

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

**CASE NO.: 2007-CA-000256-O
WRIT NO.: 07-04**

JOHN JACKSON,
Petitioner,

v.

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

Respondent.

FINAL ORDER ON RESPONDENT’S MOTION FOR REHEARING

THIS MATTER came before the Court on the Respondent’s “Motion for Rehearing,” filed on September 21, 2009. Petitioner John Jackson (Petitioner) timely filed a petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (Department) Final Order of License Suspension, sustaining the suspension of his driver’s license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). This Court entered a “Final Order Granting Petition for Writ of Certiorari” on September 10, 2009, finding that the Fifth District’s decision in Department of Highway Safety and Motor Vehicles v. Pelham, 979 So. 2d 304 (Fla. 5th DCA 2008), was binding upon this Court and the hearing officer’s decision to sustain Petitioner’s driver’s license suspension departed from the essential requirements of the law when the hearing officer declined to consider the lawfulness of the stop and arrest. Respondent timely moved for rehearing, pursuant to Florida Rule of Appellate Procedure 9.330, asserting that the issue of the hearing officer’s

consideration of the lawfulness of the stop was never raised on appeal and the supplemental authorities supplied by Petitioner should not have been considered by this Court. This Court having reviewed the motion, the Final Order, and being otherwise fully advised in the premises, finds as follows:

On October 14, 2006, Deputy Sherman of the Orange County Sheriff's Office observed a vehicle fail to stop at a posted stop sign. Upon pulling the vehicle over, Deputy Sherman made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from his breath. Deputy Sherman also observed that Petitioner's eyelids were bloodshot and red. Petitioner admitted to consuming alcohol and initially agreed to participate in the field sobriety exercises but later refused to continue any further exercises based on his poor performance. Deputy Sherman read the implied consent warning and Petitioner refused to submit to a breath-alcohol test. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On November 21, 2006, the hearing officer held a formal review hearing at which Petitioner was not present but was represented by counsel. Petitioner moved to invalidate the license suspension on four grounds: (1) that the refusal affidavit is unreliable; (2) that the Petitioner was unlawfully arrested; (3) that section 322.2615, Florida Statutes, is unconstitutional to the extent it permits suspension where a driver refuses to submit to a breath test after being illegally stopped or arrested; and (4) that section 322.2615, Florida Statutes, is unconstitutional to the extent it allows a hearing officer to refuse to issue subpoenas for relevant witnesses. Petitioner also moved to strike: (1) the traffic citation; (2) the results of the field sobriety exercises and Petitioner's refusal to continue performance of the field sobriety exercises; and (3) the horizontal gaze nystagmus exercise results. On December 12, 2006, the hearing

officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; that Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer; and Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In cases where the individual's license is suspended for refusal to submit to a breath, blood, or urine test, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007). The hearing officer's scope of review is limited to the following issues:

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.

§ 322.2615(7)(b), Fla. Stat. (2007).

At issue in the instant case is whether the hearing officer departed from the essential requirements of the law by refusing to issue a subpoena for William Harden, the individual who notarized Deputy Sherman's signature on the affidavit of refusal and the probable cause charging affidavit. Petitioner also asserts that the license suspension is not supported by competent substantial evidence that Deputy Sherman had probable cause to believe Petitioner was under the influence of alcohol or that Petitioner was lawfully arrested.

With respect to Petitioner's argument regarding the hearing officer's failure to issue the subpoena, the Department reserved the right to respond pending the Court's disposition of the Department's motion to dismiss. This Court granted in part the Department's motion to dismiss by striking the following sentence from the Petition: "To the extent the amended version of Fla. Stat. §322.2615 actually permitted the hearing officer to refuse to issue the subpoena, the statute is unconstitutional on its face and as applied to the Petitioner." The Department did not seek to file any further argument following the Court's disposition of the motion to dismiss. With respect to Petitioner's other argument, the Department contends that there is competent substantial evidence to support the hearing officer's finding that Petitioner was in actual physical control of an automobile while under the influence of alcohol.

Section 322.2615(6)(b), Florida Statutes, as amended October 1, 2006, provides that a hearing officer is authorized to issue subpoenas for the officers and witnesses identified in the following documents: (1) the driver's license; (2) an affidavit stating the officer's grounds for belief that a driver was driving or in actual physical control of a motor vehicle while under the influence of alcohol; (3) the results of a breath test or an affidavit stating that a breath test was

requested by the officer and the person refused to submit; (4) the officer's description of a person's field sobriety test; (5) the notice of suspension; (6) or a copy of the crash report. See also Yankey v. Department of Highway Safety and Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009). Below, the Department entered the notice of suspension, a copy of Petitioner's driver's license, a probable cause charging affidavit, and an affidavit of refusal. William Harden's signature is located on the probable cause charging affidavit and the affidavit of refusal. Pursuant to section 322.2615(6)(b), Florida Statutes, the hearing officer was authorized to issue subpoenas to persons listed in both documents where William Harden's signature appears.

Based on the foregoing, the Court finds that the hearing officer was authorized under 322.2615(6)(b), Florida Statutes, to issue a subpoena to the individual who notarized the refusal affidavit and the hearing officer's failure to do so constituted a departure from the essential requirements of the law. In light of this conclusion, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Court has reconsidered the "Final Order Granting Petition for Writ of Certiorari," rendered September 10, 2009, and that the "Final Order Granting Petition for Writ of Certiorari" is amended as set forth herein.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
23 day of _____ December _____, 2009.

_____/S/_____
ALICE L. BLACKWELL
Circuit Judge

_____/S/_____
THOMAS B. SMITH
Circuit Judge

_____/S/_____
JENIFER M. DAVIS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32803 and **Jason Helfant, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the 23 day of December , 2009.

_____/S/_____
Judicial Assistant