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

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502017CA011092

TODD EDWARD DAVIS,
Petitioner,
v.

THE STATE OF FLORIDA
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

Opinion filed: AUG 15 2018

Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

Petitioner seeks review of an order affirming the suspension of his driver license based upon the results of a blood alcohol test. Petitioner contends that the hearing officer departed from the essential requirements of law when she denied his motion to invalidate the results of his blood alcohol test because his consent thereto was not knowing and voluntary. We agree, and grant the Petition for Writ of Certiorari.

The relevant facts are undisputed. Petitioner was found unconscious in the driver's seat of his car after being involved in a single-vehicle crash. The responding law enforcement officer

transported Petitioner to the hospital where Petitioner regained consciousness. Prior to placing Petitioner under arrest, but after he began to suspect that Petitioner was under the influence of alcohol, the officer asked Petitioner to consent to a blood alcohol test. The conversation was recorded in the hospital:

> THE OFFICER: Yeah. Okay. What I'm going to do, [Petitioner], if it's okay with you, is I want to put a blood withdraw. And see how much alcohol you have in you, okay?
>
> UNIDENTIFIED MALE: Is that okay with you? Is that okay with you, buddy?
>
> PETITIONER: Yes.
>
> UNIDENTIFIED MALE: Yes? Okay.
>
> THE OFFICER: Okay. This concludes my investigation at 11:12 - - my interview at 11:12 a.m.

On appeal, Petitioner correctly points out that that the officer failed to advise him that a blood draw is offered only as an alternative to a urine or breath test. The issue is whether such a statement is required under the circumstances.

Consent to a warrantless, pre-arrest blood draw, where there was no accident resulting in death or serious bodily injury, is only knowing and voluntary if "the person has been fully informed that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative." *Chu v. State*, 521 So. 2d 330, 332 (Fla. 4th DCA 1988). Because "[a blood draw] is the most intrusive of the three tests[,]" the "Legislature did not intend to authorize an officer to request a blood test when the conditions described in the [implied consent law] do not exist." *Ramsey v. State*, 22 Fla. L. Weekly Supp. 1095b (15th Cir. Ct. November 4, 2014 (citing *Missouri v. McNeelly*, 133 S. Ct. 1552 (2013)).

We pause to note that there are circumstances where the lawfulness of a request for consent to perform a blood test is not determined by *Chu*. *See, e.g., State v. Dubiel*, 958 So. 2d 486 (Fla.

4th DCA 2007). In *Dubiel*, law enforcement requested consent but did not advise the suspect of the consequences of failure to consent. That fact notwithstanding, the court found that the request for the blood draw was "legislatively authorized" since the case fell within the "circumstances described in sections 316.1932(1)(c) and 316.1933(1)." *Dubiel* at 488. Such a finding does not lie in this case, as the record is devoid of evidence that a breath or urine test was impossible or impractical. *See Mejia v. DHSMV*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. November 28, 2017) (reversing hearing officer for failure to rely on competent, substantial evidence that a breath or urine test was impossible or impractical and thus legislatively authorized under sections 316.1932(1)(c) and 316.1933(1); record was devoid of evidence of expected duration of suspect's hospital stay and suspect was not unconscious or immobile). Herein, the request for consent to perform the blood test was not legislatively authorized under sections 316.1932(1)(c) or 316.1933(1), thus pursuant to *Chu*, the officer was required to apprise the suspect of his legal right to decline.

The hospital recording shows that the officer told Petitioner that he would order a blood draw "if it's okay with you." We find that this statement does not convey to Petitioner that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative. At best, the officer's statement conveys to Petitioner only that the officer would not physically perform a blood draw unless Petitioner is "okay with [it]." But this falls short of letting Petitioner know that the law does not require Petitioner to be "okay with [it]," and, more importantly, will not penalize him if he is not. We cannot say that the "the consent was knowingly and voluntarily made and not as the result of the acquiescence to lawful authority" where the suspect was not apprised of his legal right to decline. *Chu* at 332.

Based on the foregoing, we conclude that the hearing officer's denial of Petitioner's motion to invalidate the results of his blood alcohol test departed from the essential requirements of law. Accordingly, we Grant the Petition for Writ of Certiorari and Quash the order affirming Petitioner's license suspension.

HAFELE, DONALD and BOORAS, TED, JJ., concur.

ARTAU, EDWARD L., J., dissents with an opinion.

ARTAU, J., dissenting

I dissent because I do not believe the issue of the lawfulness of the police officer's request for Petitioner's consent to a blood alcohol test fell within the hearing officer's statutorily prescribed scope of review. Section 322.2615(7)(a), Florida Statutes (2017), governs the scope of the hearing officer's determination in this case:

> (a) If the license was suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher:
>
> > 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.

Petitioner's argument attacks the validity of the police officer's request for consent; it does not attack the validity of the police officer's probable cause, or the results of the blood test. Instead, Petitioner makes a constitutional argument—citing only criminal cases—that requires the exclusionary rule as a remedy. However, the exclusionary rule is inapplicable to a civil administrative license revocation proceeding. *See Roark v. Dep't of Highway Safety & Motor*

Vehicles, 107 So. 3d 1131, 1133 (Fla. 2d DCA 2012) (exclusionary rule may be used as remedy for Fourth Amendment violations[1] in criminal cases; not license revocation proceedings).

Although the majority in *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011), held that a driver whose license is suspended for refusing to submit to a test must be provided a mechanism to challenge the lawfulness of the arrest, a plurality of the court refused to go so far as to read back into the text of section 322.2615(7), Florida Statutes, the provision repealed by the Legislature in 2006 which had previously permitted the hearing officer to consider whether a suspension was incident to a lawful arrest. *Hernandez,* 74 So. 3d at 1080-81 (Justices Canady, Polston and Labarga, dissenting; Justice Quince, concurring in result only while refusing to "concur in the majority's statutory construction that the hearing officer is statutory authorized to determine the lawfulness of the arrest"). Accordingly, I do not believe a majority of the Florida Supreme Court has interpreted section 322.2615(7) to include the lawfulness of the police officer's request for Petitioner's consent to a blood alcohol test within the ambit of the hearing officer's statutorily limited role—particularly when the suspension challenged is based on the undisputed results of a legislatively authorized blood test submitted at the hospital by a licensed driver. *See State v. Dubiel,* 958 So. 2d 486, 488 (Fla. 4th DCA 2007) (concluding that blood tests are legislatively authorized and may be requested by law enforcement in a hospital or other medical facility). *See also Arenas v. Dept. of Highway Safety and Motor Vehicles,* 90 So. 3d 828, 834 n.6 (Fla. 2d DCA 2012) ("as a result of Justice Quince's concurring-in-result-only opinion, there is not a clear majority for the view that the statutory framework gives a hearing officer . . . the necessary jurisdiction to review the lawfulness . . . of arrest"). As Chief Justice Canady, joined by Justices Polston and Labarga, explained, "the contrary view . . . effectively

[1] Because the blood test was consensual, this case does not concern a warrantless search pursuant to *Missouri v. McNeely,* 569 U.S. 141, 133 S. Ct. 1552 (2013).

rewrites the text of section 322.2615(7), Florida Statutes (2006), to expand the scope of the hearing officer's review beyond the ambit unequivocally laid down in the statute. . . . A more direct abrogation of legislative intent is hard to imagine" after the Legislature repealed the provision which previously permitted a hearing officer to consider whether a suspension was incident to a lawful arrest. *Hernandez*, 74 So. 3d at 1081.

The majority in this case relies on *Chu v. State*, 521 So. 2d 330 (Fla. 4th DCA 1988), a case decided prior to the Legislature's repeal, to distinguish *Dubiel* on the basis that the record is devoid of evidence that a breath or urine test was impossible or impractical. However, it is *Dubiel* that controls here. *See Dubiel*, 958 So. 2d at 488 ("*Chu* is distinguishable. The issue addressed in *Chu* involved a blood test administered outside of a hospital or other medical facility. . . . Thus, the two cases are factually different, as Dubiel was in the hospital when the blood was requested. The blood test in *Chu* was not legislatively authorized, whereas the blood test here was."). Similar to *Dubiel*—and unlike *Chu*—the blood test in this case was requested by law enforcement after the Petitioner was transported from the accident site by ambulance to the hospital. The record reflects that Petitioner was unconscious at the scene of the accident, making it impossible or impractical for law enforcement to administer any less intrusive forensic testing (i.e., breath or urine) prior to hospitalization. Upon hospitalization, it continued to be impractical to administer such forensic tests. The fact that Petitioner regained consciousness after admission to the hospital for treatment did not make it any less impractical. Section 316.1932, Florida Statutes (2017), provides for law enforcement to request consent to in-hospital blood testing because of the inability or impracticality of taking a suspect to a detention facility or other law enforcement testing facility for less intrusive forensic testing while they remain under the care of a hospital or other medical facility. The record reflects that Petitioner was at the hospital for observation and/or treatment

because he was highly intoxicated. In fact, the results of the blood draw indicated that Petitioner had a blood alcohol content of 0.412. Under these circumstances, it is undoubtedly impractical for law enforcement to await until the hospital could safely release Petitioner (until he has achieved sobriety), to transport him to their forensic testing facility to administer a futile breath or urine test.

Moreover, the majority overlooks the hearing officer's statutorily limited role. The constitutional rights of a criminally accused driver are not at issue in this case. Thus, based on the plain text of section 322.2615(7), as limited by the legislature in its 2006 repeal, I would not find that the hearing officer departed from the essential requirements of law. To the contrary, the hearing officer stayed within the statutorily prescribed scope of review. For the foregoing reasons, I dissent.

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Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.

Petition filed: October 6, 2017

_____/

DATE OF PANEL: JANUARY 23, 2018

PANEL JUDGES: HAFELE, ARTAU, BOORAS

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/~~Without~~ Opinion	CONCURRING SPECIALLY: With/Without Opinion
DATE: 7/24/18 J.	Edward L Artau 8-14-18 J.	J.
TLB 7-26-18 DATE: J.	J.	J.
DATE: J.	J.	J.