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

CHARLES BRADY,

Petitioner,

CASE NO.: 2006-CA-1022-O
WRIT NO.: 06-14

v.

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

Respondent.
_____/

Petition for Writ of Certiorari.

Michael J. Snure, Esquire, and William R. Ponall, Esquire
Kirkconnell, Lindsey, Snure and Yates, P.A.,
for Petitioner.

Judson Chapman, General Counsel, and
Carlos J. Raurell, Assistant General Counsel
Florida Department of Highway Safety and Motor Vehicles,
for Respondent.

Before COHEN, MIHOK, and LATIMORE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Charles Brady ("Petitioner") 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 six-month suspension of his driver's license for driving with an unlawful alcohol level. This Court has jurisdiction under section 322.2615(13) and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

On November 30, 2005, the police officer observed the Petitioner's vehicle lock up its brakes, causing the tires to smoke. The Petitioner's vehicle then began rapidly changing lanes and erratically changing its speed. Once the officer pulled the Petitioner over, the officer smelled alcoholic beverages coming from the Petitioner. The officer also saw an open bottle labeled Bacardi on the floorboard near the Petitioner's right foot. The officer placed the Petitioner under arrest for driving under the influence. The Petitioner submitted to a breath alcohol test on Intoxilyzer #66-001674, and the results were .283 and .279.

Pursuant to Florida Statute section 322.2615(13) and Administrative Code Rule 15A-6, a formal hearing was held on January 4, 2006, to review the suspension of the Petitioner's driver's license. The following exhibits, inter alia, were admitted at the hearing: 1) DUI uniform traffic citation, 2) the Petitioner's driver's license, 3) the charging affidavit, 4) Intoxilyzer printout, 5) the breath test result affidavit, 6) the Agency's inspection report for Intoxilyzer #66-001674, 7) the Department's March 21, 2005, inspection report for Intoxilyzer #66-001674, 8) the Breath Test Instrumentation Evaluation Report prepared on January 26, 2004, and 9) the instrument evaluation report prepared on January 13, 2005.

Also at the hearing, the Petitioner relied on *State v. Glass*, *Mattice v. Florida Department of Highway Safety and Motor Vehicles*, *Jones v. Florida Department of Highway Safety and Motor Vehicles*, and *Mejia v. Florida Department of Highway Safety and Motor Vehicles*, all issued by the courts in this Circuit, in arguing that the license suspension should not be upheld due to the Intoxilyzer not being an approved instrument.

On January 5, 2006, the hearing officer found that the Petitioner was driving or in actual physical control of a vehicle while under the influence, the Petitioner was lawfully arrested and charged under section 316.193, and the Petitioner had an unlawful blood alcohol level.

"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. In order to uphold the suspension of a driver's license for driving with an unlawful blood-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 was placed under lawful arrest for a violation of s. 316.193.
> 3. Whether the person had an unlawful blood-alcohol level as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2005).

The Petitioner argues the hearing officer's decision was a departure from the essential requirements of the law when the hearing officer relied on breath test results from an unapproved machine. The Petitioner asks the Court to quash the suspension of his license.

Under Florida's "Implied Consent Law," only approved breath testing machines may be used to establish impairment, and Florida Administrative Code Rule 11D-8.003 establishes the procedures for the approval of such machines. *State v. Muldowny*, 871 So. 2d 911, 913 (Fla. 5th DCA 2004). In order for an analysis of a person's breath to be considered valid, the State 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); § 316.1932(1)(b)(2), Fla. Stat. (2005).

A formal review hearing in which a petitioner challenges the suspension of his or her driver's license is civil in nature; therefore, the burden is on the petitioner to come forward with evidence that the Department failed to substantially comply with the administrative rules concerning the approval of the breath testing machine. *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001); *see also Dep't of Highway Safety & Motor Vehicles v. Fiorenzo*, 795 So. 2d 1128 (Fla. 5th DCA 2001) (where petitioner failed to rebut the presumption created by documentary evidence that the Department substantially complied with the administrative rules, circuit court erred in granting certiorari). Once the breath test results are properly challenged on the basis that the Department failed to comply with the rules, the burden shifts to the Department to demonstrate substantial compliance. *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69, 71 (Fla. 5th DCA 1994).

In the instant case, the Petitioner met his initial burden of rebutting the presumption created by the Department's documentary evidence that it substantially complied with the rules governing the approval of the breath testing instrument. The Petitioner did submit case law from this circuit that held that several Intoxilyzer 5000 Series instruments, including the one at issue in this case, were substantially modified and not later approved in accordance with the administrative rules. *See State v. Paschal*, 11 Fla. L. Weekly Supp. 495a (Fla. 9th Cir. Ct. 2004) (trial court properly granted motions to suppress on basis that Intoxilyzers used to analyze breath samples were not properly approved in accordance with the requirements contained in Florida Administrative Code Rule 11D-8.003). *See also State v. Glass*, No. 2003-CT-231805 (Fla. Orange Cty. Ct. 2004); *State v. Bonet*, 11 Fla. L. Weekly Supp. 501a (Fla. 9th Cir. Ct. 2004);

State v. Patrick, 11 Fla. L. Weekly Supp. 496a (Fla. 9th Cir. Ct. 2004) (same). Such evidence is more than speculative or theoretical. *Mowry*, 794 So. 2d at 659 (without a showing of noncompliance of the regulations by the petitioner, allegations are nothing more than speculative or theoretical).

Having met his initial burden, the burden then shifted to the Department to demonstrate substantial compliance. The Department relies on the Breath Test Instrument Evaluation Report prepared January 26, 2004, and the Intoxilyzer 5000 Series Instrumentation Evaluation Report prepared January 13, 2005, which were both before the hearing officer. Although neither one of these reports analyzed the intoxilyzer at issue in this case, Intoxilyzer #66-001674, the Court finds that this is not necessary in order to support the reasonable inference that Intoxilyzer #66-001674 was indeed an approved instrument.[1] *See generally De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (stating that substantial evidence "establish[es] a substantial basis of fact from which the fact at issue can be reasonably inferred.").

Rule 11D-8.003(5) states that new instrumentations under subsection (2) shall be evaluated in accordance with FDLE/ATP Form 34 – Revised March 2004 in order to be approved. The Intoxilyzer 5000 Series Instrumentation Evaluation Report prepared January 13, 2005, and subsequent to the *Paschal* ruling, does comply with Form 34. Form 34 requires that the report contain several items, including the following:

[1] But see *Potts v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-3117-O, Writ No. 05-23 (Fla. 9th Cir. Ct. May 19, 2006), and *Lynn v. Department of Highway Safety & Motor Vehicles*, Case No. 2006-CA-2261-O, Writ No. 06-27 (Fla. 9th Cir. Ct. May 30, 2007) (issued by the undersigned Judges), which held that because the intoxilyzer at issue was not one of the intoxilyzers listed in the *Paschal* and *Marks v. Department of Highway Safety & Motor Vehicles*, No. 2004-CA-3827 (Fla. 9th Cir. Ct. Oct. 4, 2004), cases, the petitioners did not meet their burden of rebutting the presumption that the Department did not comply with the rules governing the approval of the breath testing instruments.

a. The purpose for and subject of the evaluation.
b. The evaluation location and personnel involved.
c. The make, model and serial numbers of instruments.
d. The make, model and serial numbers, and the operating conditions of any external equipment and instrumentation (such as simulators) used.
e. A conclusion based on evaluation results, including any need for additional information, and the reasons for such conclusion.

(FDLE/ATP Form 34 – Rev. March 2004.) Each one of these requirements is contained in the Report at pages 2, 3 and 13. Most importantly, the intoxilyzers that were tested met the requirements for accuracy and precision enumerated in section 4 of Form 34.[2]

Although the Petitioner met his initial burden of demonstrating that the intoxilyzer may not have complied with the rules governing the approval of the breath testing instrument, once this burden shifted, there was competent substantial evidence before the hearing officer that the Department did demonstrate substantial compliance with the rules. Specifically, the Intoxilyzer 5000 Series Instrumentation Evaluation Report prepared January 13, 2005, shows compliance with the approval requirements set forth in Rule 11D-8.003 and detailed in Form 34. This Report was prepared after the *Paschal* decision, so there is evidence that the intoxilyzer the Petitioner was tested on has been subsequently approved. Therefore, the Court denies the petition for writ of certiorari. The Court recognizes that this Order conflicts with the following cases, among others, from this Circuit: *Kingsley v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-5346-O, Writ No. 05-45 (Fla. 9th Cir. Ct. Mar. 19, 2007); *Schnier v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-5474-O, Writ No. 05-46 (Fla. 9th Cir. Ct. Mar. 28, 2007); *Deneen v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-6085-O, Writ No. 05-55 (Fla. 9th Cir. Ct. Apr. 16, 2007); *Cruz v.*

[2] Subsection (e) of 4 in Form 34 sets forth the acceptable range for the dry gas standard test. According to the Report, the "dry gas standard was not analyzed during this evaluation since the instrumentation evaluated was not equipped to analyze dry gas standards." (Pet'r App. DDL-10 at 3.)

Department of Highway Safety & Motor Vehicles, Case No. 2005-CA-7038-O, Writ No. 05-59 (Fla. 9th Cir. Ct. Apr. 10, 2007); *Della Barba v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-7112-O, Writ No. 05-61 (Fla. 9th Cir. Ct. Apr. 5, 2007); *Nickol v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-7837-O, Writ No. 05-67 (Fla. 9th Cir. Ct. Apr. 4, 2007); *Pena v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-7998-O, Writ No. 05-69 (Fla. 9th Cir. Ct. Apr. 9, 2007); *Flynn v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-8064-O, Writ No. 05-70 (Fla. 9th Cir. Ct. Apr. 24, 2007); *Mattia v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-8141-O, Writ No. 05-72 (Fla. 9th Cir. Ct. Apr. 16, 2007); *Gray v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-8537-O, Writ No. 05-77 (Fla. 9th Cir. Ct. Apr. 12, 2007); *Myers v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-8958-O, Writ No. 05-80 (Fla. 9th Cir. Ct. Apr. 11, 2007); *Rainwater v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-9107-O, Writ No. 05-83 (Fla. 9th Cir. Ct. Apr. 17, 2007); *Vadher v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-9462-O, Writ No. 05-86 (Fla. 9th Cir. Ct. Apr. 26, 2007); *Rozen v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-10536-O, Writ No. 05-91 (Fla. 9th Cir. Ct. Apr. 23, 2007); *Lerner v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-10572-O, Writ No. 05-92 (Fla. 9th Cir. Ct. Apr. 20, 2007); *Boesel v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-10728-O, Writ No. 05-94 (Fla. 9th Cir. Ct. Apr. 4, 2007); *Alejandro v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-10830-O, Writ No. 05-95 (Fla. 9th Cir. Ct. May 8, 2007); *Letellier v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-10837-O, Writ No. 05-96 (Fla. 9th Cir. Ct. Mar. 28, 2007); *Filipe v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-11002-O, Writ No. 05-98

(Fla. 9th Cir. Ct. Mar. 28, 2007); *Boswell v. Department of Highway Safety & Motor Vehicles*, Case No. 2006-CA-1260-O, Writ No. 06-16 (Fla. 9th Cir. Ct. Apr. 26, 2007); and *Ameritskiy v. Department of Highway Safety & Motor Vehicles*, Case No. 2006-CA-2226-O, Writ No. 06-26 (Fla. 9th Cir. Ct. Apr. 2, 2007).

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

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 16__ day of July, 2007.

/S/
JAY P. COHEN
Circuit Judge

/S/
A. THOMAS MIHOK
Circuit Judge

/S/
ALICIA L. LATIMORE
Circuit Judge

Cohen, J., concurring.

The Court is aware that this opinion is contrary to the above-cited cases. The goal of our system is to attempt to reach the proper result. If that requires receding from prior opinions, then that is what should be done. This issue is one that very well might be appropriate for en-banc consideration in accordance with our procedures under Amended Local Rule Number 6.

/S/
JAY P. COHEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 17 day of July, 2007, to the following: Michael J. Snure, Esq., and William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A., P.O. Box 2728, Winter Park, FL 32790-2728; and Carlos J. Raurell, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 2515 W. Flagler St., Miami, FL 33135.

/S/
Judicial Assistant