderance of the evidence.

Since this writ was filed, the Fifth District Court of Appeal announced their decision in *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). The Petitioner presented this binding authority to this Court in their Notice of Supplemental Authority. In response the Department filed their, "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings." In their motion the Department claims, "[t]he hearing officer below did not consider the lawfulness of the stop and arrest as it was the Department's position that the July 1, 2006 amendment to s. 322.2615, eliminated consideration of the lawfulness of the arrest from the hearing officer's scope of review." The Petitioner has filed a response to this motion to abate in which he opposes such an action.

As noted by numerous appellate panels within our circuit, this Court finds that the *Pelham* decision completely controls the outcome of this instant case. Our sister panels have repeatedly stated:

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 during his formal review hearing, wherein Petitioner had also argued that he did not consent to the breath test that was administered to him. An examination of the formal review hearing transcript and 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 whether Petitioner was lawfully stopped and arrested.

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.

Portnoy v. DHSMV, 16 Fla. L. Weekly Supp. 1014a, (Fla. 9th Cir. Ct. August 10, 2009); *See also Foster v. DHSMV*, 16 Fla. L. Weekly Supp. 1011a, (Fla. 9th Cir. Ct. August 18, 2009). The instant case follows exactly as outlined in *Pelham* and the above cases. The hearing officer failed to consider the lawfulness of the stop and arrest, and therefore the decision to sustain the Petitioner's suspension departed from the essential requirements of law.

In light of this conclusion, this Court finds it unnecessary to address the additional arguments made by the Petitioner and the Department.

Based upon the foregoing, 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**. It is **FURTHER ORDERED** that the Department's "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings," is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
18th day of November, 2009.

/S/

THOMAS W. TURNER
Circuit Court Judge

/S/

JANET C. THORPE
Circuit Court Judge

/S/

TIM SHEA
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 **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803; and to **Jason Helfant, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454, on this 18th day of November , 2009.

_____/S/_____
Judicial Assistant