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

JAMES LYNCH,

Petitioner,

v.

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502011CA000834XXXMB

Appealed from the Department of
Highway Safety and Motor Vehicles

Opinion filed: FEB 0 3 2012

Appeal from the Department of Highway Safety and Motor Vehicles.

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HAFELE, J.

James Lynch ("Lynch") seeks review of the Hearing Officer's order sustaining the suspension of his license. We find that, because the Hearing Officer's order fails to make a ruling on the disqualification of Lynch's commercial driver license ("CDL"), the matter must be remanded to the Hearing Officer to clarify whether the permanent disqualification of Lynch's CDL was sustained. However, our reading of *Dep't Highway Safety and Motor Vehicles v. Hernandez*, 36 Fla. L. Weekly S243a (Fla. June 9, 2011), does not mandate an overt written finding by the Hearing Officer that the refusal was incident to a lawful stop. In this case, the Hearing Officer's order states that "all elements necessary to sustain the suspension for refusal to

submit to a breath, blood or urine test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence." This statement subsumes the issue of whether the refusal was incident to a lawful stop.

Accordingly, the Petition for Writ of Certiorari is **GRANTED**. The order of suspension is **QUASHED** and the matter is **REMANDED** to the Hearing Officer solely to make a finding regarding the disqualification of Lynch's CDL.

COX, J., concur.

CROW, J., concurring in part, dissenting in part.

While I concur with the majority that the matter must be remanded for the Hearing Officer to make a determination as to the issue of Petitioner's commercial driver license, I would also remand because the Hearing Officer failed to make a finding that the refusal to submit to a breath test was incident to a lawful arrest as required by the Florida Supreme Court's recent decision in *Dep't Highway Safety and Motor Vehicles v. Hernandez*, 36 Fla. L. Weekly S243a (Fla. June 9, 2011). The majority assumes that the statement "all elements necessary to sustain the suspension for refusal to submit to a breath, blood or urine test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence" subsumes a finding that the refusal was incident to a lawful stop. Such a conclusion assumes that the Hearing Officer read section 322.2615 in *pari materia* with the implied consent statute, despite the 2004 amendment to section 322.2615 that removed the lawfulness of the stop from the Hearing Officer's scope of review.

The record is void of any indication as to how the Hearing Officer analyzed this issue, which is precisely why it must be remanded for the Hearing Officer to make an express ruling. Since the order at issue did not make a finding that the stop was lawful, a conclusion that the

issue was "subsumed" constitutes an impermissible reweighing of the evidence. The circuit court in its appellate capacity is not entitled to reweigh the evidence and must limit itself to determining whether the evidence supporting the decision was competent and substantial. *Dep't of Highway Safety and Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006); *Dep't of Highway Safety and Motor Vehicles v. Kurdziel*, 908 So. 2d 607, 609 (Fla. 2d DCA 2005).

Therefore, I would remand to the Hearing Officer for a determination whether the request to submit to a breath test was incident to a lawful arrest. This would place us in line with existing Fifteenth Judicial Circuit precedent. *See Maesel v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 1101a (Fla. 15th Cir. Ct. Sept. 26, 2011); *Bennett v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24b (Fla. 15th Cir. Ct. Oct. 17, 2011); *Lebrun v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24a (Fla. 15th Cir. Ct. Oct.17, 2011); *Christensen v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24c (Fla. 15th Cir. Ct. Oct.17, 2011); *Rielly v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 24d (Fla. 15th Cir. Ct. Oct.17, 2011); *Smith v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11c (Fla. 15th Cir. Ct. (Appellate) Oct. 14, 2011); *Hollingsworth v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11b (Fla. 15th Cir. Ct. Oct. 14, 2011); *Maloney v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 11a (Fla. 15th Cir. Ct. Oct.14, 2011); *Thomas v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Marsh v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Fraxedas v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Flanagan v. Dep't of Highway Safety & Motor Vehicles*, (Publication Forthcoming); *Ehilow v. Dep't of Highway Safety & Motor Vehicles*,

(Publication Forthcoming).