

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

MICHAEL GROSS,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-6974-O

Writ No.: 13-42

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.

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

BEFORE EVANS, DOHERTY, O'KANE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Gross (“Gross”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department or “Respondent”) final order sustaining the suspension of his driver 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).

On March 7, 2013, Gross was arrested for driving under the influence. Gross provided breath test results of 0.180 and 0.170 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and hearings were held on April 15, 2013 and April 23, 2013.

At the hearing, Gross 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 the Intoxilyzer 8000; numerous breath test results obtained from various Intoxilyzer 8000 machines; subpoenas that the hearing officer did not issue for FDLE Inspectors Roger Skipper, Patrick Murphy, FDLE Custodians of Records Jennifer Keegan, Laura Barfield, and other documents. On April 23, 2013, the hearing officer entered a written order sustaining Gross's license suspension.

“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. (2013).

In the Petition for Writ of Certiorari, Gross 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 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 Department inspection report; 4) the Intoxilyzer 8000 was improperly evaluated for approval; and 5) the Intoxilyzer 8000 was not kept in a secure location and was accessible by unauthorized individuals.

This Court denied the Petitions raising these same arguments in *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 1a (Fla. 9th Cir. Ct. Sept. 10, 2012); *Keen v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 15a (Fla. 9th Cir. Ct. Oct. 8, 2012); *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. Feb. 27, 2012) and numerous other cases. Furthermore, the Fifth District Court of Appeal denied Klinker's Petition for Writ of Certiorari seeking to quash this Court's opinion. *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835 (Fla. 5th DCA 2013), *review denied*, 123 So. 3d 558 (Fla. 2013). The Court ruled that challenges to the approval process of the Intoxilyzer machine are beyond the scope of a formal driver's license review proceeding and the Intoxilyzer 8000 is approved for evidentiary use in Florida. *Id.* at 841. The Fifth District also determined that the FDLE Inspection Report is not a document

required to be submitted by law enforcement pursuant to section 322.2615(2) and therefore, the driver has no right to request subpoenas for individuals identified in that report. *Id.*

Based on the foregoing, there was competent substantial evidence to support the hearing officer's decision, and Petitioner Gross was not deprived of due process.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that The Petition for Writ of Certiorari is **DENIED**. Respondent's Motion to Tax Attorney's Fees and For Sanctions is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 4th day of December, 2013.

/S/

ROBERT M. EVANS
Presiding Circuit Judge

DOHERTY and O'KANE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail/ email to: **Stuart I. Hyman, Esq.**, shymanlaw@aol.com, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803; **Kimberly A. Gibbs, Assistant General Counsel**, kingibbs@flhsmv.gov, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 4th day of December, 2013.

/S/

Judicial Assistant