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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 50-2020-CA-001875-XXXX-MB

SARAH MATTHEWS NEWCOMBE
Petitioner,

v.

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

Opinion filed: September 1, 2020

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 first-tier certiorari review of an order affirming the suspension of her driver license based on the refusal to submit to a blood test. Petitioner advances two arguments on review: 1) the suspension order was not supported by competent, substantial evidence as there was no sworn refusal affidavit stating that Petitioner was given the implied consent warning, and 2) the hearing officer failed to observe the essential requirements of the law by finding the blood test was lawfully requested. We reject Petitioner's first argument without further comment. However, we

agree with Petitioner on her second argument and hold that the request for a blood draw was unlawful. Thus, the Petition for Writ of Certiorari must be granted.

On December 15, 2019, Officer Luis Rocha of the Jupiter Police Department was dispatched to the site of a traffic accident. Upon arriving at the scene, Officer Rocha made contact with Petitioner, who was the driver of a vehicle that crashed into a tree shortly after rear-ending another vehicle. Officer Rocha noticed that Petitioner "had a strong odor of an alcoholic beverage emitting from her breath, bloodshot eyes, and slurred speech." Because the airbag in her vehicle deployed, Petitioner was transported to the hospital for medical clearance. After being read her *Miranda* rights, Petitioner admitted to Officer Rocha that she was driving home from a brunch where she had two glasses of champagne. Although Officer Rocha did not speak to any medical personnel to ascertain when Petitioner would be discharged, he determined that a breath test would be "impossible and impractical" as approximately two hours had already passed since the accident. Petitioner initially agreed to the test, but later withdrew her consent while the blood draw was being prepared. Officer Rocha read Petitioner an implied consent warning, but Petitioner continued to refuse. Petitioner was subsequently arrested for DUI. After a formal review hearing of her license suspension, a hearing officer entered an order affirming Petitioner's suspension.

A warrantless blood draw conducted at the direction of law enforcement constitutes a search and seizure under the Fourth Amendment. *State v. Liles*, 191 So. 3d 484, 486 (Fla. 5th DCA 2016) (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)). Unlike a breath or urine test, a blood draw is a compelled physical intrusion into a person's body which constitutes an "invasion of bodily integrity" and "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)); *see also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (holding that,

in contrast to blood draws, a breath test "does not implicate significant privacy concerns" (quotation omitted)). The legislature understood that blood draws represented a great "intrusion into personal privacy" and thus strictly circumscribed when they are appropriate in lieu of a breath or urine test. *See State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000).

The implied consent law, section 316.1932, Florida Statutes (2019), requires all persons who receive a driver license from the State to submit to a breath, urine, or blood test if they are being investigated for a DUI offense. *See Kliphouse*, 771 So. 2d at 20; *Robertson v. State*, 604 So. 2d 783, 789 n.4 (Fla. 1992). Under this statute, law enforcement may request a blood draw from a driver suspected of driving under the influence in two instances. Subsection (1)(a) allows a blood test to be ordered if it is incident to lawful arrest and the officer has "reasonable cause" to believe the driver was operating a motor vehicle while under the influence. §316.1932(1)(a), Fla. Stat; *see also State v. Serrago*, 875 So. 2d 815, 818 (Fla. 2d DCA 2004). Subsection (1)(c), in turn, authorizes a blood test when the following requirements are met: 1) there is reasonable cause to believe a person was driving under the influence; 2) the person appears for treatment at a medical facility; and 3) the administration of a breath or urine test is "impractical or impossible." §316.1932(1)(c), Fla. Stat. *See also Serrago*, 875 So. 2d at 819; *State v. Slaney*, 653 So. 2d 422, 426 (Fla. 3d DCA 1995). Petitioner alleges, contrary to the findings of the hearing officer, that the administration of a breath or urine test was not impractical.

Based on this Court's own precedent, the facts in the instant case do not support a finding that a breath test was impractical; thus, the Petition must be granted. We have previously held that "the mere passage of time is not—standing alone—sufficient to establish the impossibility or impracticability of a breath test." *Mejia v. Fla. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. 2017); *see also Smiley v. State of Fla. Dep't of Highway*

Safety & Motor Vehicles, 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. 2019). The facts here are nearly identical to that of *Smiley*, where this Court held that the fact a suspect had already been in the hospital for two-and-a-half hours was not sufficient to establish impracticability. 27 Fla. L. Weekly Supp. at 945a Petitioner in this case had also been in the hospital for slightly over two hours when Officer Rocha determined that a breath test was "impractical" given the length of time that had already passed.[1]

In addition, Officer Rocha's failure to ascertain when Petitioner would have been released from the hospital meant that he did not possess enough information to determine if a breath test would have actually been impractical. *Compare Garcia v. State*, 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. 2014) (holding that an officer who was unaware, and never asked, when the driver would be medically cleared could not establish that a breath test was impractical), *with Markgraff v. State*, 20 Fla. L. Weekly Supp. 1046a (Fla. 12th Cir. Ct. 2013) (holding that a breath test was impractical where a doctor informed law enforcement that the driver would have to be kept at the hospital overnight). Because the only basis in the record for finding a breath test "impractical" was the length of time that had already passed since the accident, section 316.1932(1)(c), Florida Statutes, did not authorize Officer Rocha to request a blood draw from Petitioner and the hearing officer failed to follow the essential requirements of the law by holding otherwise.

Respondent argues that a blood draw was still appropriate under subsection (1)(a) since the hearing officer found that the request for a blood draw was done subsequent to a lawful arrest. *See*

[1] Although Officer Rocha testified that moving Petitioner to the jail to take a breath test would take an additional 35 minutes, this delay would not render the test impractical. *See Curry v. Fla. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 421b (Fla. 17th Cir. Ct. 2004) (finding that law enforcement's fear that the time needed to move the defendant to a facility with breath testing equipment would allow the alcohol in her body to dissipate before testing was insufficient to show impracticability).

§ 316.1932(1)(a)1.a., Fla. Stat.; *Kliphouse*, 771 So. 2d at 22. The hearing officer's finding, however, is not supported by the evidence. Officer Rocha testified during the hearing that "when I asked for a blood draw [Petitioner] was not placed under arrest," which clearly and unequivocally contradicts the hearing officer's finding. Since there is no competent, substantial evidence to indicate that a request for a blood draw was made after Petitioner was arrested, subsection (1)(a) does not apply.

Since Petitioner was not under arrest when the blood draw was requested and a breath test was neither impractical nor impossible, the hearing officer failed to obey the essential requirements of law in finding that Officer Rocha properly requested a blood draw. Accordingly, we **GRANT** the Petition for Writ of Certiorari and **QUASH** the order affirming Petitioner's license suspension.

HAFELE, COATES, and CHEESMAN, JJ., concur.