



DEPARTMENT OF MOTOR VEHICLES COUNSEL'S OFFICE

OPINION OF COUNSEL (#1-12)

Subject: Time Limitations for Chemical Test Refusals

Date: June 29, 2012

Question

Is a motorist deemed to have refused a chemical test when the refusal occurs more than two hours after the arrest?

Discussion

It has been the long-standing position of the Department of Motor Vehicles that a motorist is deemed to have refused to submit to a chemical if the refusal occurs within two hours of the motorist's arrest. As you are aware, that position was based solely on statutory interpretation, since there are no Court of Appeals decisions that directly speak to the issue. Those Court of Appeals opinions that do exist speak only to the admissibility of evidence of a refusal, or blood alcohol content evidence obtained more than two hours after arrest, at a criminal trial.

However, evolving case law on the issue clearly indicates that the courts have taken a more expansive view. In People v. Atkins, 85 N.Y.2d 1007 (1995), the motorist consented to a blood test within two hours of his arrest, but it was not administered until after the two hours had expired. The Court of Appeals admitted the results of the test, holding that the two-hour rule has no application where the defendant expressly consents to the test. Relying on the holding in Atkins, the court in People v. Ward, 176 Misc. 2d 398 (Sup. Ct. Richmond Co. 1998), deciding whether to admit evidence of a refusal obtained more than two hours after arrest, held that

if evidence of the results of a chemical test expressly consented to by a defendant and administered beyond the two-hour limit is competent, then evidence of a refusal to take such a test, obtained beyond the two-hour limit, must similarly be competent (see, People v. Morales, 161 Misc. 2d 128; contra, People v. Walsh, 139 Misc. 2d 161). A contrary conclusion would not only seem to defy reason, but would permit an operator of a motor vehicle to refuse a properly requested chemical test without consequence. 176 Misc. 2d at 403.

The Ward decision has been followed in several other cases, including People v. Elfe, 33 Misc. 3d 1221A (Sup. Ct. Bronx Co. 2011) and People v. Popko, 33 Misc. 3d 277 (Crim. Ct. Kings Co. 2011).

In light of these recent and well-reasoned holdings that the two-hour rule is inapplicable to refusals, it is the Department's view that a motorist who refuses to submit to a chemical test more than two hours after the time of arrest is deemed to have refused, assuming that the other statutory elements of a refusal (i.e., reasonable grounds, arrest, warning and refusal) are established at the hearing.