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Recent Developments: Krauss v. State: Driver's Refusal to Take Breathalyzer Test Inadmissible

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Id.

The Court supported its decision by analogizing to prior cases. In *Brower v. Inyo County*, 489 U.S. 593 (1989), a driver crashed into a police blockade and was killed while fleeing from police with flashing sirens in a high speed car chase. The Court addressed the issue of whether the police had illegally seized the decedent in violation of the Fourth Amendment. The Court concluded that in *Brower*, "[w]e did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, 'show of authority' did not produce his stop." *Id.* at 1552 (quoting *Brower*, 498 U.S. at 597).

The Court also analogized the facts of *Hodari D.* to the facts of *Hester v. United States*, 265 U.S. 57 (1924). In *Hester*, revenue agents acting without a warrant were chasing moonshiners, when the moonshiners dropped containers. The containers were not excluded as illegally obtained evidence because, "[t]he defendant's own acts, and those of his associates, disclosed the jug . . . and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned." *Id.* (quoting *Hester*, 265 U.S. at 58).

Relying on such prior case law, the Court in *Hodari D.* concluded that even if the officers did display a show of authority when they chased the defendant, Hodari did not comply and was not seized until he was physically tackled by the officer. *Id.* The cocaine was not, therefore, the fruit of an illegal seizure.

The court's holding in *Hodari D.* gives a very narrow definition of the word "seizure." This holding represents a departure from prior case law which defined seizure broadly to include, for example, electronic eavesdropping as a seizure. Although the Court had the opportunity to enlarge the scope of reasonable justifications for seizure, it chose instead to significantly limit the protection of the Fourth Amendment.

- Elizabeth Lee

Krauss v. State: DRIVER'S REFUSAL TO TAKE BREATHALYZER TEST INADMISSIBLE.

In a 4-3 decision, the Court of Appeals of Maryland in *Krauss v. State*, 587 A.2d 1102 (Md. 1991), held that a driver's refusal to take a Breathalyzer test was inadmissible when pre-test procedure and availability were not challenged. Overturning the drunk driving conviction of Frank L. Krauss, the court ruled that evidence of the defendant's refusal to take a Breathalyzer test would be admissible only if material and relevant to matters other than guilt or innocence. Because Krauss admitted he was offered a test and never questioned the procedure by which it was tendered, the court concluded that the admission of Krauss's refusal was immaterial and irrelevant as to the issue of guilt and, therefore, inadmissible.

Suspected of driving while intoxicated, Krauss was stopped by a state trooper. Krauss was offered the opportunity to take a Breathalyzer test, but he refused. At the beginning of his trial, defense counsel made a motion in limine to exclude all evidence of Krauss's refusal to take the test, and stipulated that the state trooper who arrested Krauss followed proper procedures when attempting to administer the test.

Krauss argued that his refusal to take the Breathalyzer test was neither material nor relevant to any remaining issue in the case except intoxication, for which it would be inadmissible according to Md. Code Ann. Cts. & Jud. Proc. § 10-309(a) (1989). Krauss asserted, therefore, that this evidence of his refusal was highly prejudicial and that the state should be prevented from using such evidence. The trial judge denied the motion, and a jury found Krauss guilty of driving while under the influence. Following his conviction and sentencing, Krauss appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court. Thereafter, the court of appeals granted Krauss's petition for a writ of certiorari.

The court of appeals began its analysis by looking at the legislative enactments concerning drunk driving. *Krauss*, 587 A.2d at 1103. Maryland law forbids a person from driving any vehicle while intoxicated or under the influence of alcohol. Md. Code Ann. Transp. § 21-902 (1987). To facilitate the prosecution of drunk drivers, Md. Code Ann. Transp. § 16-205.1(a) (1987) provides that any person who drives a vehicle on a highway is deemed to have consented to taking a breath test to determine blood alcohol levels.

The court noted that the legislature had provided for the taking of two types of chemical breath tests: a preliminary breath test and a Breathalyzer test. *Krauss*, 587 A.2d at 1103. The preliminary breath test was used as a guide for police officers in deciding whether an arrest should be made. *Id.* The results of the preliminary test may be used as evidence by the defendant but not by the state. *Id.* However, the results of the Breathalyzer test, or a refusal to take the test could be offered into evidence by the state. *Id.* at 1104. Upon review of the transcript, the court determined that Krauss's refusal was for a Breathalyzer test. *Id.* at 1106.

The provisions of Md. Cts. &

Jud. Proc. Code Ann. §§ 10-302 through 10-309 (1989) outline the proper procedures for administering the Breathalyzer test and attempt to resolve questions as to its admissibility. *Id.* at 1103-05. In 1986, the legislature amended section 10-309(a) to permit the introduction of a refusal to take the Breathalyzer test into evidence at trial, but left unchanged that portion of the statute which stated that a jury could make no inferences or presumptions from that evidence concerning guilt or innocence. *Id.* at 1106-07. The court of appeals interpreted the language of section 10-309 to mean that evidence of a refusal to submit to a Breathalyzer test could only be applied to collateral matters that were not material or relevant to the defendant's guilt or innocence, such as whether the test was properly administered. *Id.* at 1107.

The court of appeals noted that Krauss clearly stated at trial that he would not question whether he was properly given the opportunity to take the Breathalyzer test. *Id.* at 1107. Thus, the court found, "there was no collateral matter in question, and there appeared no sound reason for the State to introduce evidence of the refusal except to influence the jury toward a verdict of guilty." *Id.* at 1107-08.

The court of appeals rejected the state's argument that the admission of the Breathalyzer test was harmless error. *Id.* at 1108. Although the facts showed some evidence that put Krauss's sobriety into doubt, there was also conflicting evidence showing that Krauss had sustained a head injury. *Id.* The court stated that it was the jury's function to weigh the evidence. *Id.* at 1108. The court could not conclude beyond a reasonable doubt that the error in admitting the Breathalyzer test in no way influenced the jury's verdict. *Id.* (applying *Dorsey v. State,* 350 A.2d 665, 679 (Md. 1976)). Finally, the court ruled that the trial judge's brief jury instructions did not overcome the prejudicial effect of admitting into evidence Krauss's refusal to take the Breathalyzer test. *Id.*

Judge McAuliffe led the dissent by arguing that section 10-309 was properly drafted to avoid misapprehension and speculation on the part of jurors. *Id.* at 1109. The dissent suggested that the legislature wrote section 10-309 to give the state an opportunity to dispel any mistaken belief among the jurors that the defendant had no right to refuse or was not given the opportunity to take the Breathalyzer test. The dissent therefore believed that admitting the defendant's refusal to take the test would merely place the state on "a level playing field." *Id.*

According to the decision in *Krauss*, the state will no longer be able to admit evidence that a drunk driver refused to take a Breathalyzer test, unless the driver first calls into question the method by which the test was administered. Only in cases where the defendant claims the police officer did not offer him the test or it was improperly performed could the evidence of his refusal then be admitted. The holding in Krauss severely curtails the state's ability to offer evidence that the defendant refused a Breathalyzer test. Unless the legislature decides to amend the statute, the state has lost an important piece of trial evidence, tipping the balance in favor of the defendant, and, thereby resulting in fewer drunk driving convictions.

- Karl Phillips

Lane v. Nationwide Mut. Ins. Co.: STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN ON AN INSURED MOTORIST'S CONTRACT CLAIM UNTIL INSURER DENIES COVERAGE.

In *Lane v. Nationwide Mut. Ins. Co.*, 582 A.2d 501 (Md. 1990), the Court of Appeals of Maryland found that in a breach of contract action by an insured motorist against his insurance carrier, the three-year statute of limitations began to run when the contract was actually breached by the insurance company when it denied coverage under the policy. The holding rejected the view espoused by the court of special appeals in *Yingling v. Phillips*, 501 A.2d 87 (Md. Ct. Spec. App. 1985), that an insured's breach of contract action accrued when the insured motorist first discovered that the tortfeasor was uninsured.

Mr. and Mrs. William Lane were involved in an auto accident when a vehicle driven by Guy Callaway tried to pass them on the left-hand side of the road. As Callaway attempted to pass the Lanes, an oncoming vehicle, driven by Joseph Warren and owned by Michael McKenna, forced Callaway off the road and hit the Lanes' vehicle. The Lanes sustained permanent injuries from the collision. At the time of the accident, the Lanes had an automobile liability insurance policy with Nationwide Mutual Insurance Co. (Nationwide). Nationwide was informed of the collision shortly after it occurred.

In December of 1982, the Lanes filed a tort action against Callaway, Warren and McKenna, and notified Nationwide of the pending suit. Prior to the filing of the tort action, the Lanes discovered that neither Warren nor McKenna had automobile insurance. The Lanes' attorney sent