

1975 WL 29028 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 24, 1975

*1 Breathalyzer results are inadmissible when the offense was not committed in the presence of the arresting officer at whose direction the breathalyzer was administered.

County Attorney
Colleton County

QUESTION PRESENTED:

Are the results of a breathalyzer admissible when the test is administered as follows:

(a) Officer #1 observes the motorist driving under the influence and stops the motorist. Officer #1 does not issue the motorist a ticket and does not remove the motorist from the scene, but calls Officer #2.

(b) Officer #2 arrives on the scene after the motorist has been stopped by Officer #1, and therefore does not observe the motorist driving. Officer #2 issues the motorist a ticket, transports him to jail, and directs Officer #3 to administer the breathalyzer.

AUTHORITIES:

South Carolina Code (1962, as amended) § 46-344 which reads in part as follows:

‘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 an intoxicating liquor.’

DISCUSSION:

It is the opinion of this Office that this Section requires that the breathalyzer be administered at the direction of the arresting officer in whose presence the offense was committed.

Even though Officer #1 apprehended the motorist, he is not the arresting officer. Officer #2, who issued the motorist a ticket and transported him to the jail is considered to be the arresting officer, and therefore could have ordered the administration of the breathalyzer only if the offense was committed in his presence. Since the motorist had already been stopped when Officer #2 arrived on the scene, the offense of driving under the influence could not have been committed in his presence. Officer #2 could charge the motorist with driving under the influence on the basis of the information given to him by Officer #1, but he could not have demanded the administration of the breathalyzer under § 46-344.

CONCLUSION:

An arresting officer may demand the administration of the breathalyzer under § 46-344 only when the offense of driving under the influence has been committed in his presence.

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