

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

ANGEL GONZALEZ-VEGA,

Petitioner,

v.

CASE NO.: 2008-CA-15115-O

Writ No.: 08-46

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

Respondent.

Petition for Writ of Certiorari.

David H. Novak, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE THORPE, JOHNSON, and WHITEHEAD, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Angel Gonzalez-Vega (“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 suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On April 16, 2008, Petitioner was placed under arrest for DUI and transported to the breath testing facility. Petitioner submitted breath samples of .124 and .143. Petitioner's driver's license was suspended for driving with an unlawful blood alcohol of .08 or higher.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on May 20, 2008. At the hearing, Petitioner moved to set aside the suspension arguing that pursuant to *Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304 (Fla. 5th DCA 2008), the scope of the hearing included the lawfulness of the arrest. The hearing officer denied the motion. On May 21, 2008, the hearing officer entered a written order sustaining Petitioner's license suspension. Petitioner now seeks certiorari review of this order.

“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 driving with an unlawful blood 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. (2008).

In the Petition for Writ of Certiorari, Petitioner argues that the hearing officer's choice to ignore the *Pelham* decision and refuse to consider the lawfulness of the stop was a departure from the essential requirements of the law. Conversely, the Department argues that the hearing officer's determination that sufficient cause existed to sustain the suspension of Petitioner's driving privilege is supported by competent substantial evidence and conformed to the essential requirements of the law.

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). Additionally, the Department cites *Pelham* in its motion to abate and remand. 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 apparent that Petitioner argued to the hearing officer that the evidence failed to establish that he was lawfully arrested in this case. Petitioner also specifically cited the *Pelham*

decision to the hearing officer to support his argument. After hearing Petitioner's arguments and motion, the hearing officer specifically denied Petitioner's motion and refused to consider the lawfulness of the stop.

Pursuant to the reasoning set forth in the *Pelham* decision, the Court finds that the hearing officer's decision to sustain the 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. Because this argument is dispositive, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Gonzalez-Vega's 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, this
__19th__ day of ____April_____, 2010.

_____/S/_____
JANET C. THORPE
Circuit Court Judge

_____/S/_____
ANTHONY H. JOHNSON
Circuit Court Judge

_____/S/_____
REGINALD K. WHITEHEAD
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 **David H. Novak, Esq.**, Jaeger & Blankner, 217 E. Ivanhoe Blvd., N., Orlando, FL 32804; 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 33454-0609, on this ___19th___ day of __April_____, 2010.

_____/S/_____
Judicial Assistant