

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

NICHOLAS J. DORN,  
Petitioner,

APPELLATE DIVISION (CIVIL): AY  
CASE NO.: 502013CA003593XXXXMB

v.

DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,  
Respondent.

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Opinion filed: **AUG - 2 2013**

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

Petitioner seeks review of the order affirming the suspension of his driver's license. The issue on appeal is whether there is competent substantial evidence to support the Hearing Officer's finding that Petitioner was placed under lawful arrest. We find that the record does not contain competent substantial evidence to support a finding that the initial traffic stop was lawful and therefore grant the petition.

A license suspension can be predicated upon a refusal to take a breath test only if the refusal was incident to a lawful arrest. *Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1073 (Fla. 2011). Whether or not a breath test is incident to a lawful

arrest is within a Hearing Officer's scope of review. *Id.* at 1077; *Ferrei v. Dep't of Hwy. Safety & Motor Vehicles*, 91 So. 3d 920, 921 (Fla. 2d DCA 2012).

Although the Hearing Officer found that the arrest was lawful, there was not competent substantial evidence from which the Hearing Officer could have concluded that the Petitioner was lawfully stopped. Officer Walsh failed to appear at the formal review hearing. Therefore, the only evidence before the Hearing Officer regarding the traffic stop was Officer Walsh's traffic report. The traffic report merely indicated that Officer Walsh observed a vehicle with front-end damage, vaguely characterized as "heavy," and initiated the stop.

In *Hilton v. State*, 961 So. 2d 284 (Fla. 2007), a vehicle was pulled over due to a cracked windshield. The State relied on section 316.610, Florida Statutes, which prohibits driving a vehicle in an unsafe condition, as the basis for the stop. *Id.* at 297. The State presented no evidence that the cracked windshield caused the vehicle to be in an unsafe condition to endanger person or property or that it was in violation of section 316.2952, which specifically governs windshield requirements. *Id.* The trial court made no findings and provided no conclusions with regard to whether the crack in the windshield rendered the defendant's vehicle unsafe. *Id.* Accordingly, the Florida Supreme Court held that the State failed to demonstrate that the stop was reasonable, and concluded that the stop was illegal under the Fourth Amendment. *Id.* See also *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

As in *Hilton*, it appears that the only potentially applicable statute is section 316.610, yet there is no evidence in the record that this vehicle was in an unsafe. *Cf. State v. Santos*, 19 Fla. L. Weekly Supp. 867b (Fla. Brevard Cty. Ct. 2012) (finding reasonable suspicion for a stop where the truck's muffler was dragging on the ground with sparks flying and smoke coming from the truck). Furthermore, there was no evidence introduced of the nature or extent of the

damage that would give rise to a concern over public safety. There was also no evidence presented to indicate that Officer Walsh made the stop to carry out an accident investigation. Therefore, there was not competent substantial evidence to support a finding of a lawful arrest.

Accordingly, the Petition for Writ of Certiorari is hereby **GRANTED** and the order of suspension is **QUASHED**.

BRUNSON, G. KEYSER, and BROWN, JJ., concur.

FILED  
JUL 11 1997  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK