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RECENT DEVELOPMENT

MOTOR VEHICLE ADMIN. V. DEERING: A DRIVER WHOSE LICENSE IS SUSPENDED UNDER THE “IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW” IS NOT ENTITLED TO CONSULT WITH AN ATTORNEY BEFORE DECIDING WHETHER TO TAKE A BREATH TEST.

By: Patrick Toohey

The Court of Appeals of Maryland held the implied consent, administrative per se law (“administrative per se law”) does not require that a suspected drunk driver be given the opportunity to consult an attorney before deciding whether to take a breath test. *Motor Vehicle Admin. v. Deering*, 438 Md. 611, 637, 92 A.3d 495, 511 (2014). The court found that the due process clause of the Fourteenth Amendment of the United States Constitution does not establish a pre-test right to counsel for a suspected drunk driver in an administrative proceeding. *Id.* at 635-37, 92 A.3d at 510-11.

On May 3, 2012, Wicomico County police stopped April Marie Deering (“Deering”) for driving her car without dimming the high beams and having an expired registration tag. After detecting the smell of alcohol and slurred speech, the officer asked Deering to complete a series of field sobriety tests. Failing to adequately complete the roadside tests, Deering was arrested for driving under the influence of alcohol. At the police station, the officer read Deering the “DR-15 Form.” The form advised her of the options and potential consequences of declining to take the breath test and adverse test results. Deering asked for an opportunity to call her attorney before deciding whether to take the breath test. The officer denied Deering’s request because of statutory time constraints that require the breath test to be administered within two hours of the arrest. Deering subsequently agreed to take the test, which indicated a blood alcohol concentration of 0.16. In accordance with the statute, Deering was issued a ninety day driver’s license suspension order.

Deering requested an administrative review of the suspension order. The Administrative Law Judge (“ALJ”) upheld the suspension, concluding that the denial of Deering’s request to consult an attorney did not violate her due process rights because the officer had adequately advised her of potential sanctions. Furthermore, the opportunity to call a lawyer is not required in an administrative context.

Deering sought judicial review in the Circuit Court for Somerset County, which reversed the ALJ’s decision. The circuit court held that the denial of Deering’s request to contact her attorney violated her due process right. The Court of Appeals of Maryland granted the Motor Vehicle Administration’s petition for certiorari.

Under the administrative per se law, a driver has two options upon being detained. The driver may (1) refuse the breath test and receive an automatic statutory suspension or (2) take the breath test, which could result in no suspension or a substantial suspension with the potential for criminal prosecution. *Deering*, 438 Md. at 613, 92 A.3d at 496-97. The Court of Appeals of Maryland sought to determine whether a detained driver, who is denied a pre-test opportunity to consult with counsel, is entitled to have the sanctions set aside as a violation of due process. *Id.* at 613, 92 A.3d at 497.

The court began its analysis by examining due process in an administrative context. *Deering*, 438 Md. at 622, 92 A.3d at 502. In an administrative proceeding, courts apply a balancing test by considering “private interests, governmental interests, and the risk that the procedures will lead to erroneous decisions.” *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). The administrative per se law is designed to protect an individual’s private interest to drive, the public’s interest in deterring drunk driving, as well as encouraging cooperation with the breath test to measure impairment. *Id.* at 623, 92 A.3d at 502. The court articulated that in a purely administrative context, due process does not require a right to a pre-test consultation with an attorney. *Id.* at 624, 92 A.3d at 503. However, because a detained driver also faces potential criminal prosecution, the driver may be afforded greater protection. *Id.*

In the criminal context, the court has previously held that a detained driver has the limited right to a pre-test consultation with an attorney under the due process clause of both the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. *Deering*, 438 Md. at 625, 92 A.3d at 504 (citing *Sites v. State*, 300 Md. 702, 717-18, 481 A.2d 192, 199 (1984)). Subsequently, state and federal courts have not held that the due process clause of the Fourteenth Amendment establishes a pre-test right to counsel for a suspected drunk driver. *Deering*, 438 Md. at 628, 92 A.3d at 506; *see e.g.*, *State v. Degnan*, 305 S.C. 369 (1991); *Brank v. State*, 528 A.2d 1185 (Del. 1987). The United States Supreme Court has also cast doubt on the right to a pre-test consultation. *Deering*, 438 Md. at 630, 92 A.3d at 506-07 (citing *Nyloft v. Minnesota Comm’r of Public Safety*, 474 U.S. 1027 (1985)). Some state courts, however, have recognized this limited right in a criminal proceeding, citing state constitutional provisions, rules, and statutes. *Deering*, 438 Md. at 631-32, 92 A.3d at 507-08; *see e.g.*, *State v. Spencer*, 750 P.2d 147 (1988); *Copelin v. State*, 659 P.2d 1206 (Alaska 1983). The court’s ultimate inquiry rested on whether the pre-test right to counsel has an effect on the imposition of an suspension under the administrative per se law. *Deering*, 438 Md. at 631-32.

The court recognized that the Maryland General Assembly has made a cognizable effort to separate criminal and administrative proceedings that result from a suspected drunk driving incident. *Deering*, 438 Md. at 633, 92 A.3d at 508 (citing *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 366, 739 A.2d 58 (1999)). Evidence that is excluded in a criminal proceeding may still be introduced in an administrative suspension proceeding, given the

minimal deterrent effect of the exclusionary rule in administrative proceedings. *Deering*, 438 Md. at 633, 92 A.3d at 508 (citing *Richards*, 356 Md. at 371, 739 A.2d 58)).

Ultimately, the court declined to extend the right to a pre-test consultation to administrative proceedings. *Deering*, 438 Md. at 635, 92 A.3d at 509-10 (citing *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 12 A.3d 1255 (2011)). In dicta, the court in *Najafi* explained that even if any such right did exist for the purposes of an administrative proceeding, due process protection would be satisfied by proper disclosure of the DR-15 form and a reasonable effort by an officer to accommodate a request to consult an attorney. *Deering*, 438 Md. at 635, 92 A.3d at 509-10 (citing *Najafi*, 418 Md. at 184, 12 A.2d at 1255)).

The court of appeals in *Deering* upheld the ALJ's suspension of Deering's license, concluding that an opportunity to consult a lawyer is not required in an administrative context. *Deering*, 438 Md. at 637, 92 A.3d at 511. The court focused on the legislative intent in the administrative per se law to ensure widespread safety of the public, combined with the interest in obtaining a timely and accurate measurement of impairment. *Id.* As a result, Deering was not entitled to have her license suspension set aside on the grounds that she was denied an opportunity to consult an attorney. *Id.*

In *Deering*, the Court of Appeals of Maryland emphasized its support of the separation between criminal and administrative proceedings. The court found a lack of right to counsel in the initial stages of a suspected drunk driving incident. The risk that the procedure may produce erroneous decisions is outweighed by society's interest against drunk driving. Practitioners should be aware of individual's rights overlapping between different court proceedings, specifically administrative and criminal, in drunk driving incidents.