

1978 S.C. Op. Atty. Gen. 201 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-174, 1978 WL 22642

Office of the Attorney General

State of South Carolina

Opinion No. 78-174

October 20, 1978

***1 SUBJECT: Law Enforcement—DUI**

It is the duty of the arresting officer or the person conducting a chemical test of a person arrested for driving under the influence to assist that person in contacting a qualified person to conduct a blood test.

TO: A. Ray Goodshall, Esquire
Gaffney City Attorney

QUESTION:

It a defendant arrested for driving under the influence requests a blood test what is the extent of the assistance a law enforcement officer must give to such defendant to obtain such a test?

STATUTES AND CASES:

[State v. Lewis](#), 266 S.E. 45, 221 S.E.2d 524 (1976); Section 56–6–2950, Code of Laws of South Carolina (1976); [In re Koehne](#), 54 Cal.2d 757, 8 Cal. Rptr. 80, 356 P.2d 179 (1960); [In re Newbern](#), 175 Cal. App.2d 862, 1 Cal. Rptr. 80, 78 A.L.R.2d 901 (1959); [State v. Reyna](#), 92 Idaho 669, 448 P.2d 762 (1968); [State v. Munsey](#), 152 Me. 198, 127 A.2d 79 (1956); [State v. Snipes](#), 478 S.W.2d 299 (1972); 78 A.L.R.2d 905.

DISCUSSION:

In your request for an opinion concerning the right of a defendant arrested for driving under the influence who had previously refused to have a breathalyzer test administered to him to have a blood test performed, you set forth the following factual situation. You indicated that the defendant was arrested and charged with driving under the influence and upon being taken to the Law Enforcement Center he would not consent to the breathalyzer test. The defendant called his attorney and the attorney asked the officer to take the defendant and give him a blood test and stated that the cost would be paid. The officer told the attorney that he would not take the defendant to have the blood test because he refused the breathalyzer test. You have indicated that the same man was arrested again a short time later also for driving under the influence and again refused to take the breathalyzer test. Again he asked for a blood test and the officer told the defendant that since he did not take the breathalyzer test that he would not take him for a blood test.

In the case of [State vs. Lewis](#), 266 S.C. 45, 221 S.E.2d 524 (1976), the defendant was arrested for driving under the influence and upon being taken to the jail and asked to submit to a breathalyzer test, he refused to take the test and asked for a blood test instead. The breathalyzer operator told the defendant he would assist him in procuring a blood test only if he first submitted himself to a breathalyzer test. The question before the court was whether there was error in refusing the motion to dismiss the prosecution on the ground that the law enforcement officer failed to assist the defendant in obtaining a blood test. In its opinion, the Supreme Court held that the defendant was entitled to a reasonable opportunity to obtain a blood test even though he refused to take the breathalyzer test. The Court indicated that although [Section 56–5–2950, Code of Laws of South Carolina](#) 1976 does not expressly give a person this right, the Court did not construe

the statute as depriving a person arrested for driving under the influence who refuses to take a breathalyzer test, of a reasonable opportunity to obtain a blood test. The Court, however, based on the factual situation, did not agree that the defendant was not afforded a reasonable opportunity because the breathalyzer operator refused to affirmatively assist him. The Court indicated that ‘what is reasonable will, of course, depend on the circumstances of each case’. [266 S.C. at 48.](#)

*2 In reaching its decision the Court referred to that portion of [Section 56–5–2950 of the 1976 Code](#) of Laws which states 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 was of the opinion that the phrase ‘that person’ in the aforementioned section refers to a person whose breath has been tested by law enforcement officers. The Court was of the opinion that such conclusion was inescapable in construing [Section 56–5–2950](#) in its entirety. In this instance the Court indicated that the defendant was not a person tested and therefore was not entitled to the mandatory assistance provided by this section. However, the Court in its decision declared that the defendant was entitled to a reasonable opportunity to obtain a blood test, even though he refused to take a breathalyzer test, on due process grounds.

The facts before the Court in this case were that the defendant was given the opportunity to use the telephone before and after he refused to take the breathalyzer test. He was able, in the opinion of the arresting officer, to locate the name of a doctor in the telephone book and on one occasion the defendant did make a telephone call but made no arrangements for a blood test. The Court indicated that the law enforcement officers did nothing to prevent the defendant from obtaining a blood test. In reaching its decision that the defendant's due process rights were not violated by the actions of the law enforcement officers, the court concluded that the defendant was afforded a reasonable opportunity to obtain a blood test but failed to use it.

The factual situation indicated in the letter prompting this opinion is different inasmuch as instead of the breathalyzer operator having the contact with the defendant in his attempt to arrange a blood test, here the arresting officer was the one who did not take the defendant to have the blood test. With reference to such, the pertinent paragraph of [Section 56–5–2950](#) states

The arresting officer or the person conducting the chemical test . . . shall promptly assist that person to contact a qualified person to conduct additional tests. (Emphasis added).

Furthermore, with reference to the decision in [Lewis](#), even though the defendant may not have been entitled to the mandatory assistance of the officer by virtue of this particular provision, it appears that there was a duty on the arresting officer to assist the person in this respect based on due process grounds. However, it appears that based on the situation as outlined the arresting officer did perform the duty required of him in this instance inasmuch as all that is required of the arresting officer, or for that matter the breathalyzer operator, is that they are to assist the person arrested for driving under the influence in contacting a qualified person to conduct additional tests. In the letter you indicate that in the first instance a telephone call was made to an attorney and the attorney asked the officer to take the individual to have a blood test administered but the officer refused to take him to have such test done. It appears therefore that the required duty was performed in this instance. In the second arrest, there is no clarification as to what exactly was done other than you indicated that the officer told the defendant that since he did not take the breathalyzer test, he would not take him for a blood test. However, it does not appear that there was anything done to prevent the defendant from attempting to contact anyone else concerning such a blood test.

*3 In the case of [In re Koehne](#), 54 Cal.2d 757, 8 Cal. Rptr. 80, 356 P.2d 179 (1960) the California Supreme Court citing [In re Newbern](#), 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 78 A.L.R.2d 901 (1959) stated:

It is significant, however, that the law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring the evidence deemed necessary to the defense of an accused. Rather it is the accused whom must act to protect his interests, and it is only when he is denied an opportunity, reasonable under the circumstances, to procure a timely sample of his blood that he can properly claim a denial of due process. [356 P.2d at 180–181](#).

In Newbern, it was stated

While there is no duty or obligation on the law enforcement agencies to give a blood test under these circumstances, the arrested person on his own behalf, should be entitled to a reasonable opportunity to attempt to procure a timely sample. [78 A.L.R.2d at 905](#).

Other cases which support the proposition that only a reasonable opportunity, and not affirmative assistance, is constitutionally required include [State v. Reyna](#), 92 Idaho 669, 448 P.2d 762 (1968); [State v. Munsey](#), 152 Me. 198, 127 A.2d 79 (1956), and [State v. Snipes](#), 478 S.W.2d 299 (1972). See also the annotations in [78 A.L.R.2d 905](#). In Munsey, the Supreme Court of Maine held, as to the rule as to the nature of the opportunity which a defendant arrested for driving under the influence is to be accorded in obtaining a blood test:

What is reasonable will of course depend on the circumstances. When the respondent is detained under arrest, the opportunity afforded him must be consistent with safe custody. Under ordinary circumstances a respondent who is orderly and cooperative will be permitted to use the telephone to communicate with a qualified doctor of his own selection. In many places of temporary detention it is the practice of the officers to call a doctor at the request of the respondent. There is never certainty that these efforts will be successful or that a doctor will be procured in time to make an effective test. If all reasonable efforts fail and no blood sample is in fact procured, no rights of the respondent are infringed for his right is not to have a test sample taken but to only have a reasonable opportunity to attempt to gather the desired evidence. [127 A.2d at 81–82](#).

CONCLUSION:

Therefore, based on that portion of [Section 56–5–2950 of the Code](#) of Laws previously cited and the above court decision, in the opinion of this Office, it is the duty of the arresting officer or the person conducting a chemical test of a person arrested for driving under the influence to assist that person in contacting a qualified person to conduct a blood test. Upon the performance of such a duty, the defendant is not deprived of any due process violations in such a regard.

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