
Div. of Motor Vehicles v. Iuliano
Cite as 4 *N.J.A.R.* 439

DIVISION OF MOTOR VEHICLES,
Petitioner,
v.
FIORE IULIANO,
Respondent.

Decided January 9, 1980

Initial Decision

SYNOPSIS

Fiore Iuliano contested the Division of Motor Vehicles' proposed suspension of his driver license for an alleged refusal to submit to a breath alcohol determination test as required by *N.J.S.A.* 39:4-50.2 *et seq.* Iuliano argued that he could not understand the request to take the breath test because of his limited understanding of English and thus should not be found to have refused the test.

The administrative law judge found that the three elements requested by *N.J.S.A.* 39:4-50.4—probable cause to believe the licensee was operating a motor vehicle while under the influence of intoxicating liquor, arrest and refusal—had been established. As to Iuliano's defense, the administrative law judge determined that when the State has granted an individual the privilege of driving, the burden is upon the individual to understand the laws and regulations governing that privilege and thus absent a change in the statute or the decision of an appellate court, there is no requirement that the request to take the breath test be made in any language but English.

Accordingly, the administrative law judge ordered that Iuliano's driving privileges be suspended for a period of three months.

Division of Motor Vehicles, unrepresented
Jay Feldman, Esq., for respondent

ROSA, ALJ:

This matter concerns the proposed suspension of the driving privileges of Fiore Iuliano for his refusal to submit to a breath alcohol determination test as required by the "Implied Consent" Act, *N.J.S.A.*

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39:4-50.2 *et seq.* The proposed suspension resulted after the Division of Motor Vehicles received a sworn statement from Ptl. Ronald Edwards of the Belleville Police Department that on May 10, 1979, respondent was arrested for operating a motor vehicle while under the influence of intoxicating liquor, and that he refused to submit to a breath alcohol determination test as required by *N.J.S.A.* 39:4-50.2 *et seq.* On June 29, 1979, the Division of Motor Vehicles sent a notice of proposed suspension to the licensee in accordance with *N.J.S.A.* 39:4-50.2 The respondent requested a hearing and the matter was submitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

In accordance with *N.J.S.A.* 39:4-50.4, the issues at the hearing were limited to: (a) whether the arresting officer had reasonable grounds to believe that the respondent had been operating or was in actual physical control of a motor vehicle on the public highway or quasi-public areas of this State while under the influence of intoxicating liquor, (b) whether he was placed under arrest, and (c) whether he refused to submit to a breath test upon request of the officer.

Relevant testimony was as follows:

Ptl. Ronald Edwards, a member of the Belleville Police Department for the past 11 years, testified that on May 10, 1979, at approximately midnight he was on routine patrol on Joralemon Street in Belleville. At that time he was traveling in an eastbound direction, when he observed the respondent's motor vehicle also traveling in an eastbound direction. He noticed the respondent's vehicle almost sideswipe two other parked motor vehicles. When the respondent's vehicle reached the intersection of Union Street and Joralemon Street, it almost had a head-on collision with a motor vehicle coming in the opposite direction. At this, Ptl. Edwards activated the overhead lights on his vehicle and pulled the respondent's motor vehicle over on Union Street. The respondent exited his vehicle and the patrolman immediately noticed that he was staggering. At this time, the respondent asked why he was being stopped. While he was speaking he was swaying. His speech was classified by the patrolman as "rambling." The patrolman also immediately noticed the odor of alcoholic beverages. Because of a language barrier, no field tests were given at the scene. The respondent did not appear to fully comprehend the patrolman's instructions as to the performance of the standard physical dexterity tests. During this conversation, the patrolman noted that the respondent's face appeared to be flushed and excited.

The respondent was then placed under arrest and transported to

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the Belleville Police Headquarters. The trip to the police headquarters took approximately five minutes. During this period of time the patrolman continually noticed the odor of alcoholic beverages in the patrol vehicle. There was no conversation between the patrolman and the respondent while in the motor vehicle en route to the police headquarters. Again, because of the language difficulties, no physical or manual dexterity tests were given to the respondent at the police headquarters. At approximately 12:15 a.m. Patrolman Edwards read the MF-12 form to the respondent in its entirety. When the patrolman asked him if he would take the breathalyzer test, the respondent answered "No." After refusing, the respondent mentioned to the patrolman that he was under a dentist's care.

Under cross-examination the patrolman admitted that the respondent was able to exit his motor vehicle on his own and did not need any assistance. He also admitted that after the respondent was stopped and was told why he had been stopped he became very excited. It was at this time that his face became very flushed. He acknowledged that the respondent did appear to have difficulty comprehending the instructions due to a language barrier and was not sure if he fully understood all of the questions that were posed to him that evening. The patrolman also stated that there was a second request given to the respondent to take the test at the police headquarters after his wife had arrived, but that respondent similarly refused to take the test when given this second request.

The respondent, Fiore Iuliano, then took the stand on his own behalf. He testified that he was custodian in a factory and that in his job, his clothes tended to get soiled and mussed. He stated that on the day before the incident at approximately 3:00 p.m., he had visited his dentist, a Dr. Rice, for root canal work. The doctor prescribed a liquid pain killer which respondent had been taking, in dosages, since 3:00 P.M. He stated that the pain killer had an odor somewhat similar to that of wine. He also stated that when he was driving that evening, he did not feel well, inasmuch as he was in pain from the dental work that he had received. When stopped he asked the patrolman, "Why did you stop me?" He claims that the police officer broke the lock on his car. He admitted that he didn't want to take the test, but said this was due to a language difficulty and the fact that he had felt very ill from taking the prescribed dental pain medicine. He also felt that the officer didn't believe he was on medication and steadfastly stated that he did not understand the questions and statements being read to him from the MF-12 form.

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After carefully reviewing all of the evidence and testimony, and having observed the demeanor of the witnesses, I **FIND**:

1. In the early morning of May 10, 1979, at approximately 12:00 a.m., respondent was operating a motor vehicle in an erratic manner on Joralemon Street in the Town of Belleville.
2. Subsequently, respondent was stopped by Ptl. Edwards who had observed the respondent almost strike two parked cars and almost become involved in a head-on collision with a motor vehicle coming in the opposite direction.
3. During his routine investigation, Ptl. Edwards noted an odor of alcoholic beverage coming from respondent.
4. Respondent's face appeared flushed.
5. Respondent's speech was rambling and excited.
6. Respondent had great difficulty in maintaining his balance.
7. Respondent swayed on his feet while speaking to Ptl. Edwards.
8. Based on these observations and actions, Ptl. Edwards placed respondent under arrest for operating a motor vehicle while under the influence of intoxicating liquor.
9. Ptl. Edwards read to respondent, in its entirety, the standard breath test request statements and questioned him in the manner required by the Division of Motor Vehicles.
10. Respondent refused to take the breath test when first asked by Ptl. Edwards.
11. Ptl. Edwards also asked the respondent a second time to take the test and the respondent answered "No" to this second request.
12. Respondent has some difficulty understanding the English language, but is able to comprehend English to a degree which would enable him to understand the statements in the MF-12 form.

Based on the facts adduced at the hearing and the applicable law, I **CONCLUDE** that the Division of Motor Vehicles has proven the three grounds required by *N.J.S.A.* 39:4-50.4 by a preponderance of the believable and competent evidence.

On the issue of reasonable grounds to believe that the licensee had been driving while under the influence of intoxicating liquor, I **CONCLUDE** that due to the manner of operation of the motor vehicle, the actions of the respondent at the scene, and his physical appearance, the arresting officer had probable cause to believe that an offense had been committed. Probable cause exists if the facts and circumstances known to the officer would warrant a prudent person to

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believe that an offense had been committed. *In re Emberton*, 109 *N.J. Super.* 211 (App. Div. 1970). Reasonable grounds must be assessed from the point of view of the arresting officer at the time he acted. Ptl. Edwards has been a member of the Belleville Police Department for approximately 11 years. He based his determination that the requisite reasonable grounds existed on his observation of the erratic manner of operation of the motor vehicle, particularly the near accidents that the respondent had almost caused in a short period of time and the physical condition of respondent. The respondent also evidenced various symptoms usually associated with being intoxicated. The arresting officer also felt that the respondent was not capable of operating a motor vehicle. Therefore, I **CONCLUDE** that Ptl. Edwards had reasonable grounds to believe that respondent was operating a motor vehicle while under the influence of intoxicating liquor.

On the issue of arrest, I **CONCLUDE** that Ptl. Edwards made it abundantly clear to the respondent that he was arrested and as to why he was being arrested. Despite the minor language barrier, the respondent was aware that he was being placed in custody. The fact that he was subsequently transported to the Belleville Police Department and the various procedures he was made to undergo there leaves no doubt that the respondent was aware that he was under arrest.

On the issue of refusal, I **CONCLUDE** that the respondent did refuse to take the breathalyzer test. When there is evidence showing that the respondent was properly advised of his rights under the refusal statute, *N.J.S.A.* 39:4-50.2, advised of the consequences of refusal, and that the request was made timely by the arresting officer, anything substantially short of an "unqualified unequivocal assent to the officer's request that the motorist take the test constitutes refusal." *State v. Pandoli*, 109 *N.J. Super.* 1, 4 (App. Div. 1970); *see also, Sidler v. Strelecki*, 98 *N.J. Super.* 530 (App. Div. 1968).

Respondent urges as his defense for not taking the test his assertion that he could not understand the reading of the MF-12 form. Although the respondent urges the adoption of this position, it is contrary to the holding in *State v. Nunez*, 139 *N.J. Super.* 28 (Law Div. 1976). In *Nunez* the court held that the defendant's inability to understand the MF-12 form when read to him was not, in and of itself sufficient grounds for suppression of the defendant's breathalyzer test results. In holding against the Spanish speaking defendant, the court held:

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All operators of motor vehicles give their implied consent to submit to breathalyzer tests. *N.J.S.A.* 39:4-50.2. To find that this consent can be negated by a defendant's claim that he did not understand his statutory right to an independent test performed would defeat the purpose of the statute. When the State has granted an individual the privilege of driving on its highways, *the burden must be on the individual to understand the laws and regulations in furtherance of that privilege* (emphasis added).

In reaching this conclusion, the court, in *Nunez* took notice of the holding in *Camden and Amboy R.R. v. Briggs*, 22 *N.J.L.* 623 (E. & A. 1850) where the Court of Errors and Appeals stated that statutes:

intended for the public benefit are to be taken most strongly against the person claiming rights or power under them, and most favorably for the public.

Respondent relies upon dicta in the matter of *State v. Macuk*, 57 *N.J.* 1 (1970) to support his contention. However, in its holding in *Macuk* the New Jersey Supreme Court stated:

It follows defendant's contention that he did not voluntarily or understandingly consent to take the test and that he was entitled to the advice of counsel with respect thereto obviously has no merit.

Macuk, supra, at 15.

Since the Court couched the consent holding and right to counsel holding with the conjunction "and" it follows that because of the public policy behind the Implied Consent Statute there can be no requirement that a licensee be read the MF-12 form in any other language except English. Until such time as the Division of Motor Vehicles promulgates a bi-lingual policy or there is a re-examination of *State v. Nunez* by a Court of higher jurisdiction, the present policy remains.

Having found the licensee in violation of *N.J.S.A.* 39:4-50.4, it is hereby **ORDERED** that the driving privileges of Fiore Iuliano be **SUSPENDED** for a period of three months and until such time as he successfully completes a program of alcohol rehabilitation or education.

**ADOPTED BY SILENCE PURSUANT TO *N.J.S.A.* 52:143-10(C)
BY THE DIVISION OF MOTOR VEHICLES.**