

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

KATHRYN STAPLETON,

Petitioner,

v.

CASE NO.: 2007-CA-11376-O

Writ No.: 07-50

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

Petition for Writ of Certiorari.

Stuart I. Hyman, Esquire,
for Petitioner.

Jason Helfant, Esquire,
for Respondent.

BEFORE LEBLANC, KIRKWOOD, and MACKINNON, JJ.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Kathryn Stapleton (“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 the Petitioner’s driver’s license for unlawful breath alcohol level. This Court has jurisdiction under sections 322.31, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On July 5, 2007, Deputy Wilson, a member of the Orange County Sheriff’s Office, observed Kathryn Stapleton operating a motor vehicle at unlawful speeds and drifting within her lane. “Deputy Wilson made contact with Ms. Stapleton and observed her eyes to be bloodshot,

watery and red and the strong odor of alcohol emitting from her breath. Ms. Stapleton swayed and stagger[ed] slightly as she walked and swayed in an orbital rotation as she stood. She denied having been drinking but agreed to submit to the FSE's. Based on all his observations, Deputy Wilson placed Ms. Stapleton into custody and transported her to the Orange County DUI testing center, where samples of her breath resulted in .105 and .112 BAC." Subsequently, the Petitioner's driver's license was suspended for driving with an unlawful blood alcohol level of .08 or higher.

The Formal Review Hearing was held on August 10, 2007. The following exhibits were admitted at the hearing: 1) Petitioner's driver's license; 2) the DUI traffic citation; 3) the probable cause affidavit; 4) two breath alcohol test affidavits; 5) the agency inspection report for Intoxilyzer 8000, serial number 80-001416, dated April 18, 2007; 6) the agency inspection report for Intoxilyzer 8000, serial number 80-001416, dated June 13, 2007. Additionally, the Petitioner submitted numerous reports, transcripts, and regulations for the hearing officer to consider.

At the hearing, Petitioner's counsel moved to invalidate the suspension based on the following: 1) the breath test machine has been substantially modified, does not work properly, and has not been approved for use under the 11D-8 Rules; 2) the agency inspections for July and August were not in evidence; 3) the breath tests are invalid and should not be used to suspend the driver's license of the Petitioner. The administration of a second breath test after the failure of the first test should have been stricken from the record; 4) the arresting officer had no probable cause to arrest the Petitioner based on his observation and her performance on the field sobriety exercises; 5) there was no probable cause to request the field sobriety exercises from the Petitioner. Following the hearing, the hearing officer issued his "Findings of Fact, Conclusions of Law and Decision," on August 14, 2007. The hearing officer denied all the aforementioned motions, and granted an additional motion to strike the horizontal gaze nystagmus (HGN) test from the record. He sustained the Petitioner's license suspension. The 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. Where the driver's license was suspended for driving with an unlawful blood alcohol level, the scope of the review is limited to the following issues:

1. Whether the arresting 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 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).

In her Petition for Writ of Certiorari, the Petitioner first argues that “the hearing officer deprived Petitioner of due process of law when the suspension of Petitioner’s driver’s license was not set aside due to the failure of the hearing officer to issue subpoenas for Kelly Melville, Roger Skipper, Tanya Shrum and Laura Barfield to appear along with the documents requested in the subpoena duces tecum.” Next, the Petitioner argues that “the breath testing results were not properly approved since they were obtained by use of a breath testing machine that had not been properly approved pursuant to FDLE Rule 11D-8.003 and [the machine] provide scientifically unreliable results.” Finally, the Petitioner argues that “the hearing officer erred by not setting aside the suspension due to the failure of the record to establish compliance with the agency inspection requirements of FDLE Rule 11D-8.006.

In their Response, the Department argues that “the hearing officer properly denied the Petitioner’s request for subpoenas for persons not identified in the statute that provides the hearing officer the power to subpoena witnesses.” Additionally, the Department contends that their “order sustaining Petitioner’s suspension conforms to the essential requirements of the law and is supported by competent substantial evidence.” Specifically, they argue that the record reflects evidence that clearly establishes that the Petitioner’s breath test was conducted pursuant to section 316.1932, Florida Statutes, and in compliance with FDLE Rules.

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 specific persons identified in the breath test result documents submitted by the Department. During the pendency of this petition, the Second District Court of Appeal issued a decision in *Yankey v. Dep't of Highway Safety & 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 that document).

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." *Id.* at 637; *see also* § 322.2615(2), Fla. Stat. The court noted 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* at 637. Based on the statutory and administrative code provisions regarding the procedures to establish the validity of breath test results, the court 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.

In the instant case, the Department entered the breath alcohol test affidavit, the agency inspection report, and the department inspection report into evidence. Prior to the hearing, the Petitioner requested that subpoenas be issued for specific persons identified in those documents submitted by the Department. Like *Yankey*, the hearing officer refused to issue the requested subpoenas asserting that section 322.2615(6)(b) did not authorize the issuance of the subpoenas.

Based on the holding in *Yankey*, the Court finds that the hearing officer was authorized under section 322.2615(6)(b), Florida Statutes, to issue subpoenas to persons identified in the

breath alcohol analysis report, the breath test affidavit, and the agency inspection report. Thus, the hearing officer's decision to deny the issuance of the subpoenas departed 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 Kathryn Stapleton'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 __7th__ day of __January_____, 2010.

_____/S/_____
BOB LEBLANC
Circuit Court Judge

_____/S/_____
LAWRENCE R. KIRKWOOD
Circuit Court Judge

_____/S/_____
CYNTHIA Z. MACKINNON
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, Esq.**, Stuart I. Hyman, P.A., 1520 East Amelia Street, Orlando, FL 32803; and to **Jason Helfant, Esq.**, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 6801 Lake Worth Road, #230, Lake Worth, FL 33467, on this ___7th___ day of _____January_____, 2010.

___/S/_____

Judicial Assistant