

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

**CASE NO.: 2008-CA-15277
WRIT NO.: 08-45**

RONNIE PERCIBALLI,
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, Esquire,
Assistant General Counsel,
for Respondent.

Before MCDONALD, G. ADAMS, and O'KANE, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Ronnie Perciballi (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 May 1, 2008, at approximately 2:08 a.m., Trooper Hawkins of the Florida Highway Patrol was dispatched to the scene of a traffic crash. Witnesses at the scene of the traffic crash identified Petitioner as the driver of the vehicle. Upon making contact with Petitioner, Trooper Hawkins observed that Petitioner had an obvious sway when standing, stumbled when walking, his face was flushed and his eyes were bloodshot. Trooper Hawkins also observed an odor of alcohol emitting from Petitioner's breath. After completing the traffic crash investigation, Trooper Hawkins advised Petitioner that the crash investigation was completed and a criminal investigation for DUI had begun. Based on Petitioner's poor performance on the field sobriety exercises, Trooper Hawkins arrested Petitioner and transported him to the breath testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .135 and .132. 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 May 30, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on numerous grounds: (1) the hearing officer failed to issue subpoenas for Roger Skipper, Laura Barfield, Jennifer Keegan, and Kelly Melville; (2) the breath testing machine was not approved for use in the State of Florida; (3) no uniform method of administration for the breath tests; (4) failure of the record to contain an agency inspection report for the month of May when the breath test occurred; (5) failure of the record to contain admissible competent evidence establishing Petitioner as driver of the vehicle; (6) no probable cause existed to detain him; (7) no probable cause existed to request the field sobriety exercises; and (8) no probable cause existed for his arrest, because nobody identified him as the drover or in actual physical control of any vehicle. On June 4, 2008, 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. (2008). 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. (2008).

The Petitioner argues in his Petition for Writ of Certiorari that: (1) the hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Roger Skipper, Laura Barfield, Jennifer Keegan, and Kelly Melville; (2) Petitioner's breath test results were not

properly approved since they were not obtained from an approved breath testing machine; (3) the breath testing regulations are insufficient due to the lack of a uniform method of administration and the breath test results should have been excluded; (4) there existed no competent evidence in the record that would establish that the Petitioner was driving or in actual physical control of an automobile; (5) there existed no probable cause to believe that the Petitioner's normal faculties were impaired to sustain the suspension of the Petitioner's driver's license and there was no probable cause for arrest.

In response to the Petition for Writ of Certiorari, the Department argues that they established substantial compliance with FDLE rules to render the Petitioner's breath test results admissible. Additionally, they argue that competent substantial evidence exists in the record to support the hearing officer's finding that the officer had probable cause to believe that the Petitioner was driving or in actual physical control of a vehicle while under the influence of alcoholic beverages. Finally, the Department filed a "Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings," based on the Second District's holding in *Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009).

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* §622.2615(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.

This Court finds that the holding in *Yankey* completely controls the outcome 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, citing section 322.2615(6)(b), Florida Statutes, when denying these subpoenas.

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**; and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
__21st__ day of __June_____, 2010.

_____/S/_____
ROGER J. MCDONALD
Circuit Judge

_____/S/_____
GAIL A. ADAMS
Circuit Judge

_____/S/_____
JULIE H. O'KANE
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 __21st__ day __June_____, 2010.

_____/S/_____
Judicial Assistant