

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

**CHRISTOPHER OLIVERI,**

Petitioner,

v.

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

Respondent.

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**CASE NO.: 2013-CA-005733-O**

**Writ No.: 13-71**

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

Stuart I. Hyman, Esquire,  
for Petitioner.

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

BEFORE MCDONALD, HIGBEE, and MUNYON, J.J.

**PER CURIAM.**

**FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

Petitioner, Christopher Oliveri (“Oliveri”) seeks certiorari review of Respondent, the Department of Highway Safety and Motor Vehicles’ (“Department”) 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).

### *Findings of Fact*

As gathered from the Hearing Officer's findings of fact from the testimony, related documents, and breath test video presented at the formal review hearing on February 19, 2013, March 22 and 26, 2013, the facts were as follows: On January 12, 2013, at approximately 2:15 a.m., Corporal Robert Lees with the Orange County Sheriff's Office was traveling the posted speed limit of 45 mph on Alafaya Trail when he observed a vehicle pass his patrol car at a higher rate of speed. Corporal Lees paced the vehicle at 63 mph in the 45 mph zone. Corporal Lees noted that the Florida tag, GZL5G, expired September 2012, but had a registration sticker expiring September 2013.

Corporal Lees initiated a traffic stop when the vehicle came to an abrupt stop at a red light. The vehicle then pulled into a parking lot and stopped. Corporal Lees then made contact with the driver, identified as Oliveri, who was surprised to hear he was speeding. Oliveri produced a valid registration for Florida tag, GRB3K, a different tag than the tag on the vehicle. Oliveri told the officer that he was coming from the Knight's Library bar where he had been drinking beer, but had been drinking water for the last hour. While speaking to Oliveri, Corporal Lees observed that his eyes were red, bloodshot, and glassy; his speech was slurred; he smelled heavily of alcoholic beverages; he started chewing gum; he fumbled with his wallet and after dropping the wallet, he needed help finding it between his feet. At that point, Corporal Lees called Deputy Scott Danjou to conduct an impaired driver investigation.

Deputy Danjou arrived at approximately 2:19 a.m. and spoke with Corporal Lees, who advised him of his observations thus far. Deputy Danjou then met with Oliveri and immediately smelled a strong odor of an alcoholic beverage coming from his breath. Deputy Danjou noted

that Oliver's eyes were bloodshot, red and glassy, he was chewing gum rapidly, and portions of his speech were slurred.

At that point, Deputy Danjou asked Oliveri if he would perform the field sobriety exercises. Oliveri said he didn't want to do anything unless he could get a blood draw. Deputy Danjou explained to Oliveri that he was not able to get a blood draw there and that based on the totality of the circumstances, his refusal could be used against him in a criminal case. Deputy Danjou asked Oliveri again if he would submit to the exercises and Oliveri said no. Based on the observations thus far, Deputy Danjou determined that Oliveri was driving while under the influence to the extent his normal faculties were impaired and placed him under arrest.

During transport to the Orange County Breath Test Center, Deputy Danjou could smell the strong odor of an alcoholic beverage within his patrol car. Once at the Breath Test Center, the 20 minute observation was conducted and the Implied Consent Warnings were read. Oliveri then asked for an attorney. In response, Deputy Danjou read the Third District Court of Appeal ruling informing Oliveri that he was not entitled to meet with counsel prior to the administration of the breath test.<sup>1</sup> Oliveri asked what if he wanted a blood test. Deputy Danjou advised Oliveri that he would have to do that on his own accord and time, and pay for it. Oliveri stated that he preferred a blood test and wasn't sure what his rights were. Deputy Danjou then re-read the Third District's ruling and asked if he would take the breath test. Oliveri again answered that he preferred a blood test.

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<sup>1</sup> Although the Third District Court of Appeal ruling referred to is not cited in the record, this Court notes the case, *State v. Hoch*, 500 So. 2d 597 (Fla. 3d DCA 1986) (holding that a person has no Sixth Amendment right-to-counsel before being required to submit to a breath test and the results of such test are physical evidence and not testimonial; thus, a suspect has no Fifth Amendment right to consult with an attorney prior to deciding whether to submit to the test).

At that point, the colloquy continued at length as follows: Breath Test Operator (“BTO”), William Harden, told Oliveri that they do not do blood tests at the DUI Center. Oliveri then asked how he could get a blood test. BTO Harden explained to Oliveri that once he was next door at the jail he would have to make calls, do all the legwork to set it up, and pay for it. BTO Harden further informed Oliveri that only breath tests are done at the Breath Test Center and in order to get a blood test he would have to take the breath test first. Oliveri again stated he wanted a blood test and BTO Harden repeated the same information. Oliveri then stated that he felt like he didn't have a choice. Oliveri was then told that he didn't have to do anything if he didn't want to as he could either take the breath test or refuse to take the breath test.

Oliveri then refused the breath test and again stated that he wanted a blood test. Deputy Danjou then asked Oliveri if he still refused the breath test knowing that his driving privilege would be suspended for one year for a first refusal and 18 months if he had previously refused a breath test. Oliveri then questioned the license suspension for refusing and asked if that would happen even if he took a blood test as he didn't believe in the accuracy of the breathalyzer. Oliveri said that he felt the breath test was his only choice and he was being forced to take the test. Deputy Danjou again informed Oliveri that he had two choices, take the breath test or refuse to take the breath test at which point his driving privilege would be suspended for a year.

Deputy Danjou also again informed Oliveri that if he wanted to have a blood test, he would have to do it on his own after he got to the jail and at the jail he would have to get a phone book, look for a phlebotomist, have them scheduled to come to the jail, draw the blood and submit it into evidence, all at his own expense. Deputy Danjou also again advised Oliveri that only breath tests are done at the Breath Test Center. He then asked Oliveri again, to answer yes or no if he would take the breath test. Oliveri then said he didn't understand "a prior accord" as

he'd never been in this situation before. Deputy Danjou repeated if he refused to take the breath test his license would be suspended for one year and if he had a prior refusal it would be suspended for 18 months. Oliveri again refused to take the breath test. Deputy Danjou repeated the consequences for refusing to take the breath test. Oliveri then stated that he should probably take the test if his license would be suspended for a year for refusing. Again Deputy Danjou told Oliveri he needed a yes or no answer. Oliveri then went into another discussion about his choices, what would happen if he did take the breath test, and the suspension of his driving privilege. Deputy Danjou told him that he could not provide legal advice and that the technician was going to start the instrument. He told Oliveri to think about it, he'd be given instructions on how to take the breath test, and he could then either take the test or refuse to take it as it was his choice. The instructions were then provided to Oliveri and he asked did most people take the breath test. BTO Harden told Oliveri that he didn't keep count. Oliveri repeated the consequences of refusing at least twice. At that point, Oliveri stated he would take the breath test and the instructions were provided again. Oliveri provided two sufficient samples that read 0.149 and 0.147 and his driver's license was suspended for driving with an unlawful breath alcohol level.

Oliveri testified at the formal review hearing on February 19, 2013. When asked by his counsel if either the breath test operator or the deputy provided him with timely telephone access to arrange for a blood test, he stated no. When asked by counsel if upon arrival at the jail, did the officer make any attempt to assist him, Oliveri stated no. Oliveri also stated that he did not tell anyone at the jail that he wanted a blood test because it seemed like it was a major hassle and inconvenience and he was tired, so he just dropped it. Further, Oliveri stated that he had a discussion with a nurse about it, but he had no recollection of what the actual conversation was.

Lastly, Oliveri testified that he did use a phone at the jail, but had trouble with area code numbers out of that area and he tried to call collect but was never able to do so.

### ***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 law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical 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 s. 316.193.

§ 322.2615(7)(a), Fla. Stat. (2013).

### ***Arguments***

In the Petition for Writ of Certiorari, Oliveri argues that: 1) The license suspension should have been aside based on the failure to provide him with an independent blood test or assistance upon his request; 2) The Hearing Officer deprived him of procedural due process of law by failing to issue subpoenas for Florida Department of Law Enforcement (“FDLE”) personnel, Roger Skipper, Patrick Murphy, Jennifer Keegan, and Laura Barfield to appear along with the documents requested in the subpoena duces tecum; 3) The breath test results were not

properly approved per FDLE Rule 11D-8.003 because they were obtained by use of an unapproved breath testing machine and provided scientifically unreliable results; 4) The breath test results were inadmissible due to the failure of the record to contain the most recent Department inspection; 5) The Intoxilyzer 8000 machine was improperly evaluated for approval in violation of FDLE Rule 11D-8.003; and 6) The Intoxilyzer 8000 machine was not kept in a secure location; was accessible to individuals not authorized by FDLE to have access to the machine, was not properly reinspected in violation of FDLE Rules 11D-8.004 and 11D-8.007, and the hearing officer improperly prevented evidence in this regard.

### *Analysis*

#### *Argument 1 addressing the request for an independent blood test*

At the formal review hearing, Oliveri's counsel moved to set aside the license suspension based on the failure to provide him with an independent blood test or assistance upon his request. The Hearing Officer denied the motion based on the on the record evidence including Oliveri's testimony. In support of his argument both at the hearing and in this Petition, Oliveri cited *Unruh v. State*, 669 So. 2d 242 (Fla. 1996). In *Unruh*, the Florida Supreme Court reviewed the certified question as to whether the State was required to take affirmative action to assist a person in custody for DUI in obtaining an independent test for blood alcohol when it is requested pursuant to section 316.1932(1)(f)3, Florida Statutes. The Court answered the question in the affirmative holding that law enforcement must render reasonable assistance in helping a DUI arrestee obtain an independent blood test upon request. Further, the Court explained that in some cases, minimal aid such as providing access to a telephone and directory will be sufficient; in others, more active assistance such as transporting the arrestee to a blood testing facility will be necessary. Lastly, the Court explained that whether the assistance provided is "reasonable" and

thus sufficient to satisfy law enforcement's duty under the statute, will depend on the circumstances of each case.

In the instant case, the record evidence specifically relating to this argument included the testimony of Deputy Danjou, BTO Harden, and Oliveri and revealed: 1) Deputy Danjou and BTO Harden advised Oliveri of the procedures to obtain the blood test that could be done at the jail; 2) Per Oliveri's testimony, he used the telephone at the jail; and 3) Also per Oliveri's testimony, he did not tell anyone at the jail that he wanted a blood test; thus, he did not pursue the blood test; and while he may have discussed it with the nurse, he could not recall the conversation.

As the Court explained in *Unruh*, a finding as whether law enforcement provided reasonable assistance sufficient under the statute depends on the circumstances of each case. In the instant case, the Hearing Officer as the finder of fact was responsible for weighing the evidence including the credibility and demeanor of Oliveri and the witnesses in determining whether law enforcement's assistance was reasonable. *See Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) citing *Dep't of Highway Safety & Motor Vehicles v. Marshall*, 848 So. 2d 482 (Fla. 5th DCA 2003) (explaining that in this type of administrative hearing, the hearing officer is not required to believe the testimony of any witness, even if unrebutted); *see also City of Deland v. Benline Process Color Company*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (holding that the weight and credibility of the evidence before the administrative agency cannot be reevaluated by the reviewing court). Accordingly, this Court finds that based on the record evidence including the testimony of Deputy Danjou, BTO Harden, and Oliveri, the Hearing Officer followed the statutory requirements in denying Oliveri's motion



by making the finding that law enforcement did not fail to provide reasonable assistance to Oliveri to obtain a blood test.

***Arguments II, III, IV, & V - addressing the administration, inspection, approval, and evaluation of the breath testing machine***

At the formal review hearing held on March 26, 2013, Oliveri's counsel attempted to introduce documents related to the Intoxilyzer 8000 machine including the 2002 and 2005 evaluation reports; 2002 conforming products list; 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 using software 8100.26 and 8100.27 with testing dates from 2006 and 2007; FDLE data from 2011-2012 pertaining to breath volume in the machine; and subpoenas for FDLE personnel, Roger Skipper, Laura Barfield, Jennifer Keegan, and Patrick Murphy that the Hearing Officer did not issue.

In *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 1a (Fla. 9th Cir. Ct. 2012) and *Morrow v. Dep't of Highway Safety & Motor Vehicles*, 19 Fla. L. Weekly Supp. 704a (Fla. 9th Cir. Ct. 2012), this Court addressed identical arguments and denied the petitions seeking writs of certiorari. Further, second tier certiorari review of the *Klinker* decision was sought in *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835 (Fla. 5th DCA 2013), *review denied* at 123 So. 3d 558 (Table) (Fla. Sept. 3, 2013), where the Fifth District denied the petition of writ of certiorari on the merits rejecting *Klinker's* arguments. Accordingly, for the reasons stated in *Klinker* and *Morrow*, this Court finds that Oliveri was not deprived of due process and the Hearing Officer properly admitted the breath test results.

***Argument VI - claiming that the Intoxilyzer 8000 was not kept in a secure location,  
Was accessible to unauthorized persons, and was not properly reinspected***

Oliveri 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 common carrier, and therefore it was kept in locations that were not secure and individuals who did not possess a valid FDLE permit had access to the machine in violation of Rule 11D-8.007. Oliveri 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 unauthorized individuals. Oliveri argues that the breath test results were inadmissible due to these alleged violations.

Section 316.1934(5), Florida Statutes (2013), states that the breath alcohol 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. Dep't 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 alcohol 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. Oliveri attempted to demonstrate that the Department failed to substantially comply with administrative rules by speculating that

the machine was accessed by unauthorized persons, not located in a secure location, and not inspected by the Department after access by unauthorized persons.

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.

Oliveri's breath test was conducted on January 12, 2013. The agency inspection report and the breath alcohol test affidavit that lists the last agency inspection date as January 10, 2013 were admitted into evidence at the hearing. Therefore, the machine used to conduct Oliveri's breath test was inspected in accordance with the rules prior to the administration of his breath test. Based on the foregoing, this Court finds that Olivieri 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.

**Conclusion**

Based on the foregoing, procedural due process was followed, the Hearing Officer followed the essential requirements of the law, and there was competent substantial evidence to support the Hearing Officer’s findings and decision. “As long as the record contains competent substantial evidence to support the agency’s decision, the decision is presumed lawful and the court’s job is ended.” *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Christopher Oliveri’s Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, this 13th day of January, 2014.

/S/ \_\_\_\_\_  
**ROGER J. MCDONALD**  
**Presiding Circuit Judge**

HIGBEE and MUNYON, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Stuart I. Hyman, Esquire**, Stuart I. Hyman, P.A., 1520 East Amelia St., Orlando, Florida 32803, [shymanlaw@aol.com](mailto:shymanlaw@aol.com) and **Richard M. Coln, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, [richardcoln@flhsmv.gov](mailto:richardcoln@flhsmv.gov), [marianneallen@flhsmv.gov](mailto:marianneallen@flhsmv.gov) on this 13<sup>th</sup> day of January, 2014.

/S/ \_\_\_\_\_  
Judicial Assistant