

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

CRAIG ROSE,

Petitioner,

v.

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

Respondent.

CASE NO.: 2009-CA-30194-O

WRIT NO.: 09-53

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Esquire,
for Respondent.

BEFORE JOHNSON, LATIMORE, ROCHE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Craig Rose (“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 July 26, 2009, at approximately 2:24 a.m., Deputy Scott Danjou of the Orange County Sheriff's Office was in route to a call when he observed a black Harley Davidson motorcycle at a red light. The motorcycle had stopped over the stop bar. As he traveled through the intersection he received another call and made a U-turn heading back through the same intersection. Deputy Danjou had his lights and siren activated to clear the intersection. He observed the same motorcycle lying on the ground and the driver was trying to pick it up. In the interest of public safety, Deputy Danjou initiated a traffic stop to make sure the driver was not having a medical or mechanical problem.

The driver, identified as Petitioner, was having difficulty keeping the motorcycle on both wheels. Deputy Danjou observed Petitioner sitting on the motorcycle and asked him to use the kickstand to help keep him from falling. Deputy Danjou smelled the strong odor of an alcoholic beverage coming from Petitioner's breath. His eyes were watery and glassy and his speech was slurred and thick tongued. While getting his license he dropped his wallet twice and asked Deputy Danjou to get it for him. Petitioner had a blank and confused look on his face, stumbled while walking, and swayed severely. Petitioner admitted to drinking 4 to 5 beers.

Petitioner agreed to perform the field sobriety exercises and in doing so exhibited additional indicators of impairment. He swayed severely almost losing his balance. He did not complete the exercise as instructed. Further, after Petitioner made 3 attempts to perform the One Leg Stand exercise, Deputy Danjou had him stop the exercise for his safety.

Based on the totality of the circumstances, Deputy Danjou placed Petitioner under arrest for driving under the influence and placed him into the patrol vehicle. A few minutes later when Deputy Danjou entered the patrol vehicle, he smelled the strong odor of alcoholic beverages. Deputy Danjou then transported Petitioner to the DUI testing center. At the center, Petitioner

was observed for the 20 minute period, was read the Implied Consent Warning, and agreed take the breath test. The results of his two breath samples were both 0.180. Deputy Danjou then issued 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 August 21, 2009. On August 25, 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 improperly refused to set aside the suspension based on the failure of the record to contain competent substantial evidence that Petitioner was driving or in actual physical control of the motorcycle; 2) There existed no probable cause to stop Petitioner; 3) The breath test results were inadmissible due to the failure of the record to contain the most recent department inspection; 4) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; 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 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 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. Further from review of the subpoena documents, the hearing officer erroneously stated on the documents that they were discovery subpoenas and denied the issuance of them per Florida Administrative Code 15A-6, even though the documents clearly stated that the subpoenas were for the formal review hearing. *See* Appendix F in the Petition.

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).

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, Craig Rose'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 25th day of August, 2011.

_____/S/_____
ANTHONY H. JOHNSON
Circuit Court Judge

_____/S/_____
ALICIA L. LATIMORE
Circuit Court Judge

_____/S/_____
RENEE A. ROCHE
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 25th day of August, 2011.

_____/S/_____
Judicial Assistant