

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

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HONORABLE LEE J. SEIDMAN

STATE OF FLORIDA,

Appellant,

v.

TONIANN GARDELLA,

Appellee.

APPEAL NO.: 09-88AC10A
JUDGE: BACKMAN

L.T. NO.: 08-18213MM10A
JUDGE: SEIDMAN

OPINION OF THE COURT

THIS CAUSE comes before the Court, sitting in appellate capacity, upon Appellant's timely appeal of the trial court's order granting Appellee's motion to suppress for lack of substantial compliance. Having considered the briefs of both parties, the trial court record, and applicable law, this Court finds as follows:

Appellee was charged with one count of driving under the influence (enhanced), and one count of driving under the influence, person/property damage (enhanced).

On September 2, 2009, Appellee filed a motion to suppress for lack of substantial compliance based, in pertinent part, on the claim that no data reflecting a failed or problematic inspection of the Intoxilyzer 8000 would be recorded as a result of a possible power cut or "plug pull" to the machine before an inspection cycle was completed.

The lower court held hearings on this motion over the course of several days. Appellee accepts Appellant's recitation of the facts and testimony adduced in the lower court, as set forth in its brief.

Appellant's sole claim on appeal is that the trial court erred in granting Appellee's motion to suppress for lack of substantial compliance, on the ground that the law

pertaining to the Intoxilyzer 8000 was not substantially complied with, where the State presented evidence that the machine's results were attained in substantial compliance with approved methods and remain accurate and reliable.

As Appellant states in its initial brief,

The trial court granted Appellee's motion to suppress for lack of substantial compliance on its finding that '... the law pertaining to the CMI Intoxilyzer 8000 used in this case was not substantially complied with ... [and] ... the further finding that fraudulent practices and the systematic intentional destruction of evidence occurred regarding these state regulated breath alcohol testing machines', based on allegations that FDLE Department Inspector Sandra Veiga has discovered that data from a failed Intoxilyzer inspection could be erased by cutting the power (i.e. "pulling the plug") of that instrument before the completion of an inspection cycle.

(AIB at 17.) Appellant further asserts that "...in so ruling, the trial court erred reversibly since the State presented evidence that the Intoxilyzer 8000's results were attained in substantial compliance with approved methods and remain accurate." *Id.*

"A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." *State v. Cubic*, 946 So. 2d 606, 608 (Fla. 4th DCA 2007). As the Fourth District Court of Appeal held in *Cubic*, "...the trial judge in the instant case ... found the defense expert's testimony more credible than the state's expert testimony. Because it was his role to make the factual and credibility determination that gave rise to his conclusion, we find no abuse of discretion." *Id.* at 609.

"The trial court's resolution of conflicting evidence will not be disturbed on appeal if that determination is supported by substantial, competent evidence." *Tarver v. State*, 961 So. 2d 1094, 1096 (Fla. 2d DCA 2007). See also, *Morris v. State*, 958 So. 2d 598, 599 (Fla. 4th DCA 2007); *Curtis v. State*, 748 So. 2d 370, 371 (Fla. 4th DCA 2000).

In the instant case, the record reveals that conflicting expert testimony was presented by both parties in the court below. As correctly stated by Appellee in its answer brief, and as indicated by the case law cited herein, a reviewing court must

defer to the factual findings of the decision-maker who actually observed the witnesses testifying while considering any legal conclusions derived therefrom. It is not this Court's duty, nor is it within this Court's province, to make determinations concerning the credibility of witnesses and the weight of the evidence.

The trial court heard the conflicting testimony regarding whether the rules were substantially complied with, as presented by both parties. After evaluating this evidence, the trial court found that the Intoxilyzer was not in substantial compliance with the FDLE regulations. Finding that there existed substantial, competent evidence to support such a determination by the trial court, even where there existed conflicting evidence which could support a contrary determination, this Court finds no reversible error on the claim presented.

Accordingly, it is

ORDERED AND ADJUDGED that the trial court's order granting Appellee's motion to suppress is hereby **AFFIRMED**.

DONE AND ORDERED on this 18th day of May, 2010, in Chambers, Fort Lauderdale, Broward County, Florida.

PAUL L. BACKMAN

PAUL L. BACKMAN
CIRCUIT JUDGE **TRUE COPY**

Copies furnished to:

The Honorable Lee Jay Seidman

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Joseph R. Chloupek, Esq., Attorney for Appellee, Office of the Public Defender, Appeals Division