

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

ERIK BREUM,

Petitioner,

v.

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

Respondent.

CASE NO.: 2011-CA-3189-O

WRIT NO.: 11-25

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Esquire,
for Respondent.

BEFORE DAVIS, BLACKWELL, SHEA, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Erik Breum (“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 sections 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 January 9, 2011 at 1:30 a.m., Trooper Ramirez of the Florida Highway Patrol stopped at a traffic stop currently in progress at North Orange Blossom Trail and West Central Blvd. Officer Hernandez of the Orlando Police Department, who initiated the traffic stop, advised Trooper Ramirez that he made the traffic stop because he observed a vehicle being driven with no headlights illuminated. The driver of the vehicle was identified as Petitioner. Officer Hernandez, who was part of a Pro-Active Jack Squad, then turned the traffic stop over to Trooper Ramirez to handle.

Accordingly, Trooper Ramirez made contact with Petitioner and observed that his eyes were red and glassy, his face was flushed, his speech was slurred, and he had the odor of an alcoholic beverage coming from his mouth. Petitioner told Trooper Ramirez that he had been to the Cowboy's Orlando bar and had consumed four beers with the fourth beer consumed one hour ago. Petitioner then exited his vehicle, staggered while walking, and agreed to perform field sobriety exercises. During the exercises, Trooper Ramirez observed Petitioner exhibit additional indicators of impairment. He did not follow directions, he had trouble maintaining his balance, and he was unable to perform the exercises as instructed.

Following the exercises, Trooper Ramirez placed Petitioner under arrest for driving under the influence. During transport to the breath testing facility, Trooper Ramirez smelled the odor of alcoholic beverages within the patrol car. At the testing facility, the 20 minute observation was conducted and the implied consent warnings were read to Petitioner. Petitioner then agreed to submit to the breath test. The results of the breath test were 0.172 and 0.181. Petitioner was issued a notice of license suspension for driving with an unlawful alcohol level and issued a citation for driving with no headlights.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on February 14, 2011. On February 17, 2011, the hearing officer entered a written order denying Petitioner's motion and sustaining his driver's license suspension. Petitioner now seeks certiorari review of the 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. (2011).

In the Petition for Writ of Certiorari, Petitioner argues that 1) The hearing officer deprived Petitioner of procedural due process of law 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; 2) 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; 3) The breath test results were inadmissible due to the failure of the record to contain the most recent department inspection; and 4) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003. Conversely, the Department argues that the hearing officer properly sustained the suspension where there was competent substantial evidence to support the hearing officer's decision.

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 the custodians of the records for the Implied Consent Program for the Florida Department of Law Enforcement, 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 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. Among the many cases cited in the Petition in support of Petitioner's argument are: *Dep't of Highway Safety & Motor Vehicles v. Auster*, 52 So. 3d 802 (Fla. 5th DCA 2010), *rehearing denied* (2011); *Yankey v. Dep't. of Highway Safety & Motor Vehicles*, 6 So. 3d 633 (Fla. 2d DCA 2009); *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754 (Fla. 1st DCA 2009); *Dep't of Highway Safety & Motor Vehicles v. Maffett*, 1 So. 3d 1286 (Fla. 2d DCA 2009); *Guliano v. Dep't of Highway*

Safety & Motor Vehicles, Case No. 2009-CA-9142-0 (Fla. 9th Cir. Ct., Dec. 8, 2010) (wherein counsel for the Department conceded in its Response that it was a due process error not to allow subpoenas for Laura Barfield and Jennifer Keegan); *Harrell v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 965a (Fla. 9th Cir. Ct. March 15, 2010); and *Mizo v. Dep't of Highway Safety & Motor Vehicles*, Case No. 2007-CA-6641-O (Fla. 9th Cir. Ct. June 8, 2010).

Accordingly, in the instant case, this 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, this Court finds that it is unnecessary to address his other arguments.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Erik Breum'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 14th day of September, 2011.

/S/ _____
JENIFER M. DAVIS
Circuit Court Judge

/S/ _____
ALICE L. BLACKWELL
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 M. Coln, Esquire**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 14th day of September, 2011.

_____/S/_____
Judicial Assistant