

OFFICIAL OPINION NO. 44

December 31, 1969

Superintendent Robert K. Konkle
Indiana State Police
301 State Office Building
Indianapolis, Indiana 46204

Dear Superintendent Konkle:

This is in response to your request for an Official Opinion concerning the 1969 "Implied Consent" Statute. Your request raises the following questions:

1. Are the requirements of Acts of 1969, Ch. 64, as found in Burns' (1969 Supp.), Section 47-2003, independent of prior existing law?
2. Is the result of the breath analysis test inadmissible as evidence in a "driving under the influence" case where the arresting officer fails to follow the requirements of that Act?

Acts of 1969, Ch. 64, *supra*, is not amendatory legislation. It is, rather, supplemental to existing legislation. The primary purpose of this Act is to encourage persons arrested for "driving under the influence" to submit voluntarily to a breath analysis test. Under this new Act, a person gives his implied consent to take such a test when he obtains his driver's license. Failure to take such a test when arrested is grounds for the Bureau of Motor Vehicles to revoke his driver's license.

The Act has its own requirements separate and apart from those for "driving under the influence" which must be followed by an arresting officer in order for its sanctions to apply. Whether these requirements have been followed by the arresting officer is a matter for determination by the Court. Of course, failure to follow the requirements of the Act when such failure is properly presented to the court could affect the admissibility as evidence of any breath test. The statutory requirements must be followed if the sanctions of the Act are properly to be applied.

3. Can the arresting officer release a man arrested for driving under the influence when the results of the

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breath test are less than .15% by weight of alcohol in his blood, or is he required to take the accused before a magistrate?

In answer to your third question, Acts of 1939, Ch. 48, Sec. 163, as found in Burns' (1965 Repl.), Sec. 47-2307, requires that any person arrested on a charge of driving under the influence of intoxicating liquor or narcotic drugs *must be taken before a magistrate*. Since the Act in question, Acts of 1969, Ch. 64, *supra*, requires a lawful arrest before the subject submits to the breath analysis test, it follows that this person must be presented to a magistrate as soon as practicable under the circumstances. If an arrest has been made based upon factual evidence observed by the arresting officer, then the result of the breath analysis test is not the only criterion which determines whether the person is or has been "driving under the influence"; and so a negative result on the test does not automatically dictate a release.

4. Is the arresting officer required to be in uniform as per Acts of 1969, Ch. 64, Sec. 1, *supra*, or may he be out of uniform but in a clearly marked police vehicle, as per Acts of 1927, Ch. 109, Sec. 1, as last amended by Acts of 1969, Ch. 144, Sec. 1, as found in Burns' (1969 Supp.), Section 47-809?

In answer to your fourth question, it has long been held that statutes relating to the same subject matter and passed in the same session of the Legislature are to be construed together. While the Acts in question are separate and distinct from each other, dealing with different general subjects, they are, however, in irreconcilable conflict in the specific subject pertaining to an arresting officer's uniform requirements. Where there is irreconcilable conflict, the statute last approved by the Governor must take precedence. In the case at hand, Acts of 1969, Ch. 64, Sec. 1, as found in Burns' (1969 Supp.), Section 47-2003c was approved by the Governor on March 6, 1969. Acts of 1969, Ch. 144, Sec. 1, *supra*, was approved by the Governor on March 12, 1969. The latter Act thus takes precedence and provides that an officer may make an arrest out of uniform if he identifies himself and if he is operating a motor vehicle which is clearly marked as a police vehicle.

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5. What effect, if any, does Acts of 1969, Ch. 64, *supra*, have on Acts of 1939, Ch. 48, Sec. 54, which indicates that a chemical analysis of "breath, urine, or other bodily substance" is permissible to determine blood alcohol content?

6. What effect does Ch. 64 have on 1966 O. A. G. No. 17, which is an interpretation of the applicability of the Schmerber decision in Indiana?

In answer to your fifth question, Acts of 1969, Ch. 64, (Burns' 47-2003c through 47-2003h) is a separate and distinct Act from Acts of 1939, Ch. 48, Sec. 54, as amended (Burns' Sec. 47-2003). Chemical analysis of breath, urine, or other bodily substance continues as a valid method of determining blood alcohol content for evidentiary purposes. In answer to question six, it also follows that Official Opinion No. 17, 1966 O. A. G. is unaffected by this Act.

In this connection, a review of Attorney General's Official Opinion No. 41, dated December 4, 1969, will also clarify the matter of taking arrested persons before a magistrate (Burns' 47-2307, 47-2308; Acts of 1939, Ch. 48, Sections 163 and 164).