

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION: AY  
CASE NO.: 50-2019-CA-015583-XXXX-MB

JOSEPH CORDARO,  
Petitioner,

v.

DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,  
Respondent.

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Opinion filed: April 21, 2021

Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway  
Safety and Motor Vehicles

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PER CURIAM.

**ON RESPONDENT'S MOTION FOR REHEARING**

After this Court's opinion issued on April 7, 2021, Respondent Department of Highway Safety and Motor Vehicles timely filed a motion for rehearing pursuant to Florida Rule of Appellate Procedure 9.330(a). Upon consideration of Respondent's argument, we **GRANT** Respondent's motion for rehearing. We thus withdraw our April 7, 2021 opinion and substitute this opinion in its place.

## **SUBSTITUTED OPINION**

Petitioner Joseph Cordaro seeks certiorari review of a final order issued by the Florida Department of Highway Safety and Motor Vehicles (“DHSMV” or “Respondent”) affirming the suspension of his driver license for refusing to consent to a breath or urine test in violation of Florida’s implied consent law. Petitioner argues that the hearing officer below violated the essential requirements of law and deprived Petitioner of procedural due process by administering oaths telephonically without a notary being present with the witnesses. We agree and hold that a hearing officer cannot administer an oath telephonically without a notary (or other person capable of administering oaths) being physically present with the witness or without the hearing officer stating on the record that he or she can positively identify the witness.

Section 322.2615, Florida Statutes governs formal review hearings held by the DHSMV when a driver appeals the administrative suspension of his or her license. Respondent relies upon subsection (6)(b) as the basis for giving hearing officers the power to administer telephonic oaths. The statute states in pertinent part:

Such formal review hearing shall be held before a hearing officer designated by the department, and the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a), regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension. The hearing officer may conduct hearings using communications technology.

§ 322.2615(6)(b), Fla. Stat. (2019) (emphasis added). According to Respondent, the statute gives hearing officers the power to both administer oaths and to conduct hearings using “communications technology” which is a broad term that includes all manner of telecommunications. *See generally* § 817.034(3), Fla. Stat. (2019) (defining “communications technology”). While it is undisputed that witnesses can testify via telephone at a formal review

hearing without offending due process, *see Dep't of Highway Safety & Motor Vehicles v. Bennett*, 125 So. 3d 367, 369–70 (Fla. 3d DCA 2013); *Dep't of Highway Safety & Motor Vehicles v. Edenfield*, 58 So. 3d 904, 907 (Fla. 1st DCA 2011), the DHSMV argues that the language of the statute itself extends this principle to the telephonic administration of oaths.

Petitioner concedes that section 322.2615 allows witnesses to telephonically appear at formal review hearings, but argues that an oath cannot be given telephonically unless there is a notary or other official who can administer an oath physically present with the witness. Petitioner points to a variety of rules in other Florida tribunals that explicitly demand the physical presence of notaries in order to administer telephonic oaths. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.530(d)(3); Fla. R. Civ. P. 1.451(d); Fla. R. Work. Comp. P. 4.075(f)(3); Fla. Admin. Code R. 28-106.123(5)(b) (2019). Petitioner also relies upon a 1992 opinion rendered by the Florida Attorney General which opined that chapter 117, Florida Statutes does not give a notary power to administer an oath over the telephone and that a notary must be physically present with the witness for an oath to be valid. *Op. Att'y Gen. Fla. 1992-95* (1992). Petitioner asserts that, taken together, all of these authorities conclusively demand that an oath cannot be taken telephonically in Florida, regardless of the circumstance, unless a person authorized to administer an oath is physically with the witness. The DHSMV counters that none of the authority cited by Petitioner specifically applies to formal review hearings, and that the language of section 322.2615 creates this exception from the general rule.

Three circuit courts in Florida have opined on whether or not section 322.2615 allows a hearing officer to administer oaths telephonically. The Twentieth Judicial Circuit adopted the reasoning of the DHSMV and concluded that section 322.2165(6)(b) “does not state that the hearing officer or the witness must be in the presence of one another in order to place a witness

under oath,” and that a telephonic oath is acceptable. *Graca v. State of Fla., Dep’t of Highway Safety & Motor Vehicles*, 24 Fla. L. Weekly Supp. 329c (Fla. 20th Cir. Ct. July 13, 2016). In contrast, the Sixth and Thirteenth Judicial Circuits found that “a witness appearing by phone must appear before a duty officer or notary public who can vouch for the witness’s identity for such a telephonic oath to be proper” since an oath can only be valid if a witness can be positively identified and prosecuted for perjury if he or she lies under oath. *Eckert v. State Dep’t of Highway Safety & Motor Vehicles*, 28 Fla. L. Weekly Supp. 285a (Fla. 13th Cir. Ct. July 1, 2020) (citing *Collins v. State*, 465 So. 2d 1266, 1268 (Fla. 2d DCA 1985)); *Dorofy v. State of Fla., Dep’t of Highway Safety & Motor Vehicles*, 28 Fla. L. Weekly Supp. 570b (Fla. 6th Cir. Ct. Aug. 24, 2020).

We agree with the holdings of *Eckert* and *Dorofy* and find that, in order for a telephonic oath to be valid, there must be a positive identification of the witness. The key to a valid oath is that “perjury will lie for its falsity” and that the oath is “an unequivocal act in the presence of an officer authorized to administer oaths.” *Collins*, 465 So. 2d at 1268; *Youngker v. State*, 215 So. 2d 318, 321 (Fla. 4th DCA 1968), *abrogated on other grounds by Weaver v. State*, 981 So. 2d 508, 510 (Fla. 4th DCA 2008). However, we recognize that an oath can still be valid as long as a witness “can be certainly identified as the person who actually took the oath.” Op. Att’y Gen. Fla. 1992-95 (1992) (citing 67 C.J.S. *Oaths & Affirmations* § 5(a) (1992)). The Court concurs with the Sixth Judicial Circuit in *Dorofy* that, as an alternative to having a notary being physically present with the witness, the hearing officer may state on the record that he or she is able to affirmatively and positively identify the witness’ identity and then administer a valid telephonic oath. *Dorofy*, 28 Fla. L. Weekly Supp. at 570b. Since the record here demonstrates that none of the telephonic witnesses were positively identified, the hearing officer did not administer a valid oath consistent with due process. *See Pena v. Rodriguez*, 273 So. 3d 237, 240–41 (Fla. 3d DCA 2019).

In addition, the Court finds that the DHSMV's interpretation of section 322.2615(6)(b) is unpersuasive. Respondent's interpretation of the statute ignores the indisputable fact that, in all other Florida judicial or quasi-judicial forums, a telephonic oath is only valid if another person can verify the witness' identity. *See, e.g.,* Fla. R. Gen. Prac. & Jud. Admin. 2.530(d)(3); Fla. Admin. Code R. 28-106.123(5)(b) (2019). *See also Brown v. State*, 101 So. 3d 381, 381–82 (Fla. 1st DCA 2012) (finding error where the judge administered a telephonic oath without a notary during Jimmy Ryce hearing); *E-Z Serve Convenience Stores, Inc. v. Paul*, 720 So. 2d 301, 302 (Fla. 1st DCA 1998) (same, but for workers compensation hearing). It would be an absurd reading of the statute to assume that the Legislature created one exception to this rule in contravention to all other proceedings under Florida law. Because “section 322.2615 is not designed to protect the decision of the hearing officer, but to preserve due process and justice,” Petitioner is entitled to relief as the DHSMV's interpretation of the statute offends procedural due process. *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017).

Accordingly, the Petition for Writ of Certiorari is **GRANTED**. We hereby **QUASH** the hearing officer's November 8, 2019 “Amended Findings of Fact, Conclusions of Law and Decision.” The matter is **REMANDED** to the Department of Highway Safety and Motor Vehicles to conduct a new formal review hearing that is consistent with this opinion and the requirements of due process. *See Gordon v. State, Dep't of Highway Safety & Motor Vehicles*, 166 So. 3d 902, 904–05 (Fla. 4th DCA 2015)

GILLMAN, BOSSO-PARDO, and BELL, JJ., concur.