

DA 22-0604

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 88

BRYSON TURNER,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADV-21-450
Honorable David J. Grubich, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nathan J. Hoines, Kelli A. Cummings, Hoines Law Office, P.C., Great
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For Appellee:

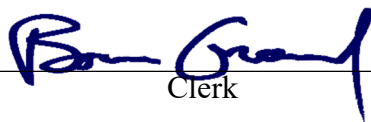
Austin Knudsen, Montana Attorney General, Bjorn Boyer, Assistant
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Submitted on Briefs: May 3, 2023

Decided: May 16, 2023

Filed


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Bryson Turner appeals the Eighth Judicial District Court’s decision to deny his petition to reinstate his driver’s license. Turner argues that his “single request” to speak to an attorney prior to both a preliminary breath test and a post-arrest blood test should not have been taken as an implied refusal to submit to either test. He contends that, because he did not refuse to take the tests, the District Court erred by refusing to reinstate his driver’s license. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On June 4, 2021, Montana Highway Patrol Trooper Donald Lee stopped Turner for speeding. The initial traffic stop ripened into an investigation for driving under the influence when Lee observed Turner’s lack of coordination and slurred speech. After Turner’s performance of standardized field sobriety tests revealed signs of impairment, Lee believed he had the appropriate particularized suspicion to request that Turner provide a preliminary breath sample to test blood alcohol levels. Before requesting that Turner provide a breath sample, Lee read the Preliminary Alcohol Screening Test (PAST) advisory. As part of the standard advisory, Lee informed Turner that Turner did not have the right to consult an attorney prior to deciding whether to take the test.

¶3 Lee later testified before the District Court that Turner explicitly refused to provide a sample for the preliminary breath test. When Lee asked if Turner was indeed refusing to provide a breath sample, Turner said that he was not refusing but that he wanted an attorney. Lee told Turner that he considered Turner’s request for an attorney to be a refusal

to submit a breath sample. Lee arrested Turner for DUI because, without the preliminary breath test, he could not dispel his suspicion that Turner was driving under the influence.

¶4 After the arrest, Lee again attempted to assess Turner's blood alcohol content, this time requesting that Turner provide a blood sample. Prior to requesting that Turner provide a blood sample, Lee read Turner the Montana Implied Consent advisory. This advisory informed Turner that, like the preliminary breath test, his right to consult an attorney did not apply to his decision to submit a blood sample. Turner told Lee that he wished to speak to an attorney prior to providing a blood sample. Lee considered Turner's request a refusal to submit to the test. Lee seized Turner's driver's license based on these refusals.

¶5 Turner petitioned the District Court to reinstate his driver's license, arguing that he did not refuse to provide a breath or blood sample. Turner maintained that he merely requested an attorney once for the preliminary breath test and once for the blood test, and that these requests should not be considered refusals. The District Court declined to reinstate Turner's license, determining that he refused the tests. Turner appeals.

STANDARD OF REVIEW

¶6 "We review a district court's ruling on a petition to reinstate a driver's license to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct." *Brown v. State*, 2009 MT 64, ¶ 8, 349 Mont. 408, 203 P.3d 842 (citation omitted). The petitioner bears the burden of proving that the suspension was improper. *Brown*, ¶ 8 (citation omitted).

DISCUSSION

¶7 Turner argues that the District Court incorrectly interpreted his “single request” for an attorney on each test as uncooperative and a refusal to provide a breath or blood test. He maintains that he did not refuse to submit samples, and his license should not have been suspended. The State counters that Turner’s explicit refusal of the preliminary breath test was sufficient to suspend his license, and his follow-up claim that he was “not refusing, but only requesting an attorney, was not a clear withdrawal of his initial refusal.” The State argues that beyond his explicit refusal, Turner impliedly refused to take the tests when he requested an attorney for both the preliminary and the post-arrest test. Regarding the preliminary breath test, the State contends that Turner impliedly refused by not responding directly to Lee’s request for a breath test after the initial refusal. Further, when requested to submit to a blood test, Turner impliedly refused by requesting an attorney, knowing how Lee would interpret this request.

¶8 By using public roadways, drivers in Montana impliedly consent to certain tests that determine the presence of alcohol or drugs in their blood. At the time Turner was arrested for suspected DUI, the relevant statutes implied a driver’s consent to: “(1) a pre-arrest preliminary alcohol screening test to estimate the person’s alcohol concentration; and (2) a post-arrest blood or breath test to determine the presence of alcohol, drugs, or both.” *Indreland v. Mont. DOJ, Motor Vehicle Div.*, 2019 MT 141, ¶ 8, 396 Mont. 163,

451 P.3d 51. *See* §§ 61-8-402, -409, MCA (2019).¹ A driver has the right to refuse these tests, effectively withdrawing the driver’s implied consent. Section 61-8-409(4), MCA. A refusal, however, may cause the person’s driver’s license to be suspended. Section 61-8-409(4), MCA.

¶9 A person whose license is suspended for refusing to submit a breath or blood sample may petition for reinstatement of the license by timely filing in district court. Section 61-8-403(1), MCA. When a person petitions for reinstatement, the court is limited to two considerations: (1) whether police had “reasonable grounds” to believe that the petitioner was operating a vehicle on a public roadway while under the influence of drugs or alcohol; and (2) whether the petitioner refused to submit to one or more tests designated by the officer. *Brown*, ¶ 11 (citing § 61-8-403(4), MCA). “This Court has repeatedly held that the ‘reasonable grounds’ requirement in § 61-8-403(4)(a), MCA, is the equivalent of a ‘particularized suspicion’ to make an investigative stop as set forth in § 46-5-401, MCA.” *Brown*, ¶ 11 (citations omitted).

¶10 Before the District Court, Turner argued that he did not refuse to provide breath and blood samples through the tests designated by Lee.² In support of his petition, Turner

¹ The statutes have since been moved, effective January 1, 2022, to §§ 61-8-1016 and -1017, MCA, but remain substantively identical: “A person who operates or is in actual physical control of a vehicle or commercial motor vehicle upon the ways of this state open to the public is considered to have given consent to a test or tests of the person’s blood or breath for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person’s body.” Section 61-8-1016(1)(a), MCA. We refer in this Opinion to the 2019 statutes in effect at the time of Turner’s arrest.

² In his notice of appeal, Turner challenged both Lee’s particularized suspicion and that he refused the tests. Turner did not brief an argument regarding particularized suspicion before the District

included a snippet of his conversation with Lee after Lee read Turner the PAST advisory.

He represented it as the following:

Lee: Will you take a breath test?

Turner: I don't refuse. I would like to speak with my lawyer before making that decision.

Lee: That right there is going to tell me "No" and that's a refusal.

¶11 The State included its version of the conversation in its response brief before the District Court, revealing that Turner omitted much of his conversation with Lee:

Lee: Bryson, will you take a Preliminary Breath Test?

Turner: I refuse.

Lee: You refuse?

Turner: No. I do not refuse.

Lee: Okay.

Turner: I would like to speak with my lawyers before making this decision.

Lee: Okay. Well, that right there is going to tell me no and that's a refusal. Okay. I'm just letting you know. That's fine. That's fine. I am going to place you under arrest for driving under the influence of alcohol.

Lee's testimony supported the State's representation of the conversation. Lee testified that Turner explicitly refused to take the preliminary breath test. Turner followed his explicit refusal by saying that he did not refuse, and he would like to speak to an attorney. Lee

Court, nor does he raise it now before this Court. We assume for purposes of this Opinion that Lee had the particularized suspicion necessary to request the tests.

testified that he marked Turner for a refusal at that point. Turner did not provide witness testimony to refute Lee's recounting of events.

¶12 Turner's argument focuses on his requests to speak with an attorney, asserting that for the preliminary breath test he expressed his wish for an attorney just once. Turner contends that asking for an attorney once should not be considered an implied refusal of a blood alcohol test. Turner does not provide a convincing argument, however, why his initial explicit refusal was insufficient to suspend his license or why this refusal should not provide relevant context to his request for an attorney.

¶13 "[I]n Montana, subsequent consent does not cure a prior refusal to submit to a blood alcohol test." *Hunter v. State*, 264 Mont. 84, 88, 869 P.2d 787, 790 (1994). And police are not "bound to accept a withdrawal of the refusal to submit to the breathalyzer test." *Hunter*, 264 Mont. at 88, 869 P.2d at 790. Turner contends that Lee did not consider the explicit refusal sufficient to suspend his license, evidenced by Lee seeking confirmation that Turner refused; the District Court therefore should not have found that Turner refused when he requested to speak to an attorney. That Turner attached, "No. I do not refuse," to his request for an attorney after Lee asked if Turner was refusing did not obligate Lee to consider Turner to be withdrawing his refusal or the District Court to find that Turner effectively withdrew his refusal. *Hunter*, 264 Mont. at 88, 869 P.2d at 790. Further, even if Lee asked Turner to confirm his explicit refusal, Turner's response requesting an attorney added context to the situation. The court considered this context when addressing Turner's refusal to provide a breath sample, stating the following:

The testimony reveals that there was an initial refusal by the Petitioner. Of course, that was – the testimony reveals that the Petitioner, then, kind of, withdrew that refusal, but replaced it with a request to speak with an attorney before making that decision. We know there’s no question here that the advisory that he was read includes the instruction that he doesn’t have a right to consult with an attorney before making that decision. And after the first request – the preliminary breath test – Trooper Lee did instruct him that his request for an attorney, at that time, would constitute a refusal.

¶14 The record reflects that Turner refused the preliminary breath test. Turner first explicitly refused to provide a sample and when asked to clarify said he was not refusing, but he wanted an attorney. At this point, Turner had been advised that he did not have the right to consult an attorney. Further, Turner told Lee that he wanted an attorney directly after he explicitly refused to take the test. We do not find the court’s reasoning “vague,” as Turner suggests. Turner’s explicit refusal was sufficient to suspend his license. That he requested to speak to an attorney before agreeing to a breath sample, after explicitly refusing to provide a breath sample, further demonstrated his refusal. The court did not err when it found that Turner refused the preliminary breath test.

¶15 Turner next argues that his request to consult an attorney when Lee asked if he would provide a post-arrest blood sample did not constitute the kind of “continual” behavior that we have recognized to be an implied refusal. We have found that “uncooperative” behavior may constitute an implied refusal to submit to a blood alcohol test—for example, deficient performance in a breath test when capable of performing or continually asking for an attorney. *See City of Great Falls v. Allderdice*, 2017 MT 58, ¶ 11, 387 Mont. 47, 390 P.3d 954 (citations omitted); *Johnson v. Division of Motor Vehicles, Montana Department of Justice*, (219 Mont. 310, 314, 711 P.2d 815, 817-18

(1985) (holding that a defendant impliedly refused a breath test by asking for an attorney three times).

¶16 Turner contends that because he asked for an attorney only once after being read the advisory to the blood test he did not engage in the kind of “continual” behavior that we recognized as uncooperative in *Johnson*. But Turner requested an attorney after Lee read him the PAST advisory stating that he did not have the right to an attorney prior to providing a breath sample; after his explicit refusal to provide a breath sample; after Lee informed Turner that requests to speak to an attorney would constitute a refusal to provide a sample; and after a second advisory, directly prior to Lee requesting a blood sample, that Turner did not have the right to speak to an attorney prior to the test. Presented with this evidence, the court did not err when it found that “when he refused the request for a blood test, the situation certainly would have been clear to Mr. Turner that requesting an attorney, knowing that he didn’t have a right to make that request before making that decision would constitute a refusal.” The District Court correctly denied Turner’s petition.

CONCLUSION

¶17 Turner did not meet his burden to prove that the suspension of his driver’s license was improper. We affirm the District Court’s denial of the petition to reinstate his license.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR