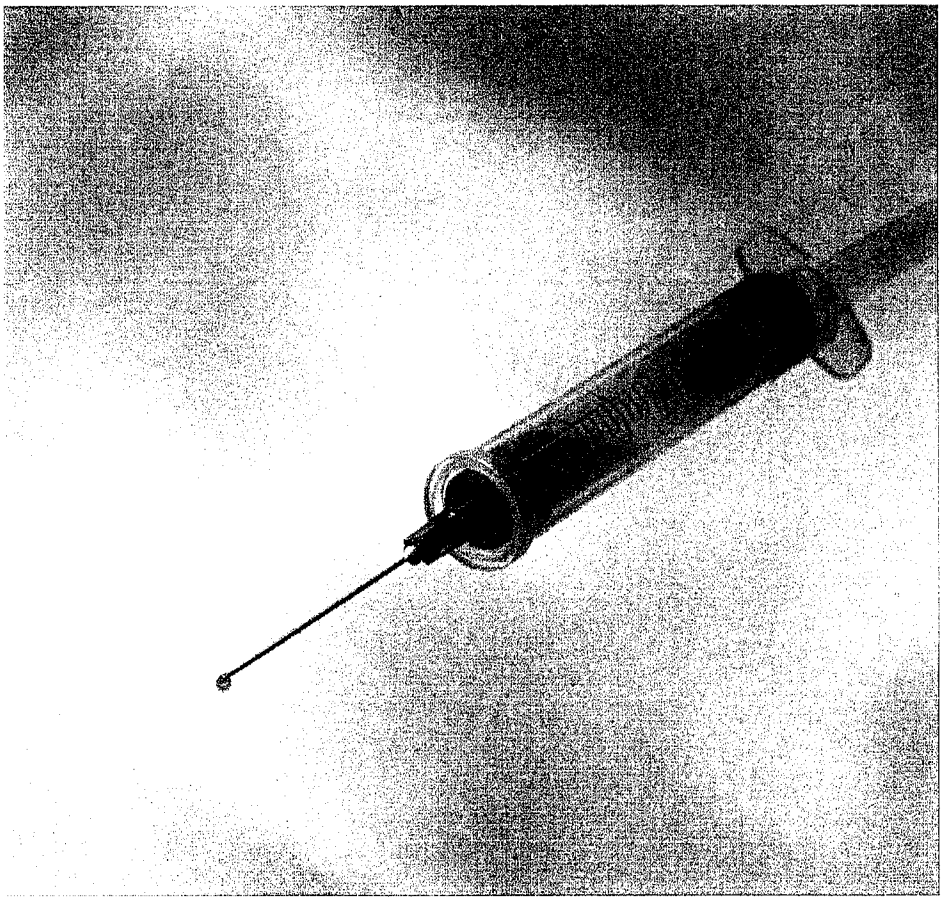

THE SOBERING REALITY of Forcible Blood Draws under Florida's Implied Consent Law

by
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INTRODUCTION

The security of an individual's rights against arbitrary intrusion by the police is basic to a free society.[1] Nevertheless, it is a sobering reality that in the State of Florida, forcible extraction of bodily samples from individuals arrested for DUI is becoming more common, in place of breath or urine tests. This practice has been approved by the United States Supreme Court, in a ruling allowing the police to obtain warrantless and involuntary blood samples from a defendant charged with DUI without violating the Fourth or Fifth Amendments.[2] The only restrictions the Court has placed on the police in such circumstances is a showing of probable cause and safe medical extraction.[3]

Individual States are authorized to adopt higher standards than those required by the federal constitution.[4] The Florida legislature has enacted tougher standards on involuntary bodily intrusions, by imposing a requirement upon individuals arrested for DUI to give samples of their breath, urine, or blood without consent.[5] By means of Florida's Implied Consent Law, the legislature has chosen to extend greater protection to Florida citizens and impose higher standards on police conduct when obtaining bodily samples in DUI cases than is provided for in the United States Constitution.[6] Florida's Implied Consent Law proscribes the circumstances when blood can be forcibly extracted. This article provides a brief overview of those circumstances.

Florida Statutes, §316.1933(1)(a), authorizes forcible extraction when a driver has caused the death or serious bodily injury.

Florida's Implied Consent Law narrowly defines the circumstances in which blood may be withdrawn in place of a breath or urine test without the driver's expressed consent. Where a law enforcement officer has probable cause to believe that a driver under the influence has caused the death or serious bodily injury of a human being, a blood sample may be compelled.[7] Serious bodily injury is defined by statute as "an injury to any person, *including the driver*, which con-

sists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[8]

There is no bright-line rule or specific set of facts that establishes when injuries are serious enough to trigger application of the statute. The question ultimately must be determined by the judge based on the facts presented. Consider for example, *State v. Schreiber*[9] where the Fourth District Court of Appeal held that a police officer lacked authority to forcibly extract the driver's blood, where the only injury resulting from the driver's accident were two fractured ankles. Additionally, in another Fourth District Court of Appeal case, the court held that a broken leg which resulted in five percent permanent impairment did not constitute serious bodily injury of a human being enough to justify the officer's actions under this statute.[10] On the other hand, other courts have found sufficient facts to warrant application of the statute where individuals have demonstrated only the possibility of serious internal injuries.[11] Without proving serious injury, an involuntary blood withdrawal would be impermissible under the statute.

Florida Statutes, §316.1932(1)(c) authorizes forcible extraction when (1) there is reasonable cause to believe the person was DUI; (2) the person appears for treatment at a hospital, clinic, or other medical facility; and (3) the administration of a breath or urine test is impractical or impossible.

A law enforcement officer is permitted to compel an involuntary blood test is if (1) there is reasonable cause to believe the person was DUI; (2) the person appears for treatment at a hospital, clinic, or other medical facility,[12] and; (3) the administration of a breath or urine test is impractical or impossible.[13] Under this statute, a driver is deemed to have consented to a blood withdrawal by appearing for medical treatment.[14] Likewise, the statute authorizes a forcible blood draw if medical treatment is required, even if the driver is incapable of refusing treatment.[15]

However, the State's ability to forcibly extract blood under this section is not absolute. "[i]f the person is 'capable of refusal,' ... the statute does not provide for the forcible taking of a blood sample but, instead, gives the person the option to refuse the blood withdrawal, although certain consequences are imposed for the refusal."[16] The consequences for refusing a blood withdrawal are similar to those that are provided for refusing to give a breath or urine sample for testing.[17] In most instances, public policy favors hospitalizing individuals, which will make a breath or urine test impracticable and thereby trigger application of the statute.[18]

Law enforcement officers should defer to trained medical personnel on the scene of an accident when determining the practicality or possibility of obtaining a breath test, where the driver does not appear to have visible signs of injuries.[19] For example, in *State v. Renwick*, the defendant struck a cement barrier in the middle of the road. Apparently, the defendant lost control of the vehicle and drove into a ditch, with the car coming to rest in a vertical position.[20] The defendant was extremely disoriented and could not stand up without the assistance of two people, and urinated and defecated on himself.[21] However, the defendant did not display any visible signs of serious physical injuries.[22] Although the defendant indicated to law enforcement officers that he was not injured, the paramedic at the scene of the accident "believed that the behavior could have been the result of an internal injury or a metabolic condition and therefore suggested that the defendant be taken to a medical facility."[23] Accordingly, the defendant was transported to the hospital to receive medical treatment.[24] Because obtaining a breath sample at that time was impractical or impossible, a blood sample was taken in order to determine the defendant's blood alcohol content.[25] The defendant sought to suppress the blood test arguing that because he did not need to go to the hospital, and that obtaining a breath test was practical and possible.[26] The Renwick court held that "[i]n investigations where there is a potential injury, great deference must be accorded to the trained medical personnel on scene in determining the practicality of obtaining a breath test."[27] In its reasoning, the court stated that

> [t]he law enforcement officers should respect the judgment of the medical professionals because the health and safety of a Defendant must always take precedence over securing evidence for the purposes of obtaining a conviction. In such situations as this, where it is a close call as to whether the Defendant should be transported to a medical facility or a DUI facility, public policy demands that we err on the side of caution. *To do otherwise would necessarily put police officers in the position of second-guessing trained medical personnel. If the officer in this case had rejected the advice of the medical professional, this Court would most likely believe that the officer was willing to jeopardize the health of the Defendant in order to obtain a breath sample.*[28]

Similarly, in *State v. Galliano*,[29] the defendant was involved in a single car accident and was treated by a paramedic for a bloody nose. The paramedic recommended that the defendant be taken to the hospital to determine if he had internal injuries.[30] As a result, a blood test was conducted rather than a breath test.[31] At the suppression hearing, the issue before the court was whether the administration of a breath test was impractical or impossible.[32] The court held that a breath test was impractical and impossible and therefore denied the defendant's motion to suppress. The court stated that:

> [i]t is incumbent on the police officer who has observed signs of injury to make prompt medical attention available to the defendant and to follow the medical recommendations of the paramedics on the scene. To do otherwise would subject law enforcement officers to potential negligence litigation. This is precisely what was done in the instant case. *If the defendant had*

> *been taken to an alcohol testing center for the purpose of administering a breath test or urine test, the officer would have been contravening the recommendation of the paramedic.* Thus, this court finds that it was impractical or impossible to administer a breath or urine test.[33]

Thus, under this statute an involuntary blood withdrawal may be authorized if a driver seeks medical treatment. But, the police must also have probable cause to believe the driver was driving under the influence and that a breath or urine test was impracticable. These elements can only be satisfied by the facts presented in each situation. It is, however, imperative that the police defer to the opinions of trained medical professionals. In the end, greater importance is emphasized on the driver's health and safety, rather than the need to acquire evidence.

If a driver voluntarily consents to a blood withdrawal, the restrictions of the Implied Consent statutes can be waived.

A person arrested for DUI may, apart from the exceptions noted in the implied consent statutes, volunteer or otherwise freely consent to give a blood sample for chemical testing purposes.[34] Therefore, blood results may be admissible even if the State does not have authority to forcibly extract a defendant's blood, if the State can prove by a preponderance of the evidence that the defendant voluntarily and knowingly consented to the blood withdrawal.[35] When making this determination, the court must look at the totality of the circumstances to determine whether consent was freely given.[36] However, in circumstances where consent has followed illegal police activity the defendant's consent is presumptively invalid and the police must make an affirmative showing of voluntary consent.[37]

In *Chu v. State*, the defendant was involved in a one-car accident in which her car overturned.[38] Paramedics and law enforcement officers reported to the scene.[39] The defendant was not injured, and therefore did not receive any medical treatment.[40] Based on the defendant's lack of coherency and because she smelled of alcohol, the law enforcement officer requested her to submit to a blood test at the scene.[41] The defendant's implied consent was read to her and the law enforcement officer obtained written consent from the defendant for the blood test.[42] The defendant moved to suppress the blood test.[43] At the suppression hearing, the law enforcement officer "testified that the reason he opted for a blood test instead of a breathalyzer test was for the fact that the paramedics were already there and he thought that it would be the most accurate and quickest way to test the defendant."[44]

The *Chu* court stated that there are some instances where law enforcement officers could request a defendant to submit to a blood test, even if the defendant did not fall within the two narrow circumstances of sections 316.1932(1)(c) and 316.1933(1).[45] In its reasoning, the court stated that

> [w]e think it is clear that the legislature intended and provided for the use of breath and urine tests, except under the circumstances described in sections 316.1932(1)(c) and 316.1933(1) and that the legislature did not intend to authorize a law enforcement officer to request a blood when the conditions described in these statutes do not exist. *However, we also recognize that circumstances may occur where it is more convenient for a person to submit to a blood test rather than a breath or urine test. Under such circumstances we see no reason to exclude a voluntary blood test provided 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.* The key to admissibility is that the consent must be knowingly and voluntarily made and not as the result of acquiescence to lawful authority.[46]

Thus, based on *Chu* and *Slaney*, absent the narrow circumstances of sections 316.1932(1)(c) and 316.1933(1), a law enforcement officer is permitted to request that a defendant submit to a blood draw, but only if the defendant 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.

Additionally, it has been held that where a defendant consents to a blood withdrawal after being improperly advised that he will lose his/her driver's license for failure to give such consent, the ensuing consent is involuntary because it was induced by a misrepresentation.[47] Also, the mere acquiescence to lawful authority is not a sufficient basis to determine that a defendant "consented" to a blood test.[48] In other words, tacitly or passively agreeing to a blood test simply because of lawful authority is not sufficient. Instead, as stated in *Chu*, "[t]he key to admissibility is that the consent must be knowingly and voluntarily made and not as the result of acquiescence to lawful authority."[49] Likewise, the officer is required to advise the defendant that the law requires submission to only a breath or urine test and that a blood withdrawal is offered only as an alternative to a breath or urine test.[50]

Even though the legislature has affirmatively sought greater protection

for DUI defendants by adopting the implied consent laws, the time honored principle that individuals can consent to waive their rights will apply to DUI blood withdrawals. The police are however required to prove that consent was freely and fully given.

CONCLUSION

Florida's implied consent law seeks to protect citizens from unreasonable bodily intrusions by the police. In order to accomplish this goal, the law has delineated specific instances in which the police can require forcible blood draws in DUI cases in place of other less intrusive means. However, as this article suggests, the courts have interpreted the constraints of the implied consent law in different ways and with varying application. This area of Florida law can easily be described as murky, given the lack of uniformity in judicial decisions. Hopefully, this article has clarified some of the murkiness.

[1] *Schmerber v. California*, 384 U.S. 757,767 (1966).
[2] *Id.* at 771.
[3] *Id.*
[4] *Cooper v. California*, 386 U.S. 58 (1967).
[5] *State v. Slaney*, 653 So. 2d 422, 425 (Fla. 3d DCA 1995).
[6] *Id.*
[7] §316.1933(1)(a), Fla. Stat. (2004).
[8] §316.1933(1)(b), Fla. Stat. (2004) (emphasis added).
[9] 835 So. 2d 344, 347-48 (Fla. 4th DCA 2002).
[10] *Galgano v. Buchanan*, 783 So. 2d 302 (Fla. 4th DCA 2001). See also *Gerlitz v. State*, 725 So. 2d 393 (Fla. 4th DCA 1998) (applying the compelled blood provisions of section 316.1933(1) where the victim of a car accident suffered a broken back).
[11] See, e.g., *State v. Cesaretti*, 632 So. 2d 1105 (Fla. 4th DCA 1994) (holding that the defendant being placed on a backboard and paramedics indicating possible internal injuries was justification of the involuntary extraction of blood); *Craborne v. State*, 564 So. 2d 1253 (Fla. 4th DCA 1990) (holding that the officer had probable cause to believe there was a serious injury when the accident victim was unconscious and possibly suffering from neck and/or internal injuries).
[12] It is important to note that an ambulance is considered an "other medical facility." §316.1932(1)(c), Fla. Stat. (2004) ("As used in this paragraph, the term 'other medical facility' includes an ambulance or other medical emergency vehicle.").
[13] §316.1932(1)(c), Fla. Stat. (2004).
[14] *Slaney*, 653 So. 2d at 426.
[15] *Id.*
[16] *Slaney*, 653 So. 2d. at 426.
[17] *Id.* The consequences are: (a) the suspension of the person's driver's license for a certain period of time, and (b) the admission into evidence of such refusal in any criminal proceeding. *Id.*
[18] *State v. Renwick*, 7 Fla. L. Weekly Supp. 406a (Fla. Dade Cty. Ct. 2000).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* (emphasis added).
[29] 37 Fla. Supp. 2d 214 (Fla. Dade Cty. Ct. 1989).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* (emphasis added).
[34] *Chu v. State*, 521 So. 2d 330 (Fla. 4th DCA 1988).
[35] *Cf. Washington v. State*, 653 So. 2d 362, 364 (Fla. 1994) (discussing the burden of proof pertaining to a search).
[36] 521 So. 2d at 331.
[37] *State v. Paul*, 638 So. 2d 537 (Fla. 5th DCA 1995).
[38] *Chu*, 521 So. 2d at 331.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 332.
[46] *Id.* (emphasis added). See also *Slaney*, 653 So. 2d at 427. ("[I]t is clear that a person arrested for DUI may, as stated in *Chu*, volunteer or otherwise freely consent to give a sample of his/her blood for chemical testing purposes.").
[47] *Slaney*, 653 So. 2d at 430 (citing *State v. Burnett*, 536 So. 2d 375 (Fla. 2d DCA 1988)).
[48] *Mobley v. State*, 335 So. 2d 880, 883 (Fla. 1976).
[49] 521 So. 2d at 331.
[50] *Id.*

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