



1985

Recent Developments: DWI Rights - Chemical Sobriety Test

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Recommended Citation

Hammond, Jennifer (1985) "Recent Developments: DWI Rights - Chemical Sobriety Test," *University of Baltimore Law Forum*: Vol. 15 : No. 2 , Article 6.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol15/iss2/6>

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distinction between imperfect self defense and the heat of passion defenses is that the defendant acted the way he did due to a "fear of life" rather than a heat of passion. The judicial recognition of the imperfect self defense allows the courts to avoid the choice between murder and complete exonerations in non-heat of passion cases where the defendant's conduct warranted neither a murder conviction nor an acquittal. This defense requires the defendant to bear some responsibility for the homicide, even though he may have lacked the requisite mens rea for murder.

The court reviewed the history of the imperfect self defense doctrine and found that the case law revealed three variations of the doctrine. Some courts have applied the doctrine where the homicide at issue falls within the perfect self defense doctrine, except for the fault of the defendant in provoking or initiating the difficulty at the non-deadly force level. Other courts have applied the doctrine where the defendant committed a homicide because of an honest but unreasonable belief that he was about to suffer death or serious bodily harm. Still, other courts have recognized the doctrine when the defendant uses unreasonable force in defending himself and as a result, killed his opponent.

Prior to the *Faulkner* decision, the court of special appeals had dealt with six imperfect defense cases which gradually expanded the application of this mitigating defense to the criminal defenses of imperfect defense of others, *Shuck v. State*, 29 Md. App. 33, 349 A.2d 378 (1975), cert. denied, 278 Md. 733 (1976) imperfect defense of duress, *Wentworth v. State*, 29 Md. App. 110, 349 A.2d 421 (1975), cert. denied, 278 Md. 735 (1976), and imperfect defense of habitation, *Law v. State*, 29 Md. App. 457, 349 A.2d 295 (1975), cert. denied, 278 Md. 729 (1976).

Due to the *Faulkner* decision, the defendant is now presented with a wide range of mitigating defenses that serve to reduce a conviction of murder to manslaughter. As the Court stated, "A defendant who commits a homicide while honestly, though unreasonably, believing that he is threatened with death or serious bodily harm, does not act with malice. Absent malice, he cannot be convicted of murder. Nevertheless, because the killing was committed without justification or excuse, the defendant is not entitled to full exoneration." Yet, according to the court the defendant is entitled to a

proper instruction to show the defendant's subjective (honest) belief that the use of force was necessary to prevent imminent death or serious bodily harm. Once the defendant has established the existence of that belief,

the jury must reject the reasonableness of that belief as well as the existence of that belief itself to find the defendant guilty of murder. ⚖️

by Regan J.R. Smith

DWI Rights

Chemical Sobriety Test

by Jennifer Hammond

The Maryland Court of Appeals recently considered the issue of whether a person who is apprehended for driving while intoxicated has a constitutional right to consult counsel before deciding whether to submit to a chemical sobriety test. In *Sites v. State*, 300 Md. 701, 481 A.2d 192 (1984), the court of appeals held that the due process clause of the Fourteenth

attempted communication will not substantially interfere with the timely administration of the testing process.

The laws concerning submission to a sobriety test in Maryland are fairly clear-cut. For instance, a chemical sobriety test must be administered within two hours "after the person accused is apprehended." Md. Cts. & Jud. Proc. Code Ann. § 10-303 (1984). A person may not be compelled to submit to such a test and any refusal is not admissible at a trial since no inference or presumption concerning guilt arises as a result of refusal to submit to the test. Md. Cts. & Jud. Proc. Code Ann. § 10-309 (1984). Additionally, § 16-205.1(a) of the Transportation Article — the "implied consent" statute — explicitly states that any person who operates a motor vehicle in Maryland is deemed to have consented to take a chemical test to determine alcohol content if that person is apprehended on suspicion of drunk driving. Md. Transp. Code Ann. § 16-205.1(b) (1984).

Maryland driver who declines to take the chemical sobriety test "shall" have his license suspended for not less than 60 days or more than 6 months for a first offense. Md. Transp. Code Ann. § 16-205.1(b) (1984).

As previously stated, the Maryland Court of Appeals in *Sites* based its decision on the due process clause of the Fourteenth Amendment. The court, citing *Rochin v. California*, 342 U.S. 165 (1952), stated that, while the exact contours of the due process clause are not definable with precision, the constitutional right of due process



Amendment of the United States Constitution, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention as a drunk driving suspect must, if the suspect so requests, be permitted a reasonable opportunity to communicate with counsel *before* submitting to a chemical sobriety test, as long as the

assures that convictions cannot be brought about in criminal cases by methods which offend a sense of justice. According to the *Sites* court, Maryland's implied consent statute, by allowing a suspect to refuse chemical testing, deliberately gives the licensed driver a choice between two different potential sanctions each of which affect vitally important interests. That is, a driver may submit to the test and any adverse results may be used against that driver in a criminal trial for drunk driving. On the other hand, if the driver refuses to submit to the chemical sobriety test then that individual's driver's license "shall" be suspended for not less than 60 days nor more than 6 months for first offense. Md. Transp. Code Ann. § 16-205.1(b) (1984). In addition, the court noted that "revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment." 300 Md. at 717, 481 A.2d at 199-200. Moreover, the continued possession of a driver's license may become essential to earning a livelihood and therefore may be an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment. Based on the foregoing, the court ruled that "to unreasonably deny a requested right of access to counsel to a drunk driving

suspect offends a sense of justice which impairs the fundamental fairness of the proceeding." 300 Md. at 717, 481 A.2d at 200.

Therefore, the court in *Sites* held that if a person under detention for drunk driving requests to telephone an attorney for advice on whether to take a sobriety test the police must honor that request. The holding of the court is not without limits, however. That is, the court held that "a person under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, *as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process.*" 300 Md. at 717-18, 481 A.2d at 200. (emphasis added). The court noted that there is no "bright line" rule as to what constitutes a reasonable delay (although Md. Cts. & Jud. Proc. Code Ann. §10-303 (1984) mandates that in no event may the test be administered later than two hours after the driver's apprehension). According to the court, the statutory purpose of the drunk driving laws is to obtain the best evidence of blood alcohol content as may be practicable under the circumstances, and it is common knowledge that such blood alcohol

content dissipates with the passage of time. Thus, the court held that if counsel cannot be contacted within a reasonable time, an individual may be required to make a decision regarding testing without the advice of counsel. The *Sites* court further emphasized that under no circumstances may the right to communicate with counsel be permitted to delay the test for an unreasonable time since such a delay would impair the accuracy of the test and defeat the purpose of the statute.

The court concluded that the determination as to whether a drunk driving suspect who seeks to communicate with counsel has been denied his due process right to do so depends on the circumstances of each case. If a suspect submits to a chemical sobriety test after being denied his due process right to contact an attorney, then, according to the *Sites* court, the only effective sanction is to suppress the results of the test where such results are adverse to the defendant. Nonetheless, the court warned that a reviewing court should afford great deference to the determination of the police authorities that it was reasonably necessary for the timely administration of the chemical sobriety test to deny the requested right of access to counsel.



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