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1/21/85

The State of South Carolina



Office of the Attorney General

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January 28, 1985

Osborne L. Morris, Chief of Police
Moncks Corner Police Department
118 Carolina Avenue
Moncks Corner, South Carolina 29461

Dear Chief Morris:

Your letter of January 22, 1985 to Attorney General Medlock has been referred to me for response. Referencing Section 56-5-2950(a) of the Code, you have raised the following questions:

(1) Under subsection(a), is the statement 'the test shall be administered at the direction of a law enforcement officer who has apprehended a person while driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor,' considered to be a mandate that a chemical test to determine the alcoholic content of blood must necessarily be given?

(2) When a person who has been arrested for DUI does not request a chemical test and is not given one by the arresting officer, must the trial officer render a directed verdict of acquittal?

As to your first question, I am enclosing copies of previous opinions of this Office dated May 29, 1981, May 25, 1971, and November 6, 1969 which are relevant to your inquiry. The 1981 opinion particularly states that

REQUEST LETTER

Continuation Sheet Number 2
To: Osborne L. Morris, Chief of Police
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"there is no obligation on the State to offer an individual, arrested for driving under the influence, a breathalyzer test. The State may instead base its case on any other relevant evidence available." 1/

As to your particular question as to whether the referenced language in Section 56-5-2950 cited above mandates that a breathalyzer test be given, in Albrecht v. State, 314 S.E.2d 859 (1984), the West Virginia Supreme Court of Appeals was faced with the argument that similar language in the West Virginia statute that a chemical test "shall be administered at the direction of the arresting law-enforcement officer" meant that such a test was mandatory following an arrest for driving under the influence. Ruling against such a construction, the court stated that

"(a)ll this phrase means is that if a chemical test is given, it has to be administered at the direction of the arresting officer.... (S)uch provisions do not mandate the use of chemical sobriety tests in all cases." 314 S.E.2d at 863, 864.

A similar construction of Section 56-5-2950 could also be made. Therefore, it remains the opinion of this Office that Section 56-5-2950 does not mandate that a breathalyzer test necessarily be given to an individual arrested for driving under the influence. Any other competent evidence could be utilized by the State.

1/ Indeed, in later provisions, Section 56-5-2950 expressly states:

"(t)he provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor."

Continuation Sheet Number 3
To: Osborne L. Morris, Chief of Police
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In your remaining question you asked whether a directed verdict of acquittal is mandated where a breathalyzer test is neither given to nor requested by an individual arrested for driving under the influence. Consistent with the response to your first question that a breathalyzer test is not mandatory, a trial officer would not be obligated to render a directed verdict of acquittal.

If there is anything further, please advise.

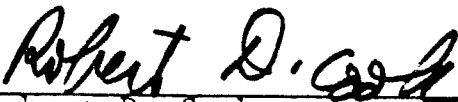
Sincerely,


Charles H. Richardson
Assistant Attorney General

CHR:djg

Enclosures

REVIEWED AND APPROVED BY:


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