

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

**CASE NO.: 2008-CA-6324
WRIT NO.: 08-28**

MICHAEL PIZZA,
Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**
Respondent.

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

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before BRONSON, LAUTEN, and DAWSON, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Pizza (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (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 pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On January 16, 2008, Deputy Shaheed of the Orange County Sheriff's Office observed a black Ford Mustang travelling southbound on South Orange Blossom Trail at Consulate Road. The vehicle was travelling faster than the flow of traffic, changed lanes without signaling on two occasions, and failed to drive in a single lane. Deputy Shaheed made contact with the driver, Petitioner, and observed the odor of alcohol emitting from Petitioner's breath and the vehicle. Deputy Shaheed also observed that Petitioner's movements were unsteady and his eyes were bloodshot and watery. Petitioner completed three field sobriety exercises: walk and turn, one-leg stand, and horizontal gaze nystagmus. Based on Petitioner's performance on the field sobriety exercises, Deputy Shaheed arrested Petitioner and transported him to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .192 and .195. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615, Florida Statutes, Petitioner requested a formal review of his license suspension. On February 22, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on five grounds: (1) that there was no lawful basis to stop Petitioner; (2) that the hearing officer failed to issue subpoenas and subpoenas duces tecum for Roger Skipper, Laura Barfield, Tanya Shrum and Kelly Melville; (3) that the Intoxilyzer 8000 was not properly approved for use in the State of Florida pursuant to section 316.1932, Florida Statutes, and FDLE Rule 11D-8.003 and that it did not work accurately; (4) that there was no probable cause to believe Petitioner's normal faculties were impaired; and (5) that the uniform method for obtaining breath test results was manipulated by the breath test operator. On February 26, 2008, the hearing officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law enforcement officer had probable cause to believe that

Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and that he had an unlawful breath-alcohol level of 0.08 or higher.

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 cases where the individual's license is suspended for an unlawful breath-alcohol level, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2006). The hearing officer's scope of review is limited to the following issues:

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. (2006).

At issue in the instant case is whether the hearing officer deprived Petitioner of procedural due process of law by finding that the lawfulness of the stop was outside the scope of the review hearing. Petitioner argues that the lawfulness of a stop must be determined before an individual's driver's license can be suspended in an administrative license suspension hearing

and, in this case, probable cause to justify stopping Petitioner's vehicle did not exist. Petitioner also argues that the hearing officer's failure to issue subpoenas and subpoenas duces tecum for State personnel involved in the administration, inspection, and approval of the Intoxilyzer 8000, deprived him of due process of law. He further asserts that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine. Lastly, Petitioner contends that the FDLE rules are insufficient to provide an accurate breath test result due to the failure to provide a uniform time for an individual to be required to stop blowing into the breath testing machine.

With respect to Petitioner's argument regarding the lawfulness of the stop, the Department filed a motion to abate citing the Fifth District's decision in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So. 2d 304 (Fla. 5th DCA 2008)(finding that hearing officer reviewing license suspension after motorist's refusal to take breath test had authority to consider lawfulness of arrest even though statute providing for such review did not include lawfulness of arrest as one of the issues within the scope of review). With respect to Petitioner's other arguments, the Department contends that it established substantial compliance with the FDLE rules to render Petitioner's breath test results admissible.

In Pelham, the petitioner urged that the 2006 amendments to section 322.2615, Florida Statutes, negated lawfulness of the arrest as a precondition to the administrative suspension of one's license. Id. at 306. The Fifth District rejected the petitioner's reasoning holding that a lawful arrest must precede the administration of a breath test and despite the statutory amendments, a hearing officer still has authority to consider the lawfulness of a motorist's arrest. Id. at 305- 08. The Fifth District also deemed the issue to be of great public importance and certified it to the Florida Supreme Court. Id. at 308.

The Court acknowledges that the Fifth District's opinion in Pelham is binding upon it and the instant case. Therefore, the Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of law when the hearing officer declined to consider Petitioner's argument that the stop and arrest was unlawful. In light of this conclusion, the 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**; the Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed June 4, 2009, is **DENIED**; the Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 25, 2009, is **DENIED**; the hearing officer's Final Order of License Suspension is **QUASHED**; and the Department is directed to reinstate Petitioner's driving privilege.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
__3rd__ day of ____November_____, 2009.

_____/S/_____
THEOTIS BRONSON
Circuit Judge

_____/S/_____
FREDERICK J. LAUTEN
Circuit Judge

_____/S/_____
DANIEL P. DAWSON
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**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the __3rd__ day of __November_____, 2009.

_ /S/ _____
Judicial Assistant