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Automobiles - Implied Consent Law - Motorist Has a Right to Speak with an Attorney Prior to Decision to Take or Refuse Chemical Testing of Blood-Alcohol Content

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RECENT CASES

AUTOMOBILES—IMPLIED CONSENT LAW—MOTORIST HAS A RIGHT TO SPEAK WITH AN ATTORNEY PRIOR TO DECISION TO TAKE OR REFUSE CHEMICAL TESTING OF BLOOD-ALCOHOL CONTENT

Appellant's car was stopped by a Hennepin County Deputy Sheriff after the officer had observed the appellant's car being driven in an erratic manner. Appellant was subsequently charged with driving while under the influence of an alcoholic beverage. Although the officer testified that he did not give appellant a *Miranda*[1] warning,[2] appellant demanded to see his attorney. The officer refused appellant's request and proceeded to read appellant an implied-consent advisory, which included a statement regarding appellant's rights, the obligations under the Minnesota implied-consent statute[3] and an inquiry whether appellant would consent to chemical testing of his blood or breath. Appellant referred the officer to his attorney. Although a telephone call to the attorney would have caused only a short delay, the officer made no attempt to allow appellant to call counsel,[4] but interpreted appellant's remarks and conduct as a refusal to take the test. Appellant's drivers license was revoked for six months for failure to permit chemical testing and the state district

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1. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* held that the prosecution may not use statements stemming from custodial interrogation unless the suspect has been informed as follows:
   1. of his privilege against self-incrimination;
   2. that anything he says may be used as evidence against him; and
   3. of his right to counsel, and if he cannot afford counsel, counsel will be appointed prior to questioning.

Id. at 444.

2. Appellant, on the contrary, testified that he had been given such a warning. Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 387 (1976). The jury was properly instructed that if a Miranda warning was given and appellant was confused about his rights as a result, under the holding in State Dept. of Highways v. Beckey, 291 Minn. 483, 192 N.W.2d 441 (1971), such confusion would be a reasonable ground to refuse the test. The jury found that appellant did not have a reasonable ground to refuse the test. Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 387 (1976).

3. MINN. STAT. ANN. § 169.123(2) (West Supp. 1976), provides in part as follows:
   At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.

4. Testimony at trial established that appellant could have been permitted to call counsel at Methodist Hospital, the blood-testing station that would have been used, or

court sustained the revocation.[5] On appeal, the Minnesota Supreme Court reversed, *holding* that any person required to decide whether to submit to chemical testing of his blood, in accordance with the implied-consent law, has a statutory right to counsel with an attorney of his own choosing before making the decision, provided the consultation does not unreasonably delay the administration of the test.[6] The motorist must be informed of his consultation right, and police officers are required to assist in the exercise of this right.[7] *Prideaux v. State Dept. of Public Safety*, ——Minn.——, 247 N.W.2d 385 (1976).

Traditionally, states have had great difficulty in gaining convictions of those charged with alcohol-related offenses. To prove these charges, the state had to rely on the arresting officer's testimony concerning the demeanor of the suspect at the time of arrest and his performance on such roadside sobriety tests as walking a straight line and touching the tip of his nose with his finger. Issues of official credibility, powers of observation, mnemonic abilities, and testimonial accuracy thus played crucial parts in the difficult attempt to secure a conviction.[8] Although the subsequent development of accurate and reliable chemical-physiological tests to determine the amount of alcohol in a person's body has produced a type of evidence of greater credibility and probative value,[9] drivers have been reluctant to submit to such tests.[10]

Beginning in the 1950's a number of states enacted implied-consent statutes designed to encourage submission to these tests by invoking a civil penalty of license revocation against those drivers who refused to comply with the testing program.[11] Such statutes were based on the premise that in return for the "privilege" of driving

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at the sheriff's patrol office in Hopkins, the breath-testing station that would have been used. Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 387 (1976). There was no testimony that the short delay, if any, would have affected the validity or reliability of the test results in any way. In fact, the record indicates there was a 45-minute delay before appellant was picked up and removed to jail, and that there would have been a delay of at least that time before blood testing could have been completed. *Id.*

5. Proceedings in the district court were pursuant to MINN. STAT. ANN. 169.123(7) (West Supp. 1976), which provides for a district court hearing de novo of license revocation proceedings, with the right to a jury trial.

6. Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 394 (1976).

7. *Id.*

8. 91 COLO. LEG. COUNCIL RESEARCH PUB. 19, 20-21 (1964).

9. *Id.* at 31-33.

10. 123 COLO. LEG. COUNCIL RESEARCH PUB. 37, 43 (1966).

11. New York was the first state to enact an implied-consent law, in 1953. 1953 N.Y. Laws ch. 854. In Schutt v. McDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (1954), this statute was declared unconstitutional because it failed to contain a provision limiting its application to cases in which there had been a lawful arrest and because there was no provision entitling a licensee to an ultimate hearing upon an adequate record before revocation of his license. *Id.* at ——, 127 N.Y.S.2d at 128. The statute was then amended to remedy these problems, 1954 N.Y. Laws ch. 320, *codified in* N.Y. VEH. & TRAF. LAW §§ 1192-1194 (McKinney 1970), *as amended*, (McKinney Supp. 1976), and subsequently has been upheld. *See* Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962).

upon the highways of the state, the driver had impliedly "consented" to take a chemical sobriety test if properly requested to do so by an officer of the state.[12] If a person refused to take the test, he in effect withdrew the consent upon which his right to drive was conditioned, and the state could then revoke the conditional privilege of driving.[13] Thus, the state created an incentive for drinking drivers to take the test and the means to remove from the highway those who refused.[14]

Although nearly all jurisdictions view license revocation proceedings as civil in nature,[15] the question whether there is a right to speak with an attorney prior to submitting to a blood alcohol test has arisen frequently since the enactment of implied-consent laws.

One of the early cases dealing with compulsory blood-alcohol testing under an implied consent statute was *Schmerber v. California*.[16] In that case, the United States Supreme Court held that the accused was not entitled to assert the sixth amendment privilege of speaking with counsel before submitting to a blood test.[17] The Court also held that withdrawal of blood for testing the alcohol level was not compulsory self-incrimination and so did not violate the fifth amendment.[18]

The Court of Appeals of New York in *People v. Gursey*[19] held that denial of a right to telephone an attorney before taking a drunkometer test violated the statutory privilege of access to counsel.[20] However, *Gursey* limited that privilege by restricting it so it would not palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their licenses.[21]

The Court of Appeals of Ohio recognized a limited statutory right

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12. For a list of the states that were among the first to adopt these laws, *see* 123 COLO. LEG. COUNCIL RESEARCH PUB. 37, 44 (1966). At present all 50 states and the District of Columbia have some form of implied-consent statute. *E.g.*, CAL. VEH. CODE § 13353 (West 1971); MICH. COMP. LAWS ANN. § 257.625c (Supp. 1977); MINN. STAT. ANN. §§ 169.123(2)-(8) (West Supp. 1976); MONT. REV. CODES ANN. § 32-2142.1 (Supp. 1975); NEB. REV. STAT. § 39-669.08 (1974); N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1970), *as amended*, (McKinney Supp. 1976); N.D. CENT. CODE § 39-20-01 (1972); S.D. COMPILED LAWS ANN. § 32-23-10 (1976); WIS. STAT. ANN. § 343.305 (West 1971), *as amended*, (West Supp. 1977).

13. *See* MINN. STAT. ANN. § 169.123(2) (West Supp. 1976).

14. 47 U. COLO. L. REV. 723 (1976).

15. *E.g.*, Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962); Agnew v. Hjelle, 216 N.W.2d 291 (N.D. 1974); Blow v. Comm'r of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969).

16. 384 U.S. 757 (1966).

17. *Id.* at 766.

18. *Id.* at 761. *Schmerber* further held that the privilege against self-incrimination is a bar against compelling "communications" or "testimony" but that compulsion which makes a subject or accused the source of "real" or physical evidence does not violate the privilege. *Id.* at 764.

19. 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

20. *Id.* at 228, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.

21. *Id. See* Finocchairo v. Kelly, 11 N.Y.2d 58, 61, 181 N.E.2d 427, 429, 226 N.Y.S.2d 403, 405 (1962), which distinguished an absolute right to see counsel before deciding to take or refuse to take the test from a more limited right which would not impair the results of the test. (Van Voorhis, J., concurring).

to counsel in *Siegwald v. Curry*.[22] The court held there was no error in not providing an attorney unless the party expressly demanded counsel, and that demand was unjustly denied.[23] The police were also required to permit the person the use of facilities to communicate with an attorney.[24] The court upheld the lower court finding that appellant, who had indicated she would take the test after consulting with her attorney but was denied such consultation, had not refused to take the test.[25]

In *State v. Palmer*,[26] the Minnesota Supreme Court held that a blood test was part of a civil and administrative proceeding and that the defendant had no constitutional right to condition his taking the test upon his consultation with counsel.[27] The dissent in *Palmer*[28] read the Minnesota attorney consultation statute[29] as imposing on the arresting officers an absolute duty to notify defendant's attorney of his request for consultation before proceeding any further with the chemical tests, once defendent had asked for an opportunity to call his lawyer.[30]

The court in *Prideaux v. State Dept. of Public Safety*[31] did not formally overrule *Palmer* since the issue of a statutory right to counsel under the Minnesota attorney consultation statute[32] was not

22. 40 Ohio App. 2d 313, 319 N.E.2d 381 (1974).
23. *Id.* at ——, 319 N.E.2d at 384.
24. *Id.* The court in *Siegwald* based the right to communicate on OHIO REV. CODE ANN. § 2935.20 (Page 1975), which provides in part as follows:

> After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state, or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney at law so obtained who is entitled to practice in the courts of this state, and to consult with him privately. No officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this section.

25. 40 Ohio App. 2d 313, 319 N.E.2d 381 (1974). According to Siegwald v. Curry, it is not a refusal to take the required test for the arrested person to request the exercise of his statutory right, under OHIO REV. CODE ANN. § 2935.20 (Page 1975), to telephone an attorney during this reasonable time period in which he is determining whether to take the test, so long as the delay occasioned by such communication is short and reasonable. 40 Ohio App. 2d 318, ——, 319 N.E.2d 381, 385 (1974).
26. 291 Minn. 302, 191 N.W.2d 188 (1971).
27. *Id.* at 307, 191 N.W.2d at 190-91.
28. *Id.* at 309, 191 N.W.2d at 192 (Otis, J., dissenting).
29. MINN. STAT. ANN. § 481.10 (West 1958), which provides as follows:

> All officers or persons having in their custody a person restrained of his liberty upon any charge or cause alleged, except in cases where imminent danger of escape exists, shall admit any resident attorney by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify any attorney residing in the county of the request for a consultation with him. Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor, and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

30. State v. Palmer, 291 Minn. 302, 309, 191 N.W.2d 188, 192 (1971).
31. ——Minn.——, 247 N.W.2d 385 (1976).
32. MINN. STAT. ANN. § 481.10 (West 1958).

squarely decided in *Palmer*. The court in *Prideaux* indicated that in the event of any inconsistency between *Palmer* and *Prideaux*, the holding in *Palmer* was no longer of any effect.[33]

The court in *Prideaux* held that any person who is required to decide whether he will submit to a chemical test in accordance with the Minnesota implied-consent statute[34] has the statutory right to consult with an attorney of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test.[35] The person must be informed of his right and police officers must assist in its vindication.[36] The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and is given a reasonable time to contact and talk with counsel.[37]

Although the decision in *Prideaux* was based on statutory grounds,[38] the court set forth a sound argument for a constitutional right to speak with an attorney before making such an important decision.

First, revocation of a drivers license for failure to submit to chemical testing, although generally labeled a civil proceeding, is necessarily and inextricably intertwined with a criminal proceeding—prosecution for driving while under the influence of an alcoholic beverage.[39] The penalty for unreasonable refusal to take the test[40] may often impose a greater burden on the driver than conviction of the crime of driving under the influence of alcohol.[41] The obvious and intended effect of the implied-consent law is to coerce the driver into "consenting" to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be available for use against him in a subsequent criminal prosecution.[42] The license revocation

33. ——Minn.——, ——, 247 N.W.2d 385, 395 (1976).
34. MINN. STAT. ANN. § 169.123 (West Supp. 1976).
35. ——Minn.——, ——, 247 N.W.2d 385, 394 (1976).
36. *Id.*
37. *Id.*
38. *Id.* at ——, 247 N.W.2d at 397.
39. *Id.* at ——, 247 N.W.2d at 388.
40. MINN. STAT. ANN. § 169.123(4) (West Supp. 1976) provides in part as follows:
    If a person refuses to permit chemical testing, none shall be given, but the commissioner of Public Safety, upon receipt of a certificate of the peace officer that he had reasonable and probable ground to believe the person had been driving or operating a motor vehicle upon the public highways while under the influence of an alcoholic beverage, and that the person had refused to permit the test, shall revoke his license or permit to drive and any nonresident operating privilege for a period of six months.
41. *Id.* § 169.121(3) provides as follows:
    Every person who is convicted of a violation of this section shall be punishable by imprisonment of not less than ten days nor more than 90 days, or by fine of not less than $10 nor more than $300, or both, and his driver's license shall be revoked for not less than 30 days, except that every person who is convicted of a violation of this section, when such violation is found to be the proximate cause of grievous bodily injury or death to another person, shall be punished by imprisonment for not less than 60 days nor more than 90 days, or by fine of not more than $300, or both and his driver's license shall be revoked for not less than 90 days.
42. State Dept. of Highways v. Schlief, 289 Minn. 461, 463, 185 N.W.2d 274, 275 (1971).

proceeding thus becomes an arm of the prosecutor in the state's attempt to gather evidence against the accused for use in a criminal prosecution.[43]

Second, the decision whether to take or refuse chemical testing is arguably a "critical stage" in a criminal proceeding which would invoke the accused's sixth amendment right to an attorney.[44] The United States Supreme Court has stated that in determining whether a stage is critical, it must "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to avoid that prejudice."[45] An individual driver might not know that he can refuse the test in certain circumstances where the officer did not have reasonable grounds for arrest or for requesting the test, or may have confused the driver as to his rights.[46]

With virtual unanimity, state courts other than Minnesota's, including North Dakota's, have denied the existence of any right to speak with an attorney before making a decision to take or refuse a chemical blood-alcohol test.[47] Courts also have held that drivers license proceedings are civil in nature,[48] and as a corollary, that the taking of a chemical test is not a "critical stage" in a criminal prosecution.[49]

The North Dakota Supreme Court, in dealing with statutory language similar to that in Minnesota's implied consent law,[50] has held that there is no statutory or constitutional right to speak with an attorney because proceedings under the implied-consent law are civil in nature,[51] and that refusal to submit to a chemical test is unreasonable.[52] No cases have been decided in North Dakota since *Prideaux* dealing with implied consent, so it is not known if this policy will continue.

In Minnesota, according to *Prideaux*, a motorist has a statutory

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43. *Id.* at 463, 185 N.W.2d at 276.
44. ——Minn.——, ——, 247 N.W.2d 385, 389 (1974).
45. United States v. Wade, 388 U.S. 218, 222 (1967), which recognized a right to counsel at a postindictment lineup.
46. Prideaux v. State Dept. of Public Safety, ——Minn.——, 247 N.W.2d 385 (1976). *See* State Dept. of Highways v. Beckey, 291 Minn. 483, 192 N.W.2d 441 (1971).
47. *E.g.*, Mills v. Bridges, 93 Idaho 679, 471 P.2d 66 (1970); Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966); Harrison v. State Dept. of Public Safety, 298 So. 2d 312 (La. 1974); Lewis v. Nebraska State Dept. of Motor Vehicles, 191 Neb. 704, 217 N.W.2d 177 (1974); Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962); Agnew v. Hjelle, 216 N.W.2d 291 (N.D. 1974); Blow v. Comm'r of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969). *See also* Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 389 n.3 (1976).
48. *E.g.*, Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962); Agnew v. Hjelle, 216 N.W.2d 291 (N.D. 1974); Blow v. Comm'r of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969).
49. *See* United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S 263 (1967).
50. N.D. CENT. CODE §§ 39-20-01 to 04 (1972), *as amended*, (Supp. 1975), corresponds with MINN. STAT. ANN. 169.123 (West. Supp. 1976).
51. Agnew v. Hjelle, 216 N.W.2d 291 (N.D. 1974). The decision in *Agnew* was based on State Dept. of Highways v. Beckey, 291 Minn. 483, 192 N.W.2d 441 (1971).
52. Lund v. Hjelle, 224 N.W.2d 552 (N.D. 1974).

right to speak with his attorney before making a decision to take or refuse to take a chemical test of his blood-alcohol content following an arrest for an alcohol-related driving offense.[53] Because of the availability of a statutory basis for deciding *Prideaux*, the question of a constitutional right to speak with an attorney was not decided. None of the states, as yet, have held that a defendant has a constitutional right to speak with an attorney in such a situation.[54]

While the practical exigencies of blood-alcohol dissipation place significant restraints upon the time in which a test can be executed with probative results,[55] the flat refusal to allow prior consultation with an attorney seems arbitrary. The utility of counsel in assuring a knowing refusal is readily recognizable.[56] Although the implied-consent advisement does indicate some of the consequences of a refusal,[57] as a matter of fairness the state should not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel.[58]

NEIL T. GILLUND

INSURANCE—CONTRACT AND POLICY—THE DOCTRINE OF REASONABLE EXPECTATIONS APPLIED TO VOID A CROP SPRAYING EXCLUSION

Dennis and David Mills brought an action against Walter Small, Agrichemical Aviation, Inc., and Gene Engel to recover for damages to their crops caused by aerial crop spraying conducted on Small's land. A judgment was issued in favor of the Mills brothers. Small then brought a third party action against St. Paul Fire and Marine Insurance Company, Small's liability insurance carrier. There were two insurance policies involved: the first policy was a farmer's comprehensive insurance policy which provided coverage for buildings and personal property owned by Small and personal liability coverage up to $200,000; the second policy was an umbrella policy which

53. ——Minn.——, ——, 247 N.W.2d 385, 394 (1976).

54. The United States Supreme Court, in Bell v. Burson, 402 U.S. 535 (1971), recognized that suspension of an issued drivers license involves state action that adjudicates important interests of the licensees and that in such cases licenses are not to be taken away without the procedural due process required by the fourteenth amendment.

55. *See* Schmerber v. California, 384 U.S. 757, 770-71 (1966).

56. The licensee's choice to submit to or refuse the chemical test certainly involves legal implications of some importance to the licensee; loss of driving privileges for six months and increased possibility of criminal conviction. *See* Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 388 (1976).

57. *See supra* note 40, and text accompanying.

58. People v. Ianniello, 21 N.Y.2d 418, 425, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 468 (1968).