
Div. of Motor Vehicles v. Sais
Cite as 4 *N.J.A.R.* 191

DIVISION OF MOTOR VEHICLES,
Petitioner,
v.
ROBERT K. SAIS,
Respondent.

Decided December 10, 1979

Initial Decision

SYNOPSIS

Robert K. Sais was arrested for a violation of *N.J.S.A.* 39:4-50 and was charged with a refusal to submit to a breath alcohol test as required by *N.J.S.A.* 39:4-50.4.

The administrative law judge found that at approximately one o'clock in the morning, Sais was arrested and charged with a violation of *N.J.S.A.* 39:4-50 and that two breath alcohol tests were made with negative results. The judge found that a patrolman who knew of the breath tests was then told to transport Sais to the hospital for a blood test, return him to his car and release him, which he did. Approximately five minutes later, the same patrolman who released him observed Sais' car traveling along the road at high speed and thus pursued and stopped the car. Upon being stopped, Sais complained of being "hassled" and refused to produce his license and registration. The patrolman observed that Sais staggered and that his voice was slurred. Sais was arrested and transported to police headquarters where he refused to take a breath test.

The administrative law judge found that the issues of arrest and refusal to submit to a breath test had been established by a preponderance of the evidence. The judge found, however, that the patrolman lacked the requisite reasonable grounds to believe Sais was intoxicated since the patrolman possessed no direct evidence independent of his immediately past experience with Sais to support that Sais was drinking. The judge observed that to the extent Sais' driving was erratic or his conduct bizarre, the patrolman should have suspected that the conduct was caused by, if by anything, a substance other than alcohol.

Accordingly, the administrative law judge concluded that the patrolman lacked the probable cause required by *N.J.S.A.* 39:4-50 *et seq.* to request that Sais submit to a breath alcohol test at the time

of his re-arrest and ordered that the proposed suspension of Sais' license be dismissed.

OSPENSON, ALJ:

This matter concerns the proposed suspension of the driving privileges of Robert K. Sais for his refusal to submit to a breath alcohol determination test as required by the "Implied Consent Act" of New Jersey. *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 Patrolman R. Kozlowski, Badge No. 49, Palisades Interstate Park Police, that on June 24, 1979, Robert K. Sais was arrested for a violation of *N.J.S.A.* 39:4-50, and, further, that he refused to submit to a breath alcohol test as required by *N.J.S.A.* 39:4-50.2 *et seq.* A notice of proposed suspension was forwarded to the licensee on July 24, 1979, in accordance with *N.J.S.A.* 39:4-50.4. The licensee requested a hearing and the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

The issues at the hearing are limited by statute (*N.J.S.A.* 39:4-50.4) to: (a) whether the arresting officer had reasonable grounds to believe that Robert K. Sais had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of an intoxicating liquor, (b) whether he was placed under arrest, and (c) whether he refused to submit to a breath test upon the request of the officer.

The relevant testimony was as follows:

Patrolman R. Kozlowski testified that at about 3:00 a.m. on June 24, 1979, while on patrol, he was called into his headquarters in order to transport licensee to Bergen Pines Hospital for a blood test. The officer drove licensee, together with a female companion, to the hospital where the blood sample was taken. The sample was then turned over to another police officer at headquarters where licensee was returned. He was then released from custody and Patrolman Kozlowski was instructed by the desk sergeant to take him back to his automobile, which was parked near Exit 1 southbound on Palisades Interstate Parkway, approximately four miles away. Patrolman Kozlowski transported licensee and his female companion back to their car and released him. The time was then about 5:35 a.m. or 5:40 a.m. Patrolman Kozlowski instructed licensee not to drive but to let his female companion drive.

Patrolman Kozlowski then resumed patrol along the Parkway. About five minutes later, he observed licensee's car being driven northbound on the highway at high speed. He pursued it in an effort to obtain a clock of speed. He observed that at times, the speed of the licensee's car reached between 75 and 80 mph and that the car swerved from side to side.

After a pursuit of about four miles, the officer overtook and stopped licensee's car. The officer said licensee came out from the car staggering. He said licensee leaned up against the car and began yelling about being hassled again. When asked for his license and registration, licensee refused to produce them because he said he was being hassled. The officer testified he noticed licensee staggered heavily and that his voice was slurred. He arrested licensee and transported him back to headquarters. There, when informed by the desk sergeant about the arrest charge, licensee began to yell, scream and bang the desk. He finally had to be put into a cell. At about 6:00 a.m., Patrolman Kozlowski went back to the cell area and read licensee the nine points on the MF-12 Refusal Form. Licensee refused to take the breath alcohol determination test.

On cross-examination, Patrolman Kozlowski conceded that when he was instructed to take licensee to Bergen Pines Hospital for a blood test, he knew licensee had just taken two breath tests, which he knew were negative for blood alcohol content. When he saw licensee for the first time about 3:00 a.m., licensee was in custody in handcuffs. Patrolman Kozlowski said he was told about the results of the two breath tests by another officer who had been concerned in licensee's arrest at 1:00 a.m. on a charge of violation of *N.J.S.A.* 39:4-50.

The officer conceded approximately five hours elapsed between the first arrest and the second arrest that he made at 5:45 a.m. He repeated, however, it was no more than five minutes between the time he released licensee near Exit 1 on the Parkway and the time he overtook and re-apprehended licensee after pursuit. He admitted he had no evidence licensee had been drinking during the five minutes he was not in custody.

The officer said although he was aware of the two negative breath alcohol tests, he nevertheless asked licensee to take a third breath test after his re-arrest because police procedure required it.

It was stipulated by the parties the first breath test was made at 0320 and the second at 0326. In each instance, the result was .000% blood alcohol, weight to volume.

Received into evidence on behalf of licensee was a laboratory report

of the Division of State Police, Little Falls, New Jersey, dated July 17, 1979, containing the results of a laboratory analysis (qualitative) of a blood sample taken from licensee on the night in question. It showed there were no traces of ethyl alcohol in the blood sample. Unquantified traces of amobarbital and secobarbital were present in the sample.

Licensee did not testify in the proceeding.

I **FIND** the issues of arrest and refusal to submit to a breath test have been established by a preponderance of the believable evidence at the hearing.

The only remaining issue in the case is that concerning reasonable grounds. Reasonable grounds mean that probable cause exists if the facts and circumstances known to an arresting officer would warrant a prudent person to believe an offense had occurred. Reasonable grounds must be assessed from the point of view of the arresting officer at the time he acted. The fact that some of the officer's information was hearsay does not deprive it of probative efficacy in establishing probable cause. In reaching a belief the offense has been committed by the person arrested, the police are not limited to evidence admissible in a courtroom. Probable cause is "a common sensible rather than a technical concept." *In re Emberton*, 109 N.J. Super. 211, 214 (App. Div. 1970).

In assessing whether *this* officer in *this* case had reasonable grounds to believe licensee was intoxicated, and therefore, reasonable grounds to request the breath test, one may not use the evidence of blood testing to make the assessment. It is obvious that results of the blood test, though the sample was taken on June 24, 1979, were not known to the officer until completion of the test by the State Police Laboratory some three weeks later. The test results, therefore, can have formed no part in his decision to make the arrest and charge under N.J.S.A. 39:4-50 on the morning in question. After-known blood test results are no more relevant to the probable cause inquiry in an administrative suspension hearing than is the result of the trial of the basic charge in municipal court. Thus, an acquittal of the basic charge, it has been said, is not relevant. *Strelecki v. Coan*, 97 N.J. Super. 279 (App. Div. 1968). It should likewise be clear the mere requirement of police procedure that a breath test request for breath alcohol determination routinely be made cannot of itself form a basis for the existence of probable cause. Such a requirement is no substitute for an officer's subjective determination on physical evidence and demeanor that probable cause exists.

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Here, for all of this officer's awareness of erratic driving and bizarre conduct, he nevertheless knew that for the approximate five hours between the time of the first arrest and the second arrest, licensee was in police custody and was not able to drink, except for a period of approximately five minutes just before the re-arrest when he was not in police custody. The officer likewise was aware that two breath alcohol tests made shortly after 3:00 a.m. were negative.

To the officer, therefore, whatever other unlawful conduct he may have presumptively sensed was the basis for licensee's erratic and bizarre conduct, the likelihood was or should have been, that ingestion of intoxicating liquor was not the competent producing cause. There is no mandate under *N.J.S.A.* 39:4-50.4 that every arrest under *N.J.S.A.* 39:4-50 be the signal for a request by the arresting officer that a licensee submit to a breath testing for blood alcohol.

Basis for a charge under *N.J.S.A.* 39:4-50 can be other substances like a narcotic, hallucinogenic or habitproducing drug. *N.J.S.A.* 39:4-50.1 deal and *N.J.S.A.* 35:48-50.4 with violations of *N.J.S.A.* 39:4-50 relating to intoxicating liquor only.

Thus, while I find that Patrolman Kozlowski's testimony is credible, I **FIND**, nevertheless, that his determination that the requisite reasonable grounds existed was wrong and not common sensible for the following reasons:

1. Licensee was arrested about 1:00 a.m. and charged with a violation of *N.J.S.A.* 39:4-50.
2. The officer knew that two breath alcohol tests were made of licensee at 3:20 a.m. and 3:26 a.m. and that the result in each instance was negative.
3. The officer knew that except for five or ten minutes between the first arrest and the second arrest licensee was in police custody and, circumstantially, unlikely to have engaged in drinking alcohol.
4. The officer possessed no independent direct evidence that licensee was drinking, nor any admission that such was the case.
5. Under the circumstances, and despite licensee's erratic driving or bizarre conduct, the officer could not reasonably have expected a different test result at 5:45 a.m. from the two negative breath test results at 3:30 a.m. and 3:26 a.m.
6. To the extent licensee's driving was erratic or his conduct bizarre, therefore, the officer should have suspected if he suspected illegal behavior at all that such driving and conduct was caused by other substances than alcohol. *See, State v.*

DiCarlo, 67 *N.J.* 322, 328 (1974); *State v. Tamburro*, 68 *N.J.*

414, 421 (1975); and *see*, *N.J.S.A.* 24:21-8C as to barbituates.

Having reviewed the documentary exhibits, and having listened to the testimony of the officer, and in view of the above findings, I **CONCLUDE**, therefore, that the officer here did not have the requisite probable cause to request that licensee submit to breath alcohol testing at the time of licensee's re-arrest at 5:45 a.m. on June 24, 1979.

In view of the fact that there does not appear to be any issue of credibility, I **CONCLUDE**, further, that there should not be drawn, and I do not draw any, adverse inference from licensee's not being sworn to give his testimony. *See*, *State v. Clawans*, 38 *N.J.* 162, 171 (1962).

Accordingly, I **ORDER** that the notice of proposed suspension for driving privileges of licensee in this matter be and is hereby **DISMISSED**.

After reviewing this Initial Decision, the Division of Motor Vehicles, on November 20, 1980, issued the following Final Decision:

Having reviewed the initial decision and any exceptions or replies submitted, I hereby adopt the decision of the administrative law judge in the above-captioned case as the Final Decision.