

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

PATRICIA DELGADO,

Petitioner,

CASE NO.: 2011-CA-1488-O

Writ No.: 11-8

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,
Linda Labbe, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE THORPE, MCDONALD, BRONSON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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

As gathered from the hearing officer's findings of fact including the documents and testimony presented at the formal review hearing, the facts are as follows: On December 10, 2010, at approximately 2:10 am, Officer Takela Young of the Winter Garden Police Department was participating in a multi-agency DUI safety and sobriety checkpoint located south of the intersection of North Alafaya Trail and Centaurus Drive in Orange County. A vehicle entered the checkpoint that was driven by Delgado who was the sole occupant in the vehicle. Officer Young then made contact with Delgado and asked for her license, registration and proof of insurance. Officer Young observed that the Delgado's vehicle's tint was below the "A1S" line. Officer Young then conducted a traffic stop of Delgado. Officer Young observed that Delgado's eyes were glossy and slightly red. Officer Young asked Delgado where she was coming from and she answered that she was in downtown Orlando seeing a friend. Officer Young also observed a purple band around Delgado's wrist that, according to Officer Young, was normally worn by persons when attending night clubs.

Officer Young then asked Delgado to exit her vehicle. At that time Officer Young smelled the odor of alcoholic impurities coming from Delgado's person. She then explained to Delgado that there was a suspicion that she was under the influence. Delgado stated she had one drink of vodka. Officer Young then asked Delgado if she would consent to perform field sobriety exercises and she agreed to perform them. During the Horizontal Gaze Nystagmus exercise, Delgado maintained an orbital sway. While performing the Walk and Turn exercise, she took an incorrect number of steps and stepped off the line once. During the One Leg Stand exercise, she raised her knee and was observed swaying, raising her arms over six inches and putting her foot down before 30 seconds had elapsed.

Based on her training and experience, Officer Young believed that Delgado was under the influence of alcohol or drugs. Delgado was placed under arrest for DUI and transported to the BAT Mobile for testing. The 20 minute observation was conducted and the Implied Consent Warnings were read. Delgado provided two breath samples, the results of which were 0.170 and 0.180. Officer Young issued Delgado a notice of license suspension for driving with an unlawful alcohol level.

At the formal review hearing, Delgado 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 January 13, 2011, the hearing officer entered a written order sustaining Delgado'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. (2010).

Arguments

In the Petition for Writ of Certiorari, Delgado argues that: 1) She was stopped without probable cause at an invalid sobriety checkpoint where she was required to submit to field sobriety exercises without probable cause or reasonable suspicion; 2) 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; 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.

Analysis

Argument I - Sobriety/Safety Checkpoint Guidelines:

Under Argument I in her petition, Delgado makes the following sub-arguments involving the sobriety/safety checkpoint guidelines:

a) Delgado argues that the hearing officer improperly relied upon a set of operational guidelines that were never established to be written guidelines that Officer Young relied upon. This argument is without merit. At the formal review hearing, Officer Young's ICJIS Arrest Affidavit was admitted as evidence and stated that on December 10, 2010, she made contact with Delgado while participating in a DUI safety and sobriety checkpoint located south of the intersection of North Alafaya Trail and Centauras Drive. The Multi-Agency DUI Safety Checkpoint and Roving Patrol Operational Plan ("Operational Plan") was also admitted as evidence at the hearing. Upon review of the Operational Plan, specifically pages 1 and 3 of the Plan, the checkpoint was to occur on December 10, 2010 on Alafaya Trail at Centauras Drive, in the north and southbound lanes of traffic, thus involving the same location as stated in Officer Young's Affidavit. Accordingly, competent substantial evidence existed that the Operational Plan contained the written guidelines that Officer Young relied upon when making the checkpoint stop.

b) Delgado argues that the guidelines failed to establish the identity of the operational supervisor or designee who would make these determinations. This argument is without merit because on page 1 of the Operational Plan, Lieutenant Jose Campina is stated as the Operational Supervisor. In addition, the Operational Plan states that Captain Ralph Groover is the Event Commander and Deputy Claude Leslie is the Event Coordinator/Line Supervisor.

c) Delgado argues that the guidelines relied upon improperly gave the officer operating the checkpoint unfettered discretion to suspend and resume the roadblock based upon traffic congestion by diverting vehicles around the roadblock without sufficient guidelines or criteria to execute this discretion; d) Delgado also argues that the plan did not set forth any criteria for determining at what point traffic was to be deemed to be congested or backed up causing excessive delays or traffic hazard; and e) Lastly, Delgado argues that the guidelines failed to provide any criteria for determining what an orderly traffic pattern was so as to resume the checkpoint. In addressing these arguments, this Court finds:

The Sobriety/Safety checkpoint was organized pursuant to a written set of uniform guidelines, prepared in advance specifically for this operation, The Operational Plan. The “Methodology of Operation” section of the Operational Plan on page 5 provides in pertinent part:

All north and southbound traffic will be stopped during this checkpoint operation.

...

Should traffic become congested or vehicles backup causing excessive delays or traffic hazards, upon authorization of the Operational Supervisor or designee, traffic will be allowed to flow through the checkpoint until an orderly traffic pattern is restored. Checkpoint operations will then resume. All starts/stops and flow through will be recorded by the Checkpoint Traffic Direction Officers and noted in the After Action Report.

A written set of uniform guidelines must be issued before a roadblock, such as a DUI checkpoint, can be utilized. *Campbell v. State*, 679 So. 2d 1168, 1170 (Fla. 1996). The guidelines must provide a set of neutral criteria governing the officers in the field. *Id.* “Written guidelines should set out with reasonable specificity procedures regarding the selection of vehicles, detention techniques, duty assignments, and the disposition of vehicles.” *Id.* Guidelines failing to cover each of these matters are not necessarily invalid. *Id.* “Rather, courts should view each set of guidelines as a whole when determining the plan’s sufficiency.” *Id.*

Delgado relies upon two cases to support her argument, *Guy v. State*, 993 So. 2d 77 (Fla. 2d DCA 2008) and *State v. Buchholz*, 12 Fla. L. Weekly Supp. 993a (Fla. Brevard Cty. Ct. July 4, 2005). In *Guy*, the written guidelines provided that every vehicle was to be stopped. *Guy*, 993 So. 2d at 79. However, if a traffic backup occurred, the Event Commander/Checkpoint Supervisor would develop a contingency plan either temporarily closing the checkpoint until traffic cleared or changing the number of vehicles to be stopped. *Id.* The court found that the guidelines left the vehicle selection procedure to the discretion of a field officer to develop a contingency plan on the spot in the event of a traffic backup. *Id.* It further reasoned that the undeveloped contingency plan runs afoul of the mandate in *Campbell* that “the vehicle selection procedure be governed by neutral criteria which limits the conduct of individual officers.” *Id.* Therefore, the court held the checkpoint to be constitutionally invalid. *Id.*

In *Buchholz*, “the roadblock guidelines permitted the officers, in their discretion, to divert vehicles around the roadblock, in the event that four vehicles are waiting in line.” *Buchholz*, 12 Fla. L. Weekly Supp. 993a. The court found that the guidelines provided officers with the ability to “effectively suspend the roadblock, without any guidelines or criteria for its resumption.” *Id.* Therefore, based on fact that the guidelines allowed multiple officers, in their discretion, to suspend and resume the roadblock, the court found the guidelines insufficient and the roadblock constitutionally invalid. *Id.*

This Court finds the present case to be distinguishable from both *Guy* and *Buchholz*. Similar to *Guy* and *Buchholz*, the guidelines in the present case provide for the suspension and resumption of the checkpoint based on traffic patterns. However, unlike *Guy*, the guidelines in the present case do not allow the Operational Supervisor to choose whether to close the checkpoint or change the number of vehicles to be stopped. Rather, the guidelines provide that,

should traffic congestion, excessive delays, or traffic hazards occur, and only upon authorization of the Operational Supervisor or designee, traffic will be allowed to flow through the checkpoint until an orderly traffic pattern is restored, and then resume stopping all vehicles thereafter. The only discretion left to the Operational Supervisor is to determine what constitutes traffic congestion, excessive delays, or traffic hazards. We find this procedure to be “set out with reasonable specificity,” as required in *Campbell*. *Campbell*, 679 So. 2d at 1170.

Unlike *Buchholz*, the guidelines in the present case do not allow an undetermined number of multiple officers to suspend and/or resume the checkpoint, in their discretion. Rather, the guidelines allow only the Operational Supervisor or designee, one person at any given time, the limited discretion to completely suspend and/or completely resume the checkpoint based on traffic problems. Furthermore, all suspensions and resummptions were to be recorded and noted in the After Action Report. *Muller v. Dep’t of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 960a (Fla. 9th Cir. Ct. 2010); *Suffront v. State*, 8 Fla. L. Weekly Supp. 700d (Fla. 17th Cir. Ct. 2001); *State v. Gill*, 9 Fla. L. Weekly Supp. 823a (Fla. 17th Cir. Ct. 2002). Accordingly, this Court finds that the guidelines in the present case are sufficient and the sobriety/safety checkpoint was valid.

Argument I - Traffic Stop for Vehicle Tinting

Delgado also argues under Argument I in her Petition that there were no articulated facts as to how Officer Young determined that her vehicle’s tint was in violation of any law or any information as to which window she was even observing and what definition she applied for the “AIS Line”.

Section 316.2952(2)(b), Florida Statutes, (2010) provides:

“A person shall not operate any motor vehicle on any public highway, road, or street with any sign, sunscreening material, product, or covering attached to, or

located in or upon, the windshield, except. . . [S]unscreening material along a strip at the top of the windshield, so long as such material is transparent and does not encroach upon the driver's direct forward viewing area as more particularly described and defined in Federal Motor Vehicle Safety Standards No. 205 as the AS/1 portion of the windshield.”

Also, per section 316.2952(7), Florida Statutes (2010), a violation of this statute is a noncriminal traffic infraction, punishable as nonmoving violation under chapter 318, Florida Statutes.

Officer Young stated in her Arrest Affidavit that she noticed that the tinting on Delgado's vehicle was below the “A1S” line. It appears that Officer Young made a clerical error in her Arrest Affidavit by stating “A1S” line instead of “AS/1” line. However, there was competent substantial evidence for the hearing officer to conclude that Officer Young was referring to the AS/1 line portion of the vehicle's windshield as stated in the statute and to find that based on the window tint violation the traffic stop was lawful.

Argument I- Delgado's Submission to Field Sobriety Exercises

Delgado also argues under Argument I in her Petition there was no probable cause or reasonable suspicion for Officer Young to require Delgado's submission to field sobriety exercises. Specifically, Delgado claims that Officer Young's observations of an odor of alcohol from Delgado's person and her glassy and slightly red eyes without any evidence of impairment were insufficient to require that Delgado submit to sobriety exercises. This Court finds that based on Officer Young's observations of Delgado's glossy, red eyes, coupled with the purple bar band and the odor of alcoholic impurities emanating from Petitioner's breath, and her admission to consuming vodka prior to driving, competent substantial evidence existed in support of the hearing officer's finding that Officer Young had a reasonable suspicion to request that Delgado submit to the field sobriety exercises.

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 Delgado 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, Patricia Delgado's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 11th day of October, 2012.

/S/

ROGER J. MCDONALD
Circuit Judge

/S/

JANET C. THORPE
Circuit Judge

/S/

THEOTIS BRONSON
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 11th day of October, 2012.

/S/ _____

Judicial Assistant