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

APPELLATE DIVISION (CIVIL): AY
CASE NO: 50-2015-CA-009311-XXXX-MB

ERIC BASHEIN,

Petitioner,

v.

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

Respondent.
_____/

Opinion filed: JUN - 8 2016

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

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PER CURIAM.

The Petition for Writ of Certiorari is DENIED.

K. MARX, and BONAVITA, JJ. concurring. COX, J. dissents, with opinion.

COX, J. dissenting.

The instant petition for writ of certiorari should be granted based on this Court's decision

in *Stachura v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 1073a (Fla. 15th Cir. Ct. 2011). Like *Stachura*, there was no competent, substantial evidence to establish that Petitioner was driving under the influence of alcohol, as opposed to a controlled substance.

Petitioner was stopped for driving 51 miles per hour ("mph") in a 35 mph posted speed zone. Petitioner's eyes were bloodshot, glassy, glazed, and red; his speech was slurred and slow; his movements were slow and lethargic. During the DUI investigation, Petitioner stated that he did not consume alcohol that day, but that did take a thyroid medication that made him feel tired and drowsy. Petitioner performed poorly on the field sobriety exercises, and was then arrested for driving under the influence. When Petitioner was taken into custody, he told the police that he smoked marijuana approximately two hours before the stop and that that he had a "vape [sic] pipe and . . . oil in it in the car." The police located the pipe, along with a small zip lock bag containing .2 grams of cocaine located in Petitioner's glove box. Petitioner was then asked to submit to a breath-alcohol test and read the implied consent law regarding refusal to submit to this test. Petitioner refused to submit to the breath test and was issued a citation for his refusal. At no time was Petitioner asked to submit to a urine test.

This appellate court previously held that it is error to sustain the suspension of a driver license when law enforcement requests an individual to submit to a breath test, but the evidence does not establish that the driver was impaired by alcohol. *Stachura*, 18 Fla. L. Weekly Supp. 1073a. In *Stachura*, the petitioner admitted to law enforcement that he consumed Xanex and Seroquel prior to driving his car. *Id.* Law enforcement observed that the petitioner appeared dazed and disoriented, his speech was slurred, he had difficulty answering questions, and he was unable to follow simple instructions. *Id.* Additionally, the petitioner's movements were slow

and delayed, he had poor balance and swayed in a circular motion, he lacked coordination, and he had mood swings. *Id.* The record in *Stachura* included notations from law enforcement stating "I do not suspect alcohol but rather drugs," and "[I]t should be noted . . . I did not observe any odors of alcohol." *Id.*

In *Stachura*, this Court articulated, "[t]he Implied Consent Law [section 316.19632(1)(a), Florida Statutes] clearly states that the consent to a breath test is for the purpose of determining the alcoholic content of the driver's breath." *Id.* (emphasis added). This Court further emphasized that the Implied Consent Law also provides that a law enforcement officer can request that an individual submit to a urine test when the officer has probable cause to believe that the individual "was driving or was in actual physical control of a motor vehicle . . . while under the influence of chemical substances or controlled substances." *Id.* (quoting § 316.1932(1)(b), Fla. Stat. (2010)) (emphasis added). Thus, this Court determined that no reasonable cause existed to request the petitioner to submit to a breathalyzer test. *Id.* The Court emphasized the lack of evidence demonstrating intoxication by alcohol and highlighted the fact that law enforcement did not suspect that the petitioner was under the influence of alcohol. *See also Gruszecki v. Dep't of Highway Safety & Motor Vehicles*, 18 Fla. L. Weekly Supp. 642a (Fla. 4th Cir. Ct. 2008) (holding that law enforcement must have some evidence of alcohol consumption to lawfully request a breath test under section 316.1932(1)(a)).

In this case, there was no competent, substantial evidence presented to the hearing officer that Petitioner was under the influence of alcohol at the time of his arrest. Petitioner admitted to law enforcement that he consumed medication and marijuana, but Petitioner told law enforcement that he did not consume any alcohol prior to the stop. Additionally, nothing in the

record demonstrates that law enforcement either found or made note of any additional evidence tending to show intoxication by alcohol – i.e., an open container, an admission, or an odor of alcohol on Petitioner. Thus, the present matter is unlike *Dep't of Highway Safety & Motor Vehicles v. Rose,* because the conclusion that Petitioner was driving under the influence of a controlled substance does not require this Court to "ignore" or "overlook" evidence to the contrary. 105 So. 3d 22, 24 (Fla. 2d DCA 2012).

Because *Stachura v. Dep't of Highway Safety & Motor Vehicles* controls in this matter, I dissent from the majority's decision to deny the petition for writ of certiorari. There was no competent, substantial evidence before the hearing officer to support a finding that the arresting officer had probable cause to believe that Petitioner was impaired by alcohol. Without some evidence of impairment by alcohol, *Stachura* mandates that law enforcement's request for Petitioner to submit to a breathalyzer test was unlawful.