

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DUSTIN D. SMITH,

Petitioner,

CASE NO.: 2006-CA-906-O

WRIT NO.: 06-12

v.

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

Respondent.

Petition for Writ of Certiorari.

Jason A. Shepelrich, Esquire,
The Shepelrich Law Firm, P.A.,
for Petitioner.

Judson Chapman, General Counsel, and
Jason Helfant, Assistant General Counsel
Florida Department of Highway Safety and Motor Vehicles,
for Respondent.

Before LAUTEN, ROCHE, and MCDONALD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Dustin D. Smith (“Petitioner”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the six-month suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under section 322.2615(13) and Florida Rule of Appellate Procedure 9.030(c)(3).

On October 15, 2005, the police officer observed the Petitioner’s vehicle weaving and causing another vehicle to take evasive action to avoid being hit by the Petitioner’s vehicle.

Once the officer pulled the Petitioner over, the officer smelled alcoholic beverages coming from the Petitioner's breath and noted that the Petitioner's speech was slow, slurred, and thick-tongued. After the Petitioner performed poorly on the field sobriety exercises, the officer placed the Petitioner under arrest for driving under the influence. The Petitioner submitted to a breath alcohol test on Intoxilyzer #66-001676, and the results were .257 and .267.

Pursuant to Florida Statute section 322.2615(13) and Administrative Code Rule 15A-6, a formal hearing was held on December 30, 2005, to review the suspension of the Petitioner's driver's license. The following exhibits, inter alia, were admitted at the hearing: 1) DUI uniform traffic citation, 2) the Petitioner's driver's license, 3) the charging affidavit, 4) Intoxilyzer printout, 5) the breath test result affidavit, 6) the Agency's inspection report for Intoxilyzer #66-001676, 7) the Department's March 21, 2005, inspection report for Intoxilyzer #66-001676, 8) the Breath Test Instrumentation Evaluation Report prepared on January 26, 2004, and 9) the instrument evaluation report prepared on January 13, 2005.

Also at the hearing, the Petitioner relied on *Paschal v. State* and *Garcia v. Florida Department of Highway Safety and Motor Vehicles*, both issued by the courts in this Circuit, in arguing that the license suspension should not be upheld due to the Intoxilyzer not being an approved instrument.

On January 4, 2006, the hearing officer found that the Petitioner was driving or in actual physical control of a vehicle while under the influence, the Petitioner was lawfully arrested and charged under section 316.193, and the Petitioner had an unlawful blood alcohol level.

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and

judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In order to uphold the suspension of a driver’s license for driving with an unlawful blood-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

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 was placed under lawful arrest for a violation of s. 316.193.
3. Whether the person had an unlawful blood-alcohol level as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2005).

The Petitioner argues the hearing officer’s decision was a departure from the essential requirements of the law when the hearing officer relied on breath test results from an unapproved machine. The Petitioner asks the Court to quash the suspension of his license.

Under Florida’s “Implied Consent Law,” only approved breath testing machines may be used to establish impairment, and Florida Administrative Code Rule 11D-8.003 establishes the procedures for the approval of such machines. *State v. Muldowny*, 871 So. 2d 911, 913 (Fla. 5th DCA 2004). In order for an analysis of a person’s breath to be considered valid, the State must show that it was performed substantially according to the methods approved by the Department as reflected in the administrative rules and statutes. *Dep’t of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001); § 316.1932(1)(b)(2), Fla. Stat. (2005).

A formal review hearing in which a petitioner challenges the suspension of his or her driver’s license is civil in nature; therefore, the burden is on the petitioner to come forward with

evidence that the Department failed to substantially comply with the administrative rules concerning the approval of the breath testing machine. *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001); *see also Dep't of Highway Safety & Motor Vehicles v. Fiorenzo*, 795 So. 2d 1128 (Fla. 5th DCA 2001) (where petitioner failed to rebut the presumption created by documentary evidence that the Department substantially complied with the administrative rules, circuit court erred in granting certiorari). Once the breath test results are properly challenged on the basis that the Department failed to comply with the rules, the burden shifts to the Department to demonstrate substantial compliance. *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69, 71 (Fla. 5th DCA 1994).

In attempting to meet this burden, Petitioner argued that other court decisions pertaining to this Intoxilyzer instrument rebutted the Department's evidence and shifted back to the Department the burden of proving that Petitioner was tested on an approved breath test instrument. Petitioner attempted to meet his burden of rebutting the presumption that the breath test was administered on an approved Intoxilyzer without calling any witnesses or admitting any evidence. This Court held in an en banc proceeding in *Brady v. Department of Highway Safety and Motor Vehicles*, 2006-CA-1022-O, that unless a party is collaterally estopped from contesting an issue or *res judicata* bars further litigation, mere citation to another court's decision is not sufficient to meet an evidentiary burden. *See Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2005) (explaining the doctrines and setting forth the requirements of collateral estoppel and *res judicata*). To the extent that the opinions of this Circuit's appellate division appear to authorize this practice, the Court disapproved of this practice and receded from those holdings in *Brady*.¹

¹ *See Alejandro v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 738b (Fla. 9th Cir. Ct. May 8, 2007); *Boswell v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 717b (Fla. 9th Cir. Ct.

Moreover, this Court held in *Brady* that the Breath Test Instrument Evaluation Report, prepared January 26, 2004, and the Intoxilyzer 5000 Series Instrumentation Evaluation Report, prepared January 13, 2005, constitute competent substantial evidence upon which the hearing officer could rely in suspending a petitioner's driver's license. The evaluations upon which the reports were based were conducted subsequent to the *Paschal* ruling that suppressed the Intoxilyzer results issued in 2004 and addressed concerns pertaining to software changes in the instrument. Although neither one of these reports analyzed the Intoxilyzer at issue in this case, Intoxilyzer #66-001676, the Court finds that this is not necessary in order to support the reasonable inference that Intoxilyzer #66-001676 was indeed an approved instrument. *See generally De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (substantial evidence

Apr. 26, 2007); *Vadher v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 719a (Fla. 9th Cir. Ct. Apr. 26, 2007); *Flynn v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 723a (Fla. 9th Cir. Ct. Apr. 24, 2007); *Rozen v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 729a (Fla. 9th Cir. Ct. Apr. 23, 2007); *Rainwater v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 734a (Fla. 9th Cir. Ct. Apr. 17, 2007); *Myers v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 625a (Fla. 9th Cir. Ct. Apr. 11, 2007); *Cruz v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 603a (Fla. 9th Cir. Ct. Apr. 10, 2007); *Della Barba v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 629a (Fla. 9th Cir. Ct. Apr. 5, 2007); *Boesel v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 617a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Nickol v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 597a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Ameritskiy v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 619a (Fla. 9th Cir. Ct. Apr. 2, 2007); *Filipe v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 627a (Fla. 9th Cir. Ct. Mar. 28, 2007); *Shamey v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 408a (Fla. 9th Cir. Ct. Jan. 24, 2007); *Zicchino v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 947a (Fla. 9th Cir. Ct. Apr. 6, 2006); *Garcia v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 28a (Fla. 9th Cir. Ct. Aug. 16, 2005); *Lessard v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 19a (Fla. 9th Cir. Ct. Aug. 2, 2005); *Kimmins v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1013a (Fla. 9th Cir. Ct. July 6, 2005); *Clark v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. July 1, 2005); *Talbott v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 539a (Fla. 9th Cir. Ct. June 30, 2005); *Kuneman v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. June 29, 2005); *Spano v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 830a (Fla. 9th Cir. Ct. Apr. 29, 2005); *Jones v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 698b (Fla. 9th Cir. Ct. Apr. 12, 2005); *MaGee v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 699a (Fla. 9th Apr. 7, 2005); *Bennett v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 707a (Fla. 9th Cir. Ct. Mar. 30, 2005); *McEver v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 703a (Fla. 9th Cir. Ct. Mar. 30, 2005); *Mejia v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 701a (Fla. 9th Cir. Ct. Mar. 30, 2005); and *Guerrero v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 695a (Fla. 9th Cir. Ct. Jan. 21, 2005).

“establish[es] a substantial basis of fact from which the fact at issue can be reasonably inferred.”).

Florida Administrative Code Rule 11D-8.003(5) states that new instrumentations under subsection (2) shall be evaluated in accordance with FDLE/ATP Form 34 – Revised March 2004 in order to be approved. The Intoxilyzer 5000 Series Instrumentation Evaluation Report, prepared January 13, 2005, and subsequent to the *Paschal* ruling, complies with Form 34. Form 34 requires that the report contain several items, including the following:

- a. The purpose for and subject of the evaluation.
- b. The evaluation location and personnel involved.
- c. The make, model and serial numbers of instruments.
- d. The make, model and serial numbers, and the operating conditions of any external equipment and instrumentation (such as simulators) used.
- e. A conclusion based on evaluation results, including any need for additional information, and the reasons for such conclusion.

(FDLE/ATP Form 34 – Rev. March 2004.) Each of these requirements is contained in the Intoxilyzer 5000 Series Instrumentation Evaluation Report at pages 2, 3 and 13. Most importantly, the Intoxilyzers that were tested met the requirements for accuracy and precision enumerated in section 4 of Form 34.

As mentioned, the 2005 evaluation tested software changes that concerned the county court in its ruling suppressing evidence in *Paschal*. Thus, the hearing officer had competent substantial evidence upon which he could base his decision that the Intoxilyzer instrument used in this case was an approved instrument. The Circuit Court is not entitled to reweigh the evidence in the case, but rather is only entitled to determine whether such evidence constitutes competent substantial evidence upon which the hearing officer could rely. The 2004 and 2005 reports constitute that evidence. To the extent that appellate decisions from this Circuit have

found to the contrary, the Court en banc disapproved of those decisions and receded from them in *Brady*.²

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ___14___ day of _____November_____, 2008.

/S/
FREDERICK J. LAUTEN
Circuit Judge

/S/
RENEE A. ROCHE
Circuit Judge

/S/
ROGER J. MCDONALD
Circuit Judge

² See *Alejandro v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 738b (Fla. 9th Cir. Ct. May 8, 2007); *Boswell v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 717b (Fla. 9th Cir. Ct. Apr. 26, 2007); *Vadher v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 719a (Fla. 9th Cir. Ct. Apr. 26, 2007); *Flynn v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 723a (Fla. 9th Cir. Ct. Apr. 24, 2007); *Rozen v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 729a (Fla. 9th Cir. Ct. Apr. 23, 2007); *Lerner v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 712b (Fla. 9th Cir. Ct. Apr. 20, 2007); *Rainwater v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 734a (Fla. 9th Cir. Ct. Apr. 17, 2007); *Deneen v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 725a (Fla. 9th Cir. Ct. Apr. 16, 2007); *Mattia v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 736a (Fla. 9th Cir. Ct. Apr. 16, 2007); *Gray v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 621b (Fla. 9th Cir. Ct. Apr. 12, 2007); *Myers v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 625a (Fla. 9th Cir. Ct. Apr. 11, 2007); *Cruz v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 603a (Fla. 9th Cir. Ct. Apr. 10, 2007); *Pena v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 611a (Fla. 9th Cir. Ct. Apr. 9, 2007); *Della Barba v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 629a (Fla. 9th Cir. Ct. Apr. 5, 2007); *Boesel v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 617a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Nickol v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 597a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Ameritskiy v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 619a (Fla. 9th Cir. Ct. Apr. 2, 2007); *Filipe v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 627a (Fla. 9th Cir. Ct. Mar. 28, 2007); *Letellier v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 605b (Fla. 9th Cir. Ct. Mar. 28, 2007); *Schnier v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 593a (Fla. 9th Cir. Ct. Mar. 28, 2007); and *Kingsley v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 608a (Fla. 9th Cir. Ct. Mar. 19, 2007).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 14 day of November, 2008, to the following: **Jason A. Shepelrich, Esquire**, The Shepelrich Law Firm, P.A., 840-A North John Young Parkway, Kissimmee, FL 34741; and **Jason Helfant, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler St., Miami, FL 33135.

/S/
Judicial Assistant