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Right to Counsel Prior to Submission to Breathalyzer Test--The Impact of Missouri Supreme Court Rule 37.89

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States territory, but also of possible retaliatory actions by other states.⁴⁸ The *IIT* court's expansion of a basis for subject matter jurisdiction, *i.e.*, significant conduct in the United States when there is no finding of substantial effect on American interests or American investors, seems reasonable and desirable.

PAUL V. HERBERS

RIGHT TO COUNSEL PRIOR TO SUBMISSION TO BREATHALYZER TEST—THE IMPACT OF MISSOURI SUPREME COURT RULE 37.89

*Gooch v. Spradling*¹
*Spradling v. Deimeke*²

John Gooch was arrested for driving while intoxicated and was taken to a police station where the arresting officer requested that Gooch submit to a breathalyzer test. Gooch asked to consult with his attorney before deciding whether to submit to the breathalyzer test but this request was denied. The officer continued to offer the test to Gooch, but after a series of refusals, the officer filled out a refusal form in accordance with section 564.444, RSMO 1969.³ Pursuant to the same statute, Gooch's operator's license was revoked for one year. The revocation was based on Gooch's refusal to take the

48. Becker thinks that one effect of an application of the Securities Exchange Act that violates international law would be the risk that other states will do the same resulting in a "crazy-quilt of law covering sales of stocks and bonds issued by corporations of international investment interest." See Becker, *Extraterritorial Dimensions of the Securities Exchange Act*, 2 N.Y.U.J. INT'L L. & POL. 233, 234 (1969). The *Bersch* court noted the dubious binding effect of a judgment for the defendants on absent foreign plaintiffs in the large class action case. *Bersch* also expressed doubts about the propriety of purporting to bind those foreign plaintiffs. See Goldman & Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 VA. L. REV. 1015, 1026 (1969), for a list of various factors to determine whether a statute should be given extraterritorial application. See also Comment, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 104-09 (1969), which considers formation of a general rule.

1. 523 S.W.2d 861 (Mo. App., D.K.C. 1975).

2. 528 S.W.2d 759 (Mo. 1975).

3. The refusal form was authorized by § 564.444, RSMO 1969. See statute quoted note 8 *infra*.

breathalyzer test.⁴ Gooch filed a petition for review as authorized under section 564.444, RSMO 1969,⁵ and the circuit court set aside the revocation. The Missouri Court of Appeals, Kansas City District, affirmed, holding that Missouri Supreme Court Rule 37.89⁶ entitled Gooch to an opportunity to consult with an attorney "at all times" after his arrest.⁷

Sections 564.441-444, RSMO 1969,⁸ are often referred to as the "implied consent" law. However, the court in *Gooch* pointed out that this is actually a misnomer because the motorist does in fact have a real option, either to consent to the breathalyzer test or refuse it.⁹ This view is in agreement with the position in the majority of states with similar statutes.¹⁰

The holding in *Gooch* was based on Missouri Supreme Court Rule 37.89, which guarantees the right to consult with counsel to "[e]very person

4. See statute quoted note 8 *infra*.

5. *Id.*

6. MO. SUP. CT. R. 37.89 provides:

Every person arrested and held in custody by any peace officer in any jail, police station or any other place, upon or without a warrant or other process for the alleged commission of an offense or upon suspicion thereof, shall be permitted to consult with counsel or other persons in his behalf at all times and, for such purposes, to use a telephone if one be available.

7. 523 S.W.2d at 866.

8. Section 564.441, RSMO 1969, provides in part:

Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 564.441, 564.442 and 564.444, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated. The test shall be administered by or at the direction of a law enforcement officer whenever the person has been arrested for the offense.

Section 564.444, RSMO 1969, provides in part:

If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given. In this event, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon the public highways of this state while in an intoxicated condition and that, on his request, refused to submit to the test. Upon receipt of the officer's report, the director shall revoke the license of the person refusing to take the test for a period of not more than one year; or if the person arrested be a nonresident, his operating permit or privilege shall be revoked for not more than one year; or if the person is a resident without a license or permit to operate a motor vehicle in this state, an order shall be issued denying the person the issuance of a license or permit for a period of not more than one year.

9. 523 S.W.2d at 865.

10. See, e.g., *Brady v. Tofany*, 36 App. Div. 2d 987, 320 N.Y.S.2d 880 (1971); *Blow v. Comm'r of Motor Vehicles*, 83 S.D. 628, 164 N.W.2d 351 (1969).

arrested and held in custody by any police officer"¹¹ The *Gooch* court read rule 37.89 in conjunction with sections 564.441-.444, RSMO 1969, and concluded that the rule's right to counsel guarantee was applicable to the breathalyzer test situation.¹² This decision is supported by Missouri Supreme Court Rule 37.02 which states that rule 37.89 is to apply to all municipal court proceedings and traffic cases.¹³ The interpretation is also in accord with decisions from other states with similar statutory provisions.¹⁴

A matter not entirely resolved in the *Gooch* opinion is what constitutes "consulting with counsel" in the breathalyzer test situation. The language of the rule indicates that the telephone is but one of the means authorized and does not rule out in-person consultations between the licensee and his attorney.¹⁵ In *Gooch*, the court implied that consulting with counsel under rule 37.89 includes consultation either by telephone or in person if the attorney can promptly reach the location where the test is to be given.¹⁶ However, the court indicated in dictum that rule 37.89 does not require that the licensee be given in-person consultation with his attorney where he has previously consulted with his attorney by telephone.¹⁷

The recent Missouri Supreme Court decision in *Spradling v. Deimeke*¹⁸ addressed many of the issues raised in the *Gooch* opinion. Deimeke was arrested at 1:45 a.m. for driving while intoxicated. The arresting officer requested that Deimeke submit to a breathalyzer test and informed him of the consequences should he refuse. Deimeke agreed to take the test. He arrived at the location where the test was to be administered about 2:30 a.m. Deimeke was permitted to telephone his attorney and did in fact communicate with him. After the telephone conversation, Deimeke stated that he was not going to take the test without the presence of his attorney. The officer wrote the matter up as a refusal, and Deimeke's driver's license was revoked for one year. The Missouri Supreme Court affirmed the revocation by holding that Deimeke's request to have counsel present as a condition precedent to taking the breathalyzer test constituted a refusal within the meaning of section 564.444, RSMO 1969.¹⁹

The *Deimeke* court found that there was no constitutional right to counsel in the breathalyzer test situation. With regard to the administrative nature of license revocation, this position is in line with that taken in the majority of other states.²⁰ However, the *Deimeke* court did not purport to

11. MO. SUP. CT. R. 37.89.

12. 523 S.W.2d at 866.

13. MO. SUP. CT. R. 37.02.

14. Siegwald v. Curry, 40 Ohio App. 2d 313, 318, 319 N.E.2d 381, 385 (1974).

15. See rule quoted note 6 *supra*.

16. 523 S.W.2d at 867.

17. *Id.*

18. 528 S.W.2d 759 (Mo. 1975).

19. *Id.* at 766.

20. See, e.g., Calvert v. State Dep't of Revenue, Motor Vehicle Div., 519 P.2d 341 (Colo. 1974); Wiseman v. Sullivan, 190 Neb. 724, 211 N.W.2d 906 (1973); Phaves v.

distinguish between the administrative procedure of license revocation and the criminal prosecution for driving while intoxicated. Other state courts have carefully distinguished the two situations and have limited their holdings that there is no constitutional right to counsel to the license revocation situation.²¹

Addressing the claim of statutory right to counsel under rule 37.89, the supreme court approved the holding in *Gooch*, that there is a statutory right to consult with counsel prior to deciding whether to submit to a breathalyzer test.²² However, the court further determined that rule 37.89 does not guarantee a licensee the right to have an attorney present at such test nor to condition his consent to take the test on the presence of counsel during the test.²³ This interpretation seems clearly mandated if the statute providing for the administration of breathalyzer tests is not to be completely frustrated. However, presence of counsel during the administration of the test is not precluded. The court said that if the attorney arrives before or during the administration of the test, the licensee has the right to have the attorney present during the testing procedure.²⁴

With respect to the right to consult under rule 37.89, the *Deimeke* court stated:

In the instant case, appellant was afforded and exercised his right to call his lawyer and did not consult with him on the phone. If his lawyer had come to the police station, appellant would have had the right to consult with him in person.²⁵

This language can be interpreted to mean that the licensee has the right to consult with his attorney both by telephone and in person at the testing location if his attorney promptly arrives there. Another possible interpretation is that once the licensee has received the advice of his attorney by telephone, his right to consult under rule 37.89 has been satisfied, and he is not entitled to consult with his attorney again at the test location. This interpretation is equivalent to reading the second sentence of the quoted

Dep't of Pub. Safety, 507 P.2d 1225 (Okla. 1973); *Blow v. Comm'r of Motor Vehicles*, 83 S.D. 628, 164 N.W.2d 351 (1969).

21. See, e.g., *Blow v. Comm'r of Motor Vehicles*, 83 S.D. 628, 164 N.W.2d 351 (1969); *Gottschalk v. Sueppel*, 258 Iowa 1173, 140 N.W.2d 866 (1966).

22. 528 S.W.2d at 763. This right is based on MO. SUP. CT. R. 37.89. This position was followed in *Dain v. Spradling*, 534 S.W.2d 813 (Mo. App., D. St. L. 1976).

23. 528 S.W.2d at 764. The supreme court stated the reasoning for this position:

[I]t must be immediately recognized that if a person is entitled to have someone else of their choosing present as a condition to performing the breathalyzer test, then the test is readily avoidable. The person who has been requested to be present may not come or he may delay arrival until a time when the alcohol has been dissipated. The practical result would simply be a readily available technique to circumvent the implied consent law.

24. 528 S.W.2d at 763.

25. *Id.*

language to mean "if *instead* his lawyer had come" The latter interpretation is consistent with the construction of rule 37.89 advanced by the *Gooch* court.²⁶ That interpretation is also supported by the *Deimeke* court's statement that the purpose of rule 37.89 is to afford the licensee a reasonable time to contact his attorney and get the benefit of his lawyer's advice.²⁷ This purpose is satisfied by the initial telephone conversation. Requiring in-person consultation after the licensee has already consulted with his attorney by telephone would enable the licensee to delay the administration of the breathalyzer test. The *Deimeke* court expressly stated that a licensee is not entitled to delay the test until his attorney arrives.²⁸ Thus, the supreme court's interpretation of rule 37.89 should probably be understood to recognize the right of each licensee to *one* consultation whether in person or by telephone.

The determination that the licensee is entitled to one consultation with his attorney before deciding whether to submit to the breathalyzer test is not a final resolution of the problem. Consider the situation where the licensee contacts his attorney by telephone and all his attorney tells him is that he will be right over. Technically, the licensee has had the opportunity to consult with counsel. Moreover, in *Deimeke*, the supreme court stated that a licensee could not condition his consent to take the breathalyzer test on the presence of counsel. However, assuming that the delay would not jeopardize the validity of the breathalyzer test, the police would be unwise, on the strength of *Deimeke*, to refuse to wait a few minutes for the licensee's attorney to arrive.

Another troublesome situation not addressed by the *Deimeke* court is where the licensee calls his attorney and talks to his secretary. The secretary might inform the attorney of the situation and he might instruct her to relay the message that he is on his way to the place of detention. In this situation it is harder to show that the licensee has had an opportunity to consult with counsel. To say that the licensee had an opportunity to consult with counsel in this situation could be viewed as denying his right to consult solely because of the actions of his attorney. However, if the situation is not viewed as an opportunity for the licensee to consult with counsel, it constitutes a method for the licensee to evade the impact of the *Deimeke* decision. In *Deimeke*, the court did not make it clear whether the licensee can postpone his decision to submit to the breathalyzer test in this manner.

Neither court elected to fix a specific amount of time to which a licensee is entitled in his attempt to obtain the advice of counsel under rule 37.89. The *Gooch* court, while acknowledging that there was a limit to the time period that is afforded a licensee to contact his attorney under rule 37.89, said that a telephone call made within a few minutes of the request or counsel's presence secured within the hour did not exceed the time period

26. 523 S.W.2d at 867.

27. 528 S.W.2d at 765.

28. *Id.*

required.²⁹ In *Deimeke*, the supreme court asserted that a licensee must be given a "reasonable time" to obtain the advice of counsel and that one hour could be a "reasonable time."³⁰ While police officers would undoubtedly prefer a fixed time limit, the "reasonable time" test provides a workable standard for the judiciary. What constitutes a "reasonable time" in the breathalyzer test situation must necessarily be the subject of an independent judicial determination based on the facts and circumstances of each case. It should be emphasized, however, that once the licensee consults with his attorney, his rights under rule 37.89 have been satisfied. The licensee is not entitled to the balance of his "reasonable time" period to wait for his attorney to arrive because he is not entitled to condition his consent upon the presence of his attorney.

In both *Gooch* and *Deimeke*, the Missouri courts were faced with the problem of reconciling the protections of rule 37.89 with the license revocation statutes. It is clear from these decisions that there is no constitutional right to counsel in the breathalyzer test situation. The statutory protection of rule 37.89 was clearly interpreted to entitle a licensee to a "reasonable time" in which to contact and consult with his attorney before he may be deemed to have refused the breathalyzer test. In most cases, this "reasonable time" will probably be at least one hour. However, once the licensee consults with his attorney either by telephone or in person, his rights under rule 37.89 will be satisfied. The licensee may not condition his consent on his attorney's presence during administration of the test, but he is entitled to the presence of his attorney during the test if the attorney arrives before it is administered. These principles represent a workable compromise based on a thoughtful consideration of the interests involved.

THOMAS F. DASSE

29. 523 S.W.2d at 867.

30. 528 S.W.2d at 764-65.

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