STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2004
v	No. 245608 Livingston Circuit Court
JOEL ADAM KABANUK, Defendant-Appellant.	LC No. 02-019027-AV

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

In this civil infraction prosecution of a minor for refusing to take a preliminary breath test, MCL 436.1703(5), defendant appeals by leave granted from a circuit court order affirming defendant's district court conviction. We affirm.

I. Material Facts And Proceedings

After conducting a formal hearing on the charged civil infraction, the district court issued a written opinion and order, setting forth its findings of facts and conclusions of law. Since neither party has argued that the district court's findings of fact were clearly erroneous, we set them forth here:

> The court has concluded that on October 31, 2001, Officer Flood was dispatched to an MIP (minor in possession) party located at 614 Flint Street, in the city of Brighton, county of Livingston. The officer approached the residence and observed individuals at the residence whom appeared to be minors. Officer Flood testified that when he approached the defendant, he could smell the odor of intoxicants on the defendant's person, he observed that the defendant's eyes were glassy, the defendant appeared intoxicated, and the defendant's speech was a bit slurred. Based on the officer's observations, Officer Flood requested that the defendant take a preliminary breath test (PBT) because he appeared to be a minor who had been consuming alcoholic beverages, in violation of MCLA 436.1703. The officer testified that he explained to the defendant that refusal to take the PBT would result in sanctions. The defendant then refused to take the PBT and asked to call his father. Subsequently, Officer Flood wrote a citation to the defendant for refusing to take a preliminary breath test.

After setting forth these facts, the district court analyzed and rejected defendant's position that his refusal to take the PBT is subject to a 14th Amendment due process analysis, and that he had the right to counsel before deciding whether to take the PBT. The court therefore found that defendant violated MCL 436.1703(5) by refusing a lawful request by a police officer to submit to a PBT.

Defendant appealed the district court's decision to the circuit court. The circuit court, in exercising its appellate function, considered and rejected the three arguments made by defendant, which were based upon the Fifth, Sixth and Fourteenth Amendments, holding that (1) the penalty for refusing to take a PBT is not unconstitutional in the absence of implied consent; (2) an individual need not be apprised of any rights prior to being subjected to the penalties for refusing a PBT test, and (3) defendant had no right to counsel before deciding whether to submit to the PBT. Defendant now appeals to this Court, and we affirm the decision of the learned trial judge.

II. Analysis

Defendant's first argument is confusing, as it does not clearly delineate what constitutional right he claims was violated. We take his argument to be that the Fifth Amendment to the US Constitution prevents the state from imposing a penalty for refusing to submit to a PBT without some sort of accompanying implied consent requirement. In making this argument, defendant fails to cite any authority in support of his position, except for citations to several inapplicable cases dealing with investigatory stops. Defendant has also ignored the constitutional principle that a party challenging the constitutionality of a statute bears a heavy burden in overcoming the presumption that a statute is constitutional. See *People v Abraham*, 256 Mich App 265, 280; 662 NW2d 836 (2003). Thus, defendant has failed to preserve the argument for appellate review. *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999) ("a party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim").

In any event, defendant's argument is premised on the erroneous presumption that there is constitutional protection under the Fifth Amendment from being compelled to submit to a PBT altogether, or, at least, without a court ordering the same. "The constitutional privilege against self-incrimination protects a defendant from being compelled to testify against himself or from being compelled to provide the state with evidence of a *testimonial or communicative nature*." *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988) (emphasis added).

The leading case is *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966). In that case, the Court held that the Fifth Amendment protection against governmental compelled self-incrimination did not apply to the government's compelled procurement of a blood sample, since the Fifth Amendment only protects against compelled evidence of a communicative or testimonial nature:

> On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that

> compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. [*Id.* at 764; footnote omitted.]

As the Circuit Court for the District of Columbia held in *United States v Hubbell*, 167 F3d 552, 572-573 (CA DC, 1999), the critical distinction for Fifth Amendment analysis is between communications (usually requiring the exercise of some mental process) and the production of his or her body for inspection:

> Subsequent cases echo and develop this focus upon the Fifth Amendment as a barrier against compulsion that acts upon, and requires the exercise of an individual's mental faculties for communication. *Schmerber v California*, 384 US 757, 764-765; 86 S Ct 1826; 16 L Ed 2d 908 (1966) (privilege against self-incrimination does not extend to a compelled blood sample); *Gilbert v California*, 388 US 263, 265-267; 87 S Ct 1951; 18 L Ed 2d 1178 (1967) (privilege does not extend to compelled voice exemplar), *United States v Wade*, 388 US 218, 222-223; 87 S Ct 1926, 18 L Ed 2d 1149 (1967) (privilege does not extend to compelled voice exemplar), and *United States v Dionisio*, 410 US 1, 5-6; 93 S Ct 764; 35 L Ed 2d 67 (1973) (privilege does not extend to compelled voice sample), all rely upon the essential distinction between compulsion which operates upon the mind by forcing the accused to communicate information or testimony, and compulsion which merely requires him to produce his body for inspection. While in each instance the government draws evidentiary inferences as a result of the compulsion, the Fifth Amendment only protects against those inferences which derive from compelled communication.

Accordingly, defendant's position has no basis in law since it is well-established that the administering of a PBT does not coerce evidence of a testimonial or communicative nature and therefore is not protected by the self-incrimination clauses of the Michigan and U.S. Constitutions. *People v Jelneck*, 148 Mich App 456, 460; 384 NW2d 801 (1986); *People v Gebarowski*, 47 Mich App 379, 383; 209 NW2d 543 (1973).

Defendant also argues that he has a "constitutional right" to be advised of his rights before he can be penalized for failing to submit to a PBT. We disagree.[1]

The statute in question here, MCL 436.1703(5), does not require that a defendant be informed of his chemical breath rights. To the contrary, the statute is absolute in stating:

> A minor who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00. [MCL 436.1703(5)]

[1] We note that in making this argument defendant makes many statements of fact, but does not cite to any record support, contrary to MCR 7.212(C)(6).

Though defendant concedes that this is a civil matter, and as such, rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *Escobedo v Illinois*, 378 US 478; 84 S Ct 1758; 12 L Ed 2d 977 (1964), do not automatically attach, he does argue that because driver's license sanctions are part of the consequences for refusal to take a PBT, procedural due process is implicated and requires that he be informed of his rights. Defendant relies on *Hall v Secretary of State*, 60 Mich App 431; 231 NW2d 396 (1975), in support of this proposition. However, *Hall*, and the cases it relies on, are distinguishable from the case at bar. The plaintiff in *Hall* was facing a full suspension of his driving privileges. *Id.* at 435. Here, defendant was facing at most a $100 fine and two points assessed to his driving record. Accordingly, defendant's interests are not the same as those present in *Hall*, and *Hall* is not controlling.[2] As such, defendant has failed to establish any factual or legal support for requiring that any informed consent be given before a PBT is performed.

Finally, defendant argues that he was denied a reasonable opportunity to consult with counsel, rendering his conviction invalid. For several reasons, we disagree. First, the district court never found that defendant requested an attorney, and defendant has not pointed to any record support that he made such a request. Thus, the issue is not properly preserved.

Second, in *Ann Arbor v McCleary*, 228 Mich App 674, 678-679; 579 NW2d 460 (1998), we previously recognized that there is no right to consult with counsel prior to taking a PBT:

> This Court has stated repeatedly that there is no right to counsel in deciding whether to submit to a Breathalyzer test. *Underwood v Secretary of State*, 181 Mich App 168, 172, 448 NW2d 779 (1989) ("the police could require petitioner to make his decision to take the test in the absence of counsel"); *People v Burhans*, 166 Mich App 758, 764; 421 NW2d 285 (1988) ("[t]his Court has held that there is no right to counsel prior to the taking of the Breathalyzer test due to the minimal risk that defense counsel's absence will harm a defendant's right to a fair trial"); *People v Jelneck*, 148 Mich App 456, 460-461, 384 NW2d 801 (1986) ("[n]or does the Sixth Amendment right to counsel attach prior to the taking of the Breathalyzer test"); *Holmberg v 54-A Judicial Dist Judge*, 60 Mich App 757, 760, 231 NW2d 543 (1975) ("denial of the right to consult with counsel before an accused decides whether to take the Breathalyzer test does not violate the Sixth Amendment"). See also *McVeigh v Smith*, 872 F2d 725, 728 (CA 6, 1989) (declaring that there is no Sixth Amendment right to counsel, or Fifth or Fourteenth Amendment due process right to counsel, when deciding whether to submit to a blood alcohol test).

Accordingly, assuming defendant requested to speak with counsel before taking the PBT, his argument fails.

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[2] Defendant's reliance on such cases as *People v Castle*, 108 Mich App 353; 310 NW2d 379 (1981) and *Underwood v Secretary of State*, 181 Mich App 168; 448 NW2d 779 (1989), is misplaced. In those cases, the statute required some form of implied consent, while the statute in this case does not.

Affirmed.[3]

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray

[3] During oral argument before this Court, the parties raised the recent decision in *Spencer v Bay City*, 292 F Supp 2d 932 (ED Mich, 2003). In that case, the court struck down an ordinance, similar to the statute in this case, on Fourth Amendment grounds. However, defendant did not raise a Fourth Amendment challenge in the trial court, nor in the briefs filed in this Court. Accordingly, *Spencer* is irrelevant to the disposition of this case.