

Opinion No. 91-13

November 14, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn, Randall Van Vleck, Assistant Attorneys General

TO: The Honorable Rick Miera, New Mexico House of Representatives, Post Office Box 3815, Albuquerque, New Mexico 87190

QUESTIONS

1. Under NMSA 1978, 66-8-107, may a law enforcement officer request a blood test from a person who has already submitted to a breath test?
2. If so, is the person's driver's license subject to mandatory revocation for a year under NMSA 1978, Section 66-8-111 if the person refuses to submit to the additional test?

CONCLUSIONS

1. Yes. Multiple testing of a person suspected of driving while under the influence ("DWI") is authorized under the Implied Consent Act, NMSA 1978, §§ 66-8-1-5 to -112 (Repl. Pamp. 1987 & Cum. Supp. 1991).
2. Yes. The driver's license of a person who refuses a blood test after submitting to a breath test is subject to mandatory revocation.

FACTS

A driver who was stopped and arrested by police for driving under the influence of drugs or alcohol was administered a breath test to determine whether he was driving under the influence of alcohol. A breath test is not capable of determining whether the driver is under the influence of drugs. The driver's breath test showed that he was not under the influence of alcohol. Because, on the basis of observation of the driver, the police believed he was under the influence of alcohol or drugs, the police asked the driver to consent to a test of his blood. Blood tests reveal the quantity and type of drugs and of alcohol in a driver's body. The driver refused to allow the police to take a blood sample for testing.

ANALYSIS

1. Multiple Tests

Section 66-8-107 of the Implied Consent Act provides:

A. Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act, to chemical **tests** of his breath or blood, as determined by a law enforcement officer, or for the purpose of determining the drug or alcoholic content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or any drug.

B. A test of blood or breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug.

(Emphasis added). In our view, this provision expressly imposes implied consent to multiple tests requested by a law enforcement officer with reasonable grounds to believe a driver has been driving while under the influence of alcohol or drugs.¹ Subsection (A) specifies that a person who operates a motor vehicle in New Mexico consents to chemical "tests" of his breath or blood as determined by a law enforcement officer. Subsection (B)'s reference to "a test of blood or breath" does not limit the authority for multiple tests granted under subsection (A), but simply sets out the required standard for administering either kind of test.²

In addition, Section 66-8-107's reference to tests of "breath or blood" does not mean that a law enforcement officer is limited to administering either breath tests or blood tests exclusively. In *State v. Copeland*, 105 N.M. 27, 727 P.2d 1342 (Ct. App.), cert. denied, 104 N.M. 702, 726 P.2d 856 (1986), the Court of Appeals addressed whether police were authorized to seek a search warrant for a blood test under Section 66-8-111(A) of the Act when the suspect refused the blood test after submitting to several breath tests.³ The court concluded that the blood test was not "per se unauthorized," observing that "[n]owhere in the Act is there a provision which limits the number of tests to one, or any other number." 105 N.M. at 32. The court also was persuaded that multiple testing was consistent with the purpose of the Act "to deter driving while intoxicated, and to aid in discovering and removing the intoxicated driver from the highway." *Id.*⁴

Based on the language and purpose of Section 66-8-107, and on the applicable case law, we conclude that the Implied Consent Act permits law enforcement officers who have reasonable grounds to believe that an arrested person has been driving a motor vehicle while under the influence of intoxicating liquor or drugs to direct the administration of multiple or different tests. We note, however, that law enforcement officers should not administer more than one test arbitrarily or without reason. See *People v. Klyczek*, 516 N.E.2d 783 (Ill. Ct. App. 1987) (blood test administered after breath test was reasonable when performed to determine drug concentration and not merely to confirm defendant's alcohol level); *Commonwealth v. McFarren*, 525 A.2d 1185 (Pa. 1987) (a second test may be proper if the first test was inconclusive due to faulty equipment or faulty performance by person being tested, but requiring a blood test solely to bolster the results of a prior breath test is not reasonable under Pennsylvania's constitution). Cf. *Blair v. Commonwealth*, 539 A.2d 958 (Pa. Commw.

Ct. 1988) (indicating that a second test of the same type, e.g., two breath tests, is reasonable if required by regulation).

2. Effect of Refusing a Second or Different Test

Section 66-8-111 of the Implied Consent Act sets forth the consequences of refusing to submit to a blood or breath test. Subsection (A) provides that "[i]f a person under arrest for violation of an offense enumerated in the Motor Vehicle Code...refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in Section 66-8-107 NMSA 1978, none shall be administered" without a search warrant. Subsection (B) states: The department, upon receipt of a statement signed under penalty of perjury from a law enforcement officer stating the officer's reasonable grounds to believe the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug and that, upon his request, the person refused to submit to a chemical test after being advised that failure to submit could result in revocation of his privilege to drive, shall revoke the person's New Mexico driver's license or any nonresident operating privilege for a period of one year.

As discussed above, the Implied Consent Act contemplates that a DWI suspect might be asked to submit to more than one or to different chemical tests. Given this, it is clear that Section 66-8-111(B) applies whenever a person arrested for driving under the influence refuses any test requested. Similarly, courts in other states have concluded that when a driver impliedly consents to multiple tests, "a refusal to submit to any one of these tests upon request constitutes a refusal for purposes of the statute." *People v. Kiss*, 462 N.E.2d 546, 549 (Ill. Ct. App. 1984) (interpreting statute that implied consent to "a chemical test or tests of blood, breath, or urine," and that provided that refusal to submit to "the test" would result in suspension of the driver's license). See also *Stalego v. McCullion*, 477 N.E.2d 1215 (Ohio Ct. App. 1984) (to be the basis for a license suspension, a refusal need be directed at only one test if two are designated, not at both); *Burris v. State ex rel. Department of Public Safety*, 785 P.2d 332 (Okla. Ct. App. 1989) (under statute contemplating that more than one test might be required, driver's license was properly revoked following his refusal of a blood test after he passed a breath test).

Moreover, application of more than one test may be necessary to properly determine a person's apparent intoxicated state. E.g., *McKeown v. State*, 371 S.E.2d 243 (Ga. Ct. App. 1988) (blood and urine tests to determine presence of drugs were requested from impaired motorist after breath test revealed low blood alcohol content). If a person could escape the revocation penalty imposed under subsection (B) by submitting to one test and refusing a second, application of the penalty would depend entirely on the law enforcement officer's ability to pick the right test first. Such an interpretation would lead to arbitrary results and would not be consistent with the purposes of the Act identified in *Copeland*. See *City of Las Cruces v. Garcia*, 102 N.M. 25, 26-27, 690 P.2d 1019 (1984) (statute must be interpreted consistent with legislature's intent and in a manner that will not render its application absurd, unreasonable or unjust).⁵

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) New Mexico courts have interpreted Section 66-8-107 to imply consent only when a person is arrested for any offense committed while under the influence of intoxicating liquor or drugs. **State v. Richerson**, 87 N.M. 437, 439, 535 P.2d 644 (Ct. App.), **cert. denied**, 87 N.M. 450, 535 P.2d 644 (1975). Because such arrest is necessary before consent will be implied, a law enforcement officer generally will have the requisite probable cause of "reasonable grounds" under Section 66-8-107 (B) to administer a breath or blood test. **State v. Wyrostek**, 108 N.M. 140, 142, 767 P.2d 379 (Ct. App. 1988), **cert. denied**, 108 N.M. 115, 767 P.2d 354 (1989). **See also Schmerber v. State of California**, 384 U.S. 757 (1966) (probable cause to arrest for DWI and exigent circumstances constituted sufficient justification to seize suspect and "search" him by administering blood test).

[n2](#) Under the rules of statutory construction, the provisions of a statute must be read together to ascertain the legislature's intent. **Winston v. New Mexico State Police Bd.**, 80 N.M. 310, 311, 454 P.2d 967 (1969). Aside from Section 66-8-107(A), other provisions of the Implied Consent Act also clearly contemplate the administration of more than one chemical test. **See, e.g.**, NMSA 1978, § 66-8-108 (unconscious persons "deemed not to have withdrawn the consent provided by Section 66-8-107 ... and the **test or tests** designated by the law enforcement officer may be administered" (emphasis added)), § 66-8-111(A) (if a person refuses to submit to "chemical tests" designated by a law enforcement officer, none shall be administered without a warrant).

[n3](#) Section 66-8-111(A) requires a search warrant for chemical tests if an arrested person refuses to submit to the tests upon request of a law enforcement officer.

[n4](#) Other state courts have interpreted implied consent statutes with language and purposes similar to New Mexico's to permit multiple testing. **See, e.g., McKeown v. State**, 371 S.E.2d 243 (Ga. Ct. App. 1988) (nothing in statute granting implied consent for "a chemical test or tests" prohibited a law enforcement officer from requesting multiple tests at one time); **People v. Klyczek**, 516 N.E.2d 783 (Ill. Ct. App. 1987) (statute referring to "test or tests" signified that an officer might request more than one test from a motorist); **State v. Pawlow**, 298 N.W.2d 220 (Wis. Ct. App. 1980) (law enforcement officer's initial request for a breath test did not create an irrevocable election precluding a request for additional or different tests).

[n5](#) The United States Supreme Court has held that compulsory administration of a blood test to a person arrested for drunk driving does not violate the fourth amendment's proscription against unreasonable searches and seizures. **Schmerber v. State of California**, 384 U.S. 757 (1966). Courts that have considered the issue also have determined that an otherwise permissible breath or blood test is not rendered

unreasonable under the fourth amendment solely because refusal to submit to the test will result in the revocation of driving privileges. **See, e.g., State v. Taylor**, 531 A.2d 157 (Conn. Ct. App. 1987); **State v. Newton**, 636 P.2d 393 (Or. 1981). **See also Mackey v. Montrym**, 443 U.S. 1 (1979) (Massachusetts statute mandating suspension of driver's license for refusal to take a breath-analysis test upon arrest for driving while under the influence did not violate due process clause of fourteenth amendment). **See generally** 4 R. Erwin, **Defense of Drunk Driving cases** § 33.02 (1991) (discussing various constitutional challenges to implied consent laws).