

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL) 'AY'  
Case No.: 502012CA010478XXXXMB

DUSTIN BRANT WALKER,

Petitioner,

v.

FLORIDA DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES,

Respondent.

---

Opinion filed: APR 04 2013

**Petition for Certiorari to the Florida Department of Highway Safety and Motor Vehicles**

For Petitioner: Ira D. Karmelin, Esq.  
3897 Haverhill Road North, Suite 127  
West Palm Beach, FL 33417

For Respondent: Damaris E. Reynolds, Esq.  
P.O. Box 540609  
Lake Worth, FL 33454

**PER CURIAM.**

Dustin Brant Walker ("Walker") seeks review of an order of the Department of Highway Safety and Motor Vehicles ("DHSMV") affirming the suspension of his driver's license. We find that the DHSMV hearing officer erred in admitting the results of Walker's breath-alcohol test into evidence without shifting the burden to DHSMV to prove that the breath test operator and agency inspector had valid permits.<sup>1</sup> See *Boivin v. DHSMV*, 19 Fla. L. Weekly Supp. 1004a (Fla. 15th Cir. Ct. Sept. 5, 2012); *Rivera v. DHSMV*, 19 Fla. L. Weekly Supp. 1048a (Fla. 15th

---

<sup>1</sup> We decline to grant certiorari relief on the other ground raised in Walker's petition.

Cir. Ct. Sept. 5, 2012). If the breath test operator and agency inspector did not have valid permits when they operated and inspected the Intoxilyzer machine used on Walker, the results of Walker's breath-alcohol test are not admissible in the license suspension proceeding. *See Yankey v. DHSMV*, 6 So. 3d 633, 637 (Fla. 2d DCA 2009) (citing § 316.1932, Fla. Stat. (2012)); Fla. Admin. Code R. 11D-8.006(1). Furthermore, without the results of the breath-alcohol test, the hearing officer did not have substantial, competent evidence to support the finding that Walker drove with a blood- or breath-alcohol level of 0.08 or higher. *See* § 322.2615(7), Fla. Stat. (2012).

Accordingly, the hearing officer's order of May 8, 2012 is **QUASHED** and this matter is **REMANDED** to the hearing officer. DHSMV shall have the opportunity to submit evidence that the agency inspector, Gregory Croucher, and the breath-test operator, Sue Owen, possessed valid Florida Department of Law Enforcement permits when they inspected and operated the Intoxilyzer 8000 used to test Walker's breath-alcohol content. If DHSMV fails to prove that the breath-alcohol test was performed in substantial compliance with FDLE regulations, the hearing officer shall reverse Walker's license suspension and his driving privilege shall be reinstated, if he is otherwise eligible.<sup>2</sup>

ROSENBERG and FRENCH, JJ., concur.

McCARTHY, J., concurring separately.

While I agree with the ultimate decision of the Majority to remand, I write to point out that the Standard of the License suspension for driving with breath alcohol level of 0.08 or higher is a two pronged test. Under FS 322.2615 (f)(a)(1) the first prong is whether the law enforcement office had Probable cause to believe that the person whose license was suspended

---

<sup>2</sup> The Court notes that proof that the Intoxilyzer inspector and operator have completed the renewal courses required to maintain valid Florida Department of Law Enforcement permits would be sufficient to meet DHSMV's burden.

was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical controlled substances.

Here the arresting officer stated and the hearing officer found that there was more than sufficient probable cause to believe that the petitioner was under the influence. He had a very strong odor of alcoholic beverage on his breath, blood shot eyes, slurred speech and poor balance. He performed badly on two tasks and refused to perform the rest of the tasks. The petitioner's admission to having consumed 5 vodka drinks explained his condition. The probable cause prong is beyond a debatable challenge.

The second statutory prong, FS 322.2615 (f) (a) (2) requires valid proof that the petitioner had a blood alcohol test of 0.08 or higher. This also requires that DHSMV proves that the breath test operator and agency inspector had valid permits. DHSMV either couldn't or didn't prove this prong. In my opinion the case gets remanded solely to determine if agency inspector, Gregory Croucher and breath test operator, Sue Owen, possessed valid FDLE permits when they inspected and operated the intoxilyzer used to test Walker's breathe alcohol content.