

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

JOHN KISER,

Petitioner,

v.

**CASE NO.: 2008-CA-29591-O
WRIT NO.: 08-66**

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER LICENSES,**

Respondent.

/

Petition for Writ of Certiorari.

Tad A. Yates, Esquire and William R. Ponall, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE DAWSON, BRONSON, LAUTEN, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, John Kiser (“Kiser”) 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 suspension of his driver’s license for having an unlawful breath-alcohol level. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

Findings of Fact

As gathered from the charging affidavit and testimony of Trooper Jacob Vaughn of the Florida Highway Patrol and other related documents provided at the formal review hearing, the facts were as follows: On August 29, 2008, Trooper Vaughn observed Kiser speeding and made a traffic stop. Upon making contact with Kiser, Trooper Vaughn observed Kiser's signs of impairment including the odor of alcohol on his breath, bloodshot and watery eyes, and his speech was slurred. Kiser also admitted that he consumed alcoholic beverages before driving. Trooper Vaughn then asked Kiser to exit the vehicle and stand at the rear of the vehicle whereupon he observed that Kiser exhibited a noticeable side to side sway in his movement. Trooper Vaughn then asked Kiser to participate in the field sobriety exercises and he agreed to do so and cooperated fully with the exercises. However, Kiser had difficulty performing some of the exercises including trouble maintaining balance, a noticeable sway, stepping off the line, and lack of smooth pursuit with his eyes.

Based upon Trooper Vaughn observations, he believed that Kiser was under the influence of alcohol to the extent that his normal faculties were impaired. Accordingly, Trooper Vaughn placed Kiser under arrest for DUI and transported him to the Orange County DUI Center. After arriving at the DUI Center, Kiser was observed for 20 minutes by the breath test operator, Pamela Ramkishun. After the observation period was complete, Trooper Vaughn read Kiser the implied consent warning and asked him to take a breath test on video. Kiser agreed to take the test and provided two sufficient samples of his breath with results of .107 and .108. Kiser's privilege to drive was suspended for six months for driving with an unlawful breath-alcohol level.

Kiser requested a formal review hearing pursuant to section 322.2615, Florida Statutes, that was held on September 30, 2008. On October 7, 2008, the hearing officer entered a written order denying Kiser's motion and sustaining his driver's license suspension. Kiser now seeks certiorari review of this order.

Standard of Review

"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). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. In cases where the individual's license is suspended for an unlawful breath-alcohol level, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2008).

Arguments

In the Petition for Writ of Certiorari, Kiser argues: (1) The hearing officer's decision to consider the results of his breath test and to sustain his license suspension was a departure from the essential requirements of the law because the hearing officer failed to establish that the Intoxilyzer 8000 instrument used to conduct the breath test complied with Florida Administrative Rule 11D-8.003 and (2) Kiser was deprived of procedural due process because he was deprived of his right to confront and cross-examine the breath test operator, Pamela Ramkishun who had no independent recollection of administering the breath test.

Conversely, the Department argues: (1) It established substantial compliance with the Florida Department of Law Enforcement ("FDLE") rules and the hearing officer properly relied on the breath test results in sustaining the suspension of the Kiser's driving privilege and (2) The breath test operator's lack of recollection did not deprive Kiser procedural due process.

Court's Analysis and Findings

Argument I addressing whether the Intoxilyzer 8000 complies with Rule 11D-8.003

Rule 11D-8.003 of the Florida Administrative Code addresses the approval of breath test methods and instruments and provides:

- (1) The Department has approved the following method(s) for evidentiary breath testing: Infrared Light Test, also known as Infrared Light Absorption Test.
- (2) The Department approves breath test methods and new instrumentation to ensure the accuracy and reliability of breath test results. The Department has approved the following breath test instrumentation for evidentiary use: CMI, Inc. Intoxilyzer 5000 Series – including any or all instruments using one of the following programs: 5000 Basic Software Program; Florida

Software Program; R-Software Program; and CMI, Inc. Intoxilyzer 8000 using software evaluated by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2004.

- (3) The Department has approved the following options for use with Intoxilyzer 5000 Series instruments: keyboard; simulator recirculation; sample capture; pressure switch setting at no less than two inches and no more than six inches of water.
- (4) A Department inspection performed in accordance with Rule 11D-8.004, F.A.C., validates the approval, accuracy and reliability of an evidentiary breath test instrument.
- (5) The Department shall conduct evaluations for approval of new instrumentation under subsection (2) in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 – Rev. March 2004.
- (6) The availability or approval of new instruments, software, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications.

Specifically, Kiser argues that the hearing officer failed to establish that the Intoxilyzer 8000 instrument used to conduct the breath test complied with Rule 11D-8.003 because the instrument may be using a micron band width not specified in the U.S. Department of Transportation Conforming Products List (“U.S. DOT CPL”). At the formal review hearing, Kiser’s counsel submitted as evidence a letter from Alcohol Testing Program Manager, Laura Barfield, addressed to Toby Hall, President of CMI, Inc., the company that manufactured the Intoxilzyer instruments. The letter consisted of questions as to whether the Intoxilyzer 8000 was on the U.S. DOT CPL and questions about the instrument’s micron wavelengths. Also, at the formal review hearing and in the Petition, Kiser based this argument on the Orange County court case, *State of Florida v. Atkins, et al.*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008).

The Department, in the instant case, submitted evidence at the formal review hearing that included the Breath Alcohol Test Affidavit of breath test operator, Pamela Ramkishun (DDL-4), the FDLE Alcohol Testing Program Agency Inspection Report dated August 6, 2008 performed by Kelly Melville (DDL-5), and FDLE Alcohol Testing Program Department Inspection Report dated May 13, 2008 performed by Roger Skipper (DDL-6). Accordingly, the Department, in its Response to the Petition, argues that the record evidence established that Kiser's breath test was conducted pursuant to sections 316.1932 and 316.1934, Florida Statutes, and in compliance with the FDLE Rules. Therefore, under subsection 316.1934(2), Florida Statutes, Kiser's breath test results were *prima facie* evidence that he was impaired. *Dep't of Highway Safety & Motor Vehicles v. Johnson*, 686 So. 2d 672 (Fla. 5th DCA 1997). The Department further argues that the breath test results were valid and admissible because the analysis of Kiser's breath was performed in substantial accordance with methods approved by FDLE at the time of Kiser's arrest.

This Court first finds that the *Atkins* case is not controlling as it involved a criminal court proceeding, not an administrative proceeding. For an analysis of a person's breath to be considered valid, the Department 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). Section 316.1934(5), Florida Statutes, states that the breath test affidavit is presumptive proof of the results of an authorized test to determine alcohol content of the breath if the affidavit contains all the statutorily required information prescribed in that subsection. *See Gurry v. Dep't. of Highway Safety & Motor Vehicles*, 902 So.2d 881, 884 (Fla. 5th DCA 2005). Once the Department meets its burden, the contesting party must

demonstrate that the Department failed to substantially comply with the administrative rules concerning approval of the breath testing machine. *Dep’t of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

This Court concurs with the Department that it met its burden that the breath test was performed substantially in accordance with the FDLE rules and finds as follows: The Breath Alcohol Test Affidavit established that Kiser’s breath test was conducted by a certified breath technician with a valid permit to administer breath tests on the Intoxilyzer 8000 and that the test was conducted in compliance with Rule 11D-8 of the Florida Administrative Code. The Agency Inspection Report and the Department Inspection Report established that the Intoxilyzer 8000 series instrument used was an approved instrument pursuant Rule 11D-8.003 and Kiser’s breath test was conducted pursuant to the FDLE Rules, including Rules 11D-8.003(2), (3), and (4). The Agency Inspection Report also established that the breath test instrument used to conduct Kiser’s breath test was inspected in compliance with Rule 11D-8.006 and found to be in good working order. These documents, which are self-authenticating, were properly in the record for the hearing officer’s consideration pursuant to Rule 15A-6.013(2), Florida Administrative Code and along with the charging affidavit and testimony of Trooper Vaughn and Ms. Ramkishun, there was competent substantial evidence that the Department that it met its burden to prove by a preponderance of the evidence that the breath test results were valid and admissible.

This Court finds that Kiser failed to submit any evidence or testimony, expert or otherwise, that showed that the Intoxilyzer 8000 in issue was actually using a non-approved micron band width or was defective or deficient in any manner. Kiser failed to make a showing that the Intoxilyzer 8000 was not approved, accurate or reliable as provided by Rule

11D-8.003(4). The only evidence he submitted was Ms. Barfield's letter that did not contain an admission that the Intoxilyzer 8000 was not in compliance, but instead only contained questions about it. Without a demonstration of noncompliance, Kiser's argument is nothing more than speculative and theoretical. *Wissell v. State*, 691 So. 2d 507 (Fla. 2nd DCA 1997); *State v. Friedrich*, 681 So. 2d 1157, 1163 (Fla. 5th DCA 1996). Therefore, Kiser failed to overcome the presumptive proof of impairment.

Lastly, the hearing officer has the responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Satter* at 695. Since Kiser failed to demonstrate any defect in the breath test, the hearing officer, as trier of fact, properly determined that the breath test was in substantial compliance with the FDLE rules. Based on the foregoing, the record evidence established substantial compliance with the requirements of Rule 11D-8 and the hearing officer's finding that the maintenance procedures on the Intoxilyzer 8000 used to conduct Kiser's breath test were in compliance with FDLE rules and that his breath test results were admissible was supported by competent substantial evidence and observed the essential requirements of law.

***Argument II addressing the right to confront and cross-examine
the breath test operator, Pamela Ramkishun***

Kiser argues that he was deprived of his right to confront and cross-examine the breath test operator, Pamela Ramkishun, because she had no independent recollection of administering the breath test. This argument lacks merit for the following reasons:

- (1) Upon review of the transcript from the formal review hearing, the Court concurs

with the Department that Kiser fails to demonstrate that he was prejudiced by Ms. Ramkishun's lack of recall under the facts of this case. The hearing officer first questioned Ms. Ramkishun and established that she was the DUI Technician who administered the breath test to Kiser on August 29, 2008. Kiser's counsel was then provided ample opportunity to cross examine Ms. Ramkishun and asked her if she conducted the 20-minute observation. Ms. Ramkishun first answered that she did perform the 20 minute observation, but without the alcohol influence report to refer to she could not confirm that she did. However, she did state that it was either herself or Trooper Vaughn who administered the 20 minutes observation. She also stated that she did not have an independent recollection of administering Kiser's test and that she has done several.

(2) Kiser's counsel also had ample opportunity to question Trooper Vaughn and asked him who conducted the 20- minute observation. Trooper Vaughn answered that both he and Ms. Ramkishun conducted the 20- minute observation. Trooper Vaughn further testified that he was present with Ms. Ramkishun during the entire 20 minute observation and Ms. Ramkishun was sitting to his right, closer to Kiser as it was her main task to conduct the test. Kiser's counsel could have addressed additional questions to Trooper Vaughn, who clearly had a distinct recollection of the time spent with Kiser on the evening of his arrest.

(3) Lastly, the testimony is supported by the Breath Alcohol Test Affidavit-DDL-4 that clearly shows Ms. Ramkishun's signature dated August 29, 2008 as the breath test operator and that Kiser was observed for at least 20 minutes. Also, the charging affidavit states that Kiser was observed for 20 minutes by Ms. Ramkishun. Accordingly, the testimony does not contradict the documents in evidence and Ms. Ramkishun's lack of independent recollection did not deprive Kiser of due process.

Conclusion

Accordingly, upon review of the hearing officer's order in conjunction with the charging affidavit, transcript from the formal review hearing, and the other documents in the court record, this Court finds that Kiser was provided due process of law and the hearing officer's decision to sustain Kiser's license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, John Kiser's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 18th day of July, 2012.

/S/
DANIEL P. DAWSON
Circuit Court Judge

/S/
THEOTIS BRONSON
Circuit Court Judge

/S/
FREDERICK J. LAUTEN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Tad A. Yates, Esquire**, The Law Offices of Tad A. Yates, P.A., 3117 Edgewater Drive, Orlando, Florida 32804; **William R. Ponall, Esquire**, Snure & Ponall, P.A., 425 W. New England Avenue, Suite 200, Winter Park, Florida 32789; and **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles - Legal Office, P.O. Box 570066, Orlando, FL 32857, on this 18th day of July, 2012.

/S/
Judicial Assistant