1975

Betty P. Peterson v. Earl N. Dorius : Brief of Appellant

Utah Supreme Court

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STATE OF UTAH

BETTY P. PETERSON,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver License Division, Department of Public Safety, State of Utah,
Defendant-Appellant.

Case No. 13981

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE GORDON R. HALL, JUDGE, PRESIDING.

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IN THE

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STATEMENT OF THE KIND OF CASE

This appeal concerns the legality of a driver's license revocation by the appellant under Utah Implied Consent Law, Utah Code Ann. § 41-6-44.10 (1953), as amended.

DISPOSITION BELOW

On June 14, 1974, appellant revoked the respondent's driver's license for the latter's alleged failure to submit to a sobriety test under Utah Code Ann. § 41-6-44.10

(1953), as amended, said revocation to be for one year. Pursuant to the provisions of said act, respondent, through her attorney, Richard J. Maughan, filed a complaint and petition June 21, 1974, requesting a de novo hearing and further requesting a restoration of license pending appeal. Thereafter, new counsel, D. Gilbert Athay for the respondent, and counsel for the appellant, presented the matter at trial on the 5th day of December, 1974, before the Honorable Gordon R. Hall. Judge Hall found that the respondent did not unreasonably refuse to submit to a sobriety test. Consequently, Judge Hall ruled that the petition of the respondent to set aside the revocation under administrative hearing be granted and that the respondent be ordered reinstated to her driving privileges.

The order of the Third District Court Judge Gordon R. Hall was entered January 14, 1975.

RELIEF SOUGHT IN THIS PROCEEDING

Appellant seeks a reversal of the lower court's order of January 14, 1975, ordering the restoration of the respondent's driver's license and seeks an order in accord with appellant's prior administrative revocation.

Respondent would have this court affirm the lower court's decision.

STATEMENT OF FACTS

On the 16th day of April, 1974, Trooper Clint Hendry of the Utah State Highway Patrol observed respondent

while driving a vehicle southbound on a two-lane highway in the vicinity of 3500 South Redwood Road at approximately 2:30 o'clock a.m. Due to his observation the trooper stopped the vehicle and later determined it to be driven by the respondent. After investigation and observation of the respondent, the trooper decided that the respondent was under the influence of intoxicating liquor and placed her under arrest at approximately 2:40 a'clock a.m. The respondent was advised of her constitutional rights as well as her rights under the Utah's Implied Consent Law, the same having been given to her by Trooper Hendry, and respondent indicated she understood said rights (R. 22-25).

The respondent indicated at the scene that she would like to talk to her attorney (R. 25, line 26). At the jail, the respondent called Mr. Richard Maughan, her attorney, which call occurred approximately 3:25 or 3:30 o'clock a.m. Trooper Hendry also spoke to Mr. Maughan and upon being asked what advice he was giving Mrs. Peterson with respect to the chemical test, Trooper Hendry was advised by attorney Maughan that he though he had better jump into some clothes and run on down and have a little chat with the respondent. Trooper Hendry agreed to that. Trooper Hendry advised Mrs. Peterson, the respondent, of her rights on more than two occasions, two of which were at the jail (R. 27). The respondent was offered either a blood test or a breath test, to which the respondent said "I don't want to take any tests until my attorney was present (R. 27, line 27-28). See also (R. 43). Trooper Hendry was prepared

to administer a breath test and was a qualified operator of the breathalyzer. If required, persons were available for a blood test (R. 28). Attorney Don Sawaya of the county attorney's office was also present (R. 28). The respondent and Trooper Hendry waited approximately 45 minutes, after which time contact was made by phone to Mr. Maughan's residence and respondent was advised and she advised the officer that Mr. Maughan should be at the jail within five minutes or so. Trooper Hendry waited by his record approximately 15 minutes longer and then left the jail when Mr. Maughan had not appeared (R. 29).

Trooper Hendry advised the respondent "that I could not wait any longer time since the driving that occurred had been two hours. I had been at the jail since 3:10 a.m., it was now 4:30; and I asked her (Mrs. Peterson) one more time if she would take a chemical test for us, either a blood test or a breath test, and explained the consequences of refusing to take the test" (R. 29, lines 14-19). The respondent indicated she did not want to take any test without her attorney present (R. 29, lines 23 and 23, R. 31, R. 38, lines 5 and 6). Respondent disputes that 15 additional minutes were waited, alleging maybe 10 minutes is all that elapsed.

Trooper Hendry left the jail and went to the parking lot of the Metropolitan Hall of Justice, where he waited approximately 15 minutes while compiling his reports (R. 31, 32). Trooper Hendry informed no one at the jail that he would be waiting in the parking lot, that

not being his customary procedure. Within approximately five minutes after Trooper Hendry left the jail, Mr. Richard Maughan, the attorney for respondent, arrived at the jail to converse with respondent (R. 45).

Upon cross-examination, Trooper Hendry stated that the respondent had an opportunity to talk to her lawyer (R. 34, lines 8-9). Trooper Hendry was not advised at any time that Mr. Maughan had arrived at the jail (R. 38, lines 22-24). Trooper Hendry did advise respondent that if she did not take the test he would file a refusal and she indicated she did not want to take any tests without her attorney present (R. 29). Trooper Hendry found the attorney not coming by 4:30 a.m. noteworthy as follows:

> "I thought it was a bit unusual — what struck me unusual about it was that he hadn't cared to advise his client on the phone, which is a common practice, and that he had insisted on coming down and then that an hour had transpired and he hadn't appeared. That struck me as unusual, yes" (R. 39, lines 11-16).

The respondent agrees that the time between the first and the second call was probably 45 minutes (R. 44, lines 27-28). The respondent agreed that there was no request from either herself or attorney Maughan to any of the jailer personnel to have Trooper Hendry return to the jail (R. 46, 47). Respondent and her attorney left immediately on her own recognizance not more than fifteen or twenty minutes later (R. 46, line 22).

The trial court held that respondent had a right to contact counsel prior to deciding whether to take the offered chemical test under the Implied Consent Law. Further, that respondent's conduct under the above set of facts did not constitute a refusal to submit to a chemical test of her blood or breath such as would warrant the suspension of her driver's license.

Thereafter, the court held that the petition of respondent should be granted and that the revocation of June 7, 1974, should be rescinded and respondent's driving privileges reinstated.

BACKGROUND

In hope of curbing the tremendousc increase in accidents and deaths and to help overcome many of the difficulties in proving the fact of drinking and driving, the legislatures of many states, including Utah, have enacted Implied Consent Laws requiring persons licensed to drive to submit to a chemical analysis of their breath, blood or urine to determine if they are driving under the influence of alcohol or some drug. These laws uniformly hold that the refusal to submit to such a test while yet a licensed driver are grounds for the revocation of the driving privilege.

In summary, courts view the Implied Consent Law as a means (1) of assisting the court in ascertaining the truth of the charge that the defendant was under the influence of intoxicating liquor or drugs, by encouraging the defendant to take a chemical test to determine the

condition of his blood. Scientific evidence thus obtained provides an objective evaluation. This evaluation achieves additional benefits (a) to help the public and protect them by removing drunk drivers from the highway, (b) helps innocent persons who may have the odor of alcohol on their breath but have not been drinking to excess but whose conduct may create the appearance of intoxication when the driver may be suffering from some other physical condition that gives such impression, and further (c) helps provide information on the causes of accidents which is important in the development of a successful accident prevention program.

In each Implied Consent case, basic requisites must apply. These include (a) probable cause to consider the driver to be intoxicated, (b) an arrest, (c) a designation by the peace officer within reason of the test to be administered, (d) the refusal either express or implied is communicated to or within reason presumed by the peace officer. The relevant wording of Utah Code Ann. § 41-6-44.10 (1953), as amended, is as follows:

> "(a) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath or blood for the purpose of determining the alcoholic content of his blood, provided that such test is administered at the direction of a peace officer having reasonable grounds to believe such person to have been driving in an intoxicated condition. The arresting officer shall determine within reason which of the aforesaid tests shall be administered . . . (c) If such

person has been placed under arrest and has thereafter been requested to submit to any one of the chemical tests, provided for in subsections (a) or (b) of this section and refuses to submit to such chemical test, the test shall not be given and the arresting officer shall advise the person of his rights under this section."

ARGUMENT

POINT I.

RESPONDENT'S FAILURE TO SUBMIT TO A REQUIRED CHEMICAL TEST UNDER UTAH CODE ANN. § 41-6-44.10 (1953), AS AMENDED, UNTIL A PERSONAL CONFERENCE WITH HER ATTORNEY AT THE JAIL, IS NOT A "REASONABLE CAUSE" NOT TO SUBMIT, IF THE TIME OF PERSONAL CONFERENCE IS SO FAR REMOVED AS TO RENDER POTENTIALLY OBTAINABLE TEST RESULTS MEANINGLESS.

The Supreme Court of the State of Utah has not specifically ruled on the question of how much time may elapse before it is too late to obtain chemical test results or how long a peace officer must wait, that is to say what is a reasonable length of time to wait, under the circumstances generally, before there is "unecessary delay," or before any results obtainable may be meaningless.

In the case at bar, a real issue is whether Trooper

Hendry was reasonable or unreasonable in failing to wait beyond an hour from the time that attorney Richard Maughan said he would come to the jail. The respondent could argue, of course, that she was following her attorney's advice in waiting until he arrived before submitting to a test. This procedure, without parameters as to time, carried to its logical conclusion could make the villain of an attorney, not the one arrested, and the one with the duty of decision, the respondent, and the results that would flow from such a decision would be totally opposite from the purpose intended by the legislature in creating the Implied Consent Law.

(A) *Time Factor.*

Funke v. *Department of Motor Vehicles*, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969), holds that it is common knowledge that time lapse between ingestion of alcohol and blood tests effects accuracy of test results.

A recent Oregon case, decided December 9, 1974, *Cavagnaro* v. *Motor Vehicle Division, Department of Transportation*, Or. App., 521 P. 2d 1090 (1974), held that evidence showing that motorist refused to take breathalyzer test, until he talked to an attorney, and that the peace officer allowed 15 minutes to contact the attorney and waited twice that long during which period motorist was unable to reach attorney and then advised motorist of his rights, that the officer then turned off his machine, and the motorist 15 minutes later reached his attorney and said he would take the test; that the

officer's declining to administer the test over two hours after the motorist's arrest, all failed to support the judgment of the lower trial court vacating suspension of the motorist's driver's license by the Department of Transporation for refusal to take a breathalyzer test, and the court reversed the trial court, holding it a refusal. In that case the court quotes a previous Oregon decision, *Stratikos* v. *Department of Motor Vehicles*, 4 Or. App. 313, 477 P. 2d 237 (1970), 478 P. 2d 654, Supreme Court review denied 1971, where the court in quoting a New Jersey case of 1970, *State* v. *Pandoli*, 109 N. J. Super. 1, 262 A. 2d 41 (1970), where the driver contended that there was no flat refusal to take the test where he refused to take the test until he had an opportunity to call his attorney; the Oregon Court approves the language of the New Jersey Court quoted as follows:

> " 'In any event, the request for consultation with counsel necessarily involved a delay in the administration of the test. Having in mind the remedial purpose of the statute, and the rapidity with which the passage of time and the psychological processes tend to eliminate evidence of ingested alcohol in the system, it is sensible to construe the statute to mean that anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so.' "

The court then cites another Oregon case elsewhere referred to in the brief *Johnson* v. *Department of Motor*

Vehicles, 5 Or. App. 617, 485 P. 2d 1258 (1971), as supportive.

The Oregon Court concludes in the *Cavagnaro* case as follows:

> "We conclude that as a matter of law, the voluntary postponement for a specified period of time of the administration of a breathalyzer test by a police officer to enable the driver to contact an attorney does not itself constitute the waiver of a valid previous demand to take the test beyond the time allowed by the officer." *Id.* at 1092.

This should be the rule of law in the case at bar. The fact that two hours had elapsed from time of arrest would control. The officer had not abandoned his previous requests, when he advised the respondent at 4:30 a.m. that he wanted her to express if she would take the test before he left.

An analysis of the *Hunter* case does indicate that the delay was over an hour within which time Dr. Hunter, after refusing consistently, then said that he would take a blood test and the officer refused, saying it was too late. By distinction, in this case, the reasonable time lapsed, in the officer's opinion, before the attorney came.

Certainly, the courts should not be placed in the position to ratify without some parameters of reasonableness some time frame that would control; otherwise, attorneys could with impunity, advise clients in similar circumstances not to take the test or to wait until the

attorney came to the jail, whether in fact this did or did not occur, which would require peace officers to wait before booking procedures for extended periods of time, unduly burdening their work schedules, not knowing for sure whether the attorney will or will not come, and all the while any measureable quantitative test and its use or validity thereby diminishing to the point of non-value.

Appellant submits that based upon the facts at trial, the evidence clearly shows that the failure to submit to the requested chemical test on the part of the respondent, an hour from the time of consultation on the phone with her attorney and at that point of time two hours beyond the time of arrest, was unreasonable.

If there was any confusion in respondent's mind as to whether she should proceed to take the test or stand the consequences of losing her license for a year, that *confusion was created by counsel* and not by the peace officer. Subsequent advice of Trooper Hendry was clear that so much time had elapsed that she would then have to make a decision on her own as to whether she would take the test or not, and if she failed to take the test at that point in time, he would have to count it as a refusal, as he was required to leave. (Emphasis ours.)

Trooper Hendry had been patient, cooperative and without arbitrariness.

The failure on the part of the respondent or her counsel to request Officer Hendry's return, if the attorney's arrival was so close as to cause the suggestion that

Trooper Hendry was impatient, then again it was the responsibility of respondent and/or her counsel or both to ask for a test and make some reasonable request to get the same if they did not want to suffer the consequences of the submission of a refusal affidavit to the state, a hearing thereon, and the subsequent revocation as did occur in this case prior to trial de novo.

(B) *Public Interest.*

An Oregon decision sets forth the balance that must be given weight between public's interest and that of the driver. In a decision rendered August 25, 1972, the Court in *Kauffman* v. *Motor Vehicle Division, Department of Transportation*, Or. App. 1'72, 500 P. 2d 475, in a case where the driver blew into the breathalyzer which was not functioning propertly and thereafter refused to blow a second time at the request of the officer, subsequent to his attorney then advising the driver not to blow a second time and as a result the driver refusing to do so, from which of course no reading was obtained from the breathalyzer, the Court said:

> "Petitioner was not prejudiced by the officer's error. Upon its prompt discovery, he was asked to breath into the machine a second time. There is no contention that the machine was not in proper operating order or that the unmeasured first blow could have effected the correct measurement of the one he refused. Therefore, since the policy of the statute to remove drunk drivers from the highway outweighs any possible prejudice which the second attempted test would have caused the petitioner,

> we conclude that the petitioner as a matter of law was not justified or excused in refusing to submit to the breathalyzer test a second time."

The court reversed the trial finding.

The same public policy exists in Utah as enunciated by the Oregon court that the policy of the Implied Consent Law to attempt to remove drunk drivers from the road has a higher priority and the law should be upheld, not rendered meaningless, as is the attempt here. Therefore as to the question should a license be revoked for a refusal under the fact situation presented, the answer is clearly yes. It can only be concluded under the facts before the court that if there was probable cause, and if the driver was arrested, and if the person was properly advised of her rights, and if the driver was given an opportunity to consult with an attorney, and if the driver failed to submit within a reasonable time to a chemical test with or without the presence of her attorney, it is clearly a refusal.

The fact that the officer agreed at first to the appearance of counsel does not negate the fact that a request for a test was made prior to that point in time and both respondent and counsel knew it. This acquiesence does not, as a voluntary postponement, act as a waiver on the part of the officer of a valid previous demand to take the test, and when approximately two hours had elapsed from the time of arrest, *it should be concluded as a matter of law respondent's failure to submit is a refusal.* (Emphasis ours.)

POINT II.

THE COURT ERRED AT LAW THAT THE *HUNTER V. DORIUS* CASE, *SUPRA*, HOLDING A "RIGHT TO CONSULT LEGAL COUNSEL" INCLUDES THE RIGHT TO HAVE COUNSEL PRESENT PRIOR TO SUBMISSION TO A TEST.

The Utah Implied Consent Law could be rendered meaningless if the court were to let stand the proposition that an attorney could be present before a chemical test under the Implied Consent Law could be administered and the attorney, for whatever reason, failed to show up at the jail for an hour or two hours or for an extended period of time, whatever it may be, and that by virtue of said time lapse would negate the results of any chemical test then to be administered.

This question of right to consult an attorney, or the right to have an attorney present at a jail before one, in the position of the respondent, were to make a decision to either take or not take a requested chemical test is one of many constitutional issues that have been raised over the years in respect to the Implied Consent Law. In summary, as to constitutional issues in general, case law has established that the Implied Consent type law does not violate the privilege against self-incrimination, nor is an unreasonable search and seizure involved, and it meets the requirements of due process of law. It is not a bill of attainder or an ex post facto law nor does

the Implied Consent Law breach the equal protection laws. It does not violate the separation of powers doctrine or freedom of speech.

In speaking to the question of right to counsel, see the case of *Fallis* v. *Department of Motor Vehicle*, July 1968, 264 A. C. A. 441, 70 Cal. Rptr. 595, *Ent* v. *Department of Motor Vehicles*, 265 Cal. App. 2d 936, 71 Cal. Rptr. 726, sets forth the general rule of most jurisdictions:

> "Neither the denial of the opportunity for advice of counsel before stating whether one will submit to a test and before deciding which test to take, nor the denial of the opportunity to have counsel present while the test is administered, is the denial of any constitutional right."

The Court quoted the above declaration in *Ent* v. *Department of Motor Vehicles, supra.* In the *Ent case,* the court concluded by citing *United States* v. *Wade*, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), as further authority that no right to counsel attached.

In States that hold a minority position, of which Utah is apparently one, the New York Court of Appeals in *People* v. *Gursey*, 22 N. Y. 2d 224, 292 N. Y. S. 2d 416, 239 N. E. 2d 351, 352-53 (1968), wisely stated:

> "The privilege of consulting with counsel concerning the exercise of legal rights should not, however, extend so far as to palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their

> licenses. It is common knowledge that the human body dissipates alcohol rapidly and, indeed, under subdivision 3 of section 1192 of the Vehicle and Traffic Law, test results are admissible in evidence only if the test had been taken within two hours of the time of arrest. Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene (see Matter of Finocchairo v. Kelly, 11 N. Y. 2d 58, 61, 226 N. Y. S. 2d 403, 181 N. E. 2d 427, 429) . . . If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel."

Certainly the fair import of the *Gursey* case is that a driver could consult with his attorney if he was present or could be reached promptly by phone before submitting to a test, but that there was no absolute right to refuse until an attorney was reached if the attorney was not immediately available. *See Appendix A* for additional cases in this area. (Emphasis ours.)

New York, which like Utah holds that a driver in these circumstances should have the privilege of consulting with an attorney concerning the exercise of legal rights, nevertheless is clear to point out that this privilege or right, should not "extend so far as to . . . impair or nullify the statutory procedure requiring drivers to

choose between taking the test or losing their licenses . . ." and that there are times when ". . . the defendant may be required to elect . . . without the aid of counsel." *People* v. *Gursey*, Id. This case on appeal is such a case.

In contrast to the New York Vehicle law, Utah has no rule that test results are admissible only if the test has been taken within two hours of the time of arrest. There are other states in addition to New York who do have such a rule.

Within this jurisdiction, we have the holding of the *Hunter* v. *Dorius*, case, *supra*, stating at page 124, 23 Utah 2d 122, as follows:

> "After the plaintiff had been advised as to his rights under the statute and the consequences of his refusal to submit to a test at the hour of 9:48 p.m., the plaintiff still had a reasonable time in which to make up his mind and seek legal counsel."

Just prior to that statement the Court further stated:

> "It is conceded by the defendant that the plaintiff had a right to *consult* legal counsel before making a decision to take or decline the test." (Emphasis ours.)

The court does not amplify whether this right to legal counsel existed as a result of the concession thereof by the defendant or defendant's counsel. It was agree-

able to the officer in the *Hunter* case that an attorney be called as is the situation before the court in the case at bar. The question is whether that right is an absolute right as some would argue the *Hunter* case stands for or whether there is a distinction between right *of consultation*, and right to have the attorney *present*. (Emphasis ours.)

In the *Hunter* v. *Dorius*, case, it specifically states that a driver had a right to consult legal counsel before making a decision to take or decline the test. The respondent in the case at bar had such an opportunity and did in fact consult with the attorney on the phone. The *Hunter* case does not stand for the proposition that the respondent in a case such as before the court, has a right to the personal presence of her attorney at the jail prior to submitting to such a test. The attorney could have given respondent any necessary advice on the telephone. Such advice was so given Dr. Hunter in the *Hunter* v. *Dorius*, case.

Drivers on the highways of Utah are presumed to know the law. A peace officer such as Trooper Hendry has the duty to advise said parties so arrested of their rights. One lawfully arrested, properly advised of his rights, thereafter refusing or failing to take the chemical test as denoted by the officer within reason, must determine whether to take or not take the test and stand the risk of losing his privilege to drive for one year if he so fails to take the test without reasonable cause.

Appellant avers that the trial court, in holding respondent's conduct did not constitute a refusal is attempting to draw some distinction and hold that right to *confer* with an attorney means the right to wait until he was *present* before submitting to the test. (Emphasis ours.)

In the case of *Johnson* v. *Department of Motor Vehicles of the State of Oregon*, 485 P. 2d 1285, the arrested driver was unable to reach his attorney but his daughter got ahold of an attorney who thereafter advised the driver to take a breathalyzer when he got there (meaning the jail). The attorney did not arrive at the jail prior to the officer leaving and filing a refusal affidavit. The trial court, as in the case at bar, held that the driver's failure to take a test did not constitute a refusal under the circumstances. The appellate court said that any erroneous impression upon which the driver relied in failing to take the breathalyzer, was created by his counsel, not by the police, and the appellate court reversed the trial court. Appellant suggests this case is closely on point.

POINT III.

THE CONCLUSIONS OF LAW AND THE ORDER OF THE TRIAL COURT WERE NOT SUPPORTED BY THE EVIDENCE.

According to the record, the evidence and the findings of fact are not in dispute except as to one small point: that is, as to whether or not Trooper Hendry

waited approximately 15 minutes after the second phone call at 4:15 o'clock a.m. prior to leaving the jail at approximately 4:30 a.m. or whether it was five to ten minutes as set forth in the Statement of Facts (R. 11, 12, 13), to which appellant takes issue.

The last sole question, therefore, to be determined is: Did the trial court properly conclude as a matter of law that the respondent consented to take the sobriety test?

Since the state of the record of the findings of fact are as above stated, the comment of Mr. Justice Ellett in his dissenting opinion in *Hunter* v. *Dorius*, 23 Utah 2d 122, 458 P. 2d 877 (1969), applies and appellant quotes:

> "The sole question to be determined is: Did the trial court properly conclude as a matter of law that the plaintiff consented to take a sobriety test? Since the evidence is not in dispute, the trial court is in no better position to rule upon the matter than is this court."

The evidence in this case clearly shows that the time from arrest at 2:40 o'clock a.m. to the time approximately Mr. Maughan arrived at the jail was two hours, the attorney's arrival being beyond dispute at 4:35 or 4:40 o'clock a.m. It is further uncontested that after the arrival of counsel, no request was made of any jail personnel nor was any attempt made to have Trooper

Hendry return to the jail with Mr. Maughan's arrival being so shortly after the officer's departure.

The evidence is further unrebutted that the respondent was aware of the officer's concern, that it would be beyond two hours before any test could be administered from the time of the arrest and well beyond two hours from the time of first stopping the respondent and considerably longer than that from the time that any alcoholic beverages were consumed by respondent, which fact was clearly admitted by respondent (R. 47). Such drinks had occurred at home before going to eat (R. 47). Respondent asked to consult with a lawyer. *That was permitted. Se did talk to the attorney from the jail* (emphasis ours) and he advised both Trooper Hendry and respondent that he was coming to the jail. The officer waited an additional hour, informed respondent that he could not wait any longer, told her the consequences of her failure to make a decision to take a test prior to his leaving, gave her her rights again, and yet respondent consistently said that she would do nothing until her attorney arrived. When her attorney arrived, neither respondent nor attorney indicated to any of the jail personnel that she would take a test or wanted to take a test of any kind nor did they communicate with the arresting officer who appellant alleges reasonable men could assume would still be in his vehicle either checking out or on his way home within the time period alleged had elapsed of not more than 15 minutes before respondent left the jail herself.

The evidence in the case before us shows that the delay ocasioned, waiting for counsel to come to the jail, was unreasonable and was not justified, especially where respondent had an opportunity to talk to and consult with the attorney on the phone.

Respondent was properly advised as to the consequences of her refusal to take a test. If respondent, after notice by the officer that he had to leave and could not wait longer, in the performance of his duties, chose to wait further until counsel would arrive, it being in the opinion of the officer that sufficient time had elapsed, to permit said arrival, then the consequences of failing to take the test prior to Trooper Hendry's leaving the jail is a consequence, adverse though the results may be, that must be borne by the respondent as a result of her failure to promptly decide after she was given a second opportunity to take a sobriety test, which was the case her.

The court's finding that there was a consent by Mrs. Peterson, the respondent, to take the chemical test requested by the trooper, and that said consent was not rebutted, is not supported by the evidence or the law and therefore this case should be reversed and remanded on that ground.

CONCLUSION

Appellant respectfully requests that for the reasons above stated in this appeal, the order of the trial court

should be reversed and the case remanded with instructions for the trial court to revoke respondent's driving privileges for one year.

Respectfully submitted,

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APPENDIX A.

Barteg v. *Commonwealth*, ... Va. ....., 207 S. E. 2d 828 (1974)

Blow v. *Commissioner*, 164 N. W. 2d 351 (S. D. 1969)

Brady v. *Tolany*, 320 N. Y. S. 2d 880 (A. D. 1971)

Campbell v. *Superior Court*, 106 Ariz. 542, 479 P. 2d 685 (1971)

Commonwealth v. *Morris*, 280 A. 2d 658 (Pa. 1971)

Ent v. *Dept. of Motor Vehicles*, 71 Cal. Rptr. 726 (Cal. App. 1968)

Fallis v. *Dept. of Motor Vehicles*, 70 Cal. Rptr. 595 (Cal. App. 1968)

Finley v. *Orr*, 69 Cal. Rptr. 137 (Cal. App. 1968)

Finocchairo v. *Kelly*, 11 N. Y. 2d 58, 226 N. Y. S. 2d 403, 181 N. E. 2d 427 (1962)

Gottschalk v. *Sueppel*, 140 N. W. 2d 866 (Iowa 1966)

Hunter v. *State*, 25 Ohio Misc. 117, 266 N. E. 2d 599 (1970)

Janusch v. *Dept. of Mtor Vehicles*, 80 Cal. Rptr. 726 (Cal. App. 1969)

Lagomarsino v. *Dept. of Motor Vehicles*, 81 Cal. Rptr. 193 (Cal. App. 1969)

Lewis v. *Nebraska State Dept. of Motor Vehicles*, 191 Neb. 704, 21 N. W. 2d 177 (1974).

Metschke v. *Dept. of Mtor Vehicles*, 181 N. W. 2d 843 (Neb. 1970)

Mills v. *Bridges*, 471 P. 2d 66 (Idaho 1970)

People v. *Gursey*, 22 N. Y. 2d 224, 292 N. Y. S. 2d 416, 239 N. E. 2d 351 (1968)