

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

STEPHANIE WYATT,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,

Respondent.

CASE NO.: 2012-CA-17271-O

Writ No.: 12-82

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Kenneth Russell, Hearing Officer.

Stuart I. Hyman, Esquire,
for Petitioner.

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

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

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephanie Wyatt ("Wyatt" or "Petitioner") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department" or "Respondent") 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

On August 25, 2012, Wyatt was arrested for driving under the influence. Wyatt provided breath test results of 0.175 and 0.164 and her license was suspended. She requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and a hearing was held on September 20, 2012.

At the hearing, Wyatt 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; subpoenas for Roger Skipper, Patrick Murphy, Laura Barfield, and FDLE Custodian of Records Jennifer Keegan that the hearing officer did not issue, and other documents. On September 21, 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).

Arguments

In the Petition for Writ of Certiorari, Wyatt argues that: 1) 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, Patrick Murphy, Jennifer Keegan and Laura Barfield; 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 annual inspection report; 4) the Intoxilyzer 8000 was improperly evaluated for approval; and 5) she was not lawfully stopped.

I.-IV. Intoxilyzer 8000

This Court denied the Petitions raising arguments one through four 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). Although Petitioner has included a more recent Subject Test Electronic Data of an

Intoxilyzer 8000 breath test result than what was included in *Klinker*, the Court does not find that this document warrants a decision contrary to *Klinker*.¹

For the reasons stated above and in *Klinker* and *Morrow*, the Court finds that the hearing officer properly admitted the breath tests results, there was competent substantial evidence to support the hearing officer's findings, and Petitioner was not deprived of due process.

V. Unlawful Stop of Vehicle

Petitioner claims that Officer Andrew Speer testified that he stopped Petitioner's vehicle for failure to maintain a single lane and other vehicles were not endangered by her driving pattern. She states that Officer Speer observed her vehicle leave its lane on two occasions but it never interfered with any other vehicle. Petitioner argues that her driving pattern does not meet the reasonable suspicion standard necessary to stop her vehicle.

Although Officer Speer testified that Petitioner was stopped for failing to maintain a single lane, the arrest affidavit also states that Petitioner was stopped because the officer was concerned that Petitioner was either distracted or under the influence of drugs or alcohol. The arrest affidavit states as follows:

On 8/25/2012 at approximately 0135 hours, I was traveling northbound on State Road 600 in my fully marked patrol car (#327). At the time, I observed a black Volkswagen SUV traveling northbound in the center lane near just before the intersection of Lake Avenue. The Volkswagen drew my attention because both of its left side tires were riding directly on the striped white line and then crossed over it just before entering the intersection of Lake Avenue. As I continued to follow the aforementioned vehicle northbound at a safe distance, its right side tires crossed over the striped line and entered the curb lane for approximately 2 seconds before the driver sharply corrected the steering just before Manor Road. Between the intersections of Manor Road and Horatio Avenue the black Volkswagen continued to drift from side to side within its lane and came close to leaving its lane of travel on multiple occasions. Just before the Intersection of George Avenue, I became concerned that the driver was either distracted or under the influence of drugs or alcohol. I activated my overhead

¹ The Court notes that this document refers to an Intoxilyzer 8000 with a different serial number than the machine used to conduct Petitioner's breath test and the date of that test was July 18, 2010, two years prior to Petitioner's breath test. (See Pet. App. D).

emergency equipment and conducted a traffic stop on the same black Volkswagen bearing Florida tag (L625AC). The driver pulled to the curb lane and turned into the well-lit Publix parking lot at 242 N. Orlando Ave.

(Pet. App. CC, DDL 5).

A legitimate concern for public safety can warrant an investigatory stop to determine the reason for an erratic driving pattern. *Bailey v. State*, 319 So. 2d 22 (1975) (stop of driver weaving within her own lane of traffic and driving at a slow speed was justified to determine reason for unusual operation of vehicle); *State v. Carrillo*, 506 So. 2d 495, 496 (Fla. 5th DCA 1987) (vehicle weaving within lane more than five times for a quarter mile justified stop for driving under the influence); *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (observation of driver using lane markers to position vehicle and abruptly slowing from 55 to 30 miles per hour then rapidly accelerating justified stop to determine cause of erratic driving).

Officer Speer testified that Petitioner drifted within her lane for about three or four blocks approximately three or four times. (Pet. App. A. 11-12). The officer also stated in the arrest affidavit that Petitioner's driving pattern gave him concern that the driver was either distracted or driving under the influence of alcohol. Therefore, there was competent substantial evidence to support the hearing officer's findings that Petitioner was lawfully stopped.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**. In addition, Respondent's Motion to Strike Petitioner's Appendix to the Petition, filed January 11, 2013 is also **DENIED**.

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

/S/_____
HEATHER L. HIGBEE
Circuit Judge

/S/_____
JULIE H. O'KANE
Circuit Judge

/S/_____
REGINALD K. WHITEHEAD
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**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 14th day of February, 2013.

/S/ _____
Judicial Assistant