

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

**CASE NO.: 2009-CA-28607-O
WRIT NO.: 09-28**

IVAN AUZENNE,
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,
Donna Petty, Hearing Officer.

Joerg Jaeger, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
Assistant General Counsel,
for Respondent.

Before MACKINNON, WALLIS, and LUBET, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Ivan Auzenne (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 June 3, 2009, at approximately 11:05 p.m., Officer Schellhorn of the Orlando Police Department observed the Petitioner make a left turn onto East Church Street from South Orange Avenue in downtown Orlando. While turning, the Petitioner drove onto a concrete sidewalk separating East Church Street from the bus lane on the same street. The Petitioner proceeded to stop at the next red light, where Officer Schellhorn approached him and conducted his traffic stop. Upon making contact with Petitioner, Officer Schellhorn observed a strong smell of alcohol, red and bloodshot eyes, and poor coordination when retrieving his license and registration. When Officer Schellhorn asked the Petitioner to exit his vehicle, he noticed that the Petitioner was unsteady on his feet and walked with a side to side stagger. The Petitioner agreed to perform field sobriety exercises. Based on the Petitioner's poor performance on the field sobriety exercises, Officer Schellhorn arrested the Petitioner and transported him to the breath testing facility where the Petitioner refused to submit to a breath test. As a result, the Department suspended the Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On August 4, 2009, 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. On August 6, 2009, the hearing officer entered an order 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. (2009).

The Petitioner argues in his Petition for Writ of Certiorari that the hearing officer departed from the essential requirements of law by failing to consider binding precedent requiring her to issue a subpoena for the breath technician involved in this case. In response to the Petition for Writ of Certiorari, the Department argues that the hearing officer properly sustained the license suspension of the Petitioner where there was competent and substantial evidence to support the hearing officer's decision, the essential requirements of law were met, and the Petitioner was afforded procedural due process.

At both the hearing and through his Petition for Writ of Certiorari, the Petitioner presented a decision from this circuit court, sitting in its appellate capacity, *Amodeo v. DHSMV*, No. CI96-3994 (Fla. 9th Cir. Ct. August 20, 1997) (Aff'd, without opinion, 711 So. 2d 148 (Fla. 5th DCA 1998)). In *Amodeo* the court ruled that a hearing officer's refusal to issue a subpoena for a fact witness requested by the petitioner was a departure from the essential requirements of law and deprived the petitioner of due process. The court went on to state that "the defense has the absolute right to subpoena other witnesses to testify as to whether or not the Defendant exhibited any signs of impairment at or near the time of arrest."

Amodeo is clearly on point with the instant case. The case of *Department of Highway Safety & Motor Vehicles v. Chamizo*, 753 So. 2d 749 (Fla. 3d DCA 2000), upon which the Department relies, is factually distinguishable because in *Chamizo* the petitioner provided three breath alcohol samples, all of which were above the legal limit. In the instant case the Petitioner refused to submit to the breath test, and the arresting officer's observations are not accompanied by breath test results that would corroborate those observations. *Chamizo* is therefore

distinguishable from the instant case and this Court finds that *Amodeo* should have controlled the hearing officer's decision.

In the instant case, the Petitioner requested a continuance at the hearing to subpoena the breath tech operator present at the time of the Petitioner's arrest. The hearing officer chose to deny the motion for continuance despite the Petitioner's explanation that the breath tech operator would be used to cross-examine another witness in this case who had pertinent, relevant, material observations close in time to the observations that were made by the arresting officer and whose name was submitted before the hearing officer on the alcohol influence report.

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 breath tech operator and the hearing officer's failure to do so constituted a departure from the essential requirements of the law. The Department properly cites to *Lillyman v. DHSMV*, 645 So. 2d 113 (Fla. 5th DCA 1994), for the procedurally proper disposition of the instant case. "When an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings." *Id.* at 114. Since it was error for the hearing officer to refuse to subpoena the breath tech operator, this Court must remand the case for a new hearing at which the breath tech operator can be subpoenaed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**; and the hearing officer's Final Order of License Suspension is **QUASHED**; the cause is **REMANDED** for a new hearing consistent with this Final Order; and the Petitioner's request for costs and fees to be taxed on the Department is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this ___4th___ day of ___August_____, 2010.

_____/S/_____
CYNTHIA Z. MACKINNON
Circuit Judge

_____/S/_____
F. RAND WALLIS
Circuit Judge

_____/S/_____
MARC L. LUBET
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 **Joerg Jaeger, Esquire**, Jaeger & Blankner, 217 E. Ivanhoe Blvd, N., Orlando, FL 32804 and **Kimberly A. Gibbs, Esquire, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 570066, Orlando, FL 32857, on the 4th day August , 2010.

_ / S / _____
Judicial Assistant