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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 27, 2005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