



Effects of Revised Regulations on Drunk Driving and Refusal Cases

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Pursuant to Rhode Island General Law (R.I. Gen. Laws) 31-27-2.1 ("Refusal Statute"), "[a]ny person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath."

Moreover, the Refusal Statute states, "[i]f a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests, as provided in section 31-27-2, none shall be given, but a judge of the traffic tribunal or district court judge, upon receipt of a report of a law enforcement officer:

- that he or she had reasonable grounds to believe the arrested person had been driving a motor vehicle within this state under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these;
- that the person had been informed of his or her rights in accordance with section 31-27-3;
- that the person had been informed of the penalties incurred as a result of noncompliance with this section; and
- that the person had refused to submit to the tests upon the request of a law enforcement officer;

shall promptly order that the person's operator's license or privilege to operate a motor vehicle in this state be immediately suspended and that the person's license be surrendered within five (5) days of notice of suspension."

The Refusal Statute also states that the chemical tests shall consist of, "[n]o more than two (2) complete tests, one for

the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in section 21-28-1.02(7), . . . The director of the department of health is empowered to make and file with the secretary of state, regulations which prescribe the techniques and methods of chemical analysis of the person's body fluids or breath and the qualifications and certification of individuals authorized to administer the testing and analysis."

R.I. Gen. Laws 31-27-2 ("Drunk Driving Statute"), sets out conditions precedent which the state must establish before the results of a chemical test are admissible and competent. R.I. Gen. Laws 31-27-2(c) states:

In any criminal prosecution for a violation of subsection (a) of this section, evidence as to the amount of intoxicating liquor, . . . in the defendant's blood at the time alleged as shown by a chemical analysis of the defendant's breath, blood, or urine or other bodily substance shall be admissible and competent, provided that evidence is present that the following conditions have been complied with: . . .

(4) The test was performed according to methods and with equipment approved by the director of the department of health of the state of Rhode Island and by an authorized individual.

In May of 2006, the Rhode Island Department of Health (DOH) promulgated amended RULES AND REGULATIONS PERTAINING TO PRELIMINARY BREATH TESTING AND STANDARDS FOR THE DETERMINATION OF THE AMOUNT OF ALCOHOL AND/OR DRUGS IN A PERSON'S BLOOD BY CHEMICAL ANALYSIS OF THE BREATH, BLOOD AND/OR

URINE OR OTHER BODILY SUBSTANCES (DOH Regs). It should be noted that the DOH Regs were last updated in August of 2003.

A significant revision of the DOH Regs regarding the monitoring program specified in section 6.7 states, "[a]n authorized agent of the Department shall check the accuracy of approved breath testing instruments as prescribed by law. The instrument shall read within +/- 0.005 or +/- 5% (whichever is greater) of the target value." Previously, the DOH Regs stated that the "[i]nstruments must indicate the same alcohol percent as the standard alcohol solution used in the test." The revision of this portion of the DOH Regs reflects the controversy surrounding the certification of breathalyzer machines by a DOH representative when the machine indicated a minor deviation from the solution used to test the accuracy of the machine.

Section 7.1 adds a new subsection (d) which allows for "[b]lood specimens collected voluntarily from an individual for the purpose of determining blood alcohol content and/or drug screening shall be turned over to the requesting law enforcement authority at the time of blood drawing." In addition, section 7.2 adds a new subsection (c) which states "[u]rine specimens collected voluntarily from an individual for the purpose of determining blood alcohol content and/or drug screening shall be turned over to the requesting law enforcement authority at the time of collection." Finally, Section 7.3 adds a new subsection (a) which states "[o]ther bodily substances collected voluntarily from an individual shall be turned over to the requesting law enforcement authority at the time of collection"

The new sections 8.2 (a) and (b) of the DOH Regs still hold that "[a] com-

plete breath test shall consist of two (2) valid breath samples [and] [t]he breath samples shall be taken after the suspect has been observed for a minimum of fifteen (15) minutes to ensure that the subject has not ingested or inserted any substance into his/her mouth, or caused any residual mouth alcohol to occur.”

The most significant change is in section 8.2 (c) which states that “[t]he breath samples shall be collected within fifteen (15) minutes of each other and the results reported as the alcohol level based upon grams of alcohol per 210 liters of breath. To be acceptable as a valid breath test, the two (2) results shall be within +/- 0.020 g/210L and taken within fifteen (15) minutes of each other. If the results of the first and second sample are more than +/- 0.020 g/210L apart, a third sample shall be analyzed.” Section 8.2 (d) further states, “[t]o be acceptable as a valid breath test, any two (2) of the three (3) results shall be within +/- 0.020 g/210L and taken within fifteen (15) minutes of each other. In the event the person tested fails to provide the required number of valid breath samples, then this event shall constitute a refusal in accordance with section 31-27-2.1 of the Rhode Island General Laws, as amended. If this process exceeds the allocated time, a second series may be implemented to satisfy the requirements of obtaining a valid breath test.”

What is most significant about these recent revisions is that, in the past, the second breath test sample was to be taken when at least thirty minutes had elapsed following the first breath test sample. In addition, there was no requirement that two of the samples be within +/- 0.020 g/210L of each other. Therefore, under the new DOH Regs, an argument can be made that if the breath test samples are not within the DOH Regs margin of error then the breath test samples must be suppressed.

Hopefully, this article will assist practitioners involved with the prosecution and defense of these types of cases in this ever changing area of the law.

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