IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIRCUIT CIVIL DIVISION

SCOTT SMITH,
Petitioner,

CASE NO.: 21-CA-5080

v.

DIVISION: H

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.
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ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

This case is before the Court on Scott Smith's June 18, 2021 Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that he was denied his right to procedural due process because the hearing officer, after being notified that Petitioner was unable to serve *former* Trooper Noto due to statutory and administrative restrictions, refused to issue a subpoena on her own initiative. Petitioner argues that without the former trooper's testimony, Petitioner was denied a meaningful opportunity to be heard. Because state law and Department policy prevented the driver from properly serving a subpoena on the arresting officer, thus eliminating his ability to have the officer present at the hearing and denying Petitioner his right to a meaningful hearing, the court agrees that Petitioner was denied due process and grants the petition.

On March 15, 2021, Petitioner was arrested by Florida Highway Patrol (FHP) Trooper Noto for driving under the influence of alcohol or drugs (DUI). His driving privileges were suspended under the Implied Consent Law for refusing to submit to a breath test. Petitioner requested a formal review to challenge the suspension and received subpoenas from the Department for service. On May 4, 2021 Petitioner attempted to serve Trooper Noto. The attempt was rejected because, as of April 15, 2021, the trooper was no longer employed by FHP. Petitioner's counsel notified the hearing officer assigned to this case of the rejection of service and the impossibility of obtaining Trooper Noto's personal address, because personal contact information for former law enforcement officers is exempt from public

records. § 119.071(4)(d), Fla. Stat. The hearing officer advised Petitioner's counsel that she was unable to provide advice or assist in serving the former trooper asserting that she did not have Noto's contact information and that issuing a subpoena on her own initiative would be a departure from neutrality.[1] At the formal review hearing, Petitioner's counsel moved to have his license suspension invalidated because he was denied the right to cross examine Trooper Noto as the sole author of the documents entered into evidence. The hearing officer denied the motion, finding no due process violation because the Confrontation Clause under the Sixth Amendment does not apply to civil administrative hearings.

As he did in the administrative proceeding, Petitioner again contends that his procedural due process rights were abridged because the hearing officer, after being notified that Petitioner was unable to serve former Trooper Noto due to statutory and administrative restrictions, refused to issue a subpoena on her own initiative. Petitioner further argues that he was denied a meaningful opportunity to be heard because his inability to properly serve the former trooper was caused by state law and policy. Petitioner concedes that he does not have a right to confront the arresting officer under the Sixth Amendment because this is not a criminal proceeding. Instead, Petitioner argues, as he did in the proceeding below, that he was denied procedural due process under the Fifth and Fourteenth Amendments, which require fair notice and a meaningful opportunity to be heard when a property interest is involved. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).[2] Florida's statutory driver's license suspension hearings are facially valid and meet the standards of procedural due process; however, "if, under the facts of a particular case, a suspendee's rights have not been respected, the suspendee may be entitled to relief." *DHSMV v. Pitts*, 815 So. 2d 738, 743–44 (Fla. 1st DCA 2002).

To determine whether an administrative procedure provides sufficient procedural due process, this Court must consider three factors: first, the private interest affected by the procedure; second, the risk of erroneous

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[1] A hearing officer is permitted to issue a subpoena on his or her own initiative. 15A-6.012(1), F.A.C.

[2] The administrative order upholding the suspension of Petitioner's driving privilege did not address Petitioner's argument that his due process rights under the Fifth and Fourteenth Amendments were denied.

deprivation and the probable value of additional or substitute safeguards; and third, the government interests that would be affected, including fiscal and administrative burdens, that the additional or substitute safeguards would require. *Mathews*, 424 U.S. at 334–35. The first factor requires the Court to determine what, if any, private interest is affected by the procedure at issue. *Id.* at 335. Florida courts have found that after a driver's license has been issued, continued possession of that license is an important private interest and should not be taken away without due process. *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1078–79 (Fla. 2011); *Wiggins v. Florida Dept. of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017).

The second factor considers the risk of erroneous deprivation of Petitioner's private interest and the probable value of additional substitute safeguards regarding that risk. Petitioner contends that the risk of erroneous deprivation in this case is caused by FHP's discretion to reject service for a trooper no longer employed by the agency, and the former trooper's personal contact information being unavailable to the public. § 119.071(4)(d), Fla. Stat.; Rule 15A-6.012(3), F.A.C. Petitioner adds that witness testimony is the only method available to present a defense in the formal hearing, and that because former Trooper Noto was the sole officer involved in the investigation and arrest at issue in this case, § 119.071(4)(d) and R. 15A-6.012(3) combine to form a denial of a meaningful opportunity to be heard. This second factor presents the Court with a dilemma. The Department is correct that the hearing officer is permitted to rely on documentary evidence alone when making a determination. §322.2615(11), Fla. Stat. The Department is also correct that former Trooper Noto was never properly served, albeit through no fault of Petitioner's. Given these realities, the Department maintains that the hearing officer was not required to invalidate the suspension under section 322.2615(11), Florida Statutes.

Although the Department is correct that section 322.2615(11) allows a hearing officer to conduct a hearing solely on the documents furnished to the Department by law enforcement, this ability is not unlimited. *DHSMV v. Colling*, 178 So. 3d 2, 5 (Fla. 5th DCA 2014) (when the Department proceeds without a witness at a formal review hearing, "it does so at the risk that the documents might contain irreconcilable, material contradictions"). Drivers are permitted to subpoena the arresting officer and breath test inspector to overcome the statutory presumption that the documents provided to the hearing officer are proper proof. *Yankey v. DHSMV*, 6 So. 3d 633, 638 (Fla.

2d DCA 2009). And, the importance of their appearance is underscored in section 322.2615(11), which provides that the failure of a properly subpoenaed arresting officer or breath test operator to appear requires the hearing officer to invalidate the suspension. Here, again, the Department is correct that there is no failure to appear by the arresting officer because Petitioner was unable to serve the subpoena.[3] Generally, when a driver requests a subpoena, the driver is responsible for ensuring that the subpoena is enforced. § 322.2615(6)(c), Fla. Stat.; Rule 15A-6.012(2), F.A.C.. If a properly served witness fails to appear, the driver may choose to either participate in the hearing without the witness or ask for a continuance. *Objio v. DHSMV*, 179 So. 3d 494, 496 (Fla. 5th DCA 2015). It is clear, then, that under most circumstances, the driver is responsible for ensuring that the witness appears to give testimony, and, if the witness' failure to appear can be ascribed to the driver, it is not a due process violation for the hearing officer to proceed without the requested witness.

Here, however, the failure to properly serve the arresting officer[4] was not caused by Petitioner, but by the fact that the designated FHP agent is permitted to reject service for former employees, and the personal contact information of former law enforcement officers is statutorily protected. It is important to note that the Florida legislature created different statutory outcomes regarding the absence of the arresting officer compared to other witnesses; the 2013 amendments to section 322.2615(11), reflect the importance of the arresting officer's testimony in formal hearings when compared to other witness testimony. *Compare* § 322.2615(6)&(11), Fla. Stat. (2010), *with* § 322.2615(6)&(11), Fla. Stat. (2013) (the failure of a subpoenaed witness to appear is not grounds to invalidate the suspension, *unless* the witness is the arresting officer or breath technician, in which case "the department shall invalidate the suspension"). Because state law and Department policy prevented Petitioner from properly serving the arresting officer, and the failure cannot be attributed to an act or omission of the driver, there is a risk of erroneous deprivation.

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[3] It follows that if Petitioner could not *serve* the subpoena, the subpoena enforcement mechanism found in section 322.2615(6)(c), Florida Statutes, and Rule 15A-6.012(2), F.A.C. would not afford Petitioner the needed relief.

[4] In this case, the arresting officer was the *only* law enforcement officer to witness the arrest.

The third factor is the government's interest; in this case, ensuring the safety of travelers on public roadways though formal review hearings of license suspensions following a DUI arrest,[5] and protecting former law enforcement officers by keeping their personal contact information confidential. The formal review process is expeditious and facially valid when weighed against the private interest at stake. *Pitts*, 815 So. 2d at 743–44. It is sometimes necessary, however, to fill procedural gaps with basic principles of due process. *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 147 (Fla. 2d DCA 2003). Given that hearing officers are permitted to issue subpoenas on their own initiative, and that designated employees are not *required* to reject service for former officers, this Court concludes that additional safeguards may be employed in situations like the case at hand, without creating an undue burden or altering the existing rules and procedures. This Court therefore will not mandate a specific procedure that the Department must follow.

In light of the foregoing, the petition is GRANTED and the order below is QUASHED.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 5/25/2022
Emmett L. Battles

EMMETT L. BATTLES, Circuit Court Judge

Electronic Copies Provided Through JAWS

[5] *Wiggins*, 209 So. 3d at1173.