The State of South Carolina

Office of the Attorney General

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The Honorable Allen F. Sloan
Sheriff, Richland County
Post office Box 143
Columbia, South Carolina 29202

Dear Sheriff Sloan:

In a letter to this Office you referenced the procedure set forth in the SLED Breathalyzer Operator's Test Report which relates to the defendant's right to additional tests in a DUI case. Included in the procedure is the statement made to a defendant

> "... You have the right to additional, independent tests. Whether you take this breath test or not, you will be given reasonable assistance in contacting a qualified person, of your own choosing, to conduct any additional tests. You will have to pay for any additional tests."

You have requested an opinion of this Office as to

(1) the definition of "reasonable assistance" as used in the above statement;

(2) whether or not the transporting of a defendant to a designated hospital is required; and

(3) whether or not the arresting agency is entitled to a sample of an additional test (blood or urine) when the defendant pays for the test.

Section 56-5-2950(a) of the Code provides for the implied consent of the operator of a motor vehicle to chemical tests of breath, blood and urine to determine the presence of alcohol or drugs. Such

provision states in part:

> If the breathalyzer reading is ten one-hundreths of one percent by weight of alcohol in the person's blood or above, the officer may not require additional tests of the person as provided in this chapter ... The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified of that right. A person's failure to request additional blood or urine tests shall not be admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples taken at the direction of the law enforcement officer. The arresting officer shall provide reasonable assistance to the person to contact a qualified person to conduct additional tests....

In Town of Fairfax v. Smith 285 S.C. 458, 330 S.E.2d 290 (1985) the State Supreme Court construed Section 56-5-2950 prior to its being amended in the manner set forth above. Such statute formerly provided:

> The person tested may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing conduct a test or tests in addition to the test administered by the law-enforcement officer ... The arresting officer or the person conducting the chemical test of the person apprehended shall promptly assist that person to contact a qualified person to conduct additional tests.

The Court noted

> The statute clearly gives to an accused person the right to a reasonable opportunity to contact an independent qualified person to conduct a blood test. State v. Lewis, 266 S.C. 45, 221 S.E.2d 524 (1976) held that the statute mandates assistance by the police officer in securing an independent analysis.

285 S.C. at 460. In Lewis the Court construed still earlier statutory language, former Section 46-344(a), which provided:

> The arresting officer or the person conducting the chemical test of the person apprehended shall promptly assist that person to contact a qualified person to conduct additional tests.

As to the assistance required of law enforcement in these situations, the Court in Lewis noted that the defendant, who refused to submit to a breathalyzer test, "... was not a person tested and, therefore, was not entitled to the mandatory assistance provided by ... (the statute)." 266 S.C. at 48. However, the Court determined that the defendant was still entitled to a "reasonable opportunity" to obtain a blood test but held that

> ... we do not agree that Lewis was not afforded a reasonable opportunity because ... (the officer) ... refused to affirmatively assist him. What is reasonable will, of course, depend on the circumstances of each case.

266 S.C. at 47. In the situation before the Court, the defendant was given the opportunity to use the telephone and was able to locate the name of a doctor in the telephone book. The defendant made a telephone call but made no arrangements for a blood test. The Court noted that "(t)he law enforcement officers did nothing to prevent ... (the defendant) ... from obtaining a blood test." 260 at 49. The Court concluded therefore that in the circumstances in that particular case the defendant was provided a reasonable opportunity to obtain a blood test but failed to utilize the opportunity. The conviction was upheld.

In Town of Fairfax, supra, the defendant, who submitted to a breathalyzer test, requested an independent blood test and was taken to the hospital. Over the defendant's objection, the police officer took possession of the blood sample drawn at the hospital and did not permit analysis by the hospital. The sample was instead sent to SLED where analysis was made. At the trial, testimony was admitted by the breathalyzer operator as to the breathalyzer reading along with the results of the blood sample analyzed by SLED. The Supreme Court in reversing the conviction noted that it was intended that a defendant be given the right to gather independent evidence which could be submitted in reply to the State's evidence. The Court concluded that where the defendant was not afforded the right to have analysis of the blood sample made by an individual of his own choosing, the State should not have been allowed to introduce evidence of either the breathalyzer test or the blood sample analyzed by SLED.

In State v. Pipkin, 294 S.C. 336, 364 S.E.2d 464 (1988) the State Supreme Court dealt with a situation where an individual, after being administered a breathalyzer test, requested an independent test. The defendant was taken to a local hospital where a blood sample was taken. However, the officer took possession of the sample and indicated it would be sent to SLED for analysis. The defendant was then informed that if a "back-up" test was desired, another sample would have to be drawn. The defendant refused to provide the second sample.

Section 56-5-2950(a) at that time provided

> No person shall be required to submit to more than one test for any one offense for which he has been charged ... The person tested may have a ... qualified person of his own choosing conduct a test or tests in addition to the test administered by the law enforcement officer. The arresting officer or the person conducting the chemical test of the person shall promptly assist that person to contact a qualified person to conduct additional tests.

The Supreme Court in reversing the conviction held that the seizure and testing of the blood sample by the officer was an unauthorized second examination of the defendant's blood alcohol content. The Court noted "(t)he statute permits only one such examination--the breathalyzer test." 294 S.C. at 338. The Court also concluded that the defendant's right to have an independent test was compromised in that the defendant was entitled to have his blood analyzed independently from the sample taken without having to submit to having a second blood sample taken. Citing Town of Fairfax, supra, the Court suppressed the breathalyzer and blood test results.

In State v. Wilson, 296 S.C. 73, 370 S.E.2d 715 (1988) the Supreme Court reviewed the case of a defendant who, having submitted to a breathalyzer test, requested an independent blood test. Law enforcement officers drove defendant to the Baptist Hospital in Columbia where two blood samples were taken without objections being raised. One sample was given to the defendant; the other was given to the officers. The hospital advised the defendant that it did not analyze blood alcohol content. The officers had their sample analyzed. Upon the defendant's release from jail, he took his sample to Moncrief Army Hospital for analysis but due to that hospital's testing methodology, he was advised to have the blood analyzed at Richland Memorial Hospital. Appellant made no further attempts to obtain analysis. At the defendant's trial, the blood test results were admitted.

The Supreme Court held that the lower court erred in admitting the State's analysis of the defendant's blood sample. However, the Court concluded that in the case before it the test results were cumulative and as a result, admission of the State's test result was not prejudicial. The Court further held

> We conclude that appellant was not denied his statutory right to a reasonable opportunity to have his blood tested by an independent, qualified person as were the defendants in Town of Fairfax and Pipkin.

296 S.C. 76.

As referenced, you have questioned the definition of "reasonable assistance" as used in the statement noted in your letter and Section 56-5-2950(a) and whether or not the transporting of a defendant who submits to a breathalyzer test to a hospital for additional testing is required. This Office cannot categorically define what is meant by "reasonable assistance" or state exactly what is required of law enforcement in each individual situation. As stated by the Supreme Court in State v. Lewis, "(w)hat is reasonable will ... depend on the circumstances of each case." In Lewis, the defendant refused to submit to a breathalyzer test but the Supreme Court concluded that the defendant was still entitled to a "reasonable opportunity" to obtain an independent test even though he was not entitled to the mandatory assistance required by statute. The defendant had asserted that such an opportunity was required under the due process clause of the Fourteenth Amendment. As noted, the defendant was not transported to a hospital but instead was given the opportunity to use the telephone. However, in the Town of Fairfax, Pipkin and Wilson cases the defendants who submitted to breathalyzer tests and who requested independent blood tests were transported to hospitals to have their blood sample drawn. As to cases in other jurisdictions, in Fiegel v. City of Cabot, 767 S.W.2d 539 (1989) the Arkansas Court of Appeals considered whether the Arkansas statutory requirement that a law enforcement officer "permit and assist" an individual arrested for driving under the influence to obtain an additional independent chemical test was met in the circumstances before the court. In that situation, the officer gave the defendant the choice of telephoning a qualified individual to request that the individual come to headquarters to take a blood sample or alternatively, the defendant could have someone transport him to a facility that could take a sample. Instead, the defendant requested that the officer transport him to a hospital for his test. The officer denied the request explaining that his department was short-handed and he was the only officer on duty. The facility where such a test could be performed was more than eight

miles away. The court in a split decision found that the officer's actions were reasonable in such circumstances and concluded that the officer's actions substantially complied with the statute. Again, as to your question regarding the degree of assistance required in the circumstances you described, each situation must be analyzed on a case by case basis.

You also asked whether the arresting agency is entitled to a sample of an additional test when the defendant pays for the test. I assume you are referencing a situation where a defendant submits to a breathalyzer test and the alcohol-blood reading on such is .10 or above. As noted, Section 56-5-2950(a) provides that if a breathalyzer test reading is .10 or above, "the officer may not require additional tests...." Also, as referenced, the State Supreme Court in Pipkin and Wilson disapproved of analysis by the State of a blood sample taken pursuant to the request of the defendant who had submitted to a breathalyzer test. Therefore, I am unaware of any basis for concluding that a law enforcement agency is absolutely entitled to a blood sample as a second test in circumstances where a defendant requests an independent test.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions