

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

JORGE RAMIREZ,

Petitioner,

CASE NO.: 2011-CA-6648-O

Writ No.: 11-45

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,
Mary Varnadore, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE APTE, EVANS, MUNYON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Jorge Ramirez (“Ramirez”) 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 documents and testimony provided at the formal review hearing, the facts were as follows: On March 27, 2011, Lieutenant Arnold Alvarez of the Orlando Police Department was traveling eastbound on Interstate 4 approaching Conroy Road when he observed a vehicle not able to maintain a single lane, crossing all four lanes of traffic instantaneously from left to right two to three times, and failing to use the turn signal.¹ Based on the infractions that he observed, Lt. Alvarez conducted a traffic stop and made contact with the driver identified as Ramirez. Lt. Alvarez smelled the strong odor of the impurities of alcohol coming from Ramirez and noticed that Ramirez's eyes were red and bloodshot and that his speech was slurred. Lt. Alvarez then called Officer Robert Schellhorn also with the Orlando Police Department for assistance to conduct a DUI investigation.

When Officer Schellhorn arrived at the scene, Lt. Alvarez advised Officer Schellhorn of his observations of Ramirez and asked that he speak with Ramirez. Upon making contact with Ramirez, Officer Schellhorn smelled the odor of the impurities of alcohol coming from Ramirez who was out of his vehicle and leaning up against the concrete wall from about 15 feet away. Officer Schellhorn asked Ramirez to step away from the wall. Ramirez was very unsteady on his feet, standing with an orbital sway of six to eight inches. Officer Schellhorn again smelled the overpowering odor of the impurities of alcohol coming from Ramirez and his exhaled breath and noticed that his eyes were red, glassy, and bloodshot. Officer Schellhorn asked Ramirez what

¹ Per the Arrest Affidavit, Lt. Alvarez also observed Ramirez's vehicle traveling at a high rate of speed. He caught up to Ramirez's vehicle and paced the vehicle at 85 miles per hour in a 55 mile per hour zone with the calibrated speedometer of his patrol vehicle. However, at the hearing, Lt. Alvarez testified that the speedometer's calibration certificate had expired two months prior to when he observed Ramirez speeding. Accordingly, the hearing officer did not consider the speed of Ramirez's vehicle as a valid reason for the stop. See the hearing officer's Findings of Fact, Conclusions of Law and Decision.

was going on and Ramirez replied that he was on his way home. The odor of alcoholic impurities increased as Ramirez spoke with slow, slurred speech. Ramirez admitted to drinking two beers. Officer Schellhorn informed Ramirez of his observations and asked if he would consent to perform the field sobriety exercises. Ramirez agreed and performed the exercises poorly as he had difficulty following instructions and he raised his arms for balance.

Based on Officer Schellhorn's training and experience, he believed Ramirez was operating a motor vehicle under the influence of alcohol to the extent his normal faculties were impaired. Accordingly, Ramirez was placed under arrest and transported to the Orange County Breath Testing Center. After the twenty minute observation period was conducted, Officer Schellhorn read Ramirez the implied consent warning. Ramirez provided two breath samples with results of 0.138 and 0.138. Ramirez's privilege to drive was suspended for six months for driving with an unlawful alcohol level.

At the formal review hearing held on April 28, 2011, Lt. Alvarez testified first about the traffic stop of Ramirez. Second, Officer Schellhorn testified about his DUI investigation of Ramirez, but he did not bring with him the field sobriety testing and instructor manuals per the subpoena duce tecum. Third, breath tech operator, Sam Gerrity with the Orange County Sheriff's Office, testified about the breath test administered to Ramirez. Lastly, DUI technician Kelly Melville with the Orange County Sheriff's Office testified about the agency inspection report of the Intoxilyzer 8000 machine. Ramirez did not testify at the hearing. Also at the hearing, Ramirez's counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of Florida Department of Law Enforcement ("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 May 3, 2011, the hearing officer entered a written order sustaining Ramirez'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 individual's 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, Ramirez argues that: 1) The hearing officer deprived him of due process of law due to the failure of the hearing officer to issue subpoenas for Roger Skipper, Jennifer Keegan, and Laura Barfield along with the documents requested in the subpoena duces tecum; 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 report; 4) The Intoxilyzer 8000 was improperly evaluated for approval; 5) The breath test results should be inadmissible due to a violation of FDLE Rule 11D-8.007; 6) The hearing officer deprived him of due process of law by failing to set aside the suspension upon the failure of Officer Schellhorn to produce his field sobriety testing and instructor manuals at the formal review hearing; and 7) There was no probable cause or basis to stop Ramirez's vehicle.

Analysis

Arguments I through IV

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.² Accordingly, for the reasons stated in *Klinker* and *Morrow*, the Court finds that Ramirez was not deprived of due process and the hearing officer properly admitted the breath tests results.

² *Klinker* is currently on review with the 5th District Court of Appeal, *Klinker v. Dep't of Highway Safety & Motor Vehicles*, case no. 5D12-3896.

Argument V- Breath Test Results & Rule 11D-8.007

Ramirez argues that the video tape and testimony addressing the breath test established that he burped in the twenty minutes prior to the administration of the breath test and that the breath test operator ignored the burp and took no steps to reasonably ensure that he had not regurgitated in the twenty minutes prior to the breath test. Therefore, Ramirez concludes that the breath test results should be inadmissible due to a violation of FDLE Rule 11D-8.007.

Rule 11D-8.007(3) of the Florida Administrative Code provides:

The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty (20) minute observation period before the administering of a subsequent sample.

In response to Ramirez's argument, the Department points out that the hearing officer was presented with competent substantial evidence, including the video tape, testimony, and the Breath Test Affidavit in which Officer Schellhorn swore that Ramirez was observed for at least twenty minutes to ensure that Ramirez did not take anything orally and did not regurgitate. Therefore, the Department argues that the hearing officer reasonably relied on law enforcement's findings and testimony that Ramirez was observed for at least twenty minutes prior to his breath test and that he did not regurgitate or take anything by mouth. The Department further argues that Ramirez did not present any credible evidence contrary to the officer's observation, but only provided argument of counsel. The Department claims that without any contrary evidence, the hearing officer justifiably found that Ramirez was lawfully observed for twenty minutes. The hearing officer is in the best role as the trier of fact to make factual determinations and was privileged to determine the weight and credibility of the evidence and to resolve any conflicts in the evidence. Therefore, The Department concludes that this Court should not substitute its

judgment for that of the hearing officer as to whether or not Ramirez was observed for twenty minutes prior to his breath test as it was the hearing officer's duty to resolve any potential conflict.

Upon this Court's review of the transcript from the formal review hearing, breath test tech, Sam Gerrity ("Gerrity"), testified that the video of Ramirez began after the twenty minute observation period was complete. Gerrity also testified that, although not normal procedure, generally when a person burps, he will ask the person if something was regurgitated. He stated that he could not recall whether he observed Ramirez burp nor whether he asked Ramirez if something was regurgitated when he burped as it wasn't written in his report. The video was then submitted into evidence and viewed at the hearing. Upon viewing the video, the hearing officer stated that Ramirez burped and swallowed. Gerrity then testified that the breath test occurred approximately nine minutes after Ramirez burped.

This Court has also reviewed the breath test video and had to review it several times in order to discern the portion where Ramirez's counsel claims that the burp occurred. From what can be discerned, the alleged burp occurred while Officer Schellhorn was reading Ramirez the implied consent warning (approximately at counter 00.52 of the video). At that point in the video, it appears that Ramirez mildly cleared his throat, but it was barely noticeable and audible. It is possible that the clearing of his throat was a burp, but this Court cannot go further to determine this issue as the hearing officer as the trier of fact had the ability to weigh the evidence including the findings from the video, the Breath Test Affidavit, and testimony. Therefore, this Court cannot re-weigh the evidence as to whether the breath technician was able to ensure that Ramirez did not regurgitate when he burped. Further, per Gerrity's testimony, Ramirez burped after the twenty minute observation was complete. Accordingly, competent substantial evidence

existed for the hearing officer to find that the twenty minute observation period and the breath test were administered lawfully. *Kaiser v. State*, 609 So. 2d 768 (Fla. 2d DCA 1992) (holding that continuous face-to-face observation of Kaiser for twenty minutes was not required to make certain that he did not ingest anything or regurgitate as the rules did not require the breath technician to stare fixedly at Kaiser for the entire observation period to achieve substantial compliance and further holding that the determination of whether the technician was able to make certain that Kaiser did not regurgitate or ingest anything went to the weight of the evidence which was an issue for the jury); *City of Deland v. Benline Process Color Company*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (holding that the weight and credibility of the evidence before the administrative agency cannot be reevaluated by the reviewing court).³

Argument VI – Failure to Produce Field Sobriety Testing & Instructor Manuals

Ramirez argues that his due process rights were violated because Officer Schellhorn failed to produce the field sobriety manuals and he did not provide a good faith or legitimate excuse for not bringing or attempting to bring the manuals. From review of the transcript from the formal review hearing, the issue of Officer Schellhorn's failure to produce the field sobriety manuals per the subpoena duces tecum was discussed at length. Officer Schellhorn stated that he did not bring the manuals because he was on paid administrative leave and the manuals were in his patrol vehicle. The hearing officer then provided Ramirez an opportunity to continue the hearing in order for Officer Schellhorn to produce the manuals. However, Ramirez's counsel declined the offer to continue the hearing and instead, moved to invalidate the license suspension

³ Ramirez cites *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69 (Fla. 5th DCA 1994) in support of his argument. *Farley* is distinguishable from the instant case because Farley was only observed for seventeen minutes total. In the instant case, evidence supports that Ramirez was observed for at least the required twenty minutes before he allegedly burped and then provided his first breath sample.

due to Officer Schellhorn's failure to provide the manuals. Accordingly, the hearing officer released Officer Schellhorn from his subpoena.

From review of the record, this Court finds that Ramirez was not denied due process by Officer Schellhorn's failure to bring the manuals to the formal review hearing because he did not request nor accept the opportunity for a continuance for Officer Schellhorn to produce the subpoenaed manuals. Further, the Arrest Affidavit was very detailed as to the field sobriety exercises administered by Officer Schellhorn and Ramirez did not proffer evidence that the officer failed to comply with the manuals when he administered the exercises. *Walker v. Dep't of Highway Safety & Motor Vehicles*, 13 Fla. L. Weekly Supp. 953a (Fla. 9th Cir. Ct. 2006); *Bourcier v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 287a (Fla. 9th Cir. Ct. 2004).⁴

Argument VII – The Traffic Stop

Ramirez argues that he merely changed lanes on Interstate 4 on two occasions from the right to the left lane and from the left lane to the right without any evidence that his vehicle interfered with any other vehicles or created any danger. Therefore, Ramirez concludes that there was no probable cause or basis to stop his vehicle because the evidence failed to establish that he operated his vehicle in an atypical manner.

In the Arrest Affidavit and testimony, Lt. Alvarez, while traveling east on Interstate 4 observed that Ramirez's vehicle not able to maintain a single lane, crossing all lanes of traffic from left to right two to three times, and failing to use the turn signal. This Court finds that Lt. Alvarez's observations of Ramirez's erratic driving pattern as stated in the Arrest Affidavit along

⁴ Ramirez cites *Crespi v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 411a (Fla. 9th Cir. Ct. 2010) in support of this argument. However, *Crespi* is distinguishable from the instant case. In *Crespi*, the officer failed to produce the manuals at the initial review hearing that was then continued. At the second review hearing, the officer again failed to produce the manuals.

with his testimony provided competent substantial evidence to support the hearing officer's finding that there was reasonable suspicion to make the traffic stop. *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 had 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 had the right to temporarily detain the driver, conduct a reasonable inquiry, including field sobriety exercises, in order to confirm or deny that probable cause existed 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); *Brown v. State*, 719 So. 2d 1243 (Fla. 5th DCA 1998) (holding that only reasonable suspicion is required for a lawful stop).

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, Jorge Ramirez'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/

ALAN S. APTE
Circuit Judge

/S/

ROBERT M. EVANS
Circuit Judge

/S/

LISA T. MUNYON
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 and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 6th day of November, 2012.

/S/ _____

Judicial Assistant