

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

CASE NO.: 2010-CA-16879
WRIT NO.: 10-61

JASON MAHON,

Petitioner,
vs.

**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,
Robert Mustain, Hearing Officer.

Matthews R. Bark, Esquire,
for Petitioner

Richard M. Coln, Assistant General Counsel,
for Respondent.

Before POWELL, WHITEHEAD, BRONSON, J.J.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Mahon seeks certiorari review of a decision of a hearing officer sustaining the suspension of his driver's license following a formal review hearing. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and grant the Petition.

Petitioner was arrested for DUI, his driver's license was suspended, and he timely requested a formal review hearing which was scheduled within the required 30 days for June 22, 2010. On June 16, five days before the hearing, Petitioner requested the Department to issue a witness subpoena for Deputy Danjou, the arresting officer who authored the DUI citation and the arrest

report which had been supplied as required to the Department. Hearing Officer Labbe refused to issue the subpoena.

At the hearing on June 22 before a different hearing officer, Robert Mustain, Petitioner moved to invalidate the suspension based upon the refusal to issue a subpoena for Danjou, and objected to the hearing officer considering Danjou's arrest report until he could have Danjou present and examine him. The motion was denied and the objection overruled. Hearing officer Mustain offered to grant Petitioner a continuance which was declined. The record does not show that he offered to issue Petitioner a temporary driving permit to be in force until the re-scheduled hearing.¹ Hearing officer Mustain went ahead and marked and admitted in evidence the several required documents including DUI citation and Danjou's arrest report which he obviously considered in making his decision. On June 28, 2010, the hearing officer issued his decision sustaining the suspension of Petitioner's driver's license. Petitioner then filed this petition for writ of certiorari.

Several Florida District Court of Appeals have held that it is error and a denial of due process for a hearing officer to refuse to issue a subpoena for a witness named in the documents required to be filed by the arresting officer if the witness's testimony would be relevant to an issue to be decided by the hearing officer at a formal review hearing. *See DHSMV v. Auster*, 52 So.3d 802 (Fla. 5th DCA 2010); *Lee v. DHSMV*, 4 So.3d 754 (Fla. 1st DCA 2009) *Yankey v. DHSMV*, 6 So.3d 633 (Fla.2d DCA 2009); *DHSMV v. Maffet*, 1 So.3d 1286 (Fla. 2d DCA 2009). Here, deputy Danjou's testimony would be relevant to reasonable suspicion for the stop and probable cause for the DUI arrest, two issues to be decided by the hearing officer at the formal review hearing.

Hearing Officer Labbe noted on Petitioner's subpoena request two reasons for denial: "subpoena not timely" and "officer out 6-19-2010 until 6-27-10". Neither of these two reasons

¹ See Section 322.64(9), Florida Statutes which provides that if a scheduled hearing is continued at the Department's initiative, a temporary driving permit shall be issued to the petitioner if he or she is otherwise eligible.

justified the refusal. As to the first reason, that the subpoena request was untimely, there is nothing in the law which sets a deadline for the issuance of these subpoenas. As to the second reason, unavailability, Deputy Danjou had notified the supervisor at the Bureau of Administrative Services of the DHSMV in writing on January 16, 2010 that he would “be out of the county from the 19th of June, 2010 through the 27th of June, 2010.” Again, there is nothing in the law which permits refusal based upon advance notice to the Department of an individual’s unavailability as a witness during a certain period of time in the future. We think that Labbe’s refusal was an abuse of discretion and a denial of due process.

It was further a denial of due process for Hearing Officer Mustain to offer to grant a continuance of the hearing to Petitioner without charging the continuance to the Department and issuing Petitioner a temporary driving permit.

Consequently it is ordered that the hearing officer’s decision of June 28, 2010 is quashed, and this case is remanded to the Department to immediately restore Petitioner’s driving privileges if he is otherwise eligible, and remove from Petitioner’s driving record the suspension herein.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED**, the hearing officer’s decision of June 28, 2010 is **QUASHED**, and the case is **REMANDED** with directions.

DONE AND ORDERED at Orlando, Florida this 24th day of June , 2011.

 /S/
ROM W. POWELL
Senior Judge

 /S/
REGINALD WHITEHEAD
Circuit Judge

 /S/
THEOTIS BRONSON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Matthews R. Bark, Esq.**, 217 E. Ivanhoe Blvd., N, Orlando, Florida 32804; and **Richard M. Coln, Assistant General Counsel**, P.O. Box 570066, Orlando, Florida 32857, by mail, this 24th day of June, 2011.

/S/

Judicial Assistant