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Motor Vehicles; Driving While Intoxicated; Section 4511.19; Implied Consent; Aurora v. Kepley

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Aurora v. Kepley, 60 Ohio St. 2d 73, 397 N.E.2d 400 (1979)

ON MAY 12, 1977, Mr. James Kepley was arrested for driving a motor vehicle while intoxicated after police observed him driving in an erratic manner. He thereafter exhibited difficulty in performing coordination tests. At the Aurora police station, Kepley was requested and agreed to take a breathalyzer test having been advised of the Ohio implied consent law.[1] The test was administered by an Aurora police officer holding a valid "operator's permit" issued by the Director of Health.[2] Two Aurora officers held "senior operator's permits" but neither were present when Kepley was tested.[3] At trial Mr. Kepley's attorney objected to the admission of the test results[4] because the test was not "performed by a senior operator or an operator who is under the general direction of a senior operator . . ."[5] as required by the regulations of the Director of Health. The test results were admitted into evidence and Kepley was convicted. The Portage County Court of Appeals reversed the conviction holding that the regulation requires a "senior operator" to be physically present when the test is administered and as one was not present when Kepley was tested, the results were erroneously admitted.[6]

The Ohio Supreme Court disagreed and held that a "senior operator" need not be physically present when an officer holding a valid "operator's permit" administers a breathalyzer test.[7] The court reasoned that the purpose of the regulation was to ensure accuracy by requiring at least one highly skilled operator to maintain and calibrate the machine and periodically check the operator's performance at every facility where breathalyzer tests are administered. This close supervision of the equipment coupled with the operator's training in the proper methods of operation ensure accurate results without constant supervision by the senior operator.

The Supreme Court interpreted the requirement of this regulation so as to correct the literal meaning given it by the Court of Appeals. Pur-

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[1] OHIO REV. CODE ANN. § 4511.191 (Page Supp. 1978).

[2] OHIO AD. CODE § 3701-53-07(E).

[3] *Id.* at ¶ (D).

[4] Kepley's blood alcohol content was measured at .24%. OHIO REV. CODE ANN. § 4511.19(B) states that a person is presumed to be under the influence of alcohol if there is .10% or more by weight of alcohol in a person's blood.

[5] OHIO AD. CODE § 3701-53-07(C).

[6] Aurora v. Kepley, 60 Ohio St. 73, 76, 397 N.E.2d 400, 401 (1979).

[7] *Id.* at 76, 397 N.E.2d at 402.

suant to section 4511.19 proscribing the operation of a motor vehicle while intoxicated and providing for the taking of the breathalyzer test, one of the requirements for admissability of the results is that the test be administered within two hours of the alleged violation.[8] The Director of Health, in formulating regulations,[9] developed two permits in part to facilitate testing within this time frame. The training requirements for "operator's permits" involve only the actual operation of the machine and are capable of being held by more officers than the more intensive training required to obtain the "senior operator's permit."[10] If it were necessary for a senior operator to be present during every test, each police department would require at least two officers with those qualifications to ensure that one would be available every hour of the day for testing within the two hour limit. Besides the unnecessary expense of training and then requiring both an operator and senior operator to be present, this would involve needless duplication of knowledgeable personnel during testing. Accurate results may be achieved if the senior operator generally oversees the functioning and calibration of the machine and the operator administers the test in the manner in which he has been trained.

When breathalyzer tests are conducted according to approved methods and by competent operators, courts have given favor to the use of the results in criminal cases involving driving while intoxicated. The Supreme Court of Ohio, in 1968, followed a growing trend in other states by recognizing the reasonably reliable results of these tests on the issue of intoxication.[11] In Ohio, before accepting the results as evidence, however, the prosecutor is required to affirmatively establish that: 1) the bodily substance was withdrawn within two hours of the alleged violation; 2) that it was analyzed in accordance with methods approved by the Director of Health; and; 3) that the test was conducted by qualified operators.[12] Most challenges relating to these requirements are that the test was not administered according to approved methods as in *Aurora,* but few have been successful.[13] The importance of having the test results admitted lies in the fact that the

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[8] This requirement also is stated in OHIO AD. CODE § 3701-53-05(A).

[9] OHIO REV. CODE ANN. § 3701.143 authorizes the Director of Health to formulate methods for chemical testing and qualifications for those performing the tests.

[10] OHIO AD. CODE § 3701-53-07 requires three years experience in the operation of the breathalyzer for both permits. The senior operator training is more extensive during that time in that it also includes calibration and maintenance of the equipment. Both are subject to periodic on-site checks by the Department of Health and certificate renewal every two years.

[11] Westerville v. Cunningham, 15 Ohio St. 2d 121, 123, 239 N.E.2d 40, 41 (1968).

[12] Cincinnati v. Sand, 43 Ohio St. 2d 79, 330 N.E.2d 908 (1975).

[13] *But see* State v. Jones, 37 Ohio App. 2d 127, 308 N.E.2d 755 (Clinton Cty. 1973) (failing to affirmatively establish that the body substance was analyzed in accordance with methods approved by the Department of Health is fatal to admissability); State v. Miracle, 33 Ohio App. 2d 289, 294 N.E.2d 903 (1973) (testimony required to establish that the test is administered in specific compliance with approved methods).

statutory presumptions[14] of intoxication are thereby triggered which, though rebuttable,[15] aid in convicting drunken drivers by not having to depend exclusively on eye witness observation or officer interpretation of exhibited performance of coordination tests.[16] More significantly, having statutory presumptions eliminates the need for medical testimony to interpret the meaning of the breathalyzer test results.[17]

With the constant problem of accidents caused by drinking drivers[18] and the fairly reliable results of breathalyzer tests established,[19] judicial decisions have upheld the statutory scheme providing for its use through an era when rights of an accused have been greatly expanded. It has been held that the breathalyzer test results are not testimonial but physical evidence and therefore not protected by the Fifth Amendment privilege against self-incrimination.[20] Thus, the accused has no constitutional right to refuse to take the test,[21] and the prosecutor may comment at the trial on his refusal relying on its' probative value as to whether the driver was intoxicated at the time of the incident.[22] New York goes even further and says as long as there is no compulsion to refuse to take the test, the refusal is admissable at trial[23]

Challenges on the ground that the test is an unreasonable search and seizure have been unsuccessful[24] as well based on the language of the United States Supreme Court in *Schmerber v. California*.[25] If the test was done in a shocking or offensive manner it would be violative of the *Rochin*[26] test for Due Process but this attack is of little value as the test results

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[14] OHIO REV. CODE ANN. § 4511.19(A),(B),(C) (Page Supp. 1975).

[15] State v. Myers, 26 Ohio St. 2d 190, 271 N.E.2d 245 (1971).

[16] *Id.* at 199, 271 N.E.2d at 251 by dicta says that this type of evidence is also admissable to carry out the intended thrust of the statute.

[17] *Id.* at 198, 271 N.E.2d at 251.

[18] UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THIRD SPECIAL REPORT TO THE UNITED STATES CONGRESS ON ALCOHOL AND HEALTH, 61-63, (June, 1978).

[19] Conley, *Scientific Investigation of Intoxication*, 11 CLEV.-MAR. L.R. 108 (1962); Clark, *Driving While Intoxicated - Implied Consent in Ohio*, 20 CASE W. RES. L. REV. 277, 280 (1968).

[20] State v. Brean, 136 Vt. 147, 385 A.2d 1085 (1978); City of Piqua v. Hunger, 15 Ohio St. 2d 110, 113, 238 N.E.2d 766, 767-768 (1968), citing *Schmerber v. California*, 348 U.S. 757 (1966) as controlling.

[21] Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968); People v. Sudduth, 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1967).

[22] 15 Ohio St. 2d at 123, 239 N.E.2d at 41. This is not true in all jurisdictions. Massachusetts, for example, provides by statute that comment may not be made at the alleged violator's criminal trial.

[23] People v. Thomas, 46 N.Y.2d 100, 107, 412 N.Y.S.2d 845, 849, 385 N.E.2d 584, 587 (1978).

[24] Campbell v. Superior Court, 106 Ariz. 542, 554, 479 P.2d 685, 697 (1971); State v. Starnes, 21 Ohio St. 2d 38, 43, 254 N.E.2d 675, 678 (1970).

[25] 384 U.S. 757 (1966).

[26] Rochin v. California, 342 U.S. 165 (1952).

will be excluded on the lesser showing that the test was not conducted according to statutorily defined methods. Courts generally hold that it is not necessary to give *Miranda* warnings before administering the test because there is no interrogation involved.[27] Nor does the right to counsel attach prior to deciding whether to submit to the test.[28] Consent to take the test, however, may still be negated if the accused was not properly informed that he could refuse and the consequences of refusal[29] or, in some jurisdictions, that the accused may have another physician of his choice administer an independent body substance test for intoxication.[30]

Asking a person to submit to a test must be based on prior legal arrest in all jurisdictions. But even though driving while intoxicated is a misdemeanor which requires either a warrant or police observation, Ohio courts have upheld warrantless arrests as legal when the officer arrives at an accident shortly after it occurs; the driver admits he had been driving and appears intoxicated; and the officer could reasonably conclude he had been driving before the accident.[31] An affidavit and warrant are required, however, if the officer fails to see the operation of the vehicle and the driver does not admit driving.[32] It has been stated that even though a police officer didn't state that he was arresting the accused, the circumstances would indicate he was sufficiently under the officer's control to put the person on notice that he was under arrest.[33] After arrest if the officer fails to give a test upon the request of the alleged violator, it has been held that the driver was not deprived of due process or any other constitutional right.[34]

By facilitating the use of breathalyzer tests, courts and legislators are seeking to deter drunken driving and recidivism to ensure future safety on the highways through the punitive aspects of conviction. A fairly recent trend in some jurisdictions to more effectively counter this continuing problem[35] is providing a statutory alternative for rehabilitation and driver alcohol education for those convicted. The Massachusetts statute,[36] for example, allows the judge to grant a one-year probationary period

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[27] 15 Ohio St. 2d at 112, 238 N.E.2d at 767 (1968).

[28] Wiethe v. Curry, — Ohio App. 2d —, 325 N.E.2d 561 (Hamilton Cty. 1975); Robertson v. State ex rel. Lester, 501 P.2d 1099, 1103 (Okla., 1972).

[29] 136 Vt. at 151, 385 A.2d at 1088 (1978).

[30] State v. Creson, 576 P.2d 814 (Or. App., 1978). This was said to be an insufficient basis for exclusion in *State v. Myers*, 26 Ohio St. 2d 190, 271 N.E.2d 245 (1971).

[31] City of Oregon v. Szakovits, 32 Ohio St. 2d 271, 276, 291 N.E.2d 742, 744 (1972).

[32] State ex rel. Wilson v. Nash, 41 Ohio App. 2d 201, 324, N.E.2d 774 (1974).

[33] 325 N.E.2d at 561.

[34] State v. Urrego, 41 Ohio App. 2d 124, 322 N.E.2d 688 (Monroe Cty. 1974).

[35] U.S. Department of Transportation, National Safety Bureau, "The Alcohol Safety Countermeasures Program", 17-22 (pamphlet, 1971); U.S. Department of Transportation, "Highway Safety 1978, A Report on Activities Under the Highway Safety Act of 1966 as amended January 1, 1978- December 31, 1978", 14 (1978).

[36] MASS. GEN. LAWS ANN. ch. 90 §§ 24(D), 24(E) (Supp. 1978) (West).

to persons convicted who agree to participate in either an education or alcoholic rehabilitation program. This approach may yield greater deterrence value and less recidivism than the punitive aspects of conviction alone. It does, however, still depend on conviction which makes the breathalyzer test results instrumental in reaching the point where rehabilitation may be considered.

To encourage people arrested of driving while intoxicated to submit to the test every state, plus the District of Columbia,[37] now has an implied consent statute. Based on the theory that every motorist by driving on the highways impliedly consents to take the test upon arrest for driving while intoxicated, the statutory schemes sanction those refusing through license suspension for varying periods of time up to one year.[38] The legal fiction of implied consent in this setting is of the same cloth as the nonresident motorist statutes both of which are considered valid law.[39] The implied consent statutes are considered reasonable regulations capable of state enforcement under its police powers to protect public safety. When a person is requested to take the test he is informed of the consequence of license suspension as an inducement to consent and the production of reliable and relevant evidence for trial. To avoid any coercion in eliciting consent, the statutes generally provide that upon refusal the test shall not be given but that the police officer shall file a sworn statement to the Registrar including the reasonable grounds on which he based his belief that

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[37] ALA. CODE tit. 32-5-192 (1975); ALASKA STAT. § 28.35.031-032 (1975); ARIZ. REV. STAT. ANN. § 28-691(d), (e) (1976); ARK. STAT. ANN. § 75-1045(d) (Supp. 1975); CAL. VEH. CODE § 13353(b)-(c) (1971) (Deering); COL. REV. STAT. § 13-5-30 (1971); CONN. GEN. STAT. ANN. tit. 14 § 227(b) (Supp. 1976); DEL. CODE ANN. tit. 21 § 2742 (1974); D.C. CODE ANN. § 40-1005, 1006 (Supp. 1976); FLA. STAT. ANN. § 322.261(d), (e) (1975); GA. CODE ANN. tit. 68, § 1625.1(b), (c) (1972); HAW. REV. STAT. § 286-155 (1968); IDAHO CODE § 49-352 (1976); ILL. REV. STAT. ch. 95½, § 11-501.1(d) (1976); IND. CODE ANN. tit. 9, § 4-4.5-4 (1975) (Burns); IOWA CODE ANN. § 321.137-138 (Supp. 1976) (West); KAN. STAT. § 8-1001 (1975); KY. REV. STAT. § 185.565 (Supp. 1976); LA. REV. STAT. ANN. § 32-667-668 (Supp. 1976) (West); ME. REV. STAT. tit. 29 § 1312(2) (Supp. 1976); MD. ANN. CODE art. 66½, § 6-205.1 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f), (g) (Supp. 1976) (West); MICH. STAT. ANN. § 257.625(e) (Supp. 1976); MINN. STAT. ANN. § 169.123 (Supp. 1973) (West); MISS. CODE ANN. § 63-11-21-23 (1972); MO. ANN. STAT. § 564.441 (Supp. 1976) (Vernon); MONT. REV. CODE ANN. §§ 32.2142.1-2 (Supp. 1972); NEB. REV. STAT. § 39-669.16 (1960); N.H. REV. STAT. ANN. § 262-A-69e (Supp. 1972); N.J. REV. STAT. § 39.4-50.4 (Supp. 1976); N.M. STAT. ANN. § 64.22-2.12 (Supp. 1971); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1972); N.C. GEN. STAT. § 20-16.2 (1975); N.D. CENT. CODE § 39-20-04-5 (Supp. 1975); OHIO REV. CODE ANN. § 4511.191 (Supp. (1978) (Page); OKLA. STAT. tit. 47, § 753-4 (1975); OR. REV. CODE § 482.540 (1971); PA. STAT. ANN. tit. 75, §§ 1447, 1550 (1977); R.I. GEN. LAWS § 31-27-2.1 (1969); S.C. CODE § 46-344(d) (Supp. 1972); S.D. COMPILED LAWS ANN. §§ 32-23-10-11 (1969); TENN. CODE ANN. § 59-1045 (Supp. 1976); TEX. CIV. CODE ANN. § 67011-5(2) (1977) (Vernon); UTAH CODE ANN. § 41-6-44.10(c) (1960); VT. STAT. ANN. tit. 23, § 1205 (Supp. 1976); VA. CODE § 18.2-268 (Supp. 1972); WASH. REV. CODE tit. 46, § 20.308(3) (Supp. 1976); W. VA. CODE § 17C-5A-3 (1975); WIS. STAT. ANN. § 343.305(7)(a) (1971) (West); WYO. STAT. §§ 31-247.2 (d)-247.3 (Supp. 1976).

[38] Ohio's implied consent law provides for a six-month revocation period.

[39] *Cf.* Hess v. Pawloski, 274 U.S. 352 (1972), upholding the validity of nonresident motorist statutes.

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the person was driving while intoxicated, that the alleged violator had been advised of the consequences of refusal and that he refused.[40] In twelve states[41] the license is immediately suspended with provision for a post-suspension hearing upon request. Other states, including Ohio, notify the driver of the revocation and a procedure for seeking review of this action which if he chooses to pursue will postpone the suspension until after the hearing unless he prevails at this proceeding. In Ohio a time frame is established so that he must seek his review within twenty days of the mailing of the notice of the administrative action.[42] The issues at the hearing are limited in all states to the narrow issues surrounding the incident and in Ohio are confined to whether there were reasonable grounds for the police to believe the person was driving while intoxicated, whether he was properly advised of the consequences of refusal, and whether he refused.[43] This is a civil, administrative proceeding completely separate from the criminal trial which has no res judicata effect on these issues[44] though the two proceedings actually do impact on each other. The prosecutor is allowed to comment at trial upon the drivers refusal in Ohio,[45] though not in all states,[46] which, because of the damaging inference to the driver, may be considered an additional sanction. Ohio also statutorily provides that the suspension of the driver's license shall terminate upon the entering of a guilty plea or being convicted after a plea of no contest to the charge[47] apparently considering these equivalents to the taking of the test or, at least, yielding the same result.

Implied consent statutes have been the subject of challenges on Fifth and Fourteenth Amendment due process grounds for failing to provide a hearing before revocation of the driver's license of one who refused to submit to the test. This area has been the most controversial and, until recently, least settled. State courts have consistently upheld[48] their statutes

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[40] *See generally* statutes cited *supra* note 37.

[41] Alabama, Alaska, Delaware, Iowa, Massachusetts, Maine, Mississippi, Montana, Rhode Island, Missouri, New Hampshire, New Mexico.

[42] OHIO REV. CODE ANN. § 4911.191(F) (Page Supp. 1978).

[43] *Id.*

[44] State v. Starnes, 21 Ohio St. 2d 38, 45-46, 254 N.E.2d 675, 680 (1970).

[45] *Id.* at 43, 254 N.E.2d at 678.

[46] Massachusetts provides statutorily that the Prosecutor may not comment on refusal in the criminal proceeding.

[47] OHIO REV. CODE ANN. § 4911.191(I) (Page Supp. 1978).

[48] *But see Schutt v. McDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (1954) finding New York's recently enacted implied consent statute (the first enacted) unconstitutional for failing to provide reasonable safeguards against arbitrary action by the police and Motor Vehicle Division. The statute was amended to require an arrest before requesting a person to submit to the test, that police submit a sworn statement to the registrar attesting to the refusal, and that some type of hearing be available to review the administrative action. In its amended form this statute was upheld as constitutional and served as a model for formulation of implied consent statutes in other states. Anderson v. MacDuff, 208 Misc.2d 271, 143 N.Y.S. 2d 257 (Sup. Ct. 1955).

on this challenge considering the issuance of a driver's license a privilege rather than a right and therefore subject to this type of regulation to affect public safety.[49]

In 1971, the United States Supreme Court addressed the due process implications of summarily revoking drivers licenses in *Bell v. Burson.*[50] At issue in the case was Georgia's Motor Vehicle Safety Responsibility Act[51] which provided for revocation without a hearing of the driver's license of any uninsured driver involved in an accident unless he posted security in the amount claimed as damages by persons harmed in the accident. The court found that once a license was issued the important interest of the licensee in continued possession is protected as property under the fourteenth amendment so as to prevent a state from terminating it without due process.[52] To comply with the requirements of the Due Process Clause, the court said a meaningful hearing appropriate to the nature of the case must be afforded by the state *before* the termination unless it was an emergency situation.[53] The nature of the hearing necessary to satisfy due process under the Georgia statute was deemed to require determination of whether a judgment arising from the accident was reasonably possible against the driver.

Since *Bell* there has been a split in decisions between federal and state courts confronted with the issue of whether implied consent statutes that provide for revocation of licenses before a hearing comport with the requirements of due process. Federal courts have found such statutes unconstitutional[54] based on the language of *Bell* that a driver's license is an important protected interest requiring a hearing before revocation. The courts have rejected arguments by the states that immediate revocation is required under an emergency exception[55] in order to rid the highways of drunken drivers observing that the reason for revocation is not that the person drove while intoxicated but because he refused to take the test. They supported this reasoning by pointing out that those taking the test are allowed to keep their licenses until after a criminal trial regardless

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[49] Robertson v. State ex. rel. Lester, 501 P.2d 1099 (Okla. 1972); Campbell v. Superior Ct., 106 Ariz. 542, 479 P.2d 685 (1971); Blydenburg v. David, 413 S.W.2d 284 (Mo. 1967); Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966).

[50] 402 U.S. 535 (1971).

[51] GA. CODE ANN. § 92A-601 (1958).

[52] Bell v. Burson, 402 U.S. 535, 539 (1971).

[53] *Id.*, at 542.

[54] Montrym v. Panora, 429 F. Supp. 393 (Mass. 1977); Slone v. Kentucky Dept. of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974); Chavez v. Campbell, 397 F. Supp. 1285 (D. Ariz. 1973); Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973).

[55] Only very unusual circumstances will justify seizure of property without a hearing. It must be a situation where seizure is necessary to secure an important governmental or general public interest, there is a special need for promptness, and the seizure is strictly controlled by government officials. Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972).

of the blood alcohol level indicated by the test.[56] A hearing prior to revocation is deemed necessary by the federal courts to allow the person an opportunity to show compliance with the statute and because the person cannot be restored for the period he was denied driving privileges if it later is found the deprivation was wrongful.[57]

Based on the federal courts decisions, other states not providing for a hearing were urged to amend their statutes,[58] which some did,[59] but other state courts continued to uphold this statutory scheme against due process attacks.[60] State courts typically distinguish *Bell* as indicating that the state interest in assuring an uninsured persons financial ability to cover judgments arising out of accidents does not outweigh the driver's personal interest in continued possession of his license.[61] The implied consent statutes, on the other hand, are deemed to represent the more important state interest in public safety which justifies immediate revocation with the availability of a later hearing.[62] Some courts find that the statutory scheme fits into an emergency exception for the reason that prompt action is required to achieve this public interest.[63] It is also said that the statutes satisfy all that due process requires by providing the alleged violator the choice of either taking the test or refusing, thereby facing the penalty of revocation, and providing the availability of some judicial review of the administrative action based on the police officer's sworn statement.[64]

In 1977, the United States Supreme Court reviewed the decision of the District Court of the Northern District of Illinois and held that, based on *Bell*, a driver's license could not constitutionally be suspended without a preliminary hearing to determine whether there is a lack of ability to exercise reasonable care in the safe operation of a motor vehicle. The Illinois statute[65] provided for automatic license suspension if the driver had been convicted of three moving violations within a twelve-month period and for automatic revocation after three suspensions within a ten year period.[66] The statute provided for the Secretary of State to schedule

[56] 354 F. Supp. at 202; 397 F. Supp. at 1288.

[57] 379 F. Supp. at 654-655.

[58] Comment, *Motor Vehicles: A New Challenge to the Implied Consent Law*, 27 OKLA. L. REV. 525 (1974).

[59] Kansas, Oklahoma, Pennsylvania.

[60] Commissioner of Motor Vehicles v. McCain, 84 N.M. 657, 506 P.2d 1204 (1975); Daneault v. Clark, 309 A.2d 884 (N.H. 1973); Jones v. Schaffner, 509 S.W.2d 72 (Mo. 1974).

[61] Popp v. Motor Vehicle Department, 211 Kan. 763, 508 P.2d 991 (1973).
The Kansas statute, however, was later amended to provide for a pre-suspension hearing.

[62] *Id.*

[63] 309 A.2d at 886.

[64] 506 P.2d at 1208.

[65] ILL. REV. STAT. ch. 95½, § 6-206 (1975).

[66] Dixon v. Love, 431 U.S. 105 (1977).

an evidentiary hearing within twenty days after revocation or suspension upon the request of the driver. The issuance of a limited permit for commercial use or in the case of hardship was statutorily allowed.[67] The Supreme Court in *Dixon v. Love* decided the issue of "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter."[68] In resolving this issue the Court applied the factors enunciated in *Mathews v. Eldridge*:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[69]

The private interest affected by the Illinois statute is, of course, continued possession of the driver's license. In light of the statutory provision for hardship and commercial drivers, however, the Court found that the private interest was "not so great as to require . . . [departure] 'from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' "[70] The risk of erroneous deprivation was found to be slight under the scheme and additional procedures unlikely to reduce such errors. The Court pointed out that here Mr. Love was not disputing the factual basis of the administrative action but merely sought an opportunity to argue for leniency.[71] In analyzing the third factor, the Court distinguished *Bell*. The Georgia statute at issue there was only for the purpose of obtaining financial security to satisfy judgments against the uninsured motorist and represented a lesser state interest than the important interest in prompt removal of unsafe drivers from the highways at issue in *Love*.[72] In addition to this strong state interest as justification for Illinois' statutory scheme, the Court determined that the availability of a pre-revocation hearing would impede the substantial public interest in administrative efficiency in that by giving the driver the option for a hearing and delaying the suspension until after this proceeding, drivers would automatically request full administrative hearings as a dilatory tactic.[73] The Court, therefore, held that the Illinois statute was con-

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[67] *Id.* at Paragraph (c), (2) & (3).

[68] 431 U.S. at 112 (1977), citing *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[69] 424 U.S. at 335 (1976).

[70] Dixon v. Love, 431 U.S. at 113 (1977), citing *Mathews*, 424 U.S. at 343.

[71] *Id.* at 114.

[72] *Id.*

[73] *Id.*

stitutionally adequate under the Due Process Clause. The concurring opinions in *Love* agreed with the district court that a driver's license could not be revoked on an ex-parte determination that a driver is unsafe but found that in this situation the state could automatically revoke a license without a pre-revocation hearing after three separate license suspensions within a ten-year period, where each suspension was premised on convictions of moving traffic violations and authorized by statute.[74]

In Massachusetts, after *Love,* the Registrar petitioned the District Court to reconsider its ruling in *Montrym v. Panora*[75] that the Massachusetts implied consent statute was unconstitutional for failing to provide a pre-suspension hearing. Upon rehearing[76] the court applied the *Eldridge* factors and found *Love* distinguishable because the possibility for irreparable personal injury was greater under the Massachusetts statute; there was more risk of error; and providing a hearing before revocation did not frustrate the state interest in public safety.[77] The District Court reaffirmed its earlier ruling whereupon the Registrar appealed to the United States Supreme Court.

The Supreme Court was thus presented an opportunity in *Mackey v. Montrym*[78] to resolve directly the issue of the process due before revoking licenses upon refusal to take a breathalyzer test and settle the split between state and federal courts. The Massachusetts statute[79] at issue provides for an automatic suspension of ninety days once the registrar receives the officers affidavit stating the grounds for believing the individual had been driving while intoxicated, that he was requested to take the test and that he refused. Once the driver surrenders his license an immediate hearing before the registrar is available to contest the issues of whether the officer had reasonable grounds for his belief, whether the driver was under arrest and whether the driver had in fact refused to take the test.[80] The immediate hearing involves only the hearing officer who holds the police affidavit and the driver who may be represented by counsel. If the driver requests that other evidence or witnesses be introduced, the hearing may be continued until a later time. The decision of the hearing officer may be appealed to the Board of Appeal, whose decision may be reviewed in the state courts.

The incident out of which *Mackey* arose began when Mr. Montrym was arrested for driving while under the influence of alcohol after he had been involved in an accident and police observed his unsteadiness, slurred

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[74] *Id.* at 116-118.
[75] 429 F. Supp. 393 (D. Mass. 1977).
[76] Montrym v. Panora, 438 F. Supp. 1157 (D. Mass. 1977).
[77] *Id.* at 1159.
[78] 47 U.S.L.W. 4798 (1979).
[79] MASS. GEN. LAWS ANN., ch. 90, § 24(1)(f) (Supp. 1976) (West).
[80] *Id.* at ¶ 24(1)(g).

speech and a strong odor of alcohol. Mr. Montrym refused to take the breathalyzer test upon arrival at the station but after speaking to his attorney he sought to retract his refusal and submit to the test. The officer would not perform the test even though only twenty minutes had elapsed since the refusal. Montrym later claimed that his attorney and not the police officer told him of the ninety day revocation period for refusal. It appeared in the police affidavit to the Registrar, however, that Montrym was properly informed of this consequence. The charge of driving while intoxicated was subsequently dismissed by a state court based on Montrym's affidavit that he was denied a breathalyzer test after consenting to one within thirty minutes of his earlier refusal. Montrym's attorney notified the Registrar of the courts dismissal order but the Registrar nonetheless suspended Montrym's license while advising him of his right to appeal. He was not notified of the statutory hearing immediately available. Montrym surrendered his license and sought an appeal which was scheduled for a little less than one month after relinquishing the license. In the meantime, however, he brought this action in the United States District Court where he prevailed on his claim that he had been denied due process by not being afforded a pre-suspension hearing.

Though the Massachusetts statutory scheme more closely resembles that in *Bell* which the Court found unconstitutional, the Supreme Court determined that *Love* was not distinguishable and upheld the Massachusetts implied consent statute as fulfilling the mandates of the Due Process Clause.[81] The majority reaffirmed that a driver's license is a protected property interest,[82] and viewed the issue as the extent of process due under this statutory scheme once again relying on the *Eldridge* factors. Their analysis under these factors, however, inappropriately aligned this scheme with the Illinois statute involved in *Love* so as to yield the same result.

Comparing the property interest involved under each scheme the majority found that the personal interest involved is actually less substantial as it involves suspension for only a period of ninety days as opposed to a year or more under the Illinois statute. The Court also noted that an immediate hearing is available upon surrendering the license in Massachusetts where a hearing under the Illinois statute was not available for up to a twenty day period. Once having established that a driver's license is a protected interest, however, inquiry should not be directed at the length of deprivation but whether there is an opportunity to be heard prior to action by the state. The Supreme Court observed in *Fuentes v. Shevin* that the factors of length and severity of deprivation are appropriate in determining the form of a hearing but are not decisive of the basic right

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[81] Mackey v. Montrym, 47 U.S.L.W. at 4798.

[82] *Id.* at 4800, n. 7.

to a prior hearing of some kind.[83] Under the Illinois statute in *Love,* a licensee has three separate trials where he may properly contest each incident before his license may be revoked. Three convictions is a reasonable enough indication of being an unsafe driver so as to allow the state to suspend his license to protect other drivers. Mr. Montrym, having at issue the nature of his refusal for which he is being sanctioned, was never afforded an opportunity to contest the written police affidavit before the suspension. The Court's emphasis on the availability of the immediate hearing is unwarranted as Mr. Montrym was not even informed of this. To comply with the basic requirements of due process, Mr. Montrym, having at issue the very reason for the revocation, should have been allowed a hearing to contest this state ex parte administrative action before it occurred regardless of the length of time for which the state may revoke or whether there is an immediate post-suspension hearing. The Supreme Court required no less in *Bell* and has traditionally opined that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."[84] This should have been especially clear in Montrym's case where he successfully disputed the matter of his refusal in his criminal proceeding and could likely have prevented the revocation from occurring at all had he been given the opportunity.

The Court found that there was little risk of erroneous deprivations under the pre-suspension procedure required by the Massachusetts statute. Once again comparing *Love,* the Court viewed the basis for revocation as similarly based on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him."[85] The state basis of revocation, the police affidavit, was deemed sufficiently reliable to render the risk of error insubstantial. The "objective facts" in *Love,* however, were notices of three separate license suspensions following convictions of moving traffic violations before a neutral judicial body as opposed to the implied consent statute where revocation is based solely on notice to the Registrar of the police officer's determination and recording of refusal to submit to the breathalyzer test. The police officer is not an impartial government official in this context but more nearly an adversary of the licensee who is placing at issue his version of the refusal. The Registrar cannot be termed a neutral official as even the majority observed that he has no discretion to stop the revocation once the officer's affidavit is submitted.[86] The Court, in an earlier case, *Mitchell v. W. T. Grant Co.*[87] gave credence to the fact that a deprivation of property occurred on the basis of a sworn affidavit,

[83] 407 U.S. 67, 86 (1972).
[84] *Id.* at 82.
[85] 47 U.S.L.W. at 4801.
[86] *Id.* at 4799.
[87] 416 U.S. 600 (1974).

and by this decision seems to strengthen the idea that once an affidavit exists a pre-suspension hearing is less likely mandatory as process due. Though a sworn statement is credible evidence, it is not so unquestionably reliable as to justify an ex parte determination that a person's property will be taken from him.

In testing the third *Eldridge* factor, the state interest served by this procedure, the majority found compelling the state's need to deter drunken driving and thereby protect the public. This strong interest certainly allows states to enact implied consent statutes under their police powers but cannot be used to deny due process. The revocation of licenses under implied consent statutes is based on refusal to submit to a test and not on driving while intoxicated. Those submitting to the test are allowed to keep their licenses and are not subject to the sanction of revocation unless it is imposed after a criminal trial regardless of the level of alcohol the test results indicate. There is, of course, a strong state interest in having the person submit to the test so as to gather the best evidence for trial. This interest is achieved, however, by sanctioning refusal with the threat of license revocation and is not defeated by affording a licensee a hearing on the narrow issues surrounding refusal prior to final revocation. This is clearly evidenced by the fact that thirty nine of the fifty one jurisdictions with implied consent statutes allow the licensee a hearing upon request before his license is finally revoked.[88] It would seem that the majority in *Montrym* could have easily determined whether allowing this procedure actually resulted in the dilatory tactics they feared.[89] The majority of states, including Ohio, have statutory schemes that more than satisfy due process after *Montrym*.

In view of the fact that *Montrym* was a 5-4 decision and that the analysis of the dissenting judges was more clearly in keeping with past decisions regarding the process due before a state may deprive a person of his property, the matter of the constitutionality of implied consent statutes on this ground may not be finally settled and is worthy of future challenge. It may be argued that *Montrym* should be limited to implied consent statutes similar to that of Massachusetts involving a suspension period of ninety days and the availability of an immediate post-suspension hearing as the Court placed great emphasis on these aspects. Challenges to statutory schemes allowing for longer suspensions without an immediate hearing available may be vehicles for the court to either review the due process analysis of *Montrym* or at least to limit its effect.

The implied consent statutory schemes are useful in deterring persons from driving while intoxicated and in promoting highway safety and, therefore, deserve continued judicial favor when the statutory requirements

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[88] Twelve states revoke prior to a hearing, *supra* note 41.

[89] 47 U.S.L.W. at 4802.

have been met. The potential societal costs in life and property capable of being incurred by drunken drivers require legislative and judicial countermeasures effective in limiting the dangers posed by them. In developing and using these countermeasures, however, the gravity of the problem should not overshadow the basic components of due process that are mandated by the Constitution.

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