

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

ANDREW MACHATA,

Petitioner,

CASE NO.: 2006-CA-2637-O

WRIT NO.: 09-02

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,**

Respondent.

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

William R. Ponall, Esquire,
for Petitioner.

Heather Rose Cramer, Assistant General Counsel,
for Respondent.

Before McDONALD, J. ADAMS, AND THORPE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Andrew Machata (“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 suspension of his driver’s license for driving with an unlawful alcohol level. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule

of Appellate Procedure 9.030(c)(3). The Court dispenses with oral argument. Fla. R. App. P. 9.320.

On January 27, 2006, Deputy Wilson of the Orange County Sheriff's Office observed the Petitioner driving in excess of the speed limit and failing to maintain a single lane. Deputy Wilson stopped the vehicle and subsequently arrested the Petitioner for DUI. The Petitioner submitted to a breath alcohol test on Intoxilyzer #66-001674, and the results were .164 and .169.

Pursuant to section 322.2615(13), Florida Statutes, and Administrative Code Rule 15A-6, a formal hearing was held on February 28, 2006, to review the suspension of the Petitioner's driver's license. The following exhibits were admitted at the hearing: 1) the DUI uniform traffic citation, 2) the Petitioner's driver's license, 3) the charging affidavit, 4) the Intoxilyzer printout, 5) the breath test result affidavit, 6) the Agency's inspection report for Intoxilyzer #66-001674, 7) the Department's January 25, 2006, 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. In addition, the Petitioner relied on *Mattice v. Department of Highway Safety and Motor Vehicles*, *McEver v. Department of Highway Safety and Motor Vehicles*, and *Lessard v. Department of Highway Safety and Motor Vehicles*, all issued by this Circuit, in arguing that the license suspension should not be upheld due to the Intoxilyzer not being an approved instrument.

On March 1, 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 ignored cases from this Circuit and relied on breath test results from an unapproved machine.

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 attempting to meet this burden, the Petitioner argued that other court decisions pertaining to this Intoxilyzer instrument rebutted the Department's evidence and shifted back to the Department the burden of proving that the Petitioner was tested on an approved breath test instrument. The Petitioner attempted to meet his burden of rebutting the presumption that the breath test was administered on an approved Intoxilyzer without

calling any witnesses or admitting any evidence. This Court held in an *en banc* proceeding in *Brady v. Department of Highway Safety and Motor Vehicles*, 2006-CA-1022-O, that unless a party is collaterally estopped from contesting an issue or *res judicata* bars further litigation, mere citation to another court's decision is not sufficient to meet an evidentiary burden. *See Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2005) (explaining the doctrines and setting forth the requirements of collateral estoppel and *res judicata*). To the extent that the opinions of this Circuit's appellate division appeared to authorize this practice, the Court disapproved of this practice and receded from those holdings in *Brady*.¹

¹ *See Alejandro v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 738b (Fla. 9th Cir. Ct. May 8, 2007); *Boswell v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 717b (Fla. 9th Cir. Ct. Apr. 26, 2007); *Vadher v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 719a (Fla. 9th Cir. Ct. Apr. 26, 2007); *Flynn v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 723a (Fla. 9th Cir. Ct. Apr. 24, 2007); *Rozen v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 729a (Fla. 9th Cir. Ct. Apr. 23, 2007); *Rainwater v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 734a (Fla. 9th Cir. Ct. Apr. 17, 2007); *Myers v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 625a (Fla. 9th Cir. Ct. Apr. 11, 2007); *Cruz v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 603a (Fla. 9th Cir. Ct. Apr. 10, 2007); *Della Barba v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 629a (Fla. 9th Cir. Ct. Apr. 5, 2007); *Boesel v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 617a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Nickol v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 597a (Fla. 9th Cir. Ct. Apr. 4, 2007); *Ameritskiy v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 619a (Fla. 9th Cir. Ct. Apr. 2, 2007); *Filipe v. Dep't of Highway Safety & Motor Vehicles*, 14 Fla. L. Weekly Supp. 627a (Fla. 9th Cir. Ct. Mar. 28, 2007); *Shamey v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 408a (Fla. 9th Cir. Ct. Jan. 24, 2007); *Zicchino v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 947a (Fla. 9th Cir. Ct. Apr. 6, 2006); *Garcia v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 28a (Fla. 9th Cir. Ct. Aug. 16, 2005); *Lessard v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 19a (Fla. 9th Cir. Ct. Aug. 2, 2005); *Kimmins v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1013a (Fla. 9th Cir. Ct. July 6, 2005); *Clark v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. July 1, 2005); *Talbott v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 539a (Fla. 9th Cir. Ct. June 30, 2005); *Kuneman v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 1017a (Fla. 9th Cir. Ct. June 29, 2005); *Spano v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 830a (Fla. 9th Cir. Ct. Apr. 29, 2005); *Jones v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 698b (Fla. 9th Cir. Ct. Apr. 12, 2005); *MaGee v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 699a (Fla. 9th Cir. Ct. Apr. 7, 2005); *Bennett v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 707a (Fla. 9th Cir. Ct. Mar. 30, 2005); *McEver v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 703a (Fla. 9th Cir. Ct. Mar. 30, 2005); *Mejia v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 701a (Fla. 9th Cir. Ct. Mar. 30, 2005); and *Guerrero v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 695a (Fla. 9th Cir. Ct. Jan. 21, 2005).

Moreover, this Court held in *Brady* that the Breath Test Instrument Evaluation Report, prepared January 26, 2004, and the Intoxilyzer 5000 Series Instrumentation Evaluation Report, prepared January 13, 2005, constituted competent substantial evidence upon which the hearing officer could rely in suspending a petitioner's driver's license. The evaluations upon which the reports were based were conducted subsequent to the *Paschal* ruling that suppressed the Intoxilyzer results issued in 2004 and addressed concerns pertaining to software changes in the instrument. Although neither one of these reports analyzed the Intoxilyzer at issue in this case, Intoxilyzer #66-001674, the Court in *Brady* found that this is not necessary in order to support the reasonable inference that the Intoxilyzer is an approved instrument. *See generally De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (substantial evidence "establish[es] a substantial basis of fact from which the fact at issue can be reasonably inferred.").

Based on the foregoing, the hearing officer did not depart from the essential requirements of the law. The Circuit Court is not entitled to reweigh the evidence in the case, but rather is only entitled to determine whether such evidence constitutes competent substantial evidence upon which the hearing officer could rely. The 2004 and 2005 reports constitute that evidence. To the extent that appellate decisions from this Circuit have found to the contrary, the Court *en banc* disapproved of those decisions and receded

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Heather Rose Cramer, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, Lake Worth Legal Office, PO Box 540609, Lake Worth, FL 33454-0609 and **William R. Ponall, Esq.**, PO Box 2728, Winter Park, FL 32790 on the 8 day of April , 2009.

_____/S/_____
Judicial Assistant