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

CASE NO.: 2010-CA-10152-O
Writ No.: 10-27

CAROL MORROW,

Petitioner,

v.

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

Respondent.
_______________________________________/

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

Stuart I. Hyman, Esquire,
for Petitioner.

Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE TURNER, LATIMORE, GRINCEWICZ, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Carol Marrow ("Marrow") timely filed this Petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles' ("Department") Findings of Fact, Conclusions of Law and Decision. Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of her driver license for driving with an unlawful breath alcohol level. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of

Appellate Procedure 9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On January 31, 2010 at approximately 11:30 P.M., Orange County Deputy Cindy Turek initiated a traffic stop of a black BMW, driven by Morrow, for failing to stop at a four way stop sign at McKinnon Road and Lake Butler Boulevard in Orange County, Florida. Morrow stumbled slightly as she exited the vehicle and handed the deputy her license. The deputy smelled a pungent odor of alcohol as Morrow approached her, noticed that her speech was slurred, and Morrow admitted that she had three glasses of wine. Deputy Turek suspected that Morrow may be impaired and requested that she perform field sobriety exercises which Morrow performed poorly. Deputy Lori Haberle arrived on scene as back up for Deputy Turek and observed the field sobriety exercises. Deputy Haberle also smelled the impurities of alcohol on Morrow. Morrow was placed under arrest for DUI and taken to Orange County breath alcohol testing facility. At the facility, Morrow provided breath results of 0.156, 0.177, and 0.166.

Morrow requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on March 8, 2010, and continued on March 22, 2010 and March 30, 2010. At the hearing, breath test operator Samuel Gerrity, Orange County Agency Inspector Kelly Melville, Orange County Deputies Turek and Haberle, and Morrow all testified. Morrow was represented by counsel.

At the hearing, Morrow attempted to introduce into the record documents related to the 2002 approval study of the Intoxilyzer 8000, transcripts of the testimony of Roger Skipper from a formal review hearing in other cases in 2006, and numerous breath test results obtained from various Intoxilyzer 8000 machines using 8100.26 and 8100.27 software. The hearing officer did not allow Morrow to enter these documents into the record. Morrow also admitted into evidence

requested subpoenas and subpoena duces tecum for FDLE Inspector Roger Skipper and custodians of records Laura Barfield and Jennifer Keegan that the hearing officer did not issue. On April 2, 2010, the hearing officer entered a written order sustaining Morrow's license suspension. Morrow now seeks certiorari review of that order.

"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." *Dept. 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 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 whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in § 316.193.

§ 322.2615(7)(a), Fla. Stat. (2010).

In the Petition for Writ of Certiorari, Morrow argues that: 1) the hearing officer deprived her of due process of law and violated section 316.1932(1)(f)(4) when her license suspension was not set aside due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan and Laura Barfield; 2) the breath test results were not properly approved

because they were obtained by use of an unapproved breath testing machine; 3) the breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; and 4) the Intoxilyzer 8000 was improperly evaluated for approval.

Argument I

Morrow argues that she was deprived of due process when the hearing officer failed to issue subpoenas for Roger Skipper, Jennifer Keegan and Laura Barfield who were named in the documents she introduced and proffered at the hearing. To support her argument, Morrow cites *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 758 (Fla. 1st DCA 2009), in which the Court held that failure to issues subpoenas for witnesses identified in any documentary evidence submitted at or prior to the hearing would constitute a denial of a driver's due process right to challenge the suspension. Morrow also argues that Skipper, Barfield, and Keegan were necessary to corroborate her position that the breath test machine upon which she was tested was not approved because the software was unapproved. The Department concedes that it erred in not issuing the subpoenas for Keegan and Barfield based on this Court's opinions that refusal to issue the subpoenas is a violation of due process. The Department requests this Court grant the Petition and remand this matter to the hearing officer so that subpoenas may be issued for Barfield and Keegan.

In *Berne v. Department of Highway Safety Motor Vehicles,* 17 Fla. L. Weekly Supp. 75a (Fla. 9th Cir. Ct. Oct. 23, 2009), this Court granted that Petition for Writ of Certiorari finding that the Intoxilyzer machine used in that case was not approved because it used a software version that was not approved. On review, the Fifth District Court of Appeal determined that only evaluation, not approval, of the software versions is required and quashed this Court's

order. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 780 (Fla. 5th DCA 2010), *review granted,* 65 So. 3d 515 (Fla. 2011).

Morrow's Petition and the Department's Response were filed prior to the Fifth District's decision in *Berne*. However, an appellate court is required to follow the law as it exists at the time of the appellate disposition. *Goodfriend v. Druck*, 289 So. 2d 710, 711 (Fla. 1974); *Florida East Coast Railway Company v. Rouse*, 194 So. 2d 260, 262 (Fla. 1966); *Wendell v. United Services Auto.*, 881 So. 2d 1178, 1179 (Fla. 5th DCA 2004). Accordingly, this Court must apply the law as stated in the Fifth District's holding in *Berne*, finding that only evaluation of the software is necessary. *Berne*, 49 So. 3d at 780. Because only evaluation, not approval, of the software is required, there is no reason to remand this case to issue subpoenas for witnesses whose testimonies are only relevant to establish that the software was not approved.

Argument II & IV

Morrow argues that the software version 8100.27 upon which she was tested was not approved by FDLE and the Intoxilyzer 8000 is not an approved machine. She claims that the breath test results were inadmissible because they were conducted on an unapproved machine.

For an analysis of a person's breath to be considered valid, the Department 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). Section 316.1934(5) 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 entered into the record the breath alcohol test affidavit DDL-06 dated January 28, 2010 indicating a breath alcohol level of 0.08 or higher. Morrow attempted to overcome the presumption of impairment by introducing evidence that software version 8100.27 was not approved. However, only an evaluation of the software is required by Rule 11D-8.003, not an approval study. *Berne*, 49 So. 3d at 780. Morrow also attempted to overcome the presumption of impairment by introducing evidence that the Intoxilyzer is not an approved machine because the evaluations occurred before the Intoxilyzer was on the Conformed Products List (CPL).[1] However, pursuant to Rule 11D-8.003(2), the Intoxilyzer 8000 is an approved instrument if it is used with software evaluated by FDLE in accordance with Instrument Evaluation Procedure FDLE/ATP Form 34. *Id.* at 784. Morrow did not present any evidence that software version 8100.27 was not evaluated by FDLE in accordance with FDLE/ATP Form 34. Therefore, Morrow failed to overcome the presumptive proof of impairment.

Argument III

Morrow argues that Rule 11D-8.004 requires the Department inspect the Intoxilyzer machine on an annual basis and claims the record did not contain an annual inspection. She claims that failure of the record to contain the most recent Department inspection or a Department inspection in accordance with Rule 11D-8.004 renders the breath test results inadmissible.

[1] Instrument Evaluation Procedure FDLE/ATP Form 34 (Rev. March 2004) requires that only breath test machines on the CPL will be evaluated. Fla. Admin. Code R. 11D-8.017.

Rule 11D-8.004(2) requires annual inspection of the breath test instruments. Rule 11D-8.006(1) requires inspection of the breath test instruments once each calendar month. In order to admit the breath test results, the Department is only required to provide the most recent inspection, not both monthly and annual inspections. § 316.1935(5)(e), Fla. Stat. (2010); *State v. Buttolph*, 969 So. 2d 1209 (Fla. 4th DCA 2007). The annual inspection is only necessary when it is the most recent inspection. *Buttolph*, 969 So. 2d 1209.

Morrow's breath test was conducted on January 28, 2010. The record contains an Agency Inspection Report with a date of inspection of January 20, 2010 certifying that the instrument complies with Chapter 11D-8 of the Florida Administrative Code. Morrow did not present any evidence to demonstrate that the January 20, 2010 inspection was not the most recent inspection prior to the date of Morrow's breath test. Therefore, the hearing officer properly admitted the breath test results.

Based on the foregoing, the Court finds that the hearing officer's findings were supported by competent substantial evidence and Petitioner was not deprived of due process.

Accordingly, 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, this _27th___ day of __February__________________, 2012.

__/S/___________________________
THOMAS W. TURNER
Circuit Judge

_/S/___________________________
ALICIA L. LATIMORE
Circuit Judge

__/S/___________________________
DONALD E. GRINCEWICZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esq.,** Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803 and to **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this __27th____ day of _February___________, 2012.

_/S/_____________________________
Judicial Assistant