

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

**CASE NO.: 2008-CA-12644
WRIT NO.: 08-43**

MARK UISELLI,

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

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

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before KOMANSKI, LEBLANC, and RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Uiselli (Petitioner) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' (Department) Final Order of License Suspension, sustaining the suspension of his driver's license pursuant to section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to sections 322.2615 and 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

On March 1, 2008, at approximately 10:47 p.m., Officer Wallace of the Winter Garden Police Department conducted a traffic stop on a vehicle that had an expired tag and was crossing back and forth between its lane and an oncoming traffic lane. Upon pulling the vehicle over, Officer Wallace made contact with the driver of the vehicle, Petitioner, and observed the odor of alcohol emitting from the vehicle. Officer Wallace also observed that Petitioner's eyes were bloodshot and that there was an open liquor container behind the vehicle's center console. Based on Petitioner's performance on the field sobriety exercises, Officer Clark of the Winter Garden Police Department arrested Petitioner and transported him to the Orange County testing facility. Petitioner agreed to submit to a breath test and gave breath-alcohol samples of .144 and .150. As a result, the Department suspended Petitioner's driving privileges.

Pursuant to section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his license suspension. On April 25, 2008, the hearing officer held a formal review hearing at which Petitioner was represented by counsel. Petitioner moved to invalidate the license suspension on five grounds: (1) Officer Wallace's failure to appear at the hearing without just cause; (2) lack of probable cause to arrest Petitioner; (3) Petitioner was illegally detained by Officer Wallace while he waited for Officer Clark to arrive; (4) hearing officer's refusal to issue subpoenas for Laura Barfield and Kelly Melville was a violation of due process; and (5) if the motion to strike the field sobriety exercises is granted, the suspension should be invalidated because there was no probable cause to believe Petitioner was under the influence of alcohol or controlled substances. Petitioner also moved to strike the field sobriety exercises and any reference to Petitioner's performance on the field sobriety exercises because he was coerced into performing the exercises. On April 29, 2008, the hearing officer entered an order denying Petitioner's motions and sustaining the suspension of his driver's license finding that the law

enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and that he had an unlawful breath-alcohol level of 0.08 or higher.

The Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In cases where the individual's license is suspended for an unlawful breath-alcohol level, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2007). The hearing officer's scope of review is limited to the following issues:

1. Whether the 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 chemical 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).

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 the agency inspector and other witnesses. Petitioner argues that the hearing officer's failure to issue subpoenas violated his right to full discovery concerning the breath test

machine upon which he was tested and precluded him from challenging the reliability of the breath test results. He also asserts that the evidence before the hearing officer failed to establish that Officer Wallace had the authority to detain Petitioner after issuing the traffic citation for driving with an expired tag. Lastly, Petitioner asserts that the hearing officer departed from the essential requirements of the law by considering evidence concerning Petitioner's performance on the field sobriety exercises because the Petitioner performed those exercises only after he was misadvised that he was required by law to do so.

With respect to Petitioner's argument regarding the hearing officer's failure to issue subpoenas, the Department asserts that there was no departure from the essential requirements of the law because the hearing officer lacked authority to issue the subpoenas. The Department contends that under section 322.2615(6)(b), Florida Statutes, a hearing officer may only issue subpoenas for witnesses identified in the following documents: (1) the driver's license; (2) an affidavit stating the officer's grounds for belief that a driver was under the influence of alcohol; (3) the results of any breath test or an affidavit stating that a breath test was requested by the officer and that person refused to submit; (4) the officer's description of a person's field sobriety test, if any; (5) the notice of suspension; and (6) a copy of the crash report, if any. Because the witnesses at issue are not named in the above described documents, the Department asserts that the hearing officer did not have authority to issue the subpoenas. With respect to Petitioner's other arguments, the Department contends that the record supports a finding of reasonable suspicion to detain Petitioner for a DUI investigation. The Department further contends that there is competent substantial evidence in the record to support the hearing officer's finding that the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of an automobile while under the influence of alcohol.

Following the briefing phase in this appeal, the Department filed a motion to abate and remand for further proceedings citing the Second District's decision in Yankey v. Department of Highway Safety and 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 the document). The Department's motion to abate and remand is still pending. We find the appellate court's decision in Yankey to be dispositive of the instant case. Id.; see Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978)(disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered).

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." Yankey, 6 So. 3d at 637; see also §22.2615(2), Fla. Stat. The Second District acknowledged 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, 6 So. 3d at 637. Based on the statutory and

administrative code provisions regarding the procedures to establish the validity of breath test results, the Second District 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.

Below, the Department entered the breath-alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. The agency inspection report was completed by Kelly Melville. Like in Yankey, the hearing officer below refused to issue the subpoena asserting that section 322.2615(6)(b), Florida Statutes, did not authorize him to do so.

Based on the foregoing, the Court finds that the hearing officer was authorized under 322.2615(6)(b), Florida Statutes, to issue a subpoena to Kelly Melville and the hearing officer's failure to do so constituted a departure 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 the Petition for Writ of Certiorari is **GRANTED**; the Department's Motion to Abate Petition for Writ of Certiorari and Remand for Further Proceedings is **DENIED**; and the hearing officer's Final Order of License Suspension is **QUASHED**. We **DISPENSE** with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this
__20__ day of _____ January _____, 2010.

_____/S/_____
WALTER KOMANSKI
Circuit Judge

_____/S/_____
BOB LEBLANC
Circuit Judge

_____/S/_____
JOSE R. RODRIGUEZ
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to **William R. Ponall, Esquire**, Kirkconnell, Lindsey, Snure & Yates, P.A., 1150 Louisiana Avenue, Suite 1, Post Office Box 2728, Winter Park, Florida 32790 and **Heather Rose Cramer, Assistant General Counsel**, DHSMV-Legal Office, Post Office Box 540609, Lake Worth, FL 33454-0609, on the __20__ day of _____ January _____, 2010.

_____/S/_____
Judicial Assistant