

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

**CASE NO.: 2007-CA-1531
WRIT NO.: 07-12**

ALEXANDER TOMACELLI,
Petitioner,

v.

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

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Reginald Owes, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before THORPE, LAUTEN, and G. ADAMS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Alexander Tomacelli (Petitioner) timely filed this 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).

On December 1, 2006, Deputy Butler of the Orange County Sheriff's Office observed a vehicle driving with faulty equipment. Upon pulling the vehicle over, Deputy Butler made contact with the driver, Petitioner, and observed the odor of alcohol emitting from his breath. Deputy Butler also observed that Petitioner's eyes were bloodshot, red, watery, and glassy. Based on Petitioner's performance on the field sobriety exercises, Deputy Butler arrested Petitioner and transported him to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .179 and .170. 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 January 9, 2007, the hearing officer held a formal review hearing at which Petitioner was present and represented by counsel. Petitioner moved to invalidate the license suspension on nine grounds: (1) the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Kelly Melville, and Tanya Shrum; (2) Deputy Butler did not have probable cause to ask Petitioner to step out of vehicle and perform field sobriety exercises; (3) there was no probable cause to arrest Petitioner; (4) Petitioner's submission to the breath test was coerced; (5) the breath test machine was not approved for use in the State of Florida; (6) the Department failed to prove that the breath test was approved; (7) the tests results are unreliable because a new twenty minute observation period should have been triggered after Petitioner belched; (8) section 322.2615, Florida Statutes, fails to establish the traditional predicates; and (9) section 322.2615, Florida Statutes, violates Petitioner's due process rights. Petitioner's motion to strike the horizontal gaze nystagmus exercise results was granted. On January 12, 2007, 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 and that he had an unlawful breath-alcohol level of 0.08 or higher.

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 an unlawful breath-alcohol level, "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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2007).

At issue in the instant case is whether the hearing officer departed from the essential requirements of the law in interpreting section 322.2615(6)(b) to prohibit the issuance of subpoenas for Kelly Melville, Roger Skipper, Laura Barfield, and Tanya Shrum. Petitioner argues that the hearing officer's failure to issue subpoenas violated his right to full discovery

concerning the breath test machine upon which he was tested. He also asserts that the breath test results were inadmissible because the samples were obtained by using an unapproved and unreliable breath testing machine and the breath test operator failed to make certain that Petitioner did not regurgitate in the twenty minutes prior to the administration of the breath test.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department filed a motion to dismiss but reserved its right to respond pending the Court's disposition of the motion. On April 20, 2007, this Court entered an order striking Argument I of the Petition for Writ of Certiorari on the basis that Argument I challenged the constitutionality of section 322.2615, as amended. Following the briefing phase in this appeal, the Department filed a motion to abate and remand for further proceedings citing the Second District's decision in Yankey v. Department of Highway Safety and Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009)(finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in that document), that addresses the issue raised in Argument I of the Petition for Writ of Certiorari. After further reviewing Argument I of the Petition for Writ of Certiorari, this Court entered an order vacating the order of April 20, 2007, denying the Department's motion to dismiss, and striking one sentence in Argument I of the Petition for Writ of Certiorari that addresses the constitutionality of section 322.2615.

With respect to Petitioner's other arguments, the Department contends that there is competent substantial evidence in the record that the Department substantially complied with FDLE rules to render Petitioner's breath test admissible.

Following the briefing phase in this appeal, the Department filed a motion to abate and remand for further proceedings citing the Second District's decision in Yankey v. Department of Highway Safety and Motor Vehicles, 6 So. 3d 633 (Fla. 2d DCA 2009)(finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in that document). The Department's motion to abate and remand is still pending.

In Yankey, the petitioner filed a petition for writ of certiorari seeking to quash a circuit court order affirming the department's suspension of her license for driving with an unlawful breath-alcohol level. Id. at 634. The petitioner asserted that the hearing officer and the circuit court departed from the essential requirements of the law in interpreting section 322.2615(6)(b), Florida Statutes, to prohibit the department's issuance of a subpoena for the agency inspector responsible for testing the breath test machine and signing the agency inspection report. Id. Pursuant to section 322.2615(6)(b), Florida Statutes, a driver in a formal review hearing "may subpoena those witnesses who are identified in documents submitted by the arresting officer, which documents include the results of any breath test." Yankey, 6 So. 3d at 637; see also §22.2615(2), Fla. Stat. The Second District acknowledged that law enforcement had established a practice of routinely providing the department with a breath-alcohol analysis report, a breath test affidavit, and an agency inspection report, in order to report the results of the breath test and support the license suspension. Yankey, 6 So. 3d at 637. Based on the statutory and administrative code provisions regarding the procedures to establish the validity of breath test results, the Second District concluded that when an officer suspends a person's license and "submits breath test results pursuant to section 322.2615(2) that include the breath alcohol

analysis report, a breath test affidavit, and an agency inspection report, and those documents identify specific persons, the hearing officer is authorized under section 322.2615(6)(b) to issue a subpoena to any person ‘identified in’ those documents.” Id. at 638.

We find the Yankey decision to be dispositive of the instant case. See Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978)(disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court’s decision rather than the law in effect that the time the judgment appealed was rendered). Below, the Department entered the breath-alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. The agency inspection report was completed by Kelly Melville and the department inspection report was completed by Roger Skipper. Like in Yankey, the hearing officer below refused to issue the subpoenas asserting that section 322.2615(6)(b), Florida Statutes, did not authorize him to do so.

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 Kelly Melville 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 Petition for Writ of Certiorari is **GRANTED**; the Department’s Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 25, 2009, is **DENIED**; the hearing officer’s Final Order of License Suspension is **QUASHED**; and the matter is **REMANDED** for further proceedings consistent with this Final Order.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this

 30 day of April , 2010.

_____/S/_____
JANET C. THORPE
Circuit Judge

_____/S/_____
FREDERICK J. LAUTEN
Circuit Judge

_____/S/_____
GAIL A. ADAMS
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**, 1520 East Amelia Street, Orlando, Florida 32803 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the 30 day of April , 2010.

_____/S/_____
Judicial Assistant