

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

NICOLE LOPEZ,

Petitioner,

CASE NO.: 2012-CA-13835-O

Writ No.: 12-71

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,
Linda Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE LUBET, EGAN, ROCHE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Nicole Lopez (“Lopez”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of her 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 hearing officer's findings of fact, the facts were as follows:

On June 2, 2012, at approximately 12:43 a.m., Officer Brian Ferrara with the Orlando Police Department was working in an off duty capacity at the West South Street parking garage. He was monitoring the South Street entrance and exit to the parking lot. Officer Ferrara observed a blue Toyota SUV exit the parking lot, turning onto West South Street. Approximately one minute later Officer Ferrara was advised that a blue Toyota SUV had crashed into one of the access control arms and failed to stop. Based on the description of the hit and run vehicle, Officer Ferrara stopped the blue Toyota SUV he had just seen leaving the parking lot at the 1-4 ramp from South Street. Officer Ferrara immediately noticed that the driver, later identified as Lopez, had the odor of an alcoholic beverage coming from her breath. Lopez's speech was slurred and she appeared confused. Lopez stated she did not remember hitting the access control arm. Officer Ferrara observed that Lopez's vehicle had damage to the right side consistent with the crash. Officer Ferrara believed that Lopez was possibly under the influence of alcohol and called for assistance.

Officer Ferrara then went to the crash scene and spoke to witnesses Susan Meghnot ("Meghnot") and Zachary Jones ("Jones"). Meghnot stated that she was standing near the access control arm when it was hit and stated that she could identify the driver and the vehicle. Officer Ferrara then brought Meghnot to the traffic stop location. Meghnot positively identified Lopez as the driver and the vehicle as the one that hit the access control arm. Meghnot also provided a sworn statement. Jones, a Valet parking attendant at the garage who reported the crash, stated that he witnessed the crash and told Lopez that she had hit the access control arm. Lopez responded to Jones that she was sorry and then drove away.

Officer Ferrara then determined that Lopez was the driver of the vehicle that damaged the access control arm and she was cited for Leaving the Scene of a Crash with Property Damage.

Officer Ferrara then advised Lopez that the crash investigation was complete and that Officer Joshua Campbell, who arrived on scene to provide assistance, wanted to speak to her about the DUI investigation. Officer Campbell made contact with Lopez, who was still seated in the vehicle. He smelled the impurities of alcohol coming from the vehicle and noticed that Lopez had vomited in her lap. Officer Campbell advised Lopez that he was conducting a DUI investigation. Lopez then stumbled out of the driver's door and used the spare tire at the rear of the jeep to maintain her balance. Lopez agreed to perform the field sobriety exercises and Officer Campbell read her the Miranda Rights. Lopez was uneasy on her feet and appeared to be in a daze. Lopez stated that she took a muscle relaxer for back pain that morning. When asked, Lopez stated that she had two drinks at a bar.

During the exercises, Officer Campbell observed additional indicators of impairment as Lopez did not follow directions, had difficulty maintaining her balance, and was unable to complete the exercises as explained and demonstrated. At the conclusion of the exercises Officer Campbell placed Lopez under arrest for DUI and transported her to the DUI center where the 20 minute observation was conducted and the Implied Consent Warnings were read. A breath test was then requested. Lopez took the breath test and the results were 0.147 and 0.143. Lopez was charged with DUI with Property Damage and Leaving the Scene of an Accident with Property Damage. Her privilege to operate a motor vehicle was suspended for driving with an unlawful breath alcohol level. The formal review hearing was held on July 19, 2012 and on July 30, 2012, the hearing officer entered a written order sustaining Lopez'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 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, Lopez argues that: 1) The hearing officer improperly failed to set aside the suspension when Officer Ferrara, Officer Campbell, and Agency Inspector, Kelly Melville, failed to appear pursuant to lawfully served subpoenas; 2) The hearing officer deprived her 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; 3) The Intoxilyzer 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; 4) 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; 5) The breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; and 6) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003.

Analysis

Argument I – Failure of Hearing Officer to Set Aside Suspension due to Subpoenaed Persons’ Failure to Appear at Formal Review Hearing

Under Argument I in her petition, Lopez argues that the hearing officer improperly failed to set aside the suspension when Officer Ferrara, Officer Campbell, and Agency Inspector, Kelly Melville, failed to appear pursuant to lawfully served subpoenas and thus, violated her right to due process and a meaningful hearing within thirty days from requesting the hearing.

Section 322.2615(6)(a), Florida Statutes (2012) provides that if the person whose license was suspended requests a formal review, the department must schedule a hearing to be held within thirty days after such request is received by the Department and must notify the person of the date, time, and place of the hearing. Section 322.2615(6)(c), Florida Statutes (2012), provides that a party may seek enforcement of a subpoena for a review hearing by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing

to comply with the subpoena resides. Florida Administrative Code Rule 15A-6.015(2)(c) states that no hearing shall be continued for a second failure to appear.

From review of the record, the formal review hearing was originally scheduled for July 5, 2012. On or about June 18, 2012, Lopez's counsel submitted to the hearing officer a motion to reschedule the hearing due to a scheduling conflict. The hearing was rescheduled for July 2, 2012 at 10:00 a.m. Subpoenas were issued for Officer Ferrara and Kelly Melville on June 20, 2012 and for Officer Joshua Campbell and also breath technician, Armand Mills, on June 28, 2012.¹ Subsequently, affidavits of non-service were received by the hearing officer for Officer Campbell, Kelly Melville, and Armand Mills. The reasons for non-service were that Officer Campbell was not on duty until after July 2, 2012, Kelly Melville was on vacation until July 3, 2012, and Armand Mills was on bereavement leave out of state until after July 6, 2012. An affidavit of substitute service was received for Officer Ferrara.

On July 2, 2012 Lopez' counsel arrived for the hearing and stated that Officer Ferrara had called his office to notify him that he was unavailable for the hearing. Accordingly, the hearing was continued and rescheduled for July 19, 2012, at 11:00 a.m. and affidavits of substitute service were then received for all four witnesses. On July 18, 2012, the hearing officer received notification that Armand Mills was unavailable for the hearing and he was excused. On July 19, 2012, at 8:09 a.m., the hearing officer received a statement of non-availability from Kelly Melville and she was excused. The hearing then proceeded as scheduled on July 19, 2012, at 11:00 a.m. whereupon Officers Campbell and Ferrara failed to appear and did not provide the hearing officer with just cause for failing to appear at the hearing. The hearing officer then advised Lopez's counsel of the option to continue the

¹ Lopez does not reference Armand Mills in her argument.

hearing again and to seek enforcement through the circuit court. Lopez's counsel chose not to seek enforcement of the subpoenas and instead, made a motion to invalidate the suspension based on the failure to appear of Officer Campbell once and Officer Ferrara twice. The hearing officer denied the motion.

In this case, the formal review hearing scheduled for July 2, 2012 was continued due to non-service of the subpoenas on Officer Campbell, Kelly Melville, and Armand Mills and due to Officer Ferrara's failure to appear at the hearing, although he had been properly subpoenaed. At the July 19, 2012 hearing, all four witnesses had been properly subpoenaed, but none of them appeared for the hearing. Kelly Melville and Armand Mills had properly notified the hearing officer that they were unavailable to attend the hearing. Officers Campbell and Ferrara did not notify the hearing officer that they were unavailable to attend the hearing.

This Court acknowledges that Lopez's argument may have merit as to Officer Ferrara, who, although properly subpoenaed for both the July 2, 2012 and July 19, 2012 hearings, did not appear for either hearing. However, notwithstanding Officer's Ferrara's second failure to appear, Lopez's argument fails on two points. First, as the Department correctly points out in their Response, Lopez's argument is without merit because in her motion to reschedule the hearing originally set for July 5, 2012, she expressly waived her right to have the hearing held within thirty days from when she requested the hearing. Second, the other witnesses, Officer Campbell, Kelly Melville, and Armand Mills only failed to appear once under properly served subpoenas. Therefore, it was within the hearing officer's authority to provide Lopez the opportunity to continue the hearing again. Accordingly, the hearing officer's denial of

Lopez's motion to invalidate the suspension based on the witnesses' failure to appear did not depart from the essential requirements of the law.

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

Lopez argues that only individuals with a valid FDLE permit are authorized to have access to the Intoxilyzer 8000. She 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. Lopez also argues that a Department inspection is required in addition to an agency inspection anytime the machine is returned from an authorized repair facility. She alleges that the machine was used to administer her breath test after it was returned from FDLE but the Department inspection was not performed after access by unauthorized individuals. Lopez argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5), Florida Statutes (2012), 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. Lopez 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.

Lopez's breath test was conducted on June 2, 2012. The May 23, 2012 agency inspection report and the breath test affidavit that lists the last agency inspection date as May

23, 2012 were admitted into evidence at the hearing. Therefore, the machine used to conduct Lopez's breath test was inspected in accordance with the rules prior to the administration of her breath test. Based on the foregoing, the Court finds that Lopez 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.

Arguments II, IV, V, & VI
Addressing the Administration, Inspection, Approval, and
Evaluation of Breath Testing Machine

At the formal review hearing held on July 19, 2012, Lopez' counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000 machine; transcripts of the testimony of Florida Department of Law Enforcement ("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*, FLWSUPP 2001KLIN (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.² Accordingly, for the reasons stated in

² *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.

Klinker and *Morrow*, the Court finds that Lopez was not deprived of due process and the hearing officer properly admitted the breath test 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, Nicole Lopez's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 8th day of January, 2013.

/S/

MARC L. LUBET
Circuit Judge

/S/

ROBERT J. EGAN
Circuit Judge

/S/

RENEE A. ROCHE
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 8th day of January, 2013.

/S/

Judicial Assistant