

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

JUSTIN MURRAY,

Petitioner,

v.

**CASE NO.: 2009-CA-15171-O
WRIT NO.: 09-63**

**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 MIHOK, LAUTEN, SHEA, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Justin Murray (“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 February 25, 2009, Officer Studer of the Orlando Police Department observed a vehicle driven by Petitioner with an expired tag. A computer check revealed the tag had been expired since December 16, 2008. Upon making the traffic stop, Officer Studer made contact with Petitioner and observed the odor of alcohol emitting from him and observed that his eyes were bloodshot and red. Officer Schellhorn responded to the scene at the request of Officer Studer who passed along his observations of Petitioner. Officer Schellhorn also made contact with Petitioner and observed the odor of alcohol emitting from within the vehicle and observed that Petitioner's eyes were bloodshot, red, and glassy. The odor of alcohol increased as Petitioner spoke in a slow slurred labored speech. Petitioner's balance was unsteady as he stood and he performed the field sobriety exercises poorly.

He was then arrested by Officer Schellhorn and transported to the DUI testing center where he was read the implied consent warnings for the breath test. Petitioner submitted to the breath test with results of .150 and .164 BAC. 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 March 26, 2009 and April 13, 2009. On April 14, 2009, 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. (2009).

In the Petition for Writ of Certiorari, Petitioner argues that 1) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; 2) The breath test results are inadmissible due to unauthorized individuals having access to the Intoxilyzer 8000 machine upon which Petitioner was tested; 3) The hearing officer violated Petitioner’s procedural due process right by limiting Petitioner’s questions of Roger Skipper as to the approval of the Intoxilyzer 8000 machine and its inability to accurately measure volume; 4) 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 Jennifer Keegan and Laura Barfield to appear along with the documents requested in the subpoena duces tecum; 5) The breath test results obtained from Petitioner were not 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, thus providing scientifically unreliable results; 6) The breath test regulations are insufficient due to the lack of a uniform method of administration and the breath test results should have been excluded; and 7) Officer Studer did not have probable cause or a well founded suspicion of criminal activity to detain Petitioner longer than necessary to issue a traffic citation.

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 IV and VII 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.¹

From review of the court record, this Court finds that Petitioner's argument IV 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 Jennifer Keegan and Laura Barfield to appear at the formal hearing along with the documents requested in the subpoena duces tecum. Petitioner claims that and Ms. Keegan and Ms. Barfield, as employees and 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.

This Court concurs with Petitioner as to his claim made in argument IV that the hearing officer deprived him of procedural due process of law by failing to issue subpoenas

¹ The Department filed a motion to abate the petition and to remand for further proceedings. This Court denied the motion on July 29, 2010.

for 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 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 March 26, 2009 and April 13, 2009, 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 IV 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, Justin Murray'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
24th day of October, 2011.

/S/

A. THOMAS MIHOK
Circuit Court Judge

/S/

FREDERICK J. LAUTEN
Circuit Court Judge

/S/

TIM SHEA
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 25th day of October, 2011.

/S/

Judicial Assistant