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Div. of Motor Vehicles v. Scannell  
Cite as 6 *N.J.A.R.* 196

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**DIVISION OF MOTOR VEHICLES,**  
Petitioner,  
v.  
**THOMAS J. SCANNELL,**  
Respondent.

Decided April 12, 1982

**Substantive Order**

**SYNOPSIS**

The Division of Motor Vehicles sought to suspend respondent's driving privileges for a period of one year based upon his refusal to submit to a breath alcohol determination test and because of a conviction within the past 15 years for permitting an individual to operate a motor vehicle while under the influence of alcohol.

The administrative law judge rejected respondent's argument that a conviction under *N.J.S.A.* 39:4-50, for permitting someone under the influence of alcohol to operate a motor vehicle properly, might serve as the first offense required by *N.J.S.A.* 39:4-50.4 before an enhanced penalty was imposed. The judge noted that the statutory scheme viewed drunk driving offenses to be so serious that an enhanced penalty would be required whether it is the drunk driver at fault or the person who permits another to drive while under the influence.

Accordingly, the judge concluded that an enhanced penalty is required where an individual has suffered a prior conviction for permitting one under the influence to operate a motor vehicle owned by or in the custody or control of that individual who is subsequently found guilty of refusing a breath test.

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**Anne Simonoff**, Deputy Attorney General, filed a brief on behalf of the petitioner (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

**John H. Rosenberger**, Esq., for respondent (Tort, Jacobs, Gross, Rosenberger & Todd, attorneys)

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**MASIN, ALJ:**

The Division of Motor Vehicles seeks to suspend the driving privileges of Thomas J. Scannell for a period of three months, or one year,

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and until he completes the required alcohol education or rehabilitation program. The basis of the proposed suspension is an allegation that on May 7, 1980, in Absecon Highlands, Mr. Scannell was arrested for a violation of the Drinking-Driving Law, *N.J.S.A.* 39:4-50, and that following his arrest he refused to submit to the statutorily required breath chemical test. A notice of the proposed suspension, dated July 15, 1980, was sent to the respondent, who thereafter requested a hearing. The matter was transferred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

The Division seeks to impose a one-year suspension because Mr. Scannell was convicted within the past 15 years of permitting an individual to operate a motor vehicle while under the influence of alcohol, a violation of *N.J.S.A.* 39:4-50. This conviction apparently occurred in April 1978. At the hearing, Mr. Scannell's counsel advised the court that while his client would be willing to accept the three-month suspension required for first-time offenders under the refusal statute, *N.J.S.A.* 39:4-50.4, his client would contest the refusal issue if there was any potential that the enhanced penalty of one year required of second offenders would be applicable to this situation. Specifically, counsel questions whether a conviction under *N.J.S.A.* 39:4-50 for permitting someone under the influence of alcohol to operate a motor vehicle may properly serve as the "first offense" required prior to imposition of the enhanced penalty mandated by statute for second offenders. The court and counsel agreed that a decision would be rendered on this legal issue and that if the decision was that the penalty might be one year, that a hearing would then be scheduled at which the substantive issue of whether a violation of the refusal statute had occurred would be contested. At the direction of the court, the Attorney General was requested to file a brief presenting the Division of Motor Vehicles' position on the issue. The Division's brief was received on December 17, 1981, and the record was closed on that date, subject to reopening in light of the ruling of the court.

### DISCUSSION

*N.J.S.A.* 39:4-50 states:

- (a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or permits another person who is under the influence of intoxicating liquor . . . to operate a

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motor vehicle owned by him or in his custody or control, shall be subject, for the first offense. . . .

*N.J.S.A.* 39:4-50.4 reads:

- (a) If an operator of a motor vehicle, after being arrested for a violation of R.S. 39:4-50, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal. . . .
- (b) Any revocation of the right to operate a motor vehicle over the highways of this State for refusing to submit to a chemical test shall be for 90 days unless the refusal was in connection with a subsequent offense of this section, in which case, the revocation period shall be for 1 year. In addition to any other requirements provided by law, a person whose operator's license is revoked for refusing to submit to a chemical test must satisfy the requirements of a program of alcohol education or rehabilitation pursuant to the provisions of R.S. 39:4-50.

The New Jersey Supreme Court has recently addressed the question of the proper interpretation to be given to the phrase "unless the refusal was in connection with a subsequent offense of this section." That decision, *In re Bergwall*, 85 *N.J.* 382 (1981), reversed a decision of the Appellate Division, reported at 173 *N.J. Super* 431 (App. Div. 1980), substantially for the reasons expressed in the dissent of Judge Lora. Judge Lora's decision is instructive with respect to the issue currently before me.

In *Bergwall*, the court was deciding whether the enhanced penalty was to be applied where one had previously been convicted of driving while impaired and had, in connection with that offense, submitted to the breathalyzer test. *Bergwall* was subsequently arrested for drunk driving and refused to take the breath test. The Director imposed a one-year suspension penalty. While the majority in the Appellate Division decided that the penalty should be three months and that the term "subsequent offense of this section" required that there be two refusals in order for the one-year penalty to be imposed, Judge Lora, in dissent, argued that a reading of the statute *in toto*, with appropriate consideration of the legislative history, indicated that the phrase "in connection with a subsequent offense of this section" meant that where one had previously been convicted of driving under the influence of alcohol (or, under the statute prior to its amendment,

either driving while impaired or driving under the influence) a subsequent refusal was punishable by a one year penalty. In so doing, Judge Lora read the word "section" to mean *N.J.S.A.* 39:4-50 rather than limiting "section" to *N.J.S.A.* 39:4-50.4. The judge referred, for support, to the statement of the Senate Law, Public Safety and Defense Committee attached to Senate Bill No. 1423, which bill amended the drinking-driving statute. In that statement, the Committee provided a chart which referenced various issues arising under the drinking-driving statute, noting the then current provisions of the statute and listing the recommendations of the Commission which had reviewed the statute. In connection with the issue of refusal, the chart shows the then current statute as providing for a six-month D.L. suspension (D.L. standing for driver's license). The Commission's recommendation is listed as follows:

1st-6 mos. plus Alcohol Education or Rehabilitation Subsq. to  
Prior DWI Conv. in 15 yrs.-1 yr.

As noted in Judge Lora's decision, the initials, DWI, stand for driving while under the influence. Judge Lora concludes in his decision that the statute, when read in light of the legislative history, indicates that the proper reading of the statute requires the imposition of a one-year penalty where one is found to have refused a chemical test and has a previous conviction, within 15 years, for driving while under the influence. Thus, it is not necessary that in connection with the prior offense, there must have been a finding of a refusal.

In the present matter, counsel for respondent argues that the chart contained in the statement to the bill amending the statute merely refers to a prior DWI conviction and makes no mention of the offense of permitting someone under the influence to operate a motor vehicle. From this lack of reference, counsel concludes that the "[l]egislative intent underlining *N.J.S.A.* 39:4-50.4(b) was to impose the one-year suspension only in those cases where there had been a conviction within the last 15 years for driving while intoxicated, and not when the conviction had been for permitting another to operate a motor vehicle while intoxicated." With this analysis, I cannot agree.

Given the Supreme Court's decision in upholding Judge Lora's dissent, it is clear that the statute must be read as a whole. It is clear that the Legislature intended, both in the original Drunk-Driving Law and in its amended form, to address the evil of drunk driving. In doing so, the Legislature chose to penalize both those who drive while under the influence and those who, while not themselves the intoxicated

drivers, have a motor vehicle which they either own or have in their custody or control and which they permit one to operate while under the influence. The statute makes no distinction between these two offenses, which are listed as alternatives and which subject the miscreant to the same penalty. It can be implied that the Legislature, in viewing the evil of drunk driving, found both the drunk driver himself and the person who permits one to drive while under the influence to be equally at fault. Given the extreme danger arising from operation of motor vehicles by intoxicated individuals, it is no wonder that the Legislature felt the need to punish both the drunk driver and the person who gives the drunk the instrument to operate on the highways. The Legislature apparently saw no distinction between the fault of these persons and chose to penalize each equally.

Given the above legislative scheme, it is obvious that the Legislature, in amending the penalties for refusing to submit to a breath test, did not intend to distinguish, with respect to a second offender, between one whose first offense was personally driving while under the influence and one whose first offense was permitting another to drive while under the influence. Since the Legislature clearly viewed the evils as equal, it is not surprising that it would view the necessity for second offender status to be just as necessary. This is particularly true in light of the fact that, as confirmed by the Supreme Court's acceptance of Judge Lora's position, the Legislature did not require that one guilty of a refusal must have previously refused the test in order to qualify for second offender status. Since one who accepted the test on the first occasion can suffer the enhanced penalty, it seems that the Legislature was more concerned with the existence of a prior violation of *N.J.S.A.* 39:4-50 than with limiting its concern to the existence of a prior refusal. Since no distinction has ever been drawn by the Legislature between the drunk driver and the permitter, I can see no basis for drawing such a distinction in connection with the imposition of the enhanced penalty.

The failure of the statement to Senate Bill No. 1423 to specifically note that the enhanced penalty would be imposed upon someone who had a prior "permitting" conviction as opposed to a prior driving while under the influence conviction is not persuasive. It is interesting to note that nowhere in the chart is there any reference made to the permitting violation. However, it seems that the preparers of the chart used the phrase "prior DWI conviction" as a shorthand method of referring to any violation under the Drunk-Driving Law, whether that conviction actually be for driving while under the influence or even

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for the lesser penalty of driving while impaired. I do not find the lack of any reference to the permitting offense in Section 8 of the chart to be at all significant as indicating a purposeful determination of the Legislature to exclude one with a prior permitting conviction from the risk of an enhanced penalty upon a subsequent refusal.

I **CONCLUDE** that the enhanced penalty is required where an individual has suffered a prior conviction for permitting one under the influence to operate a motor vehicle owned by or in the custody or control of the permitting individual and subsequently found guilty of having improperly refused the breath test.

Since Mr. Scannell faces the possibility of a one-year penalty, and since he has not waived his right to contest the issues of reasonable grounds, arrest and refusal, a further hearing will be required. It is, therefore, **ORDERED** that the Clerk of the Office of Administrative Law schedule this matter for hearing at the earliest date.

**ADOPTED BY SILENCE PURSUANT TO *N.J.S.A 52:14B-10(c)*  
BY THE DIVISION OF MOTOR VEHICLES.**