

## ISSUES

(1) Under what circumstances do school police officers have the authority to make traffic stops? (2) If a DUI arrestee refuses to take a chemical test, can officers authorize a forcible blood draw? (3) Must a DUI arrestee be permitted to take a breath test if, after having refused to take any chemical test and after officers told him he would be given a blood test, he requested a breath test?

## FACTS

At about 9:30 P.M., Officer Rossi of the San Diego City Schools Police Department was driving on a local freeway in a black and white patrol car. A car driven by McHugh passed him on the right. As Rossi pulled behind the car he clocked it at 90 m.p.h.

Rossi attempted to get McHugh to slow down by flashing his high beams, but he kept speeding. Rossi then turned on his overhead red and blue lights. This caused McHugh to slow to 70 m.p.h. but he would not pull over, even after Rossi turned on his siren. McHugh exited the freeway, then sped up to 85 m.p.h. He eventually stopped for a traffic light, at which point Rossi blocked him in and arrested him at gunpoint.

While taking McHugh into custody, Rossi noticed three things that, in addition to McHugh's driving, provided him with probable cause to arrest him for DUI; i.e., a strong odor of alcohol on his breath, "glassy" eyes, and slurred speech. Rossi then arrested McHugh on an additional charge of DUI.

At the police station, Rossi offered McHugh a choice of a blood or breath test. McHugh refused to take any test. Rossi then advised him of the "legal ramifications" of a refusal. McHugh still refused. At this point, Rossi told him that a sample of his blood would be drawn, and it "would be better" if he did not fight. McHugh said he would not fight, but would not consent, either. A certified phlebotomist then drew a blood sample which tested at .18% alcohol.

Because McHugh had three prior DUI's within the past seven years, he was charged with felony DUI.<sup>1</sup> He pled guilty to all charges but appealed the trial court's refusal to suppress the blood test results.

## DISCUSSION

McHugh contended the results of the blood test should have been suppressed because, (1) as a school police officer, Rossi did not have authority to make traffic stops; (2) the traffic stop was unlawful because Rossi drew his handgun; (3) a DUI arrestee who has refused to take any test cannot be forced to submit to a blood test; and (4) after a DUI arrestee refuses to take any chemical test, officers must give him a chemical test if he requests it.

THE TRAFFIC STOP: California's Penal Code states that school district police officers are peace officers "as to any public offense with respect to which there is imminent danger to person or property . . ." <sup>2</sup> Thus, Rossi had the authority to arrest McHugh if McHugh's various offenses constituted such an imminent danger. In ruling they did, the court observed:

Driving at 90 miles per hour on an interstate freeway, and then reacting to an officer's attempt to stop him by leaving the freeway and accelerating to 85 miles per hour on a public street is (in the trial court's words) "dangerous," "reckless,"

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<sup>1</sup> See Vehicle Code § 23550.

<sup>2</sup> See Penal Code § 830.32.

and “the kind of driving that allows no error whatsoever and can cause an accident simply by someone else’s slight error.”

McHugh also argued the stop was unlawful because Rossi blocked his car and displayed his handgun. But, as the court pointed out, both of these actions were reasonably necessary under the circumstances. Said the court, “The trial court found McHugh’s reckless driving and failure to yield created a reasonable fear that McHugh might resume his flight. Rossi displayed his weapon only for the limited amount of time necessary to obtain McHugh’s car keys and ensure that McHugh’s high-speed drive had ended.”

THE BLOOD DRAW: McHugh also contended the blood test results should have been suppressed on grounds that officers cannot authorize a nonconsensual blood draw when a DUI arrestee refuses to take any chemical test. On the contrary, said the court, “A person who refuses to comply with the breathalyzer test option may be required to submit to a blood draw without violating the Fourth Amendment as long as there is probable cause to believe he was driving under the influence, and the blood draw is performed in a reasonable, medically approved manner.<sup>3</sup> Both of these requirements were met.

Finally, McHugh claimed that after Rossi told him his blood would be drawn forcibly, if necessary, he changed his mind and agreed to take a breath test. Thus, according to McHugh, Rossi had no right to take a blood sample. Although the court was not convinced that McHugh ever agreed to take a breath test, it ruled a DUI arrestee who refuses to take any chemical test does not have a legal right to the test of his choice after he is notified that officers have elected to take a blood sample.<sup>4</sup> In the words of the court:

[T]he trial court found that *if* McHugh asked for a breathalyzer test, this request came *after* he refused to take either test and *after* Rossi told McHugh his blood would be drawn regardless of McHugh’s refusal. The courts have consistently held that after a driver refuses to take any of the proffered chemical tests, he or she may not later retract the refusal to avoid the consequences of that refusal.

Consequently, the court ruled the blood test results were admissible. McHugh’s convictions were affirmed.<sup>5</sup>

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<sup>3</sup> Citing *People v. Sugarman* (2002) 96 Cal.App.4<sup>th</sup> 210, 214-6; *People v. Ford* (1992) 4 Cal.App.4<sup>th</sup> 32, 35.

<sup>4</sup> Citing *Cole v. DMV* (1983) 139 Cal.App.3d 870, 873-4; *Dunlap v. DMV* (1984) 156 Cal.App.3d 279, 280-1; *Skinner v. Sillas* (1976) 58 Cal.App.3d 591, 598; *Morgan v. DMV* (1983) 148 Cal.App.3d 165, 170-1.

<sup>5</sup> NOTE: McHugh also argued the blood test results should have been suppressed because, pursuant to Vehicle Code § 23158, a licensed phlebotomist is not authorized to draw blood from DUI arrestees. The court ruled, however, that a violation of Vehicle Code § 23158 is not grounds to suppress a blood test if, as occurred here, the blood was drawn in a reasonable manner.