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

CASE NO.: 2012-CA-9926-O
Writ No.: 12-50

MARK WICHROWSKI,

Petitioner,

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,
Ronald Barnes, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE WALLIS, HIGBEE, O'KANE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Victor Wichrowski ("Wichrowski" 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 March 24, 2012, Wichrowski was arrested for driving under the influence. Wichrowski provided breath test results of 0.135 and 0.125 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearings were held on May 14, 2012 and May 16, 2012.

At the hearing, Wichrowski attempted to introduce documents related to the 2002 approval study of the Intoxilyzer 8000; transcripts of the testimony of FDLE Inspector Roger Skipper from formal review hearings in other cases in 2006; a letter dated in 2006 from FDLE Custodian of Records Laura Barfield about the Intoxilyzer 8000 with software version 8100.26; numerous breath test results obtained from various Intoxilyzer 8000 machines using software 8100.26 and 8100.27 with testing dates in 2006 and 2007; subpoenas for FDLE Inspector Patrick Murphy, Roger Skipper, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue, and other documents. On May 18, 2012, 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. (2012).

<u>Analysis</u>

In the Petition for Writ of Certiorari, Wichrowski argues that: 1) 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; 2) the breath test results were inadmissible due to the officer's failure to conduct a proper 20 minute observation; 3) the Intoxilyzer 8000 was not kept in a secure location and was accessible by unauthorized individuals; 4) 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; 5) the breath test results were inadmissible due to the failure of the record to contain the annual inspection report; and 6) the Intoxilyzer 8000 was improperly evaluated for approval.

This Court denied the Petitions raising arguments (1), (4), (5), and (6) 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.

II. Failure to Conduct Proper 20 Minute Observation

Wichrowski argues that Officer Velez left the room within the 20 minutes prior to the breath test and testified that he could not observe him during the time he was out of the room. He claims the officer that remained in the room did not look at him to determine whether he took anything into his mouth, burped or regurgitated the contents of his stomach into his mouth. Wichrowski argues that because of the lapse in the observation time prior to the breath test, he was not observed for 20 minutes prior to the breath test as required by Florida Administrative Code, Rule 11D-8.007. Wichrowski argues that the breath test results should not have been admitted because of this alleged violation of the Rule.

Wichrowski initially refused to take the breath test. Then after talking with his father who was also acting as his attorney, he agreed to take the breath test.

Florida Administrative Code 11D-8.007(3) states:

> 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 20 minutes before administering the test**. **This provision shall not be construed to otherwise require an additional 20-minute observation period before the administering of a subsequent sample.** (Emphasis added).

The first sample breath test was administered at 9:16 P.M. Therefore the 20 minute observation period required by the Rule for this case is from 8:56 P.M. through 9:16 P.M. The video shows that Wichrowski's hands are handcuffed behind his back during the entire process.

The video also demonstrates that from 8:56 P.M. until 9:07 P.M.,[1] Officer Hommy Velez observed Wichrowski until he left the room. At that time, a female officer observed Wichrowski from 9:07 P.M. to 9:09 P.M. until a male officer took over the observation. For approximately eight seconds there is no officer shown on camera during the time it takes the male officer to walk around what appears to be a partition in the room to get to a desk. During these eight seconds, the video shows that Wichrowski is seated with his back against the wall, his left profile facing the camera, and his hands handcuffed behind his back. It can be seen from the video that Wichrowski does not place anything into his mouth or regurgitate during these eight seconds. From 9:09 P.M. to 9:11 P.M., the male officer observed Wichrowski until Officer Velez returned. Officer Velez continued to observe Wichrowski from 9:11 P.M. until the first sample breath test was administered at 9:16 P.M. Therefore, the evidence entered at the hearing shows that an officer reasonably ensured that Wichrowski had not taken anything by mouth or regurgitated for at least 20 minutes before administering the test. Unlike *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69 (Fla. 5th DCA 1994) cited by Wichrowski, in this case Wichrowski did not demonstrate that the 20 minute observation period Rule was violated.

In addition, continuous face to face observation is not required to comply with Rule 11D-8.007. *Kaiser v. State*, 609 So. 2d 768 (Fla. 2d DCA 1992). The video demonstrates that all the officers were in a position to observe Wichrowski to ensure that the he had not placed anything in his mouth or regurgitate.

[1] It was stipulated at the hearing that that the video's timestamp was one hour behind the actual time possibly due to someone forgetting to change the clock after daylight savings time. (Pet. App. A, p. 24, 27- 28).

Based on the evidence submitted at the hearing, the hearing officer properly determined that the officers reasonably ensured that Wichrowski had not taken anything by mouth or regurgitated for at least 20 minutes before administering the test. Therefore, the Department substantially complied with Rule 11D-8.007.

III. Intoxilyzer 8000 Not Kept In Secure Location and Accessible to Unauthorized Persons

Wichrowski 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 a non-FDLE permitted individual who had access to the machine and it was kept in locations that were not secure in violation of Rule 11D-8.007. Wichrowski 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 the unauthorized individual. Wichrowski argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5) 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 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. Wichrowski attempted to demonstrate that the Department failed to substantially comply with administrative rules by speculating that the machine was accessed by an unauthorized person, not located in a secure location, and not inspected by the Department after access by the unauthorized person.

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.

Lynn Pettingill, the agency inspector, testified that the Intoxilyzer 8000 used in this case was driven by an officer to FDLE in Tallahassee for the Department inspection prior to the date of the breath test and returned by the same method. Pettingill testified

that the Department inspection was completed before the machine was returned to the Apopka Police Department and he conducted an agency inspection before placing the machine back in service.

Wichrowski's breath test was conducted on March 24, 2012. The March 2, 2012 agency inspection report and the breath test affidavit that lists the last agency inspection date as March 2, 2012, were admitted into evidence at the hearing. Therefore, the machine used to conduct Wichrowski's breath test was inspected in accordance with the rules prior to the administration of Wichrowski's breath test. Based on the foregoing, the Court finds that Wichrowski 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.

In conclusion, Petitioner was not deprived of due process, the hearing officer did not depart from the essential requirements of law and there was competent substantial evidence to support the hearing officer's findings.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED**. Petitioner's Motion for Attorney's Fees is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _16th_ day of _October, 2012.

/S/____________________________
F. RAND WALLIS
Circuit Judge

_/S/___________________________
HEATHER L. HIGBEE
Circuit Judge

_/S/___________________________
JULIE H. O'KANE
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 **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this _16th day of October, 2012.

_/S/______________________________
Judicial Assistant