IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR ST LUCIE COUNTY, FLORIDA.
**APPELLATE DIVISION**

Circuit Case No. 17-AP-37
Petition for Writ of Certiorari

EDWARD KACZMARSKI,

Petitioner,
v.

Not final until time expires for filing motion
for rehearing, and if filed, disposed of.

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

Respondent.
_____/
Decision filed August 22, 2018.

Petition for Writ of Certiorari to the Department of Highway Safety and Motor Vehicles.

John Anastasio, Stuart, for petitioner.

Rebecca Pettit, Assistant General Counsel, Tampa, for respondent.

VAUGHN, J.

The Petitioner's driver's license was suspended for refusal to submit to a breath test, and he requested formal review. At the review hearing, the Petitioner moved to invalidate his driver's license suspension based on the arresting officer's failure to appear, and he cited §322.2615(11), Fla. Stat. (2017).[1] The hearing officer reserved ruling, and three days later, she rendered a written order upholding the suspension. The Petitioner now seeks this court's review of that order.

The standard of review applicable to circuit court's review of a Department of Highway

[1] The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. **If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the Department shall invalidate the suspension.**

Safety and Motor Vehicles ("Department") hearing officer's order is whether procedural due process was afforded, whether the essential requirements of the law were observed, and whether the findings and judgment were supported by competent substantial evidence. *State of Florida, Department of Highway Safety and Motor Vehicles v. Sarmiento*, 989 So. 2d 692, 693 (Fla. 4th DCA 2008) (quoting *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995).

The hearing officer improperly denied the Petitioner's motion because she found that the Petitioner did not properly serve the subpoena on Officer McGighan. In her order, she stated "Michael Flee, who served the subpoena to Officer McGighan, is not a licensed process server and an employee (sic) of John Anastasio, Esquire." §48.021(1), Fla. Stat. (2017) allows the rules of civil procedure to specify who can serve a civil witness subpoena. Fla. R. Civ. P. 1.410(d) applies:

> A subpoena may be served by any person authorized by law to serve process or by any person who is not a party and who is not less than 18 years of age. Service of a subpoena on a person named within must be made as provided by law. Proof of such service must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so.

The amended return of service states "the undersigned, who is not a party to this action and being above the age of eighteen…", which complies with the rule. There is no evidence in the record, much less competent substantial evidence, that Michael Flee is John Anastasio's employee, which is what makes the hearing officer's ruling so problematic.

However, this court can affirm the hearing officer's decision to deny the motion to invalidate the driver's license suspension and therefore uphold the hearing officer's order affirming the suspension based on the tipsy coachman doctrine, since the hearing officer reached the right result for the wrong reason, i.e. there was not proof that the arresting officer was properly served. *See State, Dept. of Highway Safety and Motor Vehicles v. Dean*, 175 So. 3d 939, 940 (Fla. 5th DCA 2015). In *Robertson v. State*, the Florida Supreme Court explained that though the general principle is that a claim not raised in the lower tribunal will not be considered on appeal, it acknowledged that under the tipsy coachman doctrine, a lower court's "ruling will be upheld if there is any theory or principle of law *in the record* which would support the ruling." 829 So.2d 901, 906 (Fla.2002) (quoting *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638,

644 (Fla.1999)). "The key to the application of this doctrine of appellate efficiency that there must be support for the alternative theory or principle of law in the record before the trial court." *Id*.

The service of a subpoena on a law enforcement witness in a Department administrative suspension review hearing is governed by Fla. Admin. Code R. 15A-6.012(3), which states in relevant part:

> Service of a witness subpoena upon a law enforcement officer or upon any federal, state or municipal employee called to testify in an official capacity may be made as provided in Section 48.031(1),[2] F.S., or **by delivery to a designated supervisory or administrative employee at the witness' place of employment if the agency head or highest ranking official at the witness' place of employment has designated such employee to accept such service…**

(Emphasis added). The amended return of service in this case states that the subpoena was served on Lisa Scott at the Stuart Police Department; however, there is no explanation on who she is or what she does there; it merely states her name.[3] There is no indication on the amended return of service that she is the designated supervisory or administrative employee designated to accept service, as required Fla. Admin. Code R. 15A-6.012(3). The flaw in failing to list Lisa Scott's title or position within the Stuart Police Department (if any) in the amended return of service is the alternative theory that allows us to apply the tipsy coachman theory to affirm the hearing officer's decision. The dissent objects to the use of this theory on denial of due process grounds because the exact issue of Lisa Scott's title "was not raised during the hearing, so the Petitioner could not have requested opportunity to amend the deficient return." From a practical standpoint, there are eight places in the relatively short transcript (eleven pages total) where either the hearing officer or the field supervisor are transcribed as "indiscernible" in response to the Petitioner's counsel's arguments/statements. During all of those instances, the surrounding conversation in the transcript

[2] This section states "an employer, when contacted by an individual authorized to serve process, shall allow the authorized individual to serve an employee in a private area designated by the employer. An employer who fails to comply with this paragraph commits a noncriminal violation, punishable by a fine of up to $1,000."

[3] The amended return of service specifically states in relevant part: "The undersigned, not being a party to this action and being above the age of 18 years old, received a subpoena deuces (sic) tecum for hearing for Officer William McGighan on October 3, 2017. And, under Section 48.021(1) Florida Statutes and Florida Rule of Civil Procedure 1.410(d), did serve the same at 4:00pm on October 5, 2017 in Martin County, Florida as follows: SUBSTITUTED SERVICE By delivering a true and correct copy…with any applicable witness fees under Section 92.141 Florida Statutes, with the date and hour of service endorsed upon the same, upon Officer William McGighan, by substituted service at the address of the law enforcement agency, the Stuart Police Department, 830 SE Martin Luther King Jr. Blvd., Stuart, Florida 34994, by personally delivering the same to Lisa Scott. Verification under Section 92.525 Florida Statutes:…"

revolved around the service issue, so it cannot be conclusively stated, as the dissent does with such conviction below, that "no one challenged the service of process as to the omission of information about the person served." What we do know, however, is that we have an amended return of service, **in the record**[4], that does not comply with Fla. Admin. Code R. 15A-6.012(3) because it gives no indication who Lisa Scott is, whether she is the designated supervisory or administrative employee at the Stuart Police Department allowed to accept service, or quite simply, if she even works at the Stuart Police Department; she could have been merely at member of the public standing in the lobby, based on the amended return of service in this record. While we agree with the dissent that the Department does not need the aid of this court in upholding the hearing officers' incredibly high suspension affirmance rates[5], we must use the tipsy coachman theory to uphold the hearing officer's decision on these specific facts.

Therefore, the petition for writ of certiorari is denied.

SWEET, J. concurs.

BRYANT, J. (Acting Circuit Judge) dissents with an opinion.

I respectfully disagree with my learned colleagues, but not without appreciation of the subtle irony of applying a principle regarding an inebriated 19th Century Uber driver ("tipsy coachman") to support a ruling in a DUI-related case.

The relevant facts are that the Petitioner was arrested for driving under the influence by an officer of the Stuart Police Department and was alleged to have refused a breath test, resulting in a license suspension. The Petitioner requested a formal hearing on the suspension. The arresting officer was subpoenaed, but he failed to appear for the hearing. The hearing officer, accompanied by a Department of Highway Safety and Motor Vehicles ("Department") Field Supervisor, conducted the hearing with only defense counsel present. Counsel moved to invalidate the

[4] Both parties admit in their pleadings that the amended return of service is validly part of the record for this court's consideration, via the Petitioner's appendix, as they both reference it to support their respective arguments.

[5] *See Sarris v. State of Florida, Department of Highway Safety and Motor Vehicles*, FLWSUPP 2602SARR (4th Jud. Cir. March 28, 2018).

suspension due to the officer's failure to appear. The hearing officer denied the motion, stating that the person who served the subpoena on the officer "is not a *licensed*[6] process server and an employee of (defense counsel)." The hearing officer went on to make findings of fact from the case documentation and affirmed the suspension.

There was lengthy discussion between the hearing officer, her supervisor, and defense counsel regarding the process server issue during the hearing. Nowhere in the record of the administrative proceedings is there evidence that the process server, Michael Flee, is "an employee" of defense counsel. There was a comment by defense counsel that the individual had served process for him for thirteen years, but that cannot reasonably be construed as an employee relationship. The majority is correct in ruling that the hearing officer improperly denied the Petitioner's motion to invalidate the suspension by finding that the Petitioner did not properly serve the subpoena on the arresting officer by using someone who was not a "licensed" process server.

That is where our analysis should end. Unfortunately, the majority chose to look further. The Department certainly does not need the aid of this court. The Department adopts their own rules for the hearings. The Bureau of Administrative Review ("B.A.R.") hearing officers are employees of the Department and are supervised, as in the hearing in this case, by Department Field Supervisors. As detailed in *Sarris v. State of Florida, Department of Highway Safety and Motor Vehicles*, FLWSUPP 2602SARR (4th Jud. Cir. March 28, 2018), the B.A.R. has held training for law enforcement with the goal of improving the B.A.R.'s "incredible 95.3%" rate of sustained suspensions after formal review hearings, offering tips on how to improve those percentages, how to avoid invalidated suspensions, and what to include in an arrest affidavit to avoid invalidation of suspensions. The *Sarris* opinion cites several opinions of our courts in which the neutrality and fairness of the B.A.R. hearing process were questioned. Clearly the Department does not need this court to assist the B.A.R. with its "sustained suspension" percentage.

This court's task and scope should be limited to determining if the Petitioner was accorded procedural due process by the Department, whether or not the essential requirements of law were complied with, and whether competent substantial evidence supported the decision of the hearing

[6] There is no provision in the law for a "licensed" process server. The hearing officer referred to both "licensed" and "certified" process server during the hearing but used the term "licensed" in the order affirming the suspension. Neither is required by Florida Law to serve a witness subpoena.

officer. It is not our function to reweigh the evidence and make findings of our own. This is not a trial *de novo*. We can only affirm or reverse the actions of the hearing officer, not remand with instructions.

The majority has found that, though the process server himself was authorized to serve the witness subpoena, the record shows that the return of service was lacking, in that the process server failed to note the person served was the designated supervisory or administrative employee designated to accept service at the law enforcement agency. This was not a finding by the hearing officer, nor was it a basis for denying Petitioner's motion to invalidate the suspension due to the non-appearance of the arresting officer. Enter the "tipsy coachman."

Applying the "tipsy coachman" doctrine of appellate efficiency requires support for the alternative theory or principle of law in the record before the trial court. The record of the administrative proceedings herein includes an "Amended Return of Service" stating that the arresting officer was served by substitute service, as authorized by F.A.C. 15A-6.012 (3)[7]

> *by delivering a true copy of the subpoena duces tecum, with any applicable witness fees… with the date and hour of service endorsed upon the same, upon Officer William McGigham, by substituted service at the address of the law enforcement agency, the Stuart Police Department, 830 SE Martin Luther King, Jr. Blvd., Stuart, FL 34994, by personally delivering the same to Lisa Scott."*

The majority concludes that the failure to state that Lisa Scott was the designated supervisory or administrative employee designated to accept service at the law enforcement agency was fatal to the service of the subpoena.

Rules adopted by the Department provide in F.A.C. 15A-6.012(4)[8] that valid proof of service only requires the date and time of service, *the name of the person served*, and a certification

[7] F.A.C. 15A-6.012(3) states "Service of a witness subpoena upon a law enforcement officer or upon any federal, state or municipal employee called to testify in an official capacity may be made as provided in Section 48.031(1), F.S., or by delivery to a designated supervisory or administrative employee at the witness' place of employment if the agency head or highest ranking official at the witness' place of employment has designated such employee to accept such service…"

[8] F.A.C. 15A-6.012(4): Proof of service of a subpoena must include the date and time of service, the name of the person served, a certification of service by the person who served the subpoena, proof of payment of witness compensation pursuant to Chapter 92, F.S., and a certification of written notice to the assistant state attorney.

of service by the person who served the subpoena.[9] This is the specific rule for this type of proceeding. There is no specific requirement that the authority of the person served be included in the return of service. Even if there was a requirement for more information in the return of service about the person served, the courts have set forth the procedure for determining the effectiveness of service of process. The return of service is evidence of whether service was validly made. If the return of service is regular on its face, service of process is presumed to be valid and the burden then shifts to the party challenging service to rebut the presumption with clear and convincing evidence. *See Koster v. Sullivan*, 103 So. 3d 882 (Fla. 2d DCA 2012), aff'd, 160 So. 3d 385 (Fla. 2015). No one challenged the service of process as to the omission of information about the person served. And even though the hearing officer read aloud F.A.C. 15A-6.012(4) during the hearing, there was no finding that the Amended Return of Service was deficient for the reason the majority raises. It would have been incumbent upon the Department, or the arresting officer, to challenge the Amended Return of Service and rebut the presumption of validity by clear and convincing evidence. For this reason, the decision of the hearing officer should be reversed, and the suspension invalidated.

But even if more detail was required in the return of service, §48.21(2), Fla. Stat. (2017) allows for amendment of the return of service to state the omitted facts "at any time on application to the court from which the process issued." The Amended Return of Service is then deemed as effective as if it had originally stated the omitted facts.[10] Service of the subpoena by someone not authorized to serve the process, as erroneously ruled by the hearing officer, would be a fatal circumstance. It is the service itself, not the Amended Return of Service that is deficient. A deficient return of service is not a fatal circumstance, as it can be corrected in the lower proceeding. Because this court cannot remand with instructions in these administrative appeals, a finding that the Amended Return of Service is deficient due to omission of details about the person served results in a violation of the Petitioner's right to due process. The issue was not raised during the

[9] Rule 15A-6.012(4) also requires the return to include proof of payment of the witness fee, which is included in the Amended Return of Service in the record, and a certification or written notice to the assistant state attorney. Petitioner filed a separate Notice of Issuance of Subpoenas for Formal Review Hearing to the assistant state attorney.

[10] Fla. Stat. §48.21(2) "A failure to state the facts or to include the signature required by subsection (1) invalidates the service, but the return is amendable to state the facts or to include the signature at any time on application to the court from which the process issued. On amendment, service is as effective as if the return had originally stated the omitted facts or included the signature. A failure to state all the facts in or to include the signature on the return shall subject the person effecting service to a fine not exceeding $10, in the court's discretion."

hearing, so the Petitioner could not have requested opportunity to amend the deficient return. Our raising the issue for the first time in our ruling on the appeal precludes any opportunity for amendment by the Petitioner. A foundational principle of appellate review is that "if a claim is not raised in the trial court, it will not be considered on appeal." *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). Certainly the "tipsy coachman" doctrine was not intended to elevate "appellate efficiency" over statutorily permitted procedure and a party's due process rights.

The record establishes that the officer was served with the subpoena. No one has actually questioned that. The officer did not appear for the hearing. §322.2615(11), Fla. Stat. (2017)[11] is unambiguous. If the arresting officer fails to appear for the Formal Hearing pursuant to a subpoena, the Department "shall invalidate the suspension."

Because due process, statutory mandates, and fundamental fairness require it, I would reverse the hearing officer and invalidate the suspension.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.

[11] Fla. Stat. §322.2615(11) "The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the Department **shall invalidate the suspension**."