

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

CASE NO. 2020-CA-008603-O

PEDRO J. MARRERO ASTACIO,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES,

Respondent.

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Petition for Writ of Certiorari from the  
Department of Highway Safety and  
Motor Vehicles,  
Craig P. Rogers, Hearing Officer.

Michael D. Barber, Esquire, Petitioner.

Christie S. Utt, General Counsel, and  
Mark L. Mason, Assistant General Counsel,  
for Respondent.

Before STROWBRIDGE, HARRIS, and CALDERON, JJ.

PER CURIAM.

Petitioner Pedro J. Marrero Astacio seeks certiorari review of the hearing officer's final order, which upheld the Department of Highway Safety and Motor Vehicles' administrative suspension of his driver's license for driving a motor vehicle after Petitioner refused a request for a blood draw. Because the final order was not

supported by competent substantial evidence, we grant the petition for writ of certiorari.

According to the arrest affidavit, at 3:00 a.m. on June 13, 2020, Officer Jerrell Ogletree of the Windermere Police Department observed a dark SUV traveling 52 mph in a 30 mph zone. Officer Ogletree initiated a traffic stop on the SUV by activating the emergency lights of his patrol vehicle. However, the SUV made a sudden right turn and sped up. Officer Ogletree saw the SUV crash into a tree. Shortly thereafter, Officer Ogletree observed a female occupant exit the SUV from the passenger door, followed by a male occupant. The female occupant fled the scene. The male occupant initially hesitated, but then followed Officer Ogletree's commands to get on the ground.

Officer Ogletree asked the male where the female was going, but instead of answering the question, the male spontaneously stated that he had not been driving the SUV. The female later returned to the scene. The male was identified by his driver's license as Petitioner.

Officer Ogletree observed damage to the driver's side of the SUV. The driver's side airbags had been deployed. After observing visible injuries to Petitioner's hands, Officer Ogletree requested medical services. Though Officer Ogletree detected the odor of alcohol on Petitioner's breath, no field sobriety exercises were performed due to Petitioner's injuries. Petitioner was transported to Health Central Ocoee for medical evaluation.

At Health Central Ocoee, Officer Ogletree conducted a DUI investigation and read Petitioner his *Miranda* rights. Petitioner indicated that he understood those rights, and requested counsel. Officer Ogletree then requested Petitioner to submit to a blood draw, explaining to Petitioner his implied consent for a blood draw under Florida law. However, there is no indication in the arrest affidavit that Officer Ogletree offered Petitioner an opportunity to submit to a breath or urine test, or that the administration of a breath or urine test would have been impractical or impossible. Petitioner refused to submit to a blood draw. Officer Ogletree executed an affidavit of refusal and issued a DUI traffic citation. As a result, Petitioner's driver's license was then suspended.

Petitioner requested an administrative hearing to challenge his driver's license suspension. *See* § 322.2615, Fla. Stat. At the administrative hearing, the hearing officer admitted documentary evidence including Officer Ogletree's arrest affidavit, the affidavit of refusal, and the DUI traffic citation. Neither party presented sworn testimony. Petitioner's counsel moved to invalidate his driver's license suspension, arguing among other things that under the circumstances, there was no evidence that Officer Ogletree was entitled to request Petitioner to submit to a blood test. For support, counsel pointed out that there was nothing in the arrest affidavit to indicate that Officer Ogletree initially offered Petitioner an opportunity to submit to a breath or urine test, or that the administration of a breath or urine test would have been impractical or impossible. Rather, the arrest affidavit reflected that Petitioner was not

unconscious, and was in fact sufficiently lucid to understand and exercise his *Miranda* rights.

After the administrative hearing, the hearing officer issued his final order, which sustained the suspension of Petitioner's driver's license. The final order specifically rejected counsel's challenge to Officer Ogletree's request for a blood test. Petitioner now seeks certiorari review of the hearing officer's final order.

In the instant Petition, Petitioner argues that there was no competent substantial evidence for the hearing officer to find that he refused to submit to a lawful blood test. In Petitioner's view, Officer Ogletree was not entitled to request Petitioner to submit to a blood test in the first place, since Officer Ogletree failed to observe the statutory requirements for implied consent to a blood test, as set forth in section 316.1932(1)(c), Florida Statutes.

For factual support, Petitioner asserts that Officer Ogletree failed to include any information in the arrest affidavit indicating that it would have been impossible or impractical to administer a breath or a urine test prior to requesting a blood sample. For legal support, he cites to case law including *Smiley v. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Dec. 20, 2019); *Mejia v. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. Nov. 28, 2017); and *Gracia v. State*, 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. May 8, 2014).

Section 316.1932(1)(c), Florida Statutes, which is part of the Florida implied consent law, provides as follows:

A person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible.

According to *State v. Serrago*, 875 So. 2d 815, 819 (Fla. 2d DCA 2004), this statute

authorizes blood draws but only under the following circumstances: (1) where there is reasonable cause to believe the person was driving a vehicle while under the influence of alcohol, chemicals, or controlled substances; (2) where the person appears for treatment at a medical facility; and (3) where the administration of a breath or urine test is impractical or impossible.

*See also Bedell v. State*, 250 So. 3d 146, 150 (Fla. 1st DCA 2018) (citing and quoting *Serrago*). Thus, under the statute and the case law construing it, one of the requirements for implied consent to a blood test is that the “administration of a breath or urine test is impractical or impossible.”

In the instant case, Petitioner correctly asserts that Officer Ogletree failed to include any information in the arrest affidavit indicating that it would have been “impractical or impossible” to administer a breath or a urine test, as required by

section 316.1932(1)(c), Florida Statutes. *See Serrago*, 875 So. 2d at 819. *See also Bedell*, 250 So. 3d at 150. Absent such a statement or determination, the Court determines that there was no competent substantial evidence for the hearing officer to find that a breath or a urine test be impractical or impossible in deciding whether Petitioner refused to submit to a lawful blood test. *See Bedell*, 250 So. 3d at 150 (whether the administration of a breath or urine test is impractical or impossible “is a finding of fact” for the lower tribunal).

The Court also determines that the case law cited by Petitioner is persuasive. Under circumstances similar to those in the instant case, the court in *Smiley v. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Dec. 20, 2019) granted certiorari to quash an order sustaining a driver's license suspension. As in the instant case, in *Smiley* there was “nothing in the record to suggest that the officer requested a breath or a urine test or that a breath or urine test was impractical or impossible before requesting a blood test from Petitioner.” Therefore, *Smiley* determined that the order was “not supported by competent, substantial evidence because one of the legal requirements for requesting a blood test—that a breath or urine test was impossible or impractical when the officer requested that Petitioner submit to a blood draw—was not satisfied.” *See also Mejia v. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. Nov. 28, 2017); *Gracia v. State*, 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. May 8, 2014).

On the other hand, *State v. Dubiel*, 958 So. 2d 486, 487 (Fla. 4th DCA 2007) and *Dep't of Highway Safety & Motor Vehicles v. Davis*, 264 So. 3d 965, 966 (Fla. 4th DCA), *review denied*, No. SC19-629 (Sept. 3, 2019), cited by Respondent, are both factually distinguishable and do not otherwise call for a different result. In contrast to the facts in the instant case, in both *Dubiel* and *Davis*, the motorist consented to a blood draw, and there was no issue whether the administration of a breath or urine test would have been impractical or impossible.

In *Dubiel*, a criminal proceeding, the motorist was a hospital patient who had been involved in an accident. 958 So. 2d at 487. After the officer read the motorist his *Miranda* rights, the motorist consented to a blood draw. *Id.* The officer conceded that he had failed to advise the motorist of the consequences of refusing to submit to a blood test under section 316.1932(1)(c), Florida Statutes. *Id.* The trial court suppressed the blood test results. *Id.* On appeal, *Dubiel* held that the failure to advise a motorist of the consequences of refusing to submit to a blood test pursuant to section 316.1932(1)(c) did not warrant the suppression of the blood test results in a criminal proceeding. *Id.* at 488. *Dubiel* distinguished *Chu v. State*, 521 So. 2d 330 (Fla. 4th DCA 1988), which had been relied on by the trial court, on the basis that *Chu* “involved a blood test administered outside of a hospital or other medical facility” and was not “legislatively authorized.” *Id.*

The fact pattern in *Davis* is similar to that in *Dubiel*, except that *Davis* was a driver’s license suspension proceeding. As in *Dubiel*, the motorist in *Davis* was a

hospital patient who had been involved in an accident. 264 So. 3d at 966. Also as in *Dubiel*, the motorist consented to a blood draw. *Id.* Testing yielded a 0.412 blood alcohol content. *Id.* The motorist's driver's license was suspended and the hearing officer upheld the suspension. *Id.* However, the circuit court in its appellate capacity granted certiorari. *Id.* at 967. In so doing the circuit court, while acknowledging *Dubiel*, nonetheless relied on *Chu v. State*, 521 So. 2d 330 (Fla. 4th DCA 1988) "for the proposition that the blood draw at issue was not legislatively authorized under Florida's implied consent law because nothing in the record suggested that a breath or urine test was impossible or impractical." *Id.*

On certiorari review, *Davis* quashed the decision of the circuit court, determining that *Dubiel* rather *Chu* was controlling under the factual circumstances. *Id.* at 968. *Davis* explained that *Dubiel* itself distinguished *Chu* on the basis that the blood test in *Chu* was not legislatively authorized, as it involved a blood draw and test administered outside of a hospital or other medical facility. *Id.* at 967. *Davis* further explained that like the defendant in *Dubiel*, the motorist was in the hospital when the officer requested a blood draw and he voluntarily consented. *Id.*

To be sure, Respondent seizes upon language in *Dubiel* and *Davis* indicating that a request for a blood test at a hospital or medical facility is "legislatively authorized." In Respondent's view, it is of no moment that the drivers in *Dubiel* and *Davis* consented to the requested blood draw because both cases "held that requests

for a blood test are legislatively authorized when law enforcement has probable cause of DUI and requests such a test at a hospital or other medical facility.”

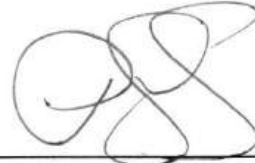
The Court does not agree. Contrary to Respondent’s position, *Dubiel* and *Davis* turned largely on the fact that the respective motorists in the two cases consented to a blood draw. Respondent overlooks that *Davis* flatly stated, “In *Dubiel*, we held that a blood draw is legislatively authorized when a suspect is in a hospital and voluntarily consents.” 264 So. 3d at 967 (emphasis added). Respondent also overlooks that *Davis* further stated that the “implied consent law does not apply when a suspect voluntarily consents to a blood draw while in a hospital.” *Id.* (emphasis added) (citing *State v. Meyers*, 261 So. 3d 573, 574 (Fla. 4th DCA 2018)). According to *Davis*, in that instance, the impracticality of a breath or urine test is not a necessary precondition for obtaining a blood draw.” *Id.* at 967-68 (citing *Meyers*, 261 So. 3d at 574).

In contrast to *Dubiel* and *Davis*, Petitioner did not give his consent to a blood test. Therefore, the implied consent law did apply in the instant case. Compare *Davis*, 264 So. 3d at 967; *Meyers*, 261 So. 3d at 574. As indicated, under section 316.1932(1)(c), Florida Statutes of the implied consent law, impracticality of a breath or urine test was a necessary precondition to a blood test. See *Serrago*, 875 So. 2d at 819. See also *Bedell*, 250 So. 3d at 150. However, as also indicated, there was no competent substantial evidence to support a finding that a breath or urine test would have been impractical or impossible.

In the absence of such competent substantial evidence, the hearing officer's final order cannot stand.<sup>1</sup> See *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) (lower tribunal's decision must be supported by competent substantial evidence). Therefore, the Court grants certiorari and quashes the hearing officer's final order.

PETITION GRANTED; ORDER QUASHED.

DONE and ORDERED in Chambers, at Orlando, Orange County, Florida, on this 31<sup>st</sup> day of August, 2021.

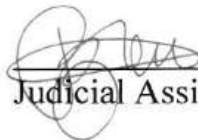


PATRICIA L. STROWBRIDGE  
Presiding Circuit Judge

HARRIS and CALDERON, JJ., concur.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Order was furnished *via e-mail* on this 1<sup>st</sup> day of September, 2021, to the following: Michael D. Barber, Esquire, Law Office of Michael D. Barber, P.A., 1212 Woodward St., Suite 5, Orlando, FL 32803 at [MBarber@DevotedToJustice.com](mailto:MBarber@DevotedToJustice.com); Mark L. Mason, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, 2900 Apalachee Pkwy., A-432, Tallahassee, FL 32399-0504 at [MarkMason@flhsmv.gov](mailto:MarkMason@flhsmv.gov) and [MelissaHowland@flhsmv.gov](mailto:MelissaHowland@flhsmv.gov).



Judicial Assistant

<sup>1</sup> In view of our disposition on this basis, we need not address Petitioner's remaining arguments.