

LICENSES:
DRIVERS LICENSE:
BREATH TEST:

The revocation of the operators license by the Director of Revenue of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Cum. Supp. 1965, should not be rescinded by the court because the offender was subsequently charged with driving while intoxicated under a county or municipal ordinance rather than the state law.

If a person refuses to take the test as provided in Section 564.441, RSMo Cum. Supp., the arresting officer should send a sworn statement to the Director of Revenue as provided in Section 564.444, RSMo Cum. Supp., regardless of what criminal charges are subsequently brought against the driver.

August 11, 1966

OPINION NO. 390

Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Clayton, Missouri 63105



Dear Mr. O'Brien:

This is in answer to your request for an opinion in which you ask whether a court may rescind an order of the Director of Revenue revoking the drivers license of a person who has refused to take a chemical breath test as provided in Sections 564.441-564.444, RSMo Cum. Supp., when such person is later criminally charged with driving while intoxicated in violation of a county or municipal ordinance rather than a state law. Your request also inquires as to whether the police officers of a municipality should send a sworn written report to the Department of Revenue requesting the revocation of the license of such a person because of his refusal to take the test as provided by Section 564.444, RSMo Cum. Supp.

Section 564.441, RSMo Cum. Supp. provides in part:

"1. 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

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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. * * *
(Emphasis ours)

The authority of the Director of Revenue to revoke the license of one who refuses to take this test is found in Section 564.444, RSMo Cum. Supp. as follows:

"1. 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; o[r] if the person arrested be a non-resident, 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. (Emphasis added).

"2. If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:

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(1) Whether or not the person was arrested;

(2) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and,

(3) Whether or not the person refused to submit to the test.

"3. If the judge determines any issue not to be in the affirmative, he shall order the director to reinstate the license or permit to drive.

"4. Requests for review as herein provided shall go to the head of the docket of the court wherein filed."

If the procedural requirements prescribed in Section 564.444 are satisfied, in our opinion it makes no difference whether the driver is subsequently charged with driving while intoxicated under the state law, Section 564.440, RSMo Cum. Supp., or under a local ordinance or indeed whether criminal charges for driving while intoxicated are ever brought. The revocation of the person's drivers license is for refusing to take the test and is not affected by any subsequent proceedings relating to criminal charges for driving while intoxicated. On this point we enclose a copy of our Opinion No. 69 issued February 8, 1966, to the Honorable Thomas A. David, Director of Revenue, in which we found that the revocation of the operator's license of one who has refused to take a chemical breath test may not be rescinded except for those reasons set out in paragraph 2 of Section 564.444, RSMo Cum. Supp., and is not affected by a subsequent finding of not guilty of a criminal charge of driving while intoxicated under Section 564.440.

For the same reasons set out in the opinion to Mr. David, we think that a court would be incorrect in rescinding the revocation of the drivers license of one who has refused to submit to a chemical breath test because he was subsequently charged with driving while intoxicated under a municipal ordinance.

It may be seen that the legislature contemplated the possibility of a licensee being charged under a county or municipal ordinance, for in Section 564.442, RSMo Cum. Supp., it is stated that the evidence obtained from the chemical breath test is admissible in a trial "of any criminal action or violations of county or municipal ordinances arising out of acts alleged to have been committed by any person while driving a motor vehicle while intoxicated."

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It could not reasonably be said that the legislature intended the results of a chemical breath test to be used in the trial of one alleged to have been driving while intoxicated in violation of county or city ordinances but the sanctions against one refusing to take the test could not be applied if he was later charged with the same county or municipal violations.

In answer to your second question, if a municipal officer arrests a driver for any offense arising out of acts which he had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated and such person refuses to submit to the test, the officer should send a sworn statement to the Director of Revenue containing the information required in the emphasized portion of Section 564.444. This report should be sent regardless of what charge is made against the person as this has no bearing upon the authority of the Director to revoke his license.

Section 564.444-2 provides that the arresting officer should be represented at the hearing by the local prosecuting attorney in appeals in this nature who should vigorously oppose any rescission of the order revoking a drivers license for the reasons discussed herein. If the judge still rescinds the Director's order, the prosecuting attorney should immediately notify the Director of Revenue and this office so that an appeal may be taken if deemed desirable. This is the only way the legality of the judge's actions can be determined. We have sent a copy of the letter requesting this opinion together with this opinion to the Department of Revenue and asked them to notify us when an order of revocation has been rescinded under the circumstances herein.

CONCLUSION

The revocation of the operators license by the Director of Revenue of one who has refused to take a chemical breath test as provided in Sections 564.441 and 564.444, RSMo Cum. Supp. 1965, should not be rescinded by the court because the offender was subsequently charged with driving while intoxicated under a county or municipal ordinance rather than the state law.

If a person refuses to take the test as provided in Section 564.441, RSMo Cum. Supp., the arresting officer should send a sworn statement to the Director of Revenue as provided in Section

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564.444, RSMo Cum. Supp., regardless of what criminal charges are subsequently brought against the driver.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON
Attorney General

Enclosure (opinion):

No. 69, to David, 2/8/66