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

CASE NO.: 2010-CA-23536-O
Writ No.: 10-87

BRANDI DIX,

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 ARNOLD, LAUTEN, O'KANE, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Brandi Dix ("Dix" or "Petitioner") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department" or "Respondent") final order sustaining the suspension of her driver's license for driving with an unlawful breath alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

Facts and Procedural History

On August 21, 2010, Dix was arrested for driving under the influence. Dix provided breath test results of 0.123 and 0.131 and her license was suspended. She requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on September 27, 2010.

At the hearing, Dix 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 2006 and 2007; and subpoenas for Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On September 30, 2010, the hearing officer entered a written order sustaining Petitioner's license suspension.

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, Dix argues that: 1) the hearing officer deprived her of due process of law 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 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; and 4) the Intoxilyzer 8000 was improperly evaluated for approval. This Court denied the Petitions raising these same arguments in *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-19788, Writ 10-70 (Fla. 9th Cir. Ct. Sept. 10, 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012).

I. Failure to Issue Subpoenas

As in *Klinker* and *Morrow*, Dix attempted to introduce documents concerning Intoxilyzer 8000 machines not used to administer her test and documents from tests administered

in 2006 and 2007. Dix argues that Roger Skipper, Jennifer Keegan and Laura Barfield who were named in the documents she attempted to introduce at the hearing were necessary to establish that the breath test machine upon which she was tested was not approved pursuant to FDLE Rules and the breath test machine was not working in a scientifically reliable manner.

Dix's breath test was administered on August 21, 2010. Therefore, the documents she attempted to introduce are not relevant to the issue in this case, whether the machine used to test her breath alcohol level on August 21, 2010 was an approved scientifically reliable machine. Dix is not entitled to present evidence that is not relevant to the issue before the hearing officer. *Lee v. Dep't of Highway Safety & Motor Vehicles*, 4 So. 3d 754, 757 (a driver has the right to present evidence *relevant* to the issues when seeking review of a license suspension pursuant to section 322.2615 (emphasis added)).

II. Breath Test Results Were Not Properly Approved
IV. Intoxilyzer 8000 Was Improperly Evaluated For Approval

The Department entered into the record the breath alcohol test affidavit indicating a breath alcohol level greater than 0.08 which is presumptive proof of the results. § 316.1934(5), Fla. Stat. (2010).. 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. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 784 (Fla. 5th DCA 2010). Dix did not present any evidence that software version 8100.27 was not evaluated by FDLE in accordance with FDLE/ATP Form 34. In addition, only an evaluation of the software is required, not approval. *Id.* at 780. Therefore, Dix failed to overcome the presumptive proof of impairment. *See Gurry v. Dept. of Highway Safety*, 902 So.2d 881, 884 (Fla. 5th DCA 2005); *Dep't of Highway Safety & Motor Vehicles v. Mowry,* 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

III. Record Failed To Contain The Most Recent Department Inspection

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. Section 316.1934(5) states that the breath test affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the breath if the affidavit discloses: "…… (e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument." The "most recent required maintenance" can be either the monthly or annual inspection, whichever is most recent. *State v. Buttolph,* 969 So. 2d 1209 (Fla. 4th DCA 2007).

Dix's breath test was conducted on August 21, 2010. The date of the last agency inspection on the breath test affidavit is July 21, 2010. Dix did not present any evidence to demonstrate that the July 21, 2010 inspection was not the most recent inspection prior to the date of Dix's breath test. Therefore, the hearing officer properly admitted the breath test results.

Based on the foregoing, there was competent substantial evidence to support the hearing officer's findings 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 5th day of October, 2012.

/S/
C. JEFFERY ARNOLD
Circuit Judge

/S/
FREDERICK J. LAUTEN
Circuit Judge

/S/
JULIE H. O'KANE
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 __5th____ day of October, 2012.

_/S/_____
Judicial Assistant