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

KURT KLINKER,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2010-CA-19788-O
Writ No.: 10-70

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE SHEA, G. ADAMS, JOHNSON, JJ.

PER CURIAM.

**ORDER ON MOTIONS FOR REHEARING AND
FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, Kurt Klinker ("Petitioner") and the Respondent, Department of Highway Safety and Motor Vehicles ("Department" or "Respondent") move for rehearing of this Court's order granting the Petition for Writ of Certiorari.

Petitioner sought certiorari review of the order sustaining the suspension of his driver license for driving with an unlawful breath alcohol level. This Court granted relief based on the Fifth District Court's per curiam decision without opinion that denied on the merits the

Department's petition to review an order rendered by this Circuit.[1] *Dep't of Highway Safety & Motor Vehicles v. Breum*, No. 5D11-3426 (Fla. 5th DCA Mar. 28, 2012). After reviewing Petitioner's Motion for Rehearing, Respondent's Motion for Rehearing En Banc, Petitioner's Response to Respondent's Motion for Rehearing and relevant case law, the Court finds that the Petition should be denied. We find it unnecessary to conduct a rehearing en banc and dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

In the Motion for Rehearing, Petitioner argues that the Court misapprehended and overlooked factual and legal issues in deciding that this matter should be remanded for a new hearing and in denying arguments II through IV in the Petition. Because the Court is now denying the Petition, there is no need to remand the matter for a new hearing. In addition, the Court has not overlooked or misapprehended the facts or legal issues in Arguments II through IV in the Petition. Accordingly, Petitioner's motion for rehearing is denied.

Respondent argues that the Court improperly treated the Fifth District's per curiam denial of *Breum* as precedent that this Court must follow. Petitioner argues that the Fifth District created binding precedent in *Breum* by using the language "denied on the merits." Petitioner also argues that this Circuit has previously granted Petitions arguing due process violation for failing to issue subpoenas for the same witnesses in this case.

Although previous decisions from this Circuit have held that there was a due process violation for failing to issue subpoenas for the same witnesses involved in this case, some of those cases can be distinguished. A few of those cases were decided before this Circuit's decision in *Berne* v. *Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 75a

[1] In *Breum v. Dep't of Highway Safety & Motor Vehicles*, No. 2011-CA-3189-O (Fla. 9th Cir. Court Sept. 14, 2011), this Circuit granted a petition for writ of certiorari due to the hearing officer's failure to issue subpoenas for the same witnesses in this case.

(Fla. 9th Cir. Ct. Oct. 23, 2009) was quashed.[2] In other cases, the witnesses were identified in the documents admitted into evidence at the hearing, however the witnesses Petitioner wishes to subpoena in this case were not identified in documents admitted at the hearing. Furthermore, if the Court finds that there was an error in the legal analysis of prior decisions, the Court may reconsider those decisions. *See Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003).

After reviewing the case law presented by Petitioner and Respondent, the Court finds that it erred in treating the Fifth District's decision in *Breum* as precedent. Although the Court recognizes that per curiam decisions without opinions have no precedential value, the Court misinterpreted the phrase "denied on the merits" in *Breum* as creating precedent.

In *Dep't of Legal Affairs v. Dist. Court of Appeal*, 434 So. 2d 310 (Fla. 1983), the Supreme Court explained the danger of applying the rule of *stare decisis* to decisions without opinions. The Court expressed, "If there is a body of law floating around in unwritten or unpublished opinions, only those persons privy to those cases know those pronouncements. This creates unwarranted confusion and disparity in the orderly presentation of issues." *Id.* at 312. This same reasoning would apply to a decision without opinion even if it includes the phrase "on the merits." The basis for the decision would be unknown to all but the court that rendered the decision. Accordingly, this Court concludes that the phrase "denied on the merits" in the Fifth District's decision in *Breum* does not create precedent, but instead precludes consideration of the issue on the basis of *res judicata*. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). Therefore, the Petition for Writ of Certiorari is denied for the reasons explained below.

[2] Prior to the Fifth District's order quashing *Berne*, this Circuit determined that the witnesses were relevant to Petitioner's argument that the Intoxilyzer with the new software versions was not approved. However on review, the Fifth District held that only evaluation, not approval, of the new software for the Intoxilyzer was required. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 780 (Fla. 5th DCA 2010).

Facts and Procedural History

On June 18, 2010 at approximately 1:56 A.M., Florida Highway Trooper J.C. Ramirez was traveling northbound on Orange Blossom Trail near Michigan Street in Orange County, Florida when he observed a black Volkswagen, driven by Petitioner, traveling southbound. He visually estimated the vehicle's speed at 75 miles per hour in a 35 miles per hour zone. He then activated his radar unit and obtained a readout of 76 miles per hour. He made a U-turn, followed the vehicle, and observed the vehicle change lanes several times without signaling and cut off several vehicles. The trooper activated his emergency lights and siren and initiated a traffic stop. When he approached the vehicle, the trooper observed Petitioner had glassy blood shot eyes, a flushed face, and smelled a strong odor of alcoholic beverage coming from his mouth and lower face area. Petitioner stated that he was coming from the Cowboys Club and had two beers. The trooper observed that Petitioner's speech was slurred and requested that he perform field sobriety exercises which Petitioner performed poorly. Petitioner was placed under arrest for DUI and transported to the Orange County Breath Test Center. Petitioner provided breath results of 0.196 and 0.200 and was transported to the Orange County Jail. His license was suspended for driving under the influence of alcohol.

Petitioner requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on July 28, 2010. At the hearing, Breath Test Operator Jimmy Burke, Orange County Sheriff's Office Agency Inspector Kelly Melville, and Florida Highway Trooper J.C. Ramirez all testified. Petitioner was present and represented by counsel.

At the hearing, Petitioner attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of 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 March 2006 through March 2007; and subpoenas for Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On August 6, 2010, the hearing officer entered a written order sustaining Petitioner's license suspension. Petitioner then sought certiorari review of that order.

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 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).

Analysis

In the Petition for Writ of Certiorari, Petitioner argues that: 1) the hearing officer deprived him of due process of law when his 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 and provided scientifically unreliable results; 3) the breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; 4) the Intoxilyzer 8000 was improperly evaluated for approval; and 5) there existed no probable cause to stop Petitioner's vehicle.

I. Failure to Issue Subpoenas

Petitioner argues that he 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 he attempted to introduce at the hearing. To support his argument, Petitioner cites *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 758 (Fla. 1st DCA 2009) and numerous other cases. Petitioner argues that Skipper, Barfield, and Keegan were relevant to prove: (1) noncompliance with FDLE rules, (2) that the breath test machine upon which he was tested was not approved pursuant to FDLE Rule 11D-8.003, and (3) that the breath test machine was not working in a scientifically reliable manner.

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 introduced the breath test affidavit, DDL#4, 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. Petitioner attempted to demonstrate that the Department failed to substantially comply with administrative rules by introducing documents from 2002, 2006, and 2007 that he alleged demonstrates that the breath test machine upon which he was tested was not approved pursuant to FDLE Rule 11D-8.003 and was not working in a scientifically reliable manner.

When seeking review of a license suspension pursuant to section 322.2615, a driver has "the right to present evidence *relevant* to the issues, to cross-examine opposing witnesses, to impeach any witness, and to rebut the evidence presented against the driver." (emphasis added) *See* Fla. Admin. Code R. 15A-6.013(5); *Lee*, 4 So. 3d at 757.

The issue in this case is whether the machine used to test Petitioner was an approved machine and working in a scientifically reliable manner. Petitioner attempted to introduce documents concerning Intoxilyzer 8000 machines not used to administer his test and documents from tests administered in 2006 and 2007. Petitioner's breath test was administered on June 28, 2010. Therefore, the documents Petitioner attempted to introduce are not relevant to the issue in this case, whether the machine used to test Petitioner was an approved scientifically reliable machine. Petitioner is not entitled to present evidence that is not relevant to the issue before the hearing officer.

In addition, the Fifth District Court of Appeal determined that only evaluation, not approval as Petitioner argues, of the new software versions of the Intoxilyzer 8000 is required. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 780 (Fla. 5th DCA 2010). Therefore, this Court finds that Petitioner is not entitled to question witnesses to determine whether the software version used for Petitioner's breath test was approved when only evaluation is required. Also, testimony about documents referring to Intoxilyzer machines that were not used to test Petitioner would not be relevant to the issue of whether the machine used to test Petitioner was a scientifically reliable machine. Accordingly, Petitioner was not deprived of due process.

II. Breath Test Results Were Not Properly Approved

III. Record Failed To Contain The Most Recent Department Inspection

IV. Intoxilyzer 8000 Was Improperly Evaluated For Approval

Arguments II through IV in the Petition are denied for the reasons expressed in *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012).

V. Lawfulness of Stop

Petitioner argues that there existed no probable cause to the stop his vehicle. He argues that evidence of the radar reading could not be considered because the admissibility requirements were not met. He also claims that the visual estimate was invalid because the trooper could not recall how far Petitioner's vehicle was located from his vehicle and the estimate was made when he was traveling in the opposite direction.

Only reasonable suspicion is required for a lawful stop. *Brown v. State*, 719 So. 2d 1243 (Fla. 5th DCA 1998). In determining whether reasonable suspicion exists, a court may take into consideration the time of day, day of week, manner of operation of the car involved, and

anything unusual in the situation as interpreted in light of the officer's knowledge, training, and experience. *Id.* We find that the trooper's arrest affidavit submitted into evidence along with his testimony provided competent substantial evidence to support the hearing officer's finding that there was reasonable suspicion to stop Petitioner for speeding.

In addition, verification of the actual speed is not necessary to justify a stop for speeding. *State v. Allen*, 978 So. 2d 254 (Fla. 2d DCA 2008); *State v. Joy*, 637 So. 2d 946 (Fla. 3d DCA 1994); *Paras v. Dep't Highway Safety & Motor Vehicles*, 7 Fla. L. Weekly Supp. 490a (Fla. 9th Cir. Ct. Mar. 22, 2000). Therefore, there was no need to address whether the admissibility requirements for the radar reading were met. *Paras*, 7 Fla. L. Weekly Supp. 490a. The radar reading was sufficient to establish reasonable suspicion for the stop. *Id.* Accordingly, there was competent substantial evidence to support the hearing officer's finding that Petitioner was lawfully stopped.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED;** Petitioner's Motion for Rehearing is **DENIED**; Respondent's Amended Motion for Rehearing is **GRANTED in part**; Respondent's request for rehearing en banc is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _10th___ day of _September__, 2012.

_/S/_____
TIM SHEA
Circuit Judge

_/S/_____
GAIL A. ADAMS
Circuit Judge

_/S/_____
ANTHONY H. JOHNSON
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 **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this _10th_____ day of _September_____, 2012.

_/S/_____
Judicial Assistant