

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

JAMES DORMAN,

Petitioner,

v.

**CASE NO.: 2008-CA-31275-O
WRIT NO.: 08-74**

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Richard Coln, Esquire,
for Respondent.

BEFORE JOHNSON, WHITEHEAD, THORPE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

James Dorman (“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 his driver’s license for having an unlawful breath alcohol level. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

As gathered from the hearing officer's findings of fact, on September 25, 2008, at approximately 2:38 a.m., Sergeant Jon E. Askins of the Winter Park Police Department observed a blue vehicle making an improper right turn and almost hitting a curb. He then observed the vehicle abruptly jerk left upon making a sharp left turn. Sergeant Askins became concerned due to the vehicle's driving pattern and conducted a traffic stop. He made contact with Petitioner who was the driver and noticed that Petitioner's eyes were bloodshot and he slurred his words. Officer T. Fairbanks responded as back up and conducted a DUI investigation. He detected from Petitioner a moderate odor of alcohol and noticed that his eyes were bloodshot, watery, and glazed and his speech was slurred. Petitioner admitted to consuming several glasses of wine at his girlfriend's house. Petitioner's gait was unsteady and he performed the field sobriety exercises poorly.

Petitioner was placed in custody for driving under the influence and transported to the Winter Park Police station where he agreed to submit to a breath test. Officer L. Suepat conducted the twenty minute observation and administered the breath test with results of 0.194 at 3:53 a.m., volume not met at 3:59 a.m., 4:04 a.m., 4:13 a.m. and 0.189 at 4:18 a.m., volume not met at 4:23 a.m. and 4:41 a.m. At this point Officer Fairbanks explained the implied consent warning to Petitioner advising him of the consequences. Petition also agreed to provide a urine sample. In addition, he submitted to a second breath test with results of 0.182 at 4:44 a.m. and 0.182 at 4:48 a.m. Petitioner's driver's license was then suspended.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on October 23, 2008. On October 31, 2008, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of this 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. In cases where the individual’s license is suspended for an unlawful breath-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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. (2008).

In the Petition for Writ of Certiorari, Petitioner argues that 1) The hearing officer deprived Petitioner of procedural due process of law when the suspension of his driver’s license was not set aside due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan, and Laura Barfield to appear along with the documents requested in the subpoena duces tecum;¹ 2) The breath test results obtained from Petitioner were not

¹ Petitioner includes the name, Elvie Armand, in the title of Argument I in the Petition, but he does not address this person further in his argument. Subsequently, in his Reply addressing Argument I, the name, Elvie Armand, is deleted from the title. Therefore, it appears that Petitioner’s initial inclusion of her name was a clerical error.

Also, Petitioner discusses in Argument I in the Petition that the hearing officer should have issued a subpoena for Kelly Melville of the Orange County Sheriff’s Office. However, it appears from the court record that Richard

properly approved as they were obtained by use of a breath testing machine that had not been properly approved pursuant to FDLE Rule 11D-8.003 that provided scientifically unreliable results; 3) There did not exist probable cause to stop Petitioner's vehicle; and 4) The breath test operator failed to adequately observe Petitioner in the twenty minutes prior to the administration of the breath test.

Conversely, the Department in its Response argues that the hearing officer properly determined by a preponderance of the evidence that sufficient cause existed to sustain Petitioner's suspension. However, the Department concedes error as to Petitioner's arguments I and III and requests that the Court grant the Petition and remand this matter to the hearing officer for a determination of the lawfulness of Petitioner's stop and arrest and for the issuance of subpoenas for witnesses, Laura Barfield and Jennifer Keegan.²

From review of the court record, this Court finds that Petitioner's argument I is dispositive as to all arguments presented by him as follows: Petitioner argues that the hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Roger Skipper, Jennifer Keegan, and Laura Barfield to appear at the formal hearing along with the documents requested in the subpoena duces tecum. Petitioner claims that Mr. Skipper, as the inspector of the Intoxilyzer 8000 machine, and Ms. Keegan and Ms. Barfield as custodians of the records for the Florida Department of Law Enforcement's Alcohol Testing Program, were relevant and necessary witnesses as to the issues involving the inspections and functions of the Intoxilyzer 8000 and the breath test results that it produced.

Bosworth with the Winter Park Police Department was the person whom Petitioner requested the subpoena for. Therefore, it appears that Petitioner's references to Kelly Melville, instead of Richard Bosworth, was a clerical error.

² The Department filed a motion to abate the petition and to remand for further proceedings. This Court denied the motion on August 3, 2010.

This Court concurs with Petitioner as to his claim made in argument I that the hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Roger Skipper, Jennifer Keegan, and Laura Barfield as were properly requested. Petitioner fully addresses this issue in his Petition with ample case law in support where the courts have held that the failure to issue subpoenas for state personnel involved in the administration, inspection, and approval of breath testing devices and simulator solutions constitutes a violation of due process of law. Among the many cases cited in the Petition and the Notice of Supplemental Authority are: *Dep't of Highway Safety & Motor Vehicles v. Amodeo*, 711 So. 2d 148 (Fla. 5th DCA 1998) (affirming a Ninth Judicial Circuit Court ruling that the hearing officer had no discretion to refuse to issue a subpoena for a breath technician because the technician was a fact witness as to all issues to be determined); *State v. Muldowny*, 871 So. 2d 911 (Fla. 5th DCA 2004); *Yankey v. Dep't. of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009); and *Dep't of Highway Safety & Motor Vehicles v. Maffett*, 1 So. 3d 1286 (Fla. 2d DCA 2009).

As to the Department's request that this case be remanded, this Court finds that per this Court's prior order denying the Department's motion to remand and in light of the amount of time that has passed since the time when the formal review hearing was held on October 23, 2008, remanding this case would place an undue and unnecessary burden on both Petitioner and the Department. Further, this Court finds no need to remand this case when the time for having a meaningful hearing has been exhausted.

Accordingly, in the instant case, the Court finds that the hearing officer's decision to sustain Petitioner's license suspension departed from the essential requirements of the law and

was not based on competent substantial evidence. Because Petitioner's argument I is dispositive, the Court finds that it is unnecessary to address his other arguments.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, James Dorman's, Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 13th day of October, 2011.

/S/

ANTHONY H. JOHNSON
Circuit Court Judge

/S/

REGINALD K. WHITEHEAD
Circuit Court Judge

/S/

JANET C. THORPE
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, Esquire**, 1520 E. Amelia Street, Orlando, FL 32803 and to **Richard Coln, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 13th day of October, 2011.

/S/

Judicial Assistant