



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO BOX 086
TRENTON, NJ 08625-0086
TELEPHONE: (609) 984-6500

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

VAUGHN L. MCKOY
Director

CONSTITUTIONAL ASPECTS OF DWI ENFORCEMENT

I. Fourth Amendment

A. Motor Vehicle Stops

Random suspicionless police stops of motorists are constitutionally prohibited. Except in those situations in which there is at least articulable and reasonable suspicion that a motorist or vehicle is in violation of the law, stopping an automobile and detaining the driver in order to check a driver's licence and the registration of the automobile are unreasonable under the Fourth Amendment.

1. Under certain circumstances, a law enforcement officer may stop a motor vehicle on less than an articulable suspicion that a law has been violated.

- a) Police inquiry as to whether something is wrong based on "out of the ordinary" circumstances which do not rise to the level of criminal conduct.
- b) Police stop of vehicle in an attempt to prevent operator from violating the law.
- c) Police stop is permissible under community caretaking function.

2. A properly conducted police DWI road block at which individual motorists are briefly detained is an exception to the "individualized reasonable suspicion" requirement and is constitutional.

B. Field Sobriety Tests

1. Field sobriety tests are not "searches" for constitutional purposes.



2. An individual is not under arrest or in custody simply when asked to perform field sobriety tests.

C. Videotaping

Police videotaping of DWI suspect's booking procedures was neither a search nor a seizure implicating the Fourth Amendment.

D. Blood and Breath Alcohol Testing

1. A compelled intrusion into the body for blood to be analyzed for alcohol content is a search under the Fourth Amendment.

2. Subjecting a person to a Breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood- alcohol test, also is a search.

However, breath tests are less intrusive than blood tests. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Therefore, the administration of a breath test does not implicate significant privacy concerns."

3. A search warrant is not required for Breathalyzer testing of arrested drunken drivers. Testing is permissible under the "exigent circumstances" and "search incident to a lawful arrest" exceptions to the Fourth Amendment warrant requirement.

From a constitutional perspective, a warrant also is not required for the drawing of blood for alcohol testing.

4. To request a breath or blood alcohol test, a police officer must have probable cause (reasonable grounds?) to believe that the suspect has been operating a motor vehicle while under the influence of intoxicating liquor.

II. Fifth Amendment

A. General Application to DWI Offenses

Miranda requirements apply regardless of nature or severity of the suspected offense. Miranda applies to police questioning of motorist for misdemeanor DWI offense.

B. Roadside Questioning

Roadside questioning of a motorist detained pursuant to a routine traffic stop was

not "custodial" for purposes of Miranda. Miranda warnings are not required.

C. Field Sobriety Testing

1. Standard sobriety tests measuring reflexes, dexterity and balance do not require the performance of testimonial acts and do not violate the Fifth Amendment in the absence of Miranda warnings.
2. Admission into evidence of defendant's refusal to perform field sobriety tests does not violate the privilege against self-incrimination.
3. Counting numbers and reciting the alphabet – testimonial?
4. Asking defendant to rate his level of intoxication on a scale of 1 to 10 cannot be characterized as a field sobriety test. Rather, it is an example of interrogation seeking testimonial evidence.

D. Post-Arrest Questioning

Upon arrest, a custodial situation clearly exists, but "custody" is only one component of the Miranda analysis. Consider also whether the evidence is testimonial.

1. The slurred nature of a suspect's speech. The physical inability to articulate words in a clear manner due to the lack of muscular coordination of the tongue and mouth is not a testimonial component of a suspect's responses to police questioning.
2. Questions regarding a suspect's name, address, height, weight, eye color, date of birth, current age, etc. Inquiries of this nature subsequent to arrest constitute "custodial interrogation"; it does not matter that the questions were not intended to elicit information for investigatory purposes. However, these questions fall within the "routine booking question" exception which exempts from Miranda's coverage questions to secure biographical data necessary to complete booking or pretrial services. This does not mean that any question asked during the booking process is exempt from Miranda; only those inquiries reasonably related to the police's administrative concerns are given this status.
3. Police observations that a defendant is "abusive, arrogant, incoherent and very talkative" during routine booking questions are not testimonial in nature.
4. Police request that defendant calculate the date of his sixth birthday constituted custodial interrogation which attempted to elicit a testimonial response. Whenever a suspect is asked for a response requiring communication of an express or implied assertion of belief, the response (whether based on truth or

falsity) contains a testimonial component.

5. Questions regarding whether defendant could "feel the effects" of what he had been drinking and whether defendant's drinking had affected his driving and performance of field sobriety tests requires Miranda warnings since they were likely to elicit self-incriminating testimonial evidence.

6. Volunteered statements made by a suspect while in custody are admissible and require no Miranda warnings.

E. Breath Testing

1. Police officer's request for a suspect to take a breath or blood test is not interrogation for purposes of Miranda. Since it is not a response to interrogation, a suspect's refusal to submit to a breath or blood test is admissible evidence in a DWI prosecution, even in the absence of Miranda warnings.

2. Breath tests, while incriminating, are not testimonial communications within the ambit of the Fifth Amendment.

F. Videotaping

1. The videotaping of field sobriety tests or the station house questioning of a suspect adds nothing to the Miranda analysis. The nature of the subject matter of the videotape determines whether Miranda applies. The videotape is merely a mechanical reproduction of the observations made by individuals who witnessed the actions of defendant at the time of the videotaping. The videotape is no more testimonial than the taking of still pictures, blood or urine samples held to be outside the privilege against self-incrimination.

2. In cases involving Miranda violations, there is a distinction between the audio portion and the video portion of the videotape. Since a defendant's physical movements are not testimonial, the video portion of the tape, which depicts those movements, should routinely be admitted into evidence.

G. Right to Counsel

A suspect has a right to consultation with and the presence of an attorney during custodial interrogation.

III. Sixth Amendment

A. Field Sobriety Tests

A motorist who is ordered to perform field sobriety tests as part of an investigative stop prior to arrest has no statutory or constitutional right to contact counsel before performing the field sobriety tests.

B. Videotaping

A suspected drunk driver has no right to consult with an attorney prior to submitting to field sobriety tests which are being videotaped.

C. Breath Testing

Possible sources of a right to consult with counsel to decide whether to submit to breath testing are: Sixth Amendment (critical stage analysis), Due Process Clause, state statutes and state constitutions.

1. A suspected drunken driver has no right to counsel for purposes of deciding whether to submit to breath testing.

2. Breath testing is a "critical stage" of the prosecution in a constitutional sense; an accused has the right to counsel in determining whether to submit to breath testing.

3. Due process provides right to counsel for purposes of breath testing.

4. Some states have established a statutory right to counsel to decide whether to submit to breath testing.

5. Right to counsel guaranteed by State Constitution.

6. The United States Supreme Court's view:
In Nyflot v. Commissioner of Public Safety, 369 N.W.2d 512 (Minn. 1985), the Supreme Court of Minnesota held that a suspected drunk driver had no statutory or constitutional right to an attorney to decide whether to submit to breath testing. The defendant appealed to the United States Supreme Court. A majority of the court refused to hear the case and dismissed the appeal for lack of a substantial federal question. Justices White and Stevens dissented from the dismissal, arguing that the split of legal authority around the country required the Court's review to settle the issue. 106 S.Ct. 586 (1985). Justice White again pressed the issue in a dissent from a denial of certiorari two years later, Griffith v. Illinois, 107 S.Ct. 3179 (1987). The Supreme Court has yet to take a case on this topic.

7. Even those jurisdictions that have recognized a right to counsel for purposes of breath testing have not held that this right is absolute. Given the evanescent nature of the evidence being sought through breath testing, a suspect is entitled only to be afforded a "reasonable opportunity" to consult with counsel.

8. A defendant has no right to have counsel actually present during the administration of the test.

D. Blood Testing

The applicability and extent of a right to counsel for purposes of deciding whether to give a blood sample for alcohol testing will in all likelihood be coextensive with the scope of the right to counsel which a particular jurisdiction recognizes for purposes of breath testing. In deciding this question, be familiar with the specific origin of any right to counsel which may exist for breath testing (e.g., state statute, state constitution).