

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

SARAH BOSWELL,

Petitioner,

CASE NO.: 2006-CA-1260-O

WRIT NO.: 06-16

v.

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

Respondent.

Petition for Writ of Certiorari.

Warren W. Lindsey, 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 SPRINKEL, T. SMITH, and THORPE, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Sarah Boswell (“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 her 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 December 4, 2005, the police officer was dispatched to a traffic accident involving the Petitioner. The officer smelled alcoholic beverages coming from the Petitioner and noted the Petitioner's bloodshot and watery eyes and her difficulty in staying on her feet. After the Petitioner refused to do the field sobriety exercises, 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 .179 and .185.

Pursuant to Florida Statute section 322.2615(13) and Administrative Code Rule 15A-6, a formal hearing was held on January 10, 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. Burns*, *Mattice v. Florida Department of Highway Safety and Motor Vehicles*, *McEver v. Florida Department of Highway Safety and Motor Vehicles*, and *Lessard 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 12, 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).

Because certiorari is warranted as to one argument raised by the Petitioner, her other argument will not be addressed herein.

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 her 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 her 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 her initial burden, the burden then shifted to the Department to demonstrate substantial compliance. The Department, however, presented no evidence that the machine was not modified, that it was approved after being modified, or that it was approved since 2001 or 2002, when the breath tests of the defendants in *Paschal* were performed. The Department offers the amended version of Florida Administrative Code Rule 11D-8.003(4), but the language is not determinative because the Department still has not shown that there was ever an approval of Intoxilyzer #66-001674. In addition, this argument was rejected by this Court in *Shamey v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-4800, Writ No. 05-40 (Fla. 9th Cir. Ct. Jan. 24, 2007), and *McGaffigan v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-4773, Writ No. 05-39 (Fla. 9th Cir. Ct. Mar. 14, 2007).

The Department also points to the Department Inspection Report for Intoxilyzer #66-001674. The Report, however, only states that the machine complies with “Chapter 11D-8, F.A.C.” (Pet’r App. DDL-7.) The conclusory statement that the machine complies with Chapter 11D-8 of the Florida Administrative Code does not equal competent substantial evidence that the machine was approved. *See Duval Util. Co. v. Fla. Public Serv. Comm’n*, 380 So. 2d 1028, 1030-31 (Fla. 1980) (conclusory statements did not constitute competent substantial evidence supporting commission’s findings).

Finally, the Department mentions 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. Neither one of these reports, however, analyzed the intoxilyzer at issue in this case, Intoxilyzer #66-001674. In addition, there was no evidence that the intoxilyzers that were evaluated in the Reports were similar to Intoxilyzer #66-001674. Thus, the Court has no evidentiary basis with which to consider the Department's argument that the Report provides competent substantial evidence that the intoxilyzer was an approved instrument.

Accordingly, the hearing officer departed from the essential requirements of the law in considering the Petitioner's breath test results in sustaining the suspension of her driver's license. *See Marks v. Dep't of Highway Safety & Motor Vehicles*, No. 2004-CA-3827 (Fla. 9th Cir. Ct. Oct. 4, 2004) (certiorari granted where petitioner submitted *Paschal* to rebut presumption that the Intoxilyzer used to test his breath was an approved machine and the Department then failed to show substantial compliance with the rules concerning its approval); *Guerrero v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 695a (Fla. 9th Cir. Ct. 2005) (certiorari granted where petitioner submitted *Paschal* to rebut presumption that the Intoxilyzer used to test his breath was an approved machine and the Department then failed to show substantial compliance with the rules concerning its approval); *Lessard v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 19 (Fla. 9th Cir. Ct. 2005); *Zicchino v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 947 (Fla. 9th Cir. Ct. 2006). In addition, the facts of this case are identical to *Clark v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-2681, Writ No. 05-20 (Fla. 9th Cir. Ct. July 1, 2005), *Shamey v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-4800, Writ No. 05-40 (Fla.

9th Cir. Ct. Jan. 24, 2007), and *McGaffigan v. Department of Highway Safety & Motor Vehicles*, Case No. 2005-CA-4773, Writ No. 05-39 (Fla. 9th Cir. Ct. Mar. 14, 2007), wherein this Court also granted the petitions for writ of certiorari.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the hearing officer's final order is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 26__ day of April, 2007.

/S/
GEORGE A. SPRINKEL IV
Circuit Judge

/S/
THOMAS B. SMITH
Circuit Judge

/S/
JANET C. THORPE
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 26 day of April, 2007, to the following: Warren W. Lindsey, 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