

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

STEPHANIE GUTIERREZ-TOROK,

Petitioner,

v.

CASE NO.: 2007-CA-3388-O

Writ No.: 07-22

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

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Heather Rose Cramer, Esquire,
for Respondent.

BEFORE KIRKWOOD, MACKINNON, and LEBLANC, JJ.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Stephanie Gutierrez-Torok (“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 suspension of the Petitioner’s driver’s license for unlawful breath 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 October 27, 2006, Deputy Remy, a member of the Orange County Sheriff’s Office, observed Stephanie Gutierrez-Torok crash into two parked vehicles in downtown Orlando. After

Deputy Remy called the Orlando Police Department, two officers arrived and conducted a traffic stop. While speaking with Petitioner, the arresting officer observed that she had alcohol on her breath, her eyes were glassy, bloodshot, and she had been crying. The Petitioner consented to performing field sobriety exercises, and performed poorly on those exercises. Petitioner was placed under arrest for DUI and transported to the breath testing facility. Petitioner submitted breath samples of .126 and .121. Petitioner's driver's license was suspended for driving with an unlawful blood alcohol level of .08 or higher.

The Formal Review Hearings were held on January 19, 2007, and February 23, 2007. The following exhibits were admitted at the hearing: 1) Petitioner's driver's license; 2) the DUI traffic citation; 3) the breath alcohol test affidavit; 4) the charging affidavit; 5) the annual inspection report for Intoxilyzer 8000, serial number 80-001258; 6) the monthly inspection report for Intoxilyzer 8000, serial number 80-001258. Additionally, the Petitioner submitted numerous reports, transcripts, and regulations for the hearing officer to consider.

At the hearing, the Petitioner moved to set aside the suspension on numerous grounds, arguing: 1) there was no probable cause to believe the driver was under the influence to the extent that her normal faculties were impaired; 2) that all statements made by the Petitioner should be stricken based on the accident report privilege; 3) that no competent evidence existed to demonstrate that the Petitioner was driving or in actual physical control of a motor vehicle; 4) that the breath testing machine had never been properly approved for use in the State of Florida; 5) that the crash investigation was never officially concluded; 6) that no probable cause existed to start a criminal investigation for DUI; and 7) that the horizontal gaze nystagmus (HGN) test should be stricken due to improper administration of the test. Following the hearing, the hearing officer issued his "Findings of Fact, Conclusions of Law and Decision," on February 27, 2007. In that order the hearing officer denied the above mentioned motions and sustained the Petitioner's license suspension. The Petitioner now seeks certiorari review of this February 27, 2007 order.

"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’s license was suspended for driving with an unlawful blood alcohol level, the scope of the review is limited to the following issues:

1. Whether the arresting 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 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. (2007).

In her Petition for Writ of Certiorari, the Petitioner argues that the hearing officer’s failure to issue subpoenas deprived the Petitioner of due process. Additionally, the Petitioner argues that the results of the breath alcohol test were not admissible since the breath testing machine was not properly approved for use in the State of Florida pursuant to FDLE’s own regulations. In their Response, the Department argues that the hearing officer properly denied the Petitioner’s request for subpoenas for persons not identified in the statute that provides the hearing officer the power to subpoena witnesses. Additionally, the Department contends that they established substantial compliance with FDLE rules to render the Petitioner’s breath test results admissible.

At issue in the instant case is whether the hearing officer departed from the essential requirements of the law in interpreting section 322.2615(6)(b) to prohibit the issuance of subpoenas for specific persons identified in the breath test result documents submitted by the Department. After the Department filed its Response to the Petition for Writ of Certiorari, it filed a motion to abate and remand the case, as to the subpoena issue. As a basis for the motion

to abate, the Department cited the Second District's decision in *Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009) (finding that when the department relies upon a document prepared by an agency inspector to properly validate the breath test results, section 322.2615, Florida Statutes, permits the driver to subpoena the inspector identified in that document). The motion to abate is currently pending along with the Petition.

In *Yankey*, the petitioner filed a petition for writ of certiorari seeking to quash a circuit court order affirming the department's suspension of her license for driving with an unlawful breath-alcohol level. *Id.* at 634. The petitioner asserted that the hearing officer and the circuit court departed from the essential requirements of the law in interpreting section 322.2615(6)(b), Florida Statutes, to prohibit the department's issuance of a subpoena for the agency inspector responsible for testing the breath test machine and signing the agency inspection report. *Id.* Pursuant to section 322.2615(6)(b), Florida Statutes, a driver in a formal review hearing "may subpoena those witnesses who are identified in documents submitted by the arresting officer, which documents include the results of any breath test." *Id.* at 637; *see also* § 322.2615(2), Fla. Stat. The court noted that law enforcement had established a practice of routinely providing the department with a breath alcohol analysis report, a breath test affidavit, and an agency inspection report, in order to report the results of the breath test and support the license suspension. *Yankey* at 637. Based on the statutory and administrative code provisions regarding the procedures to establish the validity of breath test results, the court concluded that when an officer suspends a person's license and "submits breath test results pursuant to section 322.2615(2) that include the breath alcohol analysis report, a breath test affidavit, and an agency inspection report, and those documents identify specific persons, the hearing officer is authorized under section 322.2615(6)(b) to issue a subpoena to any person 'identified in' those documents." *Id.* at 638.

In the instant case, the Department entered the breath alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. Prior to the hearing, the Petitioner requested that subpoenas be issued for specific persons identified in those documents submitted by the Department. Like *Yankey*, the hearing officer refused to issue the requested subpoenas asserting that section 322.2615(6)(b) did not authorize the issuance of the subpoenas.

Based on the holding in *Yankey*, the Court finds that the hearing officer was authorized under section 322.2615(6)(b), Florida Statutes, to issue subpoenas to persons identified in the breath alcohol analysis report, the breath test affidavit, and the agency inspection report. Thus, the hearing officer's decision to deny the issuance of the subpoenas departed from the essential requirements of the law. In light of this conclusion, the Court finds it unnecessary to address the additional arguments made by Petitioner and the Department.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Ms. Gutierrez-Torok's Petition for Writ of Certiorari is **GRANTED**; The Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings, filed March 12, 2009, is **DENIED**; and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__16th__ day of _____December_____, 2009.

_____/S/_____
LAWRENCE R. KIRKWOOD
Circuit Court Judge

_____/S/_____
CYNTHIA Z. MACKINNON
Circuit Court Judge

_____/S/_____
BOB LEBLANC
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 **Stuart I. Hyman, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803; and to **Heather Rose Cramer, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on this 16th day of December , 2009.

____/S/_____

Judicial Assistant