

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

AMAR PATEL,

Petitioner,

CASE NO.: 2011-CA-14038-O
Writ No.: 11-94

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,
Mary Varnadore, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
Richard M. Coln, Assistant General Counsel,
for Respondent.

BEFORE SHEA, DAVIS, BLACKWELL, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Amar Patel (“Patel” 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 June 23, 2011, Patel was arrested for driving under the influence. Patel provided breath test results of 0.188 and 0.194 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on June 20, 2011 and September 23, 2011.

At the hearing, Patel 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 Patrick Murphy, Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue. On October 3, 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 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 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. (2011).

Analysis

In the Petition for Writ of Certiorari, Patel argues that: 1) he was deprived of a meaningful hearing within 30 days as required by section 322.2615 of the Florida Statutes; 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; 5) the Intoxilyzer 8000 was improperly evaluated for approval; and 6) there was no probable cause to stop Petitioner's vehicle.

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). For the reasons stated in *Klinker* and *Morrow*, the Court finds that

Petitioner was not deprived of due process and the hearing officer properly admitted the breath test results.

I. Petitioner Deprived of Due Process and a Meaningful Hearing within 30 Days

Patel claims that on June 30, 2011 he made a public record request for copies of records to be considered at his July 20, 2011 hearing. He asserts that Respondent did not produce the records until the day of the hearing. Patel argues that because he was unable to review the records prior to the hearing and subpoena the necessary witnesses, he was deprived of a meaningful hearing within 30 days as required by section 322.2615 of the Florida Statutes.

Section 322.2615(6)(a) requires that the Department schedule a formal review hearing within 30 days of a driver's request. Section 322.2615(9) also states that if the scheduled hearing is continued at the Department's initiative, the driver shall be issued a temporary driving permit, if the driver is eligible, until the hearing is conducted.

Patel has not cited to any statute, rule, or case law that requires the Department provide the driver with copies of documents to be presented at the suspension hearing prior to the formal review hearing. *See Beall v. Dep't of Highway Safety & Motor Vehicles*, 2010-CA-4610, Writ 10-09 (Fla. 9th Cir. Ct. May 12, 2011). The cases cited by Patel refer to law enforcement's failure to accept service of subpoenas or failure of the Department to issue subpoenas to relevant witnesses. In this case, Patel was not provided the documents until the day of the July 20, 2011 hearing and was therefore unable to subpoena the witnesses. The hearing was continued to September 23, 2011, Patel was issued a temporary driving permit during that time, and subpoenas were issued for the witnesses listed in the Department's documents. Therefore, Patel was given an opportunity to review the records prior to the September 23, 2011 hearing and

subpoena and question the witnesses who testified at the continued hearing. Accordingly, Patel was not deprived of a meaningful hearing and there was no violation of section 322.2615.

VI. No Probable Cause to Stop Petitioner's Vehicle

Patel claims he was improperly stopped by law enforcement while driving down a lane in a parking lot that was blocked by emergency vehicles. He claims there was room to allow him to avoid the emergency vehicles or turn around. He argues that there was no probable cause or well-founded suspicion of a traffic violation or violation of law to stop his vehicle and therefore his arrest was illegal. Patel did not testify at the hearing.

According to the arrest affidavit and testimony, Orange County Sheriff Deputy Jessie Bourque was re-directing traffic in the parking lot of an establishment on University Boulevard at 1:46 A.M. The travel lanes in the lot were completely blocked by the patrol car and fire engines with their emergency lights flashing and there was not enough room for a car to pass. Deputy Bourque was several car lengths in front of the fire engines and people were standing alongside the travel lanes. The deputy observed Patel's vehicle driving towards the blocked off area. As the vehicle approached it did not slow down so the deputy shouted, "Stop" because she was concerned for the public safety and the driver's well-being. Deputy Bourque stated in the affidavit that the driver looked at her with a blank stare and stopped several feet later. The deputy then approached Patel's vehicle to order him to turn around and observed numerous indications of impairment while speaking with Patel. She then began a DUI investigation, and concluded that she had probable cause to believe he was driving impaired while under the influence of alcohol.

The deputy's initial encounter with Patel was in the capacity of a "community caretaking function" necessary for public safety and welfare. *See Cady v. Dombrowski*, 413 U.S. 433, 441,

(1973); *Ortiz v. State*, 24 So. 3d 596, 600 (Fla. 5th DCA 2009); *Shively v. State*, 61 So. 3d 484 (Fla. 2d DCA 2011). Patel's actions of driving in a lane blocked by emergency vehicles with pedestrians standing along the side endangered the public and emergency personnel. Therefore, the deputy had a valid basis to direct Patel to stop and turn around and neither probable cause nor reasonable suspicion was necessary to stop the vehicle.

Even if the deputy's directions to Patel were considered an investigatory stop, the deputy's actions were lawful because of Patel's unusual operation of the vehicle. Patel's actions of driving down a lane blocked by emergency vehicles with pedestrians standing along the side was an unusual operation of a vehicle to justify the deputy's actions directing him to stop and turn around. *See Bailey v. State*, 319 So. 2d 22, 26 (Fla.1975) (upholding stop to determine reason for driver's "unusual operation" of vehicle at slow speed and weaving within lane, even though circumstances would not have led the officer to believe criminal activity was taking place); *State v. Rodriguez*, 904 So. 2d 594, 598 (Fla. 5th DCA 2005) (citing *Ndow v. State*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) (a stop may be justified in the absence of a traffic infraction when the vehicle is being operated in an unusual manner)); *Shively*, 61 So. 3d 484 (driver's failure to place parking token in the slot after several attempts and inability to exit the garage which impeded the traffic flow was "unusual" operation of a vehicle that justified brief investigatory stop); *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (a legitimate concern for the safety of public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence). Therefore, Patel was lawfully stopped and there was competent substantial evidence to support the hearing officer's findings.

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 12th day of October, 2012.

/S/ _____
TIM SHEA
Circuit Judge

/S/ _____
JENIFER M. DAVIS
Circuit Judge

/S/ _____
ALICE L. BLACKWELL
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 **Kimberly A. Gibbs, Assistant General Counsel** and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 15th day of October, 2012.

/S/ _____
Judicial Assistant