Theodore Roosevelt Inns of Court Program Materials
for
Thursday, November 17th at 5:30PM

To Take the Test or Not to Take the Test . . . The DWI Motorist's Dilemma
The Late Night Call about a New Drunk Driving Arrest and the Importance of Good Legal Advice

Program Description:

Dr. Shirley ShouldItakethetest, a 35-year old pediatric neurosurgeon, about to be promoted to Chief of Pediatric Neurosurgery at Faber College of Medicine Hospital in Mineola, just finished a 24-hour shift, including the successful 18-hour surgical separation of the conjoined Twoforone twins, Timmy and Tommy. Exhausted, she showers at the hospital and meets her girlfriend and condo-closing attorney, Laura Lee Quitethelush, Esq., at a nearby restaurant for drinks. While driving home, Dr. ShouldItakethetest swerves to avoid killing Rover the dog who darted across Old Country Road in front of her and nearly collides with an oncoming truck. Police Officer Barnaby Buzzkill, witnesses the near accident (but not Rover), pulls her over and arrests her for DWI.

Our presentation will illustrate the dynamics of a DWI case from the points of view of several players, from the drinking at the restaurant, to the scene of the arrest to the events at the Central Testing Unit. We will demonstrate the issues that frequently confront the average DWI motorist and Dr. ShouldItakethetest, in particular, especially the consequential decision about whether a person under arrest for DWI should consent to a chemical test of his or her breath and/or blood. In so doing, we will highlight the difference between inexperienced, potentially harmful legal advice which she receives from her intoxicated real estate lawyer friend and sound legal advice given to her by our story's hero, Dudley Dooright, Esq.

Content of Materials

FYI/DWI*

What You Do In The Midnight Hour Can Win Your Case!

By Steven Epstein, Esq.

Attorneys from time to time are awakened in the middle of the night by a telephone call regarding a client who is in the process of being arrested. When attorneys handle such a telephone call that pertains to a driving while under the influence of alcohol or drugs offense ("DUI") offense they should be aware that the actions they take at that very moment can dramatically change the outcome of their client's case.

Motorists arrested for a DUI offense in New York are typically asked to submit to a breath or a blood test to determine their blood alcohol concentration ("BAC"). This evidence is instrumental in a DUI prosecution and New York Vehicle and Traffic Law §1195 gives such evidence significant importance at trial. In short it can result in *prima facie* evidence that will establish intoxication and make or break the government's case. When faced with the choice given to them by law enforcement to take or refuse a breath test, motorists often do not know what to do. In trying to make that decision motorists sometimes reach out to an attorney for advice or assistance. In other instances, the client's family or friends may reach out to an attorney early on in the process to retain you to represent the person being charged.

New York's Vehicle and Traffic Law does not address whether a motorist arrested for driving while under the influence of alcohol has a right to consult with a lawyer prior to determining whether to consent to a breath test. At this early stage, the Sixth Amendment right to counsel has not yet attached because "official judicial proceedings" have not been commenced. Kirby v. Illinois, 406 U.S. 682, 688, 92 S.Ct. 1877(1972). New York courts have however, long recognized that a motorist at this early stage does have a right to consult with a lawyer prior to determining whether to consent to a breath test. This has been described as a limited right to counsel. See People v. Gursey, 22 N.Y.2d 224 (1968). This limited right to counsel mandates that upon a request by an accused to speak with counsel, law enforcement "may not, without justification, prevent access between the criminal accused and his lawyer." Gursey, at 227.

Up until recently, this limited right to counsel was triggered only by a motorist's request to speak to counsel. That changed with the Court's decision in People v. Washington, 964 N.Y.S.2d 176 (2d. Dept. 2013). In Washington, the Court affirmed the lower court's ruling suppressing the results of a breath test and extended the right to counsel to instances where the assertion of the right is made by counsel and not the accused. In Washington, the police requested that the defendant submit to a breath test and the defendant gave her consent at 3:30 a.m. The breath test was administered at 3:39 a.m. At 3:31 a.m. an attorney retained by the defendant's family called and spoke to a police dispatcher at police headquarters. The attorney notified the police that he represented the defendant and stated "[y]ou have to stop all questioning and we are not consenting to any form of testing whatsoever." The

police did not allow counsel to speak to his client. Applying the holding in People v. Garofolo, 46 N.Y.2d right or access to counsel may not be deprived.

This decision is important because it significantly broadens the State Constitutional right to counsel and the principles that apply to individuals faced with the choice of submitting to a breath test. Based on this holding, it is essential that counsel who undertakes to represent a person accused of DUI notify the police promptly, request that they stop all questioning and refrain from all testing whatsoever until they allow them to speak to their client. The attorney should be sure to document the precise time of any such efforts, who they spoke to and what their exact language was in the conversation. It may also be advisable to record, upon notice, the conversation, if feasible. If the efforts to speak to a client are frustrated by the police it may in fact lead to the suppression of the most important piece of evidence in the case, the results of the breath test itself.

*FYI/DWI is a news brief which will be published by NYSACDL in each issue of Atticus. It will keep readers informed of recent developments which impact clients charged with DUI offenses in New York.

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FROM ARRAIGNMENT TO TRIAL IN A DWI CASE: BUILDING A PATHWAY TO SUCCESS

By Steven Epstein, Esq.*

Introduction: Reasons for DWI Traffic Stops

The first step of course is the stop of the client's vehicle. A DWI stop by law enforcement that results in an arrest generally occurs because the driver was involved in a vehicle and traffic law (VTL) infraction, a car accident, or was stopped at a DWI sobriety checkpoint. Any violation of New York State traffic law will give law enforcement the basis to stop a vehicle. In a typical DWI case, when the officer initially asks to see the driver's license and registration they will detect signs of impairment or intoxication such as the odor of alcohol, that the driver has watery, bloodshot eyes and/or slurred speech. Very often, there will be an admission by the motorist that they recently had something to drink in response to a police inquiry.

Once the driver has made a statement admitting to alcohol consumption, and/or the police officer observes signs of impaired ability to operate a motor vehicle, including evidence/indicia of intoxication or alcohol consumption, i.e., slurred speech, watery/bloodshot eyes, unsteadiness—they will ask the driver to step out of their car to perform the standardized field sobriety tests [SFSTs) and also be tested by a portable breath testing (PBT) device. It should be noted that a New York City driver who is stopped on suspicion of DWI will not be subjected to SFSTs, but they are widely used in other areas of the state.

After a driver is arrested for DWI they are generally brought to another location, often a police precinct, which has a breath testing device that is more reliable than the one that is used in the field. A police precinct will typically have an evidentiary breath testing device; portable breath testing device results are usually inadmissible in court because of their lack of reliability. However, we have recently seen a series of decisions in the New York City Criminal Courts where judges have been allowing portable breath testing device results into evidence because they are on the Conforming Products List of the Federal Registry of devices that could be used to determine whether someone has alcohol in their blood.

The Right to Consult with an Attorney

New York's Vehicle and Traffic Law does not address whether a motorist arrested for driving while under the influence of alcohol has a right to consult with a lawyer prior to determining whether to consent to a breath test.

New York courts have however long recognized that such a motorist has a limited right to counsel. *People v. Gursey*, 22 N.Y.2d 224 (1968). This limited right to counsel mandates that upon a request by an accused to speak with counsel, law enforcement "may not, without justification, prevent access between the criminal accused and his lawyer." *Gursey*, at 227.

Up until recently this limited right to counsel was triggered by a motorist's request to speak to counsel. However in the recent decision of *People v. Washington*, 964 N.Y.S.2d 176 (2d. Dept. 2013) the Court extended this to requests is made by counsel and not the accused. In *Washington*, the police requested that the defendant submit to a breath test and the defendant gave her consent at 3:30 a.m. The breath test was administered at 3:39 a.m. At 3:31 a.m. an attorney retained by the defendant's family called and spoke to a police dispatcher at police headquarters. The attorney notified the police that he represented the defendant and stated "[y]ou have to stop all questioning and we are not consenting to any form of testing whatsoever." The police did not allow counsel to speak to his client. Applying the holding in *Peple v. Garofolo*, 46 N.Y.2d 592 (1979) the Court held that when the police are aware that an accused has counsel the accused right or access to counsel may not be deprived.

This decision is important because it extends the State constitution right to counsel and its principles to individuals faced with the choice of submitting to a breath test. Based on this holding it is essential that counsel, who is retained to represent a person accused of driving while under the influence of alcohol contemporaneously with the arrest, promptly notify the police and document the precise time of any such efforts. If the efforts to speak to a client are frustrated by the police it may in fact lead to the suppression of the most important piece of evidence in the case, the results of the breath test.

Simply put, if the defense attorney notifies the police that he wants to speak to his client, the police have to notify the client and let him speak to his attorney. This is a very important case for DWI defense counsel to be aware of; whereas in the past there was only so much you could do to help a client charged with DWI during the initial stages of a case, now you can take substantial steps to help your client early on. In fact, I had a very similar case the week the *Washington* decision came out; I was notified by the client's family that the client wanted to retain me, and I then contacted the police. The defendant, unbeknownst to me, was taken to the hospital; and even though I had told the police that I wanted to speak to my client before he was asked to take a blood test, the police did not give him that information. This resulted in a very favorable outcome for the client.

When to Agree to a Breath Test and Field Sobriety Testing

There is a general myth that you should always refuse to submit to a breath test or field sobriety testing—a myth that is promulgated by law enforcement and by many attorneys who are misinformed. Very often, that advice is incorrect; it is not a general rule that should always be subscribed to, as I shall explain.

If your client has had a prior DWI conviction within the last ten years, which means that their next conviction could very well be charged as a felony, if your client was involved in a car accident that caused either serious physical injury or death to another individual, or if your client knows that he is significantly intoxicated, and not just close to or a little over the legal limit, then your client should likely not take a breath test. In a DWI case involving possible felony charges or a serious injury you do not want to give evidence to the prosecution that is helpful to their case. Obviously, the client's refusal to submit to testing is admissible evidence against your client, but it is of less import than a very high BAC reading.

The reason why I believe that not every client should refuse to submit to breath and field sobriety testing is because most district attorney's offices across the state have a plea policy with regard to DWI cases. DWI cases are perhaps the most politically sensitive cases that a prosecutor may face, and because of that fact, the DA's office has set clear policies for when they will offer a reduction of a DWI charge to a driving while ability impaired (DWAI) charge which is a traffic infraction charge, not a crime. You cannot fully understand the decision making process in this area unless you understand the scheme of the DWI statute, VTL Section 1192, which states that a DWI arrest can be charged as a traffic infraction, a misdemeanor, or a felony. If it is resolved as a traffic infraction, the client avoids a criminal conviction and criminal record, and avoids having to install an ignition interlock device in their car. Also, the period of the client's license suspension is significantly shorter than it would be if the client is charged with a misdemeanor or a felony. Of course, one should keep in mind that a DWI plea is never a sealable offense. Therefore, if the client is ever the subject of a background check, a prior DWI plea will come to light regardless of the level of offense. However, if the client is asked, "have you ever been convicted of a crime" subsequent to pleading guilty to driving while ability impaired—i.e., VTL1192(1)—they can answer that question in the negative, because they do not have a criminal conviction on their record.

The policy that prevails in most DA's offices is that if this is your first DWI arrest, you were not involved in a car accident, you submitted to a breath test and your blood alcohol concentration was below .13, then depending on the jurisdiction, the DWI charges may be reduced to driving while ability impaired. However, those same DA's offices generally have a policy that if you refuse a breath test they will not offer such a reduction. Consequently, if a client is facing their first arrest for DWI, they only had a few drinks, then taking a breath test would probably be a good idea: the results might show that the client is not intoxicated at all, and/or they may be able to benefit from the offer of a favorable plea bargain that they would not be able to obtain had they refused testing. I have seen many situations where a breath

test result would have been exculpatory for a DWI client because it would have shown that they were not intoxicated, or the DA might have agreed to reduce the charges in their case if they had taken the test.

I have found that the policies in smaller towns seem to be less stoic and more flexible when it comes to reducing DWI charges, whereas policies in larger cities tend to be more rigid and inflexible. It may be because of the large volume of DWI cases that we see in big cities.

DWI Laws and Charges

The first section of the DWI statute is VTL Section 1192 (1)—i.e., driving while ability impaired, which is a traffic infraction, not a crime. It requires proof that the individual's ability to operate their motor vehicle was actually impaired by alcohol. Again, clients should know that even though a DWAI charge is not a crime it is not a sealable offense; all too often, people believe that it will not be part of their record.

The next section is VTL 1192(2), which is driving while intoxicated, per se. The reason it is called "per se" is because in order for the government to prove their case under Section 1192(2) they need to introduce evidence of the results of a defendant's blood alcohol concentration/content [BAC), which is generally obtained by using a breath testing device. The limit for DWI per se is .08; and it is charged as an unclassified misdemeanor offense.

VTL Section 1192(2a) is aggravated driving while intoxicated. Under this Section, the prescribed BAC is .18; and the driver can be charged with an unclassified misdemeanor. The minimum length of the driver's license revocation goes up from six months to one year; and the fines are higher under this Section as well. Under Section 1192(2), the fines range from $500-$1,000, whereas under Section 1192(2a) the fines start at $1,000 and go up to $2,500.

VTL Section 1192(3) covers New York's common law DWI charges. Essentially, this statute provides that you cannot operate a motor vehicle while in an intoxicated condition. Breath test and other relevant evidence is admissible but is not required for a conviction under this section, primarily because there may not be any breath, blood, or other chemical test evidence to determine blood alcohol content. Typically, if an individual refuses to submit to testing, this is the statute that they are charged with violating. The jury instruction provides that intoxication is a specific definition under 1192(3), whereas under 1992(2), intoxication is proved by BAC. Under 1192(3), intoxication is proved by evidence that demonstrates that such person has consumed alcohol to the extent that he or she is incapable, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent—and it is the term "substantially impaired" that differentiates this statute from VTL 1192(1). Any impairment is a traffic infraction and substantial impairment of ability to operate a motor vehicle is a misdemeanor.

VTL Sections 1192(4) and (4)(a) provide mechanisms for the government to prove that an individual's ability to operate a motor vehicle is impaired by the combined influence of alcohol and drugs, or just

drugs. In addition, there are a couple of other sections of 1192 that apply to commercial operators operating a commercial vehicle.

Procedurally, it is also important to know at an early stage that an individual who is charged with DWI needs to obtain an alcohol and/or substance abuse screening or assessment, which means that they have to be tested by an individual who is certified by the Office of Alcohol and Substance Abuse Services (OASIS) to determine whether or not they need to attend an alcohol or drug rehab program.

Arraignment on DWI Charges

The DWI arraignment process largely depends upon the jurisdiction you are located in. In most large locations, such as New York City, the defendant is brought to a police precinct, fingerprinted, and the accusatory instrument is drawn up by the prosecutor. The defendant may be held in jail for as long as twenty-four hours while they are waiting to see a judge for their arraignment. In smaller locations, state troopers will issue a summons or a desk appearance ticket for an individual to return to court on another day for their arraignment; and in jurisdictions where there is a low volume of arrests that arraignment time process could be much quicker than twenty-four hours. It should be noted that the New York Court of Appeals has ruled that an individual must be arraigned within twenty-four hours in order to see a judge.

The arraignment is generally not the appropriate time to enter a plea of guilty, unless there is some exceptional circumstance such as the need for an immediate conditional license. Neither the client nor the defense attorney is in a position to make an assessment of a DWI case without seeing any evidence or without doing any due diligence. That said, you may be facing a unique situation—i.e., the ability to drive may be so fundamentally important to your client that they must take a plea during their arraignment, as doing so might be their only way to get back on the road immediately so that they can maintain their employment or get to and from work. However, other than for that limited purpose I prefer not to enter into a quick plea agreement.

At the arraignment in a DWI case an individual is generally released in some form—either on their own recognizance, or a very modest bail is set. In most DWI cases we are dealing with an individual's first arrest. Again, if the defendant is charged with a felony or someone was seriously injured as a result of their driving the defendant might be held in jail, but most people who are charged with DWI are released.

Preliminary Client Meetings/Information Gathering in DWI Cases

The next stage of a DWI case is the discovery process; and the mechanism that triggers that process is CPL Section 240.20, New York's discovery statute controls the information that you are entitled to obtain in a DWI case—and the extent of the DWI discovery process is typically much more significant it is in a non-DWI case

Prior to my initial meeting with a DWI client I have them fill out a lengthy intake form—a roughly twenty-page questionnaire. When you are handling a DWI case there is a tremendous amount of information that you need to obtain from your client. As in every criminal case you need to learn as much as you can about your client's background, including their social/personal history. You need also to understand any issues relating to their driver's license. You may have to conduct an investigation with respect to their prior driving history, and you should obtain a lifetime abstract from the Department of Motor Vehicles (DMV), because there are now regulations in effect that could result in your client being permanently disqualified from driving privileges or having a driver's license in New York State, based upon the action you take in a DWI case if it results in a license revocation.

There is a litany of other issues that need to be explored in DWI cases involving breath or blood test results. For example, you need to learn about the client's medical background—i.e., does the client have diabetes or gastro esophageal reflux disorder? Is the client regularly exposed to certain solvents that could render them susceptible to high blood alcohol concentration readings on breath testing devices? You should also explore your client's prior criminal record in the jurisdiction where they are being tried, as well as any other jurisdiction, because it could affect the level of charges they are facing in New York. A prior DWI misdemeanor conviction will result in the charges being increased from a misdemeanor to a felony.

In addition, you need to learn about the circumstances of what happened on the day or night of the client's DWI arrest. What were the facts with respect to any car accident the client was involved in? How much alcohol did the client consume and what time did they consume it? What is the client's body weight? This last piece of information is important with respect to a blood alcohol concentration analysis; you need to determine what their true BAC should have been, or get an approximate range based upon the client's weight, the amount of alcohol consumed and the period of time in which it was consumed. You also need to know what the client ate during the twenty-four hours prior to the breath test. You should discuss any issues relating to the car stop—i.e., how they drove their vehicle prior to the stop, and if there are witnesses who need to be investigated. Basically, you need to have enough information so that you can do a quick investigation.

Video Evidence

Very often I have been able to obtain videotapes showing my client driving their car prior to a DWI stop. For example, if my client drove over a bridge, I may be able to obtain video evidence from the bridge's toll cameras which shows how the client was operating their vehicle; and in some instances, that evidence has been dispositive of my client's case. I may learn that the client parked their car in a garage earlier in the evening, and they left the garage just before they got pulled over for DWI— very often the garage has cameras that record the client's actions before driving away. Simply stated, you need to do an early and thorough investigation.

Unfortunately, the New York City police generally do not use dash cams, but they do videotape the proceedings that take place at the intoxicated driver testing unit in New York City. Outside of New York City—i.e., in Westchester County—I am often able to obtain dash cam evidence; and such evidence can provide great pieces of discovery. You get to see how the client performed on the standardized field sobriety tests; you do not have to rely solely upon the police officer's notes/report—and very often you find that what the police officer wrote in their report does not match what actually happened, according to the video evidence. I believe that video evidence is instrumental in these cases; it is proof positive of what took place. If you can show an inconsistency between what an officer said and what is on the tape, you have gone a long way towards winning your client's case.

My clients generally do not testify in DWI cases. Therefore, as noted, I try to obtain as much discovery as I can get my hands on. Again, there may be video evidence in the hands of law enforcement or some third party such as the Transit Authority if the client went over a toll bridge; or you may be able to obtain surveillance video from the client's bank or apartment building.

Documents Concerning BAC Testing Evidence

It is also important to obtain as many documents that you can that relate to the police department testing in your case—documents which are generally willingly turned over by most DA's offices in an effort to try to resolve DWI cases; most DA offices will participate in voluntary discovery. It is particularly important to obtain as many documents as you can that relate to the method of analysis used to obtain a BAC result. For example, I recently tried a case in Nassau County in which the driver, who had a .18 BAC test result, was involved in a car accident. An instrumental strategy in that case was utilizing extensive motions practice to compel the DA's office to turn over the results of many different tests that it had done that relate to breath alcohol concentration levels. That discovery led to an acquittal.

Four different tests are used to measure BAC levels in New York State—breath, blood, urine, and saliva tests—but only two are predominantly used; i.e., breath and blood testing. Urine tests are usually only done in drug testing cases, and I have never seen a saliva test used. With respect to breath and blood test results, you need to do an exhaustive diligence search to obtain as many documents as you can that relate to the testing machine that was used. The only way to determine the reliability of a machine is to look at its maintenance and repair records. You cannot cross-examine a machine, hoping to get an inconsistent statement; the machine does not have a prior criminal record, and it does not have the credibility issues that a witness generally does. What a machine does have is a maintenance history. Therefore, you need to not only look into the results of the tests that were collected on the day your client was tested, you must also look at all of the calibration and maintenance records that relate to that device from as far before and as far after your client was tested as a judge will allow you to obtain.

I tend to delve even deeper than that. For example, when breath testing technicians run a calibration check on a testing device they use a simulator solution that is used to simulate a breath sample. When

that solution is tested independently using gas chromatography, the processes that the machine generates are called chromatograms—and the volume of that discovery can be substantial. Again, with respect to the DWI trial I worked on in Nassau County, after the trial started I found out that there were 120 pages of chromatograms that were not turned over to the defense; and when we looked at them we found that there was a substantial difference between the amount of ethyl alcohol that was reported by the police department to be in the simulator solution and what an independent lab saw—i.e., the lab found a much smaller amount of ethyl alcohol. Basically, that result means that when the device was calibrated it was calibrated to produce readings that were too high—and every individual in Nassau County who was tested on that machine had received artificially inflated readings. In some cases, even a slightly inflated reading could mean the difference between a guilty and not guilty verdict. Therefore, it is essential to conduct an exhaustive search to obtain those records.

Making Recommendations in DWI Cases

Once I receive all of the police reports, eyewitness accounts, videotapes, and testing machine calibration and maintenance records in connection with my client's case, I will go over that information and conduct an evaluation of the client's case. Also, before meeting with the client to discuss my findings I will try to determine from the prosecutor what our best pre-trial offer is going to be. I will then discuss the case with the client, and they have to make a decision regarding whether or not to go to trial or work out a favorable disposition.

If the client asks me for a specific recommendation I will tell them what I think they should do, but in most cases there is no right or wrong decisions in this area; most of the issues that we are dealing with are neither black nor white. I will generally give the client my opinion as to whether or not I think their case is triable; and I will conduct a risk analysis for them. Each individual's risk tolerance is different; and you must always consider the probability of winning and the gravity of the harm that the client will suffer if you lose—i.e., how much money will they have to spend, could they go to jail, or will they wind up on probation?

Omnibus Motion Practice

Once the initial discovery process is completed you move on to pre-trial omnibus motion practice, a process that includes motions to compel further discovery. In virtually every DWI case I do not get all of the discovery that I am entitled to receive; indeed, most defense attorneys do not ask for all of the discovery that they should be given. Basically, you are fighting an uphill battle, because most prosecutors are not aware of or held to what they are required to produce under the discovery statute. Consequently, for me, the omnibus motion will often include a motion to compel discovery; and it will include issues related to statements that your client made—i.e., in most DWI cases a defendant makes a statement with respect to how much alcohol they drank prior to their arrest, and they will typically say they only had one or two drinks. If the client refused to take a breath test, there will generally be a

portion of the motion that concerns the admissibility of a refusal to take a breath test. Similarly, if there is a right to counsel issue it will be dealt with in the omnibus motion. If the client did take a breath test, then CPL Section 710.20(5) authorizes a hearing to suppress evidence regarding any chemical test evidence. Usually all of the witnesses in a DWI case are police witnesses; therefore, there is no need for any identification procedure. Also, during a vehicle search the police will often find evidence such as bottles of alcohol, and that search will be the subject of a motion to suppress physical evidence.

Pre-Trial Hearing Strategies

After the omnibus motion stage in a DWI case you engage in pre-trial hearings, at which point witnesses give testimony. The judge will typically grant an evidentiary hearing to determine the admissibility of evidence.

Every jurisdiction differs in terms of whether the court requires a defendant to be present at different stages of the pre-trial process; the presumption is that your client has to be there unless you can get the court to excuse your client for some reason such as school or being out of the state. During the pre-trial hearing stage the client may wish to present testimony that might be relevant, especially in situations where he or she has requested the opportunity to speak to an attorney. Therefore, if you have made allegations of fact in your motion papers that your client can testify to then you will want to put your client on the stand at the pre-trial hearing. Generally speaking, however, most of these issues do not require the defendant to testify—and obviously, they are not obligated to testify. The prosecutor generally bears the burden of proof for most of the issues that arise at these pre-trial hearings. From time to time I will put a client on the stand at a DWI suppression hearing, but more often than not I will only do that if I do not expect they are going to testify at trial, because I do not want to subject my client to cross-examination that will result in a transcript that could be used to impeach him at trial.

I believe that one of the most important aspects of trying a DWI case is to know what your trial strategy is before you go to hearings—and the pre-trial hearing stage is your best opportunity to obtain discovery in a DWI case. Typically, the witness who testifies during the pre-trial hearing will be the state's principal witness at trial—i.e., the arresting officer who observed your client driving, administered the standardized field sobriety tests, and who will ultimately present an opinion at trial that your client was intoxicated. Therefore, the pre-trial hearing presents the defense attorney with a great opportunity to ask questions of the prosecution's witness so that you can set up your cross-examination trial strategy.

For example, let us say that I have a videotape of my client taken shortly after his arrest that shows that he looked fine and did well on all of the roadside coordination tests. However, his breath test result is a .22; in other words, there is a disconnect between the video and breath test evidence. Obviously, you would want the jury to believe that they cannot trust the breath test machine results. Therefore, during the pre-trial hearing I would try to get the police officer to confirm that the videotape evidence shows how my client looked when the officer first saw him at the time of the arrest. The officer may testify at trial, "sure, he looks good on the video because he had two hours to sober up by the time the video was shot; he looked much worse when I first pulled him over." In order to avoid the possibility of that type of

testimony coming out at trial, you need to ask questions at the pre-trial hearing that would lock the police officer into admitting that he has reviewed the videotape and the videotape fairly and accurately represents how your client looked when he first saw your client that night.

You should limit what the police officer witness will be able to testify to at trial by determining the basis for their conclusion that your client was intoxicated. For example, the officer may testify at the pre-trial hearing that they believed your client was intoxicated because he had slurred speech and he was unsteady on his feet. You should then ask him whether there was anything else that he observed that led him to that opinion. If he says "no," that prevents him from adding that your client had watery, bloodshot eyes or other signs of intoxication when he testifies at trial.

During the pre-trial DWI hearing stage you should not only explore the signs of intoxication that have been attributed to your client, but with respect to each sign you should develop a line of cross-examination that could help you to attack the officer's observations. For example if he says that the client had watery bloodshot eyes you may want to bring out the countless reasons for that condition which do not relate to alcohol such as being tired. You should also look into how the officer conducted the standardized field side sobriety tests—and you need to have a good understanding of the National Highway Traffic Safety Administration (NHTSA) guidelines for administering those tests so that you can spot any areas where the police officer may have not conducted a test in the right way. For example did he read your client the correct instructions on how to do each test.

Similarly, while the prosecution will typically focus on the bad facts with respect to your case, you do not want to ignore all of the good evidence pertaining to your client's actions during the course of the DWI stop—i.e., your client was polite and cooperative; he was able to understand the officer's instructions; he was able to maintain his balance, keep his head steady, and only move his eyes when he was asked to during the HGN test; and he had no difficulty in producing his driver's license and registration. It is important to focus on all of the good things that your client did during the stop of his vehicle and while he was operating his vehicle, as those facts will be very helpful to you at trial.

During the pre-trial suppression hearing you will receive additional discovery material; and after you have the opportunity to review that material you can refine the questions that you are going to ask the witnesses. Obviously, you should strive to suppress any negative evidence during the pre-trial stage, but more often than not you will be unable to do that. In any case, a good transcript from a pre-trial hearing could be very valuable, and sometimes even more helpful than the suppression of a statement such as, "I had two drinks." That is why pre-trial hearings are so important in a DWI case.

Negotiating a Deal with the Prosecution

With respect to settlement options, much depends upon the case and the prosecutor you are dealing with. Generally speaking, I wait for the prosecution to come to me with a plea offer. I prepare every case as if it is going to go to trial, because I find that you get good results if you are willing to put in hard work. Again, when you are handling a DWI case you have to do your research and fact finding; you have

to review the evidence; you have to subpoena documents; and you have to bring motions to compel discovery. Hard work helps you obtain good results.

It is important to keep an eye open to negotiating a plea throughout a DWI case—sometimes until the verdict stage. I have had cases where the DA found out during the trial process that their case was not as strong as they initially thought; and as a result, a plea bargain was offered to my client during the trial. Very often such an offer is made as a result of something that occurs at a pre-trial suppression hearing. The DA may finally get to see their officer witness on the stand, and it soon becomes evident that the officer will not be a good witness because of certain personality traits or lack of memory, or perhaps because of poor note taking or inconsistencies in their police reports.

In some cases, the prosecution's negotiation strategy changes simply because we have introduced the adversary process. Previously, the prosecutor was looking at the evidence from his viewpoint, but once their witness is subject to cross-examination some of the weaknesses in their case may become evident. There may be issues related to evidence that cannot be introduced, or questions raised about a witness's credibility. Essentially, the pre-trial suppression hearing can give you the opportunity to further explore new plea bargains that may not have been available to you and your client before that hearing.

I find that your relationship not only with the DA but with the court officers, the stenographers, and every other participant in the criminal justice system defines who you are as an attorney. I believe in treating everyone with respect until they have proven to you that they are not worthy of that respect—which sometimes happens, especially with young prosecutors who are overly ambitious. I do not generally see any advantage to playing hardball or being difficult with the prosecutor unless it is absolutely necessary in a particular case, because the same prosecutors that you are dealing with in your current case will be facing you in court in another case—and if you burn your bridges in this area of the law, you will not enjoy much success or longevity in your career. You need to establish a reputation that will allow you to successfully defend your clients.

Trial Preparation Strategies

Trial preparation starts with reviewing the pre-trial suppression hearing transcript and going over that information in a detailed-oriented fashion. I like to make an outline of all of the statements that are attributable to the officer witness at the pre-trial hearing and include the exact page number so I can later use that evidence to impeach the officer at trial. I will go back over the entirety of the discovery that I have in my case, including the transcripts from the pre-trial hearing; and I organize all of that information in a trial binder.

My primary focus is on preparing my jury charge, as that is the last thing the jury will hear; and then the judge will tell the jury that they have to accept the law as he explains it to them. Therefore, you really need to know what that law is in your case, and you need to integrate it into your arguments and summation. In fact, I work backwards with respect to trial preparation; I start with the jury charge and

then I write my summation. I then determine my theory of the case, and I develop an opening statement that marries it.

Jury Selection in DWI Cases

I always carefully consider what types of jurors I want to serve on a DWI case—i.e., men or women, what age group, and if they do or do not have children. I set up a jury profile; and then I compile a list of questions that I think will help me to select the best jury. You need to have good jurors to win a case, and you must also be sure that the law supports your arguments. The primacy and recency parts of the trial—i.e., the jury charge and the jury selection process—are, in my opinion, the two most critical parts of the trial, and they are the two parts that are usually the most ignored.

The process of choosing the right jurors largely depends upon the facts and theory of your case. Very often in a DWI case, tremendous passions are aroused in a juror—often related to their fear of having a loved one involved in a DWI accident. Most people who have had a significant event in their life that involved a drunk driver will tell you that fact during jury selection, but some will not; therefore, you need to explore that issue during jury selection. It is also important to keep in mind that most potential jurors are immediately prejudiced by the fact that your client is accused of DWI; and they will begin drawing inferences against your client before anything is introduced into evidence.

While I do not believe that you can completely overcome such prejudices, I think that you need to minimize them. You need to find a way to get the jury to realize that they can have a certain opinion in their private life about drivers who are accused of DWI, but once they are selected and sworn in as a juror they have an obligation to follow the instructions that the judge gives them regarding the law—and that means that they cannot treat the accusation against your client as evidence of anything. They must understand that their responsibilities as jurors should supersede their emotions. The more you allow potential jurors to talk, and the more you listen to what they say during the selection process, the better job you can do of screening out those potential jurors who will not be able to reach an impartial verdict.

For example, during the jury selection process I always try to sense if there is any doubt in a juror's voice when they are asked whether or not they can set their emotions aside. Also, at the beginning of the process I always ask the jury panel to raise their hands if they are against DWI. Of course, everyone raises their hand and I acknowledge their response—and I then tell them that we all feel that way, but that is not what this case is about. This case is not about whether or not DWI is a good or bad thing, or the war against DWI; it is about one person's life and one accusation—and that accusation is that my client was driving while intoxicated. I then ask the jury how comfortable they are with setting whatever emotions they may have aside and sitting as a juror on this case. I may ask, "How do you feel about the fact that there was a car accident in this case that resulted in injuries? How do you feel about the fact that Mr. Jones admitted to having three martinis?"

Ultimately, I find that it usually takes less than two days to convene a jury. Very often you will start with a panel of twenty-five to fifty people; and about half will say that they cannot sit on the case because of their work or vacation schedule, or their child care obligations. Other jurors will state that they are biased due to having dealt with a DWI issue in the past. Therefore, a lot of jurors will leave the panel before you even get to start questioning them.

One difficult aspect of jury selection in New York is that most DWI charges are misdemeanors, which means that you are only allowed three preemptory challenges. There are several grounds to excuse a juror for cause—and again, the biggest issue is whether they can be a fair and impartial juror in this particular case.

There can be some difficulties in this area. For example, if a potential juror says, "my sister's daughter died in a DWI accident, but I can set that fact aside and be fair and impartial," you need to consider whether they are being truthful. In some cases, it is not until the juror starts hearing the testimony and evidence in the case and goes through the deliberation process that they are able to fully understand how difficult their task may be. In the sterile environment of jury selection—i.e., before you hear any evidence—it is a lot easier to say that you can be impartial than it is once you start seeing witnesses, hearing evidence, and deliberating with your fellow jurors. The trial process really tests whether or not you can set certain feelings aside.

It is important to keep in mind that the only time you can ever communicate with a jury is during jury selection—that is the only time you are allowed to talk to the jurors, and they to you. During the trial they are just passive observers. As an attorney, my legal arguments are made to the judge; and a factual examination is made with the witnesses. My opening statement and my summation is delivered to the jury but there is no process of interacting with them. Therefore, it is extremely important to communicate with the jury during the jury selection process; that is the only time when you will receive feedback from them.

Preparing Your Summation/Closing Arguments

Preparing my summation/closing arguments in a DWI case is one of my favorite things to do. I do a lot of performing and directing, and I feel that the courtroom is a theatrical environment. You have an audience, which is a jury; and in order to communicate an idea to them you need to use techniques and methods that are similar to those an actor uses.

The most important part of preparing a summation starts at the beginning of the case. Again, I start to write my summation early on. I know the arguments that I want to make to the jury, and I know what the jury charge is. Therefore, I tend to try to frame those arguments at the beginning of the case; and as the trial proceeds I take notes about everything in a section of my trial notebook called "summation." As I am writing the summation I keep in mind that it needs to mirror my opening statement; you need to establish a theme or theory that is clear to the jury from the beginning to the end of the case. Therefore, your summation should be structured early on; and it should be interwoven with the legal issues in the

case. You have examined the jury charge at the beginning of your case, and now all that you are doing is adding in the facts that arose during the trial and reminding the jury of those facts in your summation. Basically, you are creating a story; if the summation is not a story, nobody wants to listen to it. The summation must capture the jury's attention, and you are not going to captivate the jury unless you are telling them a story. The art of storytelling, which is important throughout a DWI trial, is most important during the summation.

I think that most jurors make up their mind with respect to their decision before the summation—which means that most lawyers overstate the importance of the summation. At the same time, I think that you can often persuade jurors to change their mind during your summation.

Obviously, the summation sets the stage for the process of deliberation. Consequently, I structure my summation by using a verdict form, which is prepared by the court. Basically, a verdict form lays out the charges in the case. If, for example, the case involves an aggravated DWI charge the verdict form will say that the jury must first consider the count of aggravated driving while intoxicated; if they find the defendant guilty of this charge they can proceed to a third charge, which is driving while intoxicated common law. If, on the other hand, the jury finds that the defendant is not guilty of aggravated DWI they can consider the second charge, which is driving while intoxicated per se—i.e., having a BAC of .08.

I always review the verdict sheet with the jury before I give my summation. I feel that using the verdict form as the basis of my summation gets the jury to think about the issues I want them to think about as they review the evidence; and I try to use the verdict form in a way that makes the deliberation process more interesting.

Successful Outcomes

Ultimately, my definition of achieving a successful outcome for a DWI client is receiving a "not guilty" verdict if I end up trying their case. Certainly, you have to manage the client's expectations; and if their case cannot be tried, you need to explain to the client why that is so. Your job is not to try the case; your job is to help your client achieve the best outcome as determined by the facts and circumstances of their case.

Conclusion

There is a path to success in every DWI case. Finding that path starts with becoming familiar with each stage of a DWI case. That path will guide you through discovery and the fact finding process which is where you will become aware of your facts, both good and bad. You will apply those facts to the law and determine trial strategies which may be as basic as the need to avoid trial entirely and work out the best plea bargain possible for your client. But whatever the path you find it will only lead to success through hard work and preparation. Good luck in your journey down that path!

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Mr. Epstein has extensive experience in DWI and Vehicular Assault/Homicide defense. He is a Faculty Member of the National College for DUI Defense. Mr. Epstein has lectured, taught workshops and continuing legal education classes on the subjects of Criminal Law and DWI defense across the New York metropolitan area and upstate New York for many organizations, including but not limited to The Nassau County Bar Association, The Bronx County Bar Association, The Legal Aid Society of the City of New York and The Sullivan County Bar Association. His vast experience and proven track record of success defending individuals accused of DWI related offenses has led to him being relied upon as the principal instructor for The Legal Aid Society of the City of New York in the area of DWI defense since 1998 and he has taught hundreds of attorneys how to handle the DWI case.

WESTLAW

McKinney's Consolidated Laws of New York Annotated
Vehicle and Traffic Law (Refs & Annos)

§ 1192. Operating a motor vehicle while under the influence of alcohol or drugs

McKinney's Consolidated Laws of New York Annotated Vehicle and Traffic Law Effective December 18, 2009 *(Approx. 4 pages)*

Article 31. Alcohol and Drug-Related Offenses and Procedures Applicable Thereto (Refs & Annos)

Proposed Legislation

Effective: December 18, 2009

McKinney's Vehicle and Traffic Law § 1192

§ 1192. Operating a motor vehicle while under the influence of alcohol or drugs

Currentness

1. Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol.

2. Driving while intoxicated, per se. No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.

2-a. Aggravated driving while intoxicated. (a) Per se. No person shall operate a motor vehicle while such person has .18 of one per centum or more by weight of alcohol in such person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva made pursuant to the provisions of section eleven hundred ninety-four of this article.

(b) With a child. No person shall operate a motor vehicle in violation of subdivision two, three, four or four-a of this section while a child who is fifteen years of age or less is a passenger in such motor vehicle.

3. Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.

4. Driving while ability impaired by drugs. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

4-a. Driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs.

5. Commercial motor vehicles; per se--level I. Notwithstanding the provisions of section eleven hundred ninety-five of this article, no person shall operate a commercial motor

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vehicle while such person has .04 of one per centum or more but not more than .06 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article, provided, however, nothing contained in this subdivision shall prohibit the imposition of a charge of a violation of subdivision one of this section, or of section eleven hundred ninety-two-a of this article where a person under the age of twenty-one operates a commercial motor vehicle where a chemical analysis of such person's blood, breath, urine, or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article, indicates that such operator has .02 of one per centum or more but less than .04 of one per centum by weight of alcohol in such operator's blood.

6. Commercial motor vehicles; per se--level II. Notwithstanding the provisions of section eleven hundred ninety-five of this article, no person shall operate a commercial motor vehicle while such person has more than .06 of one per centum but less than .08 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article, provided, however, nothing contained in this subdivision shall prohibit the imposition of a charge of a violation of subdivision one of this section.

7. Where applicable. The provisions of this section shall apply upon public highways, private roads open to motor vehicle traffic and any other parking lot. For the purposes of this section "parking lot" shall mean any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.

8. Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to subdivision two of section eleven hundred ninety-three of this article, provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of this section which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of subdivision one of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to subdivision two of section eleven hundred ninety-three of this article.

8-a. Effect of prior finding of having consumed alcohol. A prior finding that a person under the age of twenty-one has operated a motor vehicle after having consumed alcohol pursuant to section eleven hundred ninety-four-a of this article shall have the same effect as a prior conviction of a violation of subdivision one of this section solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of this article, provided that the subsequent offense is committed prior to the expiration of the retention period for such prior offense or offenses set forth in paragraph (k) of subdivision one of section two hundred one of this chapter.

9. Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty.

10. Plea bargain limitations. (a)(i) In any case wherein the charge laid before the court alleges a violation of subdivision two, three, four or four-a of this section, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of this section, other than subdivision five or six, and no other disposition by plea of guilty to any other charge in satisfaction of

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such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of this section is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

(ii) In any case wherein the charge laid before the court alleges a violation of subdivision two, three, four or four-a of this section, no plea of guilty to subdivision one of this section shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the alcohol and drug rehabilitation program established pursuant to section eleven hundred ninety-six of this article, including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or substance abuse screening or assessment conducted pursuant to section eleven hundred ninety-eight-a of this article or for other good cause shown. The provisions of this subparagraph shall apply, notwithstanding any bars to participation in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

(iii) In any case wherein the charge laid before the court alleges a violation of subdivision one of this section and the operator was under the age of twenty-one at the time of such violation, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of such subdivision; provided, however, such charge may instead be satisfied as provided in paragraph (c) of this subdivision, and, provided further that, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of subdivision one of this section is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

(b) In any case wherein the charge laid before the court alleges a violation of subdivision one or six of this section while operating a commercial motor vehicle, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of this section and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney upon reviewing the available evidence determines that the charge of a violation of this section is not warranted, he may consent, and the court may allow, a disposition by plea of guilty to another charge is [1] satisfaction of such charge.

(c) Except as provided in paragraph (b) of this subdivision, in any case wherein the charge laid before the court alleges a violation of subdivision one of this section by a person who was under the age of twenty-one at the time of commission of the offense, the court, with the consent of both parties, may allow the satisfaction of such charge by the defendant's agreement to be subject to action by the commissioner pursuant to section eleven hundred ninety-four-a of this article. In any such case, the defendant shall waive the right to a hearing under section eleven hundred ninety-four-a of this article and such waiver shall have the same force and effect as a finding of a violation of section eleven hundred ninety-two-a of this article entered after a hearing conducted pursuant to such section eleven hundred ninety-four-a. The defendant shall execute such waiver in open court, and, if represented by counsel, in the presence of his attorney, on a form to be provided by the commissioner, which shall be forwarded by the court to the commissioner within ninety-six hours. To be valid, such form shall, at a minimum, contain clear and conspicuous language advising the defendant that a duly executed waiver: (i) has the same force and effect as a guilty finding following a hearing pursuant to section eleven hundred ninety-four-a of this article; (ii) shall subject the defendant to the imposition of sanctions pursuant to such section eleven hundred ninety-four-a; and (iii) may subject the defendant to increased sanctions upon a subsequent violation of this section or section eleven hundred ninety-two-

a of this article. Upon receipt of a duly executed waiver pursuant to this paragraph, the commissioner shall take such administrative action and impose such sanctions as may be required by section eleven hundred ninety-four-a of this article.

(d) In any case wherein the charge laid before the court alleges a violation of subdivision two-a of this section, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of subdivision two, two-a or three of this section, and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized, provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of this section is not warranted, such district attorney may consent and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge, provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition. Provided, further, however, that no such plea shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the alcohol and drug rehabilitation program established pursuant to section eleven hundred ninety-six of this article, including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or substance abuse screening or assessment conducted pursuant to section eleven hundred ninety-eight-a of this article or for other good cause shown. The provisions of this paragraph shall apply, notwithstanding any bars to participation in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

11. No person other than an operator of a commercial motor vehicle may be charged with or convicted of a violation of subdivision five or six of this section.

12. Driving while intoxicated or while ability impaired by drugs--serious physical injury or death or child in the vehicle. (a) In every case where a person is charged with a violation of subdivision two, two-a, three, four or four-a of this section, the law enforcement officer alleging such charge shall make a clear notation in the "Description of Violation" section of a simplified traffic information (i) if, arising out of the same incident, someone other than the person charged was killed or suffered serious physical injury as defined in section 10.00 of the penal law, such notation shall be in the form of a "D" if someone other than the person charged was killed and such notation shall be in the form of a "S.P.I." if someone other than the person charged suffered serious physical injury; and (ii) if a child aged fifteen years or less was present in the vehicle of the person charged with a violation of subdivision two, two-a, three, four or four-a of this section, such notation shall be in the form of "C.I.V.". Provided, however, that the failure to make such notations shall in no way affect a charge for a violation of subdivision two, two-a, three, four or four-a of this section.

(b) Where a law enforcement officer alleges a violation of paragraph (b) of subdivision two-a of this section and the operator of the vehicle is a parent, guardian, or custodian of, or other person legally responsible for, a child aged fifteen years or less who is a passenger in such vehicle, then the officer shall report or cause a report to be made, if applicable, in accordance with title six of article six of the social services law.

Credits

(Added L.1988, c. 47, § 18. Amended L.1988, c. 406, § 1; L.1990, c. 173, §§ 62, 63; L.1992, c. 449, § 1; L.1996, c. 196, §§ 7 to 10; L.2002, c. 3, §§ 1, 2; L.2003, c. 236, § 1; L.2006, c. 231, § 1, eff. Nov. 1, 2006; L.2006, c. 732, §§ 1 to 4, 16, eff. Nov. 1, 2006; L.2006, c. 746, § 1, eff. Dec. 15, 2006; L.2009, c. 496, §§ 1, 2, eff. Dec. 18, 2009.)

Editors' Notes

PRACTICE COMMENTARIES

by Joseph R. Carrieri

WESTLAW

McKinney's Consolidated Laws of New York Annotated
Vehicle and Traffic Law (Refs & Annos)

§ 1194. Arrest and testing

McKinney's Consolidated Laws of New York Annotated Vehicle and Traffic Law Effective July 13, 2010 *(Approx. 6 pages)*

Article 31. Alcohol and Drug-Related Offenses and Procedures Applicable Thereto (Refs & Annos)

Proposed Legislation

Effective: July 13, 2010

McKinney's Vehicle and Traffic Law § 1194

§ 1194. Arrest and testing

Currentness

1. Arrest and field testing. (a) Arrest. Notwithstanding the provisions of section 140.10 of the criminal procedure law, a police officer may, without a warrant, arrest a person, in case of a violation of subdivision one of section eleven hundred ninety-two of this article, if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when the officer has reasonable cause to believe that the violation was committed by such person.

(b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit to a chemical test in the manner set forth in subdivision two of this section.

2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two of this article and within two hours after such person has been placed under arrest for any such violation; or having reasonable grounds to believe such person to have been operating in violation of section eleven hundred ninety-two-a of this article and within two hours after the stop of such person for any such violation,

(2) within two hours after a breath test, as provided in paragraph (b) of subdivision one of this section, indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a

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member;

(3) for the purposes of this paragraph, "reasonable grounds" to believe that a person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of such subdivision. Such circumstances may include any visible or behavioral indication of alcohol consumption by the operator, the existence of an open container containing or having contained an alcoholic beverage in or around the vehicle driven by the operator, or any other evidence surrounding the circumstances of the incident which indicates that the operator has been operating a motor vehicle after having consumed alcohol at the time of the incident; or

(4) notwithstanding any other provision of law to the contrary, no person under the age of twenty-one shall be arrested for an alleged violation of section eleven hundred ninety-two-a of this article. However, a person under the age of twenty-one for whom a chemical test is authorized pursuant to this paragraph may be temporarily detained by the police solely for the purpose of requesting or administering such chemical test whenever arrest without a warrant for a petty offense would be authorized in accordance with the provisions of section 140.10 of the criminal procedure law or paragraph (a) of subdivision one of this section.

(b) Report of refusal. (1) If (A) such person having been placed under arrest, or (B) after a breath test indicates the presence of alcohol in the person's system, or (C) with regard to a person under the age of twenty-one, there are reasonable grounds to believe that such person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked, or, for operators under the age of twenty-one for whom there are reasonable grounds to believe that such operator has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, shall be revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested or detained, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to subdivision three of this section, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made. Such report may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law and such form notice together with the subscription of the deponent shall constitute a verification of the report.

(2) The report of the police officer shall set forth reasonable grounds to believe such arrested person or such detained person under the age of twenty-one had been driving in violation of any subdivision of section eleven hundred ninety-two or eleven hundred ninety-two-a of this article, that said person had refused to submit to such chemical test, and that no chemical test was administered pursuant to the requirements of subdivision three of this section. The report shall be presented to the court upon arraignment of an arrested person, provided, however, in the case of a person under the age of twenty-one, for whom a test was authorized pursuant to the provisions of subparagraph two or three of paragraph (a) of this subdivision, and who has not been placed under arrest for a violation of any of the provisions of section eleven hundred ninety-two of this article, such report shall be forwarded to the commissioner within forty-eight hours in a manner to be prescribed by the commissioner, and all subsequent proceedings with regard to refusal to submit to such chemical test by such person shall be as set forth in subdivision three of section eleven hundred ninety-four-a of this article.

(3) For persons placed under arrest for a violation of any subdivision of section eleven hundred ninety-two of this article, the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended

by the court without notice pending the determination of a hearing as provided in paragraph (c) of this subdivision. Copies of such report must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties. Such report shall be forwarded to the commissioner within forty-eight hours of such arraignment.

(4) The court or the police officer, in the case of a person under the age of twenty-one alleged to be driving after having consumed alcohol, shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner. If a hearing, as provided for in paragraph (c) of this subdivision, or subdivision three of section eleven hundred ninety-four-a of this article, is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, as of the date of receipt of such waiver in accordance with the provisions of paragraph (d) of this subdivision.

(c) Hearings. Any person whose license or permit to drive or any non-resident driving privilege has been suspended pursuant to paragraph (b) of this subdivision is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner. If the department fails to provide for such hearing fifteen days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section. The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of section eleven hundred ninety-two of this article, (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof. If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds on any one of said issues in the negative, the hearing officer shall immediately terminate any suspension arising from such refusal. If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of paragraph (d) of this subdivision. A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to this subdivision may appeal the findings of the hearing officer in accordance with the provisions of article three-A of this chapter. Any person may waive the right to a hearing under this section. Failure by such person to appear for the scheduled hearing shall constitute a waiver of such hearing, provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable.

(d) Sanctions. (1) Revocations. a. Any license which has been revoked pursuant to paragraph (c) of this subdivision shall not be restored for at least one year after such revocation, nor thereafter, except in the discretion of the commissioner. However, no such license shall be restored for at least eighteen months after such revocation, nor thereafter except in the discretion of the commissioner, in any case where the person has had a prior revocation resulting from refusal to submit to a chemical test, or has been convicted of or found to be in violation of any subdivision of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article not arising out of the same incident, within the five years immediately preceding the date of such revocation; provided, however, a prior finding that a person under the age of twenty-one has refused to submit to a chemical test pursuant to subdivision three of section eleven hundred ninety-four-a of this article shall have the same effect as a prior finding of a refusal pursuant to this subdivision solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of this article, provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in paragraph (k) of subdivision one of section two hundred one of this chapter.

b. Any license which has been revoked pursuant to paragraph (c) of this subdivision or pursuant to subdivision three of section eleven hundred ninety-four-a of this article, where the holder was under the age of twenty-one years at the time of such refusal, shall not be restored for at least one year, nor thereafter, except in the discretion of the commissioner. Where such person under the age of twenty-one years has a prior finding, conviction or youthful offender adjudication resulting from a violation of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article, not arising from the same incident, such license shall not be restored for at least one year or until such person reaches the age of twenty-one years, whichever is the greater period of time, nor thereafter, except in the discretion of the commissioner.

c. Any commercial driver's license which has been revoked pursuant to paragraph (c) of this subdivision based upon a finding of refusal to submit to a chemical test, where such finding occurs within or outside of this state, shall not be restored for at least eighteen months after such revocation, nor thereafter, except in the discretion of the commissioner, but shall not be restored for at least three years after such revocation, nor thereafter, except in the discretion of the commissioner, if the holder of such license was operating a commercial motor vehicle transporting hazardous materials at the time of such refusal. However, such person shall be permanently disqualified from operating a commercial motor vehicle in any case where the holder has a prior finding of refusal to submit to a chemical test pursuant to this section or has a prior conviction of any of the following offenses: any violation of section eleven hundred ninety-two of this article; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter. Provided that the commissioner may waive such permanent revocation after a period of ten years has expired from such revocation provided:

(i) that during such ten year period such person has not been found to have refused a chemical test pursuant to this section and has not been convicted of any one of the following offenses: any violation of section eleven hundred ninety-two of this article; refusal to submit to a chemical test pursuant to this section; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter;

(ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment, and

(iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law by the court in which such person was last penalized.

d. Upon a third finding of refusal and/or conviction of any of the offenses which require a permanent commercial driver's license revocation, such permanent revocation may not be waived by the commissioner under any circumstances.

(2) Civil penalties. Except as otherwise provided, any person whose license, permit to drive, or any non-resident operating privilege is revoked pursuant to the provisions of this section shall also be liable for a civil penalty in the amount of five hundred dollars except that if such revocation is a second or subsequent revocation pursuant to this section issued within a five year period, or such person has been convicted of a violation of any subdivision of section eleven hundred ninety-two of this article within the past five years not arising out of the same incident, the civil penalty shall be in the amount of seven hundred fifty dollars. Any person whose license is revoked pursuant to the provisions of this section based upon a finding of refusal to submit to a chemical test while operating a commercial motor vehicle shall also be liable for a civil penalty of five hundred fifty dollars except that if such person has previously been found to have refused a chemical test pursuant to this section while operating a commercial motor vehicle or has a prior conviction of any of the following offenses while operating a commercial motor vehicle: any violation of section

eleven hundred ninety-two of this article, any violation of subdivision two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a commercial motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter, then the civil penalty shall be seven hundred fifty dollars. No new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid. All penalties collected by the department pursuant to the provisions of this section shall be the property of the state and shall be paid into the general fund of the state treasury.

(3) Effect of rehabilitation program. No period of revocation arising out of this section may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article.

(e) Regulations. The commissioner shall promulgate such rules and regulations as may be necessary to effectuate the provisions of subdivisions one and two of this section.

(f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this article but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.

(g) Results. Upon the request of the person who was tested, the results of such test shall be made available to such person.

3. Compulsory chemical tests. (a) Court ordered chemical tests. Notwithstanding the provisions of subdivision two of this section, no person who operates a motor vehicle in this state may refuse to submit to a chemical test of one or more of the following: breath, blood, urine or saliva, for the purpose of determining the alcoholic and/or drug content of the blood when a court order for such chemical test has been issued in accordance with the provisions of this subdivision.

(b) When authorized. Upon refusal by any person to submit to a chemical test or any portion thereof as described above, the test shall not be given unless a police officer or a district attorney, as defined in subdivision thirty-two of section 1.20 of the criminal procedure law, requests and obtains a court order to compel a person to submit to a chemical test to determine the alcoholic or drug content of the person's blood upon a finding of reasonable cause to believe that:

(1) such person was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law, and

(2) a. either such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this article, or

b. a breath test administered by a police officer in accordance with paragraph (b) of subdivision one of this section indicates that alcohol has been consumed by such person; and

(3) such person has been placed under lawful arrest; and

(4) such person has refused to submit to a chemical test or any portion thereof, requested in accordance with the provisions of paragraph (a) of subdivision two of this section or is unable to give consent to such a test.

(c) Reasonable cause; definition. For the purpose of this subdivision "reasonable cause" shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of section eleven hundred ninety-two of this article. Such circumstances may include, but are not limited to: evidence that the operator was operating a motor vehicle in violation of any provision of this article or any other moving violation at the time of the incident; any visible indication of

alcohol or drug consumption or impairment by the operator; the existence of an open container containing an alcoholic beverage in or around the vehicle driven by the operator; any other evidence surrounding the circumstances of the incident which indicates that the operator has been operating a motor vehicle while impaired by the consumption of alcohol or drugs or intoxicated at the time of the incident.

(d) Court order; procedure. (1) An application for a court order to compel submission to a chemical test or any portion thereof, may be made to any supreme court justice, county court judge or district court judge in the judicial district in which the incident occurred, or if the incident occurred in the city of New York before any supreme court justice or judge of the criminal court of the city of New York. Such application may be communicated by telephone, radio or other means of electronic communication, or in person.

(2) The applicant must provide identification by name and title and must state the purpose of the communication. Upon being advised that an application for a court order to compel submission to a chemical test is being made, the court shall place under oath the applicant and any other person providing information in support of the application as provided in subparagraph three of this paragraph. After being sworn the applicant must state that the person from whom the chemical test was requested was the operator of a motor vehicle and in the course of such operation a person, other than the operator, has been killed or seriously injured and, based upon the totality of circumstances, there is reasonable cause to believe that such person was operating a motor vehicle in violation of any subdivision of section eleven hundred ninety-two of this article and, after being placed under lawful arrest such person refused to submit to a chemical test or any portion thereof, in accordance with the provisions of this section or is unable to give consent to such a test or any portion thereof. The applicant must make specific allegations of fact to support such statement. Any other person properly identified, may present sworn allegations of fact in support of the applicant's statement.

(3) Upon being advised that an oral application for a court order to compel a person to submit to a chemical test is being made, a judge or justice shall place under oath the applicant and any other person providing information in support of the application. Such oath or oaths and all of the remaining communication must be recorded, either by means of a voice recording device or verbatim stenographic or verbatim longhand notes. If a voice recording device is used or a stenographic record made, the judge must have the record transcribed, certify to the accuracy of the transcription and file the original record and transcription with the court within seventy-two hours of the issuance of the court order. If the longhand notes are taken, the judge shall subscribe a copy and file it with the court within twenty-four hours of the issuance of the order.

(4) If the court is satisfied that the requirements for the issuance of a court order pursuant to the provisions of paragraph (b) of this subdivision have been met, it may grant the application and issue an order requiring the accused to submit to a chemical test to determine the alcoholic and/or drug content of his blood and ordering the withdrawal of a blood sample in accordance with the provisions of paragraph (a) of subdivision four of this section. When a judge or justice determines to issue an order to compel submission to a chemical test based on an oral application, the applicant therefor shall prepare the order in accordance with the instructions of the judge or justice. In all cases the order shall include the name of the issuing judge or justice, the name of the applicant, and the date and time it was issued. It must be signed by the judge or justice if issued in person, or by the applicant if issued orally.

(5) Any false statement by an applicant or any other person in support of an application for a court order shall subject such person to the offenses for perjury set forth in article two hundred ten of the penal law.

(6) The chief administrator of the courts shall establish a schedule to provide that a sufficient number of judges or justices will be available in each judicial district to hear oral applications for court orders as permitted by this section.

(e) Administration of compulsory chemical test. An order issued pursuant to the provisions

of this subdivision shall require that a chemical test to determine the alcoholic and/or drug content of the operator's blood must be administered. The provisions of paragraphs (a), (b) and (c) of subdivision four of this section shall be applicable to any chemical test administered pursuant to this section.

4. Testing procedures. (a) Persons authorized to withdraw blood; immunity; testimony. (1) At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: (i) a physician, a registered professional nurse, a registered physician assistant, a certified nurse practitioner, or an advanced emergency medical technician as certified by the department of health; or (ii) under the supervision and at the direction of a physician, registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn: a clinical laboratory technician or clinical laboratory technologist licensed pursuant to article one hundred sixty-five of the education law; a phlebotomist; or a medical laboratory technician or medical technologist employed by a clinical laboratory approved under title five of article five of the public health law. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

(2) No person entitled to withdraw blood pursuant to subparagraph one of this paragraph or hospital employing such person, and no other employer of such person shall be sued or held liable for any act done or omitted in the course of withdrawing blood at the request of a police officer pursuant to this section.

(3) Any person who may have a cause of action arising from the withdrawal of blood as aforesaid, for which no personal liability exists under subparagraph two of this paragraph, may maintain such action against the state if any person entitled to withdraw blood pursuant to paragraph (a) hereof acted at the request of a police officer employed by the state, or against the appropriate political subdivision of the state if such person acted at the request of a police officer employed by a political subdivision of the state. No action shall be maintained pursuant to this subparagraph unless notice of claim is duly filed or served in compliance with law.

(4) Notwithstanding the foregoing provisions of this paragraph an action may be maintained by the state or a political subdivision thereof against a person entitled to withdraw blood pursuant to subparagraph one of this paragraph or hospital employing such person for whose act or omission the state or the political subdivision has been held liable under this paragraph to recover damages, not exceeding the amount awarded to the claimant, that may have been sustained by the state or the political subdivision by reason of gross negligence or bad faith on the part of such person.

(5) The testimony of any person other than a physician, entitled to withdraw blood pursuant to subparagraph one of this paragraph, in respect to any such withdrawal of blood made by such person may be received in evidence with the same weight, force and effect as if such withdrawal of blood were made by a physician.

(6) The provisions of subparagraphs two, three and four of this paragraph shall also apply with regard to any person employed by a hospital as security personnel for any act done or omitted in the course of withdrawing blood at the request of a police officer pursuant to a court order in accordance with subdivision three of this section.

(b) Right to additional test. The person tested shall be permitted to choose a physician to administer a chemical test in addition to the one administered at the direction of the police officer.

(c) Rules and regulations. The department of health shall issue and file rules and regulations approving satisfactory techniques or methods of conducting chemical analyses of a person's blood, urine, breath or saliva and to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination

WESTLAW

McKinney's Consolidated Laws of New York Annotated
Vehicle and Traffic Law (Refs & Annos)

§ 1195. Chemical test evidence

McKinney's Consolidated Laws of New York Annotated Vehicle and Traffic Law Effective: July 1, 2003 *(Approx. 2 pages)*

Article 31. Alcohol and Drug-Related Offenses and Procedures Applicable Thereto (Refs & Annos)

Effective: July 1, 2003

McKinney's Vehicle and Traffic Law § 1195

§ 1195. Chemical test evidence

Currentness

1. Admissibility. Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of this article, the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of this article.

2. Probative value. The following effect shall be given to evidence of blood-alcohol content, as determined by such tests, of a person arrested for violation of section eleven hundred ninety-two of this article:

(a) Evidence that there was .05 of one per centum or less by weight of alcohol in such person's blood shall be prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol, and that such person was not in an intoxicated condition;

(b) Evidence that there was more than .05 of one per centum but less than .07 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence that such person was not in an intoxicated condition, but such evidence shall be relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol; and

(c) Evidence that there was .07 of one per centum or more but less than .08 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence that such person was not in an intoxicated condition, but such evidence shall be given prima facie effect in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol.

3. Suppression. A defendant who has been compelled to submit to a chemical test pursuant to the provisions of subdivision three of section eleven hundred ninety-four of this article may move for the suppression of such evidence in accordance with article seven hundred ten of the criminal procedure law on the grounds that the order was obtained and the test administered in violation of the provisions of such subdivision or any other applicable law.

Credits

WESTLAW

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)

§ 220.03 Criminal possession of a controlled substance in the seventh degree

McKinney's Consolidated Laws of New York Annotated Penal Law Effective: April 13, 2015 *(Approx. 2 pages)*

Title M. Offenses Against Public Health and Morals

Article 220. Controlled Substances Offenses (Refs & Annos)

Proposed Legislation

Effective: April 13, 2015

McKinney's Penal Law § 220.03

§ 220.03 Criminal possession of a controlled substance in the seventh degree

Currentness

A person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance, provided, however, that it shall not be a violation of this section when a person possesses a residual amount of a controlled substance and that residual amount is in or on a hypodermic syringe or hypodermic needle obtained and possessed pursuant to section thirty-three hundred eighty-one of the public health law, which includes the state's syringe exchange and pharmacy and medical provider-based expanded syringe access programs, nor shall it be a violation of this section when a person's unlawful possession of a controlled substance is discovered as a result of seeking immediate health care as defined in paragraph (b) of subdivision three of section 220.78 of the penal law, for either another person or him or herself because such person is experiencing a drug or alcohol overdose or other life threatening medical emergency as defined in paragraph (a) of subdivision three of section 220.78 of the penal law.

Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor.

Credits

(Added L.1973, c. 276, § 19. Amended L.1978, c. 772, § 4; L.1979, c. 410, § 11; L.2010, c. 284, § 1, eff. Oct. 28, 2010; L.2011, c. 154, § 4, eff. Sept. 18, 2011; L.2015, c. 57, pt. I, § 4, eff. April 13, 2015.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARY

by William C. Donnino

See Supplementary Practice Commentary to Penal Law § 220.00.

PRACTICE COMMENTARY

NOTES OF DECISIONS (125)

WESTLAW

Disagreed With by Com. v. Brazelton, Mass., May 1, 1989

View National Reporter System version

People v Gursey
Court of Appeals of New York June 05, 1968 22 N Y 2d 224 239 N E 2d 351 292 N Y S 2d 416 *(Approx. 4 pages)*

The **People** of the State of New York, Appellant,

v.

Bruce D. **Gursey**, Respondent.

Court of Appeals of New York
Argued May 14, **1968**;
decided June 5, **1968**.

CITE TITLE AS: **People** v **Gursey**

HEADNOTES

Motor vehicles

driving while intoxicated--conviction for driving while intoxicated (Vehicle and Traffic Law, §1192, subd. 2) may not rest upon results of chemical test performed over defendant's objection and after he had been *225 prevented from telephoning lawyer, where communication involved no significant or obstructive delay.

(1) A conviction for driving while intoxicated (Vehicle and Traffic Law, § 1192, subd. 2) may not rest upon the results of a chemical test performed over the defendant's objection and after he had been prevented from telephoning his lawyer for legal advice concerning the test where such communication involved no significant or obstructive delay. While the privilege of consulting with counsel should not extend so far as to impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their licenses, granting this defendant's requests to consult his lawyer would not have substantially interfered with the investigative procedure. (*Matter of Story v. Hults*, 19 N Y 2d 936, distinguished.) Accordingly, the conviction was properly reversed.

(2) No issue of self incrimination is presented.

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the First Judicial Department, entered September 7, 1967, which (1) reversed, on the law, a judgment of the Criminal Court of the City of New York, rendered in New York County, convicting defendant of a violation of section 1192 of the Vehicle and Traffic Law (driving while intoxicated) (Frank Cacciatore, P. J., James Yeargin and Harold Birns, JJ., at time of conviction; Thomas G. Weaver, Simon Silver and Daniel Hoffman, JJ., at time of sentence), and (2) ordered a new trial.

POINTS OF COUNSEL

Frank S. Hogan, *District Attorney* (*Alfred Avins*, *H. Richard Uviller* and *Michael R. Stack* of counsel), for appellant.
I. Defendant's guilt was proved beyond a reasonable doubt. II. The Constitution does not require that access to counsel be allowed before the administration of a scientific test for

SELECTED TOPICS

Criminal Law

Consultation with Counsel; Privacy
Deprive Defendant of Effective Assistance of Counsel

Automobiles

Evidence of Sobriety Tests
Police Officer Administration of Field Sobriety Tests

Secondary Sources

s 909. Field-testing; screening-breath test

8A N Y. Jur. 2d Automobiles § 909

Every person operating a motor vehicle that is involved in an accident or that is operated in violation of any of the provisions of the Vehicle and Traffic Law must, at the request of a police officer,...

s 38:12. Ineffective assistanc counsel

New York Driving While Intoxicated ... (2d ed.)

Guaranteed by both the Federal and New York constitutions, interpretation of these provisions is generally controlled by **People** v. Baldi and its progeny. While traditionally counsel's effectiveness had...

s 38:10. Sufficiency of the ev

New York Driving While Intoxicated ... (2d ed.)

In resolving the sufficiency of the evidence, a court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reache...

See More Secondary Sources

Briefs

Brief for Petitioner

2012 WL 5532197
STATE OF MISSOURI, Petitioner, v. Tyler G. MCNEELY, Respondent.
Supreme Court of the United States
Nov. 09, 2012

The opinion of the Missouri Supreme Court is reported as State v. McNeely, 358 S.W.3d 65 (Mo. banc 2012), and can be found in the Petition Appendix (hereinafter "Pet. App."), at 1a-22a. The order of th...

Brief for the Respondents

2009 WL 4951303
Eric H. HOLDER, Jr., Attorney General, et al., Petitioners, v. HUMANITARIAN LAW PROJECT, et al. HUMANITARIAN LAW PROJECT, et al., cross-petitioners, v. Eric H. HOLDER, Jr., Attorney General, et al.
Supreme Court of the United States
Dec. 22, 2009

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 552 F.3d 910.

intoxication, which is required of all who drive motor vehicles on pain of loss of license. (*People v. Meyer*, 11 N Y 2d 162, *People v. Donovan*, 13 N Y 2d 148; *Miranda v. Arizona*, 384 U. S. 436; *Escobedo v. Illinois*, 378 U. S. 478; *Matter of Finocchairo v. Kelly*, 11 N Y 2d 58; *Powell v. Alabama*, 287 U. S. 45; *United States v. Wade*, 388 U. S. 218; *Gilbert v. California*, 388 U. S. 263; *Hamilton v. Alabama*, 368 U. S. 52.)

Lester D. Janoff for respondent.

I. The denial of defendant's request to telephone his attorney before being subjected to the drunkometer test violated defendant's constitutional rights to the assistance of counsel and to due process of law. (*Escobedo* ***226** *v. Illinois*, 378 U. S. 478; *Miranda v. Arizona*, 384 U. S. 436; *People v. Di Biasi*, 7 N Y 2d 544; *People v. Waterman*, 9 N Y 2d 561; *People v. Noble*, 9 N Y 2d 571; *People v. Meyer*, 11 N Y 2d 162; *People v. Donovan*, 13 N Y 2d 148; *People v. Sanchez*, 15 N Y 2d 387; *Matter of Finocchairo v. Kelly*, 11 N Y 2d 58, 370 U. S. 912; *Schmerber v. California*, 384 U. S. 757.) II. The failure of the police to comply with the provisions of section 1194 of the Vehicle and Traffic Law renders the drunkometer test evidence obtained herein inadmissible. (*People v. Pizzaro*, 15 N Y 2d 803; *People v. Burton*, 47 Misc 2d 1077; *People v. Maxwell*, 18 Misc 2d 1004; *People v. Davidson*, 5 Misc 2d 699; *People v. Ashby*, 31 Misc 2d 707.)

OPINION OF THE COURT

Breitel, J.

The People appeal from an order of the Appellate Term unanimously reversing a judgment of the Criminal Court of the City of New York, New York County, and ordering a new trial. Defendant had been convicted, after trial, of the misdemeanor of driving while intoxicated (Vehicle and Traffic Law, §1192, subd. 2) and the offense of driving the wrong way on a one-way street.[*] On the drunken driving charge, he was sentenced to pay a fine of $100 or serve 10 days in jail. The latter conviction was reversed by the Appellate Term because of the trial court's failure to suppress on defendant's application the results of a drunkometer test performed after defendant had been denied an opportunity to telephone his lawyer. Since there was sufficient other evidence of intoxication, the Appellate Term ordered a new trial.

The only issue presented is whether a criminal conviction may rest upon the results of a chemical test performed over the defendant's initial objection and after he had been prevented from telephoning his lawyer for legal advice concerning the test, such communication involving no significant or obstructive delay. Since it is concluded that the test results were secured in violation of defendant's privilege of access to counsel without occasioning any significant or obstructive delay, the order of the Appellate Term should be affirmed.

On the evening of February 7, 1966, one Patrolman Foley, while on radio patrol, stopped defendant's automobile traveling ***227** eastward in Manhattan on 47th Street, a one-way west street. While questioning defendant driver, the officer noticed that defendant's head was bobbing, his speech was slurred, and his breath betrayed an alcoholic odor. The officer drove defendant to the station house and questioned him there. At a point during the questioning, defendant asked permission to call his lawyer and was told, "You will be allowed to make a call to your attorney after I get this information." Significantly, defendant had a particular attorney in mind when he requested permission to call. Although at one point defendant indicated an intention to claim his privilege against self incrimination, he nevertheless continued to answer questions and perform co-ordination tests, after his request to call his lawyer had been denied. When asked to submit to a drunkometer or breath analysis test, however, defendant refused, and again asked for permission to call his lawyer. Another police officer, the sergeant in charge of the drunkometer test, told defendant, "You have got to take this test." When defendant asked what would happen if he did not submit to the test, the sergeant replied, "If you don't take this test, the State will take away your license." Thereupon, defendant submitted to the test.

At trial, a *voir dire* was held to determine the admissibility of the statements made by defendant as well as the results of the physical co-ordination exercises and drunkometer tests. The trial court suppressed the statements and the results of the co-ordination tests,

Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion o...

Respondent's Brief and Supple Appendix

2011 WL 7561652
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. Howard K. SMITH, Appellant.
Court of Appeals of New York.
May 24, 2011

...FN1. By amended order, the counseling component of defendant's sentence was vacated by Judge Phinney. FN2. All charges but the DWI charge were dismissed upon defendant's pre-trial motion for failure to...

See More Briefs

Trial Court Documents

The People of the State of New White

2010 WL 2066679
THE PEOPLE OF THE STATE OF NEW YORK, v. Gary WHITE.
Supreme Court, New York.
Mar. 24, 2010

...[This opinion is uncorrected and not selected for official publication.] Date: March 9, 2010. Defendant moves, pro se, for an order vacating his judgment of conviction pursuant to CPL § 440.10(1)(h), on...

People v. Bracey

2013 WL 10542655
The PEOPLE of the State of New Yo...
Darren BRACEY, Defendant.
Supreme Court, New York.
Apr. 30, 2013

...Defendant, currently in the custody of New York State, seeks to vacate or set aside his conviction pursuant to CPL § 440.10, or alternatively, seeks a hearing on his claims of ineffective assistance of...

People of the State of New Yorl Polite

2011 WL 3235989
PEOPLE OF THE STATE OF NEW YORK, v. Mark POLITE, Defendant.
Supreme Court, New York.
July 14, 2011

...[This opinion is uncorrected and not selected for official publication.] Dated: June 13, 2011. Indictment No. 2771/99. The defendant moves pro se to vacate judgment pursuant to CPL § 440.10 (1)(b)(d)(g)(...

See More Trial Court Documents

but admitted evidence of the drunkometer readings. The Appellate Term unanimously reversed on the ground that "the denial of defendant's request to telephone his attorney before he took the test violated his constitutional rights."

In light of current recognition of the importance of counsel in criminal proceedings affecting significant legal rights, law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand. This court recently noted, in another context, that: "As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced *228 absence of counsel" (*People v. Ianniello*, 21 N Y 2d 418, 424; see *Escobedo v. Illinois*, 378 U. S. 478, 486, *People v. Donovan*, 13 N Y 2d 148, 153). In the present case, defendant possessed a number of statutory options which could be asserted only during the transaction at the station house, and concerning which the advice of counsel, if available, was relevant.

Subdivision 1 of section 1194 of the Vehicle and Traffic Law reads: "1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic ... content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition or, while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol ... and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test, the test shall not be given, but the commissioner shall revoke his license or permit to drive and any non-resident operating privilege".

By these provisions, defendant had the option to refuse to take the drunkometer test, electing instead to submit to the revocation of his license. In addition, if he elected to take the test, he was entitled "to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer" (Vehicle and Traffic Law, §1194, subd. 4). Of course, defendant was informed that he would lose his license if he refused to take the police-administered test. Nevertheless, he wished legal counseling concerning his option and refused to submit to the test until his several requests to telephone his lawyer were denied. Granting defendant's requests would not have substantially interfered with the investigative procedure, since the telephone call would have been concluded in a matter of minutes. At least, the record here does not indicate otherwise. Consequently, the denial of defendant's requests for an opportunity to telephone his lawyer must be deemed to have violated his privilege of access to counsel. *229

Quite different was the situation in *Matter of Story v. Hults* (19 N Y 2d 936, affg. 27 A D 2d 745) in which, apart from the quite significant fact that only an administrative proceeding was involved, petitioner's lawyer did not appear at the station house until just before the expiration of the statutory two-hour period, and in the meantime petitioner had refused to submit to the test. It is notable, however, that in the *Story* case petitioner was permitted to telephone his wife or his lawyer, and he did call his wife, who, evidently, procured the lawyer, but too late.

The privilege of consulting with counsel concerning the exercise of legal rights should not, however, extend so far as to palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their licenses. It is common knowledge that the human body dissipates alcohol rapidly and, indeed, under subdivision 3 of section 1192 of the Vehicle and Traffic Law, test results are admissible in evidence only if the test had been taken within two hours of the time of arrest. Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But, to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene (see *Matter of Finocchairo v. Kelly*, 11 N Y 2d 58, 61 [Van Voorhis, J., concurring]). If the lawyer is not

physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.

Nor is any issue of self incrimination presented in this case, namely, whether defendant was subject to a chemical test, on which *Schmerber v. California* (384 U. S. 757), involving a blood test, would be applicable (see, also, *State v. Kenderski*, 99 N. J. Super. 224).

Accordingly, the order of the Appellate Term should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Keating and Jasen concur.
Order affirmed. ***230**

Footnotes

* On this charge defendant was fined $5 or two days, and evidently there was no appeal.

WESTLAW

Declined to Follow by State v. Senn, Iowa, June 24, 2016

View New York Official Reports version

People v. Washington
Supreme Court, Appellate Division, Second Department, New York. April 17, 2013 107 A.D.3d 4 964 N.Y.S.2d 176 2013 N.Y. Slip Op. 02000 (Approx. 23 pages)

The **PEOPLE**, etc., appellant,

v.

Jonai **WASHINGTON**, respondent.

April 17, 2013.

Synopsis

Background: In prosecution for second-degree manslaughter, second-degree vehicular manslaughter, and two counts of operating a motor vehicle while under the influence of alcohol (OUI), the Supreme Court, Nassau County, George R. Peck, J., granted motorist's motion to suppress the results of chemical breath test for blood alcohol content (BAC). State appealed.

Holding: The Supreme Court, Appellate Division, Leventhal, J., held that as a matter of first impression, if a motorist consents to chemical breath test but, prior to commencement of test, police become aware that an attorney has appeared in the matter, New York's constitutional right to counsel requires police to make reasonable efforts to inform motorist of counsel's appearance if such notification will not substantially interfere with timely administration of test.

Affirmed.

Daniel D. Angiolillo, J.P., filed a dissenting opinion.

West Headnotes (20)

Change View

1 **Automobiles** Consent, express or implied
A motorist does not have a constitutional right to refuse to consent to a chemical breath test for blood alcohol content (BAC). McKinney's Vehicle and Traffic Law § 1194(2).

2 Cases that cite this headnote

2 **Automobiles** Advice or warnings; presence of counsel or witness
A motorist's statutory right to refuse a chemical breath test for blood alcohol content (BAC) may be waived without an attorney's assistance. McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1194(2).

1 Case that cites this headnote

3 **Automobiles** Advice or warnings; presence of counsel or witness
Where a motorist is arrested for driving while under the influence of alcohol

SELECTED TOPICS

Criminal Law

Evidence
Fourth Amendment Right of Defendant

Automobiles
Police Officer Use of Chemical Blood Test
Advice or Warnings; Presence of Counsel
Test Statute Requirements

Secondary Sources

Defense on Charges of Driving Intoxicated

19 Am. Jur. Trials 123 (Originally pu... 1972)

...This article discusses matters pertinent to the defense of a person accused of operating a motor vehicle while his physical and mental faculties are impaired by the consumption of alcoholic beverages. ...

s 11:10. The importance of st compliance

New York Driving While Intoxicated (... (2d ed.)

...In a trilogy of cases known collectively as People v. Moselle, the Court of Appeals examined three convictions, each of which asserted a particular violation of the procedures contained in former Vehicl...

s 184:5. Indelible attachment of right to counsel

33 Carmody-Wait 2d § 184:5

...The accused has the right to have an attorney present while he or she is considering whether to waive his or her right to counsel. In such cases, the right to counsel is said to have "indelibly attache...

See More Secondary Sources

Briefs

Brief of Respondent

2016 WL 1068982
Danny BIRCHFIELD, Petitioner, v. NORTH DAKOTA, Respondent.
Supreme Court of the United States
Mar. 15, 2016

..."No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990). Indeed, "this Cou...

Respondent's Brief and Appen

2010 WL 9462071
THE PEOPLE OF THE STATE OF N... YORK, Respondent, v. Matthew CENTERBAR, Appellant.
Supreme Court, Appellate Division, Third Department.
Sep. 22, 2010

...FN1. While the defendant was being transported to the hospital, Officer Martindale

(DWI) and asks to contact an attorney before responding to a request to take a chemical test for blood alcohol content (BAC), the motorist's limited right to counsel precludes the police from, without justification, preventing access between the motorist and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand. McKinney's Vehicle and Traffic Law § 1194.

4 **Automobiles** Advice or warnings; presence of counsel or witness
For purposes of a motorist's limited right to counsel if the motorist is arrested for driving while under the influence of alcohol (DWI) and asks to contact an attorney before responding to a request to take a chemical test for blood alcohol content (BAC), the request to speak with an attorney must be specific; generalized requests for an attorney are insufficient to invoke the limited or qualified right. McKinney's Vehicle and Traffic Law § 1194.

1 Case that cites this headnote

5 **Automobiles** Advice or warnings; presence of counsel or witness
A motorist's limited right to counsel, if the motorist is arrested for driving while under the influence of alcohol (DWI) and asks to contact an attorney before responding to a request to take a chemical test for blood alcohol content (BAC), is not absolute, and if the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the motorist may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel. McKinney's Vehicle and Traffic Law § 1194.

1 Case that cites this headnote

6 **Automobiles** Advice or warnings; presence of counsel or witness
Where there has been a violation of the limited right to counsel when a motorist is arrested for driving while under the influence of alcohol (DWI) and asks to contact an attorney before responding to a request to take a chemical test for blood alcohol content (BAC), any resulting evidence may be suppressed at the subsequent criminal trial. McKinney's Vehicle and Traffic Law § 1194.

7 **Criminal Law** Right of Defendant to Counsel
The New York constitutional right to counsel is a cherished and valuable protection that must be guarded with the utmost vigilance. McKinney's Const. Art. 1, § 6.

8 **Constitutional Law** Necessity; right to counsel in general
Criminal Law Right of Defendant to Counsel
The indelible state constitutional right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel, and the privilege against compulsory self-incrimination. McKinney's Const. Art. 1, § 6.

1 Case that cites this headnote

9 **Criminal Law** Adversary or judicial proceedings
Criminal Law Inquiry, interrogation, or conversation; request for attorney while in custody
New York's constitutional right to counsel attaches indelibly: (1) upon the commencement of formal proceedings, or (2) when a suspect in custody requests to speak to an attorney, or when an attorney who is retained to represent the suspect enters the matter under investigation. McKinney's Const. Art. 1, § 6

went to the Warren County Sheriffs Office to retrieve a blood kit so that he could seek a sample of the defendant's b...

PETITIONER'S REPLY BRIEF

2000 WL 1634975
Texas v. Raymond Levi Cobb
Supreme Court of the United States
Oct. 30, 2000

...FN* Counsel of Record This case presents two different visions of the Sixth Amendment right to counsel. According to Cobb, the Sixth Amendment forbids police from questioning an accused outside his law...

See More Briefs

Trial Court Documents

The People of the State of New York v. Howard

2010 WL 6817951
THE PEOPLE OF THE STATE OF NEW YORK, v. Keir HOWARD, Defendant.
Supreme Court, New York.
Aug. 11, 2010

...Defendant by indictment is charged with Burglary in the Second Degree and related charges. Defendant filed an omnibus motion to suppress any statements made by the defendant on the grounds that the sta...

The People of the State of New Gaymon

2004 WL 5546651
THE PEOPLE OF THE STATE OF NEW YORK, v. Willie GAYMON, Defendant
Supreme Court, New York.
May 10, 2004

...This decision resolves defendant's pending motions for suppression of defendant's statements and severance from codefendant Scott, supplementing oral rulings previously rendered on these issues. Defend...

The People of the State of New Gaffney

2000 WL 35626568
THE PEOPLE OF THE STATE OF NEW YORK, v. Thomas J. GAFFNEY, Defendant.
County Court of New York
Nov. 09, 2000

...Indictment No. 9-00 Defendant has been accused by indictment of two counts of Vehicular Manslaughter in the Second Degree, two counts of Driving While Intoxicated and one count of failure to keep right...

See More Trial Court Documents

10 **Criminal Law** Counsel
Once the police have been apprised that a lawyer has undertaken to represent a person in custody in connection with criminal charges under investigation, the person so held may not validly waive the state constitutional right to assistance of counsel except in the presence of the lawyer. McKinney's Const. Art. 1, § 6.

11 **Criminal Law** Interference in attorney-client relationship
Inadequate police procedures to track a person in custody, which delay communication between an attorney and client, violate the constitutional right to counsel guaranteed under the federal and state Constitutions. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

12 **Criminal Law** Interference in attorney-client relationship
A defendant's statements made after counsel enters a case may be suppressed, even where the police make good faith efforts to locate the defendant who is in their custody but are unable to do so. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

13 **Criminal Law** Particular cases or issues
Motorist suspected of operating a motor vehicle while under the influence of alcohol (OUI) was in custody, for purposes of New York's constitutional right to counsel, once motorist was arrested and transported to the police precinct. McKinney's Const. Art. 1, § 6.

14 **Criminal Law** Lineup or showup
Suspects are not entitled to counsel at pre-accusatory, investigatory lineups, but once the state constitutional right to counsel has attached, that right requires the police to notify defense counsel of an impending investigatory lineup and afford counsel a reasonable opportunity to attend. McKinney's Const. Art. 1, § 6.

15 **Criminal Law** Lineup or showup
At an investigatory lineup, defense counsel's role is limited to being a passive observer; counsel may not actively participate in the procedure. McKinney's Const. Art. 1, § 6.

16 **Automobiles** Advice or warnings; presence of counsel or witness
Where a motorist consents to a chemical breath test to determine her blood alcohol content (BAC) but, prior to commencement of the test, the police become aware that an attorney has appeared in the matter, New York's constitutional right to counsel requires the police to make reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test. McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1194.

17 **Criminal Law** Deprivation or Allowance of Counsel
When the police are aware that a suspect has counsel, the suspect's right or access to counsel cannot be deprived. McKinney's Const. Art. 1, § 6.

18 **Automobiles** Consent, express or implied
Automobiles Advice or warnings; presence of counsel or witness
Where a motorist consents to a chemical breath test to determine her blood

alcohol content (BAC) but, prior to commencement of the test, the motorist is notified by the police that an attorney has appeared in the matter, the motorist is free to, among other things, request to speak with counsel, refuse a test, or retract a consent to submit to a test. McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1194.

19 **Automobiles** Right to take sample or conduct test; initiating procedure
Automobiles Advice or warnings; presence of counsel or witness
The rule that, where a motorist consents to a chemical breath test to determine her blood alcohol content (BAC) but, prior to commencement of the test, the police become aware that an attorney has appeared in the matter, New York's constitutional right to counsel requires the police to make reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test, applies to cases which involve death or serious physical injury to a person other than the driver, so that the police may obtain a court order compelling a chemical test if the motorist refuses to submit to a test. McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1194(3).

20 **Criminal Law** Right of Defendant to Counsel
New York's constitutional right for a criminal defendant to interpose an attorney between himself and the sometimes awesome power of the sovereign is a cherished principle, and the highest degree of judicial vigilance is required to safeguard the state constitutional right to counsel. McKinney's Const. Art. 1, § 6.

Attorneys and Law Firms

***179** Kathleen M. Rice, District Attorney, Mineola, N.Y. (Tammy J. Smiley and Yael V. Levy of counsel), for appellant.

Frederick K. Brewington, Hempstead, N.Y. (Valerie Cartright of counsel), for respondent.

DANIEL D. ANGIOLILLO, J.P., THOMAS A. DICKERSON, JOHN M. LEVENTHAL, and ROBERT J. MILLER, JJ.

Opinion

LEVENTHAL, J.

***5** This case calls upon us to address a matter of first impression involving the right to counsel under the New York Constitution (*see* N.Y. Const., art. I, § 6), where the defendant consented to a chemical breath test to determine her blood alcohol content (hereinafter BAC), but, prior to the commencement of the test, the police made no effort to inform the defendant that her attorney had appeared in the matter. For the reasons which follow, we hold that where, as here, the police are aware that an attorney has appeared in a case before the chemical breath test begins, they must make reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test. Since the People failed to establish that notifying the defendant of her attorney's appearance would, in fact, have interfered with the ***6** timely administration of the chemical breath test, we conclude that the Supreme Court properly granted that branch of her omnibus motion which was to suppress the results of that test.

Following a collision between the defendant's vehicle and a pedestrian in Nassau County, the defendant was charged with manslaughter in the second degree (*see* Penal Law § 125.15[1]), vehicular manslaughter in the second degree (*see* Penal Law § 125.12[1]), and two counts of operating a motor vehicle while under the influence of alcohol (*see* Vehicle and Traffic Law § 1192[2], [3]).

At a suppression hearing, evidence was adduced demonstrating that, on August 30, 2010, at approximately 2:05 a.m., Nassau County Police Officers responded to the scene of a motor vehicle accident. At the scene, the officers observed the defendant standing beside the door of her vehicle crying and speaking on her cell phone. The defendant's vehicle had a dented hood and a crushed windshield. Between 50 to 70 feet away from the defendant's car lay an injured pedestrian. The pedestrian subsequently died from his injuries. The defendant appeared intoxicated and, after the officers conducted various field sobriety tests, they placed the defendant under ****180** arrest at 2:40 a.m. and transported her to the Central Testing Section at Nassau County police headquarters. When the defendant's family learned of the accident and her arrest, they immediately contacted an attorney and arranged for him to represent the defendant.

At police headquarters, the police requested that the defendant submit to a chemical breath test. The **People** submitted into evidence a consent form initialed by a police officer and signed by the defendant wherein the defendant agreed to submit to the chemical breath test at 3:30 a.m. The parties stipulated that at 3:39 a.m. the defendant's breath was drawn.

Anthony Mayol, the attorney retained by the defendant's family, testified on her behalf. According to telephone records submitted into evidence by the **People**, at 3:31 a.m., Mayol called and spoke to a police dispatcher at Nassau County Police headquarters, and was transferred to "Detention" at 3:32 a.m. This telephone call lasted a total of nine minutes and two seconds. Mayol testified that during this phone call with Detention, he informed the police that he represented the defendant and stated, "You have to stop all questioning and we're not consenting to any form of testing whatsoever." Mayol's cell phone records show that he remained on the line with the police until ***7** 3:39 a.m., the time that the defendant's breath was drawn. Mayol testified that he was told that someone from the precinct would call him back.

The **People** did not offer any testimony from the police officer who spoke with Mayol during the initial phone call. According to the prosecutor, that individual had no recollection of the relevant facts.

At 4:33 a.m., after Mayol did not receive a return call from the police, he telephoned police headquarters a second time. According to Mayol, he asked to speak directly to the defendant, but he could not recall whether he made this request during the first or second call; he testified, "I almost want to say it was the first time, but I couldn't tell you for certain it was the first time. It was one of the two times that I definitely asked to speak to her." The police did not permit Mayol to speak with the defendant.

During the colloquy at the suppression hearing, the hearing court indicated that the "main cases" it was interested in were *People v. Gursey*, 22 N.Y.2d 224, 292 N.Y.S.2d 416, 239 N.E.2d 351 and *People v. Garofolo*, 46 N.Y.2d 592, 415 N.Y.S.2d 810, 389 N.E.2d 123. In response to an argument raised by the prosecutor that "it would [have been] impossible for anyone to run out and cut the test off, tell [the defendant] to stop providing a sample," the court stated that the **People** failed to adduce any testimony to establish that alleged fact. The court also stated that "]t]here was a denial of access to]sic] the lawyer to his client by the police department. That is proven beyond a reasonable doubt." In an order dated July 29, 2011, the hearing court granted that branch of the defendant's omnibus motion which was to suppress the results of the chemical breath test. The **People** appeal (*see* CPL 450.20, 450.50). [1]

On appeal, the **People** assert that the branch of the defendant's omnibus motion which was to suppress the results of the chemical breath test should have been denied because the defendant failed to invoke ****181** her limited right to counsel prior to consenting to the chemical breath test. The **People** argue that a defendant's attorney cannot direct that tests should not be administered unless the client confirms the directive. The ***8** **People** also contend that the defendant failed to establish that her counsel actually requested to speak with her when he called the police prior to the administration of the test. The **People** further argue that Mayol's 3:31 a.m. call was too late to stop the test, which was commenced at 3:39 a.m. when the defendant's breath was drawn.

"Chemical breath tests to determine blood alcohol content . . . are an important investigative tool used by law enforcement in the effort to combat driving while intoxicated and related offenses" (*People v. Smith*, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 965 N.E.2d 928). "Every person who operates a motor vehicle in this state shall be deemed to have given consent" to, among other things, a chemical breath test to determine the alcoholic content of their blood, within certain time limits after being arrested for driving under the influence of alcohol (Vehicle and Traffic Law § 1194[2]). Vehicle and Traffic Law § 1194 sets forth the standards governing the administration of chemical breath tests, and provides that if a motorist refuses a test the motorist's driver's license will be immediately suspended and thereafter revoked for one year. A motorist's failure to submit to a chemical test is admissible as evidence at trial (*see* Vehicle and Traffic Law § 1194[2][f]). "[T]o maximize the probative value of BAC evidence, the police endeavor to administer chemical tests as close in time as possible to the motor vehicle infraction, typically within two hours of an arrest" (*People v. Smith*, 18 N.Y.3d at 548, 942 N.Y.S.2d 426, 965 N.E.2d 928).

1 2 Notably, a motorist does not have a constitutional right to refuse to consent to a chemical breath test (*see People v. Smith*, 18 N.Y.3d at 548, 942 N.Y.S.2d 426, 965 N.E.2d 928; *People v. Shaw*, 72 N.Y.2d 1032, 534 N.Y.S.2d 929, 531 N.E.2d 650; *People v. Thomas*, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 385 N.E.2d 584, *appeal dismissed* 444 U.S. 891, 100 S.Ct. 197, 62 L.Ed.2d 127). Moreover, the statutory right to refuse a test may be waived without an attorney's assistance (*see* Vehicle and Traffic Law § 1194[2]; *People v. Shaw*, 72 N.Y.2d at 1033, 534 N.Y.S.2d 929, 531 N.E.2d 650). Further, "Vehicle and Traffic Law § 1194 does not address whether a motorist has a right to consult with a lawyer prior to determining whether to consent to chemical testing" (*People v. Smith*, 18 N.Y.3d at 549, 942 N.Y.S.2d 426, 965 N.E.2d 928). Nevertheless, if a motorist is arrested for driving while intoxicated, the Court of Appeals has recognized "a limited right to counsel associated with the criminal proceeding" (*id.*).

3 4 5 6 Possessing a "limited right to counsel" means that where a defendant is arrested for driving while under the influence of alcohol and asks to contact an attorney before responding to a request to take a chemical test, the police "may not, without ***9** justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand" (*People v. Gursey*, 22 N.Y.2d 224, 227, 292 N.Y.S.2d 416, 239 N.E.2d 351). If such a request is made, and it is feasible for the police to allow a defendant to attempt to reach counsel without unduly delaying administration of the chemical test, a defendant should be afforded such an opportunity. The request to speak with an attorney must be specific; generalized requests ****182*** for an attorney are insufficient to invoke the limited or qualified right (*see People v. Curkendall*, 12 A.D.3d 710, 715, 783 N.Y.S.2d 707; *People v. Hart*, 191 A.D.2d 991, 594 N.Y.S.2d 942; *cf. People v. DePonceau*, 275 A.D.2d 994, 715 N.Y.S.2d 197). Furthermore, the right to consult with an attorney is not absolute. "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel" (*People v. Gursey*, 22 N.Y.2d at 229, 292 N.Y.S.2d 416, 239 N.E.2d 351; *see People v. Smith*, 18 N.Y.3d at 550, 942 N.Y.S.2d 426, 965 N.E.2d 928). Where there has been a violation of the limited right to counsel recognized in *Gursey*, any resulting evidence may be suppressed at the subsequent criminal trial (*see People v. Smith*, 18 N.Y.3d at 550, 942 N.Y.S.2d 426, 965 N.E.2d 928).

Applying these principles here, as the People correctly contend, there is no evidence in the record that the defendant personally requested to speak to an attorney prior to submitting to the breath test, and thus the limited right to counsel, first recognized in *Gursey*, was not triggered or violated (*cf. People v. Mora–Hernandez*, 77 A.D.3d 531, 531, 909 N.Y.S.2d 435 [suppressing results of breath test where "[p]olice ignored defendant's repeated requests for counsel prior to the administration of the test"]). The defendant concedes that she did not personally invoke the limited right to counsel by requesting to speak with counsel prior to the completion of the chemical breath test.

7 8 9 Turning from the limited right to counsel, we now consider whether, under the circumstances of this case, the defendant's State constitutional right to counsel

attached prior to the administration of the chemical breath test. "New York has long viewed the right to counsel as a cherished and valuable protection that must be guarded with the utmost vigilance" (*People v. Lopez*, 16 N.Y.3d 375, 380, 923 N.Y.S.2d 377, 947 N.E.2d 1155). "The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination" ***10** (*People v. Grice*, 100 N.Y.2d 318, 320, 763 N.Y.S.2d 227, 794 N.E.2d 9; *see* N.Y. Const., art. I, § 6; *People v. Bing*, 76 N.Y.2d 331, 338–339, 559 N.Y.S.2d 474, 558 N.E.2d 1011; *People v. Hobson*, 39 N.Y.2d 479, 481, 384 N.Y.S.2d 419, 348 N.E.2d 894). The right to counsel attaches indelibly (1) upon the commencement of formal proceedings (*see People v. Samuels*, 49 N.Y.2d 218, 221, 424 N.Y.S.2d 892, 400 N.E.2d 1344; *People v. Settles*, 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612), or (2) when a suspect in custody requests to speak to an attorney, or when an attorney who is retained to represent the suspect enters the matter under investigation (*see People v. Cunningham*, 49 N.Y.2d 203, 205, 424 N.Y.S.2d 421, 400 N.E.2d 360; *People v. Rogers*, 48 N.Y.2d 167, 422 N.Y.S.2d 18, 397 N.E.2d 709; *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894; *People v. Arthur*, 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537; *see also People v. Grice*, 100 N.Y.2d at 320–321, 763 N.Y.S.2d 227, 794 N.E.2d 9 [discussing the right to counsel under the State Constitution]; *People v. West*, 81 N.Y.2d 370, 373–374, 599 N.Y.S.2d 484, 615 N.E.2d 968).

10 "[O]nce the police have been apprised that a lawyer has undertaken to represent a defendant in custody in connection with criminal charges under investigation, the person so held may not validly waive the assistance of counsel except in ***183** the presence of the lawyer" (*People v. Garofolo*, 46 N.Y.2d 592, 599, 415 N.Y.S.2d 810, 389 N.E.2d 123; *see People v. Grice*, 100 N.Y.2d at 320–321, 763 N.Y.S.2d 227, 794 N.E.2d 9 [the right to counsel is indelible because once it attaches, interrogation is prohibited unless the right is waived in the presence of counsel]; *People v. Arthur*, 22 N.Y.2d 325, 329, 292 N.Y.S.2d 663, 239 N.E.2d 537 ["once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant" the indelible right to counsel attaches regardless of the lack of a formal retainer agreement]; *People v. Gunner*, 15 N.Y.2d 226, 231–232, 257 N.Y.S.2d 924, 205 N.E.2d 852; *People v. Harris*, 93 A.D.3d 58, 66, 936 N.Y.S.2d 233).

For example, in *People v. Garofolo*, 46 N.Y.2d 592, 415 N.Y.S.2d 810, 389 N.E.2d 123, the defendant, a suspect in a homicide, waived his right to remain silent and made inculpatory statements to the police. Before the defendant's statements had been reduced to writing, the defendant's counsel had made repeated efforts to locate and speak with his client (*see id.* at 600–601, 415 N.Y.S.2d 810, 389 N.E.2d 123). Defense counsel's efforts to locate the defendant were unsuccessful because, at the time, there was "no central pool of information of persons in the custody of the police department" (*id.* at 598, 415 N.Y.S.2d 810, 389 N.E.2d 123). It took almost two hours for counsel to ascertain the defendant's whereabouts; at that point the defendant had already provided the police with a written confession (*see id.* at 598, 415 N.Y.S.2d 810, 389 N.E.2d 123).

11 12 The Court of Appeals in *Garofolo* held that the police were required "to establish and maintain procedures which will ***11** insure that an attorney representing [a person in custody] may communicate with him and with the officials responsible for the investigation, without unreasonable delay" (*id.* at 600, 415 N.Y.S.2d 810, 389 N.E.2d 123, citing *People v. Pinzon*, 44 N.Y.2d 458, 464, 406 N.Y.S.2d 268, 377 N.E.2d 721). The Court held that inadequate police procedures to track a person in custody, which delay communication between an attorney and client, violate the right to counsel guaranteed under the federal and state constitutions (*see People v. Garofolo*, 46 N.Y.2d at 596, 599, 415 N.Y.S.2d 810, 389 N.E.2d 123). Thus, *Garofolo* allows for the suppression of a defendant's statements made after counsel enters a case, even where the police make good faith efforts to locate the defendant who is in their custody but are unable to do so (*see id.* at 600–601, 415 N.Y.S.2d 810, 389 N.E.2d 123).

13 Here, the evidence adduced at the suppression hearing demonstrates that the defendant was in custody once she was arrested and transported to the police precinct

(*see People v. Yukl*, 25 N.Y.2d 585, 589, 307 N.Y.S.2d 857, 256 N.E.2d 172, *cert. denied* 400 U.S. 851, 91 S.Ct. 78, 27 L.Ed.2d 89 [a suspect is deemed to be in custody when, a reasonable person, innocent of any crime, would not have believed she was free to leave the presence of the police]). Furthermore, the defendant's counsel appeared and actually entered the case at 3:31 a.m., when he informed the police that he represented the defendant. Thus, the defendant's indelible right to counsel attached at that point (*see People v. Grice*, 100 N.Y.2d at 324, 763 N.Y.S.2d 227, 794 N.E.2d 9; *People v. West*, 81 N.Y.2d at 373–374, 599 N.Y.S.2d 484, 615 N.E.2d 968), and any subsequent statements that the defendant may have made were rendered inadmissible at trial (*see People v. Garofolo*, 46 N.Y.2d at 599, 415 N.Y.S.2d 810, 389 N.E.2d 123; ***184 *People v. Pinzon*, 44 N.Y.2d 458, 406 N.Y.S.2d 268, 377 N.E.2d 721). However, the evidence which the defendant sought to suppress was the result of the chemical breath test, not a statement.

The defendant advances the contention that once her attorney appeared in the case and instructed the police not to perform the chemical breath test, it was incumbent upon the People to inform her of counsel's instructions and to allow her to consult with counsel. The defendant argues that the People did not submit any evidence at the suppression hearing demonstrating that there was insufficient time to permit her to speak with counsel, and that this failure constituted a deprivation of her right to counsel.

14 The defendant's contentions are analogous to arguments considered by our courts in cases where individuals have sought to apply the rules relating to the State constitutional right to *12 counsel[2] to suppress the results of investigatory lineups (*see e.g. People v. Mitchell*, 2 N.Y.3d 272, 274–275, 778 N.Y.S.2d 427, 810 N.E.2d 879 ["Once the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear"]; *People v. LaClere*, 76 N.Y.2d 670, 563 N.Y.S.2d 30, 564 N.E.2d 640 [finding that the results of investigatory lineups should be suppressed where the lineups occurred after the defendants' right to counsel had attached and where the lineups were conducted without notice to counsel or a recognized excuse for counsel's absence]; *People v. Coates*, 74 N.Y.2d 244, 544 N.Y.S.2d 992, 543 N.E.2d 440; *People v. Hawkins*, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 435 N.E.2d 376; *People v. Blake*, 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 625). In those cases, the Court of Appeals has determined that suspects are not entitled to counsel at pre-accusatory, investigatory lineups, but once the right to counsel has attached, that right requires the police to notify defense counsel of an impending investigatory lineup and afford counsel a reasonable opportunity to attend (*see People v. LaClere*, 76 N.Y.2d at 672–673, 563 N.Y.S.2d 30, 564 N.E.2d 640).

15 At an investigatory lineup, defense counsel's role is limited to being a passive observer; counsel may not actively participate in the procedure (*see People v. Hawkins*, 55 N.Y.2d at 485, 450 N.Y.S.2d 159, 435 N.E.2d 376 [during an investigatory lineup, defense counsel plays the "relatively passive role of an observer"]). However, the role of defense counsel prior to the administration of a chemical breath test is not so passive. A defendant has a right to consult with counsel. Defense counsel serves as an advisor to a defendant as to whether a defendant ought to consent to the administration of such a test and the consequences of a consent or refusal.

The facts of this case can be contrasted with those confronted by the Appellate Division, Fourth Department, in *People v. Pfahler*, 179 A.D.2d 1062, 579 N.Y.S.2d 520 and by the Appellate Term, First Department, in *People v. Meytin*, 30 Misc.3d 128[A], 958 N.Y.S.2d 648.

In *Pfahler*, the Fourth Department held that the defendant's limited or qualified right to counsel was not violated:

> ***185** "When defendant's attorney called the hospital and was informed that defendant was about to have a *13 blood test, *the attorney did not ask to speak to defendant and did not object to the blood test*. The uncontroverted hearing evidence establishes that *defendant was told that his counsel had called before he submitted to the test*. Inasmuch as defendant's only right in this context is the right to consult with counsel before deciding whether to

submit to the test, there was no denial of defendant's right to counsel"

(*People v. Pfahler*, 179 A.D.2d at 1062, 579 N.Y.S.2d 520 [emphasis added]). Like the case at bar, defense counsel in *Pfahler* called and made contact with the police prior to the administration of a chemical breath test. However, *Pfahler* is distinguishable on two grounds: the attorney in that case did not object to the test and, critically, the *defendant was told that his attorney had called* before he willingly submitted to the test.

In *Meytin*, the defendant moved to suppress the results of an intoxilyzer test. The evidence adduced at the suppression hearing showed that, prior to administering the test, defense counsel stated that the defendant should not be "dealt with or questioned" (*People v. Meytin*, 30 Misc.3d 128[A] at *1). Thereafter, the police *informed the defendant* that an attorney had called the police and stated that he was the defendant's attorney. However, the defendant did not request to speak with his attorney about whether he should consent to the sobriety tests and, therefore, it was determined that the defendant waived any qualified right to counsel. The order denying suppression was affirmed. Here, unlike in *Meytin*, the record is clear that the police did not inform the defendant that her attorney had appeared. Hence, we do not know whether the defendant here would have withdrawn her consent after consulting with her attorney.

16 The sui generis nature of this case requires us to examine the gap between *Gursey* and *Garofolo*. To that end, we are asked to consider whether, as the defendant contends, the New York Constitution must be interpreted so as to obligate the police to: inform a motorist in custody that an attorney has appeared in the matter on his or her behalf; inform a motorist that an attorney has requested that the motorist not be subjected to chemical testing; or make efforts to allow counsel to consult with a motorist prior to the commencement of such a chemical test. In addressing these contentions, this Court must balance the defendant's State constitutional right to counsel against the ***14** time-sensitive need to conduct the chemical breath test. " Our right to counsel jurisprudence has continuously evolved with the ultimate goal of 'achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other' " (*People v. Grice*, 100 N.Y.2d at 322–323, 763 N.Y.S.2d 227, 794 N.E.2d 9, quoting *People v. Waterman*, 9 N.Y.2d 561, 564, 216 N.Y.S.2d 70, 175 N.E.2d 445).

17 18 It is well settled that when the police are aware that a suspect has counsel, the suspect's "right or access" to counsel cannot be deprived (*People v. LaClere*, 76 N.Y.2d at 674, 563 N.Y.S.2d 30, 564 N.E.2d 640; *see People v. Blake*, 35 N.Y.2d at 338, 361 N.Y.S.2d 881, 320 N.E.2d 625). The principles which underlie the indelible right to counsel —due process of law, the right to effective assistance of counsel, and the privilege against compulsory self-incrimination (*see* N.Y. Const., art. I, § 6; *People v. Grice*, 100 N.Y.2d at 320, 763 N.Y.S.2d 227, 794 N.E.2d 9)—demand that ***186** the State constitutional right to counsel be interpreted so as to protect the rights of the defendant. Thus, we hold that when the police are aware that an attorney has appeared in a case where a motorist has consented to a chemical breath test, the police are obligated to exercise reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test.[3] While we decline the defendant's request to hold that the police must act as an intermediary for a motorist by relaying messages from an attorney to a client, safeguarding the right to counsel requires a reasonable effort to provide notification of counsel's appearance. Once a motorist is so notified, that individual is free to, among other things, request to speak with counsel, refuse a test, or retract a consent to submit to a test. Where there is no evidence that the police made any efforts to notify a motorist that counsel has appeared in the matter, we must presume that a motorist would have requested to speak with counsel and would have withdrawn her consent to submit to a chemical breath test.

Applying this standard to the facts at issue here, the evidence shows that during Mayol's initial phone call to the police precinct, he spoke to a police officer. This individual would have been expected to provide the hearing court with testimony as to the feasibility of informing the defendant, prior to the commencement of the chemical breath test, that her

attorney had *15 appeared in the action. The witness could have testified, for example, that the defendant was nearby, or that it would have been difficult to reach the defendant when Mayol called, or that the chemical breath test had commenced and could not be halted. However, that individual did not testify and the People's failure to call that witness was crucial. As discussed below, due to the vagueness in their proof, the People failed to satisfy their burden of going forward to show the legality of the police conduct in the first instance (*see People v. Berrios*, 28 N.Y.2d 361, 367, 321 N.Y.S.2d 884, 270 N.E.2d 709).

The record demonstrates that at 3:31 a.m., Mayol notified the police over the telephone that he represented the defendant. This phone call was made prior to the commencement of the chemical breath test (i.e., when the defendant's breath was drawn at 3:39 a.m.). However, the record is barren as to whether the People made any efforts to inform the defendant that her counsel had appeared in the case. The defendant's right to counsel was compromised inasmuch as the People were aware that the defendant's counsel had called, but the People failed to adduce any evidence to show that it was not reasonable to notify the defendant that her attorney had appeared. Therefore, we hold that the People's failure to so notify the defendant mandates the suppression of the chemical breath test results, since that test was commenced after defense counsel appeared in the case.

In view of the People's failure to produce the appropriate witness at the hearing, we need not reach the issue of whether the police are required to interrupt an ongoing chemical breath test when a motorist's attorney has appeared in a matter.

19 We note that in cases such as this which involve death or serious physical **187 injury to a person other than the driver, the police may obtain a court order compelling a chemical test of a driver who refuses to submit to a test (*see* Vehicle and Traffic Law § 1194[3]; *see also People v. Whelan*, 165 A.D.2d 313, 567 N.Y.S.2d 817). This option, however, does not warrant a different result in this case. Law enforcement's ability to compel the defendant to submit to a breath test will not sanction the deprivation of the defendant's right to counsel under the State Constitution. Stated differently, the mere fact that a motorist is alleged to have committed a more serious crime does not mean that such an individual is entitled to a lesser, or greater, right to counsel.

Our dissenting colleague posits that once a motorist has agreed to submit to a chemical breath test, that consent cannot *16 be withdrawn. The dissent equates a consent to undergo a chemical breath test with a waiver which essentially cannot be withdrawn once the proverbial horse is out of the barn. We disagree with the dissent's view. We see no reason why a motorist, in the circumstances of this case, cannot elect to withdraw a previously given consent to submit to a chemical breath test prior to its administration. Here, the chemical breath test had not yet been commenced before Mayol entered the case and, had the defendant been notified of counsel's appearance, she could have elected to withdraw her consent and deal with the consequences that flowed therefrom. The dissent's thesis would eliminate a motorist's right to counsel after a consent is initially given, but prior to the commencement of a chemical breath test. This would render counsel's appearance a nullity as well as prohibiting a motorist from retracting her consent prior to the commencement of a chemical test. Our learned dissenting colleague's analysis only survives scrutiny if a consent to a chemical test is irrevocable even prior to the commencement of such a test. We do not think that the law deems consents to be irrevocable prior to the actual commencement of the test.

Our dissenting colleague also notes that if this were a matter involving a defendant's uncounseled waiver of her privilege against self-incrimination, the evidence obtained from a defendant pursuant to a knowing waiver of that constitutional right, prior to counsel's entry in the matter, would not be subject to suppression (*see People v. Garofolo*, 46 N.Y.2d at 601–602, 415 N.Y.S.2d 810, 389 N.E.2d 123). However, the evidence sought to be suppressed here is not the defendant's consent to submit to the test, which was given prior to counsel's appearance in the case, but rather the results of the chemical breath test which were obtained after counsel's appearance, and following the police's unexplained failure to notify the defendant of counsel's appearance.

20 We are cognizant that our holding here constitutes an extension of the principles set

forth in *Pinzon* and *Garofolo* and their progeny insofar as we affirm the order granting suppression of the chemical breath test results on the ground that the defendant's State constitutional right to counsel was violated. Nevertheless, "[i]n this State, the right of a criminal defendant to interpose an attorney between himself and the sometimes awesome power of the sovereign has long been a cherished principle" (*People v. Settles*, 46 N.Y.2d at 160, 412 N.Y.S.2d 874, 385 N.E.2d 612). Indeed, the " 'highest degree of [judicial[vigilance' is required to 'safeguard' " the State right to counsel (*People v. Harris*, 77 N.Y.2d 434, 439, 568 N.Y.S.2d 702, 570 N.E.2d 1051, quoting *People v. Cunningham*, 49 N.Y.2d 203, 207, 424 N.Y.S.2d 421, 400 N.E.2d 360).

***17** Accordingly, the order is affirmed.

DICKERSON and MILLER, JJ., concur.

****188** ANGIOLILLO, J.P., dissents, and votes to reverse the order dated July 29, 2011, and deny that branch of the defendant's omnibus motion which was to suppress the results of a chemical breath test, with the following memorandum:
On August 30, 2010, at 3:30 a.m., the defendant signed a consent form in which she agreed to submit to a chemical breath test to determine her blood alcohol content (hereinafter BAC). Her consent was valid under applicable statutory provisions and case law. Every motorist arrested for driving while intoxicated is deemed to consent to a chemical test (*see* Vehicle and Traffic Law § 1194 [2[[a[; *People v. Hall*, 61 N.Y.2d 834, 835, 473 N.Y.S.2d 959, 462 N.E.2d 136), and any motorist may, without an attorney's assistance, effectively waive the qualified statutory right to refuse the test (*see People v. Shaw*, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 531 N.E.2d 650). After the defendant gave her valid consent, an attorney entered the case. The majority holds that the chemical breath test results must be suppressed because the police unreasonably failed to advise the defendant of her attorney's appearance so that she could, among other possibilities, reconsider her previous valid consent with the advice of counsel, retract that consent, and refuse to take the test. I do not agree with my colleagues that, under the circumstances presented here, the defendant's right to counsel under the New York State Constitution was violated. Therefore, I respectfully dissent.

The evidence at the suppression hearing established that the defendant was the driver of a car which allegedly struck and killed a pedestrian in the early morning hours of August 30, 2010. Nassau County Police Officers Marlon Sanders and Michael Schneider responded to the scene. At 2:40 a.m., after conducting various field sobriety tests, the police officers arrested the defendant for driving while intoxicated and transported her to the Central Testing Section of the Nassau County Police Department (hereinafter NCPD) headquarters. A consent form signed by the defendant established that, at 3:30 a.m., she agreed to submit to a chemical breath test to determine her BAC. The form was initialed by Police Officer Sanders, identified as the arresting officer, and signed by Police Officer Michael Dyckman, identified as the technician for the chemical breath test.

After the defendant had signed the consent form, an attorney employed by her family, Anthony Mayol, called the NCPD and initially spoke with a switchboard operator. A recording of that segment of the call, starting at 3:31 and 53 seconds and ending at 3:32 and 21 seconds, was entered into evidence. During the recorded segment, Mayol identified himself by name, stated that he was calling on behalf of his client who had been arrested, ***18** and asked to speak to the arresting officer or detective; he did not give the name of his client, nor did he request to speak to her. The operator stated that she would transfer his call to "Detention." The recording ended there. Thus, the recording establishes that Mayol did not inform the police between 3:31:53 and 3:32:21 that the person he represented was the defendant. The time at which Mayol identified the defendant by name is not known, but at the earliest, it would have been sometime after 3:32:21, when the call was transferred to Detention. Telephone records of Mayol's mobile service provider indicate that Mayol remained on the line with the NCPD until 3:39 a.m., and he called a second time at 4:33 a.m. The parties stipulated that the defendant's breath was drawn at 3:39 a.m., which was the same minute that Mayol's first call to the NCPD ended. However, the exact times at which the chemical breath test was commenced ****189** and completed are unknown. At the

suppression hearing, Mayol testified that, after his first call was transferred by the operator, he told a sergeant that his client had just been arrested, he wished to speak to the arresting officer, and "we're not consenting to any form of testing whatsoever." Mayol also testified that, at some point, he asked if he could speak directly to the defendant to "ask how she's doing and calm her down," but he could not recall if he made this request during the first or second call. In any event, he was not given the opportunity to speak with the defendant.

At the suppression hearing, the **People** failed to offer any testimony from the sergeant who had spoken with Mayol, nor did they offer any evidence regarding the feasibility of informing the defendant between 3:32 a.m. and 3:39 a.m. that an attorney had called and was currently speaking with a member of the NCPD. The suppression court generally "credited the testimony of all witnesses ... [in] all material aspects," but made no express finding with regard to Mayol's equivocal testimony regarding his inability to recall if he requested to speak to the defendant during his first or second telephone call. The court granted that branch of the defendant's omnibus motion which was to suppress her chemical breath test results, finding that there had been "a denial of access to the lawyer." I would reverse the order and hold that the results of the chemical breath test are admissible.

Section 1194(2)(a) of the Vehicle and Traffic Law provides that "[a]ny person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one ***19** or more of the following: breath, blood, urine, or saliva," where, as here, a police officer has reasonable grounds to believe that the motorist has violated section 1192 of the Vehicle and Traffic Law. The test must be conducted within two hours after the motorist has been stopped or placed under arrest for such violation (*see* Vehicle and Traffic Law § 1194[2][a]; *People v. Smith*, 18 N.Y.3d 544, 548 n. 1, 942 N.Y.S.2d 426, 965 N.E.2d 928). The Court of Appeals has recognized that chemical breath tests to determine BAC are an important investigative tool in the effort to combat driving while intoxicated, and the administration of these tests "is a time-sensitive proposition; to maximize the probative value of BAC evidence, the police endeavor to administer chemical tests as close in time as possible to the motor vehicle infraction, typically within two hours of an arrest" (*People v. Smith*, 18 N.Y.3d at 548, 942 N.Y.S.2d 426, 965 N.E.2d 928). The Legislature carefully chose the wording of the implied consent provision to ensure timely testing without the need for express consent, even in circumstances where the motorist is unconscious, incapacitated, or injured as a result of excessive drinking (*see People v. Kates*, 53 N.Y.2d 591, 595–596, 444 N.Y.S.2d 446, 428 N.E.2d 852 [analyzing legislative history]).

Chemical BAC testing does not violate any Federal or State constitutional right. Testing of unconscious or incapacitated motorists without their express consent does not violate the constitutional right to equal protection (*see id.* at 596, 444 N.Y.S.2d 446, 428 N.E.2d 852). Compelling the motorist to undergo such testing does not violate the Federal constitutional rights set forth in the Fourth Amendment (unreasonable searches and seizures), Fifth Amendment (privilege against self-incrimination), Sixth Amendment (right to counsel), or Fourteenth Amendment (due process) (*see Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908). The police are not obligated to administer *Miranda* warnings (*see* ***190** *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) prior to a chemical BAC test because no testimonial compulsion is involved and the defendant does not have the right to counsel at this stage of the investigation (*see People v. Craft*, 28 N.Y.2d 274, 277–278, 321 N.Y.S.2d 566, 270 N.E.2d 297; *see also People v. Hager*, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 505 N.E.2d 237 [*Miranda* warnings not required prior to physical performance tests, which do not violate the defendant's privilege against self-incrimination under either the Federal or State Constitution]). A defendant has no constitutional right to refuse to take a chemical test (*see People v. Shaw*, 72 N.Y.2d at 1033, 534 N.Y.S.2d 929, 531 N.E.2d 650). "[I]nasmuch as a defendant can constitutionally be compelled to take such a test, he has no constitutional right not to take one" ***20** (*People v. Thomas*, 46 N.Y.2d 100, 106, 412 N.Y.S.2d 845, 385 N.E.2d 584). Since, under the statutory scheme, there is no compulsion of any sort to elicit a refusal, the introduction of evidence of a defendant's refusal to take the test does not violate the Federal or State Constitution (*see id.* at 107–108, 110, 412 N.Y.S.2d 845, 385 N.E.2d 584). There is no violation of the Sixth Amendment of the Federal Constitution if the police ignore the defendant's repeated requests to speak to his or her attorney prior to taking the test (*see Miller v. O'Bryan*, 498

F.Supp.2d 548, 557).

A defendant does, however, have a "qualified" statutory right to decline to voluntarily take a chemical test with the understanding that the refusal will result in the immediate suspension and ultimate revocation of his or her driver's license for one year and will permit the People to elicit evidence of such refusal at any subsequent criminal trial (*People v. Smith*, 18 N.Y.3d at 548, 942 N.Y.S.2d 426, 965 N.E.2d 928; *see* Vehicle and Traffic Law § 1194 [2[[b[, [2][d[, [2][f[ ). Even so, a defendant's invocation of the qualified statutory right to refuse may be superseded in a case involving death or serious physical injury to a person other than the driver where the police make an ex-parte application and obtain a court order compelling a chemical test (*see* Vehicle and Traffic Law § 1194[3]; *see also People v. Elysee*, 49 A.D.3d 33, 847 N.Y.S.2d 654; *People v. Whelan*, 165 A.D.2d 313, 567 N.Y.S.2d 817). It is in connection with a defendant's qualified statutory right to refuse the test that the courts have considered the issue of access to counsel to aid the defendant in making this decision.

A defendant's "privilege of access to counsel" in this context was first addressed in *People v. Gursey*, 22 N.Y.2d 224, 226, 292 N.Y.S.2d 416, 239 N.E.2d 351. In that case, the defendant, having "a particular attorney in mind," asked to call his attorney twice prior to making his decision whether to submit to a chemical breath test (*id.* at 227, 292 N.Y.S.2d 416, 239 N.E.2d 351). The Court of Appeals determined that the denial of his requests "violated his privilege of access to counsel" (*id.* at 228, 292 N.Y.S.2d 416, 239 N.E.2d 351), holding that "law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand" (*id.* at 227, 292 N.Y.S.2d 416, 239 N.E.2d 351). The *Gursey* Court factually distinguished a previous case in which a motorist had asked to consult with his lawyer on the ground that a defendant has "no ... absolute right to refuse the test until a lawyer reaches the scene" (*id.* at 229, 292 N.Y.S.2d 416, 239 N.E.2d 351, citing *Matter of Finocchairo v. Kelly*, 11 N.Y.2d 58, 61, 226 N.Y.S.2d 403, 181 N.E.2d 427; *see Matter of Boyce v. Commissioner of N.Y. State Dept. of Motor* ***191** *Vehs.*, 215 A.D.2d 476, 477, 626 N.Y.S.2d 537).

***21** Subsequently, in *People v. Shaw*, the Court of Appeals held that, because the defendant has no Federal constitutional right to counsel during this stage of the investigation, there is no obligation to advise the defendant of a right to counsel:

> "The defendant has no constitutional right to refuse to consent to such a search. The right is entirely statutory and, by its terms, may be waived without an attorney's assistance. The Sixth Amendment does not require that the defendant be afforded counsel at this stage in the proceedings. Although the defendant was called upon to waive a statutory right, it was not a critical stage in the proceedings within the meaning of the Sixth Amendment because no judicial proceedings had been initiated against the defendant at that time. The defendant's suggestion that he should be afforded the same rights as a person placed in a police lineup is unavailing because the same rule applies to such proceedings; the right to counsel does not attach at a lineup prior to judicial intervention"

(*People v. Shaw*, 72 N.Y.2d at 1033, 534 N.Y.S.2d 929, 531 N.E.2d 650 [internal citations omitted]). However, the Court noted that, "in this State, a defendant ... generally has the right to consult with a lawyer *before deciding* whether to consent to a sobriety test, *if* he [or she] requests assistance of counsel" (*id.* at 1033–1034, 534 N.Y.S.2d 929, 531 N.E.2d 650 [emphasis added[ ). In so holding, the Court apparently recognized that the *Gursey* rule was premised upon the right to counsel under the New York State Constitution (*see* N.Y. Const. art. I, § 6). The Court distinguished *Gursey*, holding that, "when, as here, an attorney's assistance has not been requested, the fact that the defendant has made an uncounseled waiver of the statutory right to refuse the test ... provides no basis for suppressing the results" (*People v. Shaw*, 72 N.Y.2d at 1034, 534 N.Y.S.2d 929, 531 N.E.2d 650).

More recently, in *People v. Smith*, the Court of Appeals characterized the holding in *Gursey*

as providing "a limited right to counsel" which arises "if a defendant arrested for driving while under the influence of alcohol asks to contact an attorney *before responding to a request to take a chemical test*" (*People v. Smith*, 18 N.Y.3d at 549, 942 N.Y.S.2d 426, 965 N.E.2d 928 [emphasis added]). The Court reiterated: "We have already rejected the notion that the police must notify a defendant concerning the limited right recognized in *Gursey*" (*id.* at 551, 942 N.Y.S.2d 426, 965 N.E.2d 928, citing *People v. Shaw*, 72 N.Y.2d 1032, 534 N.Y.S.2d 929, 531 N.E.2d 650). "Where there has been a violation of the limited right to counsel recognized in *Gursey*, any resulting evidence may be ***22** suppressed at the subsequent criminal trial" (*People v. Smith*, 18 N.Y.3d at 550, 942 N.Y.S.2d 426, 965 N.E.2d 928).

The limited right to counsel is invoked only upon an express request by the defendant to consult his or her attorney prior to making the decision whether to submit to a chemical BAC test or to exercise the qualified right to refuse (*see People v. Gursey*, 22 N.Y.2d at 228, 292 N.Y.S.2d 416, 239 N.E.2d 351; *People v. Mora–Hernandez*, 77 A.D.3d 531, 909 N.Y.S.2d 435 [the defendant made repeated requests for counsel prior to the administration of the test]). A general request for an attorney is not sufficient to invoke the right (*see People v. Curkendall*, 12 A.D.3d 710, 714–715, 783 N.Y.S.2d 707 [limited right not invoked when the defendant agreed to submit to the test but made a general request for an attorney upon receiving *Miranda* warnings[; *People v. Vinogradov*, ****192** 294 A.D.2d 708, 709, 742 N.Y.S.2d 698 [post-*Miranda* refusal to talk without an attorney does not invoke the limited right to counsel with respect to a breathalyzer test]; *People v. Hart*, 191 A.D.2d 991, 594 N.Y.S.2d 942 [the defendant's statements that he should have counsel did not unequivocally inform the police of his intention to retain counsel or that he wanted to consult with an attorney before undertaking the sobriety tests[ ).

Here, as the majority acknowledges, there is no evidence that the defendant asked to speak with an attorney at any time. Thus, she did not invoke her limited right to counsel, as defined in *Gursey*, *Shaw*, and *Smith* (*see People v. Curkendall*, 12 A.D.3d at 714–715, 783 N.Y.S.2d 707; *People v. Vinogradov*, 294 A.D.2d at 709, 742 N.Y.S.2d 698). Clearly, this situation is governed by the rule set forth in *Shaw*: "[W]hen, as here, an attorney's assistance has not been requested, the fact that the defendant has made an uncounseled waiver of the statutory right to refuse the test, provides no basis for suppressing the results" (*People v. Shaw*, 72 N.Y.2d at 1034, 534 N.Y.S.2d 929, 531 N.E.2d 650). Thus, the record establishes that, at 3:30 a.m., the defendant validly waived her qualified statutory right to refuse the test, and her uncounseled waiver provides no basis for suppressing the test results.

More than two minutes after the defendant's valid waiver of her qualified statutory right to refuse, an attorney informed a member of the police department that he represented the defendant in custody. The relevant question at this point is whether the failure of the NCPD, between 3:32:21 a.m., and the taking of the defendant's breath sample at 3:39 a.m., to inform the defendant that her attorney had called, requires suppression of the breathalyzer results. I would hold that it does not.

The Court of Appeals has yet to consider a case involving an attorney's entry at the investigatory stage after the motorist ***23** has made a valid waiver of the qualified statutory right to refuse. Other courts which have considered an attorney's entry into the investigation under various circumstances have found no violation of the right to counsel; however, the defendants in those cases, unlike the one before us, were each informed of their attorney's phone call, and thus, those courts were not faced with the question before us of whether the police had the obligation to notify the defendant of her attorney's contact prior to administering the test (*cf. People v. Pfahler*, 179 A.D.2d 1062, 579 N.Y.S.2d 520; *People v. Meytin*, 30 Misc.3d 128[A]).

Nor has the Court of Appeals considered the interplay between the limited right to counsel and statutory authority for law enforcement to obtain a court order superseding the defendant's qualified right to refuse in a case involving death or serious physical injury. While I would agree with my colleagues in the majority that the nature of the alleged crime committed should not dictate the extent of a defendant's constitutional rights, this does not

answer the question of whether a defendant has a constitutional right to counsel in this context in the first place.

In the absence of case law on point, the majority has taken guidance from decisions outside the area of law governing chemical BAC tests which concern the "indelible right to counsel" under the State Constitution with respect to a suspect's decision to waive his or her privilege against self-incrimination (*People v. Grice*, 100 N.Y.2d 318, 320, 763 N.Y.S.2d 227, 794 N.E.2d 9). In that context, the indelible right to counsel is invoked "before an action is commenced when ... an attorney ***193** who is retained to represent the suspect enters the matter under investigation" by notifying the police of the representation (*People v. Grice*, 100 N.Y.2d at 321, 763 N.Y.S.2d 227, 794 N.E.2d 9). As a corollary of this right, the police must "establish and maintain procedures which will insure that an attorney representing a person in custody may communicate with him [or her] and with the officials responsible for the investigation, without unreasonable delay" after the attorney has contacted the police (*People v. Garofolo*, 46 N.Y.2d 592, 600, 415 N.Y.S.2d 810, 389 N.E.2d 123 [internal quotation marks omitted]; *see People v. Borukhova*, 89 A.D.3d 194, 214–215, 931 N.Y.S.2d 349).

In my view, this line of cases has no application to the situation at hand involving a motorist's waiver of the qualified statutory right to refuse a chemical test. The indelible right to counsel is inconsistent with the statutory procedure allowing *24 law enforcement to overcome a counseled refusal to submit to the test in a case involving death or serious injury where the police obtain a court order. More importantly, not one of the constitutional underpinnings of the "indelible right to counsel" cases is present in any situation in which the Vehicle and Traffic Law authorizes a chemical test. "The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination. The right is 'indelible' because once it 'attaches,' *interrogation* is prohibited unless the right is waived in the presence of counsel" (*People v. Grice*, 100 N.Y.2d at 320–321, 763 N.Y.S.2d 227, 794 N.E.2d 9 [internal citations omitted, emphasis added]; *see* N.Y. Const., art. I, § 6). "[A]bsent the advice of an attorney, the average person, unschooled in legal intricacies, might very well unwittingly surrender his [or her] privilege against compulsory self incrimination when confronted with the coercive power of the State and its agents ... Thus, our indelible right to counsel rule has developed to ensure that an individual's protection against self incrimination is not rendered illusory during pretrial interrogation" (*People v. Hawkins*, 55 N.Y.2d 474, 485, 450 N.Y.S.2d 159, 435 N.E.2d 376 [internal quotation marks omitted]). "The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary" (*People v. Hobson*, 39 N.Y.2d 479, 484, 384 N.Y.S.2d 419, 348 N.E.2d 894; *see People v. Cunningham*, 49 N.Y.2d 203, 208, 424 N.Y.S.2d 421, 400 N.E.2d 360).

Here, by contrast, compelling the submission to a chemical BAC test pursuant to Vehicle and Traffic Law § 1194, as opposed to interrogation, does not require the waiver of any constitutional right and implicates only a qualified statutory right to refuse. As noted above, the State and Federal constitutional rights to remain silent are not implicated. Moreover, there is no State or Federal constitutional right to counsel during the investigatory stage involving the chemical BAC test, except for *25 the limited right to counsel under the State Constitution as defined in *Gursey*, *Shaw*, and *Smith*. The limited right arises only upon a defendant's express, specific request, and thus, the indelible right to counsel, as defined in the interrogation cases to arise through an attorney's appearance in the case, cannot apply in this situation. In any event, even if the limited right to counsel is viewed more liberally to include a general right to counsel in making a decision whether to submit to a ***194** chemical BAC test, such a right must arise, if at all, prior to the defendant's decision whether to submit to the test. Thus, the indelible right to counsel would attach, if at all, only when counsel contacts the police prior to the defendant's waiver of his or her qualified statutory right to refuse. This did not happen here. Notably, the two courts to consider a situation in which an attorney appeared held that the defendants properly waived their limited right to counsel outside the presence of counsel after being informed that the

attorney had called (*see* ***People v. Pfahler***, 179 A.D.2d at 1062, 579 N.Y.S.2d 520, ***People v. Meylin***, 30 Misc.3d at 128[A], 958 N.Y.S.2d 648). These holdings implicitly are at odds with the indelible right to counsel in the interrogation context (*see* ***People v. Grice***, 100 N.Y.2d at 320–321, 763 N.Y.S.2d 227, 794 N.E.2d 9), but consistent with the rule that there is no State or Federal constitutional right to counsel during the investigatory stage involving the chemical BAC test, except for the limited right arising upon a defendant's request (*see* ***People v. Craft***, 28 N.Y.2d 274, 277–278, 321 N.Y.S.2d 566, 270 N.E.2d 297). Since there is no fear that the defendant involuntarily waived a constitutional right, the constitutional underpinnings and the purpose of the indelible right to counsel are not present.

Further, even if we were to take guidance from *Garofolo* and other cases concerning the indelible right to counsel, the result reached by the majority does not necessarily follow. If this were a matter involving a defendant's uncounseled waiver of his or her privilege against self-incrimination, the remedy for an unreasonable delay in affording access to counsel is the suppression of evidence obtained from the defendant's uncounseled waiver of the constitutional right to remain silent (*see e.g.* ***People v. Garofolo***, 46 N.Y.2d at 600–601, 415 N.Y.S.2d 810, 389 N.E.2d 123 [the defendant waived his right to remain silent and gave a written statement to the police after entry of counsel in the matter]). Even in such a circumstance, evidence obtained from a defendant pursuant to an intelligent and knowing waiver of a constitutional right *prior* to counsel's entry in the investigation is not subject to suppression (*see* ***26** *id.* at 601–602, 415 N.Y.S.2d 810, 389 N.E.2d 123 [the defendant's oral statements to police upon his uncounseled waiver of the right to remain silent were admissible, but his written statement taken after counsel's entry and police denial of access were suppressed]). Applying this holding here by analogy, the chemical breath test results were obtained as a result of the defendant's valid uncounseled waiver of the statutory right made prior to counsel's entry into the case, and thus, the test results should not be suppressed.

The majority also draws an analogy to cases involving the State constitutional right of access to counsel during preaccusatory, investigative lineups. In that context, as here, although the accused does not have a State or Federal constitutional right to counsel in general (*see* ***People v. Wilson***, 89 N.Y.2d 754, 758, 658 N.Y.S.2d 225, 680 N.E.2d 598, ***People v. Hawkins***, 55 N.Y.2d at 487, 450 N.Y.S.2d 159, 435 N.E.2d 376), where the police have been notified that an attorney represents the accused, "the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear" (***People v. Mitchell***, 2 N.Y.3d 272, 274–275, 778 N.Y.S.2d 427, 810 N.E.2d 879; *see* ***People v. Wilson***, 89 N.Y.2d at 758–759, 658 N.Y.S.2d 225, 680 N.E.2d 598, ***People v. LaClere***, 76 N.Y.2d 670, 672–673, 563 N.Y.S.2d 30, 564 N.E.2d 640). The right to counsel attaches in that situation even though defense counsel is effectively limited to "the relatively passive ***195** role of an observer" during the lineup (***People v. Hawkins***, 55 N.Y.2d at 485, 450 N.Y.S.2d 159, 435 N.E.2d 376). However, in a lineup, unlike here, the police are not acting under a two-hour statutory constraint. Moreover, a defendant has no right to refuse to participate in a lineup, while the defendant here had the qualified statutory right to refuse the chemical BAC test. Allowing an attorney to enter the case after the defendant effectively waived the qualified statutory right affords the defendant the opportunity to reconsider and revoke that previous valid waiver. In my opinion, the analogy ends there.

In conclusion, the rule stated by the majority, allowing a motorist to withdraw a previous valid waiver, challenges the clear pronouncement by the Court of Appeals that "an uncounseled waiver of the statutory right to refuse the test, provides no basis for suppressing the results" (***People v. Shaw***, 72 N.Y.2d at 1034, 534 N.Y.S.2d 929, 531 N.E.2d 650). It further challenges the holding that the limited right to counsel must be invoked "*before* responding to a request to take a chemical test" (***People v. Smith***, 18 N.Y.3d at 549, 942 N.Y.S.2d 426, 965 N.E.2d 928 [emphasis added]; *see* ***People v. Shaw***, 72 N.Y.2d at 1034, 534 N.Y.S.2d 929, 531 N.E.2d 650 ["before deciding"]). The rule stated by the majority leads to the inconsistent result that evidence obtained pursuant to a valid, uncounseled waiver of the constitutional right to remain silent is not subject *27 to suppression (*see* ***People v. Garofolo***, 46 N.Y.2d at 601–602, 415 N.Y.S.2d 810, 389 N.E.2d 123), whereas evidence obtained pursuant to a valid waiver of a *qualified statutory* right is

being suppressed. Notably, we generally do not give a defendant a second chance to reconsider a previous valid waiver, even when that waiver involves the most cherished constitutional rights (*cf. People v. Alexander*, 97 N.Y.2d 482, 485, 743 N.Y.S.2d 45, 769 N.E.2d 802 [a defendant may not withdraw a guilty plea "merely for the asking"], *People v. Rossetti*, 95 A.D.3d 1362, 944 N.Y.S.2d 911 [same]). Under the rule announced today, a defendant is not only given the right to consult with an attorney after making a decision to submit to a chemical BAC test, the defendant is also given the right to reconsider and revoke a previous valid consent. In my view, this goes too far in expanding the previously established limited right to counsel to assist the defendant in determining whether to exercise the qualified statutory right to refuse a chemical test under Vehicle and Traffic Law § 1194. Accordingly, I would reverse the order of the Supreme Court and deny that branch of the defendant's omnibus motion which was to suppress the test results.

ORDERED that the order is affirmed.

All Citations

107 A.D.3d 4, 964 N.Y.S.2d 176, 2013 N.Y. Slip Op. 02600

Footnotes

1 The People have filed a statement with this Court pursuant to CPL 450.50 asserting that the deprivation of the use of the suppressed evidence has rendered the sum of the proof available to the People with respect to *all* the charges in the indictment "so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed."

2 The courts of this State have, on several occasions, afforded criminal defendants greater protections of counsel under the State Constitution as compared to the rights afforded under the United States Constitution (*see e.g. People v. Hawkins*, 55 N.Y.2d 474, 483, 450 N.Y.S.2d 159, 435 N.E.2d 376, *cert. denied* 459 U.S. 846, 103 S.Ct. 103, 74 L.Ed.2d 93; *People v. Settles*, 46 N.Y.2d at 161, 412 N.Y.S.2d 874, 385 N.E.2d 612).

3 Just as it is important to conduct an investigatory lineup as close in time to the relevant circumstance as possible (*see People v. Hawkins*, 55 N.Y.2d at 486, 450 N.Y.S.2d 159, 435 N.E.2d 376), promptness is equally important to the police with respect to the administration of chemical breath tests (*see People v. Smith*, 18 N.Y.3d at 548, 942 N.Y.S.2d 426, 965 N.E.2d 928).