

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

DINA CHUN,

Petitioner,

v.

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

Respondent.

CASE NO.: 2013-CA-9049-O

Writ No.: 13-57

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

Stuart I. Hyman, Esquire,
for Petitioner.

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

BEFORE J. RODRIGUEZ, SHEA, LATIMORE, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Dina Chun (“Chun”) seeks certiorari review of the Department of Highway Safety and Motor Vehicles’ (“Department”) final order sustaining the suspension of her 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 April 27, 2013, Chun was arrested for driving under the influence. Chun provided breath test results of 0.160 and 0.156 and her license was suspended. She requested a formal review hearing pursuant to section 322.2615, Florida Statutes, and the hearing was held on May 30, 2013. On June 6, 2013, the hearing officer entered a written order sustaining Chun'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).

Chun argues that the hearing officer failed to follow the essential requirements of the law when she considered the evidence that arose from an illegal seizure. Chun claims there was no well-founded suspicion of criminal activity or probable cause to seize her because she was

lawfully sleeping in a lawfully parked car and Trooper Vickers had no founded suspicion of criminal activity to order her to open the door and roll down the window. Chun also argues that the Trooper unlawfully ordered her to exit the vehicle because at that time, the Trooper only observed the odor of alcohol coming from the passenger compartment of the vehicle and no other evidence that she was impaired.

The following facts are derived from Trooper M.K. Vickers' arrest affidavit, Trooper Robert Hull's sworn statement, and the Road Ranger's witness statement submitted at the evidentiary hearing. On April 27, 2013 at approximately 3:27 A.M., Troopers Vickers and Hull were dispatched to the Florida Turnpike north of I-4 in reference to a report by a Road Ranger that there was a vehicle stopped on the shoulder with its engine running, and a female behind the wheel who was unresponsive after the Road Ranger pounded on the hood, roof, windshield, and door of the vehicle. Trooper Hull was unable to awake the driver after knocking on the windows multiple times. When Trooper Vickers arrived, he observed Trooper Hull standing at the passenger side of the vehicle shining his light in the driver's face and the driver had her hands in front of her face. He then approached the passenger side and knocked on the window. Chun awoke at that time and Trooper Hull described her as appearing disoriented with red and bloodshot eyes. Trooper Vickers asked her to roll down the window. After she complied, he asked her if she was ok and she responded yes. Trooper Vickers stated he could smell the odor of alcohol coming from the vehicle. He then requested Chun's driver license and asked her to turn off the engine and step out of the vehicle. After she stepped out of the vehicle, Trooper Vickers observed additional signs of impairment. Chun performed poorly on the field sobriety exercises and was arrested for driving under the influence.

The Troopers' initial encounter with Chun was a consensual encounter for a well-being check in response to the Road Ranger's report of an unresponsive female sitting in the driver's seat of a running vehicle on the shoulder of the Florida Turnpike. *Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) (finding that an officer making contact with a driver of parked car supported "a finding of a consensual encounter" and that "[t]he officer was not required to negate each and every possible act or circumstance that might transform a consensual encounter into an investigatory stop"); *Dermio v. State*, 112 So. 3d 551 (Fla. 2d DCA 2013) (police officer's actions of opening door was consensual encounter to check on well-being of driver in a car with the motor running and lights on who appeared to be sleeping or possibly in an unconscious state, failed to react when the officer shined her flashlight into the vehicle, seemed incoherent after waking when the officer tapped the flashlight on the vehicle's window, and did not comply with the officer's order to roll down the window). The hearing officer reviewed the video of the encounter and arrest during the hearing and stated in the final order that both Troopers had to knock on Chun's window numerous times before she awoke and Chun appeared disoriented when she awoke. Therefore, Trooper Vickers could lawfully request Chun to step out of the vehicle to continue his well-being check since there was still a question about her welfare after she awoke and appeared disoriented. *See Id.* at 556 (deputy's request for a driver to roll down his window and the act of opening the driver's door did not transform the consensual encounter into investigatory stop because the deputy's concern for the driver's safety had not yet been alleviated because the driver continued to appear incoherent and "out of it".)

The evidence submitted at the hearing was competent substantial evidence to support the hearing officer's decision denying Chun's motion to set aside the suspension based on an

unlawful seizure. Therefore, the hearing officer did not depart from the essential requirements of law by considering the evidence from the encounter.

Chun also argues that: 1) she was deprived of due process 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 because the record did not contain the annual 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 Petitions alleging 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 Fifth District 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 Court 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.* Therefore, Chun was not deprived of due process.

Based on the foregoing, the hearing officer did not depart from the essential requirements of law, there was competent substantial evidence to support the hearing officer's decision, and Petitioner Chun 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 13th day of December, 2013.

/S/ _____
JOSE R. RODRIGUEZ
Presiding Circuit Judge

SHEA and LATIMORE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Stuart I. Hyman, Esq.**, shymanlaw@aol.com, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803; **Richard M. Coln, Assistant General Counsel**, richardcoln@flhsmv.gov, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 13th day of December, 2013.

/S/ _____
Judicial Assistant