

"Kansas Supreme Court Addresses Proper Procedure for use of PBT's (Portable Breath Tests) in DUI/Drunk Driving Cases"

In Kansas v. Edgar, a written opinion rendered on February 1, 2013, the Kansas Supreme Court issued an opinion addressing/clarifying the requirements for offering a PBT (portable breath test) to Kansas drivers involved in DUI/drunken driving investigations.

ISSUE AND HOLDING:

Did the investigating officer in this case substantially comply with applicable Kansas statutory law which requires oral notice to the driver that he can refuse to take a PBT in a DUI/drunken driving investigation when the officer incorrectly told the driver that he had no right to refuse? The officer in this case failed to comply with the notice requirements and incorrectly informed the driver that he had no right to refuse the PBT. Accordingly, the Kansas Court of Appeals decision is reversed and the case remanded to the Kansas District Court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND:

On July 29, 2007, Edgar's vehicle was stopped at a driver's license checkpoint. The officer testified Edgar acted confused when asked for basic information. Edgar presented an identification card when asked for his driver's license. It turned out that Edgar's Kansas driver's license was suspended at the time.

The officer testified that he could smell a "light smell of alcoholic beverage" coming from Edgar's truck. Edgar admitted to consuming beer previously. Edgar performed the following field sobriety tests:

1. HGN Test: No signs of impairment noted.
2. Nine Step Walk and Turn: The officer testified Edgar "did fine", except that he did not walk heel to toe on several steps during the test.
3. One Leg Stand Test: Edgar passed this test.

The final test the officer administered was a PBT (portable breath test) because, the officer said, it was part of his agency's standard procedures. Critically, the officer advised Edgar that he had no right to refuse the PBT. After those instructions, Edgar agreed to take a PBT which showed a .12 blood alcohol content.

Following the preliminary hearing, Edgar filed a motion to suppress the results of the PBT as Edgar argued that he was not properly advised of his right to refuse before the PB test was administered.

The District Court ultimately denied Edgar's motion to suppress the PBT results. The District Court noted that the administration of the PBT could occur either before or after field testing.

The parties stipulated to the facts as listed during the preliminary hearing, and at a bench trial the District Court convicted Edgar of DUI.

COURT OF APPEALS DECISION:

The Court of Appeals upheld the District Court's denial of Edgar's motion to suppress the PBT results. The Court of Appeals noted that the applicable Kansas statute states that, "Anyone who drives consents to taking a PBT." And accordingly; the Court of Appeals panel held that Edgar's consent was not required to be knowing or voluntary because consent for the PBT test was statutorily implied.

Edgar's appeal on this issue to the Kansas Supreme Court was based on the argument that his consent to the PBT was not voluntary because the officer improperly informed Edgar that he had no right to refuse the test.

DISCUSSION AND HOLDING:

Edgar's argument is that when the officer told him "he didn't have a right to refuse the PBT", that this obvious misstatement of notice under the statute rendered his subsequent consent to the test invalid. Edgar noted that at the preliminary hearing the officer testified that he performed well on the field sobriety tests and would not have arrested him but for the PBT results. This testimony, he contends, necessarily justifies our scrutiny of the statutory notice requirements for administration of the PBT. We agree.

The PBT given in this case is considered a search and cannot be administered absent an exception to the general rule which requires search warrants. Before a PBT may be administered, an officer is required to first provide oral notice to the subject that: (1) There is no right to consult with an attorney regarding whether to submit to testing; and (2) refusal to submit to testing is a traffic infraction; and (3) further testing may be required after the preliminary screening test. Edgar's argument is that the officer incorrectly told him that he did not have a right to refuse the test, thus invalidating any subsequent consent for the deep air sample that followed. It is obvious that the investigating officer provided an incorrect notice to Edgar regarding the PBT test. Because the PBT statute provides that a driver's refusal to take the test is a traffic infraction, clearly refusal is always an option for the driver. In Kansas, the benchmark for statutory notice is whether an officer "substantially complied" with the required statutory language. In the case at bar, the officer explicitly misstated the law and misinformed the driver regarding his right to refuse the PBT. Accordingly, we hold that the officer's misstatement that Edgar had no right to refuse the PBT rendered the test involuntary. Telling Edgar that he had no right to refuse the test transformed the test into an involuntary search by depriving Edgar of the opportunity to revoke his statutorily implied consent. Based on the officer's misinformation, Edgar would understand that he had no choice but to submit to the PBT. The District Court erred by not suppressing the PBT result. Additionally, that error also invalidated Edgar's DUI/drunk driving arrest and the subsequent blood alcohol test.

Edgar's motion to suppress the PBT results and subsequent arrest for DUI and blood alcohol test should have been granted by the District Court. Therefore, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.