

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: **16-2010-CA-5408**
DIVISION: **CV-A**

RANDOLPH ELLIS,
Petitioner,

vs.

**DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,**
Respondent.

Petition for Writ of Certiorari arising from State of Florida, Department of Highway Safety and Motor Vehicles' Final Order of License Suspension.

David M. Robbins, Esquire and Cheyenne L. Palmer, Esquire, attorneys for Petitioner.
Judson Chapman, Esquire, Senior Assistant General Counsel, attorney for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, RANDOLPH ELLIS, seeks review of an order of the Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES (hereafter "DHSMV"), upholding the administrative suspension of his driver's license for driving with an unlawful blood alcohol level. This court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution; Rule 9.030(c), Fla. R. App. P.; and §§322.2615(13) and 322.31, Fla. Stat. For the reasons stated below, the petition is hereby quashed and the case is remanded back to the DHSMV for further proceedings.

Petitioner was arrested for DUI and thereafter submitted to a breath test. The test results indicated that his breath alcohol level was .191 and .194 and Petitioner's license was suspended accordingly. Petitioner then timely requested a formal review of the agency's suspension of his license pursuant to §322.2615(6), Fla. Stat., and he was issued a temporary driver's permit until the

conclusion of the formal review hearing. Before the formal review, Petitioner requested that the Hearing Officer issue a subpoena to Deputy Paul Beasley who performed the monthly agency inspection of the breath testing machine used to test Petitioner's breath alcohol level. The Hearing Officer complied with Petitioner's request and Petitioner's counsel obtained service of process on Deputy Beasley.

Unfortunately, Deputy Beasley failed to appear at the scheduled formal review hearing. He did not request an alternative date from the Hearing Officer or provide any information to show that he had good cause for failing to appear. He simply did not show up. In light of the circumstances, Petitioner's counsel first moved to invalidate the suspension and his request was denied. After a somewhat contentious exchange between the Hearing Officer and Petitioner's counsel, the Hearing Officer asked Petitioner's counsel if he wanted a continuance in order to take advantage of the subpoena enforcement procedure outlined in §322.2615(6)(c), Fla. Stat. However, the Hearing Officer refused to extend Petitioner's temporary driving permit for the period of time it would take for Petitioner to seek enforcement in the appropriate Circuit Court. Petitioner's counsel declined the offer to continue the proceedings without the accompanying extension of the temporary driving permit and the Hearing Officer upheld the administrative suspension of Petitioner's license.

Petitioner contends that he was denied procedural due process when the Hearing Officer refused to extend the temporary driving permit for the period of time required for Petitioner to enforce the subpoena in Circuit Court. The court agrees.

The First District was very clear in Lee v. DHSMV, 3 So.3d 754, 757 (Fla. 1st DCA 2009), that it is "a violation of basic principles of due process" if a Hearing Officer considers a document or report in a formal review hearing challenging the administrative suspension of a license, but denies the driver the ability to meaningfully cross-examine the individual or individuals who

prepared those documents or reports. In Lee, the agency's monthly inspection report for the breath testing machine was part of the record considered by the Hearing Officer, but the Hearing Officer refused to issue a subpoena for the agency inspector who prepared the report. The court in Lee quashed the administrative order upholding the suspension because of the Hearing Officer's failure to grant the requested subpoena.

While the Hearing Officer in this case correctly issued a subpoena to Deputy Beasley, she refused to allow Petitioner an extension of his temporary driving permit to give him the opportunity to take advantage of the subpoena enforcement provisions of §322.2615(6)(c) when Deputy Beasley failed to show up. The Hearing Officer appeared to ground her decision on a determination that Deputy Beasley was a "relevant" witness, but not a "critical" witness. This arbitrary distinction has no basis in any Florida statute, in any agency rule or other provision found in the Florida Administrative Code, or in any decision by any Florida appellate court. In fact, Deputy Beasley has the same "relevance" to this case as the witness in Lee. Each performed the monthly agency inspection of the breath testing machine and nowhere in the Lee decision does the court categorize witnesses who prepared documents considered by the Hearing Officer according to the potential importance of their testimony.

There is no question that a suspension of a driver's license implicates a protectable property interest and that procedural due process must be afforded to an individual facing such a suspension. DHSMV v. Pitts, 815 So.2d 738, 743 (Fla. 1st DCA 2002). The Florida legislature and the DHSMV have taken great care to set out the due process protections that attach in a proceeding involving the administrative suspension of a driver's license. One aspect of the due process afforded to individuals facing such a suspension is the right to have a meaningful administrative review *before* the commencement of the automatic suspension.

Even though a law enforcement officer is required under §322.2615(1)(a), Fla. Stat., to suspend the driving privilege and take the driver's license of a person who drives with an unlawful blood-alcohol or breath-alcohol level, or refuses to submit to a test of his or her breath-alcohol or blood-alcohol, the officer must also issue the individual a 10-day temporary permit if the person is otherwise eligible for a driver's license. Although not a model of clarity, once a driver requests a formal review hearing within the applicable time period, §15A-6.011(2)(d), Fla. Admin. Code, directs that the Division of Driver Licenses shall issue a business purpose driving permit which shall be cancelled if the suspension is thereafter sustained. The clear import of these provisions is that the automatic suspension of an individual's driver's license is stayed until the completion of the formal review process.¹

The Hearing Officer's refusal to extend Petitioner's temporary driving permit until he was able to enforce the subpoena directed to Deputy Beasley amounted to the commencement of the administrative suspension of Petitioner's license without giving Petitioner a full and complete administrative review. Although §322.2615(6), Fla. Stat., puts the burden on the requesting party to ensure compliance with their subpoena, fundamental fairness requires giving the individual a reasonable and appropriate amount of time to actually take advantage of the available procedural tools before his or her suspension takes effect.

DHSMV argues that a Hearing Officer under §322.2615(9), Fla. Stat., does not have the authority to extend a temporary driving permit for any reason other than in those cases where DHSMV requests a continuance of the formal hearing. DHSMV further argues under this same

¹§322.2615(9), Fla. Stat., prohibits the extension of the temporary business permit if an individual requests and obtains a continuance of the formal review hearing. Thus, the suspension period will begin before the completion of a formal review hearing if an individual, for whatever reason, requires a continuance.

provision that a Hearing Officer is expressly prohibited from granting an extension when the driver requests such a continuance. The agency maintains that any effort to halt the proceedings in this case when Deputy Beasley failed to appear should be considered a request on the part of Petitioner to continue the formal hearing.

On the contrary, when a properly subpoenaed witness fails to appear through no fault of the driver, and the driver communicates an intention to utilize the enforcement provisions of §322.2615(6)(c), the Hearing Officer, being neutral and detached, has no choice but to continue the proceedings. Otherwise, the due process right under Lee to cross-examine witnesses like Deputy Beasley would be meaningless. In such a situation, the need for a continuance should not be charged to the driver because he or she has not yet had the opportunity to enforce the subpoena through the only means provided by law.

Additionally, §15A-6.011(2)(a), Fla. Admin. Code, provides that the temporary business permit is cancelled only after the administrative suspension is sustained. The Hearing Officer cannot sustain an administrative suspension until he or she hears all of the evidence and the suspended driver has had the opportunity to meaningfully cross-examine those witness that have prepared documents considered by the Hearing Officer during the formal administrative review. To do otherwise would likewise be contrary to basic due process. Thus, §15A-6.011(2)(a) appears to authorize an extension until the Hearing Officer makes his or her final decision and the Hearing Officer cannot make a final decision until the suspended driver has an opportunity to present all of the relevant evidence to challenge the administrative suspension, even if that means postponement until an individual in Petitioner's situation has the opportunity to enforce the subpoena by way of a petition in the appropriate Circuit Court.

Petitioner argues that this court should quash the decision to uphold the administrative

suspension of his license and not remand the case back to the DHSMV for further hearing. He argues that the record shows that the Hearing Officer demonstrated that she was not neutral and detached. While there is some authority for what Petitioner requests, the record does not demonstrate bias on the part of the Hearing Officer. She and Petitioner's counsel clearly developed friction during the hearing, but on this record, the Petitioner's request is denied.

Based upon the foregoing, Petitioner's request for a writ of certiorari is granted. The decision upholding the administrative suspension of Petitioner's driver's license is quashed and the case is remanded back to the DHSMV for further proceedings. DHSMV is also directed to reinstate and/or extend Petitioner's temporary driver's permit until the conclusion of the formal administrative review.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 8TH day of September, 2010.

JAMES H. DANIEL, Circuit Judge

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ORDER ENTERED

SEP 08 2010

/s/James H. Daniel