

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

JEFFREY ALAN HARVEY,

Petitioner,

v.

CASE NO.: 2008-CA-3693-O

Writ No.: 08-15

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

Petition for Writ of Certiorari.

Robert R. Berry, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE BLACKWELL, MACKINNON, and J. ADAMS, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Jeffrey Alan Harvey (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of his driver’s license for refusing to submit to the breath-alcohol test. This Court has jurisdiction under sections 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On November 15, 2007, the arresting officer observed Petitioner at a traffic stop conducted by a Seminole County Sheriff's Deputy. Upon contact with the Seminole County Deputy, the arresting officer learned that Petitioner was being issued a citation for driving with knowledge of a suspended license. Shortly after this encounter, the arresting officer observed Petitioner driving. The arresting officer then conducted a traffic stop. The arresting officer observed that Petitioner had unsteady balance, slow and deliberate speech, and the odor of alcohol on his breath. The arresting officer requested that Petitioner perform field sobriety exercises, and Petitioner refused. The arresting officer then transported Petitioner to the breath testing facility where he refused the breath test.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on January 18, 2008. Prior to the hearing, Petitioner requested that a subpoena be issued for the Seminole County Sheriff's Deputy who issued him a citation immediately prior to his Orange County arrest and did not indicate any observations of Petitioner's impairment. The Department denied the subpoena request. At the hearing, Petitioner moved to set aside the suspension arguing that a subpoena should have been issued for the Seminole County Deputy, that there was no competent substantial evidence against Petitioner in the record, and that the implied consent warning was not properly represented. On January 22, 2008, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of his driver's license.

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and

judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver’s license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting 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 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. (2008).

Petitioner argues that the hearing officer departed from the essential requirements of the law when he failed to issue a subpoena for the Seminole County Deputy who was described in the arresting officer’s report. Conversely, Respondent argues that compulsory process is not a requirement of due process at administrative hearings.

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 a

subpoena for specific deputy identified in the Charging Affidavit submitted by the Department.

Section 322.2615(6)(b) provides:

(b) Such formal review hearing shall be held before a hearing officer employed by the department, and the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, **issue subpoenas for the officers and witnesses identified in documents in subsection (2)**, regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension. (emphasis added)

Subsection (6)(b) permits the hearing officer to issue subpoenas “for the officers and witnesses identified in documents in subsection (2).” § 322.2615(6)(b), Fla. Stat. (2008). Subsection (2) refers to those records the officer was required to provide to the Department, including “an affidavit stating the officer’s grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence.” § 322.2615(2), Fla. Stat. (2008).

In the present case, prior to the formal hearing, Petitioner requested that the Department issue a subpoena for a specific Seminole County Deputy who issued Petitioner a citation immediately prior to his Orange County arrest. Petitioner sought to have the Seminole County Deputy present at the hearing to testify about his failure to observe any signs of Petitioner’s impairment immediately prior to Petitioner’s arrest for D.U.I. in Orange County. The hearing officer denied the subpoena request citing section 322.2615(6)(b) indicating that the Seminole County Deputy was not “identified” per the statute.

The Court finds that while the Seminole County Deputy was not identified by name in the Orange County Deputy’s charging affidavit, he was sufficiently identified for purposes of the statute. The subpoena submitted to the hearing officer specifically named the Deputy requested and included the documents used to ascertain his identity. The Seminole County deputy was referenced in the charging affidavit submitted as part of the documentation to support the license

suspension. The charging affidavit is one of the documents listed in section 322.2615(2), from which an officer or witness identified in these documents may be subpoenaed. The charging affidavit detailed how the arresting officer made contact with the Seminole County Deputy as he was issuing the citation to Petitioner for driving with a suspended license. The identity of the Deputy was ascertained by looking at a copy of the citation issued to Petitioner by the Seminole County Deputy.

In sum, the Deputy was identified by name in the subpoena submitted to the Department, and he was identified by description in the charging affidavit submitted by the Department. The Deputy's identity was easily ascertainable and did not require the hearing officer to engage in any investigation. Thus, the hearing officer departed from the essential requirements of the law when he failed to subpoena the deputy who was identified in the charging affidavit.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Harvey's Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
15th day of ___April_____, 2010.

_____/S/_____
ALICE L. BLACKWELL
Circuit Court Judge

_____/S/_____
CYNTHIA Z. MACKINNON
Circuit Court Judge

_____/S/_____
JOHN H. ADAMS, SR.
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Robert R. Berry, Esq.**, Eisenmenger, Berry & Peters, P.A., 5450 Village Drive, Viera, FL 32955; and to **Heather Rose Cramer, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on this 15th day of April , 2010.

____/S/_____
Judicial Assistant