

113 Wash.App. 193
Court of Appeals of Washington,
Division 2.

James W. BALL, Respondent,

v.

STATE of Washington, DEPARTMENT
OF LICENSING, Appellant.

No. 26822-1-II. | Aug. 30, 2002.

Department of Licensing revoked licenses of driver who offered unresponsive and unclear answers when asked if he wanted to speak to an attorney, and failed to follow instructions when taking a breath test, after being stopped for driving while intoxicated. Driver appealed. The Superior Court, Pierce County, Rosanne Buckner, J., reversed the revocation, and Department petitioned for discretionary review. The Court of Appeals, Armstrong, J., held that driver refused to take the breath test, thus justifying revocation of his driving privilege.

Reversed and remanded.

West Headnotes (4)

[1] **Automobiles**
🔑 Scope of review; discretion and fact questions

Driver's refusal to take the breath test is a legal conclusion, which the Court of Appeals reviews de novo.

[2] **Automobiles**
🔑 Administrative procedure in general

Automobiles

🔑 Advice or warnings; presence of counsel

Criminal Law

🔑 Necessity in general

Criminal Law

🔑 Right to counsel

Criminal Law

🔑 Counsel in General

A license revocation proceeding is a civil administrative proceeding and is separate from a criminal prosecution for driving while intoxicated; a driver arrested for driving while intoxicated must be given the *Miranda* warnings, which inform the arrestee of his right to counsel prior to police interrogation, but a person has no right to counsel in a license revocation proceeding or action, and thus, for license revocation purposes, a driver need not receive counsel nor be advised or reminded of his right to counsel before deciding whether to take a breath test.

1 Cases that cite this headnote

[3] **Automobiles**

🔑 Refusal to take test

Driver refused to take the breath test, thus justifying revocation of his driving privilege, where driver repeatedly drank from a drinking fountain, ignoring the officer's order that he not put anything in his mouth, including water.

4 Cases that cite this headnote

[4] **Automobiles**

🔑 Refusal to take test

Absent evidence of impossibility, unwillingness to cooperate with the administration of a breath test constitutes a refusal under the implied consent law, even if the driver is too intoxicated to comprehend and respond to an officer's request that he submit to the test.

4 Cases that cite this headnote

Attorneys and Law Firms

****58 *195** Lynette Weatherby-Teague, Asst. Attorney General, Tacoma, for Appellant.

Owen Sherman Limstrom, Law Office of Owen S. Limstrom, Tacoma, for Respondent.

Opinion

ARMSTRONG, J.

Police arrested James Ball for driving while intoxicated and took him to jail. Ball offered unresponsive and unclear answers when asked if he wanted to speak to an attorney. And he failed to follow instructions when taking a breath test. The Department of Licensing revoked Ball's driving privilege. Ball successfully appealed to the superior court, which concluded that Ball was denied a reasonable opportunity to contact counsel and did not refuse to take the breath test. We accepted the State's petition for discretionary review and now reverse.

FACTS

Police officer Ron Sasaki arrested James Ball for driving while intoxicated in January 2000. Sasaki read Ball his *Miranda*¹ rights and took him to jail. There, Sasaki asked Ball to sign a form acknowledging that he understood his rights. Ball refused and said, "I think I'd like my attorney." AR (1/27/2000 Orting Police Report) at 3. Sasaki asked Ball if he had an attorney. Without answering the question, Ball asked, "Where are we going?" AR (1/27/2000 Orting Police Report) at 3. Sasaki explained the breath test process and again asked Ball if he had an attorney. Ball replied, "I hope I don't need him." AR (1/27/2000 Orting Police Report) at 3. Sasaki asked Ball if he wanted to speak to an attorney and asked for a "yes" or "no" answer. Ball said, "I have an attorney." AR (1/27/2000 Orting Police Report) at 3. Sasaki concluded that Ball did not want to speak to an attorney.

Officer Sasaki then read Ball his rights under the implied consent law, as stated in RCW 46.20.308(2), that a driver has the right to refuse to submit to a breath test, subject to revocation of his privilege to drive. Ball indicated that he did not understand. Sasaki read the implied consent warnings again, and Ball repeated that he did not understand. Ball pointed to the RCW citations in the statement and wanted to know what they meant. Sasaki explained that they were state laws, and Ball wanted to see them. Sasaki refused and asked if Ball would like to speak to his attorney to help him understand his rights. Ball replied, "I have a RCW I'd like to speak to." AR (1/27/02 Orting Police Report) at 4. Sasaki again asked if Ball understood his rights, and Ball said, "I know what it says. We all know what it says. I don't think I'm under the

influence." AR (1/27/2000 Orting Police Report) at 4. Sasaki concluded that Ball understood his rights.

Officer Sasaki then asked Ball if he would submit to a breath test. He said, "I'd rather not, why?" AR (1/20/2000 Orting Police Report) at 4. Sasaki explained the process to Ball and again asked if Ball would take the test. Ball again asked why he needed to take the test. Sasaki said that he was going to consider Ball's response a refusal to take the test. Ball said that he was not refusing, so Sasaki began the test. Sasaki explained that if Ball wanted to take the breath test, he could not put anything in his mouth, including water, during the 15-minute observation period or his actions would constitute a refusal to take the test. Ball drank from a drinking fountain four times. Sasaki ended the test and recorded Ball's refusal to comply.

The Department of Licensing revoked Ball's driving privilege. He contested the revocation. The administrative hearing officer upheld the revocation based on Ball's refusal to cooperate with the breath test and determined that Ball had several opportunities to contact an attorney. Ball appealed to Pierce County Superior Court, which reversed the revocation. The trial court concluded that Officer Sasaki denied Ball a reasonable opportunity to contact counsel and that Ball did not refuse to take the breath test. We granted the State's petition for discretionary review.

ANALYSIS

[1] The State challenges the superior court's conclusion that Ball did not refuse to take the breath test. This is a legal conclusion, which we review de novo. *See To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 410, 27 P.3d 1149 (2001), cert. denied, 535 U.S. 931, 122 S.Ct. 1304, 152 L.Ed.2d 215 (2002).

[2] A license revocation proceeding is a civil administrative proceeding and is separate from a criminal prosecution for driving while intoxicated. *Gonzales v. Dep't of Licensing*, 112 Wash.2d 890, 900, 774 P.2d 1187 (1989). A driver arrested for driving while intoxicated must be given the *Miranda* warnings, which inform the arrestee of his right to counsel prior to police interrogation. *State v. Staeheli*, 102 Wash.2d 305, 309, 685 P.2d 591 (1984). But a person has no right to counsel in a license revocation proceeding or action. *Keefe v. Dep't of Licensing*, 46 Wash.App. 627, 632, 731 P.2d 1161 (1987); *Haas v. Dep't of Licensing*, 31 Wash.App. 334, 337-38, 641 P.2d 717 (1982); *Wolf v. Dep't of Motor Vehicles*,

27 Wash.App. 214, 221–22, 616 P.2d 688 (1980). Thus, for license revocation purposes, a driver need not receive counsel nor be advised or reminded of his right to counsel before deciding whether to take a breath test. *Gonzales*, 112 Wash.2d at 900, 774 P.2d 1187.

In reversing Ball's license revocation, the superior court relied on our opinion in *Johnson v. Dep't of Licensing*, 71 Wash.App. 326, 858 P.2d 1112 (1993). The parties dispute the meaning of one paragraph in that opinion:

****60** A driver arrested for driving while intoxicated must be advised of his *Miranda* rights so that he can intelligently respond to a police interrogation request and understand his constitutional ***198** and court rule rights of access to counsel. *State v. Staeheli*, 102 Wash.2d 305, 309, 685 P.2d 591 (1984); CrRLJ 3.1. After the police advise a defendant of his rights, “[i]f the defendant requests the assistance of counsel, access to counsel must be provided before administering the test.” (Italics ours.) *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wash.2d 824, 831, 675 P.2d 599 (1984).

Johnson, 71 Wash.App. at 331–32, 858 P.2d 1112. Ball interprets *Johnson* as holding that the constitutional and court rule rights of access to counsel apply in a civil proceeding under the implied consent statute. He is incorrect. We did not intend, in *Johnson*, to alter the longstanding rule that there is no right to counsel in an implied consent proceeding. See *Keefe*, 46 Wash.App. at 632, 731 P.2d 1161; *Haas*, 31

Wash.App. at 337–38, 641 P.2d 717; *Wolf*, 27 Wash.App. at 221–22, 616 P.2d 688. Furthermore, our statement in *Johnson* was dicta, as the issue there was whether the record supported a finding that the accused did not ask for an attorney until he was jailed after refusing to take a breath test. *Johnson*, 71 Wash.App. at 332, 858 P.2d 1112.

[3] [4] Here, we need only decide whether Ball refused to take the breath test. Absent evidence of impossibility, unwillingness to cooperate with the administration of a breath test constitutes a refusal. *Woolman v. Dep't of Motor Vehicles*, 15 Wash.App. 115, 117, 547 P.2d 293 (1976). This is true even if the driver is too intoxicated to comprehend and respond to an officer's request that he submit to the test. *Dep't of Motor Vehicles v. McElwain*, 80 Wash.2d 624, 627–28, 496 P.2d 963 (1972). Ball repeatedly drank from a drinking fountain, ignoring the officer's order that he not put anything in his mouth, including water. We conclude that Ball refused to take the breath test, and the Department of Licensing properly revoked his driving privilege.

We reverse the superior court's order and remand for revocation of Ball's driving privilege.

We concur: BRIDGEWATER, J., and Hunt, C.J.

Parallel Citations

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Footnotes

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).