

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

DAVID STODART,

Petitioner,

v.

CASE NO.: 2006-CA-8706-O

Writ No.: 06-80

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

Respondent.

Petition for Writ of Certiorari.

Neal T. McShane, Esquire,
for Petitioner.

Thomas C. Mielke, Esquire,
for Respondent.

BEFORE M. SMITH, MUNYON, and WATTLES, JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

David Stodart (“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 six months suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On August 7, 2006, Petitioner was arrested for DUI and transported to the Osceola County Jail. A breath test was requested and the results were .151. and .158. Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on September 7, 2006. At the hearing, Petitioner learned that the Department never received Petitioner's pre-hearing statement containing his requests for subpoenas. Petitioner moved to set aside the suspension arguing that the Breath Alcohol Test Affidavit was not sworn to, that the charging affidavit was a pre-printed form, that the officer never witnessed the Petitioner's actual physical control of the vehicle, and that the implied consent warning is invalid. Additionally, Petitioner requested that, in the event the hearing officer did not invalidate the suspension for the objections presented at the hearing, a continuance be granted to subpoena the officer involved. On September 13, 2006, the hearing officer entered a Final Order of License Suspension denying Petitioner's motions and sustaining the suspension of his driver's license.

"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 order to uphold the suspension of a driver's license for refusal to submit to a test of his or her breath, urine or blood for alcohol or controlled substances, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.
2. Whether the person was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
4. Whether the person was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2006).

Petitioner argues that the hearing officer erred by refusing to grant a continuance allowing Petitioner to subpoena the arresting officer. Petitioner argues that the hearing officer indicated that she would agree to continue the hearing in the event she decided to deny the Petitioner's other substantive objections. The Department concedes that this case should be remanded to allow Petitioner the opportunity to subpoena relevant witnesses.

At the hearing, Petitioner's counsel indicated that he had difficulty with mail service, but assured the hearing officer that he mailed a pre-hearing statement including witness subpoenas to be signed by the hearing officer. The Petitioner then proceeded to present his motions to invalidate the suspension. At the conclusion of the hearing, the hearing officer agreed to grant a continuance in the event the motions to invalidate the suspension were denied. However, on September 13, 2006, the hearing officer entered the Final Order of License Suspension without

affording Petitioner the opportunity to subpoena the arresting officer as agreed to at the hearing on September 7, 2006.

When an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings. *Lillyman v. Dep't of Highway Safety & Motor Vehicles*, 645 So. 2d 113 (Fla. 5th DCA 1994) (court found error in limiting cross-examination on a relevant matter and refusing to allow a proffer). The Department agrees that the matter should be remanded to allow the Petitioner to subpoena the relevant witnesses. Thus, this case is remanded for further proceedings so the Petitioner may have an opportunity to subpoena the arresting officer. Additionally, the Court finds that Petitioner's arguments dealing with the legality of the stop and probable cause for arrest would be better addressed after the arresting officer has had the opportunity to testify.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** as to Petitioner's argument that he be granted a continuance, as agreed upon at the hearing, to allow him to subpoena witnesses. The Department of Highway Safety and Motor Vehicles' order affirming the suspension of Petitioner's license is **QUASHED**, and the cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 25 day of February, 2009.

/S/

MAURA T. SMITH
Circuit Court Judge

/S/

LISA T. MUNYON
Circuit Court Judge

/S/

BOB WATTLES
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 **Neal T. McShane, Esq.**, Law Offices of Neal T. McShane, P.A., 836 N. Highland Ave., Orlando, FL 32803; and to **Thomas C. Mielke, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler St., Miami, FL 33135, on this 26 day of February , 2009.

Judicial Assistant