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

MICHAEL C. FABIANAC

CASE NO.: CVA1 07-20
LOWER COURT CASE NO.:
2006-TR-0025818-E

Appellant,

v.

STATE OF FLORIDA

Appellee.
_______________________________________/

Appeal from the Traffic Hearing Officer,
in and for Orange County, Florida,
Hearing Officer Thomas R. Kirkland.

Michael C. Fabianac, pro se,
for Appellant.

No appearance for Appellee.

Before M. SMITH, GRINCEWICZ, and DAWSON.

FINAL ORDER REVERSING TRAFFIC HEARING OFFICER'S JUDGMENT AND REMANDING FOR NEW HEARING

Appellant, Michael C. Fabianac, timely appeals the Traffic Hearing Officer's decision finding him guilty of failing to obey a traffic control device, pursuant to section 316.074(1), Florida Statutes. Specifically, Appellant was charged with making a left hand turn in a zone prohibiting such turns at set time periods. This Court has jurisdiction. Fla. R. App. P. 9.030(c)(1)(C); Fla. R. Traf. Ct. 6.630(e).

On December 1st, 2006, at 4:24 p.m., Officer A. Aguilera of the Winter Park Police Department observed the Appellant make a prohibited left turn onto Phelps Avenue from Aloma Avenue. The left turn is prohibited at this intersection from Monday through Friday, 4:00 p.m. until

6:00 p.m. Officer Aguilera proceeded to pull over the Appellant and issued him a Florida Uniform Traffic Citation for violation of a traffic control device.

Appellant elected to attend a hearing and he pled not guilty to his citation on February 6, 2007. (R. at 2-3). At the hearing the Appellant attempted to present his case on his own behalf and attempted to examine Officer Aguilera. The Traffic Hearing Officer found the Appellant guilty of violating a traffic control device and ordered him to pay $205.00 in fines and court costs as well as ordered him to attend an eight hour defensive driving class within thirty days.

Appellant challenges the Traffic Hearing Officer's finding and appears *pro se* before this Court. The State did not file an Answer Brief in connection with this appeal.

The standard of review is an abuse of discretion standard. The test for whether discretion has been abused in one of reasonableness. "[I]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In other words, discretion has been abused where the decision is "arbitrary, fanciful, or unreasonable." *Delno v. Market Ry. Co.*, 124 F. 2d 965, 967 (9th Cir. 1942), cited approvingly in *Canarkis*, 382 So. 2d at 1203.

Appellant raises numerous arguments on appeal, all related to the procedure of the hearing and to the conduct of the hearing officer during the proceedings. The seven issues raised by the appellant are: 1) whether the hearing officer limited cross-examination in a manner that precluded relevant and important facts from being introduced; 2) whether the hearing officer violated Article 1, Section 16 of the Constitution of the State of Florida by failing to allow appellant to adequately confront an adverse witness; 3) whether the hearing officer erred in prohibiting appellant from viewing materials the issuing officer would be using to refresh his memory; 4) whether the hearing officer erred in objecting to certain lines of appellant's questioning as "argumentative"; 5) whether

the hearing officer erred by not allowing appellant to make a closing statement; 6) whether the hearing officer erred in not allowing appellant the opportunity to present all relevant evidence; and 7) whether it was error to not provide adequate space for the appellant to organize his evidence. As remand is appropriate as to at least one of these arguments, the remainder will not be addressed in this opinion.

When an appellant fails to preserve an error by making a timely objection at trial, the only errors that may then be corrected on appeal are fundamental errors. *Jenkins v. State*, 824 So. 2d 977, 981 (Fla. 4th DCA 2002). "Fundamental error has been defined as one that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process." *Id*. quoting *Scoggins v. State*, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997). Appellant's failure to preserve this issue of a denial of full cross-examination for review is of no consequence, as it is within the authority of an appellate court to correct fundamental error. See *Pettry v. Pettry*, 706 So. 2d 107, 108 (Fla. 5th DCA 1998).

The Appellant argues that his opportunity to cross-examine Officer Aguilera was limited by the hearing officer and as such, he was not able to fully develop his case. A review of the audio transcript of this hearing indicates that the hearing officer told the appellant that: "I run the show." He questioned the Appellant about his ability to recall what happened on the day of the incident by asking him what he had for breakfast. He intimated that the Appellant invaded the privacy of the officer by taking his picture after receiving the citation. He also interrupted the Appellant at numerous times with questions, told the Appellant at numerous times his questions were "immaterial or argumentative," and also answered numerous questions for the officer. The hearing officer then abruptly ended the Appellant's examination of the officer by making a ruling and adjourning court.

Florida Rules of Traffic Court Rule 6.450(c) allows the defendant to offer sworn testimony and evidence. Rule 6.450(c) states that "[t]he defendant may offer sworn testimony and evidence and, after such testimony is offered, shall answer any questions asked by the official." Fla. R. Traf. Ct. 6.450(c). "It is fundamental that defendants be allowed to complete their cross-examination." *Ayoub v. State*, 14 Fla. L. Weekly Supp. 334a (Fla. 6th Cir. Ct. Dec. 4, 2006); *see Griffith v. State*, 922 So. 2d 436 (Fla. 2d DCA 2006). The court in *Ayoub* found that it was error to prevent a defendant from concluding his cross-examination of the police officer who witnessed the alleged violation. *Ayoub*, 14 Fla. L. Weekly Supp. 334a. In *Griffith*, the appellate court held that the trial court's abrupt conclusion of a hearing constituted a denial of due process and fundamental error because Griffith was not able to complete his examination of a witness or present two separate motions to the trial court. 922 So. 2d at 438. The hearing officer did not allow the Appellant to finish his questioning of Officer Aguilera before interjecting his own personal commentary and questions. Thus, it was a denial of due process to prevent the Appellant from finishing his examination of Officer Aguilera.

"When a hearing officer combines inquiry and judicial function in a hearing, 'the hearing officer must be zealous in the recognition and preservation of the right to a hearing by an impartial trier of fact.'" *Pitts v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 588a (Fla. 4th Cir. Ct. July 9, 2001) quoting *State v. Johnson*, 345 So. 2d 1069 (Fla. 1977). *Pitts* involved the review of a hearing officer's decision to suspend Mr. Pitts' license following his arrest for driving under the influence. *Pitts*, 8 Fla. L. Weekly Supp. 588a. Citing numerous examples from the hearing transcript, the court determined that the hearing officer improperly moved the hearing to conclusion by repeatedly preventing counsel from fully questioning witnesses. *Id.* In addition, the court noted that the hearing officer inappropriately answered questions for the witnesses. *Id.* The court in *Pitts* found that "[b]y interposing objections, and severely limiting the scope of direct

examination of witnesses, the hearing officer did not leave an 'impression of impartiality[.]'" *Id.* quoting *Love v. State*, 569 So. 2d 807, 810 (Fla. 1st DCA 1990). The facts present in *Pitts* demonstrate a loss of impartiality by the hearing officer resulting in reversible error. Here, there was a similar loss of impartiality in the lower court. By interposing objections, answering questions for the officer, and failing to allow the Appellant to complete his examination of the officer, the hearing officer abused his discretion.

Finally, this Court received Appellant's "Motion to Strike Appellee's Answer Brief for Failure of Appellee to File Brief," on March 18, 2008. Per the order of this Court dated June 19, 2007, the Appellee was obligated to comply with the Appellate Rules or risk having this case move forward with the documents in the file. Since the Appellee did not file an answer in this case, this Court proceeded with the documents in the file. The Appellant's motion therefore does not require a ruling.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the traffic hearing officer's "Infraction Disposition" is **REVERSED.** This case is **REMANDED** to the traffic court for proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 27__ day of ____May________, 2008.

____/S/______________________________
MAURA T. SMITH
Circuit Judge

____/S/_____________________________
DONALD E. GRINCEWICZ
Circuit Judge

____/S/______________________________
DANIEL P. DAWSON
Circuit Judge

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **MICHAEL C. FABIANAC, 2939 Summerfield Road, Winter Park, FL 32792** and **KAREN VINCI, 415 N. Orange Ave, Suite 300, Orlando, Florida 32802** on the _27____ day of __May___________, 2008.

___/S/________________________________
Judicial Assistant