

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

**JEREMY THOMAS,**

Petitioner,

v.

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

Respondent.

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**CASE NO.: 2011-CA-5760-O**

**WRIT NO.: 11-38**

Petition for Writ of Certiorari.

Matthews R. Bark, Esquire,  
for Petitioner.

Richard M. Coln, Assistant General Counsel,  
for Respondent.

BEFORE O’KANE, WHITEHEAD, ARNOLD JJ.

PER CURIAM.

**FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Jeremy Thomas (“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.

### *Findings of Fact*

As gathered from the hearing officer's findings of fact, the arrest affidavit and testimony of Deputy John Bellochi, and sworn statement and testimony of Deputy Ryan Flinn, on March 12, 2011 at approximately 2:38 a.m., Deputy Flinn was observing northbound traffic on Apopka Vineland Road when he observed a vehicle traveling at a high rate of speed, swerving several times on its right side, breaking the solid yellow line, drifting back and forth, and straddling the center lane line. Deputy Flinn then made a traffic stop and when he made contact with driver, later identified as Petitioner, he explained the reason for the stop and immediately detected a strong odor of alcoholic impurities coming from Petitioner.

Deputy Flinn then requested DUI assistance and Deputy John Bellochi responded to the scene. Upon making contact with Petitioner, Deputy Bellochi detected the distinct odor of alcoholic impurities coming from his breath and noticed that his eyes were glassy, watery, bloodshot, and his pupils were dilated. Petitioner's eyelids were droopy, his speech was slurred, mumbled and incoherent, and his reaction was slow. Deputy also noticed that Petitioner was wearing a green paper wristband on his right wrist commonly used for admission into nightclubs or bars.

Deputy Bellochi requested Petitioner to perform the field sobriety exercises. Petitioner consented and he performed the exercises poorly. Based upon Petitioner's poor performance of the exercises, his driving pattern, the odor of alcohol from his breath, and his personal observations and experience, Deputy Bellochi believed that Petitioner was under the influence of drugs, alcohol or both and arrested him for DUI. Deputy Bellochi transported Petitioner to the Orange County Breath Testing Center where the 20 minute observation was

conducted. Deputy Bellochi then read the implied consent warnings to Petitioner. Petitioner submitted to the breath test with results of .188 and .188. Petitioner's driver's license was suspended for driving with an unlawful breath-alcohol level.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on April 7, 2011. On April 13, 2011, 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.

#### *Standard of Review*

“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. (2011).

### *Arguments*

In the Petition for Writ of Certiorari, Petitioner argues that 1) He was denied due process because the hearing officer refused to issue the subpoena he requested for Laura Barfield; 2) The hearing officer failed to follow the essential requirements of law when she improperly analyzed the lawfulness of the traffic stop and determined that there was competent substantial evidence to support the traffic stop in this case; 3) The hearing officer failed to follow the essential requirements of law when she improperly analyzed the lawfulness of the detention of the defendant for a DUI investigation and determined that there was competent substantial evidence to support the said detention; and 4) The hearing officer did not follow the essential requirements of law when she allowed the breath alcohol content of the Petitioner alleged on the breath test affidavit to be admitted as evidence that Petitioner had a breath alcohol content above a .08.

Conversely, the Department in its Response argues that the hearing officer properly sustained Petitioner's license suspension where there was competent substantial evidence to support the hearing officer's decision, essential requirements of law were met, and Petitioner was afforded due process.

### *Court's Analysis and Findings*

From review of the court record, the Court finds that Petitioner's first argument is dispositive as to all arguments presented by him as follows: Petitioner argues that the hearing officer deprived him due process of law by failing to issue a subpoena for Laura Barfield to appear at the formal hearing along with the documents requested in the subpoena duces tecum. In his prehearing statement, Petitioner provided the reasons why he was seeking a subpoena for Ms. Barfield in compliance with Florida Administrative Rule 15A-6. Laura

Barfield, as the Director/Manager of the Alcohol Testing Program with the Florida Department of Law Enforcement, was being called to testify about the malfunctions of the Intoxilyzer 8000 machine including letters she had written in 2006 addressing the malfunctions. The hearing officer denied Petitioner's request to subpoena Ms. Barfield and denied his request to review the letters at the hearing and have them submitted into the record.

The Court concurs with Petitioner that the hearing officer deprived him of due process of law by failing to issue the subpoena for Laura Barfield as was properly requested. Ample case law exists in support of this argument 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. See *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); *Dep't. of Highway Safety & Motor Vehicles v. Auster*, 52 So. 3d 802 (Fla. 5th DCA 2011) (holding that the motorist had a due process entitlement to the issuance of a subpoena for the breath test technician). Also see *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); *Dep't of Highway Safety & Motor Vehicles v. Maffett*, 1 So. 3d 1286 (Fla. 2d DCA 2009); *Romaguera v. Dep't of Highway Safety & Motor Vehicles*, Case No. 2007-CA-009009-O, Writ No. 07-42 (appellate capacity) (Fla. 9th Cir. Ct. January 29, 2010) and Order Granting Motion for Clarification and Rehearing (Fla. 9th Cir. Ct. March 22, 2010).

Accordingly, in the instant case, the Court finds that Petitioner was deprived of due process of law, 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 first argument 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, Jeremy Thomas' 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 7th day of February, 2012.

/S/  
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**JULIE H. O'KANE**  
Circuit Court Judge

/S/  
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**REGINALD K. WHITEHEAD**  
Circuit Court Judge

/S/  
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**C. JEFFERY ARNOLD**  
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 **Matthews R. Bark, Esquire**, Jaeger & Blankner, 217 East Ivanhoe Blvd. N., Orlando, Florida 32804 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 8th day of February, 2012.

/S/  
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Judicial Assistant