

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

ARIEL ALAMO,

Petitioner,

v.

CASE NO.: 2008-CA-031152-O

WRIT NO.: 08-69

**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,
Mary Varnadore, Hearing Officer.

Joerg Jaeger, Esquire,
for Petitioner.

James K. Fisher, Esquire,
for Respondent.

Before T. SMITH, T. TURNER, and EVANS, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Ariel Alamo (“Alamo”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Findings of Fact, Conclusions of Law and Decision,” sustaining the suspension of his driver’s license pursuant to section 322.2615, Florida Statutes, for refusing to submit to a breath-alcohol test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule

of Appellate Procedure 9.030(c).

On August 3, 2008, Officer Davis, of the Winter Garden Police Department, arrested Alamo for DUI and transported him to the DUI testing center. At the DUI testing center, Breath Test Operator Rodriguez (“BTO Rodriguez”) observed Alamo, and Officer Davis read Alamo the implied consent warnings. Alamo refused to submit to a breath-alcohol test. Therefore, the Department suspended his driving privilege.

Pursuant to section 322.2615, Florida Statutes, Alamo requested a formal review of his license suspension. On October 24, 2008, Hearing Officer Mary Varnadore held a formal review at which Alamo did not appear but was represented by counsel. At the hearing, Alamo stated the following objections: 1) the DUI Worksheet does not meet the proper predicate for an interview; 2) entry into evidence of the Alcohol Influence Form, authored by BTO Rodriguez, violates Alamo’s due process rights because the hearing officer denied a subpoena for BTO Rodriguez, thus preventing Alamo from cross-examining the witness; and 3) the scope of review should include whether Officer Davis had probable cause to stop Alamo and lawfully arrest Alamo. Furthermore, Alamo moved to invalidate the suspension because a subpoenaed witness, Officer Anglero of the Ocoee Police Department, did not show up for the hearing. The hearing officer reserved ruling on the three objections, but she denied Alamo’s motion to invalidate. On October 27, 2008, the hearing officer entered an order overruling the three objections and sustaining the suspension of Alamo’s driver’s license.

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. Broward County v. G.B.V. Int’l, Ltd., 787 So. 2d 838, 843 (Fla.

2001) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)).

In a case where the individual's license is suspended for refusing to submit to a breath, blood, or urine test, "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. (2008). 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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§322.2615(7)(b), Fla. Stat. (2008).

Alamo argues that the hearing officer departed from the essential requirements of the law by denying issuance of the subpoena for BTO Rodriguez because he is an essential fact witness. Alamo further argues that he was denied procedural due process because the hearing officer accepted the Alcohol Influence Form into evidence but refused to issue a subpoena for BTO Rodriguez, thus preventing Alamo from cross-examining the witness. Finally, Alamo argues that the hearing officer departed from the essential requirements of the law by failing to include the lawfulness of Alamo's arrest in her scope of review.

Conversely, the Department asserts that the hearing officer did not depart from the essential requirements of the law because she did not have the authority to issue a subpoena for BTO Rodriguez. The Department further argues that Alamo was not denied procedural due process because the hearing officer properly denied issuance of a subpoena for BTO Rodriguez.

Finally, the Department asserts that the hearing officer did not depart from the essential requirements of the law by relying on statutory language in formulating her *statement* of the scope of review because, even though that *statement* does not include the “lawfulness of the arrest,” the hearing officer clearly considered it in making her ruling.

Acceptance of the Alcohol Influence Form into Evidence

Under section 322.2615(6)(b), Florida Statutes, a hearing officer is authorized to issue subpoenas for the officers and witnesses identified in the documents referred to in subsection (2). The clear language of subsection (2) refers not only to materials that law enforcement officers are explicitly required to submit, but also, by its express terms, to “*any evidence submitted at or prior to the hearing.*” Lee v. Dep’t of Highway Safety & Motor Vehicles, 4 So. 3d 754, 756 (Fla. 1st DCA 2009) (citing §322.2615(2), Fla. Stat.). Thus, a hearing officer has authority to issue a subpoena for any officer or witness identified in any evidence submitted at or prior to the hearing. See Id. Therefore, for a hearing officer to receive into evidence and consider a report but deny the licensee the right to cross-examine the author of the report, “not only evinces a misreading of section 322.2615(2), but violates the basic principles of due process to which [a licensee is] entitled in [the formal review of a driver’s license suspension.]” Id.

Hearing Officer Mary Varnadore refused to issue a subpoena for BTO Rodriguez, but she nonetheless received the Alcohol Influence Form into evidence, over Alamo’s objection. The Department’s contention that the hearing officer lacked authority to issue a subpoena for BTO Rodriguez is inconsistent with the holding in Lee, and thus it is not persuasive. 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”). Therefore, Alamo

was denied procedural due process. In light of this conclusion, we find it unnecessary to address the additional arguments made by Alamo and the Department.

When an evidentiary error is made at an administrative hearing, such as limiting a licensee's right to cross-examine a witness, the proper remedy is to remand for further proceedings. Lillyman v. Dep't of Highway Safety & Motor Vehicles, 645 So. 2d 113, 114 (Fla. 5th DCA 1994). In this scenario, the licensee is not entitled to a dismissal of the license suspension proceeding. Id. Therefore, the proper remedy in the present case is to remand because the hearing officer did not have the benefit of Lee at the time of the hearing.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the "Petition for Writ of Certiorari" is **GRANTED**; the hearing officer's "Findings of Fact, Conclusions of Law and Decision" is **QUASHED**; and the cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _____ 21st _____ day of _____ May _____, 2010.

/S/
THOMAS B. SMITH
Circuit Judge

/S/
THOMAS W. TURNER
Circuit Judge

/S/
ROBERT M. EVANS
Circuit 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: **Joerg Jaeger, Esq., Jaeger & Blankner**, 217 East Ivanhoe Boulevard, Orlando, Florida 32804 and **James K. Fisher, Esq., Department of Highway Safety and Motor Vehicles**, 133 South Semoran Boulevard, Orlando, Florida 32807 on the 21st day of May, 2010.

_____/S/_____
Judicial Assistant