

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

CARLOS SAENZ,

Petitioner,

v.

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

Respondent.

CASE NO.: 2011-CA-17521-O

Writ No.: 11-118

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE BRONSON, THORPE, MCDONALD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlos (“Saenz” or “Petitioner”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department” or “Respondent”) final order sustaining the suspension of his 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 October 6, 2011, Saenz was arrested for driving under the influence. Saenz agreed to submit to a breath test but after two attempts, he failed to provide a valid sample and this was deemed a refusal. His license was suspended for refusal to submit to a breath test and he requested a formal review hearing pursuant to section 322.2615, Florida Statutes. A hearing was held on November 4, 2011 and November 23, 2011.

At the hearing, Saenz 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 and a 2010 criminal case; 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 Patrick Murphy, Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue, and other documents. On November 29, 2011, 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 refusal to submit to a

breath test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2011).

Analysis

In the Petition for Writ of Certiorari, Saenz argues that: 1) there was no competent substantial evidence that Petitioner willfully refused to submit to a breath test; 2) 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 Patrick Murphy, Roger Skipper, Jennifer Keegan and Laura Barfield; 3) 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; 4) the breath test results were inadmissible due to the failure of the record to contain the annual inspection report; and 5) the Intoxilyzer 8000 was improperly evaluated for approval.

This Court denied the Petitions raising arguments (2) through (5) 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). However, in this case there were no breath test results admitted by the hearing officer. Instead, the breath alcohol test affidavit showing results of volume not met was admitted along with an affidavit of refusal. Nonetheless, the Court finds that Petitioner was not deprived of due process and the hearing officer properly admitted the affidavit of refusal and breath alcohol test affidavit showing results of volume not met for the same reasons stated in *Klinker* and *Morrow*.

I. No Competent Substantial Evidence that Petitioner Willfully Refused to Submit to Breath Test

Saenz claims that the evidence demonstrates that results of volume not met, (“VNM”), were recorded each time he blew into the breath testing machine. He argues that a result of “VNM” “does not establish that he willfully refused to provide an adequate breath sample, but can be equally due to a malfunctioning flow sensor in the machine.

Pursuant to 11D-8.002(12), Florida Administrative Code, refusal or failure to provide two valid breath samples constitutes a refusal to submit to the breath test. *See Dep't of Highway Safety & Motor Vehicles v. Cherry*, 91 So. 3d 849, 855 (Fla. 5th DCA 2011). The deputy's arrest affidavit states that Saenz did not follow the instructions given by the breath test operator to maintain a constant stream of air into the mouthpiece after several attempts. The video also demonstrates that Saenz was given instructions to take a deep breath, make a tight seal around the mouthpiece, and blow out continuously until instructed to stop, but he failed to provide valid samples after numerous attempts. The Department also submitted an affidavit of refusal and breath test affidavit with results of “VNM.” Accordingly, there was competent substantial evidence that Saenz's breath samples did not meet the minimum requirements for volume to constitute a valid breath sample and therefore, he refused to submit to the breath test. *Id.* Although Saenz speculates that the machine may have had a malfunctioning flow sensor and was

not operating properly, he did not present any evidence to demonstrate that the machine was not operating properly at the time it was used to administer his breath test. Accordingly, there was competent substantial evidence to support the hearing officer's findings that Saenz refused to submit to a breath test.

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 10th day of October, 2012.

/S/

THEOTIS BRONSON
Circuit Judge

/S/

JANET C. THORPE
Circuit Judge

/S/

ROGER J. MCDONALD
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 10th day of October, 2012.

/S/

Judicial Assistant