

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

MICHAEL SIFRAR,

Petitioner,

v.

CASE NO.: 2009-CA-24816-O

WRIT NO.: 09-52

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

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Esquire,
for Respondent.

BEFORE LEBLANC, KOMANSKI, STRICKLAND, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Michael Sifrar (“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, Trooper Vaughn of the Florida Highway Patrol observed Petitioner's vehicle speeding and making an improper left turn. Deputy Vaughn then conducted a traffic stop of Petitioner. When Deputy Vaughn made contact with Petitioner, he observed that Petitioner exhibited signs of impairment, including bloodshot and watery eyes, an odor of alcohol on his breath, and his speech was thick tongued. Petitioner admitted that he consumed alcoholic beverages before driving. Petitioner, while performing the field sobriety exercises, had trouble following instructions and was unsteady on his feet. Deputy Vaughn then arrested Petitioner for driving under the influence. Following his arrest, a breath test was requested and the results were .148 and .137. 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 March 23, 2009, May 20, 2009, and June 29, 2009. On July 8, 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 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; 2) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; 3) 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; 4) 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; and 5) The breath test regulations are insufficient due to the lack of a uniform method of administration. Thus, Petitioner argues that the breath test results should have been excluded.

Conversely, the Department argues that the hearing officer properly sustained the suspension where there was competent substantial evidence to support the hearing officer's decision.

From review of the court record, this Court finds that Petitioner's argument III 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 III 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 and Reply to Response that are incorporated herein by reference as they fully address 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).

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 III 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, Michael Sifrar'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 20th day of July, 2011.

/S/
BOB LEBLANC
Circuit Court Judge

/S/
WALTER KOMANSKI
Circuit Court Judge

/S/
STAN STRICKLAND
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 **Richard M. Coln, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 20th day of July, 2011.

/S/
Judicial Assistant