

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

CHRISTOPHER TROTMAN,
Petitioner,

CASE NO.: 2007-CA-004176-O
WRIT NO.: 07-25

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,
P. Beckley, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Thomas C. Mielke, Assistant General Counsel,
for Respondent.

Before WHITEHEAD, MUNYON and MCDONALD, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Trotman 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. (2005); Fla. R. App. P. 9.030(c)(3); 9.100.

On November 27, 2006, at approximately 02:22 a.m., Lieutenant Favorit, with the Orlando Police Department, while traveling west on East Michigan Street, observed a black Dodge truck spin its tires while stopped at the red light. When the traffic light

turned green, Lieutenant Favorit further observed the Dodge truck travel at a high rate of speed, visual estimation of 70 miles per hour in a 40 mile per hour zone. Lieutenant Favorit initiated a traffic stop and further observed the driver exit the vehicle. Lieutenant Favorit made contact with the driver and noticed that the driver appeared unsteady while on his feet. Lieutenant Favorit approached the driver and smelled “the strong odor of the impurities of alcohol coming from him.”

Officer Schellhorn, assisting Lieutenant Favorit, observed the driver’s eyes to be red and bloodshot. Officer Schellhorn made contact with the driver and also smelled “the overpowering odor of the impurities of alcohol coming from him.” When Officer Schellhorn asked the driver how much he had to drink, the driver replied, “a few beers.”

Officer Schellhorn asked the driver to submit to field sobriety exercises. The driver refused to submit to field sobriety exercises. Officer Schellhorn identified the driver as the Petitioner by his Florida driver’s license. Petitioner was subsequently arrested and transported to the Orange County DUI Center where Petitioner refused the breath test.

Pursuant to section 322.2615, Florida Statutes, and chapter 15A-6, Florida Administrative Code, on December 29, 2006, Petitioner was granted a formal review held by Department Hearing Officer Beckley. The Petitioner was not present, but was represented by counsel. The formal review hearing was continued and subsequently heard on March 16, 2007. The Petitioner was present for the subsequent hearing.

At the hearing, counsel for Petitioner moved to set aside the suspension on the following grounds: 1) the Orlando Police Department’s failure to accept the subpoena for Lieutenant Favorit and Officer Schellhorn, 2) impartial hearing officer, 3) illegal detention, 4) no probable cause for the traffic stop, 5) “no probable cause to believe [Petitioner] was under the influence and [to] ask him to submit to field sobriety exercises,” and 5) violation of Petitioner’s due process rights. On March 16, 2007, the hearing officer entered a Final Order of License Suspension denying Petitioner’s motions and sustaining the suspension of Petitioner’s 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. (2005). The hearing officer's scope of review is limited to the following issues:

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 was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person 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 eighteen months.

§ 322.2615(7)(b), Fla. Stat. (2005).

Petitioner argues that: 1) the hearing officer deprived Petitioner of procedural due process by failing to “set aside the suspension at the initial hearing on December 29, 2006” and 2) “there existed no probable cause to stop Petitioner’s vehicle.” The Department responds by asserting that: 1) “Petitioner was not denied procedural due process . . . [because] Petitioner was granted a continuance with a [driving] permit and the officers did testify,” 2) “lawfulness of the arrest is not an issue in proceedings [sic] § 322.2615(7)(B), Florida Statutes (2006),” 3) “certiorari review is not the proper

procedural vehicle to challenge the constitutionality of a statute or ordinance,” 4) “determination of the lawfulness of the arrest is not constitutionally required,” 5) “there is competent substantial evidence that the detention and subsequent arrest was lawful,” and 6) “even if the lawfulness of the arrest should have been addressed by the hearing officer, remand is the proper remedy.” Petitioner responded by reiterating his arguments contained in his Petition for Writ of Certiorari.

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 Fifth District’s opinion in *Pelham* is binding upon this Court. Petitioner in this case, like the petitioner in *Pelham*, argues that his license suspension was not supported by competent substantial evidence because the hearing officer failed to make a determination as to whether Petitioner was lawfully stopped or arrested. *Id.* at 305. In *Pelham*, the Fifth District concluded that a license suspension could not be based on an individual’s refusal to take a breath test following an unlawful arrest. *Id.* at 306-07. Furthermore, the Fifth District held that an administrative hearing officer, who reviews the suspension of a motorist’s driver’s license after the motorist refused to take a breath test, following his arrest for driving under the influence, had the authority to determine whether the request for said test was incident to a lawful arrest. *Id.* at 308. Here, Petitioner argues that the hearing officer, on March 16, 2007, failed to consider the lawfulness of Petitioner’s stop and subsequent arrest; a review of the record reveals that the Petitioner is correct, the hearing officer failed to determine the lawfulness of Petitioner’s stop and subsequent arrest. Accordingly, pursuant to *Pelham*, it appears that the hearing officer’s decision was not supported by competent substantial evidence.

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**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on
this 23 day of April, 2009.

/S/
REGINALD K. WHITEHEAD
Circuit Judge

/S/
LISA TAYLOR MUNYON
Circuit Judge

/S/
ROGER J. MCDONALD
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**, 1520 East Amelia Street, Orlando, Florida, 32803 and **Thomas C. Mielke, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler Street, Miami, Florida 33135 on the 23 day of April, 2009.

/S/
Judicial Assistant