

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

HARINATH SHEELA,

Petitioner,

CASE NO.: 2011-CA-5663-O

Writ No.: 11-37

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, BUREAU OF DRIVER
IMPROVEMENT,**

Respondent.

Petition for Writ of Certiorari from the Florida
Department of Highway Safety and Motor Vehicles,
Paul A. Smith, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE MIHOK, O’KANE, LAUTEN, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Harinath Sheela (“Sheela”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) 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

As gathered from the hearing officer's findings of fact, including the Charging Affidavit and other documents and testimony presented at the formal review hearing, the facts were as follows: On March 3, 2011 at approximately 3:05 a.m., Trooper M. W. Castleberry of the Florida Highway Patrol observed a vehicle traveling on State Road 408 at a speed that was increasing the distance away from his vehicle. The trooper began to pace the vehicle in question and observed that the vehicle was traveling at a speed of seventy-one miles per hour in a posted fifty-five mile per hour nighttime construction zone. Trooper Castleberry observed the vehicle drifting to the right, coming in contact with and crossing over the white lane line on the roadway. The trooper observed the vehicle display the same driving pattern on three occasions and one occasion cross the white line, nearly driving on the unpaved shoulder of the roadway.

Trooper Castleberry accelerated to a point where he was able to read the license number. The trooper entered the number into FCIC/NCIC in the onboard computer and received a "no record found" return. Trooper Castleberry checked the license number a second time and again received a "no record found" return. Trooper Castleberry observed the vehicle exit State Road 408 at which time the trooper initiated a traffic stop and made contact with the driver Sheela.

Upon making contact with Sheela, Trooper Castleberry noticed an extremely strong odor of alcohol coming from Sheela who appeared disheveled and his eyes were extremely bloodshot and hooded. The trooper asked Sheela for his license, registration, and insurance card. Sheela could not locate his wallet initially and after unsuccessfully looking for the wallet in his immediate vicinity, he realized the wallet was sitting next to him on the center console. Sheela then produced his Florida Hospital ID card from the center console instead of the requested items.

Trooper Castleberry asked Sheela where he was traveling from. Sheela stated that he was traveling from Florida Hospital South. Sheela also stated that he did not consume any alcohol. In response, the trooper asked him why he smelled alcohol coming from Sheela's breath and from inside the car. Sheela replied that he was smoking. The trooper told Sheela that the smell of cigarettes and the smell of alcohol are two completely different odors. Sheela then informed the trooper he was a medical doctor, on call for two days, was very tired, and that the passenger in his vehicle would drive him home. However, when the trooper asked Sheela why the passenger wasn't currently driving, the passenger replied that she didn't have a license. Trooper Castleberry again asked Sheela for his registration and insurance card and he stated that he could not find them. Trooper Castleberry then informed Sheela that he stopped his vehicle due to the unlawful speed, his inability to maintain his lane of travel, and the error with the tag. Sheela replied that he had a scratch on the side of the car. The trooper asked Sheela what does a scratch have to do with him not being able to maintain his lane of travel. Sheela again replied that he had been on call at the hospital for a few days.

Due to the error with the tag, Trooper Castleberry identified the VIN on the vehicle and entered both the VIN and Sheela's driver's license into FCIC/NCIC. The VIN returned showing that Sheela was a dual owner of the vehicle and the tag assigned to the vehicle was identified as 327XTQ. The trooper again physically observed that the number of the tag attached to Sheela's vehicle was 324XTQ. At that point, the trooper requested that Sheela exit the vehicle. Sheela complied and again, Trooper Castleberry observed that Sheela looked disheveled with the front of his shirt being half tucked in and partially unbuttoned and he could smell the distinct odor of alcohol coming from Sheela. Trooper Castleberry then informed Sheela about his driving pattern,

the odor of alcohol coming from his breath, and requested that Sheela perform the field sobriety exercises. Sheela agreed to perform the field sobriety exercises and performed them poorly.

Based on the totality of the circumstances, the driving pattern, the observations of Trooper Castleberry, and Sheela's performance of the field sobriety exercises, Sheela was placed under arrest for driving under the influence and transported to the Orange County Breath Test Facility. At the Facility, Trooper Castleberry read Sheela the Implied Consent Warning and requested that Sheela submit to a breath test. Sheela took the breath test and the results were .104 and .102. Sheela's privilege to operate a motor vehicle was suspended for driving with an unlawful breath alcohol level. The formal review hearing was held on March 31, 2011.

At the formal review hearing, Sheela's counsel 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 April 11, 2011, the hearing officer entered a written order sustaining Sheela'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 breath alcohol level, 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2011).

Arguments

In the Petition for Writ of Certiorari, Sheela argues that: 1) There was no probable cause or reasonable suspicion for Trooper Castleberry to require him to submit to the field sobriety exercises and any subsequent arrest was tainted by the prior illegal administration of the field sobriety exercises; 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 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 most recent Department inspection; and 5) The Intoxilyzer 8000 was improperly evaluated for approval.

Analysis

Argument I – Sheela’s Submission to the Field Sobriety Exercises

Under Argument I in his petition, Sheela argues that there was no probable cause or reasonable suspicion to require him to submit to the field sobriety exercises and any subsequent arrest was tainted by the prior illegal administration of the field sobriety exercises. From review of the record including Trooper Castleberry’s very detailed narrative in the Charging Affidavit, Trooper Castleberry’s observations of Sheela included: 1) his erratic driving pattern; 2) his extremely bloodshot and hooded eyes; 3) the odor of alcoholic impurities emanating from his breath; 4) his repeated difficulty with retrieving his license, registration, and insurance items; 5) his statement that he was smoking when asked why the trooper smelled alcohol coming from his breath and from inside the car; 6) his statement that the passenger would drive him home, but the passenger didn’t have a license; 7) his statement that he had a scratch on the side of the car when asked about his failure to maintain his lane of travel.

Accordingly, this Court finds that the totality of Trooper Castleberry’s observations of Sheela’s erratic driving pattern, appearance, statements, and behavior provided competent substantial evidence for the hearing officer to find that Trooper Castleberry had the required reasonable suspicion to make the traffic stop and to request that Sheela perform the field sobriety exercises and to find that the trooper had probable cause to believe that Sheela was driving while under the influence of alcohol. *Amanda Re v. Dep’t of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 963a (Fla. 9th Cir. Ct. 2010) (holding that where the officer has probable cause to believe that the driver committed a traffic infraction and reasonable suspicion that he or she was driving while under the influence of alcohol or drugs, the officer has the right to temporarily detain the driver, conduct a reasonable inquiry, including field sobriety exercises, in order to

confirm or deny that probable cause exists to arrest the driver for driving while under the influence of alcohol or drugs). *Dep't of Highway Safety & Motor Vehicles v. De Shong*, 603 So. 2d 1349 (Fla. 2d DCA 1992) (holding that the deputy had a founded suspicion to stop DeShong to determine the cause of his erratic driving).

Arguments II through V

Addressing the Administration, Inspection, Approval, and Evaluation of Breath Testing Machine

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), this Court addressed identical arguments and denied the petitions seeking writs of certiorari. Accordingly, for the reasons stated in *Klinker* and *Morrow*, the Court finds that Sheela was not deprived of due process and the hearing officer properly admitted the breath tests results.

Based on the foregoing, procedural due process was followed, the hearing officer followed the essential requirements of the law, and there was competent substantial evidence to support the hearing officer's findings and decision. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Harinath Sheela's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 6th day of November, 2012.

/S/_____
A. THOMAS MIHOK
Circuit Judge

/S/_____
JULIE H. O'KANE
Circuit Judge

/S/_____
FREDERICK J. LAUTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803, shymanlaw@aol.com and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, kingibbs@flhsmv.gov on this 6th day of November, 2012.

/S/ _____

Judicial Assistant