STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 27, 2005
v	No. 257343 Eaton Circuit Court
WENDY JO BRADFORD, Defendant-Appellee.	LC No. 04-000412-AL

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order denying its petition to set aside an unfavorable order from a Driver's License Appeal Division (DLAD) hearing officer. The DLAD officer determined that defendant's refusal to submit to a chemical test was reasonable on the basis of its interpretation of case law. The circuit court, granting deference to that determination, affirmed the hearing officer. We vacate and remand to the DLAD hearing officer for reconsideration.

On October 30, 2003, defendant was pulled over by Officer Brian Kinney, who observed signs that defendant was intoxicated. After undergoing field sobriety tests, defendant was arrested for operating a motor vehicle while under the influence of alcohol and transported to Officer Kinney's station, read her "chemical rights," and asked to submit to a breath test. Defendant responded that she would not take a breath test and wanted to talk to her lawyer. Officer Kinney told her he would let her talk to her attorney after she submitted to the test. The officer also testified that he told defendant that he "was requesting that she take a chemical test and after the chemical test was through she could talk to her attorney." Defendant responded "that she wasn't taking the test until she talked with her lawyer." Officer Kinney treated defendant's responses as a refusal to undergo a chemical test and then allowed defendant to use the telephone.

A driver's license appeal hearing was held, and the DLAD hearing officer determined that defendant's refusal to take the breath test was reasonable under the circumstances. Plaintiff petitioned the Circuit Court to set aside the DLAD order, and after hearing arguments, the circuit court denied plaintiff's petition. Plaintiff filed an application for leave to appeal with this Court, which we granted.

If an arrestee places conditions on his or her submission to a chemical test, then the lack of submission is treated as a refusal. *Collins v Secretary of State*, 384 Mich 656, 668; 187 NW2d 423 (1971). The court then must determine whether the arrestee's refusal was nonetheless reasonable. *Id*. Whether an arrestee's refusal to submit to a chemical test was reasonable, under MCL 257.625f(4)(c), is an issue that must be determined from the surrounding facts and circumstances. *Hall v Secretary of State*, 60 Mich App 431, 436; 231 NW2d 396 (1975).

Regarding the reasonableness of demanding counsel, it should be remembered that "denial of the right to consult with counsel before an accused decides whether to take [a chemical test] does not violate the Sixth Amendment . . . ." *Holmberg v 54-A Judicial Dist Judge*, 60 Mich App 757, 760; 231 NW2d 543 (1975). On the other hand, it has been held that refusal to submit to a chemical test until permitted to attempt to contact counsel is reasonable when circumstances indicate that denial of the contact is designed to coerce rather than expedite the chemical test. *Hall*, *supra* at 441.

The DLAD hearing officer found that the failure to provide an arrestee with the opportunity to contact counsel would create the presumption that the arrestee's refusal was reasonable. Specifically, the hearing officer cited *Hall*, *supra*, for the proposition that "[t]he failure to provide this access to counsel gives rise to a claim that the refusal to take the breath test is reasonable." The hearing officer then focused on the reasonableness of refusing the contact rather than on the arrestee's reasonableness in refusing her cooperation. The circuit court also found that a failure to provide a detainee with the opportunity to attempt to contact counsel raised a presumably rebuttable presumption that the arrestee's refusal was reasonable. This is not the law.

In *Hall*, *supra* at 436, we held that an arresting officer's refusal "to permit plaintiff to make a phone call appears to be arbitrary," because it was the "policy of the department to refuse prisoners a telephone call unless and until they signed a booking card." We found the procedure at issue "coercive rather than an attempt to expedite the test." *Id*. We emphasized that we were not suggesting that a right to counsel existed, but that the police practice at issue was not "commendable." *Id.* at 440-441. Given the circumstances of the arrest and detainment, we held the plaintiff's refusal reasonable. *Id.* at 441. Our analysis centered on "reasonableness," which was and remains a factual determination, and did not establish a legal presumption that overrides other factual considerations. *Id*. In fact, we upheld the constitutionality of a similar police practice at issue in *Holmberg*, *supra*, notwithstanding our reiteration that allowing the opportunity to contact counsel was the more commendable practice.

In sum, the totality of the circumstances dictate whether a request to contact counsel provided a reasonable basis to refuse a chemical test. Depriving defendant of a pre-test phone call to counsel is not a presumption-raising, burden-shifting catalyst that renders the arrestee's refusal reasonable unless the officer can demonstrate the reasonableness of disallowing the phone call. To the contrary, the focus of the inquiry remains on whether the *arrestee's* actions were ultimately reasonable. However, this was not the legal approach taken in this case.

In this case, defendant initially refused outright to take the breath test and then conditioned the test on speaking to counsel. Defendant did not assert irregularity in the arrest proceedings, deception, error, or omission in the explanation of her rights, or the use of any particularly coercive police policy that might indicate whether refusal was reasonable absent an

opportunity to speak with counsel. Nevertheless, defendant was presumed to have reasonably refused the test, and plaintiff was left to prove that allowing her an opportunity to contact counsel was overly burdensome or otherwise unreasonable. This is not the law. Both the Administrative Procedures Act, MCL 24.301 *et seq*., and MCL 257.323(4), allow judicial review of agency action and allow us to set aside a hearing officer's ruling on the basis of "substantial and material error of law." MCL 24.306(1)(f); MCL 257.323(4). Without the erroneous legal presumption employed below, we are hard pressed to find any facts that would suggest that defendant's refusal was reasonable. However, it is unclear how misconstruing the law affected the hearing officer's ultimate conclusion that defendant reasonably refused her chemical test, so we merely vacate the determination and remand to the hearing officer for reconsideration.

Vacated and remanded for reconsideration in light of this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

FITZGERALD, P.J. (*dissenting*).

I respectfully dissent.

After being asked to submit to a breath test, defendant responded that she would not take a breath test and wanted to talk to her lawyer. Officer Kinney explained to defendant that he would let her talk to her attorney after the breath test, but defendant was adamant about speaking to her lawyer before taking the test. Officer Kinney arrived at the jail with defendant at 12:52 a.m. and logged her as refusing the breath test at 1:12 a.m. Because respondent was logged as having refused the test, her license was subject to suspension. MCL 257.319b; MCL 257.625a(6)(b)(v); MCL 257.625d. Respondent requested a hearing before the Driver's License Appeal Division (DLAD) as provided by MCL 257.625e.

Officer Kinney was the only witness to testify at the driver's license appeal hearing. After both sides had made closing statements, the hearing referee agreed that there is no right to counsel associated with the taking of a breath test. However, the referee found defendant's refusal to be reasonable on the basis of *Hall v Secretary of State*, 60 Mich App 431; 231 NW2d 396 (1975), stating:

> [S]imply allowing access to the phone, a phonebook and maybe five minutes of time, maybe ten minutes of time to get in contact with an attorney is an appropriate—especially when it's coupled with a statement like, no, I want to talk to an attorney. I mean it's clear that the refusal to take the test at that point is tied with wanting to talk to any attorney, whether it would be for an explanation or evidence, and I don't think it's that significant of an impediment to the process of the arrest in this case.

For these reasons, the hearing referee granted defendant's appeal and her driver's license was not suspended based on an unreasonable refusal to submit to a chemical test.

Officer Kinney, with the prosecutor's consent, sought review in the circuit court. MCL 257.625f(8). After hearing oral argument, the court stated:

> And I would think . . . [that] if the Defendant had said I want a few minutes to consider this myself after being given some relatively complicated advisement of chemical right forms it would certainly be unreasonable to not allow somebody a chance to reflect upon what they have just been told. By the same token it doesn't seem to me to be reasonable to preclude that person from contacting an attorney as long as it didn't take a great deal of time and as long as it was within the standard of reasonableness.
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> So I don't think the hearing officer is saying you have a right to have a lawyer. They [sic] are saying that you would have at least the right to have an opportunity to reflect upon the advice that you were just given and perhaps talk to legal—obtain legal counsel.
>
> Now, if she had made that effort and wasn't able to get ahold [sic] of somebody or took an inordinate amount of time, then it seems to me that would be a refusal. But that's not what happened here. And I can't find that there was an abuse of discretion on the part of the hearing officer.

Accordingly, the court entered an order affirming the hearing referee's decision on July 26, 2004.

As recognized by both the hearing referee and the lower court, there is no right to consult with counsel prior to taking a Breathalyzer test. *Ann Arbor v McCleary*, 228 Mich App 674, 678-679; 579 NW2d 460 (1998). But where a defendant places conditions on his or her submission to a breath test, the lack of submission is treated as a refusal. *Collins v Secretary of State,* 384 Mich 656, 668; 187 NW2d 423 (1971). The question then presented is whether the defendant's refusal to submit to a breath test was reasonable under MCL 257.625f(4(c). Both the trial court and the hearing officer concluded that it was reasonable for defendant to ask to speak to an attorney before taking the test.

This Court addressed the reasonable refusal issue in *Hall, supra,* where the defendant was arrested at approximately 7:00 p.m, held in the jail until 2:00 a.m., and denied the opportunity to contact either an attorney or his wife during this time. In that case, this Court relied on *Collins v Secretary of State*, 384 Mich 656, 668; 187 NW2d 423, 429 (1971), in which the Supreme Court addressed the question whether the defendant's refusal was reasonable. "The ultimate determination of that case was based upon its circumstances and its facts but we find it significant that when Collins was offered a breath test pursuant to the statute he was also granted permission to call his attorney." *Hall*, *supra* at 436. This Court concluded that although a driver's license proceeding is civil and not criminal, the significant consequences require

application of the due process requirement of fundamental fairness. *Id*. at 438. This Court stated:

> In weighing the individual interest against the governmental interest, it is suggested that to avoid the problems mentioned above, the governmental interest is best served by allowing the suspect a phone call to his attorney. A caveat: We are not suggesting a constitutional right to counsel—we are suggesting a reasonable due process approach to a certain set of circumstances. We are not unaware of the fact that the probative value of the test decreases with the delay in taking it. Here, however, approximately one hour had already elapsed, and a five minute telephone conversation with counsel would not constitute undue delay. [*Id*. at 440.]

While this Court expressly disclaimed that it was holding that Hall had an unqualified right to counsel, "[w]e do say that a stationhouse policy which prohibits a suspect from making a telephone call does not constitute commendable police practice." *Id*. at 441. Accordingly, this Court reversed the suspension of the defendant's license.

In the years since *Hall* was decided, no panel of this Court has seen fit to revisit its holding, although its application has been limited to the right to make a telephone call before taking the test. See *City of Ann Arbor v McCleary*, *supra* at 681. In light of *Hall* and *McCleary*, the circuit court did not clearly err in affirming the DLAD hearing referee's decision because it was not contrary to law and was supported by competent, material and substantial evidence. I would affirm.

/s/ E. Thomas Fitzgerald