

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

ARTURO LOZOYA,

Petitioner,

v.

CASE NO.: 2008-CA-10789-O

Writ No.: 08-37

**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.

Damaris E. Reynolds, Esquire,
for Respondent.

BEFORE EVANS, T. SMITH, AND T. TURNER, JJ.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Arturo Lozoya (“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 his 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 March 1, 2008, Officer Thomas observed Petitioner’s vehicle on the side of the road while on routine uniform patrol. Officer Thomas approached the vehicle and observed Petitioner asleep behind the wheel with the engine running and the vehicle in drive. Officer Thomas noticed the smell of alcohol coming from Petitioner and, with some effort, woke him. According

to Officer Thomas' report, Petitioner could not understand his instructions and did not speak coherently. Officer Thomas and Officer Rojas removed Petitioner from the vehicle, and when Petitioner had trouble standing, placed him on the ground and handcuffed him. Officer Thomas did not conduct any field sobriety exercises, and proceeded to transport Petitioner to the Orange County DUI Testing Center where he refused to submit to a breathalyzer test.

Pursuant to section 322.2615, Florida Statutes, and Chapter 15A-6, Florida Administrative Code, a formal review hearing was held by Department Hearing Officer Bowen on April 9, 2008. During the course of the hearing the Petitioner raised numerous arguments contesting his license suspension. Following the hearing, on April 11, 2008, the hearing officer entered a Final Order of License Suspension denying 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. Where the driver's license was suspended for refusing to submit to a breath-alcohol test, 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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended 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 18 months.

§ 322.2615(7)(b), Fla. Stat. (2008).

In the Petition for Writ of Certiorari, Petitioner argues that 1) the hearing officer improperly refused to consider Petitioner's motion to set aside the suspension based on there being no probable cause to search Petitioner's vehicle and seize Petitioner; 2) there existed no probable cause to place Petitioner under arrest; and 3) the arresting officer read Petitioner an improper implied consent warning. Conversely, the Department argues that 1) the hearing officer's determination that sufficient cause existed to sustain the driving privilege was supported by competent substantial evidence and conformed to the essential requirements of law; and 2) the implied consent warning read to Petitioner was entirely lawful.

To support his argument, Petitioner cites to *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008). This case is controlling authority on the issue of whether a hearing officer must consider lawfulness of the stop in light of the amendments to section 322.2615(7). In *Pelham*, the Fifth District analyzed 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. *Id.* The Fifth District concluded that the statutory amendment 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 section 316.1932(1)(a), Florida Statutes. *Id.* at 305-8.

Here, Petitioner argues that the hearing officer failed to consider the lawfulness of his stop and subsequent arrest during his formal review hearing. Upon a careful review of the record, it is clear that the hearing officer considered the lawfulness of the stop in making his decision. After the hearing officer denied counsel for Petitioner's motions at the end of the hearing, the following exchange occurred:

MR. HYMAN: Are you denying them because you're not considering them, or are you denying them because you're finding that there was no basis to do that?

HEARING OFFICER: There was no basis to do that, yes.

MR. HYMAN: You're saying there was a basis?

HEARING OFFICER: Yes. I found that there were sufficient basis – for the ones I denied, I find that within the scope of the review.

MR. HYMAN: Despite all those cases that you have?

HEARING OFFICER: Right. As a result of some of those cases.....

The record before this Court indicates that the hearing officer properly followed the holding from *Pelham*. The hearing officer therefore did not depart from the essential requirements of the law.

Petitioner's second argument, that there existed no probable cause for the arrest, is also without merit. This Court sits in an appellate capacity in certiorari review of decisions made by DHSMV Field Hearing Officers, and must not reweigh the evidence or substitute its judgment for that of the agency. *See Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla.1995). *See also Education Dev. Ctr. v. City of West Palm Beach*, 541 So.2d 106 (Fla.1989). In the instant case, all of the findings were supported by competent substantial evidence in the record. The charging affidavit detailed the arresting officer's observations of Petitioner upon contact with him roadside and during the course of the investigation. Based on these observations, the hearing officer had competent substantial evidence to support his findings that the arresting officer had probable cause to arrest the Petitioner for DUI. The Court cannot, on appeal, reweigh and resolve conflicts in evidence that were presented to, and resolved by the hearing officer below.

Finally, Petitioner's third argument, that the arresting officer read the Petitioner an improper implied consent warning, is without merit. Petitioner argues that the decision in *DHSMV v. Clark*, 974 So. 2d 416 (Fla. 4th DCA 2007), governs the outcome of the instant case. In *Clark*, the district court set aside the suspension of a petitioner's license by finding that there was no statutory authority to tell the petitioner that she was required to submit to a blood or urine test. *Id.* The Department responds by citing to *DHSMV v. Nader*, 4 So. 3d 705 (Fla. 2d DCA 2009) and a consolidated case, *DHSMV v. McIndoe*, where the Second District disagreed with the finding in *Clark*, and quashed the circuit court opinions reversing the license suspensions of Nader and McIndoe. The court in *Nader* reasoned that a request to submit to a "breath, blood, or urine test," without any evidence that either Nader or McIndoe were confused, asked for clarification, or asked specifically for a breath test and were denied that test, is not enough to reverse a license suspension. *Nader*, 4 So. 3d at 709. In the instant case, the hearing officer was presented with the officer's arrest report and the refusal affidavit and no evidence of confusion. Furthermore the officer's report indicates that he asked the Petitioner if he would submit to a breathalyzer test to which the Petitioner did not answer. Based on the holding from *Nader*, the hearing officer followed the essential requirements of law and had competent substantial evidence uphold the Petitioner's license suspension.

Thus, the Court finds that the Department's order sustaining Petitioner's suspension conforms to the essential requirements of the law and is supported by competent substantial evidence. To evaluate the evidence further would put the Court in the impermissible position of reweighing the evidence presented in the administrative action.

Based upon 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
10th day of _____ May _____, 2010.

_____/S/_____

ROBERT M. EVANS
Circuit Court Judge

_____/S/_____

THOMAS B. SMITH
Circuit Court Judge

_____/S/_____

THOMAS W. TURNER
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 **Damaris E. Reynolds, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, DHSMV – Legal Office, P.O. Box 540609, Lake Worth, FL 33454, on this 10th day of May , 2010.

_____/S/_____
Judicial Assistant