IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

IN THE MATTER OF THE SUSPENSION OF THE DRIVER'S LICENSE OF JERRY LYNN HEITZMAN.	)	**CASE NO. SP-99-00011 Consolidated With Case No. CR-99-00107**
JERRY LYNN HEITZMAN,	)	**OPINION AND ORDER ON APPEAL FROM MAGISTRATE'S DIVISION**
Petitioner-Appellant,	)	
STATE OF IDAHO,	)	
Respondent.	)	

Driver whose license had been seized for refusal to submit to Intoxilyzer 5000 evidentiary test for blood alcohol level requested show cause hearing on basis that he already had submitted to evidentiary testing through use of Alco-Sensor at scene of arrest. Driver appeals the determination of Magistrate Barbara A. Buchanan suspending his license and holding that State is entitled to conduct more than one evidentiary test. Reversed and remanded.

Attorneys:

Brent C. Featherston, Sandpoint, Idaho, for Petitioner-Appellant;
Roger Hanlon, Bonner County Deputy Prosecuting Attorney, Sandpoint, Idaho, for State.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter was argued before the Hon. Barbara A. Buchanan on stipulated facts and those gathered from the record, as follows:

Jerry Heitzman was driving a 1985 Oldsmobile when he was stopped and detained on January 5, 1999 by a Bonner County sheriff's officer, Officer Phil Ciammaichella. ***See*** Misdemeanor Citation; Probable Cause Affidavit in Support of Arrest. According to his affidavit, Officer Ciammaichella noticed the strong odor of alcohol on Heitzman's breath, slurred speech, and that his eyes were glassy. He requested Heitzman to perform certain field sobriety tests, including the gaze nystagmus, walk and turn, and the one-leg stand. Due to Heitzman's inability to perform these tests satisfactorily, the officer then requested him to perform a breath test for the presence of alcohol on the Alco-Sensor III (hereinafter Alco-Sensor). According to the officer's affidavit, the results of the Alco-Sensor showed a blood alcohol level of .174.

After he performed the Alco-Sensor test, Heitzman was arrested and taken to the Bonner County jail where he refused to take the Intoxilyzer 5000. Mr. Heitzman recalled saying that he would not perform the Intoxilyzer 5000 test because he already had submitted to a breath test. The officer recalled that Heitzman simply refused to perform the Intoxilyzer 5000 and refused to sign or initial the Suspension Advisory. ***See*** Transcript of B.A.C. Hearing, at 4-5. The officer quoted Heitzman as stating, "'I won't do your test and I won't do anything until I talk to my lawyer.'" Probable Cause Affidavit in Support of Arrest, at 2.

As a consequence, Heitzman's driver's license was seized.

Heitzman timely requested a hearing on his license suspension pursuant to I.C. § 18-8002. After hearing the arguments of the parties on March 3, 1999, Judge Buchanan determined that the hand-held Alco-Sensor was an additional test which the officer was entitled to use, and it did not preclude the officer from going through the proper

procedures to request the Intoxilyzer 5000. Therefore, Heitzman's refusal to take the Intoxilyzer 5000 would result in license suspension.

Judge Buchanan's determination rested in part upon the definition of "evidentiary testing" as "a procedure or test or series of procedures or tests . . . utilized to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in a person." I.C. § 18-8002(9). The fact that such testing could be a "series of procedures or tests" led Judge Buchanan to conclude that the officer was entitled to conduct more than one evidentiary test.

Both the Alco-Sensor III and the Intoxilyzer 5000 are approved as breath testing instruments for evidentiary testing by the Idaho Department of Law Enforcement. ***See*** Plaintiff's Exhibits 1 and 2.

II. DISCUSSION

The parties agree that whether a police officer can administer an Alco-Sensor test when a driver is detained as a DUI suspect and then require an Intoxilyzer 5000 or other evidentiary test after the driver's arrest is an issue of first impression in the State of Idaho.

A. Heitzman's Position

Heitzman concedes that the officer detaining a person suspected of being under the influence has the authority to determine what type of BAC test is to be given. ***See, e.g., In the Matter of Griffiths***, 113 Idaho 364, 744 P.2d 92 (1987). Heitzman argues, however, that the officer does not have the right "to conduct a series of tests until he finds one that he likes, or he can use to bootstrap a case into being." Appellant's Memorandum of Law at 4. Heitzman maintains that a police officer may conduct a second evidentiary test only if he makes an additional showing that a second test is necessary.

Heitzman points to the policy behind the implied consent statutes "to encourage individuals suspected of driving under the influence to submit to an officer's request for a BAC test." ***State v. Daniel***, 132 Idaho 701, 703, 979 P.2d 103, 105 (1999). He argues that the practice of requiring more than one test does not support this policy.

Heitzman further contends that if he is required to take more than one breath test, then the statutory warnings required by I.C. §18-8002(3) are defective because they do not advise him that he may be required to submit to one or more tests.

In response to the argument of the State that the Alco-Sensor does not qualify as an "evidentiary test" when it is administered as a preliminary breath test, Heitzman contends that the Alco-Sensor is an evidentiary test approved by the Idaho Department of Law Enforcement, regardless of how the test is used or termed by the officer.

B. State's Position

The State argues that the Alco-Sensor, as a preliminary breath test (PBT), is *not* an evidentiary test. The State contends that the Alco-Sensor is an approved evidentiary test only when the test is administered according to the Standard Operating Procedures of the Idaho Department of Law Enforcement.[1] See Plaintiff's Exhibit 2, Standard Operating Procedure, Breath Alcohol Testing, (Idaho Department of Law Enforcement, Bureau of Forensic Services August 1994 (Rev. 08/99)); ***State v. Smith***, 130 Idaho 759, 947 P.2d 1007 (Ct. App. 1997)(results of Alco-Sensor test admissible when performed in accordance with method approved by Idaho Department of Law Enforcement). The State points out that the Idaho Administrative Code requires breath tests to be "administered in conformity with standards established by the department." Plaintiff's Exhibit 1, IDAPA

11.03.01, § 013.03. The State maintains that when the Alco-Sensor is not used according to the approved procedures, it is not admissible into evidence and is not an "evidentiary test," but merely an additional field sobriety test.

C. Standard of Review

Under I.C. § 18-8002(3)(b), a driver whose license is seized has the right to show cause why he refused to submit to or complete evidentiary testing. A driver may prevail at a hearing under this section by showing "cause" for his or her refusal of a sufficient magnitude that it may be fairly said that a suspension of the license would be unjust or inequitable. I.C. § 18-8002(3)(b); ***State v. Griffiths***, 113 Idaho 364, 744 P.2d 92 (1987). Justifications for refusal include that the peace officer had no legal cause to stop and request the driver to take the test or that the request violated the driver's civil rights. I.C. § 18-8002(4)(b). A driver also may prevail in a license suspension proceeding if he can prove that he was not completely advised of the information regarding refusal mandated by I.C. § 18-8002(3). ***Beem v. State***, 119 Idaho 289, 805 P.2d 495 (Ct. App. 1991).

D. Alco-Sensor III as field sobriety test

The statutory schemes in several states allow use of the Alco-Sensor in the field as a "preliminary breath test" or "PBT."[2] Under such statues, if the police officer has reasonable suspicion of driving under the influence, the officer may administer a PBT to assist the officer in determining whether the driver should be placed under arrest. In such states, the PBT is not one of the "chemical tests" or "evidentiary tests" deemed to have

---

[1] To be admissible into evidence, the Alco-Sensor III device must be operated by a certified operator. The subject must be monitored for 15 minutes prior to the test, and the operator must otherwise follow the procedures set forth in Part III of the manual. Plaintiff's Exhibit 2, at III-1 and III-2.

[2] In some jurisdictions the Alco-Sensor III is referred to as a "portable breath tester," also a "PBT." ***See, e.g., State v. Whitacre***, 601 N.E.2d 691 (Bowling Green Municipal Court, Ohio 1992).

been consented to by the implied consent statutes.[3] Accordingly, the driver has a right to refuse the PBT, and the results of the PBT are not admissible into evidence. ***See, e.g., In the Matter of Attleberger***, 583 A.2d 24 (Pa. Commw. Ct. 1990)(under Pennsylvania vehicle code, driver wrong to assume he did not have to submit to blood test subsequent to PBT); ***Allen v. Commonwealth***, 817 S.W.2d 458 (Ky. Ct. App. 1991)(Kentucky statute[4] allows use of Alco-Sensor prior to arrest in addition to any other blood alcohol level test allowed by law); ***Moore v. Hodges***, 449 S.E.2d 218 (N.C. Ct. App. 1994)(North Carolina statute allows use of Alco-Sensor as screening device to establish probable cause); ***State v. Whitacre***, 601 N.E.2d 691 (Bowling Green Municipal Court, Ohio 1992)(under Ohio administrative code, Alco-Sensor is non-evidential, preliminary breath-testing instrument).

In California, the statutory scheme requires police to advise a suspected drunk driver that the use of the Alco-Sensor as a preliminary alcohol screening (PAS) test does not satisfy the requirement to submit to a blood, breath, or urine test under the implied consent law. The officer is further required to advise the driver of the right to refuse the PAS test. West's Ann.Cal.Vehicle Code § 23157(h). One of the reasons for

---

[3] The Pennsylvania statute provides:

> A police officer, having reasonable suspicion to believe a person is driving or in actual physical control of the movement of a motor vehicle while under the influence of alcohol, may require that person prior to arrest to submit to a preliminary breath test in a device approved by the Department of Health for this purpose. The sole purpose of the preliminary breath test is to assist the officer in determining whether or not the person should be placed under arrest. The preliminary breath test shall be in addition to any other requirements of this title. No person has any right to expect or demand a preliminary breath test. Refusal to submit to the test shall not be considered for purposes of subsections (b) and (e). 75 Pa.C.S. § 1547(k).

[4] The Kentucky statues provides:

> Law enforcement agencies may administer preliminary breath tests using devices or equipment which will ensure an accurate determination of blood alcohol content. Such tests may be administered in the field to a person suspected of violation of KRS 189A.010 before the person is arrested. This test may be administered in addition to any other blood alcohol level test authorized by law. A person's refusal to take a preliminary breath test shall not be used against him in a court of law or in any administrative proceeding. KRS 189.A.100(1).

these provisions is that prior to their enactment, defendants "typically argue[d] that they satisfied the implied consent law by submitting to the Alco-Sensor test" and most judges agreed with this argument. ***People v. Bury***, 41 Cal.App.4th 1194, 1205, 49 Cal.Rptr.2d 107, 113 (Cal. App. 1996).

Although there are at least two cases where the use of the Alco-Sensor as a field test was approved even though the state did not have a statute approving its use as a PBT, in those states the Alco-Sensor is not an approved evidentiary device. ***See, e.g., State v. Smith***, 922 P.2d 811, 815 (Wash. 1996)(Smith's consent to Alco-Sensor voluntary because he was advised that he was not required to take Alco-Sensor and had no effect on requirement to submit to DataMaster, the only approved evidentiary test); ***State v. Johnson***, 503 N.E.2d 431 (Ind. App. 1987)(Alco-Sensor results admissible at suppression hearing to establish probable cause even though not approved test under implied consent statute).[5]

In Idaho the Alco-Sensor is approved by the Department of Law Enforcement as an evidentiary test. The fact that the Alco-Sensor is not administered in accordance with the prescribed procedures by the officer detaining a DUI suspect does not change that fact. Rather, when standard operating procedures are not followed, it may raise doubts about the efficacy of the Alco-Sensor as a field sobriety test.

The Court is mindful that the use of the Alco-Sensor as a field sobriety test is regulated by statute in several states. It is not in Idaho, and the Idaho Supreme Court has cautioned against adding a "judicial gloss" to the implied consent statutes, the matter being one for the legislature to address. ***In the Matter of Brink***, 117 Idaho 55, 785 P.2d 619 (1990); ***Virgil v. State***, 126 Idaho 946, 895 P.2d 182 (Ct. App. 1995).

Further, there is a significant distinction in Idaho between field sobriety tests and breath tests. Fourth Amendment protections are implied by requesting a driver to perform field sobriety tests, but administration of such tests is reasonable as an investigative tool. ***State v. Ferreira***, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999)(officer requires only reasonable suspicion rather than probable cause to administer field sobriety tests). On the other hand, administration of a blood test or breath test to determine alcohol concentration is a seizure of the person and a search for evidence, and therefore falls within the purview of the Fourth Amendment and the warrant requirement. One exception to the warrant requirement is when a driver is deemed to have consented to an evidentiary test for alcohol concentration by application

[5]One judge dissented on the basis that there were no Indiana statutory provisions authorizing use of the Alco-Sensor or any other chemical test on less than probable cause. ***Johnson***, 503 N.E.2d at 434.

of I.C. § 18-8002(1). ***State v. Harmon***, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999). Absent legislative authority, the Court cannot ignore ***Ferreira*** and ***Harmon*** and hold that the administration of a breath test, such as the Alco-Sensor, is not a seizure to which the protections of the Fourth Amendment and implied consent statutes would apply, but a mere field sobriety test. The Court therefore rejects the State's argument in this regard.

E. Whether officer can require more than one evidentiary test

The remaining issue is whether under the definitions of evidentiary testing in Idaho Code §§ 18-8002 and 18-8002A, a police officer has unfettered discretion to administer more than one evidentiary test. The State appears to take the position that more than one test may be administered at the officer's discretion, apparently without limitation. Appellant argues that an officer should not be permitted to run a series of tests unless the officer makes an additional showing that a second test is necessary. Defendant's Memorandum of Law at 4-5.

Where the language of a statute is plain and unambiguous, the Court must give effect to the statute as written without engaging in statutory construction. ***State v. McCoy***, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996). Where the Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. ***Messenger v. Burns***, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963). To ascertain the intent of the legislature, the Court must examine not only the literal words of the statute, but also the context of those words, the public policy behind the statute and its legislative history. ***State v. Knott***, 132 Idaho 476, 974 P.2d 1105 (1999).

A statute is ambiguous where reasonable minds might differ or be uncertain as to its meaning. ***Ada County v. Gibson***, 126 Idaho 854, 856, 893 P.2d 801, 803 (Ct. App. 1995). If a statute is ambiguous, the Court looks to these rules of construction for guidance and may consider the reasonableness of proposed interpretations. ***Payette River Property Owner's Ass'n***, 132 Idaho 551, 976 P.2d 477 (1999). Constructions that would lead to absurd or unreasonably harsh results are disfavored. ***Gavica v. Hanson***, 101 Idaho 58, 60, 608 P.2d 861, 863 (1980).

The implied consent statutes define "evidentiary testing" as a "procedure or test or series of procedures or tests utilized to determine the concentration of alcohol or the present of drugs or other intoxicating substances in a person . . . ." I.C. § 18-8002A(1)(e); ***see also***, I.C. § 18-8002(9). This

language is not clear on its face, but is susceptible to differing interpretations. A "series of procedures or tests" may mean that police may take more than one breath sample in conducting a particular breath test, for instance, or it may mean that police may require a test of each type, such as a breath test, a blood test, and a urine test. Or the language could be interpreted to mean that police may administer a multiple number of one particular type of test, such as two breath tests or two blood tests. ***See, e.g., Commonwealth v. McFarren***, 525 A.2d 1185 (Penn. 1987)(phrase "one or more chemical tests of breath, blood, or urine" susceptible to differing interpretations).

Applying the rules of construction discussed above, the Court notes that the phrase "an evidentiary test" was employed when I.C. § 18-8002 was enacted in 1984. The definition of "evidentiary testing" as a "procedure or test or series of procedures or tests," was included when the statute was amended in 1989 by adding subsections (9) and (10). ***See*** Appendix A. Subsection (10) states that a person who submits to a breath test for alcohol concentration "may also be requested to submit to a second evidentiary test of blood or urine for the purpose of determining the presence of drugs or other intoxicating substances if the peace officer has reasonable cause to believe that a person was driving under the influence of any drug or intoxicating substance or the combined influence of alcohol and any drug or intoxicating substance." I.C. § 18-8002(10). In such a case, the peace officer must "state in his or her report the facts upon which that belief is based." ***Id.***

When the implied consent statute was amended to add the phrase "procedure or test or series of procedures or tests," in 1989, the Statement of Purpose explained:

> The purpose for this legislation is to allow law enforcement officers to request an additional evidentiary test of blood or urine to determine the presence of drugs when there is reasonable cause to believe that the person was driving under the influence of drugs or the combined influence of alcohol and drugs. Currently, a person who has submitted to an evidentiary breath test for alcohol, is under no legal compulsion to submit to an additional test to determine the presence of drugs.

Appendix B, Statement of Purpose, 1989 Senate Bill 1005. The fiscal impact of the proposed amendment was described as "limited" because "this second test for drugs will only be used when there is an obviously intoxicated/impaired driver who has taken the breath test for alcohol and the results show zero or low alcohol content." Appendix B, Fiscal Impact Statement, 1989 Senate Bill 1005. In the minutes of the Senate Transportation Committee, in response to a question by Senator Anderson, Pat Kole, Deputy Attorney General who spoke in support of the bill, stated: "[T]his bill allows for second tests, no further

testing." Appendix C, Senate Transportation Committee Minutes, January 17, 1989 (in discussion of Senate Bill 1005).

The legislative intent for adding the phrase "procedure or test or series of procedures or tests" is to allow a second test of blood or urine for drug intoxication. The legislature did not enact I.C. § 18-8002 to allow a peace officer to request a second test for alcohol intoxication.

Idaho courts, however, have suggested that this might occur where the officer had a valid reason for administering a different test.[6] One such case might be where the driver cannot adequately perform the type of evidentiary test requested. ***See, e.g., In re Griffiths***, 113 Idaho 364, 366, 744 P.2d 92, 94 (1987)(psychological or physical inability to perform evidentiary test may be sufficient cause for refusal if reason sufficiently articulated at time of refusal so that officer is given opportunity to request different test); ***In re Helfrich***, 131 Idaho 349, 955 P.2d 1128 (Ct. App. 1998)(when driver did not blow into tube for sufficient period of time, after several unsuccessful attempts officer could have requested a different test).

The legislature intended to allow a second blood or urine test under certain circumstances, but the legislature clearly did not intend to allow a peace officer to request two successive types of breath tests for alcohol concentration as was the case here. The cases cited above indicate the possibility of requesting only a *different* test, not a second evidentiary test of the same type. The Court concludes that Heitzman has shown cause for refusal to take the Intoxilyzer 5000 breath test, having already submitted to the Alco-Sensor breath test.

F. Statutory warnings

Heitzman further asserts that the statutory warnings mandated by I.C. § 18-8002(3) are inadequate because they do not inform the suspect that he may be required to perform more than one evidentiary test. The Court need not address this issue, having made its determination as set forth above.

III. ORDER

The order of the magistrate suspending Heitzman's driver's license is reversed, and this matter is remanded for further proceedings consistent with this decision.

DATED this _____ day of September, 2000.

---

[6]The Pennsylvania Supreme Court held that in order to justify a second evidentiary test under the implied consent statute the "police officer must establish circumstances which the support the reasonableness of a second search" or the request for a second test violates the right against unreasonable searches and seizures. ***McFarren***, 525 A.2d at 1188.

James R. Michaud
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, delivered via courthouse mail, or faxed, this _____ day of September 2000, to:

Brent C. Featherston
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864

Roger Hanlon, Bonner County Deputy Prosecuting Attorney
Courthouse Mail
Sandpoint, ID 83864

_____
District Court Secretary/Deputy Clerk