1973 S.C. Op. Atty. Gen. 103 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3502, 1973 WL 20963

Office of the Attorney General

State of South Carolina
Opinion No. 3502
March 30, 1973

***1 Re: Implied Consent Breathalyzer**

Mr. Robert A. Milam, III
Instructor
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29210

Dear Mr. Milam:
You have made several inquiries relative to Sections 46–343 and 46–344 of the South Carolina Code:
WHERE A LAW ENFORCEMENT OFFICER HAS NOT WITNESSED THE OFFENSE OF DRIVING UNDER THE INFLUENCE, BUT SUBSEQUENTLY ARRIVES ON THE SCENE AND A DRIVER APPEARS TO BE UNDER THE INFLUENCE MAY HE REQUIRE THE DRIVER TO TAKE A BREATHALYZER TEST?

The offense of driving under the influence is a misdemeanor in this State and when a misdemeanor is committed out of the presence of the law enforcement officer a warrant must be obtained prior to arrest. This, of course, is not to say when an officer arrives at the scene, e.g. to investigate an accident, and finds a driver who appears to be drunk that he may not arrest him for public disorderly conduct in proper circumstances or for some other misdemeanor that is being committed in his presence.

Let us consider, however, that an officer has arrived at an accident scene, finds a driver in an intoxicated condition, and subsequently secures an arrest warrant for the driver for driving under the influence. May this driver now be required to submit to the breathalyzer test? At first glance § 46–344(a) would appear to make no distinction between an arrest made for DUI in the officers presence and an arrest for DUI by Warrant when the offense has been committed out of the officers presence. However, the second sentence of this section contains the following language:
. . . 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 . . .. (emphasis added)

If the officer has arrived at the accident scene and must secure an arrest warrant for the offense, he has not apprehended the person while driving under the influence. He has apprehended the person after driving under the influence. There is therefore no officer to direct the administration of the test and such being the case the test cannot be required. Of course, the individual may voluntarily take the breathalyzer test, but if he does not his license may not be revoked for refusal.

Undoubtedly other interpretations could be made of the language above and other language in sub (a) of Section 46–344, however, since it is not possible to say with any certainty how our State Supreme Court would construe the above quoted language if the issue be presented and since there appears to be a substantial question as to its construction, my advice to any law enforcement officer faced with the necessity of obtaining a warrant prior to an arrest for driving under the influence would be for him in such a case not to require the taking of the breathalyzer test. Of course as stated this does not exclude a test taken voluntarily by an accused.

***2** WHERE AN INDIVIDUAL HAS BEEN PROPERLY ARRESTED FOR DRIVING UNDER THE INFLUENCE OF DRUGS MAY THE DEFENDANT BE REQUIRED TO FURNISH A SAMPLE OF HIS BLOOD AT THE REQUEST OF THE ARRESTING OFFICER?

The leading case bearing upon this question is Schmerber v. California, 347 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1986). In that case a defendant was arrested for driving under the influence of alcohol while at the hospital receiving treatment for injuries suffered in an accident involving the automobile he had been driving. Subsequently, a blood sample was withdrawn from the defendant's body by a physician at the hospital at the direction of the police officer. The blood was withdrawn despite defendant's refusal, upon advice of counsel, to consent to the test. A chemical analysis of the blood revealed a percent by weight of alcohol in defendant's blood at the time of the offense which indicated intoxication. The report of this analysis was admitted in evidence at trial and defendant was convicted. The U. S. Supreme Court affirmed the conviction. The Court stated in conclusion that
. . . (i)t bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the states minor intrusions into an individuals body under stringently limited conditions in no way indicates that it permits more substantial intrusions under other conditions. (emphasis added)

I believe that under the rationale of Schmerber that blood could be extracted from a defendant lawfully arrested for driving under the influence of drugs and that relevant results of a test upon this blood could be introduced at defendant's trial on such charge. With the caveat of the Court's statement in Schemerber, quoted above, in mind, I would, however, limit such bodily intrusion as follows:
1. The individual must be under lawful arrest,

2. A search warrant must first be obtained

Exception:
Where an emergency existe which threstens the destruction of the evidence. In Schmerber the Court stated that given the special facts that the percentage of alcohol in the blood is said to diminish after drinking stops and because time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, that the existence of these special facts allowed the conclusion that the '. . . attempt to secure evidence of blood-alcohol content . . . was an appropriate incident to petitioner's arrest.'

3. There must be a clear indication that in fact the evidence needed will be found. As stated in Schmerber, supra at p. 919 '. . . (t)he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained . . .' emphasis added.

4. Test must be performed in a reasonable manner, In Schmerber the blood was taken by a physician in a hospital environment. Although the Court in Schmerber did not specify minimum requirements in the taking of blood it is very likely that the standard must at least be that the blood be extracted by a qualified individual utilizing accepted medical technique. Although it is not presently known if such a test would be objectionable as not being given in a reasonable manner if it were given in other than a hospital environment, I would recommend that such a test only be made at a hospital, hospital type facility or doctor's office, that is, in a hospital environment, and in no other place.

***3** 5. Type of test must be reasonable. As stated in Schmerber extraction of blood is commonplace these days and that for most people the procedure involves virtually no risk, trauma, or pain. The Court did point out that since the defendant in Schmerber was not '. . . one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing . . .' that it was not necessary to decide whether such withes would have to be respected. It is not known how the

court would rule if such issues were presented, however, it would appear that whether or not the court would uphold any test would depend upon the reasonableness of the test chosen given the surrounding circumstances. Any test chosen, whether blood or otherwise, must not involve, in any event, any appreciable danger to the accused.

In conclusion I may add that it is readily apparent that 'minor intrusions into the body' such as blood tests to determine content of drug in the blood could only be conducted in 'stringently limited conditions,' and undoubtedly that any such test would come under close scrutiny by a court. Further it is my understanding that the tests most commonly conducted upon a blood sample at present in this State do not come up with a percentage of drug content in the body that can be easily translated into a level of intoxication. Additionally if a blood sample is taken the number of witnesses needed to get the sample into evidence and to testify as to what the amount of drug in the blood means in relation to intoxication, certainly increases over the number usually needed in a drunk driving case. All of which points up that from a practical point of view, an officer faced with the option of whether or not to attempt to obtain a blood test after arresting one for driving under the influence of drugs may very well conclude that the effort and chance of invading a constitutionally protected right do not justify the probable results. Such of course is a determination for the officer and his department.

WHERE AN INDIVIDUAL HAS BEEN CHARGED WITH DRUNK DRIVING AND THE CHARGE IS LATER DISMISSED OR OTHER DISPOSITION MADE OF THE CHARGE SHORT OF A CONVICTION AND THE INDIVIDUAL HAD REFUSED A BREATHALYZER TEST AT THE TIME OF HIS ARREST, MUST THE 90 DAY SUSPENSION FOR THE REFUSAL BE RESCINDED?

The answer to this question is clearly no. The ninety day suspension provided for refusal of a chemical test to determine alcoholic content of blood provided in Section 46–344 is a civil type action as opposed to a criminal action. c.f. Parker v. State Highway Dept., 224 S.C. 263, 78 S.E.(2d) 382 (1953) The suspension provided in 46–344 is entirely independent of the criminal violation created by Section 46–343 and the outcome of the criminal prosecution on the drunk driving charge has no bearing on such suspension.

IF AN INDIVIDUAL HAS HIS DRIVER LICENSE SUSPENDED AS A RESULT OF THE OPERATION OF SECTION 46–344 AND A HEARING IS HELD UPON THE SUSPENSION ARE THE ISSUES AT THE HEARING LIMITED?

***4** Section 46–344(e) provides that the scope of a hearing provided as a result of a suspension under that Section

. . . shall be limited to the issues of whether the person was placed under arrest, whether the person had been informed that he did not have to take the test but that his privilege to drive would be suspended or denied if he refused to submit to the test, and whether he refused to submit to the test upon request of the officer . . .

The issues therefore of a hearing held upon suspension of a license for refusal to take a breathalyzer test are limited to those as set forth in the quoted portion of the statute above set forth. Any testimony by any participant at the hearing relative to or bearing upon these issues would be proper, however, testimony not bearing upon these issues would properly be excluded by clear expressions of the statute of the scope of such hearing. I may add, however, that the first issue to be determined '. . . whether the person was placed under arrest . . .' undoubtedly should be interpreted to mean lawful arrest. The hearing officer therefore should hear testimony as to whether there was probable cause for the arrest for drunk driving to satisfy the first issue.

As a further comment I may note that it is my understanding that 46–344 has for some time now come under attack as too narrow and as not providing for due process of law. Although there is a possibility that the section will not survive such attacks, the question has never been determined by our State Supreme Court. Until either our Court or the General Assembly make changes in the Section the procedures established in the section should be followed. This would include limitation of the issues of a hearing as specifically prescribed above.

HOW LONG MAY AN INDIVIDUAL BE HELD IN JAIL AFTER BEING ARRESTED FOR DRUNK DRIVING?

The Statutes are silent upon this matter and our Supreme Court has not passed upon the specific question, This office, however, on several occasions has expressed the opinion that a jailor who has custody of an intoxicated prisoner is entirely within his rights in refusing to release such prisoner on bond or bail, even to a sober responsible person, absent a court order requiring such release, until such prisoner is apparently in condition to provide for his own safety. It has also been stated that it is possible that the releasing authority, whether he be judge or jailor, may have some legal responsibility if a drunk person was released and injured himself or others as a result of his intoxication. It should be noted however, that there would be obvious exceptions to a rule of non release of jailed drunk persons. Such as where valid medical reasons would dictate such release.

I hope that the above is sufficient for your purpose however, if I may be of further assistance please don't hesitate to let me know.
Very truly yours,

James C. Harrison, Jr.
Assistant Attorney General

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