

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

JEFFREY BULMER,

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

CASE NO.: 2009-CA-14496-O

WRIT NO.: 09-12

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE ROCHE, JOHNSON, LATIMORE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Jeffrey Bulmer (“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 having an unlawful breath alcohol level. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

As gathered from the hearing officer's findings of fact, on March 10, 2009, at approximately 10:33 p.m., Officer Schellhorn and Officer Weiss with the Orlando Police Department were on patrol. Both officers observed that another officer, Officer Baxter, had conducted a traffic stop so they then provided back-up. Officer Baxter advised Officers Schellhorn and Weiss that he first observed the vehicle traveling west in the bus lane. He then saw the vehicle run a steady red light at the intersection of Hughey Avenue and activated his emergency lights. The vehicle then turned into a hotel parking lot and stopped. Officer Baxter believed the driver, identified as Petitioner, was impaired because his movements were slow and very sluggish.

Officers Weiss and Schellhorn then made contact with Petitioner who was still seated in the vehicle and they smelled the overpowering odor of alcohol coming from him. His eyes were red and bloodshot and his face was flushed. He stated that he was on the job and had a few drinks at the golf course. The odor of alcohol increased as he spoke with a slow, slurred speech. Officer Baxter then came over to the vehicle and advised Petitioner why he had been stopped.

Petitioner was unsteady on his feet, used the vehicle for support as he exited, and he walked with a side to side stagger. Petitioner then agreed to perform the field sobriety exercises. During his performance of the exercises, additional indicators of impairment were observed. Petitioner was placed under arrest and transported to the DUI center. Petitioner was observed for the 20 minute period and then read the Implied Consent Warnings. Petitioner agreed to take the breath test and the results were .150 and .131. Officers Schellhorn and Weiss issued Petitioner a notice of suspension for driving with an unlawful alcohol level. Accordingly, Petitioner's driver's license was suspended.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on April 9, 2009. On April 16, 2009, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this order.

"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 cases where the individual's license is suspended for an unlawful breath-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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. (2009).

In the Petition for Writ of Certiorari, Petitioner argues that 1) The suspension should have been set aside based upon the failure of the record to contain an affidavit of probable cause submitted by Officer Weiss, the arresting officer; 2) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; 3) The breath test

results are inadmissible due to unauthorized individuals having access to the Intoxilyzer 8000 machine upon which Petitioner was tested; 4) The hearing officer violated Petitioner's procedural due process right by limiting his questions of Roger Skipper as to the approval of the Intoxilyzer 8000 machine and its inability to accurately measure volume; 5) The hearing officer deprived Petitioner of procedural due process of law when the suspension of his driver's license was not set aside due to the failure of the hearing officer to issue subpoenas for Jennifer Keegan and Laura Barfield to appear along with the documents requested in the subpoena duces tecum; and 6) The breath test results obtained from Petitioner were not properly approved as they were obtained by use of a breath testing machine that had not been properly approved pursuant to FDLE Rule 11D-8.003 that provided scientifically unreliable results.

Conversely, the Department in its Response argues that as to Petitioner's argument I, the hearing officer properly sustained the suspension where there was competent substantial evidence to support the hearing officer's decision. However, the Department concedes error as to Petitioner's arguments II through VI and stated that the Court should grant the Petition as to those arguments and remand this matter to the hearing officer for the issuance of subpoenas for witnesses Jennifer Keegan and Laura Barfield.

From review of the court record, this Court finds that Petitioner's argument V is dispositive as to all arguments presented by him as follows: Petitioner argues that the hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Jennifer Keegan and Laura Barfield to appear at the formal hearing along with the documents requested in the subpoena duces tecum. Ms. Keegan and Ms. Barfield were employees of the Florida Department of Law Enforcement's Alcohol Testing Program and custodians of

records relating to the Program. Thus, Petitioner claims that these witnesses were relevant and necessary as to the issues involving the inspections and functions of the Intoxilyzer 8000 and the breath test results that it produced.

This Court concurs with Petitioner as to his claim made in argument V that the hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Jennifer Keegan and Laura Barfield as were properly requested. See Petition for Writ of Certiorari that is incorporated herein by reference as it fully addresses this issue with ample case law in support where the courts have held that the failure to issue subpoenas for state personnel involved in the administration, inspection, and approval of breath testing devices and simulator solutions constitutes a violation of due process of law. Among the many cases cited in the Petition are: *Dep't of Highway Safety & Motor Vehicles v. Amodeo*, 711 So. 2d 148 (Fla. 5th DCA 1998) (affirming a Ninth Judicial Circuit Court ruling that the hearing officer had no discretion to refuse to issue a subpoena for a breath technician because the technician was a fact witness as to all issues to be determined); *State v. Muldowny*, 871 So. 2d 911 (Fla. 5th DCA 2004); *Yankey v. Dep't. of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009); and *Dep't of Highway Safety & Motor Vehicles v. Maffett*, 1 So. 3d 1286 (Fla. 2d DCA 2009).

As to the Department's request that this case be remanded, this Court finds that, in light of the amount of time that has passed since the time when the formal review hearing was held on April 9, 2009, remanding this case would place an undue and unnecessary burden on both Petitioner and the Department. Further, this Court finds no need to remand this case when the time for having a meaningful hearing has been exhausted.

Accordingly, in the instant case, the Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of the law and was not based on competent substantial evidence. Because Petitioner's argument V is dispositive, the Court finds that it is unnecessary to address his other arguments.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Jeffrey Bulmer'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 24th day of August, 2011.

/S/ _____
RENEE A. ROCHE
Circuit Court Judge

/S/ _____
ANTHONY H. JOHNSON
Circuit Court Judge

/S/ _____
ALICIA L. LATIMORE
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 **Stuart I. Hyman, Esquire**, 1520 E. Amelia Street, Orlando, FL 32803 and to **Kimberly A. Gibbs, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 26th day of August, 2011.

/S/ _____
Judicial Assistant