

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

GILBERTO MORENO MEDINA

CASE NO. 2014-CA-373-O

Petitioner,

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES,**

Respondent.

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

Matthew P. Ferry, Esq.
Attorney for Petitioner.

Kimberly Gibbs, Esq.
Assistant General Counsel
Department of Highway Safety and Motor Vehicles
Attorney for Respondent

Before MIHOK, TURNER, UNDERWOOD, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license following an arrest for driving under the influence. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). The Court's review is "limited to a determination of whether procedural due process was

accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence.” *Florida Dept. of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008).

Findings Made by Hearing Officer

At a hearing held on December 17, 2013, the Department hearing officer heard live testimony from Deputy Sean Dobbins and Intoxilyzer testing officer Kelly Melville. She also reviewed the documents submitted by the Orange County Sheriff’s Department. The hearing officer made the following findings:

Shortly after midnight on November 20, 2013, an Orange County deputy stopped Petitioner’s car for making an illegal left turn where a posted sign allowed for right turns only. When he spoke with Petitioner, the deputy smelled alcohol, and observed watery, bloodshot eyes and slightly slurred speech. Petitioner admitted he was coming from a bar and had consumed three beers. The deputy began a DUI investigation and instructed Petitioner to perform field sobriety exercises. The deputy observed a slight sway in Petitioner’s stance. On the walk-and-turn test, Petitioner took too many steps, failed to keep heel to toe on some steps, and had to ask the deputy to repeat the instructions part way through the test. On the one-legged stand, Petitioner did not raise his foot the full six inches he was told to and he overestimated the time by several seconds, as well as counted “one Mississippi” when he had been instructed to count “one thousand one.” He touched his nose with his knuckle rather than his fingertip. Based on the deputy’s training and observations and the field test results, the deputy arrested Petitioner for DUI. Petitioner took the breath test twice and blew scores of .080 and .081.

The hearing officer found that there was probable cause to believe Petitioner was in control of a vehicle while under the influence of alcohol and sustained the license suspension.

Probable Cause Determination

Petitioner argues that the deputy did not have a lawful basis for the stop or the DUI arrest. On review of a license suspension order, the Court is not to make an independent, *de novo* analysis as to whether there was probable cause for the arrest, but instead must determine whether there was sufficient relevant and material evidence that a reasonable mind would accept as adequate to support the hearing officer's decision. *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012; *Comprehensive Med. Access, Inc. v. Office of Ins. Regulation*, 983 So. 2d 45, 46 (Fla. 1st DCA 2008). *See, also, Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So. 2d 513, 519 (Fla. 5th DCA 2006):

The question is not whether substantial competent evidence exists in the record to support a conclusion contrary to the one reached by the hearing officer; the question is whether there exists in the record substantial competent evidence to support the hearing officer's conclusion, even when contrary inferences can be drawn from the evidence.

The record supports a finding that reasonable suspicion existed for the deputy to conduct a traffic stop (the incorrect left turn), and to initiate a DUI investigation (the odor of alcohol, watery, bloodshot eyes, slightly slurred speech, and admission of drinking). As for probable cause to arrest, the hearing officer based it on the deputy's observations of Petitioner's physical state, coupled with his performance on the field sobriety tests.

While it does not appear that Petitioner performed terribly on the exercises, the deputy made careful observations and both recorded and testified to a number of specific

errors committed by Petitioner. See, similarly, *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22 (Fla. 2d DCA 2012): an officer's observations of a driver's physical state (bloodshot, watery eyes, and slow movements), coupled with errors on several of the field sobriety exercises (primarily swaying and stepping off the line), were sufficient to support a hearing officer's finding of probable cause. A reasonable mind can likewise here conclude that there is competent substantial evidence to sustain the probable cause determination.

Shortcomings of the Intoxilyzer

Petitioner contends that the record demonstrates the Intoxilyzer was not shown to be accurate since the testing officer testified that the machine had a standard deviation level. Because the testing revealed Petitioner's blood alcohol level to be right at the legal limit of .08, he argues that variation in the machine readings could well have meant his level was actually below .08.

Where the Department's hearing officer has for review an affidavit in compliance with section 316.1934, Florida Statutes, demonstrating that a breath test was conducted on an approved and tested machine by a person authorized to conduct the test, this is presumptive proof of the results. *Dep't of Highway Safety & Motor Vehicles v. Falcone*, 983 So. 2d 755, 757 (Fla. 2d DCA 2008). The burden then shifts to the driver to demonstrate error. *Id.*

The hearing officer had the requisite Intoxilyzer affidavit as well as the testing officer's testimony to make a finding that Petitioner's blood alcohol exceeded the legal limit. Petitioner's attorney questioned the officer about the Intoxilyzer's standard deviation but she testified that she was not qualified to explain what that meant and she

could not say how it impacted the machine's readings. Petitioner's attorney argued the fact, but failed to present any evidence that the standard deviation numbers meant what he is claiming they do—that the machine is inherently inaccurate and gives readings that may vary up or down from the subject's actual blood alcohol content. Where the standard of proof at a license suspension hearing is preponderance of the evidence (*Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 838 (Fla. 5th DCA 2013)), the hearing officer's finding that the machine was correctly calibrated and operated is supported by the record and was not rebutted.

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 8th day of August, 2014.

/S/ _____
THOMAS A. MIHOK
Presiding Circuit Judge

TURNER and UNDERWOOD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Matthew P. Ferry, Esq.** Law Offices of Warren W. Lindsey, P.A., 1150 Louisiana Avenue, Suite 2, Winter Park, Florida 32789; and to **Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 570066, Orlando, Florida 32857 on this 8th day of August, 2014.

/S/ _____
Judicial Assistant