

ATTORNEY GENERAL

May 13, 1981

JOAN H. WISKOWSKI, *Director*  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION NO. 4—1981

Dear Director Wiskowski:

The Division of Motor Vehicles has asked for an opinion with regard to its authority to impose a one year revocation of driving privileges for the refusal of a motorist to submit to a breath chemical test. Specifically, the issue posed is whether a one year revocation should be imposed where a motorist who has previously been convicted of the substantive offense of driving while under the influence of intoxicating liquor is subsequently arrested on probable cause for driving while under the influence and refuses to take the breath chemical test. For the following reasons, you are advised that the Division of Motor Vehicles should impose a one year revocation of driving privileges in an instance where a motorist has been arrested for a subsequent drinking-driving violation and refuses to take a breath chemical test. You are further advised that there need not be a conviction on the subsequent substantive offense to warrant the imposition of the one year revocation for a refusal to take a breath chemical test.

The pertinent provision in this case is N.J.S.A. 39:4-50.4(b) which provides:

Any revocation of the right to operate a motor vehicle over the highways of this State for refusing to submit to a chemical test shall be for 90 days *unless the refusal was in connection with a subsequent offense of this section*, in which case, the revocation period shall be 1 year. . . . [Emphasis supplied].

In *Formal Opinion No. 13—1977*, dated June 8, 1977, the Attorney General advised the Director of Motor Vehicles that a one year revocation of driving privileges should be imposed in an instance where a motorist refuses to take a breath chemical test in connection with a subsequent substantive offense of driving while intoxicated with or without regard to whether there has been a prior breath refusal connected with a previous offense. In *In the Matter of Bergwall*, 85 N.J. 382 (1981), the Supreme Court of New Jersey substantially for the reasons stated in the dissent in the Appellate Division reported at 173 N.J. Super. 431 (App. Div. 1980) held in effect that N.J.S.A. 39:4-50.4(b) should be implemented by the Division of Motor Vehicles in a manner consistent with the advice given by the Attorney General, i.e., a one year revocation of driving privileges should be imposed in an instance where a breath refusal is in connection with a subsequent substantive offense of drunk driving with or without regard to a prior breath refusal.

The question remains, which is the focus of your inquiry, whether a second or subsequent offense needed to warrant the imposition of the enhanced one year revocation was intended to require that a motorist be

FORMAL OPINION

convicted of a subsequent offense or rather whether an arrest on probable cause for having committed such an offense is sufficient. The legislative history underlying the enactment of this provision provides guidance. In the "Statement to the Senate Bill, No. 1423," page 2, item 8 (May 24, 1976) prepared by the Senate Law, Public Safety and Defense Committee, it is indicated that the Motor Vehicle Study Commission recommendation regarding amendment of penalty provision of the refusal statute was:

1st-6 mos.+  
Alcohol Education or  
Rehabilitation Subsq.  
to Prior DWI Conv.  
in 15 yrs.—2 yr.

From this language, it is apparent that the one-year suspension was intended to apply in all cases where the refusal followed a prior driving while intoxicated conviction. No other prerequisite is indicated. More specifically, no requirement is indicated that the refusal must be followed by conviction on the related drinking-driving charge before the one-year penalty shall apply.

Similarly, in the "Statement to Senate Bill, No. 1423," p. 2 (September 27, 1976) prepared by the Assembly Judiciary, Law, Public Safety and Defense Committee, it is stated that the bill, as amended, would provide, among other things, that the:

Penalties for refusing the breath test would be a 90-day license suspension if no prior offense or 1 year suspension *if a prior conviction within 15 years.* [Emphasis added].

Again, there is no indication that anything more than the existence of a prior drinking-driving conviction followed by a refusal to take the breath test is needed before the one-year suspension will apply. It appears that probable cause to believe that the offense has been committed when coupled with the existence of the prior driving while intoxicated conviction was apparently thought sufficient by the Legislature to trigger the enhanced penalty provision for a breath refusal.

This was also the understanding of the Governor when he signed the bill into law. In his Statement upon signing of Senate Bills Nos. 1416-1423, p. 4, released February 24, 1977, it was stated that:

Refusal to take the breath test after arrest for suspected drunken driving will result in a 90 day license suspension if no prior conviction exists and one year if there has been prior conviction within 15 years.

Again, the import is clear—conviction on the driving while intoxicated charge which accompanied the breath test request and refusal is *not* a prerequisite to imposition of the one-year suspension.

This conclusion, drawn from the available legislative history, is fully consistent with an apparent legislative purpose to encourage motorists who

ATTORNEY GENERAL

have previously been convicted of driving while intoxicated and who are again arrested for that same offense to take the breathalyzer test. This presumed legislative purpose is reflected in the Motor Vehicle Study Commission's 1975 report, which report was substantially relied upon by the legislature in drafting its extensive amendments in 1977 to the Motor Vehicle Act. The Commission noted that:

If an individual is a second offender under the impaired statute, it is advantageous for him to refuse the test, since the penalty he must receive, if convicted, is two years loss of license. If he is charged with driving while under the influence, he faces either a two or ten year revocation, depending on his prior record. By refusing the test, he deprives the state of objective evidence of intoxication or impairment (and perhaps evidence of his own innocence) and risks a six-month suspension. . . .

. . . .  
It is presently advantageous for an individual to refuse the breath test since the refusal suspension penalty is so much shorter than any penalty imposed under N.J.S.A. 39:4-50 except for a first 'impaired' offense. That advantage should be removed from the law so that more individuals will be induced to take the test. [Report of the Motor Vehicle Study Commission, September 1975, at pp. 147-48, 150-51.]

Therefore, it should be noted that if a conviction on a subsequent driving while under the influence charge is required as a precondition to the imposition of a one year revocation for refusal to take a breath test, the incentive to take a breath test will be lost, i.e., in the event a motorist believes he can win acquittal on the subsequent offense by refusing to take the breath test, he would have every reason to do so for he would also thereby avoid the one year suspension for the breath refusal. On the other hand, under an interpretation of the statutory language which would allow the imposition of the one year revocation whether or not a conviction is obtained on the drinking-driving violation, the incentive to take the breath test clearly exists.

For these reasons, you are advised that the Director should impose a one year revocation of driving privileges in an instance where a motorist who has previously been convicted of the substantive offense of driving while under the influence of intoxicating liquor has again been arrested on probable cause for the offense and refuses to take a breath chemical test. There need not be a conviction obtained on the substantive offense to warrant the imposition of the one year revocation for a breath refusal.

Very truly yours,  
JAMES R. ZAZZALI  
*Attorney General*

By: ROBERT M. JAWORSKI  
*Deputy Attorney General*