

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

**JOHN SIMMONS,**

Petitioner,

**CASE NO.: 2012-CA-15022-O**

**Writ No.: 12-76**

v.

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

Respondent.

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Petition for Writ of Certiorari from the Florida  
Department of Highway Safety and Motor Vehicles,  
Linda Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,  
for Petitioner.

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

BEFORE SHEA, JOHNSON, EVANS, J.J.

PER CURIAM.

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

Petitioner, John Simmons (“Simmons”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

### Facts and Procedural History

On May 31, 2012, Deputy Michael Young of the Orange County Sheriff's Office was traveling eastbound on University Boulevard when he observed an SUV traveling behind him with the headlights off. Deputy Young observed the SUV make a right turn and then accelerated rapidly. As Deputy Young continued to follow the SUV he observed it weave within its lane several times and this driving pattern was also evidenced by the patrol car video.

Deputy Young then conducted the traffic stop. The driver was identified as Simmons and there was one passenger in the SUV. Simmons stated that he was unaware that the headlights were off. Deputy Young informed Simmons that he also observed the vehicle driving at inconsistent speeds and weaving. Deputy Young noted that Simmons' eyes were red, glassy, and dilated and he smelled the strong odor of an alcoholic beverage coming from Simmons' breath. Simmons' also exhibited slow thick speech.

Deputy Young ran a license check, after which he asked Simmons to exit the SUV to talk. Deputy Young observed that Simmons' movements were slow and deliberate. He also observed a white powdery substance on Simmons' nostril. During medical questioning, Simmons' stated that he takes Lexipro, Vivans and Aderax for depression and ADHD. Deputy Young then asked Simmons to perform the field sobriety exercises. When Simmons performed the exercises, he had trouble maintaining his balance and was unable to complete the exercises as instructed and demonstrated.

Based on the totality of the circumstances, Deputy Young determined probable cause that Simmons was driving while under the influence of alcohol, drugs, or both, to the extent his normal faculties were impaired and placed Simmons under arrest for DUI. Simmons was transported to the DUI Center where the 20 minute observation was conducted and he was read

the Implied Consent Warnings. Simmons was then requested to submit to a breath test. Simmons took the breath test and the results were 0.155 and 0.159.

Deputy Young issued Simmons a notice of license suspension for driving with an unlawful alcohol level and he was cited for DUI and Driving with No Headlights. The formal review hearing was held on July 2, 2012, July 18, 2012 and August 15, 2012. On August 17, 2012, the hearing officer entered a written order sustaining Simmons' license suspension.

#### 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. Where the driver license was suspended for driving with 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. (2012).

## Arguments

In the Petition for Writ of Certiorari, Simmons argues that: 1) The hearing officer improperly failed to set aside the suspension when Agency Inspector, Kelly Melville and breath technician, Sam Gerrity failed to appear timely within the statutory required thirty days pursuant to lawfully served subpoenas; 2) The hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Florida Department of Law Enforcement (“FDLE”) personnel, Roger Skipper, Jennifer Keegan, Patrick Murphy, and Laura Barfield, to appear along with the documents requested in the subpoena duces tecum; 3) The breath test results were not properly approved per FDLE Rule 11D-8.003 because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 4) The breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; and 5) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003.

## Analysis

### Argument I – Failure of Hearing Officer to Set Aside Suspension due to Subpoenaed Persons’ Failure to Appear at Formal Review Hearing

Under Argument I in his Petition, Simmons argues that the hearing officer improperly failed to set aside the suspension when the Agency Inspector, Kelly Melville and breath technician Sam Gerrity, failed to appear pursuant to lawfully served subpoenas and thus, violated his right to due process and a meaningful hearing within thirty days from requesting the hearing. Section 322.2615(6)(a), Florida Statutes (2012), provides that if the person whose license was suspended requests a formal review, the department must schedule a hearing to be held within

thirty days after such request is received by the Department and must notify the person of the date, time, and place of the hearing.

From review of the record, the formal review hearing was originally scheduled for July 6, 2012. On or about June 19, 2012, Simmons' counsel submitted to the hearing officer a motion to reschedule the hearing due to a scheduling conflict. The hearing was rescheduled for July 2, 2012 and subpoenas were issued for Deputy Young, Kelly Melville, and Sam Gerrity. A subpoena was also issued for the custodian of the roadside video, Al Giardiello, who provided the video per the subpoena. Deputy Young and Sam Gerrity were served with the subpoenas. Kelly Melville was not served with the subpoena because she was on vacation until July 3, 2012. At the July 2, 2012 hearing, Deputy Young appeared and testified. Sam Gerrity did not appear at the hearing, but provided good cause for his non-appearance.

The hearing was then continued and rescheduled to July 18, 2012. Sam Gerrity was noticed of the hearing as his subpoena remained in force and a new subpoena was issued and served on Kelly Melville. At the July 18, 2012 hearing, neither Kelly Melville nor Sam Gerrity appeared. Kelly Melville submitted a statement of non-availability due to agency inspections she was conducting on July 18, 2012 and she was excused. Sam Gerrity again failed to appear with good cause.

The hearing was again continued and rescheduled to August 15, 2012 and the subpoenas remained in force for Sam Gerrity and Kelly Melville. Sam Gerrity appeared and testified at the August 15, 2012 hearing. Kelly Melville did not appear at the hearing and this Court was unable to find any documentation in the record as to whether good cause existed for her non-appearance at that hearing. The hearing officer advised Simmons' counsel of the option to continue the hearing again and to seek enforcement of Kelly Melville's subpoena through the circuit court.

Simmons' counsel chose not to seek enforcement of the subpoena and instead, made a motion to invalidate the suspension based on the failure of Kelly Melville and Sam Gerrity to timely appear in thirty days as required by their subpoenas. The hearing officer denied the motion.

This Court acknowledges as the Department points out in their Response, that when Simmons moved to reschedule the hearing originally set for July 6, 2012, he expressly waived his right to have the hearing held within thirty days from when he requested the hearing. However, notwithstanding Simmons' waiver, his argument has merit as to Kelly Melville, who, although properly subpoenaed for both the July 18, 2012 and August 15, 2012 hearings, did not appear for either hearing.

Section 322.2615(6)(c), Florida Statutes, provides that a party may seek enforcement of a subpoena for a review hearing by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. However, Rule 15A-6.015(2)(c) of the Florida Administrative Code states that no hearing shall be continued for a second failure to appear.

When Kelly Melville again failed to appear at the August hearing, the hearing officer was without authority to continue the hearing again. Therefore, Simmons was not required to seek enforcement of the subpoena in the circuit court as to Kelly Melville's second failure to appear. *Burrell v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 1060a (Fla. 9th Cir. Ct. Sept. 25, 2012). As for Sam Gerrity, this argument is moot because he did ultimately testify at the August 15, 2012 hearing, although outside of the thirty day time period.

Accordingly, the hearing officer's decision to sustain Simmons' license suspension deprived him of due process and departed from the essential requirements of the law. Further, because Simmons' first argument is dispositive, this Court finds it unnecessary to address his other arguments.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, John Simmons' 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 4th day of April, 2013.

/S/\_\_\_\_\_  
**TIM SHEA**  
Circuit Judge

/S/\_\_\_\_\_  
**ANTHONY H. JOHNSON**  
Circuit Judge

/S/\_\_\_\_\_  
**ROBERT M. EVANS**  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803, [shymanlaw@aol.com](mailto:shymanlaw@aol.com) and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, [richardcoln@flhsmv.gov](mailto:richardcoln@flhsmv.gov) on this 4th day of April, 2013.

/S/\_\_\_\_\_  
Judicial Assistant