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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 27, 2005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

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.
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> 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