

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

MATTHEW VISELLI,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-12814-O

Writ No.: 13-90

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

Matthew P. Ferry, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE LUBET, G. ADAMS, MIHOK, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Matthew Viselli (“Viselli”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department or “Respondent”) final order sustaining the suspension of his driver 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).

On August 20, 2013, Viselli was arrested for driving under the influence. Viselli provided breath test results of 0.204 and 0.197 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615.

On August 30, 2013, Viselli's counsel requested subpoenas, one of which was for the arresting officer Edgard Osorno who completed the arrest affidavit entered into evidence at the hearing as DDL#3. The Department refused to issue the subpoena for Officer Osorno. At the hearing held on September 16, 2013, Viselli's counsel moved to invalidate the suspension and argued that the hearing officer's failure to issue the subpoena for Officer Osorno deprived him of due process and the Department's exhibits should be stricken from the record and not considered. The hearing officer denied counsel's objections and on September 23, 2013, entered a written order sustaining Viselli's license suspension.

"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 the Petition for Writ of Certiorari, Viselli argues that he was denied due process when the hearing officer refused to issue the subpoena for the arresting officer, Edgard Osorno, identified in the Department's exhibits DDL#1, DDL#3, and DDL#4 that were entered into evidence. The Department concedes that Viselli's due process rights were violated when the hearing officer failed to issue the subpoena for the arresting officer.

Pursuant to section 322.2615(6)(b) of the Florida Statutes, the hearing officer is authorized to issue subpoenas for officers and witnesses identified in documents provided in

section 322.2615(2)(a). §322.2615(6)(b), Fla. Stat. (2013); Fla. Admin. Code R. 15A-6.012(1); *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835 (Fla. 5th DCA 2013), *review denied*, 123 So. 3d 558 (Fla. 2013). The arresting officer, Edgard Osorno, prepared the arrest affidavit and is identified in the documents submitted to the Department pursuant to section 322.2615(2)(a). Therefore, the hearing officer was required to issue the subpoena for Officer Osorno and violated Viselli's due process rights by failing to do so. In light of this conclusion, the Court finds it unnecessary to address Viselli's other arguments.

Viselli requests that the Court order the Department to delete the suspension of his license from its records. However on certiorari review, the Court is limited to denying the petition or quashing the order on review. *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 844 (Fla. 2001). The reviewing Court cannot direct the lower tribunal to enter any particular order or judgment. *Id.*

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**; the Final Order of License Suspension is **QUASHED**; and this matter is **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 9th day of December, 2013.

/S/

MARC L. LUBET
Presiding Circuit Judge

G. ADAMS and MIHOK, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail/ email to: **Matthew P. Ferry, Esq.**, mattwarrenlindseylaw.com, Law Office of Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790, Florida 32803; **Kimberly A. Gibbs, Assistant General Counsel**, kingibbs@flhsmv.gov, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 10th day of December, 2013.

/S/ _____
Judicial Assistant