Petition for Writ of Certiorari to Review Quasi-Judicial Action, Department of Highway Safety and Motor Vehicles: DRIVER'S LICENSES—Due Process. Petitioner was not afforded adequate due process when Respondent failed to provide Petitioner with the video-recording of Petitioner's arrest for driving under the influence, when Petitioner requested the video-recording prior to the hearing, its existence was affirmatively denied prior to and at the hearing, and Petitioner then received a copy of the video-recording after the order sustaining the suspension was entered. Petition granted. *Carl S. Christian v. State of Florida, Dep't of Highway Safety and Motor Vehicles*, No. 13-CA-5160-ES (Fla. 6th Cir. App. Ct. May 12, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

CARL S. CHRISTIAN,

Petitioner, **UCN: 512013CA005160AXES**

v.

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

Respondent.
______________________________/

Petition for Writ of Certiorari

A.R. Mander, III, Esquire,
for Petitioner,

Judson M. Chapman, Esquire,
Sr. Assistant General Counsel,
for Respondent.

ORDER AND OPINION

Petitioner claims his right to due process was violated when Petitioner was not provided the video-recording of Petitioner's arrest until after the conclusion of the hearing to review the suspension of Petitioner's driver's license, at which the hearing officer issued findings sustaining the suspension. The Court

finds the facts in this specific case demonstrate Petitioner was not afforded adequate due process and therefore grants the Petition for Certiorari.

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested for driving under the influence in violation of § 316.193, Fla. Stat. Petitioner requested a formal administrative review of his license suspension pursuant to § 322.2615, Fla. Stat. An evidentiary hearing was held before a hearing officer who found sufficient evidence to sustain the suspension. The hearing officer's findings of fact included:

> Petitioner was observed in physical control of a motor vehicle on the date of the suspension. Officer's Amatruda and Burns received a call regarding a disorderly intoxication at a Pizza Hut. Officer Burns arrived at the location and observed Petitioner as unsteady when entering his vehicle, and made a traffic stop to investigate once Petitioner attempted to back the vehicle out of the parking space. After making contact with Petitioner Officer Burns observed Petitioner to have a blank stare and an odor of alcohol.
>
> Officer Amatruda arrived and took over the investigation. Officer Amatruda observed Petitioner to have slurred speech, bloodshot, watery eyes, and a strong odor of alcohol. The Officer requested Petitioner exit the vehicle, and determined the odor of alcohol was coming from Petitioner's breath.
>
> Petitioner agreed to perform field sobriety testing, which he performed poorly, and was arrested for driving under the influence. Petitioner was read the implied consent warning and refused to provide a breath sample for testing.

Based on these facts, the hearing officer found Petitioner was lawfully arrested for DUI. The hearing officer found sufficient cause to sustain Petitioner's suspension by a preponderance of the evidence. Two days after the hearing officer's order, Petitioner received a copy of the video-recording of his stop and arrest, although Officer Burns testified at the hearing that his recording equipment was not working on the night of the incident, and requests for the video prior to the hearing were denied by the Police Department, which maintained that no video existed. Petitioner seeks an order quashing the order sustaining the suspension, and to re-open the case to hear the newly discovered evidence.

STANDARD OF REVIEW

In proceedings conducted pursuant to § 322.2616, Fla. Stat., a hearing officer must determine whether sufficient cause exists to sustain a suspension of driver's license. When the suspension results from a refusal to submit to a breath test, the officer's review is limited to the following issues:

1) Whether the arresting law enforcement officer had probable cause to believe that the person 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 refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer; and,
3) Whether the person was told that if he refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year . . . .

§ 322.2615(7)(b), Fla. Stat. The officer's findings on these issues must be supported by a preponderance of the evidence. This Court's review of the hearing officer's decision is "limited to a determination whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Cherry*, 91 So. 3d 849, 854 (Fla. 5th DCA 2011).

LAW AND ANALYSIS

Petitioner contends the officers lacked probable cause for arrest, and that the arrest was therefore unlawful. Petitioner further contends that he was not afforded procedural due process based on the fact that although Officer Burns testified at the hearing that the video camera in his vehicle was inoperable at the time of Petitioner's arrest, and therefore there was no video-recording of the stop and arrest, Petitioner received the video of the stop and arrest on August 30, 2013, two days after the hearing officer entered the order sustaining the license suspension. Petitioner contends that inaccurate representations by law enforcement officers and the Dade City Police

Department resulted in a due process violation preventing Petitioner from presenting evidence and having an effective opportunity to cross examine witnesses. Because there is no remedy by which Petitioner may seek a rehearing before the hearing officer based on the discovery of new evidence, Petitioner seeks relief from this Court and contends that the procedures in place are inadequate to protect his interest at stake.

Respondent contends that any relief sought by Petitioner is unavailable because this Court's review is limited to the record that was presented to the hearing officer. Therefore, Respondent claims this Court is unable to consider any newly discovered evidence. Respondent further states that Petitioner is prevented from asserting the video-tape is newly discovered evidence, because Petitioner could have, but did not, subpoena the Department for copies of the tapes.

Procedural due process requires notice and a meaningful opportunity to be heard before a deprivation occurs. *Dep't of Highway Safety and Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009). "The determination of whether the procedures employed during a particular hearing provide a real opportunity to be heard in a meaningful manner depends on the nature of the private interest at stake and the nature of the government function involved." *Id.* In order to make this determination this Court utilizes the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). This involves a three-fold determination:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Petitioner contends that he had the right to introduce relevant evidence at the hearing which includes the video tape of his arrest, and that the Department's representation that no video-recording had been made due to inoperative equipment, and the officer's testimony that no tape existed, resulted in a violation of his due process right to a fair hearing, citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 96-97

(1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). Petitioner further claims that the procedures in place are inadequate to protect his interest because there is no method by which a party may seek to re-open a case or seek rehearing based on newly discovered evidence. Petitioner seeks to quash the order sustaining the suspension and to re-open the case and require a hearing to consider the new evidence.

Respondent contends that the private interest at stake in this case, Petitioner's driver's license, is a privilege and not a right, that the risk of an erroneous deprivation is low because reports admitted into evidence and testimony from the two officers in this case support the hearing officer's finding of a lawful arrest, and that additional safeguards are not available or necessary in such a time constrained administrative case. *See Hadley v. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982) ("procedural due process in the administrative setting does not always require application of the judicial model"). Respondent maintains the lack of procedure by which newly discovered evidence may be reviewed post-determination is not a denial of due process, and that Petitioner was afforded due process by the testimony and availability for cross-examination of the two officers in this case.

Respondent additionally claims that had Petitioner "sincerely thought that the videotape demonstrated that his field sobriety test results were not as testified to by the investigating officer, he had the opportunity to subpoena the videotape and place it into the record on his own accord," citing *Dep't of Highway Safety and Motor Vehicles v. Snelson*, 817 So. 2d 1045, 1048 (Fla. 2d DCA 2002) ("If the driver sincerely thought that the videotape demonstrated that his field sobriety test results were not as testified to by the investigating officer, he had the opportunity to subpoena the videotape and place it into the record on his own accord"). Respondent claims Petitioner may not challenge the failure to provide the video because Petitioner failed to request a subpoena to produce the video, although Petitioner had been informed by the Department that there was no video-recording of Petitioner's arrest.

Because this Court may not consider new evidence, re-weigh the evidence or make additional findings, Respondent claims this Court is unable to grant Petitioner relief beyond review of the proceedings below that is limited to materials before the hearing officer when rendering a decision, and claims the testimony of the officers in this case is sufficient evidence on which the Court may sustain the hearing officer's findings. *See Dusseau v. Metro Dade County Bd. of County Comm'rs*, 794 So. 2d 1270 (Fla. 2001).

"We recognize that claims of due process violations cast doubt upon the department's ability to carry on status quo and lend credence to the circuit court's discretion to rule on the petition." *State Dep't of Highway Safety and Motor Vehicles v. Tidey*, 946 So. 2d 1223, 1226 (Fla. 4th DCA 2007). Additionally, "some agency errors may be so egregious or devastating that the promised administrative remedy is too little or too late," in which "case equitable power of a circuit court must intervene." *Id.* Further, the law is well settled that adequate procedures must be afforded before a person is deprived of his or her driver's license:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'

Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586 (1971). "According to the department's own rules, the procedural due process rights afforded a driver when seeking review of a license suspension pursuant to section 322.2615 include the right to present evidence relevant to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." *Lee v. Dep't of Highway Safety and Motor Vehicles*, 4 So. 3d 754, 756-57 (Fla. 1st DCA 2009). A hearing officer is authorized by § 322.2615(6)(b), Fla. Stat., "to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for

the officers and witnesses . . . , regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension." *Id.* at 757.

Respondent is correct that this Court's review is limited to the proceedings before the hearing officer in this case, and therefore may not consider new evidence. However, the Court finds that based on the specific facts of this case, considering that the existence of the video-recording of the stop and arrest was not only unknown prior to the hearing, but was requested and its existence affirmatively denied, only to be provided to Petitioner two days after the hearing, constitutes a denial of due process to Petitioner. Respondent's claims that Petitioner is somehow precluded from seeking relief in this Court based on the failure to subpoena a video recording which the Department denied existed are not well taken. Based on the foregoing findings, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby GRANTED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 12th day of May 2014.

Original order entered on May 12, 2014 by Circuit Judges Stanley R. Mills, Linda Babb and Daniel D. Diskey.