Opinion overruled in Wulfkuhle v. Ks. Dept. of Revenue, 234 Kan. 241 (1983)

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ATTORNEY GENERAL OPINION NO. 82- 33

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Re: Automobiles and Other Vehicles -- Evidence of Alcoholic Content of Blood of Operator -- Refusal by Operator to Submit to Test -- Revocation of Operator's License Hearings

Synopsis: The sole issue to be resolved at an administrative hearing held under the "implied consent" law (K.S.A. 1981 Supp. 8-1001) is the reasonableness of a person's refusal to submit to a request to take a blood-alcohol test. At the hearing, the only testimony needed from the arresting officer is the sworn report required in the statute, and if the sworn report addresses the necessary issues, there is no need for the officer to attend the hearing. However, if the sworn report fails to discuss whether the licensee was capable of making a voluntary response to the request to submit to a blood-alcohol test, and it appears that this issue will be raised in the administrative hearing, the testimony of the arresting officer is essential and the attendance of the arresting officer may be compelled by subpoena [K.S.A. 8-255(b)]. Cited herein: K.S.A. 8-255, K.S.A. 1981 Supp. 8-1001 and K.S.A. 54-101.

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Dear Mr. Alderson:

You ask our opinion on several issues involving K.S.A. 1981 Supp. 8-1001, the "implied consent" law, which declares that any person who operates a motor vehicle on the highways of this state is deemed to have given consent to submitting to prescribed chemical tests for determining the alcoholic content of such person's blood. Your questions pertain to subsection (c) of that statute, which states:

> "(c) If the person so arrested refuses a request to submit to a test of breath or blood, it shall not be given and the arresting officer shall make to the division of vehicles of the state department of revenue a sworn report of the refusal, stating that prior to the arrest the officer had reasonable grounds to believe that the person was driving under the influence of intoxicating liquor. Upon receipt of the report, the division immediately shall notify such person of his or her right to be heard on the issue of the reasonableness of the failure to submit to the test. If, within twenty (20) days after receipt of said notice, such person shall make written request for a hearing, the division shall hold a hearing within the time and in the manner prescribed by K.S.A. 8-255. Notice of the time, date and place of hearing shall be given to such person by restricted mail, as defined by K.S.A. 60-103, not less than five (5) days prior to the hearing. If a hearing is not requested or, after such hearing, if the division finds that such refusal was not reasonable, and after due consideration of the record of motor vehicle offenses of said person, the division may suspend the person's license or permit to drive or nonresident operating privilege for a period of not to exceed one (1) year."

First, you ask whether the arresting officer is required to provide testimony other than that contained in his or her sworn report. In our judgment, the sworn report would be all that was needed from the officer, in most instances, as it would contain information showing the person had refused to submit to a test after being arrested and that the officer had reasonable grounds to believe that the person was driving under the influence of intoxicating liquor. Thus, there would be no need for the officer to appear at the hearing. This is true even though the report appears to be

hearsay and, therefore, would generally be inadmissible in a court of law. Timsah v. General Motors Corp., 225 Kan. 305 (1979). However, since the proceeding is an administrative hearing, pursuant to K.S.A. 8-255, the same rules of evidence are not in effect. "[I]t should be remembered that liberality is allowed in the taking of testimony and the admission of evidence before administrative boards, and that such agencies are not bound by strict and technical rules of evidence or procedure." Kansas State Board of Healing Arts v. Burwell, 5 Kan.App.2d 357, 361 (1980), citing Morra v. State Board of Examiners of Psychologists, 212 Kan. 103 (1973). For a report to comply with K.S.A. 1981 Supp. 8-1001 the truthfulness of the report must be sworn to, as opposed to the mere acknowledgement of the person's signature.

> "This report puts in motion the revocation procedure. Under other statutes (K.S.A. 21-701 and 54-105) false swearing in such matters is made criminal. False accusations may not be made with impunity. The provision for a sworn report then does afford some measure of reliability and some protection to the licensee against unwarranted accusation, and the jurat imports authenticity to the item to which it is affixed.
>
> "Certainly one purpose of 8-1001 is to provide a fair and reliable method for determining whether a license to drive should be revoked. Essential to that purpose, the legislature must have deemed it important that a report which could become the sole basis of a revocation of a driver's license be sworn to. We doubt if the legislature ever intended such drastic action should be taken on an unsworn averment alone. The very nature of the proceedings emphasizes this conclusion." Wilcox v. Billings, 200 Kan 654, 658, 659 (1968).

It should be noted that a notary public is authorized by law to administer an oath for a sworn report, providing the truth of the report is sworn to before the notary. K.S.A. 54-101 provides:

> "Notaries public, judges of courts in their respective jurisdictions, mayors of cities and towns in their respective cities and towns, clerks of courts of record, county clerks, and registers of deeds, are hereby authorized to administer oaths pertaining to all matters wherein an oath is required."

Therefore, in most situations, the sworn report would be sufficient and would constitute the only testimony required to be given by the officer, as the only issue involved at the hearing is the reasonableness of the refusal by the person to submit to a blood alcohol test. Marbut v. Motor Vehicle Department, 194 Kan. 620 (1965).

In the same light, your second question asks, if the testimony in the report is sufficient, must the arresting officer appear at the hearing. In our judgement, since the rules of evidence and procedure do not have strict application to administrative hearings (Kansas State Board of Healing Arts v. Burwell, supra.) there is no need for the officer to appear at the hearing, if the sworn report shows that the person refused to submit to the blood-alcohol test and the officer had reasonable grounds to believe that the person was driving under the influence of alcohol.

Your third question inquires whether it would be a valid reason to require the attendance of the officer at the hearing if the issue arose as to whether the licensee had sustained such injuries as to prevent the licensee from knowing whether he or she had been requested to take the test, or if he or she had refused. It appears that this would be a valid reason to subpoena an officer, because K.S.A. 1981 Supp. 8-1001 is applicable only to individuals that are capable of making a knowing response to the officer's request.

> "We hold that K.S.A. [1981 Supp.] 8-1001 is inapplicable to a driver who is found to have been incapable of making a knowing, intelligent, free, and voluntary response to a request to submit to a test of breath or blood to ascertain the alcoholic content of his blood." State v. Garner, 3 Kan.App.2d 697, 700 (1979).

Therefore, if it appears that such an issue will likely be raised at the administrative hearing and the arresting officer's sworn report does not address the matter, it would be proper to require the officer's attendance at the hearing. However, if the sworn report does address the issue of the person's capability to make a knowing response to the officer's request to submit to the test, it would not be necessary for the officer to appear at the hearing. The affidavit would be sufficient testimony from the officer, as there is no need to satisfy the general rules of evidence in regard to the hearsay problem of admitting the report. See Kansas State Board of Heaing Arts v. Burwell, supra. This office does not foresee

any other issue which would require the attendance of the arresting officer at the administrative hearing, as the hearing is limited to the issue of the reasonablenes of one's refusal to submit to the blood-alcohol test. Marbut v. Motor Vehicle Department, supra. Thus, as long as the sworn report relates to the ability of the driver to make a knowing refusal, the officer would not need to attend the hearing. On the other hand, if the sworn report does not discuss the condition of the driver at the time of the request, it is likely that the officer would need to attend the hearing, if the issue is raised.

In such a situation the director of vehicles, or the director's agent would have the authority to require the attendance of the law enforcement officer pursuant to the subpoena powers in K.S.A. 8-255(b), which provides in pertinent part:

> "Upon such hearing, the director or the director's duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require an examination or reexamination of the licensee."

Finally, you inquire as to the issues to be resolved at the administrative hearing held pursuant to K.S.A. 1981 Supp. 8-1001(c). As noted in Marbut v. Motor Vehicle Department, supra, the sole issue to be determined at the administrative hearing is the reasonableness of the refusal to submit to the test. Therefore, it appears that issues such as probable cause for arrest or the validity of the arrest are matters to be decided by the appropriate court. Furthermore, it does not appear necessary to determine if the person was capable of understanding the consequences of his or her refusal. The arresting officer has no duty to inform the person that he or she has the right to refuse the blood-alcohol test. State v. Mezins, 4 Kan.App.2d 292 (1980). Likewise, there is no duty to inform the person of the consequences of his or her refusal to submit to the test. Hazlett v. Motor Vehicle Department, 195 Kan. 439 (1965). See, also, State v. Young, 228 Kan. 355 (1980). Accordingly, since one does not have the right to be informed of the consequences of refusal, the question of whether the person understood the consequences of his or her refusal is not in issue at the hearing required by 8-1001(c) and is totally irrelevant to the proceeding. The sole issue at the revocation hearing is the reasonableness of the person's refusal to submit to a blood-alcohol test.

In summary, it is our opinion that, if the sworn report by the arresting officer covers the relevant issues, it would be the only testimony required of that officer at the hearing held pursuant to K.S.A. 1981 Supp. 8-1001(c). Furthermore, under such circumstances, there does not appear to be any need for the officer to be present at that hearing, as the rules of evidence and procedure are not strictly applied to administrative hearings. However, if the sworn report failed to discuss whether the licensee was capable of making a voluntary response to the request to submit to a blood-alcohol test, and it appears that this will be an issue at the hearing, the attendance of the officer would be necessary and may be compelled by subpoena issued pursuant to K.S.A. 8-255(b). Finally, it is our opinion the only issue to be determined at the hearing is the reasonableness of the refusal, not whether the person understood the consequences of the refusal, or if there was probable cause for the arrest or the validity of the arrest.

Very truly yours,

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