

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

KIRK STEPHENS,

Petitioner,

CASE NO.: 2011-CA-2432-O

WRIT NO.: 11-18

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

Petition for Writ of Certiorari from the Florida
Department of Highway Safety and Motor Vehicles,
Donna Petty, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE MUNYON, APTE, EVANS, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Kirk Stephens (“Stephens”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of his driver’s license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

Facts and Procedural History

As gathered from the record, including the Orange County Arrest Affidavit from the Maitland Police Department, Supplement Report, and testimony at the formal review hearing, the facts were as follows: On December 10, 2010 at approximately 1:35 a.m., Maitland police officer Kevin Plumlee was stationary and running radar in his fully marked patrol vehicle in the median of Interstate 4 and State Road 414 (Zone: 05) in Orange County when he observed a vehicle driven by Stephens traveling east on Interstate 4 at a high rate of speed, estimated at 85 miles per hour. Officer Plumlee activated his radar and received a clear Doppler tone with a reading of 86 miles per hour in a 55 mile per hour zone. Officer Plumlee pulled in behind the vehicle and conducted a traffic stop at the intersection of Interstate 4 and Wymore Road in Altamonte Springs in Seminole County.

Officer Plumlee then made contact with Stephens and the passenger who owned the vehicle. Officer Plumlee asked Stephens for his license and vehicle registration. During his encounter with the occupants, Officer Plumlee could smell the overwhelming odor of an alcoholic beverage emanating from the vehicle. Once the passenger handed Officer Plumlee the registration, Stephens continued to look at Officer Plumlee as if he was waiting for the officer to ask a question. Officer Plumlee asked Stephens once more for his license and after looking through his money clip, Stephens handed the license to the officer. At that time, Officer Plumlee observed that Stephens' eyes were red and glassy. Officer Plumlee then asked Stephens if he knew what the speed limit was. Stephens, seeing the 60 mile per hour speed limit sign directly in front of the vehicle, responded that the speed limit was 60 miles per hour. Officer Plumlee informed Stephens that the speed limit was 55 miles per hour

through Maitland. Officer Plumlee asked Stephens how fast he thought he was driving and he answered 70 miles per hour. Officer Plumlee then explained to Stephens that he was driving at 86 miles per hour. Stephens replied that the vehicle was new and he was testing it out for the passenger. Officer Plumlee then returned to his patrol vehicle, requested a routine back-up officer for a DUI investigation, and Maitland police officer Sergeant Chris Ohalek arrived on the scene. Officer Plumlee then asked Stephens to exit the vehicle and when he did so his balance was unsteady and he staggered back to the rear of the vehicle.

Officer Plumlee asked Stephens how much he had to drink and he answered two eight ounce glasses of red wine. He also stated that he was coming from the Hannibal's bar in Winter Park. Officer Plumlee explained his concerns as to Stephens' ability to operate a motor vehicle and asked him to submit to field sobriety exercises. Stephens performed the exercises poorly.

Based on Officer Plumlee's observations and the totality of the circumstances, Stephens was placed under arrest for driving under the influence. Also, during the search incident to the arrest, Officer Ohalek detected a strong odor of an alcoholic beverage coming from Stephens' person. Stephens was then transported to the Seminole County Booking Center. At the Booking Center, the 20 minute period observation period was conducted and Stephens was read the implied consent warning. Stephens provided two breath samples with results of 0.170 at 2:57 a.m. and 0.166 at 3:00 a.m. Stephens' license was suspended and a formal review hearing was held on January 24, 2011.

At the formal review hearing, Stephens' counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of

FDLE Inspector Roger Skipper from a formal review hearing in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about Intoxilyzer software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates from 2006 and 2007; and subpoenas for Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On January 28, 2011, the hearing officer entered a written order sustaining Stephens' license suspension.

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).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver license was suspended for driving with 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. (2010).

Arguments

In the Petition for Writ of Certiorari, Stephens argues that: 1) He was illegally stopped by a Maitland police officer who did not have jurisdiction to stop his vehicle and to arrest him; 2) The hearing officer deprived him of procedural due process of law due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan and Laura Barfield along with the documents requested in the subpoena duces tecum; 3) The breath test results were not properly approved because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 4) The breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; and 5) The Intoxilyzer 8000 machine was improperly evaluated for approval.

Analysis - Argument I – Stop and Arrest of Stephens

Stephens argues that the evidence in the record only established that Officer Plumlee was located on 1-4 without any reference to his location in relation to the location of the boundaries of the city of Maitland. He claims that the documentation in the record merely stated that Officer Plumlee conducted a traffic stop on the vehicle at the intersection of 1-4 and Wymore Road in Altamonte Springs in Seminole County. Therefore, Stephens concludes that Officer Plumlee did not have jurisdiction to make the traffic stop and to arrest him.

Stephens' argument is without merit as follows: In the Arrest Affidavit at the beginning of the narrative, Officer Plumlee stated that at Interstate 4 and State Road 414 (Zone: 05) in Orange County at 1:35 a.m. on December 10, 2010, he had probable cause to believe that Stephens did commit the offense of driving under the influence while in actual physical control of a motor vehicle. In the second paragraph of the narrative, Officer Plumlee

stated that on the above date and time, he was stationary in his patrol vehicle in the median of Interstate 4 running radar when he observed a vehicle (Stephens) traveling east on Interstate 4 at a high rate of speed. Further, in the third paragraph, Officer Plumlee stated that he informed Stephens that the speed limit was 55 miles per hour through Maitland. Accordingly, competent substantial evidence existed for the hearing officer to conclude that Officer Plumlee made his observations of Stephens speeding and began his pursuit of Stephens at Interstate 4 and State Road 414 in the City of Maitland.

Therefore, per the fresh pursuit doctrine, the fact that Stephens' vehicle was ultimately stopped in Seminole County does not remove Officer Plumlee's authority to make the traffic stop and to arrest Stephen as his observations and pursuit of Stephens' vehicle began in Maitland where he had jurisdiction. Section 901.25, Florida Statutes (2010); *Dep't of Highway Safety & Motor Vehicles v. McClane*, 891 So. 2d 596 (Fla. 5th DCA 2004); *Dep't of Highway Safety & Motor Vehicles v. Swegheimer*, 847 So. 2d 545 (Fla. 5th DCA 2003); *Dep't of Highway Safety & Motor Vehicles v. Leonard*, 718 So. 2d 314 (Fla. 5th DCA 1998); *Goren v. Dep't of Highway Safety & Motor Vehicles*, 8 Fla. L. Weekly Supp. 751b (Fla. 9th Cir. Ct. 2001)(also holding that a police officer had the same rights as a private citizen to make a citizen's arrest outside of his jurisdiction where a person in his presence commits a felony or breach of the peace). Accordingly, competent substantial evidence existed for the hearing officer to find that the stop and arrest were lawful.

Analysis - Arguments II through V
Addressing Administration, Inspection, Approval, and Evaluation of Breath Testing Machine

In *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-19788, Writ 10-70 (Fla. 9th Cir. Ct. Sept. 10, 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*,

19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012), this Court addressed identical arguments and denied the petitions seeking writs of certiorari. Accordingly, for the reasons stated in *Klinker* and *Morrow*, the Court finds that Stephens was not deprived of due process and the hearing officer properly admitted the breath tests results.

Based on the foregoing, procedural due process was followed, the hearing officer followed the essential requirements of the law, and there was competent substantial evidence to support the hearing officer's findings and decision. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Kirk Stephens' Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 2nd day of November, 2012.

/S/

LISA T. MUNYON
Circuit Judge

/S/

ALAN S. APTE
Circuit Judge

/S/

ROBERT M. EVANS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 5th day of November, 2012.

/S/

Judicial Assistant