

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

CASE NO. 2020 AP 000011 AP

TIMOTHY SHENUSKI,
Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

Petition for Writ of Certiorari from the
State of Florida, Department of Highway
Safety and Motor Vehicles,
Dawn Jarvis, Hearing Officer.

Stuart I. Hyman, Esquire, for Petitioner.

Mark L. Mason, Assistant General Counsel,
for Respondent.

Before MADRIGAL, SCHREIBER, and SHAFFER, JJ.

PER CURIAM.

Petitioner Timothy Shenuski timely seeks certiorari review of the hearing officer's Findings of Fact, Conclusions of Law and Decision ("Decision"), which sustained the State of Florida, Department of Highway Safety and Motor Vehicles' ("Department") administrative suspension of his driver's license for driving with an unlawful breath alcohol level.¹ Petitioner raises several grounds in his Petition for Writ of Certiorari

¹ We have jurisdiction. § 322.2615(13), Fla. Stat.; Fla. R. App. P. 9.030(c)(2).

(“Petition”), but we find his first ground to be dispositive. Accordingly, we grant his Petition, quash the hearing officer’s Decision, and remand for further proceedings.

Petitioner in his first ground argues that the hearing officer committed a procedural due process error for failing to make available to him, either before or during the hearing, a video recording made by the arresting officer’s body camera, which recorded the events that took place at the scene of his arrest. Among other things, he asserts that he “was not provided with a meaningful hearing in which he could refresh witnesses’ memories with the video and present evidence on the video that was favorable to him.” He also asserts that the “procedure employed by the hearing officer did not assure that the hearing officer did watch the entire video or preclude that she was not distracted or missed critical parts of the video that were favorable to Petitioner.” Petitioner urges that the hearing officer’s Decision should be quashed without remand, with the result that the instant driver’s license suspension proceeding would be dismissed.

In the Response, Respondent stipulates that the hearing officer committed a procedural due process error with regard to the video evidence. Respondent acknowledges that the video evidence was not made available to Petitioner’s counsel either before or during the hearing, and that the hearing officer only stated that the video evidence would be reviewed prior to her decision. Respondent also acknowledges that Petitioner’s counsel was prevented from reviewing the video and determining whether contained evidence favorable to Petitioner. Thus, counsel for Respondent “cannot in good faith assert that this was harmless error, and therefore stipulates to remand on this issue” for further proceedings “before a different hearing officer.”

In short, both parties agree that a procedural due process error occurred in the instant case with respect to the video evidence, but disagree on the remedy. As indicated, Petitioner urges that the hearing officer's Decision should be quashed without remand, which would result in the driver's license suspension proceeding being dismissed, whereas Respondent urges that the hearing officer's Decision should be quashed but with remand for further proceedings before a different hearing officer.

In *Lillyman v. Department of Highway Safety and Motor Vehicles*, 645 So. 2d 113, 144 (Fla. 5th DCA 1994), the Fifth District determined that in a driver's license revocation proceeding, the circuit court did not depart from the essential requirements of law in granting certiorari and remanding for further proceedings when the hearing officer erred in limiting cross-examination on a relevant matter and refusing to allow a proffer.

Lillyman explained,

When an evidentiary error is made in an administrative hearing, the remedy is to remand for further proceedings. The remedy is similar to granting a new trial when an error is made during trial regarding the admissibility of testimony. Petitioner is not entitled to dismissal of the license revocation proceeding.

Id. (citations omitted). See also *Dep't of Highway Safety & Motor Vehicles v. Clay*, 152 So. 3d 1259, 1260 (Fla. 5th DCA 2014) ("Because binding precedent provides an opportunity to cure a due process violation, we conclude that the circuit court departed from the essential requirements of law when it failed to remand the case for a new hearing.") (citing and quoting *Lillyman*). *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So. 3d 616, 623 (Fla. 5th DCA 2014) (proper remedy for due process

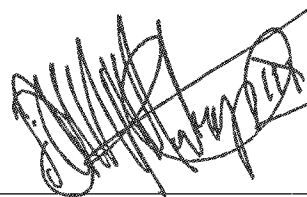
violation resulting from failure of subpoenaed witness to appear at suspension hearing was remand for new hearing).

The Court determines that *Lillyman* is controlling and warrants a remand with respect to the error regarding the video evidence in the instant case, not outright dismissal of the driver's license suspension proceeding. Therefore, the Court grants certiorari, quashes the hearing officer's Decision, and remands this case for further proceedings before a different hearing officer. Because the first ground of the Petition is dispositive, we need not address the remaining grounds.

Based upon the foregoing, it is 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 this case is REMANDED for further proceedings consistent with this Opinion.

PETITION GRANTED; ORDER QUASHED; REMANDED.

DONE and ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on this 25th day of June, 2021.



DIEGO MADRIGAL III
Presiding Circuit Judge

SCHREIBER and SHAFFER, JJ., concur.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Order was furnished on this 25th day of June, 2021, to Stuart I. Hyman, Esquire, 1520 E. Amelia St., Orlando, FL 32803 at shymanlaw@aol.com; Mark L. Mason, Assistant General Counsel, State of Florida, Department of Highway Safety and Motor Vehicles, 2900 Apalachee Pkwy. A-432, Tallahassee, FL 32399 at markmason@flhsmv.gov and OGCFiling@flhsmv.gov.


Judicial Assistant