

"South Carolina Court of Appeals Defines a Legal "Refusal" in DUI/Drunk Driving Cases"

**CASE: Chisolm v South Carolina Department of Motor Vehicles (Appellate Case No. 2011-196890, filed March 27, 2013)**

**FACTS:**

On May 19, 2010 Officer Dyar Archibald arrested Chisolm for driving under the influence (DUI). After Chisolm's arrest for DUI, Officer Archibald transported her to the police station and offered her a breath test pursuant to the South Carolina DUI law. Chisolm blew into the breath test instrument for approximately one minute and 53 seconds. Officer Archibald testified that there was a steady tone while Chisolm blew into the machine (meaning air was going into the breath testing instrument). However, Officer Archibald also testified that the instrument "just would not read it." There was no evidence presented that the breath test machine's failure to register the defendant's sample resulted from her own fault by trying to "fake out" or "thwart" the test; nor did she fail to cooperate and follow the officer's instructions. Because the machine would not read the sample, Officer Archibald considered it to be a "refusal." Consequently, Officer Archibald reported that Chisolm had refused to submit to a breath test and initiated a six month suspension of her license for same.

**PROCEDURAL HISTORY:**

Chisolm requested an administrative hearing before the South Carolina Office of Motor Vehicle hearings to challenge her license suspension for allegedly refusing to take the breath test in a DUI arrest. In this hearing, the hearing office upheld or sustained Chisolm's license suspension, finding that Chisolm refused the breath test because Chisolm's breath test results did not provide a registerable sample according to the breath test machine.

Chisolm appealed her license suspension to the administrative law court, and they affirmed the hearing officer's decision. This appeal to the South Carolina Court of Appeals followed.

**ISSUE:**

Does a "legal refusal" only take place when the defendant actually refuses the conscious act of blowing into the breath machine?

**HOLDING:**

Yes. In South Carolina, a "legal refusal" only takes place when the test subject actually refuses the conscious act of blowing into the instrument, and the administrative law court erred in interpreting the SLED policies and procedures in a contrary manner. The ALC decision is reversed.

We start with the proposition that when the breath test instrument emits a steady tone, the steady tone is an indication that the instrument is receiving a breath sample. A review of the record before the court, and the video recording of the defendant actually taking the breath test, reveals that Chisolm wanted to take the breath test, blew into the breath test machine, and that the instrument produced a steady tone for an extended period of time that indicated sufficient air was going into the instrument. Officer Archibald testified that he had been taught to listen for the "steady tone" when administering a breath test. Here, Chisolm consented to the breath test, attempted the test, and then asked to take a second test. There was no evidence whatsoever presented that Chisolm's failure to register a breath sample resulted from her own fault by making or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting a prohibited substance or failing to cooperate with the

officer's instructions or behave in any manner that would amount to a constructive refusal to take the test. Critically, there was no evidence presented whatsoever that Chisolm was attempting to thwart the test in any manner. Officer Archibald testified that he had "no clue" why the instrument would not register the sample, that the DataMaster machine "just didn't read it." Under the circumstances, Officer Archibald's decision to indicate the testing procedure as a "refusal" was both arbitrary and capricious (again, given the facts of this case).

The court finds it fundamentally unfair under the facts presided herein to label as a refusal a situation where the defendant blew into the machine for such an extended length of time with a steady tone emitted by the instrument and absent any allegations whatsoever that Chisolm attempted to fake or thwart the test. Officer Archibald's decision to enter a refusal, in light of his own testimony and the evidence presented, was both capricious and arbitrary.

Accordingly, the lower court orders are reversed and the suspension of Chisolm's license for six months is reversed.