
Div. of Motor Vehicles v. Festa
Cite as 6 *N.J.A.R.* 173

DIVISION OF MOTOR VEHICLES,
Petitioner,
v.
JILL P. FESTA,
Respondent.

Decided October 22, 1982

Initial Decision

SYNOPSIS

The Division of Motor Vehicles sought to suspend respondent's driver license based upon her refusal to submit to a breath alcohol determination test, pursuant to *N.J.S.A. 39:4-50.2 et seq.* The respondent argued that she was suffering from a diminished capacity as a result of her susceptibility to alcohol and, therefore, she was incapable of understanding the meaning of the breath test request.

The administrative law judge concluded that the respondent had failed to submit to the breath test. The judge found that the law was clear that the inability to give a knowing and intelligent refusal to a breath test due to voluntary intoxication was not a valid defense.

The judge rejected respondent's argument that the judge was precluded from considering an unpublished Appellate Division decision on the basis of *R 1:14*. While the rule was certainly binding on the courts, the judge noted that administrative agencies were not courts in the traditional sense of the word nor should the court rules be totally transported into the practice of administrative agencies. In any case, an agency is simply not free to ignore a relevant unpublished appellate opinion.

Accordingly, the administrative law judge ordered respondent's license suspended for 90 days.

SPRINGER, ALJ:

Procedural History

This matter concerns the proposed suspension of the driving privileges of Jill P. Festa for her 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 proceeding was instituted after the Division of Motor Vehicles received a sworn report from Officer Terence Gillespie of the Westfield Police Department stating that on November 5, 1981 Festa was arrested for operating a motor vehicle while under the influence of intoxicating liquor and that she refused to submit to the breath test provided under the statute. On February 26, 1982, the Division sent a notice to Festa proposing to suspend her driving privileges for three months. Respondent requested a hearing. Subsequently the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

In accordance with *N.J.S.A.* 39:4-50.4, the issues are: (a) whether the arresting officer had reasonable grounds to believe that Festa 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 intoxicating liquor; (b) whether she was placed under arrest; and (c) whether she refused to submit to a breath alcohol test upon request of the officer. At the outset, Festa stipulated that she did not contest either of the first two issues. Therefore, testimony at the hearing was limited to the circumstances surrounding Festa's refusal to submit to the test.

Findings of Fact

All of the basic facts are undisputed. I **FIND:**

Jill Festa was the operator of a motor vehicle involved in an accident which occurred on November 5, 1981, sometime around 10:00 p.m., near the intersection of North and Dudley Avenues in Westfield, New Jersey. It is stipulated that Officer Terence Gillespie had reasonable grounds to believe that Festa was operating a motor vehicle while under the influence of intoxicating liquor; and also that he placed her under arrest for drunk driving and transported her to police headquarters, arriving at 10:20 or 10:25 p.m. Soon after arrival at headquarters, Gillespie read to Festa in their entirety all nine paragraphs of the standard breath test form prepared by the Director of Motor Vehicles. In response to the breath test request, Festa originally answered "Yes." Another officer came into the room and began warming up the breathalyzer machine, a procedure which takes approximately 25 to 30 minutes to accomplish. While the machine was being readied for use, Festa changed her mind and announced that

Div. of Motor Vehicles v. Festa
Cite as 6 *N.J.A.R.* 173

she had decided not to take the test. Although Gillespie reminded her that she would automatically lose her license, Festa still would not take the test.

There is no doubt that Festa was greatly disoriented due to the effects of alcoholic consumption. Instead of responding rationally to the breath test request, she was "constantly crying," "cursing" and "swearing" at the two officers. Repeatedly, she asked to go home so she could get some sleep. Both officers described her state of mind as "confused." Her manner of speech was "highly incoherent." She "rambled on without purpose" and appeared to be completely "out of control." Her thought processes seemed to lack any logical progression. When asked about her condition, Gillespie indicated that her degree of intoxication was definitely "one of the worst I've seen." At headquarters, she was unable to perform even the simplest balance test.

Festa remembers very little of what occurred on the night in question. She recalls consuming alcoholic drinks on an empty stomach earlier that evening and then driving to a friend's house at about 8:30 p.m. However, she has no recollection of the accident or her arrest. The next event she can remember is going to her parents' house after her release from police custody. Apparently her face struck the steering wheel during the accident, and when police found her there was blood streaming down from her mouth. She does not make any claim that her mouth injuries interfered with her ability to take a breathalyzer test.

This was not the first time that Festa has experienced problems relating to alcohol. She has been diagnosed as suffering from the "middle stages of alcoholism." Two days after the accident, she was admitted to the Center for Addictive Illnesses in Morristown where she remained for treatment until January 12, 1982. According to her physician, Dr. Arthur McLellen, Festa's "level of intoxication at the time of the accident was sufficient to impair her understanding, comprehension and judgment." In the doctor's opinion, acute intoxication such as that demonstrated by Festa can be accompanied by "episodes of blackouts, or memory lapses." Therefore, he concluded that "her refusal to take the breathalyzer test could reasonably be related to the impaired judgment resulting from her intoxication." For purposes of this hearing, it is accepted as a fact that Festa's unresponsiveness to the breath test request was caused by her extreme reaction to the voluntary consumption of alcoholic beverages.

Conclusions of Law

Based on the facts developed at the hearing and the applicable law, I **CONCLUDE** that Festa refused to submit to the breath test in violation of *N.J.S.A.* 39:4-50.4.

Pursuant to New Jersey law, the very act of driving upon the highway constitutes the motorist's consent to the taking of samples of breath. *State v. Hudes*, 128 *N.J. Super.* 589, 605 (Cty. Ct. 1974). The statutory warning of the consequences of refusal is only a reminder of the licensee's existing legal obligation. *State v. Pandoli*, 109 *N.J. Super.* 1 (App. Div. 1970). Where 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 the privilege. *State v. Nunez*, 139 *N.J. Super.* 28, 34 (Cty. Ct. 1976).

Respondent argues that she was suffering from diminished capacity as a result of her susceptibility to alcohol, and, therefore, that she was incapable of understanding the meaning of the breath test request. She seeks to draw a distinction between "inability to consent" in the context of a drunk driving case and "incapacity" in the context of a breath test refusal case. Citing *State v. Quaid*, 172 *N.J. Super.* 533 (Law Div. 1980), respondent attempts to limit application of the Implied Consent Act to situations in which a person has already taken the breath test and later tries to invalidate his prior consent on the basis that it was uninformed. Neither the case law nor the statutory language supports such a narrow approach. To the contrary, *Quaid* recognizes that, "A defendant has no right under our statute to refuse to take the test, and the only statutory prohibition is against the use of force to obtain a specimen . . ." (172 *N.J. Super.* at 537). Recently, the Appellate Division expressly held in a breath test case that "a person whose mind is rendered so irrational by alcohol that he cannot intelligently make a decision" is not thereby excused from his legal obligation to submit to a breath test. *In re Rickerson* (N.J. App. Div., Jan 17, 1980, A-1703-78) (unreported), at 2. Thus, inability to give a knowing and intelligent refusal to a breath test caused by voluntary intoxication is not a valid defense. Only a very basic level of understanding is required to support a conclusion of unlawful refusal to submit to a breath test. A motorist is not presented with a complex request requiring great deliberation on his part, but rather is expected to give a simple yes or no answer. *Pandoli, supra*, at 4. To hold otherwise would "make a mockery" of the Implied Consent Act, since

those dangerous drivers most in need of testing would be exempt from its provisions. *Rickerson, supra*, at 3. Many jurisdictions have reached the same result. *See, State v. McElwain*, 80 *Wash.* 2d 624, 496 *P.* 2d 963 (Sup. Ct. 1972); *State v. Normandi*, 284 *Minn.* 24, 169 *N.W.* 2d 222 (Sup. Ct. 1969); *Bush v. Bright*, 71 *Cal. Rptr.* (Cal. App. 1969).

Unable to find a flaw in the logic of *Rickerson*, nevertheless respondent objects to any reliance upon that unreported opinion. She refers to New Jersey Court Rule 1:36-3 which was recently revised to provide:

No unpublished opinion shall constitute precedent or be binding upon any court. Except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court.

Administrative agencies, however, are not “courts” in the traditional sense of that word. *In re Uniform Adm’n Rules*, 90 *N.J.* 85, 92 (1982). While the court rules may be consulted for valuable guidance, they should not be “transported *in toto* or imported wholesale” into the practice of administrative agencies. *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). No corresponding provision of the Uniform Administrative Procedure Rules of Practice, *N.J.A.C.* 1:1-1.1 *et seq.*, prohibits agencies from considering unpublished appellate authority. Respondent points to *N.J.A.C.* 1:1-3.8, but that section incorporates generally into the uniform administrative rules only those portions of the court rules which govern “the conduct of lawyers, judges and agency personnel.” *See, R.* 1:14 through *R.* 1:29. Absent a rule requiring otherwise, an administrative agency must either apply the reasoning of an unpublished appellate opinion, distinguish the situation on the facts, or explain its policy reasons for declining to follow the decision. In any case, an agency is not free simply to ignore a relevant unpublished appellate opinion of which it is aware. Here there is no possibility of surprise or unfair advantage, a copy of the unpublished decision having been made available to respondent and ample opportunity having been allowed for the receipt of written comments on its applicability.

Other cases mentioned by respondent are not directly on point. *Sidler v. Strelecki*, 98 *N.J. Super.* 530 (App. Div. 1968), which involved a licensee’s claim that he could not understand the warning due to a language problem, did not ever reach the question presently at issue. Similarly, *State v. Stasio*, 78 *N.J.* 467 (1979) dealt with the voluntary

Div. of Motor Vehicles v. Festa
Cite as 6 *N.J.A.R.* 173

intoxication defense under the criminal law rather than the refusal issue under the Implied Consent Act. It has relevance only where intent is a necessary element of a crime. If anything, *Stasio* reinforces the view that respondent should not be relieved of her statutory responsibility merely because she happened to be under the influence of intoxicants. *Accord, State v. Maik*, 60 *N.J.* 203 (1972). Rejecting such a defense to a charge of assault with intent to rob, the Supreme Court in *Stasio* commented:

When a defendant shows that he was comatose and therefore could not have . . . committed . . . some unlawful activity, such stage of intoxication may be relevant in establishing a general denial. But short of that, voluntary intoxication, other than its employment to disprove premeditation and deliberation in murder, should generally serve as no excuse. 78 *N.J.* at 479.

Lastly, in the event that respondent loses on the merits, she asks that credit be given for the excess loss of her driver's license in connection with her related conviction for drunk driving. The municipal court imposed a 60-day suspension which began on February 5, 1982 and was scheduled to end on April 5, 1982. Respondent promptly paid the required restoration fee in late February 1982. Due to administrative delay, however, she did not actually receive her license back until approximately three weeks after expiration of the intended term of suspension. Clearly she entitled to credit for the period of time during which she was improperly deprived of her license.

Order

It is **ORDERED** that Festa's privileges be **SUSPENDED** for a period of 90 days beginning on December 20, 1982; provided, however, that credit be given for the amount of time that her license was previously suspended beyond April 6, 1982 in connection with her conviction for drunk driving arising out of the same incident.

It is further **ORDERED** that Festa's license remain suspended until such time as she successfully completes a program of alcohol education or rehabilitation satisfactory to the Director of the Division of Motor Vehicles.

And it is further **ORDERED** that Festa submit her license to the Driver Improvement Bureau, 25 South Montgomery Street, Trenton, New Jersey 08666 no later than the effective date of the suspension.

Div. of Motor Vehicles v. Festa
Cite as 6 *N.J.A.R.* 173

**After reviewing this Initial Decision, the
Division of Motor Vehicles on December 8, 1982
issued the following Final Decision:**

The Division of Motor Vehicles hereby determines the matter concerning the proposed suspension of the driving privileges of Jill P. Festa for her refusal to submit to a breath alcohol determination test as required by *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 and the exceptions filed by the licensee. Based upon the record presented, I agree with the conclusions of law and findings of fact made by the administrative law judge.

Respondent's contentions are two prone. Ms. Festa asserts that her diminished capacity resulting from her susceptibility to alcohol coupled with the injuries she sustained in her automobile accident rendered her incapable of understanding the meaning of the breath test request. Under our statute, a defendant has no right to refuse to take a breath alcohol determination test, and the only statutory prohibition is against the use of a force specimen. *State v. Quaid*, 172 *N.J. Super.* 533 (Law Div. 1980). *In re Rickerson*, (N.J. App. Div. January 17, 1980, A-1703-78) (unreported) at 2, stands for the proposition that when the mind is rendered so irrational by alcohol no justification for a refusal will lie. In reading *In re Rickerson* and *State v. Quaid* together, I come to the inescapable conclusion that respondent's first contention lacks merit.

The administrative law judge's use of *In re Rickerson* as precedent is correct. New Jersey Court Rule 1:36-3 provides:

No unpublished opinion shall constitute precedent or be binding upon any court. Except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any similar principle of law, no unpublished opinion shall be cited by any court.

The administrative law judge correctly reasoned that the court rules may not be "transported *in toto* or imported wholesale" into the practice of administrative agencies. *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). Under the Uniform Administrative Procedure Rules of Practice, no provision prohibits an agency from considering unpublished appellate authority. Absent a rule requiring otherwise, an agency is not free simply to ignore a relevant unpublished appellate opinion, of which it is aware unless the respondent can show surprise

or unfair advantage. Accordingly, respondent's second contention must fail.

I find the rest of respondent's exceptions were amply dealt with in the administrative law judge's initial decision. I also feel that these exceptions are devoid of merit, and I reject the same.

It is, therefore, on this 8 day of December, 1982, ORDERED that the driving privileges of Jill P. Festa be and the same are hereby suspended for a period of seven weeks.

It is further ORDERED that Jill P. Festa complete a program of alcohol education or rehabilitation program satisfactory to the Director of Motor Vehicles. Upon submission of proof of the Division of Motor Vehicles of prior attendance in an alcohol program, and payment of fees, this portion of the Order would be satisfied.