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

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 502012AP900041
L.T. NO: 502011CT011184

PEDRO C. GRACIA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: MAY 0 8 2014

Appeal from the County Court in and for Palm Beach County,
Judge Paul Damico.

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PER CURIAM.

REVERSE AND REMAND. This appeal arises from the denial of Pedro C. Gracia's ("Gracia") Motion to Suppress his blood test results in his driving under the influence (DUI) trial. We hold that the trial court erred when it denied the Motion to Suppress regarding Gracia's blood test results as there was not competent substantial evidence to establish that it was impossible or impractical to submit to a breath or urine test.

Gracia was arrested for driving under the influence ("DUI") and transported to the Breath Alcohol Testing Center ("BAT") where he was asked and consented to submit to a breath test. However, the breath test technician stated that a breath test could not be administered until he was

medically cleared for his bloody lip. A urine test was not requested because the officer belived that Gracia had to be medically cleared before he could perform any test and because impairment by alcohol was a concern.[1] Gracia was then transported to the Wellington Hospital; the transport to the hospital from BAT took approximately thirty (30) minutes. Gracia was medically cleared for a breath test, and the officer requested a blood test while at the hospital. The officer was in his car completing paperwork and not in the hospital to observe when Gracia was treated by the doctor; therefore, the officer was unaware of whether or not Gracia had been medically cleared at the time the blood test was requested. Thus, the record was not clear as to whether the request for Gracia to submit to a blood test was made before or after he was medically cleared.

Upon the request for a blood sample, Gracia initially refused; however, after the implied consent warning was read, Gracia consented. Approximately two (2) hours elapsed between the initial attempt to obtain a breath test at the BAT and the time a blood sample was actually taken at the hospital. After Gracia was medically cleared, he was transported back to the BAT, yet Gracia was not asked to submit to a breath test. Approximately three (3) hours elapsed between the officer's initial contact with Gracia and the second time Gracia was transported back to the BAT.

Gracia was charged by Information with DUI. Gracia filed a Motion to Suppress Blood Draw & Subsequent Test Results, and a hearing on the Motion to Suppress was held at which the arresting officer testified telephonically. The trial court denied the Motion to Suppress. Gracia proceeded to trial and was adjudicated guilty of DUI and was sentenced to twelve (12) months probation.

On Appeal, Gracia argues that the blood sample was improperly taken because a breath or urine test was not impossible or impractical; therefore, the Motion to Suppress should have been

[1] A breath test is administered to determine blood-alcohol content while a urine test is administered to determine the presence of a chemical or controlled substance. *Chu v. State,* 521 So. 2d 330, 331 (Fla. 4th DCA 1988).

granted. "In reviewing a trial court's ruling on a motion to suppress, the appellate courts defer to the trial court's factual findings so long as the findings are supported by competent, substantial evidence, and review de novo the legal question of whether there was probable cause given the totality of the factual circumstances." *State v. Hankerson*, 65 So. 3d 502, 506 (Fla. 2011). "A trial court's ruling on a motion to suppress is clothed with a presumption of correctness on appeal, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *State v. Hebert,* 8 So. 3d 393, 395 (Fla. 4th DCA 2009) (citing *State v. Manuel,* 796 So. 2d 602, 604 (Fla. 4th DCA 2001)). The reviewing court cannot substitute its judgment in evaluating credibility or evidence conflicts. *Stennes v. State*, 939 So. 2d 1148, 1149 (Fla. 4th DCA 2006).

Any person who operates a vehicle in Florida consents to submit to a blood test when 1) there is a reasonable belief that the person was driving or in actual physical control of a vehicle under the influence of alcohol or other chemical or controlled substances; 2) when the person appears for treatment at a medical facility; and 3) the administration of a breath or urine test is impossible or impractical. § 316.1932(1)(c), Fla. Stat. (2011). The State has the burden of proving compliance with Florida Statutes section 316.1932(1)(c). *Quinn v. Department of Highway Safety and Motor Vehicles*, 20 Fla. L. Weekly Supp. 1116a (Fla. 4th Cir. Ct. January 30, 2012).

In the case at bar, Gracia's Motion to Suppress the blood test evidence was denied. However, the State failed to prove that the administration of a breath or urine test was impossible or impractical to justify a blood test. The State does not have to establish that both a breath and urine test are impossible or impractical to admit blood-alcohol test results, and in this case, the State was not required to prove that a urine test was impossible or impractical because alcohol impairment was the focus of the investigation. *State v. Scott*, 7 Fla. L. Weekly Supp. 605a (Fla. 15th Cir. Ct.

June 27, 2000); *State v. Hess*, 10 Fla. L. Weekly Supp. 481a (Fla. 15th Cir. Ct. May 20, 2003) (if a defendant is suspected of alcohol impairment and a breath test is impossible or impractical, then the defendant has consented to a blood test to determine alcohol content).

The State, however, was required to prove that the administration of a breath test was impossible or impractical. In this case, Gracia was not involved in an accident, he was not immediately transported to the hospital, and he was not immobile. Upon being stopped, Gracia was initially transported to the BAT to submit to a breath test. The breath technician, not medical personnel, stated that Gracia could not submit to a breath test because he had blood in his mouth. At that point, submitting to a breath test was impossible or impractical; however, Gracia was then taken to the hospital specifically to get medically cleared for the breath test, and he was medically cleared.

At the time the officer requested the blood sample, he did not inquire with medical personnel nor did he know how long Gracia would have to remain at the hospital or what treatment Gracia needed prior to requesting the blood test. *See Markgraff v. State*, 20 Fla. L. Weekly Supp. 1046a (Fla. 12th Cir. Ct. July 26, 2013) (finding that a breath test was impossible and impractical where the doctor advised the officer that the defendant would not be discharged from the hospital that night). Rather, while Gracia was in the hospital, the officer was in his car. Additionally, there was no testimony or evidence presented about breath-alcohol levels dissipating within a certain period of time. *See Curry v. Florida Department of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 421b (Fla. 17th Cir. Ct. November 22, 2004) (holding that a breath test was not impossible or impractical to administer simply because police asserted that transporting the defendant to the breath testing facility would place an undue burden on them, would interfere with the defendant's treatment, and transporting the defendant to the facility would allow the alcohol to

dissipate before testing). Thus, because Gracia was conscious, mobile and the officer was unaware of whether Gracia had already been treated by a doctor or medically cleared, the officer's request for a blood test was not based on observations or conclusions that a breath test would be impossible or impractical.

Furthermore, upon leaving the hospital and being medically cleared, Gracia was taken to the BAT, yet he was not asked to submit to a breath test. *See State v. Donnino* 18 Fla. L. Weekly Supp. 1200a (Fla. Palm Beach Cty. Ct. September 20, 2011) (granting a motion to suppress because a breath test was not impossible or impractical when the defendant was physically able to submit to the breath test, the officer did not inquire as to how long the defendant would have to remain at the hospital and the defendant was taken to the BAT after leaving the hospital). Upon Gracia's return to the BAT, he was physically able to submit to a breath test and such test would have been administered within a reasonable time. *See Haas v. State*, 597 So. 2d 770 (Fla. 1992) (recognizing that the legislature knew that blood-alcohol test would not be administered immediately after a person is stopped and citing other states that specifically indicate that blood-alcohol test administered three hours after operation of a vehicle provides a rebuttable presumption of the blood-alcohol level at the time the vehicle was being operated); S*tate v. Miller*, 555 So. 2d 391 (Fla. 3d DCA 1989) (admitting a breath test that was administered ninety minutes after the initial stop and recognizing that the question of whether the test was timely administered does not go to admissibility of evidence but the weight of the evidence). Consequently, the trial court did not have competent substantial evidence to find that a breath test was impossible or impractical to administer. Therefore, the administration of a blood test under the implied consent law was not proper and the denial of Gracia's Motion to Suppress is reversed.

As to the issue of whether Gracia consented to the blood test, "[t]he implied consent law

requires submission only to a breath or urine test and that the blood test is offered as an alternative. The key to admissibility is that the consent must be knowingly and voluntarily made and not as the result of the acquiescence to lawful authority." *Chu v. State*, 521 So. 2d 330, 332 (Fla. 4th DCA 1988). Consent to submit to a blood test is involuntary when the defendant is improperly advised that he will lose his license for failing to consent to the blood test. *State v. Burnett,* 536 So. 2d 375 (Fla. 2d DCA 1988).

In this case, the implied consent warning did not inform Gracia that the submission to a blood test was **only an alternative** to a breath or urine test nor was there evidence in the record that indicated that the officer informed Gracia of such information. *State v. McCotter*, 17 Fla. L. Weekly Supp. 744b (Fla. 15th Cir. Ct. May 11, 2010) (holding that consent to the blood test was not voluntarily but rather in acquiescence to authority when the implied consent warning was read and the defendant was not informed that the blood test was being offered as an alternative to a breath test). Therefore, as discussed above, because the requirements of Florida Statutes section 316.1932(1)(c) were not met and because prior to being read the implied consent warning Gracia refused the blood test, Gracia's consent to the blood test was not voluntary.

We hold that the trial court erred when it denied Gracia's Motion to Suppress, and accordingly, the denial of the Motion to Suppress is **REVERSED** and **REMANDED.**

KELLEY, CROW, and MILLER, JJ. concur.