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

RICHARD WEBSTER,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2012-CA-9629-O
Writ No.: 12-49

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE SCHREIBER, WHITE, DOHERTY, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Webster ("Webster" or "Petitioner") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department" or "Respondent") 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

On February 4, 2012, Webster was arrested for driving under the influence. Webster provided breath test results of 0.161 and 0.149 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearing was held on March 6, 2012, March 15, 2012 and May 4, 2012.

At the hearing, Webster attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of FDLE Inspector Roger Skipper from formal review hearings in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about the Intoxilyzer 8000 with software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates in 2006 and 2007; subpoenas for FDLE Inspector Patrick Murphy, Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue, and other documents. On May 14, 2012, the hearing officer entered a written order sustaining Petitioner's 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 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 whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2012).

Analysis

In the Petition for Writ of Certiorari, Webster argues that: 1) the hearing officer deprived him of due process of law when his license suspension was not set aside due to the failure of the hearing officer to issue subpoenas for Patrick Murphy, Roger Skipper, Jennifer Keegan and Laura Barfield; 2) the Intoxilyzer 8000 was not kept in a secure location and was accessible by unauthorized individuals 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 annual inspection report; and 5) the Intoxilyzer 8000 was improperly evaluated for approval.

This Court denied the Petitions raising arguments (1), (3), (4), and (5) 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). For the reasons stated in *Klinker* and *Morrow*, the Court finds that Petitioner was not deprived of due process and the hearing officer properly admitted the breath test results.

II. Intoxilyzer 8000 Not Kept In Secure Location and Accessible to Unauthorized Persons

Webster argues that only persons with a valid FDLE permit are authorized to have access to the Intoxilyzer 8000. He claims that the machine was transported to and from Tallahassee by common carrier, and therefore it was kept in locations that were not secure and persons who did not possess a valid FDLE permit had access to the machine in violation of Rule 11D-8.007. Webster also argues that a Department inspection is required in addition to an agency inspection anytime the machine is returned from an authorized repair facility. He alleges that the machine was used to administer his breath test after it was returned from FDLE but the Department inspection was not performed after access by unauthorized individuals. Webster argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5) 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. Dept. of Highway Safety*, 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).

In this case, the Department introduced the breath test affidavit which contains all the statutorily required information and a breath alcohol level above 0.08. Therefore, the affidavit is presumptive proof of results of an authorized test. Webster attempted to demonstrate that the Department failed to substantially comply with administrative rules by speculating that the machine was accessed by unauthorized persons, not located in a secure location, and not inspected by the Department after access by unauthorized persons.

Florida Administrative Code Rule 11D-8.007 states:

> (1) Evidentiary breath test instruments shall only be accessible to a person issued a valid permit by the Department **and to persons authorized by a permit holder**. **This rule does not prohibit agencies from sending an instrument to an authorized repair facility**. Only authorized repair facilities are authorized to remove the top cover of an Intoxilyzer 8000 evidentiary breath test instrument. (Emphasis added)
>
> (2) The instrument will be located in a secured environment which limits access to authorized persons described in subsection (1), and will be kept clean and dry. All breath test facilities, equipment and supplies are subject to inspection by the Department.

Florida Administrative Code Rule 11D-8.004(2) states:

> Registered breath test instruments shall be inspected by the Department at least once each calendar year, and must be accessible to the Department for inspection. Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument's approval for evidentiary use.

Florida Administrative Code Rule 11D-8.006(3) states:

> Whenever an instrument is taken out of evidentiary use, the agency shall conduct an agency inspection. The agency shall also conduct an agency inspection prior to returning an instrument to evidentiary use.

Kelly Melville testified that the Intoxilyzer 8000 used in this case was sent to FDLE in Tallahassee prior to the date of the agency inspection by common carrier and returned by the same method. She stated that the machine is placed in a box and taped closed. Melville testified that there was a Department inspection conducted before the machine was returned to the Orange County Sheriff's Office. Melville also testified that when the machine arrived at the Orange County Sheriff's Office, she conducted an agency inspection before placing the machine back in service. The agency inspection

report dated January 18, 2012 and the breath test affidavit that lists the last agency inspection date as January 18, 2012, were admitted into evidence at the hearing. Based on the foregoing, the Court finds that Webster has failed to demonstrate that the Department did not substantially comply with the administrative rules.

In conclusion, Petitioner was not deprived of due process, the hearing officer did not depart from the essential requirements of law and there was competent substantial evidence to support the hearing officer's findings.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED**. Petitioner's Motion for Attorney's Fees is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _11th___ day of __October_, 2012.

/S/_____
MARGARET H. SCHREIBER
Circuit Judge

_/S/_____
KEITH F. WHITE
Circuit Judge

_/S/_____
PATRICIA A. DOHERTY
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esq.,** Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this __11th_ day of _October_, 2012.

/S/_____
Judicial Assistant