

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

OLIVER MONTANA BARNARD,

Petitioner,

CASE NO. 2013-CA-9724-O

Writ No. 13-64

v.

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY & MOTOR  
VEHICLES, DIVISION OF DRIVER  
LICENSES,

Respondent.

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Petition for Writ of Certiorari  
from the Florida Department of  
Highway Safety and Motor Vehicles,  
Hearing Officer Isabel Gibson

Matthew P. Ferry, Esquire,  
for Petitioner.

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

BEFORE EGAN, SCHREIBER and GRINCEWICZ, J.J.

PER CURIAM.

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

Petitioner Oliver Montana Barnard seeks review of the Department of Highway Safety and Motor Vehicle's suspension of his driver's license following an administrative hearing held on June 23, 2013.

The Court's certiorari review of the final order of the Department is limited to determining (1) whether procedural due process was accorded the licensee; (2) whether the

essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Pitts*, 815 So. 2d 738, 742 (Fla. 1st DCA 2002).

Petitioner has raised a single issue on appeal. He alleges that his due process rights were violated by the hearing officer's refusal to issue subpoenas for two witnesses he wanted to have at his DUI license suspension hearing—Trooper Castleberry (the arresting officer), and the custodian of records of the Florida Highway Patrol (to obtain the video recording of the traffic stop).

In the context of administrative proceedings, the concept of due process has two crucial elements: reasonable notice and a meaningful opportunity to be heard. *N.C. v. Anderson*, 882 So. 2d 990, 993 (Fla. 2004). The opportunity to be heard includes the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the party. *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 757 (Fla. 1st DCA 2009).

Drivers have the opportunity to present witnesses at a license suspension hearing. They may ask the hearing officer to issue subpoenas for the limited class of witnesses described by § 322.2615(6)(b), Florida Statutes (2013), namely “for the officers and witnesses identified in documents provided under paragraph (2)(a).” Section 322.215(2)(a) lists the documents admissible at the hearing, including the probable cause affidavit and the results of any tests, among others. “[T]he scope of the hearing officer's subpoena-issuing power in this regard is strictly limited to the officers and witnesses identified in documents in [that subsection.]” *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 839 (Fla. 5th DCA 2013).

Trooper Castleberry was certainly a person named in the documents under subsection (2)(a) and was subject to the hearing officer's subpoena power. Whether the FHP records custodian was such a person may be questionable, but the parties have not raised this issue. The hearing officer did not turn down the request for the records custodian subpoena on the basis that she did not have the power to issue it but on the basis that Petitioner's request did not meet the criteria of Department rules for a subpoena. She denied issuing the subpoena to Trooper Castleberry on the same basis.

The Department has statutory authority under § 322.02(6), Florida Statutes (2013), to create rules for conducting license suspension hearings: "The department shall make and adopt rules and regulations for the orderly administration of this chapter." The Florida Administrative Code, Section 15A-6, lays out the procedures for a Department license suspension hearing and Section 15A-6.012 specifically describes how a party may secure the issuance of a witness subpoena:

(1) The driver may request a subpoena/subpoena duces tecum, HSMV Form 78066, for signature and issuance by the clerk or by the hearing officer, for the officers and witnesses identified in documents submitted pursuant to Section 322.2615(2), F.S. . . . Such subpoena forms may be submitted ex parte to the division for issuance and shall be submitted as an original form with one copy.

(a) If a driver requests a subpoena/subpoena duces tecum, the driver shall submit a typed HSMV Form 78066 containing the name and address of the witness whose attendance is requested, the time and place at which the witness is to appear, and the driver's name and address;

(b) If a subpoena duces tecum is requested, the driver shall also describe with particularity and specificity any material to be produced and the relevancy of such material. Materials requested pursuant to a subpoena duces tecum are limited to a time period not to exceed three months prior to the date of suspension.

Fla. Admin. Code 15A-6.012 (1).

The two subpoena requests submitted by Petitioner are found as attachments H and I to his Petition. While it is not clear whether they are or are not on Form 78066, it is clear that the hearing officer wrote notes on them explaining how they failed to meet the Department's criteria. She wrote on the subpoena for Trooper Castleberry that it did not limit the subpoenaed materials to those used during the stop; the above rule limits documents to those not dated more than three months prior to the suspension. She wrote on the subpoena to the records custodian that it was not specific enough; the rule requires that subpoenas duces tecum identify with particularity and specificity any materials requested and to describe the relevancy of that material. Petitioner was given the opportunity to correct the alleged defects and failed to do so before the hearing.

Petitioner has not argued that the Department's rules with regard to the issuance of subpoenas are in derogation of the agency's statutory authority, create a due process problem, or are otherwise invalid. He does not argue that his proposed subpoenas did, in fact, meet the criteria of the rule. Rather, he ignores any reference to Rule 15A-6.012, and to the opportunity he was given to correct the allegedly nonconforming subpoenas. He simply asserts that the hearing officer's denial of his request was, per se, a due process violation of his right to call witnesses.

Where Petitioner either failed to conform to a Department rule or failed to challenge the hearing officer's interpretation of that rule, and where he presents no argument that the rule itself is invalid, his due process claim fails. His lack of opportunity to present witnesses at the suspension hearing resulted not from Department error but from his own failure to comply with the procedural rules of the Department.

Petitioner raises no other issues regarding the sufficiency of the evidence at the hearing to sustain the license suspension. Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 8th day of May 2014.

/S/  
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**ROBERT J. EGAN**  
**Circuit Judge**

**SCHREIBER and GRINCEWICZ, JJ., concur.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to **Matthew P. Ferry, Esq.**, Law Office of Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790; and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 8th day of May 2014.

/S/  
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Judicial Assistant