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

RAYMOND PEREZ,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2012-CA-9988-O
Writ No.: 12-51

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Paul A. Smith, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE TURNER, KOMANSKI, LATIMORE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Raymond Perez ("Perez") 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).

Findings of Fact

As gathered from the hearing officer's findings of fact from the arrest affidavit, testimony, and other related documents presented at the formal review hearing on April 23, 2012 and May 10, 2012, the facts were as follows: On March 15, 2012, Deputy Christopher Gambrell with the Orange County Sheriff's Office was on road patrol in the vicinity of University Boulevard and Rouse Road when he observed a vehicle drifting over the solid white lane line, nearly striking a concrete barrier, then quickly jerking back into the left lane. He then observed the vehicle drift a second time over the solid white line, striking the curb, jerking back into the lane of travel, and then drifting to the left crossing the lane divider lines, driving with the driver side tires in the center lane and passenger side tires in the right lane.

At that point Deputy Gambrell initiated a traffic stop, made contact with the driver identified as Perez and asked him to exit the vehicle with his documents. The deputy informed Perez that he was stopped for failure to obey a traffic control device. Deputy Gambrell observed that Perez's eyes were glassy and he could smell the odor of alcohol coming from his breath. The deputy asked Perez from where he was coming and he stated the World of Beers where he had picked up a friend. Deputy Gambrell observed that Perez was swaying from front to back as he stood. The deputy also asked Perez if he had been drinking and he stated that he had. While speaking to Perez, the deputy observed that his speech was slurred. Deputy Gambrell then asked Perez to perform field sobriety exercises; he agreed and performed the exercises poorly.

Based on the totality of the circumstances, Deputy Gambrell placed Perez under arrest for driving under the influence and transported him to the Orange County Breath Test Center. Perez submitted to the breath test with results of .104 and .094. Perez's driver's license was suspended

for driving with an unlawful breath alcohol level. Perez was also cited for failure to obey a traffic control device.

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. (2012).

Arguments

In the Petition for Writ of Certiorari, Perez argues that: 1) The hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Florida Department of Law Enforcement ("FDLE") personnel, Roger Skipper, Jennifer Keegan, Patrick Murphy, and Laura Barfield, to appear along with the documents requested in the subpoena duces tecum; 2) The Intoxilzyer 8000 machine was not kept in a secure location and was accessible to individuals not authorized by FDLE to have access to the machine in violation of FDLE Rule 11D-8.007; 3)

The breath test results were not properly approved per FDLE Rule 11D-8.003 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; 5) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; and 6) The breath test results were inadmissible due to the breath technician's failure to conduct a proper 20 minute observation prior to the administration of the breath test as required under FDLE Rule 11D-8.007.

Analysis

Arguments I, III, IV, & V - Addressing the Administration, Inspection, Approval, and Evaluation of the Breath Testing Machine

At the formal review hearing held on May 10, 2012, Perez's counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000 machine; 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 FDLE personnel, Roger Skipper, Laura Barfield, Jennifer Keegan, and Patrick Murphy that the hearing officer did not issue.

In *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 1a (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.[1] Accordingly, for the reasons

[1] *Klinker* is currently on review with the Fifth District Court of Appeal, *Klinker v. Dep't of Highway Safety & Motor Vehicles*, case no. 5D12-3896.

stated in *Klinker* and *Morrow*, this Court finds that Perez was not deprived of due process and the hearing officer properly admitted the breath test results.

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

Perez argues that only individuals 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 individuals who did not possess a valid FDLE permit had access to the machine in violation of Rule 11D-8.007. Perez 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. Perez argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5), Florida Statutes (2012), states that the breath alcohol 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 alcohol 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. Perez 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.

At the formal review hearing, Kelly Melville testified that the Intoxilyzer 8000 machine used in this case was sent to FDLE by a common carrier and a Department inspection was conducted before it was returned by the same method. She further testified that when the Intoxilyzer 8000 machine was returned to the Orange County Sheriff's Office, an agency inspection of the machine was conducted. Perez's breath test was conducted on March 15, 2012. The February 16, 2012 agency inspection report and the breath alcohol test affidavit that lists the

last agency inspection date as February 16, 2012 were admitted into evidence at the hearing. Therefore, the machine used to conduct Perez's breath test was inspected in accordance with the rules prior to the administration of his breath test. Based on the foregoing, this Court finds that Perez has failed to demonstrate that the Department did not substantially comply with the administrative rules. Therefore, the hearing officer properly admitted the breath test results.

Argument VI – Failure to Conduct Proper 20 Minute Observation

At the formal review hearing on April 23, 2012, among the documents admitted into evidence was the breath alcohol test affidavit and testimony provided by the affiant, breath test operator, Nicole Graves ("Graves"), who swore that the statements provided by her in the affidavit were true and correct. The affidavit stated that the 20 minute observation period was observed to ensure that Perez did not take anything orally and did not regurgitate prior to administration of his breath test. Also, when questioned by Perez's counsel, Graves testified that after the observation period when she was walking behind Perez from the observation room to the breath testing room she was unable to observe him so it was possible that he could have burped or regurgitated during the walk and entry into the breath test room. There was no video of the observation period or the administration of the breath test submitted into evidence nor did Perez testify at the hearing or present any evidence affirming his argument. Perez's counsel then brought a motion arguing that the breath tests results were inadmissible. The hearing officer denied his motion as he found that the breath alcohol test affidavit indicated compliance with the observation period and Perez provided no evidence to the contrary.

In his Petition, Perez argues that there were gaps while the breath test operator was walking behind him and therefore she could not look at him to determine whether he ingested anything into his mouth, burped or regurgitated. Perez argues that because of the lapse in the

observation time prior to the breath test, he was not observed for 20 minutes prior to the breath test as required by Florida Administrative Code, Rule 11D-8.007. Thus, he argues that the breath test results should not have been admitted because of this alleged violation of the Rule.

Florida Administrative Code 11D-8.007(3) states:

> The **breath test operator**, agency inspector, arresting officer, or person designated by the permit holder shall **reasonably ensure** that the subject has not taken anything by mouth or has not regurgitated for at least 20 minutes before administering the test. This provision shall not be construed to otherwise require an additional 20-minute observation period before the administering of a subsequent sample. (Emphasis added).

This Court concurs with the Department in their Response that there was no evidence that Perez burped or regurgitated at any point during the 20 minute observation period, but instead, only argument of counsel was presented. Further, the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the hearing officer's findings and decision and our review cannot go further to speculate or re-weigh the evidence as to whether the breath test operator was able to ensure that Perez did not ingest anything into his mouth, burp or regurgitate. *City of Deland v. Benline Process Color Company*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (holding that the weight and credibility of the evidence before the administrative agency cannot be reevaluated by the reviewing court); *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270, 1276 (Fla. 2001) (holding that once the reviewing court determines that there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end as the issue is not whether the hearing officer made the best, right, or wise decision, instead, the issue is whether the hearing officer made a lawful decision).

The record evidence, including the testimony of the breath test operator and the breath alcohol test affidavit constitutes competent substantial evidence in support of the hearing

officer's determination that the breath test operator substantially complied with Florida Administrative Rule 11D-8.007(3) by **reasonably ensuring** that Perez had not ingested anything by mouth or regurgitated for at least 20 minutes before administering the test. Unlike *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69 (Fla. 5th DCA 1994) cited by Perez, in this case Perez did not demonstrate that the 20 minute observation period Rule was violated. In addition, continuous face to face observation is not required to comply with Rule 11D-8.007. *Kaiser v. State*, 609 So. 2d 768 (Fla. 2d DCA 1992).

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, Raymond Perez's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 6th day of February, 2013.

/S/_____
THOMAS W. TURNER
Circuit Judge

/S/_____
WALTER KOMANSKI
Circuit Judge

/S/_____
ALICIA L. LATIMORE
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, shymanlaw@aol.com and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kimgibbs@flhsmv.gov on this 6th day of February, 2013.

/S/_____
Judicial Assistant