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

JOHN STIELOW,

Petitioner,

v.

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

Respondent.
_______________________________________/

CASE NO.: 2012-CA-9194-O
Writ No.: 12-48

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,
for Respondent.

BEFORE EVANS, SHEA, JOHNSON, J.J.

PER CURIAM.

FINAL ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF CERTIORARI

Petitioner, John Stielow (“Stielow”) 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).

Findings of Fact

As gathered from the hearing officer's findings of fact from the arrest affidavit, testimony, and other related documents presented at the formal review hearing on May 1, 2012, the facts were as follows: On March 22, 2012, at approximately 2:18 a.m. Officer Frank Imparato with the University of Central Florida Police Department observed a vehicle run a stop sign and then the travel at a high rate of speed. The officer pace clocked the vehicle and determined that the vehicle was traveling at a speed of 50 mph in a 35 mph speed zone.

The officer conducted a traffic stop and the driver was identified as Stielow. While speaking with Stielow, the officer observed that Stielow exhibited the following signs of impairment: 1) an odor of alcohol impurities coming from inside the vehicle and later from his facial area; 2) his face was red; 3) his eyes were watery, red, bloodshot and glassy; 4) he admitted consuming alcoholic beverages before driving; and 5) after exiting the vehicle he was swaying while standing still.

Officer Imparato then requested that Stielow submit to the field sobriety exercises. Stielow agreed and performed the exercises poorly as he had trouble following instructions, he had a noticeable orbital sway, and he was extremely unsteady on his feet during the walk and turn exercise. Officer Imparato then arrested Stielow for DUI and transported him to the Orange County Breath Testing Center where the twenty minute observation period was conducted. Stielow was then requested to submit to the breath test and he provided two breath samples with results of 0.145 and 0.133. Stielow's privilege to drive was suspended for six months for driving with an unlawful alcohol level.

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. (2012).

Arguments

In the Petition for Writ of Certiorari, Stielow argues that: 1) The hearing officer deprived him of procedural due process of law by failing to issue subpoenas for Florida Department of Law Enforcement ("FDLE") personnel, Roger Skipper, Jennifer Keegan, Patrick Murphy, and Laura Barfield, to appear along with the documents requested in the subpoena duces tecum; 2) The Intoxilzyer 8000 machine was not kept in a secure location and was accessible to individuals not authorized by FDLE to have access to the machine in

violation of FDLE Rule 11D-8.007; 3) The breath test results were not properly approved per FDLE Rule 11D-8.003 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; 5) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; and 6) The hearing officer erred by not considering the lawfulness of the arrest.

Analysis

Arguments I, III, IV, & V - Addressing the Administration, Inspection, Approval, and Evaluation of Breath Testing Machine

At the formal review hearing held on May 1, 2012, Stielow's counsel attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000 machine; 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 FDLE personnel, Roger Skipper, Laura Barfield, Jennifer Keegan, and Patrick Murphy that the hearing officer did not issue.

In *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 1a (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.[1] Accordingly, for the reasons stated in *Klinker* and *Morrow*, the Court finds that Stielow was not deprived of due process and the hearing officer properly admitted the breath test results.

<u>Argument II - Intoxilyzer 8000 Not Kept In Secure Location and Accessible to Unauthorized Persons</u>

Stielow argues that only individuals with a valid FDLE permit are authorized to have access to the Intoxilyzer 8000. He claims that the machine was transported to and from Tallahassee by common carrier, and therefore it was kept in locations that were not secure and individuals who did not possess a valid FDLE permit had access to the machine in violation of Rule 11D-8.007. Stielow also argues that a Department inspection is required in addition to an agency inspection anytime the machine is returned from an authorized repair facility. He alleges that the machine was used to administer his breath test after it was returned from FDLE but the Department inspection was not performed after access by unauthorized individuals. Stielow argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5), Florida Statutes (2012), states that the breath test affidavit is presumptive proof of the results of an authorized test to determine alcohol content of the breath if the affidavit contains all the statutorily required information prescribed in that subsection. *See Gurry v. Dept. of Highway Safety,* 902 So. 2d 881, 884 (Fla. 5th DCA 2005). Once the Department meets its burden, the contesting party must demonstrate that the Department failed to substantially comply with the administrative rules concerning approval

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

of the breath testing machine. *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 659 (Fla. 5th DCA 2001).

In this case, the Department introduced the breath test affidavit which contains all the statutorily required information and a breath alcohol level above 0.08. Therefore, the affidavit is presumptive proof of results of an authorized test. Stielow attempted to demonstrate that the Department failed to substantially comply with the administrative rules by speculating that the machine was accessed by unauthorized persons, not located in a secure location, and not inspected by the Department after access by unauthorized persons.

Florida Administrative Code Rule 11D-8.007 states:

> (1) Evidentiary breath test instruments shall only be accessible to a person issued a valid permit by the Department **and to persons authorized by a permit holder. This rule does not prohibit agencies from sending an instrument to an authorized repair facility.** Only authorized repair facilities are authorized to remove the top cover of an Intoxilyzer 8000 evidentiary breath test instrument. (Emphasis added)
>
> (2) The instrument will be located in a secured environment which limits access to authorized persons described in subsection (1), and will be kept clean and dry. All breath test facilities, equipment and supplies are subject to inspection by the Department.

Florida Administrative Code Rule 11D-8.004(2) states:

> Registered breath test instruments shall be inspected by the Department at least once each calendar year, and must be accessible to the Department for inspection. Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument's approval for evidentiary use.

Florida Administrative Code Rule 11D-8.006(3) states:

> Whenever an instrument is taken out of evidentiary use, the agency shall conduct an agency inspection. The agency shall also conduct an agency inspection prior to returning an instrument to evidentiary use.

At the formal review hearing, Kelly Melville testified that the Intoxilyzer 8000 machine used in this case was sent to FDLE by a common carrier and a Department inspection was conducted before it was returned by the same method. She further testified that when the Intoxilyzer 8000 machine was returned to the Orange County Sheriff's Office, an agency inspection of the machine was conducted. Stielow's breath test was conducted on March 22, 2012. The March 22, 2012 agency inspection report and the breath test affidavit that lists the last agency inspection date as March 21, 2012 were admitted into evidence at the hearing. Therefore, the machine used to conduct Stielow's breath test was inspected in accordance with the rules prior to the administration of his breath test. Based on the foregoing, the Court finds that Stielow has failed to demonstrate that the Department did not substantially comply with the administrative rules. Therefore, the hearing officer properly admitted the breath test results.

Argument VI - Lawfulness of the Arrest

At the formal review hearing, Stielow moved to set aside the license suspension citing *Dep't of Highway Safety and Motor Vehicles v. Pelham*, 979 So.2d 304, 305-306 (Fla. 5th DCA 2008) (holding that under the Implied Consent law, a lawful arrest must precede the administration of a breath test). He argued that the hearing officer could not be fair and impartial because she was utilizing an ex parte Department memorandum addressed to the hearing officers instructing that in cases involving unlawful blood or breath alcohol levels, they should not determine the lawfulness of the arrest. The hearing officer denied Stielow's motion ruling that the lawfulness of the arrest was outside the scope of her review.

Thus, on appeal Stielow argues that the hearing officer erred by not considering the lawfulness of the arrest as required under *Pelham*. Conversely, the Department argues that

the holding in *Pelham* does not apply to the instant case because *Pelham* involved a refusal to submit to the breath test; thus, the legality of the refusal is not at issue in the instant case as it was in *Pelham*. Further, the Department argues that even if this Court finds that the hearing officer erred in failing to consider the lawfulness of the arrest, this court should remand the matter to the hearing officer with directions to enter a new order that addresses this issue. Lastly, the Department argues that even if this Court finds that the hearing officer erred, such error is harmless as there was competent substantial evidence in the record clearly showing that Stielow was both lawfully stopped and lawfully arrested for DUI.

This Court finds that part of the Fifth District Court of Appeal's reasoning in *Pelham* was that in order to establish probable cause as required under section 322.2615, Florida Statutes, the arrest and stop must be lawful. Section 322.2615, Florida Statutes, requires a finding of probable cause both in cases where a driver refuses to take a breath test and where a driver submits to a breath test with results above .08. Therefore, it would be illogical and contrary to the statute to find that because a driver agreed to the breath test, a finding of probable cause via a lawful stop or arrest is not necessary.

Accordingly, this Court finds that *Pelham* is applicable to the instant case and the failure of the hearing officer to address the legality of Stielow's arrest was a departure from the essential requirements of the law. *Faulkner v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 255a (Fla. 9th Cir. Ct. 2010); *Nordaby v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 321a (Fla. 9th Cir. Ct. 2010); *Drozd v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 77a (Fla. 9th Cir. Ct. 2009); and *Pelto v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 74a (Fla. 9th Cir. Ct. 2009).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, John Stielow's Petition for Writ of Certiorari is **DENIED** as to Arguments I through V and **GRANTED** as to Argument VI. Therefore, the hearing officer's Final Order of License Suspension is **QUASHED** and this cause is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 14th day of February, 2013.

/S/___________________________
ROBERT M. EVANS
Circuit Judge

/S/___________________________
TIM SHEA
Circuit Judge

/S/___________________________
ANTHONY H. JOHNSON
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, kimgibbs@flhsmv.gov on this 18th day of February, 2013.

/S/___________________________
Judicial Assistant