

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

LISA CHARLENE TORRENCE,

**CASE NO.: 2013-CA-012342-O
WRIT NO.: 13-84**

Petitioner,

v.

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

Respondent.

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

Matthew P. Ferry, Esquire,
for Petitioner.

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

BEFORE ROCHE, HIGBEE, and J. KEST, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Lisa Charlene Torrence (“Torrence”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the Order sustained the suspension of her driver’s license. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

Findings of Fact

As gathered from the findings from the testimony, Arrest Report, Breath Alcohol Test Affidavit, Agency Inspection Report, and other related documents presented at the formal review hearing on September 12, 2013, the facts are summarized as follows: On August 11, 2013 at approximately 2:01 a.m., Deputy Scott Danjou with the Orange County Sheriff's Office was dispatched to the scene where a female person was passed-out in the driver's seat of a silver sports utility vehicle ("subject vehicle") near the River Park Apartments complex on River Park Boulevard and Dean Road in Orange County. Deputy Danjou testified that prior to reaching the apartment complex entrance he observed the subject vehicle partially parked on the road and partially parked on the curb with its headlights still on. The deputy then parked his unmarked patrol vehicle behind the subject vehicle and activated the patrol vehicle's emergency lights.

At that point, the deputy approached the subject vehicle and observed the sole occupant, a female person, later identified by her Florida driver's license as Torrence, was slumped against the driver's door in the driver's seat and that subject vehicle was in park with the engine running. The deputy also observed that Torrence was wearing a pink paper wristband stamped "Wall Street" on her right wrist, which identified legal drinking age patrons. The deputy then knocked on the driver's window a few times without response and shined his flashlight at Torrence's face without a response. The deputy then opened the driver's door as it was unlocked and woke up Torrence by applying a sternum rub.

Deputy Danjou asked Torrence if she needed medical attention and she answered that she did not. Torrence informed the deputy that she was okay and that she was one hundred percent tired. The deputy observed that Torrence's eyes were red and glassy. At that point, Deputy Danjou requested Torrence to turn off the vehicle. However, instead, she attempted to place the

vehicle in drive but was not successful as the brake pedal was engaged. The deputy again requested Torrence to turn off the vehicle and also to provide him with the vehicle's keys and she then complied. The deputy also detected an odor of an alcoholic beverage emanating from Torrence's breath as she spoke. Deputy Danjou then had Torrence exit the vehicle to speak to him. At that point, believing that Torrence was under the influence of either alcohol or a controlled substance, Deputy Danjou asked Torrence if she would perform the field sobriety exercises and she agreed.

When asked how much alcohol she consumed, Torrence admitted that she consumed 2 to 3 beers downtown and rated herself between a 3 and a 4 on a scale where 0 means sober and 10 means falling down drunk. When asked various medical and mental questions, Torrence denied having any health problems or being on medication that would prevent her from completing the exercises. She did inform the deputy that she was wearing contact lenses, but she could not remember how long the contacts had been in her eyes. She also informed the deputy that she had a bad right ankle and had two knee surgeries in the past. Deputy Danjou also observed that Torrence swayed while standing and swayed during the exercises. Torrence also performed the exercises poorly by not following instructions.

Torrence was then arrested for DUI and transported to the Orange County DUI Center. Elvie Armand, the Breath Test Operator, testified that at the Center, Torrence was observed for at least the 20 minutes period. Ms. Armand also testified that Torrence had red and glassy eyes and she detected an odor of alcoholic beverages emanating from Torrence's breath as she spoke. Deputy Danjou then read Torrence the Implied Consent Warning and requested her to submit to the breath test. Torrence agreed and submitted to the test with results of 0.150 and 0.144. Torrence's driver's license was suspended for driving with unlawful alcohol level.

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, Torrence argues that she was deprived of a meaningful formal review hearing because the Hearing Officer prevented her counsel from asking relevant questions about the Intoxilyzer 8000 machine and that the Hearing Officer’s decision to sustain her license suspension was not supported by competent substantial evidence that she was lawfully detained, lawfully arrested, or that she had an unlawful breath-alcohol level of 0.08 or higher.

Analysis

Torrence's Arguments Addressing Her Detainment and Arrest

First, Deputy Danjou's observations leading up to Torrence's detainment included: 1) After being dispatched to the scene, prior to reaching the apartment complex entrance, he observed Torrence's vehicle partially parked on the road and partially parked on the curb with its headlights still on; 2) When he approached Torrence's vehicle he observed that Torrence was the sole occupant, was slumped against the driver's door in the driver's seat, and her vehicle was in park with the engine running; 3) Torrence was wearing a pink paper wristband stamped "Wall Street" on her right wrist, which identified legal drinking age patrons; 4) There was no response from Torrence when he knocked on the driver's window and shined his flashlight at Torrence's face and thus, he had to wake Torrence up; 6) While Torrence told Deputy Danjou that she didn't need medical attention and she was okay, she also stated that she was one hundred percent tired; and 7) Torrence's eyes were red and glassy.

To have a valid stop for driving under the influence, a law enforcement officer need only possess a well-founded, reasonable suspicion based upon objective, specific, articulable facts that a person detained in the stop of a vehicle has committed, is committing, or is about to commit a violation of the law. Thus, a person's driving pattern does not have to rise to the level of a traffic infraction to justify a stop. *See State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987). Further, "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992).

Next, Deputy Danjou's additional observations of Torrence before he had her exit her vehicle and before he asked her if she would perform the field sobriety exercises were: 1) When he first requested Torrence to turn off the vehicle, she instead, attempted to place the vehicle in drive but was not successful as the brake pedal was engaged and 2) He detected an odor of alcoholic beverage emanating from Torrence's breath as she spoke. Lastly, Deputy Danjou's additional observations after she exited her vehicle and performed the field sobriety exercises leading to her arrest were: 1) Torrence admitted that she consumed 2 to 3 beers downtown; 2) Torrence swayed while standing and swayed during the exercises; and 3) As described in detail in the Arrest Affidavit, Torrence performed the field sobriety exercises poorly by not following instructions. Accordingly, this Court finds that the totality of Deputy Danjou's observations of Torrence provided competent substantial evidence for the Hearing Officer to find that the stop, detainment, and her arrest were lawful.

Torrence's Arguments as to Questioning Witness about the Approval Process of the Intoxilyzer 8000 Machine and Addressing Evidence of Her Breath-Alcohol Level

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 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 section 316.1934(5), Florida Statutes (2013). *Berne*, 49 So. 3d at 783; *Gurry v. Dept. of Highway Safety*, 902 So. 2d 881, 884 (Fla. 5th DCA 2005). Further, 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).

In this case, the Department admitted the Breath Alcohol Test Affidavit, DDL#4, and the Agency Inspection Report, DDL#5, that contained all the statutorily required information to establish that the Intoxilyzer 8000 used for Torrence'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 statutes and rules. Further, the agency inspections are conducted monthly. Fla. Admin Code R. 11D-8.006(1). The Breath Alcohol Test Affidavit states "Date of Last Agency Inspection: 07/17/2013." Torrence's breath test was conducted on August 11, 2013. Also, at the hearing the Agency Inspector, Kelly Melville, testified that the Intoxilyzer 8000 machine that was used for Torrence's breath test was in compliance on August 11, 2013 when Torrence submitted to the breath test. Therefore, there was competent substantial evidence to support the Hearing Officer's decision to admit the breath test results.

In Torrence's first argument she claims that she was deprived of due process i.e. a meaningful formal review hearing because during the cross-examination of Kelly Melville, the Hearing Officer prevented her counsel from asking Ms. Melville questions to determine if the Intoxilyzer 8000 machine that she submitted to was an approved breath alcohol machine. Also, in her fourth argument, Torrence 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). Torrence claims that the Department is required to demonstrate that the breath test results are in compliance with section 90.702, Florida Statutes, and the Department failed to show the results are scientifically reliable under *Daubert*.

The hearing officer is permitted to regulate the course and conduct of a hearing and make decisions on the relevance and credibility of evidence presented. § 322.2615(6)(b), Fla. Stat. (2013); Fla. Admin. Code R. 15A-6.013(7). As stated in the foregoing, the questions Torrence's counsel 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 and thus, Torrence was not deprived of due process.

Conclusion

Based on the foregoing, this Court finds that Torrence was provided due process and the Hearing Officer's decision to sustain her license suspension did not depart from the essential requirements of the law and was based on competent substantial evidence. Because the scope of this Court's review is limited to determining whether competent substantial evidence existed in support of the Hearing Officer's findings and decision, this Court's review cannot go further to reweigh the evidence presented and as long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and this 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, Lisa Charlene Torrence's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 8th day of July, 2014.

/S/

RENEE A. ROCHE
Presiding Circuit Judge

HIGBEE and J. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Matthew P. Ferry, Esquire**, Law Office Warren W. Lindsey, P.A., P.O. Box 505, Winter Park, Florida 32790 and **Richard M. Coln, Assistant General Counsel**, Dept. of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857, on this 8th day of July, 2014.

/S/

Judicial Assistant