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

ANDREW MILUNSKI,

Petitioner,

v.

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

Respondent.
_____/

CASE NO.: 2013-CA-10428-O
Writ No.: 13-70

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 TURNER, WHITEHEAD, DAWSON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Milunski ("Milunski") seeks certiorari review of the Department of Highway Safety and Motor Vehicles' ("Department") 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 June 9, 2013, Milunski was arrested for driving under the influence. He provided breath test results of 0.164 and 0.156 and his license was suspended. He requested a formal review hearing pursuant to section 322.2615 of the Florida Statutes and the hearing was held on July 11, 2013. On July 18, 2013, the hearing officer entered a written order sustaining his 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).

Milunski argues that the hearing officer improperly admitted the breath test results in violation of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Milunski claims the Department is required to demonstrate that the breath test results are in compliance with section

90.702 of the Florida Statutes and the Department failed to show the results are scientifically reliable under *Daubert*.

For an analysis of a person's breath to be considered valid, the Department must show that it was performed substantially according to the methods approved by the Department as reflected in the administrative rules and statutes. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 782 (Fla. 5th DCA 2010); *Dep't of Highway Safety & Motor Vehicles v. Russell*, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001). 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 section 316.1934(5) of the Florida Statues. § 316.1934(5), Fla. Stat. (2013); *Berne*, 49 So. 3d at 783; *Gurry v. Dept. of Highway Safety*, 902 So. 2d 881, 884 (Fla. 5th DCA 2005).

In this case, the Department admitted the breath test affidavit, DDL#4 and the agency inspection report, DDL#5. The breath test affidavit and the agency inspection report contained all the statutorily required information to establish that the Intoxilyzer 8000 used for Milunski's test was properly inspected and maintained, performed appropriately, and produced accurate and reliable test results. *See Berne*, 49 So. 3d at 783; *Russell*, 793 So. 2d at 1076; *Dep't of Highway Safety & Motor Vehicles v. Dehart*, 799 So. 2d 1079, 1081 (Fla. 5th DCA 2001). Therefore, the breath test affidavit together with the agency inspection report is presumptive proof of results of an authorized test and that the Department complied with the applicable statues and rules. Milunski attempted to introduce documents about breath test results that were not his results, documents related to the 2002 approval study of the Intoxilyzer 8000, and other documents that were not relevant to the scope of the hearing. The Fifth District Court of Appeal held 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. *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 841 (Fla. 5th DCA 2013), *review denied*, 123 So. 3d 558 (Fla. 2013). Therefore, the hearing officer correctly excluded Milunski's irrelevant evidence and the breath test affidavit was properly admitted.

Milunski also argues that he was denied due process because the hearing officer prevented him from asking relevant questions, did not allow him to proffer for appellate purposes documents to show that the Intoxilyzer 8000 and the results were scientifically unreliable under *Daubert*, and did not issue subpoenas for witnesses who would have established that the breath test results were scientifically unreliable.

The hearing officer is permitted to regulate the course and conduct of a hearing and make decisions on the relevance and credibly of evidence presented. § 322.2615(6)(b), Fla. Stat. (2013); Fla. Admin. Code R. 15A-6.013(7). As stated in the foregoing, the documents Milunski's counsel attempted to proffer and the questions he attempted to ask regarding the approval process and the scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing. *Klinker*, 118 So. 3d at 841. Therefore, the hearing officer properly limited the questions and evidence to matters within the scope of the hearing. In addition, the Fifth District has determined that a driver is limited to subpoenas for individuals identified in documents required to be submitted by law enforcement pursuant to section 322.2615(2). *Id.* at 839. The subpoenas that were not issued by the hearing officer were for witness not identified in the documents required to be submitted. Therefore, Milunski was not deprived of due process.

Milunski next claims that section 316.1934(5)(e) requires the breath test affidavit to include the date of the most recent required maintenance on the instrument. He argues that there

was no evidence that the date of the last agency inspection report on the affidavit was the most recent required inspection because the annual Department inspection was not introduced.

As stated previously, 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, including the date of the most recent required inspection. § 316.1934(5), Fla. Stat. The agency inspections are conducted monthly. Fla. Admin Code R. 11D-8.006(1). The breath test affidavit, DDL#4 states "Date of Last Agency Inspection: 5/16/2013." Milunski's breath test was conducted on June 9, 2013. Milunski has not presented any evidence that the date of the agency inspection was not the most recent required inspection. Therefore, there was competent substantial evidence to support the hearing officer's decision to admit the breath test results.

Based on the foregoing, the hearing officer did not depart from the essential requirements of the law, there was competent substantial evidence to support the decision, and Petitioner Milunski 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 19th day of December , 2013.

/S/_____
THOMAS W. TURNER
Presiding Circuit Judge

WHITEHEAD and DAWSON, 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; **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 19th day of December , 2013.

/S/_____
Judicial Assistant