

# F L O R I D A DEFENDER

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## DUI NOTES



By  
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### DMV Fought the Law and the Law Won Or Can I Get Some BTUs

I recall my first experience at the DMV hearing office. It was 18 years ago shortly after the law had changed to provide this new system of administrative suspension and review by the DMV. I was representing my first DUI client after having left the State Attorney's Office to embark on my new career as a lawyer in the private sector.

I read the citation my client received and had my secretary set up the Formal Review Hearing that was referenced on the back of the ticket. We actually created our own form to do this by tracking the language on the citation. We then received the DMV hearing request form via mail which they preferred we fill out instead of our self created form. We did that and sent it in. The next document we received gave us the date and time of the hearing and required us to list witnesses we sought to subpoena to the hearing and provide some reason why they were relevant.

We filled that out listing the arresting officer and breath testing officer as the relevant witnesses for obvious reasons and sent it in. We then received via mail blank subpoena forms from the DMV hearing office which we filled out with the names and addresses of

the witnesses and sent them back to the DMV as directed. The DMV issued the subpoenas and sent them back to us.

Our postman must have thought there was something going on between me and the hearing officer based upon the daily correspondence between us. With the issued subpoenas in hand we served the officers along with the \$5 witness fee checks as we were instructed to do.

Thus it appeared that we were off to the races. In just a few days after jumping through these hoops I was scheduled to attend my first DMV Formal Review hearing. The only problem was I figured if it had taken that much effort just to set the hearing up I had no idea what to expect at the actual hearing itself. This whole process seemed rather, well, formal.

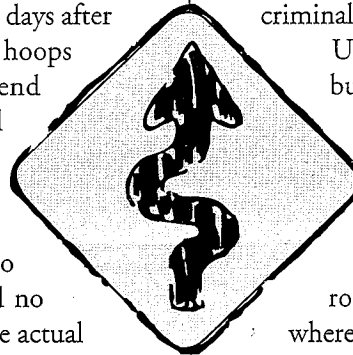
I was groping in the dark trying to figure out how this administrative hearing was going to go. I called everyone I knew for advice but no one seemed to be able to provide the answers I needed. Ultimately, I was given the sage advice to read the rules governing the hearings. That sounded like a plan. The only problem was Al Gore had not yet invented the internet and finding the rules in the law library posed an even more difficult problem. I suppose it would have helped to know what rules I was looking for.

Our normally very helpful law librarian at the courthouse was as puzzled

as I was. He never heard of DMV administrative hearing rules. He opined that he was glad it was not his case. I'm not sure if he was referring to the fact that he was not the lawyer or not my client. Anyhow, after failing at that research project I drove to the DMV hearing office with my briefcase loaded with every law book and research file I could fit inside. I figured if the rules were not easily found than at least I could hit them with the laws that pertained to DUI cases on the criminal side of things.

Upon entering the DMV building I was directed into a small, stuffy, cinderblock-constructed, windowless hearing room with the hearing officer. I sat down in the dimly lit room across the desk from where the hearing officer sat. An empty witness chair was positioned so close to me that I wasn't sure if I was expected to cross examine the witnesses or thumb wrestle with them. Because the hearing officer's desk was so full of knickknacks, pencil holders, plants and an autographed picture of Bob Martinez that I had to perch my briefcase full of case law, statute books and files on my knees to use as a writing surface.

As we sat there waiting for the witnesses to arrive the air conditioner clicked on with a roar every few minutes. I soon realized that the air conditioner at this particular DMV hearing office was there for some type of psychological torture rather than to serve as a cooling system. From what I could tell it clearly



was not designed to cool the room we were in, but it was so loud that it tricked your overheated body thermostat into thinking it was about to receive a blast of cool air every time it revved up. However, as loud as it was, no cool air was ever produced. As a result your body temperature actually went up anticipating the cold air that never arrived. It was the DMV's own version of waterboarding.

Apparently, its only real purpose other than to torture whoever was in the room was to ensure that no matter how loud a witness screamed you would never know what he said. This was extremely effective in making sure that any record from the taped hearing sounded like a recording from the Oval Office circa 1973. In fact, it was so loud that every time the AC clicked on I tried to fasten my seat belt, bring my seat back to its upright position and stow away my tray table.

I don't know if it was the lack of Freon, the fact that I had consumed some extremely spicy wings for lunch or the nervous tension from being completely inexperienced at conducting an administrative hearing in a room that was fashioned after the Hanoi Hilton, but beads of sweat began forming on my forehead. I could hear the second hand ticking on my watch as we waited for the officers to show up, which was interesting since my watch is battery-powered. Maybe I was just cracking under pressure.

After about 20 minutes of feeling sweat drops work their way down my neck and onto my now soaking wet shirt collar the hearing officer suggested that the witnesses were not going to show up, I agreed. She then turned on a recording device and asked if I had indeed subpoenaed the officers. I produced the returns of service and she left the room to make copies for her file. Then after I wiped away another sweat drop that was hanging from the tip of my nose the hearing officer returned. The AC clicked on again as she sat down and asked if I had any motions.

"What?" I yelled. "Motions!" she yelled back, "Do you have any motions?" "No" I responded, "I did not bring any

lotion with me." I was now getting really concerned. What was going to happen now and why did it involve lotion? No one warned me about this next administrative procedure. Since I had not read the rules I was praying there would be no need for a latex glove. After all, I was only 27 years old. I had a few more years before that type of procedure was going to be part of my annual humiliation. I was about to make a beeline for the parking lot when the air conditioner clicked off.

"Motions," she said, "Would you like to make any motions on your client's behalf?" I breathed a sigh of relief, "Oh, thank God, I can do that without even having to take my pants off."

With that said, I proceeded to use the rest of the hour pontificating about how my client was unlawfully stopped for a tag light being out when in fact there were two tag lights on his car and one worked which illuminated the license plate sufficiently which is all the law required. I produced a photo of the tag being illuminated by the one working light, copies of the tag light statute and case law about equipment violations and illegal stops.

As I concluded my argument I made a sweeping gesture with my arm across her desk to dramatize that the whole case was infirm. I did not realize that in doing so I hit a mini cactus that was on the desk which adhered to my jacket sleeve. The pot the cactus was planted in smashed into the picture of our smiling governor, knocking it over and breaking the frame. I apologized as the hearing officer helped remove the spiny plant from my garment. She asked that I be more careful since the room was so small. "Really, I hadn't noticed."

She then asked if I was concerned at all about the officers' failure to appear. "Oh, yeah, that too," I said. She asked if I was moving for the license suspension to be invalidated based on that. That sounded good to me. Why not throw

that in there for good measure, but I insisted that my illegal stop argument which I clearly put more time and effort into was the winner. Would she like to hear it again? No? I didn't think so. I could hear crickets chirping.

She then made some comment about giving the officers 48 hours to contact her to explain why they failed to show up and if not she would invalidate the suspension. With that she concluded the hearing. I was dumbfounded.

What was happening? Why didn't she just do what a judge does when a witness fails to appear? Why not say, "OK, we'll reset this hearing for next Tuesday at 2:00 p.m. and if they fail to appear then ... well, we'll reset it again." What was going on?

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Later, when my client called to find out his fate I had no clue what to tell him. Quite frankly, I had no idea what had happened, but I confidently explained that our stop motion was solid even though we heard no testimony about it. A week later I received a letter verifying the suspension was invalidated and advising my client that he could pick up his license at any DMV free of charge.

Yes! I won my first DMV hearing case. My argument about the illegal stop had carried the day. Well, that's what I thought until I found out that the officers had not called within two days, so I won by default. It had nothing to do with my motion based on the unlawful stop. Nevertheless, I figured the day would come when I could win one of these hearings based on the stop issue.

Interestingly, I was right. In the years that followed unlawful stop/detention/arrest motions did produce results. Not at first, but after some favorable circuit appellate decisions hearing officers actually invalidated suspensions on the spot for a while. That is until they were instructed to ignore circuit appellate

decisions. Then when the district courts of appeal weighed in there was less resistance and finally in 2004 the Florida Supreme Court settled the matter once and for all with its decision in *Dobrin v. Department of Highway Safety & Motor Vehicles*, 874 So. 2d 1171 (Fla. 2004). The US Supreme Court was not interested in stepping into this mess so the decisional law was complete.

It was then after the DMV had exhausted all legal challenges to the validity of the illegal stop/detention/arrest motions in the judicial branch that they turned to the legislature. The only way out now was to change the statute regarding the scope of the review. To that end, prior to the 2007 revision of 322.2615 the hearing officer's scope of review included, whether the person was placed under lawful arrest for a violation of s. 316.193. §322.2615(7)(b)2., Fla. Stat. (2005). So in 2007 §322.2615(7) was revised to read,

*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.*

This seemed to be the fix the DMV needed. Now they could get back to the business of suspending people's licenses without regard to the legality of the stop/detention/arrest. In fact, hearing officers denied motions to invalidate at record pace and circuit appellate courts followed suit by denying writs of certiorari based on that simple statutory change. If it was that easy the DMV should have done that years ago instead of enduring countless nitpicking appellate orders requiring them to do crazy stuff like follow the law. So that was that, right? Not so fast.

Thanks to some persistent attorneys who refused to accept that reasoning, some important cases were decided in 2008. The first was *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). In *Pelham*, the case started as expected with the hearing officer sustaining the driver's license suspension without regard to the issue raised concerning the legality of the detention. The driver appealed, but this time the circuit appellate court granted the driver's petition for certiorari and held that the suspension of the driver's license was invalid because the detention preceding the DUI arrest was unlawful. The Department of Highway Safety and Motor Vehicles therefore appealed to the 5th DCA.

The DMV argued that in the old statute the scope of review included the issue of whether the person was placed under lawful arrest for a violation of s. 316.193. However, in 2007 the legislature deleted this language and amended the statute to only include whether the officer had probable cause to believe the driver had driven while under the influence. Therefore the DMV's position was that the issue concerning the lawfulness of the arrest was no longer applicable to the administrative suspension process.

The *Pelham* court rejected that argument based on the Implied Consent Statute, 316.1932, which requires that a breath test must be incidental to a lawful arrest. The court reasoned that 322.2615 could not be construed in isolation but must be considered in pari materia with 316.1932. As such the suspension based on the refusal to take a test that resulted from an unlawful detention or arrest could not stand. Nevertheless, the 5th DCA certified the following question to the Florida Supreme Court:

*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 the DHSMV hearing officer required to address the lawfulness of the arrest as part of the review process?*

As noted in the above case citation, the Florida Supreme Court later denied review.

While that was happening, another case out of Jacksonville was being

decided. In November 2008 persistence paid off again this time in the 1st DCA due to another attorney who refused to accept the concept that an unlawful stop/detention/arrest could simply be ignored by a court of law. Importantly, this time it was the driver who had to appeal since the circuit appellate court denied the writ of certiorari. In *Hernandez v. DHSMV*, 995 So 2d. 1077 (Fla 1st DCA 2008) the formal review hearing officer chose not to consider the issue of whether the arrest of the driver was lawful despite the legal basis raised by counsel. The hearing officer upheld the suspension concluding that police had probable cause to believe the driver had driven while under the influence of alcohol.

The Circuit Appellate Court denied certiorari relief ruling that the hearing officer did not have to consider the legality of the arrest due to the statutory change to 316.2615. A writ was taken to the 1st DCA. The *Hernandez* court agreed with the reasoning in *Pelham*, holding that 316.1932 unambiguously requires that a driver implicitly consents to submit to a breath test *only when such is incidental to a lawful arrest.*

Thus the *Hernandez* court concluded that the term *lawful arrest* contemplated by 316.1932 related to the scope of review set forth in 316.2615 since that statute contemplated a *lawful* test and a *lawful* test can only stem from a *lawful* arrest. Therefore the court ruled that the circuit appellate court erred when it upheld the hearing officer's decision which failed to consider the legality of the arrest. The *Hernandez* court certified the following question to the Florida Supreme Court,

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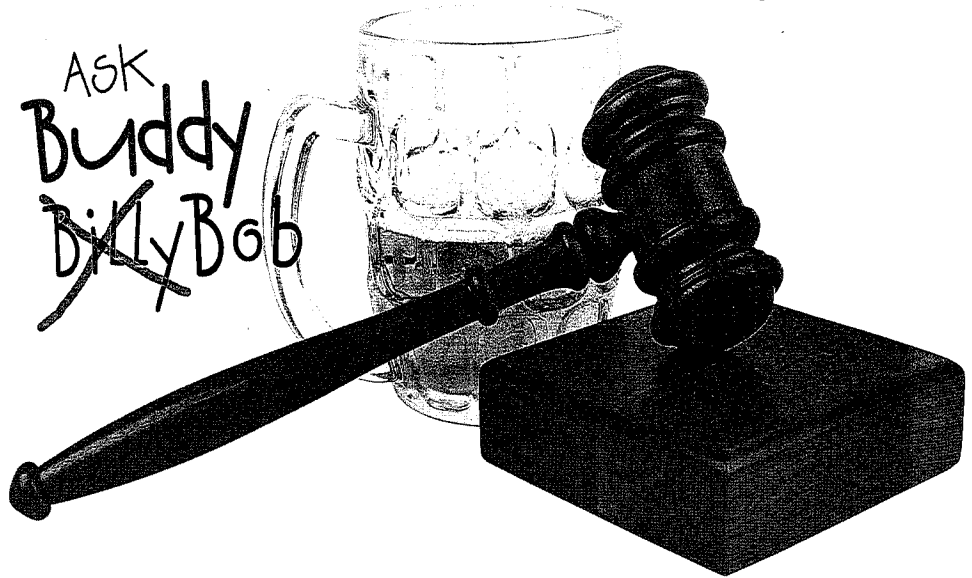
Interestingly, while this case was being decided the 2nd DCA was addressing this same issue in *McLaughlin v. DHSMV* 2. So. 3d 988 (Fla 2nd DCA

2008). In that case the court held that 322.2615 should not be read in pari material with 322.1932 because doing so creates an ambiguity that otherwise does not exist. Thus the 2nd DCA held that the Circuit Appellate Court did not depart from the essential requirements of law in denying the driver's petition because 322.2615 as amended did not require the hearing officer to consider the lawfulness of the arrest. The *McLaughlin* court acknowledged that its holding was in direct conflict with *Pelham*.

As a result, the DMV has taken the position that even though *Pelham* is settled law until the Florida Supreme Court answers the question in *Hernandez* or the conflict certified in *McLaughlin* the DMV does not have to consider the lawfulness of the stop/detention/arrest. However, since the Florida Supreme Court has, in fact, already denied review in *Pelham*, if case precedent has any influence over these matters, the DMV should follow the *Pelham* and *Hernandez* decisions and consider the legality of the stop, detention and arrest if raised by the driver at least in the circuits within the 1st and 5th districts.

If not, I would hope that courts are prepared to ensure that they get the message so that when some young lawyer is exposed to what I experienced 18 years ago he or she can confidently attend the hearing with stop/detention/arrest caselaw in hand along with the understanding that despite the revision of 322.2615 nothing has effectively changed at these DMV formal review hearings, except hopefully the air condition filter. 🏠

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by  
BuddyBob

Dear Buddy Bob,

My wife's cat likes to sleep under my car. I'm always afraid that when I start the engine that the cat will get caught in one of the belts and fur will go a' flyin.' Is there anything I can do to prevent it from happening?

—*Catatonic in Crestview*

Dear Catatonic,

The only advice I can give is to: buy a bunch of cats; buy a bunch of red roses; or convince your wife that you are allergic to them. There ain't no way to keep that cat from under your car unless you wrap chicken wire around the bottom every time you park it at home. If that don't work I know a real good divorce lawyer.



Dear Buddy Bob,

I have got a few DUI convictions in my life. I'm not sure if it's three or four. My lawyer told me I got two "first-time offenses" because of the job he done for me. Either way I want to know if I can get a driver's license. I've called other lawyers and gotten different answers. Do you know? I also want to know if I can get a bidnezz-purpose-only license because a man's got to work you know.

—*Stranded in Starke*

Dear Starke,

There's a lot of laws on this and a lot of people seem to get this confused. All questions about suspended driver's licenses must begin with Florida Statutes Section 322.271. This section addresses the DHSMV authority to modify the suspension of a driver's license. The part that applies to you is subsection 2(a). Simply put, if you were convicted of two or more DUI offenses whether they be for refusal to take an approved test for your breath, urine or blood or having an unlawful breath or blood alcohol then you cannot get a business purpose only driver's license during. So if you are currently under the effect of a suspension after being convicted of DUI then you cannot get a driver's license for any reason at all if you have two or more DUI convictions.

Another issue to be addressed prior to even attempting to obtain a driver's license is covered by Florida Statutes Section 322.291. That section holds that you must enroll and successfully complete what the DHSMV calls "a substance abuse education course conducted." The program must be licensed by the DHSMV and include a psychosocial evaluation and treatment, if referred. Florida Statutes Section 322.292 governs exactly what that program must do to receive a license to operate.

As to whether you can get a driver's license at all you must look to a different statute. The statute that applies to this