

DIVISION OF MOTOR VEHICLES,
Petitioner,
v.
EDWARD F. MEARA III,
Respondent.

Decided June 20, 1980

Initial Decision

SYNOPSIS

This case concerns the proposed suspension of a driver's license based upon an alleged refusal to submit to a breath alcohol determination test as required by *N.J.S.A.* 39:4-50.2 *et seq.* At the licensee's request a hearing was held and the administrative law judge issued an initial decision finding that the licensee had not refused to submit to a breath test and thus dismissed the action. The judge based his finding upon the licensee's credibility and upon the fact that the breathalyzer operator did not appear to testify at the hearing, thus leaving the argument that the licensee had only feigned compliance and was actually refusing to breathe into the breathalyzer machine supported only by the hearsay testimony of the arresting officer.

The Director of the Division of Motor Vehicles remanded the case "for a continued hearing at which the breathalyzer operator will testify concerning the refusal issue." The Director argued that it was the duty of the administrative law judge "to call as witnesses persons who have knowledge regarding a particular fact," and that "it was incumbent upon the administrative law judge to continue the hearing so that the breathalyzer operator could be called to testify concerning the refusal issue."

Prior to the taking of testimony on remand, the licensee's attorney moved to dismiss the action on the ground that to proceed on remand would be a violation of due process of law and would result in the imposition of an impermissible double jeopardy upon the licensee. The administrative law judge reserved decision on the motion and heard the testimony of the breathalyzer operator as well as rebuttal testimony.

In discussing the motion to dismiss, the administrative law judge concluded that the Director's remand was inconsistent with due process of law, that it improperly placed the licensee into a position of double jeopardy and that the final administrative decision in the matter should be made on the basis of evidence presented at the first hearing only. The judge reasoned

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that the Director's remand misconstrued the function of an administrative law judge by making him an adjunct of the Division of Motor Vehicles, imposed upon him a prosecutorial role and did not allow him to fulfill the independent function envisioned by the statute creating the Office of Administrative Law, *N.J.S.A.* 52:14F-11.

The judge noted that when an agency (such as the Division of Motor Vehicles) possesses investigative, prosecutorial and adjudicative functions, it is particularly important that its powers be exercised fairly. Noting that the requirements of due process apply in civil and quasi-criminal matters, the judge reasoned that an attempt by any prosecuting authorities to "supplement" or "improve" a record by way of additional proofs not presented on the scheduled hearing date would be improper and was expressly prohibited by the New Jersey Uniform Administrative Procedure Rules (*N.J.A.C.* 1:1-16.5(c)) where an agency is a party to a case. The judge noted that there had been no showing that the Division of Motor Vehicles, in the exercise of reasonable diligence, was unable to produce the breathalyzer operator at the original hearing.

Thus, the administrative law judge concluded that the remand was improper. However, to avoid any further remands on the substantive issue, the administrative law judge went on to evaluate the evidence presented at both hearings. Based upon this evaluation, the judge found that, although both the licensee and the breathalyzer operator, who testified the licensee was feigning, were credible witnesses, the licensee's testimony that he was upset and did indeed blow into the machine, coupled with evidence that the machine registered at least one adequate breath sample, supported a conclusion that the licensee did not refuse to submit to a breath test. Accordingly, the action to suspend the licensee's driving privileges was dismissed.

Division of Motor Vehicles, Unrepresented
B. Dennis O'Connor, Esq., for Respondent

MILLER, ALJ:

I. PROCEDURAL HISTORY

This matter concerns the proposed suspension of the driving privileges of Edward F. Meara, III, based upon his alleged refusal to submit to a breath alcohol determination test as required by the "Implied Consent" Act (*N.J.S.A.* 39:4-50.2 *et seq.*).

The proposed suspension resulted after the Division of Motor Vehicles received a sworn report from Trooper Lawrence W. Brodowski of the New

Jersey State Police to the effect that on March 4, 1979, Edward F. Meara, III was arrested for operating a motor vehicle while under the influence of intoxicating liquor, *N.J.S.A.* 39:4-50, and, further, that he refused to submit to a breath alcohol determination test as required by *N.J.S.A.* 39:4-50.2 *et seq.* A Notice of Proposed Suspension, dated June 4, 1979, was sent to respondent in accordance with *N.J.S.A.* 39:4-50.4.

Respondent requested a hearing, and the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A hearing was first held before me on December 13, 1979. On December 18, 1979, I rendered an Initial Decision in which I specifically found that respondent did not refuse to submit to a breath test upon request of the arresting officer and, accordingly, concluded and ordered that the action against respondent be dismissed.

I based this finding upon two factors: (1) respondent's credibility; and (2) the fact that the Breathalyzer Operator (Trooper Thomas Dombroski) neither appeared nor testified at the hearing, leaving petitioner's case -- that respondent was only feigning compliance but was actually refusing to expel air into the breathalyzer machine -- to rest only upon the hearsay testimony of the arresting officer.

By Memorandum Decision dated January 24, 1980 the Director of the Division of Motor Vehicles remanded the case to the Office of Administrative Law "for a continued hearing at which the breathalyzer operator will testify concerning the refusal issue." The Director argued that it was the duty of the administrative law judge "to call as witnesses persons who have knowledge regarding a particular fact", and that "it was incumbent upon the administrative law judge to continue the hearing so that the breathalyzer operator could be called to testify concerning the refusal issue."

The hearing on the remand was held before me on June 3, 1980 at the Office of Administrative Law in Trenton, New Jersey.

II. RESPONDENT'S MOTION

Prior to the taking of any testimony, respondent's counsel moved to dismiss the action on the ground that to proceed with further testimony on the remand would be a violation of due process of law and the imposition of an impermissible double jeopardy upon respondent. I reserved decision on the motion but heard the testimony of the breathalyzer operator, Trooper Thomas Dombroski, as well as the brief rebuttal testimony of respondent himself.

For the reasons which follow, I **CONCLUDE** that the remand by the Director was inconsistent with due process of law and constituted the improper placing of respondent into a position of double jeopardy.

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Accordingly, I **ALSO CONCLUDE** that the final administrative decision in this matter should be made only upon the basis of the evidence presented at the first hearing on December 13, 1979.

The Director's decision misconstrues the function of the administrative law judge. It seeks to make him an adjunct of the Division of Motor Vehicles and to impose upon him a prosecutorial role. This is contrary to the intention of the legislation (L. 1978, c.67; *N.J.S.A. 52:14F-1* to *N.J.S.A. 52:14F-11*) which established the Office of Administrative Law and the position of administrative law judge. The *Statement of Legislative Purpose* found in Senate Bill No. 766 (which was subsequently enacted as L. 1978, c.67) makes this clear. In pertinent part, it reads:

The purpose of this legislation is to improve the quality of justice with respect to administrative hearings. In many agencies hearing officers serve on a part-time basis. They are either self-employed persons who are paid per diem to hold hearings for State agencies or they are State employees who also perform other duties for their agency in addition to holding hearings. In both instances, a hearing officer frequently presides over cases in which his own employer is an interested party. . . .

The legislative goal embodied in this Bill is to create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. This will tend to eliminate conflict of interests for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice.

Where an agency possesses investigative, prosecutorial and adjudicative functions -- as does the Division of Motor Vehicles -- it is particularly important that its powers be exercised fairly. If it fails to do so, its decisions are likely to be reversed. See *Mazza v. Cavicchia*, 15 N.J. 498 (1954) (failure to supply to licensee copy of hearing officer's secret report deprived licensee of his right to due process and a fair hearing); *New Jersey State Board of Optometrists v. Nemitz*, 21 N.J. Super. 18 (App. Div. 1952) (agency decision to impose sanctions against a licensee reversed because it appeared that Board members were overzealous and were sitting as "silent witnesses" as well as judges); and *In the matter of Katz*, (Unrep., Superior Court, App. Div., Dkt. No. A-1399-78, decided November 20, 1979) (pointing out that an agency's expertise cannot be used as a substitute for evidence). In short, the requirements of due process of law apply in civil and quasi-criminal matters, as well as in those which are purely criminal.

It is important to note, moreover, that a number of recent cases have rejected attempts by the prosecuting authorities to "supplement" or "improve" the record by way of additional proofs not presented on the

scheduled date of hearing. *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963) (defendant subjected to double jeopardy when government was granted a continuance because it was not ready to proceed after having announced that it was ready); *In re Arndt*, 67 N.J. 432 (1975) (suspension of driver's license vacated because of undue delay in prosecuting case; driver's license revocation proceedings must meet incidence of fairness underlying due process); *State v. O'Keefe*, 135 N.J. Super. 430 (Union County Ct. 1975) (prosecution for driving on revoked list; double jeopardy attached when prosecutor granted a continuance because State had failed to submit evidence that defendant had been notified of license revocation); and *State v. Tropea*, 78 N.J. 309 (1978) (further trial barred where State failed to produce an essential element of proof, viz., the applicable speed limit).

The Uniform Administrative Procedure Rules of Practice, scheduled to be adopted on July 10, 1980, recognize the above concepts. Proposed Rule 1:1-16.5(c) reads as follows:

An agency head may enter an order remanding the contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or completely considered....

Where the agency is a party to the case, however, *the agency head may not remand to the Office of Administrative Law to develop proof that, in the exercise of reasonable diligence, could have been presented by the agency at the original hearing.* (emphasis supplied)

In the instant case, there is no showing whatever that the Division of Motor Vehicles, in the exercise of reasonable diligence, was unable to produce the breathalyzer operator at the original hearing.

For the foregoing reasons, I **CONCLUDE** that the remand was improper and the testimony of Trooper Dombroski should not be considered. Recognizing that this conclusion may be erroneous, however, and in order to avoid any further remands on the substantive issue, I will now proceed to summarize the testimony of Trooper Dombroski and that of respondent by way of rebuttal, and to render a decision based on all of the evidence presented at both hearings.

III. TESTIMONY ON THE REMAND

Thomas E. Dombroski, a sergeant in the New Jersey State Police, has been a certified breathalyzer operator since 1971. Shortly before 2 a.m. on March 4, 1979, he arrived at the Hopewell State Police barracks and observed respondent and his wife. The breathalyzer machine was "warmed up -- ready to go." Trooper Dombroski took the necessary steps, including flushing and balancing the machine, preparatory to conducting a breathalyzer test on respondent. He told respondent to put the tip of the

mouthpiece into his mouth and blow into the machine in one continuous breath. Respondent placed the mouthpiece into his mouth "but failed to expel any air." The trooper again instructed respondent and again respondent failed to blow. Trooper Dombroski then advised respondent that he had one last chance, and respondent replied, "I am blowing into the machine." He put the mouthpiece into his mouth for a third time, but according to the trooper, failed to expel air. Sergeant Dombroski thereupon advised Trooper Brodowski that respondent had refused to take the test and "to write him up" for a refusal.

Trooper Dombroski stated that he could tell that respondent was not expelling air because: (1) the red light on the machine will go out even with the slightest puff of air; (2) he (Trooper Dombroski) did not hear any air escaping from the "escape hole" in the machine; and (3) he observed no condensation on the plastic tubing leading from the mouthpiece into the machine.

The trooper admitted, however, that on at least one of the three occasions the red light on the machine *did* go out. Nevertheless, for reasons not stated by the trooper, he did not turn the instrument to "Analyze" on this occasion. In other words, at no time did he attempt to obtain any kind of breath alcohol reading.

Respondent testified briefly in rebuttal. He stated that when he arrived at the police station on March 4, 1979, it was "a highly emotional situation" for him. It was the first time in 30 years of driving that he had been in that type of situation. Adding to his stress was the fact that his wife was very upset. He declared that he blew into the machine, "as hard as I could," and that after the third time he requested a fourth opportunity, which was not allowed. He averred that he never had any intention of refusing to take the test.

IV. DECISION ON THE MERITS

The testimony set forth in the Initial Decision dated December 18, 1979 need not be repeated here. Suffice it to say, the only issue is whether respondent refused to take the breathalyzer by feigning compliance while intentionally withholding the giving of an adequate breath sample.

After observing Respondent (on two separate occasions) and Trooper Dombroski, both of whom were credible witnesses, I FIND that respondent did *not* intentionally fail to give an adequate breath sample. I believe when respondent said he was upset, that he did blow into the machine, and that he requested a fourth opportunity, which was refused. I also believe that Trooper Dombroski was of the opinion that respondent was feigning.

The factor that tips the scale in respondent's favor is the fact that the red light on the machine went out at least once -- a critical indication that

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respondent had expelled enough air into the mouthpiece to register on the machine. Yet Trooper Dombroski did not even attempt to analyze this sample of air. Why he failed to do so was simply not explained, and I cannot speculate on the reason. In any event, this fact lends credence to respondent's testimony that he was trying to comply with the officer's instructions.

Accordingly, I **CONCLUDE** that respondent did not refuse to submit to a breath alcohol determination test as required by the "Implied Consent" Act, *viz.*, *N.J.S.A.* 39:4-50.4. It is therefore **ORDERED** that petitioner's action to suspend respondent's driving privileges is **DISMISSED**.

After reviewing this Initial Decision, the Division of Motor Vehicles on August 4, 1980 issued the following Final Decision:

The Division of Motor Vehicles hereby determines the matter concerning the proposed suspension of the driving privileges of Edward F. Meara III for his refusal to submit to a breath alcohol determination test, as required by the "Implied Consent" Act (*N.J.S.A.* 39:4-50.2 *et seq.*). Prior to this final determination, I have reviewed the administrative law judge's initial decision. I disagree with the Administrative Law Judge's conclusions, and, therefore, I will reject his recommendation.

The issues of reasonable grounds and arrest are not materially disputed. The substantive issue upon which the outcome of this matter rests is the issue of refusal. For reasons explained herein, I have concluded that a refusal has taken place within the intent of the "Implied Consent" Act, *supra*.

At the first or prior hearing, the arresting officer's testimony, as an eyewitness, supported a finding that respondent failed to give a proper breath sample as required by law. I am of the opinion that there was sufficient evidence to find that respondent refused the breath test. The administrative law judge, however, recommended that this matter be dismissed.

The administrative law judge's recommendation of dismissal was based on the fact that the breathalyzer test operator did not testify concerning the refusal.

The administrative law judge found no evidence to overcome respondent's testimony that he made a good faith effort to take the test. It was then directed by Memorandum Decision that this matter be remanded to hear testimony from the breathalyzer test operator.

On remand, the administrative law judge recommended a dismissal both

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on procedural and on substantive grounds. Both of these grounds are hereby rejected.

On procedural grounds, the administrative law judge again concluded that failing to have the operator subpoenaed for the first hearing constituted grounds for dismissal. Again, I disagree. As was stated in the first Memorandum Decision remanding this case - if the administrative law judge thought the breathalyzer test operator's testimony was dispositive of the issue, he should have continued the hearing to include that testimony. *N.J.S.A.* 52:14B-10(a).

I must point out here that the Uniform Administrative Procedure Rules of Practice (R 1:1-16.5(c)), cited by the administrative law judge to support his conclusion, is not applicable to the Director's actions prior to July 10, 1980. Even under this rule, I find that the remand is appropriate in light of the facts of this matter. It must be noted that this agency acts on implied consent violations based on reports from the police departments. Sometimes their reports fail to reveal that the arresting officer, who makes out the report, is not the breathalyzer test operator. In some of these cases, exercise of reasonable diligence on this agency's part may still fail to reveal this fact until the time of the hearing. If the administrative law judge decides that the arresting officer is incompetent to testify regarding the breath test, it is incumbent on the administrative law judge to delay his decision until the breathalyzer operator's testimony is heard.

On substantive grounds, the administrative law judge recommended dismissal because at one time the red light on the breathalyzer machine went out and the operator did not attempt to analyze the sample of air. The administrative law judge, however, was mistaken in assuming that the termination of the red light meant that an adequate breath sample could be taken. For an adequate sample of breath for the test purposes, the piston of the machine has to be blown to the top of the chamber. There was no evidence that this occurred in the instant case. Therefore, there was a refusal within the intent of the "Implied Consent" Act, *supra* and the applicable penalty shall be assessed.

The statutory criteria of reasonable grounds for believing respondent to have been operating a motor vehicle while under the influence of an intoxicating liquor, arrest, and refusal to take the breath chemical test, thus having been established:

It is, therefore, on this 4th day of August, 1980, **ORDERED** that the driving privileges of Edward F. Meara, III be and the same are hereby suspended for a period of ninety (90) days and that he be required to satisfactorily complete a program of alcohol rehabilitation or education.