

IN THE SUPREME COURT OF FLORIDA

CASE NO. :
LOWER COURT CASE NO. 2D07-4891

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,

Appellant/Petitioner,

vs.

GEORGE F. MCLAUGHLIN,

Appellee/Respondent.
_____ /

INITIAL BRIEF ON JURISDICTION

ROBIN F. LOTANE
GENERAL COUNSEL

HEATHER ROSE CRAMER
Fla. Bar No. 0901600
Assistant General Counsel
Department of Highway Safety
And Motor Vehicles
Post Office Box 540609
Lake Worth, Florida 33454
Telephone: 561-357-4169

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case and Facts..... 1

Summary of Argument..... 4

Argument..... 5

THE SUPREME COURT SHOULD ACCEPT JURISDICTION TO REVIEW MCLAUGHLIN V. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES AS THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN MCLAUGHLIN IS DIRECTLY IN CONFLICT WITH TWO OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

Conclusion..... 9

Certificate of Service and Font Size..... 10

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE NO.</u>
<u>Department of Highway Safety and Motor Vehicles v. Pelham,</u> 979 So.2d 304 (Fla. 5 th DCA 2008), <i>rev. denied</i> , 984 So.2d 519 (Fla. 2008)	3,6,8
<u>Hernandez v. Department of Highway Safety and Motor Vehicles,</u> 33 Fla. L. Weekly D2707 (Fla. 1DCA Nov. 21, 2008)	3,8
<u>McLaughlin v. Department of Highway Safety and Motor Vehicles,</u> 33 Fla. L. Weekly D2659 (Fla. 2DCA Nov. 14, 2008)	3,5,8,9
<u>McLaughlin v. Department of Highway Safety and Motor Vehicles, Case No.:</u> 2007CA-001672 Order Denying Petition for Writ of Certiorari (Fla. 10 th Cir. Ct. Sept. 18, 2007)	2
 <u>FLORIDA STATUTES AND RULES</u>	
s. 316.193, Florida Statutes	5,6
s. 316.1932, Florida Statutes	2,3,6,7,8
s. 316.1932(1)(a), Florida Statutes	7
s. 322.2615, Florida Statutes	2,4,5,6,8,9
s. 322.2615(1)(b)(3) Florida Statutes	1,3
s. 322.2615(7), Florida Statutes	2
s. 322.2615(7)(a)	5
s. 322.2615(7)(b), Florida Statutes	5
s. 322.2615(7)(b)(2), Florida Statutes	5
 Florida Rule of Appellate Procedure 9.030(2)(a)(iv)	 4,9
 Chapter 2006-290, s. 45, Laws of Florida	 5,6

STATEMENT OF THE CASE AND FACTS

In this brief, Appellant/Petitioner (Respondent below), State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Appellee/Respondent (Petitioner below), George F. McLaughlin, will be referred to as "McLaughlin." The Department's Appendix will be referred to as "App. ___".

Following McLaughlin's arrest for refusal to submit to a breath test, McLaughlin requested a formal administrative review of his license suspension pursuant §322.2615 (1)(b)(3), Florida Statutes. After an evidentiary hearing for that purpose, the Department hearing officer who presided over the case determined by a preponderance of the evidence that sufficient cause existed to sustain McLaughlin's suspension. The Department informed McLaughlin in an Order dated February 27, 2007, that the suspension of his driving privilege was sustained for a period of twelve months.

On March 29, 2007, McLaughlin filed a Petition for Writ of Certiorari with the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, Florida, challenging the Department's Final Order of License Suspension. On September 18, 2007, the circuit court rendered the Order Granting Petition for Writ of

Certiorari, which upheld the Department's administrative suspension of Petitioner's driver's license. McLaughlin v. Department of High Way Safety and Motor Vehicles, Case No.: 2007CA-001672 Order Denying Petition for Writ of Certiorari (Fla. 10th Cir. Ct. Sept. 18. 2007). The circuit court rejected the numerous arguments raised in the Petition and held that the hearing officer complied with the essential requirements of law and that the final order of license suspension was supported by competent substantial evidence. In rejecting McLaughlin's argument regarding the lawfulness of the stop and arrest, the Circuit Court certified the following question as one of great public importance: DOES THE REQUIREMENT OF A LAWFUL ARREST PURSUANT TO THE IMPLIED CONSENT LAW OF §316.1932, APPLY TO DRIVER'S LICENSE SUSPENSION PROCEEDINGS CONDUCTED UNDER §322.2615, FLORIDA STATUTES?

McLaughlin then sought certiorari review before the Second District Court of Appeal of the circuit court's Order Denying Petition for Writ of Certiorari. On November 14, 2008, the Second District issued an Order that affirmed the Department's interpretation of the amendment to s. 322.2615, Florida Statutes holding that the hearing officer's scope of review is limited to those issues enumerated in s. 322.2615(7) and the lawful arrest

requirement in s. 316.1932 is not to be read *in pari materia* with the provisions in s. 322.2615. McLaughlin v. Department of Highway Safety and Motor Vehicles, 33 Fla. L. Weekly D2659 (Fla. 2d DCA Nov. 14, 2008). (App. A). In reaching its conclusion, the Second District rejected the holding of the Fifth District Court of Appeal in Pelham v. Department of Highway Safety and Motor Vehicles, 979 So.2d 304 (Fla. 5th DCA 2008), which found to the contrary that the lawful arrest issue remains in the hearing officer's scope of review because the provisions of section 322.2615 must be read *in pari materia* with the lawful arrest requirement in section 316.1932. The Second District also certified a conflict with Pelham.

Subsequent to the Court's holding in McLaughlin, the First District Court of Appeal issued an Order in Hernandez v. Department of Highway Safety and Motor Vehicles, 33 Fla. L. Weekly D2702 (Fla. 1st DCA Nov. 21, 2008). The Court in Hernandez aligned itself with the holding in Pelham.

The Department now seeks review in this Court for which the Department is filing its Brief on the issue of this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

This Court has Jurisdiction to review this case since there is an express conflict with this case and a decision of two other district courts of appeal on the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv). The Department requests this Court to accept jurisdiction to review this conflict as the issue at bar will directly impact every administrative DUI driver's license suspension in the State of Florida. As a result of this conflict, the Department is currently faced with applying the provisions of section 322.2615 inconsistently throughout the state.

ARGUMENT

THE SUPREME COURT SHOULD ACCEPT JURISDICTION TO REVIEW MCLAUGHLIN V. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES AS THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN MCLAUGHLIN IS DIRECTLY IN CONFLICT WITH TWO OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

Prior to October 1, 2006, the hearing officer's scope of review at a formal review conducted pursuant to §322.2615 required a determination that the driver was "placed under lawful arrest for a violation of § 316.193." §322.2615(7)(b)2, Florida Statutes (2005). However, §322.2615(7)(b), Florida Statutes (2006), as amended by chapter 2006-290, § 45, Laws of Florida, effective October 1, 2006, states the following with regard to hearings held pursuant to §322.2615, Florida Statutes¹

(7) In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:

*

*

*

¹ The statute was amended to remove the lawful arrest requirement from the scope of review as it relates to suspensions for both driving with an unlawful blood alcohol level and refusal. §322.2615(7)(a) and §322.2615(7)(b).

(b) If the license was suspended for refusal to submit to a breath, blood, or urine test:

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 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. (Emphasis supplied).

In addition, 2006-290 § 45 amends § 322.2615 to remove references to arrest, and to § 316.193 and § 316.1932, Fla. Stat. throughout.

Despite the amendment to s. 322.2615 and the legislature's intent to remove the lawfulness of the arrest from the hearing officer's scope of review, the Fifth District Court of Appeal in Pelham, held that a hearing officer in an administrative suspension hearing held pursuant to s. 322.2615 must continue to consider the lawfulness of the arrest as an issue in their scope of

review. The district court held that the provisions of s. 322.2615 must be read *in pari materia* with the provisions of s. 316.1932(a), which requires a lawful arrest prior to a request for a breath test. Section 316.1932 provides:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances, if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who had reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.

§ 316.1932(1)(a), Fla. Stat. (emphasis supplied)

In rendering its opinion in Pelham, the Fifth District Court of Appeal certified the following question as an issue of great public importance:

CAN THE DHSMV SUSPEND A DRIVER'S LICENSE FOR REFUSAL TO SUBMIT TO A BREATH TEST, IF THE REFUSAL IS NOT INCIDENT TO A LAWFUL ARREST? IF NOT, IS A DHSMV HEARING OFFICER REQUIRED TO ADDRESS THE LAWFULNESS OF THE ARREST AS PART OF THE REVIEW PROCESS?

On May 19, 2008 this Court declined to exercise its discretionary jurisdiction to review Pelham. Department of Highway Safety and Motor Vehicles v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008), *rev. denied*, 984 So.2d 519 (Fla. 2008). However, since the Fifth District Court of Appeal rendered its decision in Pelham, both the Second and First District Courts of Appeal have ruled on the same issue. On November 14, 2008, the Second District Court of Appeal in the case at bar rejected the Fifth District decision to construe section 322.2615 *in pari materia* with section 316.1632. Instead, the Second District held that the provisions of s. 322.2615 are clear on their face and that a hearing officer in a hearing held pursuant to s. 322.2615 **is not required** to address the lawfulness of the arrest in the scope of their review. McLaughlin, 33 Fla. L. Weekly D2659. (App. A)

Adding to the conflict, on November 21, 2008, the First District, in Hernandez, *supra*, aligned itself with the Fifth District in Pelham and held that the provisions of section 316.1932 and section 322.2615 must be read *in*

pari materia requiring the hearing officer in a formal review to consider the lawfulness of the arrest.

Based on the foregoing, the Second District's opinion in McLaughlin is in direct conflict two other district courts of appeal as specified in Fla. R. App. P. 9.030(2)(A)(iv). Therefore, the Department has shown that this Court has discretionary jurisdiction in this case. The Department requests this court accept jurisdiction to review this conflict as the issue at bar will directly impact every administrative DUI license suspension in the State of Florida. As a result of this conflict, the Department is currently faced with applying the provisions of section 322.2615 inconsistently throughout the state.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to grant its request to accept jurisdiction in this matter.

ROBIN F. LOTANE
GENERAL COUNSEL

HEATHER ROSE CRAMER
Fla. Bar No.0901600
Assistant General Counsel
Department of Highway Safety
And Motor Vehicles
Post Office Box 540609
Lake Worth, Florida 33454
Telephone: 561-357-4169

CERTIFICATE OF SERVICE AND FONT SIZE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Jurisdictional Brief has been mailed by United States mail to Tony C. Dodds, Esquire, 1628 S. Florida Avenue, Lakeland, Florida, 33803, this ____ day of December, 2008. I **HEREBY CERTIFY** that the font size used in the Department's Jurisdictional Brief is Courier New 12 point.

HEATHER ROSE CRAMER
Assistant General Counsel