

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

BRADLEY CARPENTER,

Petitioner,

v.

CASE NO.: 2008-CA-05827-O

Writ No.: 08-22

**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 O’KANE, MCDONALD, and ADAMS, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Bradley Carpenter (“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 December 8, 2007, Petitioner was placed under arrest for DUI and transported to the breath testing facility. Petitioner submitted breath samples of .160 and .161. 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 hearings were held on January 8, 2008 and February 14, 2008. At the hearings, Petitioner moved to set aside the suspension on numerous grounds, arguing: 1) that the hearing officer was required to consider the lawfulness of the stop; 2) that the hearing officer refused to issue subpoenas for Roger Skipper, Laura Barfield, Tanya Shrum, and Michael Rodriguez; 3) that the breath test machine used was unapproved for use in the State of Florida; and 4) that the breath test regulations are insufficient due to the lack of a uniform method of administration. On February 18, 2008, the hearing officer entered a written order denying Petitioner's motions and 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 there existed no probable cause or a founded suspicion of criminal activity to justify stopping Petitioner's vehicle and the hearing officer improperly refused to rule on the motion. Next, Petitioner argues that the hearing officer's failure to issue subpoenas deprived Petitioner of procedural due process. Additionally, Petitioner argues that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine. Last, Petitioner argues that the breath test results should have been excluded because the breath test regulations are insufficient due to the lack of a uniform method of administration.

Conversely, the Department argues that the hearing officer properly sustained the license suspension of Petitioner where there was competent and substantial evidence to support the hearing officer's decision, the essential requirements of the law were met, and Petitioner was afforded procedural due process. Specifically, the Department argues that 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, that the Department established substantial compliance with FDLE rules to render Petitioner's breath test results admissible, that the Department's methods of administration of the breath test are uniform and comply with Florida Statute section 316.1932, and that the lawfulness of the arrest is no longer an issue to be considered by the hearing officer.

After the Department filed its Response to the Petition for Writ of Certiorari, it filed a motion to abate and remand the case, as to the subpoena issue. Additionally, the Department filed a motion to abate and remand the case, as to the lawfulness of the stop issue. The motions to abate are currently pending along with the Petition.

To support his argument, Petitioner filed a notice of supplemental authority citing *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 attempted to argue to the hearing officer that the evidence failed to establish that he was lawfully arrested in this case. The hearing officer repeatedly interrupted Petitioner's efforts to question the witness about the lawfulness of the stop, noting that the administrative hearing was the "wrong arena" for such review. 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** as follows:

1. Carpenter's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.
2. The Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed June 3, 2008, is **DENIED**.
3. The Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 16, 2009, is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__30th__ day of __April_____, 2010.

/S/
JULIE H. O'KANE
Circuit Court Judge

/S/
ROGER J. MCDONALD
Circuit Court Judge

/S/
GAIL A. ADAMS
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 St., 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 33454-0609, on this 30th day of April , 2010.

_/S/ _____
Judicial Assistant