



DMV Per Se: Hearings and Appeals

October 16, 2019

6:00 p.m. – 8:30 p.m.

CT Bar Association

New Britain, CT

CT Bar Institute, Inc.

CT: 2.5 CLE Credits (General)
NY: 3.0 CLE Credits (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Faculty Biographies

[Andrew Marcucci, Attorney, Ruane Attorneys](#)

Andrew is a 2019 recipient of the Game Changer's Award by the CT Law Tribune and accomplished DMV lawyer who has personally handled over 250 DMV hearings in his career.

[Jay Ruane, Partner, Ruane Attorneys](#)

Jay is well known statewide as a premiere DUI attorney who has represented thousands of DUI clients in the last 20 years. Jay is a published Author on the topic of DUI Defense with multiple guidebooks available on Amazon.com

DMV Per Se: Hearings and Appeals (EDU191016)

Agenda

6:00 – 6:10 p.m.	Introduction
6:10 – 6:35 p.m.	Fundamental Caselaw for Per Se Hearings
6:35 – 7:10 p.m.	The DMV Hearing Process – with presenter and without
7:10 – 7:25 p.m.	Petitions for Reconsideration
7:25 – 7:45 p.m.	Preparing for Appeal
7:45 – 8:15 p.m.	The DMV Appeal – process, practical tips
8:15 – 8:30 p.m.	Questions and Answer Period

Important DMV Per Se Caselaw

Jay Ruane and Andrew Marcucci

CBA Presentation - October 16, 2019



RUANE
ATTORNEYS AT LAW

Introduction

Statutory Authority

Per se hearings are held pursuant to § 14-227b and are limited to four issues: See *Buckley v. Muzio*, 200 Conn. 1, 8, 509 A. 2d 489 (1986); *Weber v Muzio*, 204 Conn. 521, 523, 528 A. 2d 828 (1987). The four (4) issues at the administrative hearing are as follows:

Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or drug or both or while his ability to operate such vehicle was impaired by the consumption of intoxicating liquor; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test, commenced within two hours of the time of operation and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was eight-hundredths of one percent or more of alcohol, by weight; and (4) was such person operating the motor vehicle". Conn. Gen. Stat. §14-227b(f).

Conn. Gen. Stat. § 14-227b(f) expressly restricts a license suspension hearing to the determination of the following four issues: (1) did a police officer have probable cause to arrest a person for operating a motor vehicle while under the influence of an intoxicating liquor or drug or both or was his ability to operate such motor vehicle impaired by the consumption of an intoxicating liquor; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis; and (4) was such person operating the motor vehicle. *Dalmaso v. DMV*, 47 Conn. App. 839, 707 A. 2d 1275, 1998 Conn. App. LEXIS 84 (1998).

Conn. Gen. Stat. 14-227b does not require, as a prerequisite to license suspension, that the commissioner of motor vehicles find that the motorist fully understood what he or she had been told by the police. *Rupert v. Goldberg*, 1993 Conn. Super. LEXIS 1015 (Conn. Super. Ct. Apr. 29 1993).

To the extent that Conn. Agencies Regs. § 14-227b-10(a) conflicts with Conn. Gen. Stat. § 14-227b(c), the regulation must give way to the statute. *Robinson v. Comm’r of Motor Vehicles*, 1997 Conn. Super. LEXIS 1620 (Conn. Super. Ct. June 11 1997).

Burden of Proof (at Hearing and on Appeal of Decision)

The burden is on the plaintiff at the administrative hearing to prove that the decision by the DMV to suspend his license is clearly erroneous based on the record. See *Schallenkamp v DelPonte*, 229 Conn. 31, 39, 639 A. 2d 1018 (1994); *Lawrence v. Kozlowski*, 171 Conn. 705, 713-14, 372 A. 2d 110 (1077). However, there must still be “substantial evidence” in the record to support the Commissioner’s findings. *Bialowas v. Commissioner of Motor Vehicles*, 44 Conn. App. 702, 692 A. 2d 834 (1997).

Driver was an aggrieved person under Conn. Gen. Stat. § 4-183(a) of the Connecticut Uniform Procedure Act, Conn. Gen. Stat. §§ 4-166 through 4-189 and thus had standing to appeal the suspension of his driver’s license under Conn. Gen. Stat. § 14-227b, where the driver’s specific and legal interest, his license to drive, was adversely affected. *Papa v. DMV*, 1991 Conn. Super. LEXIS 2352 (Conn. Super. Ct. Oct. 15 1991).

In an administrative appeal, the plaintiff bears the burden of proving that the Commissioner of the State of Connecticut Department of Motor Vehicles decision to suspend his motor vehicle operator’s license was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Tucker v. State*, 1999 Conn. Super. LEXIS 2454 (Conn. Super. Ct. Sept. 9 1999).

To prevail on appeal, a driver with an operator’s license had the heavy burden of proving that substantial rights possessed by him had been prejudiced when his license was suspended for one year for not submitting to an alcohol test where the arresting officer had completed a report detailing probable cause to make the driving under the influence stop and proceed with an alcohol test; the decision to suspend the operator’s license had to be proven to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record in order for the driver to obtain relief on

judicial review. *Naab v. Comm’r of Motor Vehicles*, 1991 Conn. Super. LEXIS 1911 (Conn. Super. Ct. Aug. 21 1991).

Vehicle operator’s appeal of the suspension of his operator’s license was sustained because he was not provided a hearing within 35 days after he failed the blood-alcohol test and prior to the date that his license was administratively suspended, pursuant to Conn. Gen. Stat. § 14-227b. *Pike v. DMV*, 1991 Conn. Super. LEXIS 2674 (Conn. Super. Ct. Nov. 19 1991).

OPERATION

A police officer’s observation of an allegedly intoxicated person asleep in her car—absent other evidence such as whether the car was running, the engine was warm, the keys were in the ignition or the person’s admission that she was driving the car at the time of the accident—is insufficient by itself to prove that the person was “operating” the motor vehicle as required by the administrative per se license suspension provisions in Conn. Gen. Stat. §14-227b(f). Furthermore, the record was devoid of any evidence of the person’s location in the car not was there an admission of operation. *Id.* at 608. The Court held that there was no substantial evidence in the record on the issue of operation. *Gillogly v. Commissioner of the Department of Motor Vehicles*, 4 Conn. Ops. 605 (1998),

Operation can be found when a driver is found asleep at the wheel, stopped at a light with the “engine running, headlights on, the transmission in “drive” and the driver’s foot on the break...” However, “operation on a public highway” cannot be shown where a vehicle is operated purely on a private driveway and lawn, and thus, no probable cause exists for an arrest under §14-227a. In *Riddick v. Commissioner of Motor Vehicles*, 3 Conn. Ops. 992 (1997), See *Jones v. Commissioner*, 3 Conn. Ops. 422 (1997).

Substantial evidence existed to support the Commissioner of Motor Vehicle’s conclusion that a motorist was operating a motor vehicle at the time he was arrested for operating under the influence where police found the motorist in a parking lot, in

the operator's seat, with the engine running and the headlights on. *Redden v. Kozlowski*, 45 Conn. App. 225, 695 A.2d 26, 1997 Conn. App. LEXIS 249 (1997).

Ample evidence was in the record to conclude that there was probable cause to arrest the operator for driving while under the influence; the operator was seen leaving a bar at closing time before he proceeded to run through three red traffic lights. *Coart v. Delponte*, 1991 Conn. Super. LEXIS 584 (Conn. Super. Ct. Mar. 19 1991).

In an appeal brought by a motorist challenging the decision of the commissioner of motor vehicles to suspend his driver's license for one year pursuant to Conn. Gen. Stat. § 14-227b, substantial evidence supported the commissioner's finding that the motorist had operated the vehicle where he was found strapped into the driver's seat by his seat belt, he admitted to police that he had been arrested a year before on a DWI charge, and his attorney stated that the motorist lost his eyeglasses during the accident. *O'Rourke v. Comm'r of Motor Vehicles*, 33 Conn. App. 501, 636 A.2d 409, 1994 Conn. App. LEXIS 39 (1994).

A motorist's operator's license was suspended for refusal to submit to a chemical alcohol test because the state trooper had probable cause to arrest the motorist; although motorist's vehicle was located five to six feet off the main travel portion of a public highway, the state was not required to present absolute proof that the motorist was operating on a public highway, and the hearing officer reasonably inferred that the motorist had operated his vehicle on a public highway, in order to have arrived five to six feet off the travel portion, where he and his vehicle were found by the arresting state trooper. *Schuh v. Comm'r of Motor Vehicles*, 48 Conn. App. 547, 711 A. 2d 743, 1998 Conn. App. LEXIS 194 (1998).

Refusal Defined.

The Appellate Court has held that "refusing to take a breath test may be accomplished by a failure to cooperate as well as by an expressed refusal." *State v. Corbeil*, 41 Conn. App. 7, 19, 674 A. 2d 454, cert. Granted on other grounds and appeal dismissed, 237 Conn. 919, 676 A. 2d 1374 (1996). However, in *Bialowas v. Commissioner of Motor Vehicles*, 44 Conn. App. 702, 692 A. 2d 834 (1997), the Court Stated:

We hold that where it is undisputed that the motorist submitted to the chemical test, the fact that he failed to provide an adequate breath sample does not automatically constitute refusal within the meaning of § 14-227b. Such refusal must be supported by substantial evidence. A conclusory statement by the arresting officer that the driver failed to provide an adequate breath sample and has, therefore, refused, does not constitute such evidence. *Id.* At 714-15.

Accordingly, when the results of the breath test are inconclusive and there is no evidence in the Form A-44 and supplemental or narrative report that the plaintiff was uncooperative, there cannot be a refusal. See *McDonald v. Salinas*, 5 Conn. Ops. 164, 164-65 (1998) (arresting officer's conclusory statement regarding plaintiff's refusal in Form A-44 was not a justifiable reason to request subsequent urine test.)

Implied consent statute did not give the police or a hearing officer the authority to determine that a refusal to take a chemical breath test occurred within the meaning of the statute when the driver consented to take the test but failed to perform it properly for whatever reason, intentional or unintentional; therefore, the hearing officer's decision upholding the commissioner of motor vehicle's order suspending the driver's license was reversed, because the commissioner erroneously interpreted the statute by expanding it to include conduct that was not within its express terms. *Dorman v. DelPonte*, 41 Conn. Supp. 437, 582 A.2d 473, 1990 Conn. Super. LEXIS 1623 (Conn. Super. Ct. 1990).

Absence of an express refusal by a motor vehicle operator to take a Breathalyzer test did not require the conclusion that there was not substantial evidence in the record, overall, to support the hearing officer's finding that such a refusal had occurred in violation of Conn. Gen. Stat. § 14-227b; in concluding otherwise, the trial court improperly assumed the role of fact finder and, thereby exceeded the limited scope of judicial review authorized by the Uniform Administrative Procedure Act, specifically Conn. Gen. Stat. § 4-183(j). *Wolf v. Comm'r of Motor Vehicles*, 70 Conn. App. 76, 797 A.2d 567, 2002 Conn. App. LEXIS 288 (2002).

Passive conduct can constitute a refusal to submit to a breath or blood test under Conn. Gen. Stat. § 14-227b(g)(3). Where a driver refused to submit to a breath test,

later said that he would, and then refused again, his conduct constituted a valid refusal under Conn. Gen. Stat. § 14-227b(g)(3) *Keogh v. Salinas*, 2000 Conn. Super. LEXIS 1008 (Conn. Super. Ct. Apr. 4 2000).

In *Georgino v. Commissioner of Motor Vehicles*, 3 Conn. Ops. 842 (1997), the plaintiff failed the field sobriety tests requested by the arresting officer but passed the initial breath test (.091%). The officer then requested a urine test and the plaintiff refused to submit to the subsequent test. The Court held that the officer has reasonable cause to change the type of requested test under §14-227a(c)(5) to determine if the plaintiff was under the influence of drugs based on the single vehicle accident, failure of the field sobriety tests, and the plaintiff's inability to even stand. *Id.* At 843.

Driver's motor vehicle operator's license was properly suspended under Connecticut's implied consent law, Conn. Gen. Stat. § 14-227b, because although the driver verbally consented to a urine test, the driver purposely urinated prior to the administration of the test and was then unable to perform. *Pettit v. Goldberg*, 1992 Conn. Super. LEXIS 3322 (Conn. Super. Ct. Nov. 30 1992).

Where it is undisputed that the motorist submitted to the chemical alcohol test, the fact that he failed to provide an adequate breath sample does not automatically constitute refusal within the meaning of Conn. Gen. Stat. § 14-227b, where such refusal must be supported by substantial evidence. Where substantial evidence indicated that a motorist behaved in a manner that assured that a breathalyzer machine would not work, he was properly found not to have complied with Conn. Gen. Stat. § 14-227b(b) of the Connecticut implied consent law. *Tompkins v. Comm'r of Motor Vehicles*, 60 Conn. App. 830, 761 A.2d 786, 2000 Conn. App. LEXIS 568 (2000).

Under Conn. Gen. Stat. § 14-227b(b), the arresting officer was required to inform defendant only that his refusal to submit to chemical blood testing would result in a suspension of the defendant's license and not the duration of the suspension; there was no error in admitting testimony concerning defendant's refusal to submit to the test, or in charging the jury as to what inferences might be drawn from such a

refusal. *State v. Martin*, 15 Conn. App. 58, 544 A.2d 231, 1988 Conn. App. LEXIS 240 (1988).

Even though a police officer's request that an operator submit to chemical test was made more than two hours after his arrest for drunk driving, the suspension of the operator's license based on his refusal to submit to the test was proper because the delay in the request was due to the operator's need for medical treatment and was not motivated by an intent to harass or intimidate. *Knec v. Comm'r of Motor Vehicles*, 1996 Conn. Super. LEXIS 1658 (Conn. Super. Ct. June 28 1996).

WITNESSING A REFUSAL

Where a driver refuses to take a chemical test, under Conn. Gen. Stat. § 14-227b, the arresting officer's report must be endorsed by a third person who witnessed such refusal. *Chicares v. Comm'r of Motor Vehicles*, 1991 Conn. Super. LEXIS 2798 (Conn. Super. Ct. Dec. 3 1991).

Provision of Conn. Gen. Stat. § 14-227b(c) that, in addition to the person charged and the arresting officer, any refusal to take the test must be witnessed by a third party, does not require the ritualistic reenacting of the refusal in front of the third-party witness, and it is sufficient if the two officers or other persons are able to provide evidence based on their personal observation that the accused refused to participate or complete the testing process. *Sticca v. Salinas*, 1999 Conn. Super. LEXIS 2214 (Conn. Super. Ct. Aug. 12 1999).

In *Mailhot v. Commissioner of Motor Vehicles*, No. CV 98 0576680, 1998 (WL 246492, at *2 (Conn. Super. May, 4, 1998)(aff'd: 54 Conn App 62 (1999))), the Court held that §14-227b (c) does not require someone other than the arresting officer and the officer who witnessed the refusal to sign the A-44 form in order for it to be signed by a "third person".

Because the failure of a police officer to tell a driver of the consequences of a refusal to take a breath or blood test was not a basis for setting aside a suspension of his motor vehicle operator's license pursuant to Conn. Gen. Stat. § 14-227b, the driver's appeal of the suspension of his license by the Commissioner of Motor Vehicles was properly dismissed by a superior court; a license suspension hearing was

limited to the four issues that were set forth in Conn. Gen. Stat. § 14-227b(d). Neither the failure to arrest a driver before his refusal to submit to the tests prescribed by Conn. Gen. Stat. § 14-227b(b) nor the failure to have a witness endorse the report of refusal, as Conn. Gen. Stat. § 14-227b(c) provided, was a sufficient ground for overturning the determination of an adjudicator of the Commissioner of Motor Vehicles that the driver's motor vehicle operator's license should have been suspended pursuant to Conn. Gen. Stat. § 14-227b(d); there was no requirement that a driver be warned of the consequences of a failure to take the tests. *Volck v. Muzio*, 204 Conn. 507, 529 A.2d 177, 1987 Conn. LEXIS 937 (1987).

Warning Required as to Constructive Refusal.

In *Ellam v. Commissioner of Motor Vehicles*, 47 Conn. App. 509, 515, 704 A. 2d 257 (1998), the Court indicates that the arresting officer has an obligation to warn the plaintiff that he/she is not performing the test adequately as instructed (i.e. not forming a proper seal on the breath tube.), and that his/her conduct can constitute a refusal under §14-227b. The Court distinguished *Bialowas* on its facts and found a refusal, because of the officer's clear observations of the plaintiff's lack of cooperation after providing sufficient breath for one test that showed the plaintiff was twice over the legal limit. *Id.* See also *Heins v. Commissioner*, No. CV 98 0580699. 1998 WL 707805 (Conn. Super. Sept. 29, 1998)

Operator's repeated failure to blow sufficient breath into the tube after his arrest for driving under the influence of alcohol constituted a refusal to take the breath test under Conn. Gen. Stat. § 14-227b. Police report, which stated the police officers' observation that an operator failed to cooperate in taking a breath test, was sufficient evidence to support a hearing officer's determination that the operator refused to submit to the test. *Ellam v. Comm'r of Motor Vehicles*, 1996 Conn. Super. LEXIS 3354 (Conn. Super. Ct. Dec. 18 1996). *Boober v. Comm'r of Motor Vehicles*, 1996 Conn. Super. LEXIS 5 (Conn. Super. Ct. Jan. 3 1996).

Where a driver had told the arresting officer that he could neither submit to nor refuse a breath test without the advice of counsel, the officer properly determined that the driver had refused the breath test, and his license suspension was upheld because

he had no constitutional right to counsel prior to submitting or refusing because the test was not seeking an incriminating statement. *Altschul v. Salinas*, 53 Conn. App. 391, 730 A.2d 1171, 1999 Conn. App. LEXIS 196 (1999).

Where a driver failed field sobriety tests and marijuana residue was found in his vehicle, it was lawful under Conn. Gen. Stat. § 14-227a for an officer to request a urine test after the driver's breath test for alcohol failed to indicate a violation; following the driver's refusal to take the urine test, the Commissioner of Motor Vehicles was empowered by Conn. Gen. Stat. § 14-227b to suspend the driver's license to operate a motor vehicle. *Saba v. Comm'r of Motor Vehicles*, 1998 Conn. Super. LEXIS 721 (Conn. Super. Ct. Mar. 17 1998)

Where a driver consented to a breath test and blew into an intoximeter three times, but the machine failed to register, the commissioner of motor vehicles had no authority to suspend his license, because Conn. Gen. Stat. § 14-227b did not give the police or a departmental hearing officer the authority to determine that a "refusal" within the meaning of the statute occurred when the driver consented to take the test and failed to perform it properly, whether intentionally or unintentionally. *Tomczyk v. DelPonte*, 1991 Conn. Super. LEXIS 904 (Conn. Super. Ct. May 2 1991).

A decision of the Connecticut Commissioner of the Department of Motor Vehicles to suspend an driver's motor vehicle operator's license for her failure to submit to a breathalyzer test was affirmed; the driver's failure to affirmatively communicate her assent to be tested constituted a refusal. *Rhodes v. Salinas*, 1999 Conn. Super. LEXIS 2425 (Conn. Super. Ct. Sept. 13 1999).

Revoking Refusal.

In *Cusano v. Commissioner of Motor Vehicles*, 2 Conn, Ops. 1262 (1996), the plaintiff was willing to submit to chemical testing only four minutes after initially refusing to be tested. The Court held that this did not constitute an unreasonable delay or "refusal" to be tested under Conn. Gen. Stat. §14-227b, because it was "unreasonable for police to refuse to accede to the plaintiff's request to be tested." *Id.* At 1263. However, in *Kittredge v. Commissioner*, No, CV 97 0575594 S, 1998 WL

144810 (Conn. Super. Mar 18, 1998), the plaintiff argued that he had the right to revoke his refusal by subsequent consent. The court held :

Plaintiff's conduct in this case would not constitute a revocation of prior approval, if such a right existed. Section 14-227b (b) affords the police officer the option of selection the type of sobriety test among blood, breath or urine. The operator may not be compelled to submit to a blood test but certainly cannot himself compel testing of his choice at a time of his choosing." Id. At *2.

Therefore, a person can revoke a refusal if done so in a reasonable time, but cannot do so in order to pre-determine which test will be taken.

Admission of Form A-44 and Reports.

One of the most litigated issues is the admission of Form A-44 ("A-44) and the supplemental report. Usually the form and report are challenged because the arresting officer failed to check the box on the form that it was made under oath or as photocopies and not originals. However, these arguments are often determined to have no merit. It is reasoned the documents bear indicia of reliability based on factors that indicated the documents are essentially one report, e.g., if either was signed under oath; they contain the same report number and the relaxed evidentiary standards. See *Bialowas*, 44 Conn. Ap. At 712-13; *Cushman v. Commissioner*, No. CV 98 581551, 1998 WL 813473 at *2 (Conn. Super. Nov. 16, 1998) ("The admission of the narrative reports without the original being available did not prejudice the plaintiff where the arresting officer testified and was available for cross-examination); *Scott v. Salinas*, Commissioner of Department of Motor Vehicles, No. CV 98 0581296, 1998 WL 811370 at *2 (Conn. Super. Nov. 16, 1998) (Although Form A-44 incomplete it was incorporated into supplemental report since the arresting officer subscribed to it under oath); *O'Hare v. Gentile*, Commissioner, Department of Motor Vehicles, No. CV 97 0394580 S, 1997 WL 422456 at *1-2 (Conn. Super. July 15, 1997) (Photocopy admissible); *Treat v Hadley*, Commissioner, No. CV 94 0367992, 1997 WC 531201, at *1 (Conn. Super Aug. 18. 1997) (Plaintiff argued statements in A-44 were hearsay, however, *Bialowas* decision released after plaintiff's brief was filed). *Scott II v. Commissioner of Motor Vehicles*, No. CV 95 0127256, 1996 WL 97382 at *2 (Conn.

Super. Feb. 26, 1996) (“[T]ext of the A-44 from, which is signed under oath, is broad enough to encompass the attachment of extra pages that are photocopies of the same authors narrative report...”)

Admission of a police report pursuant to Conn. Gen. Stat. § 14-227b(c) at a license suspension hearing to determine whether a driver operated a vehicle while under the influence of an intoxicant was proper, because it contained the required indicia of reliability, and because it provided a sufficient basis for the finding that legally sustained the suspension of the driver’s license. *Packard v. DMV*, 1991 Conn. Super. LEXIS 2161 (Conn. Super. Ct. Sept. 18 1991).

Absence of a seal acknowledging a police officer’s oath on a report admitted into evidence during a hearing on the suspension of a driver’s license did not affect the validity of the suspension; a report submitted pursuant to Conn. Gen. Stat. § 14-227b(c) at a license suspension hearing was not required to bear a notarized seal or to be sworn to before a notary.

In *Havican v. Commissioner of Motor Vehicles*, 2 Conn. Ops. 333 (1996), the plaintiff challenged the admission of the A-44 report on the grounds that it was insufficient because the results of the intoximeter indicated the incorrect times and thus, indicated the machine was malfunctioning. During cross-examination, the arresting officer would not acknowledge his statement, made under oath in the report that the machine was in certified working order. In fact, the officer admitted that he had “never seen the certificate and had no first hand knowledge of the certification”. *Id.* at 334. The court concluded that the report was the only evidence before the commissioner, and this, there was no substantial evidence to uphold the suspension of the plaintiff’s licence. *Id.*

Two-Hour Time Limitation

In *Tuttle v. Commissioner of Motor Vehicles*, 2 Conn. Ops. 812, 17 Conn. L. Rptr. 231 (1996), the plaintiff argued that the Commissioner did not have the power to suspend his operator’s license because the police requested the test more than two hours after operation of the vehicle. Specifically, the plaintiff was tested twice but the machine malfunctioned, and the police requested that he be tested in a neighboring

police station approximately two and one-half hours after being arrested. The Court conducted an exhaustive review of §14-227b and its “per se” provisions and concluded:

The obligation of a person who operates a motor vehicle in this state to submit to a chemical test, in accordance with the provisions of that statute, is independent of the “per se” provisions in that statute relating to the timing of the test and the test results. Specifically, the two-hour time limitation for administering the test to a person who has agreed to take it is of critical significance in many respects, but it not a limitation on the general obligation of all motor vehicle operators in the state to submit to a test when requested by the police. It follows that the commissioner is required to suspend the license of an operator who has been arrested for drunk driving and who refuses to be tested, even if the police request the test after the two-hour time period required by the “per se” provisions of the statute. It is not necessary, in test refusal cases, to show that the request was made within a reasonable time after the arrest, considering all the circumstances, including the availability of the testing devices and the physical condition of the person arrested. *Id.* at 813.

PROBABLE CAUSE

“Probable cause, broadly defined, comprises such facts as would reasonable persuade an impartial and reasonable mind not merely to suspect or conjecture, but believe that criminal activity has occurred. ” (Internal quotation marks omitted). *State v. Barton*, 219 Conn. 529, 548, 594 A. 2d 917 (1991). “It is a flexible common sense standard that does not require the officer’s belief to be either correct or more likely true than false.” *State v. Stevens*, 26 Conn. App. 805, 810, 603 A. 2d 1203, *aff’d*. 224 Conn. 730, 620 A. 789 (1993).

Probable cause can be found from the operator’s erratic driving, failure to signal slurred speech, blood shot eyes, odor of alcohol and/or drugs on the operator’s person or in the vehicle. See *Stancuna v. Salinas*, Commissioner of the Department of Motor Vehicles, No. CV 98 0581926, 1998 WL 811370 (Conn. Super.). In *Scott II v. Commissioner of Motor Vehicles*, No. CV 95 0127256, 1996 WL97382, at *2 (Conn. Super. Feb. 26, 1996) the Court held that probable cause could be obtained for an

eyewitness. Complainant's statement contained in arresting officer's narrative report. Additionally, the Court stated that the status of this statement as hearsay was immaterial to the finding of probable cause. *Id.* at *2-3.

While a driver's eye condition, and the fact that an officer removed his eyeglasses during the field sobriety test, cast some doubt on the results of the test, there was probable cause for the arrest, pursuant to Conn. Gen. Stat. § 14-227b(f), because the driver was traveling south in a northbound lane of a divided highway, had slurred speech, had the odor of liquor on his breath, and had red, glassy eyes. *Urso v. Comm'r of Motor Vehicles*, 1997 Conn. Super. LEXIS 3186 (Conn. Super. Ct. Dec. 1 1997).

Furthermore, a dispatch record regarding an accident is enough to establish probable cause. In *Mailhot v. Commissioner of Motor Vehicles*, No. CV 98 0576680, 1998 WL 246492 (Conn. Super. May, 4, 1998), the plaintiff expressly refused to a blood test. A challenge to the findings of probable cause was made because there was no specific time in the record as to the time of the accident, and thus, there was no indication as to the time of operation. Relying on *Tuttle v. Commissioner of Motor Vehicles*, 2 Conn. Ops. 812, 17 Conn. L. Rptr. 231 (1996), the Court stated "[in] a refusal case such as this, however, proof of the time of operation is unnecessary because the two-hour time limitation for administering the test applies to those persons who agree to submit to testings." *Id.* at *2. In another case, a motorist's driver's license was not properly suspended under Conn. Gen. Stat. § 14-227b for failure to take a breath test where there was no probable cause of a temporal nexus between intoxication and motor vehicle operation; the motorist's car had rolled from a parked position into a river, and there was insufficient evidence that the motorist had violated Conn. Gen. Stat. § 14-227a. *Murphy v. Commissioner of Motor Vehicles*, 54 Conn. App. 127, 733 A.2d 892, 1999 Conn. App. LEXIS 277 (1999).

Police officer's report indicated that at the time he was stopped, plaintiff had an odor of alcohol on his breath, glassy eyes, slurred speech, and in the officer's opinion, he failed the standard field sobriety tests; plaintiff's evidence consisted of his testimony and the testimony of two friends that he was the "designated driver," that

he had only two drinks before dinner, and that his operation of the vehicle and his performance of the field sobriety tests did not indicate any impairment; in order to establish probable cause, it is not necessary to produce a quantum of proof sufficient to establish guilt; probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a crime has been committed; a review of the record established that there was substantial evidence in the form of the police officer's report which reasonably supported the hearing officer's finding of probable cause for the plaintiff's arrest. *Mullen v. Delponte*, 1993 Conn. Super. LEXIS 1966 (Conn. Super. Ct. Aug. 3 1993).

Arrest form was properly admitted into evidence; Conn. Gen. Stat. § 14-227b(c) required that the form set forth the police officer's belief that there was probable cause to arrest, which included operation on a public road, and the police officer did that by describing the road in his attachments to the form. *Roy v. Comm'r of Motor Vehicles*, 67 Conn. App. 394, 786 A.2d 1279, 2001 Conn. App. LEXIS 627 (2001).

Anonymous informant's tip did not justify an investigative stop where the tip stated only that a red car was zigzagging across the highway but did not identify the driver, allege a specific crime, nor give the time or place; since Conn. Gen. Stat. § 14-227b required that the initial investigative stop of the driver be lawful, the unlawful stop invalidated the driver's subsequent arrest for operating a motor vehicle under the influence of alcohol in violation of Conn. Gen. Stat. § 14-227a and, therefore, the driver's motor vehicle operator's license should not have been suspended. *Field v. Goldberg*, 1991 Conn. Super. LEXIS 3076 (Conn. Super. Ct. Dec. 19 1991).

FISHBEIN

Fishbein v. Commissioner, 252 Conn 38, 743 A.2d 1110 (1999), effectively killed any hope to contest the issue of probable cause for the stop of the respondent at the Per se hearing. Fishbein had driven a person to a house which was being "staked out" by the police. Upon driving off, the local police effectuated a stop on the car, for the express purposes of determining the purpose of the stop at the house. They were in a neighborhood known for drug sales, and the conduct of the passenger (going to

the door, speaking briefly with the occupant, driving off) was the basis for the stop. Fishbein argued that the police had no reasonable articulable suspicion. The appellate court disagreed and stated that the officers knowledge of the area and its drug traffic, the brief interaction between the passenger and the occupant of the house was sufficient to effectuate the stop without infringing on the rights of the defendant.

In light of Fishbein, it is conceivable that an officer, familiar with the increased propensity of DUI suspects to be arrested after leaving a tavern, can sit outside the bar and pull over the autos without reason for continued investigation which yields an arrest. The officer needs no evidence of crime to effectuate the stop of the vehicle. Even if the stop is illegal or for no good reason, once the stop is made, only a modicum of evidence is needed for the arrest of the respondent. Basically, if there is any evidence of driving under the influence after the stop, they respondent can be arrested and subjected to the Administrative license suspension.

EVIDENTIARY ISSUES

Connecticut Constitution does not mandate the application of the exclusionary rule of criminal procedure to license-suspension hearings. *Bjunes v. Comm'r, Dep't of Motor Vehicles*, 2000 Conn. Super. LEXIS 1340 (Conn. Super. Ct. May 16 2000).

Where a hearing officer assured a driver that he would review a videotape that was made shortly after the driver was arrested for driving under the influence, the officer's failure to view the videotape before suspending the driver's license deprived the driver of his due process rights. *Topar v. Goldberg*, 1994 Conn. Super. LEXIS 745 (Conn. Super. Ct. Mar. 10 1994).

Where a driver had failed a chemical alcohol test, and his driver's license was suspended, the police officer's failure to check the Miranda box on the report noting the test results and probable cause to arrest did not render the report inadmissible at the driver's hearing. *Dwyer v. DMV*, 1995 Conn. Super. LEXIS 1275 (Conn. Super. Ct. Apr. 21 1995).

Admission of a horizontal gaze nystagmus test conducted on a driver without expert scientific testimony during a license suspension hearing pursuant to Conn. Gen. Stat. § 14-227b did not deprive the driver of her right to due process, nor did it

preclude a finding that the officer who arrested the driver had probable cause to do so. *Basso v. Commissioner of Motor Vehicles*, 1998 Conn. Super. LEXIS 992 (Conn. Super. Ct. Apr. 14 1998).

Evidence and statements obtained from defendant's stop for erratic driving, and failed field testing, which was videotaped, post-Miranda voluntary statements, and failure to consent under Conn. Gen. Stat. § 14-227b(b) to breathalyzer testing, after waiting 22 minutes for the defendant's attorney to return a page, were not suppressed under the Fourth, Fifth, and Sixth Amendments and Conn. Const. art. I, § 8; however, the defendant's post-Miranda answers to an officer's questions when the officer was attempting to get her to consent to breathalyzer testing, that were not related to that consent, were suppressed. Refusal to consent to a breathalyzer examination under Conn. Gen. Stat. § 14-227b(b) is not a custodial interrogation that requires Miranda warnings under the Sixth Amendment. A defendant who is asked if he wants to take a breathalyzer answers no or yes, and then that is to be the end of the consent question if the defendant has previously invoked his right to counsel and has not waived it. *State v. Vogle*, 2004 Conn. Super. LEXIS 2524 (Conn. Super. Ct. Sept. 2 2004).

Defendant's motion to suppress a blood test revealing the alcohol content of his blood, which was taken pursuant to a warrant obtained under Conn. Gen. Stat. § 14-227a after defendant had been involved in an automobile accident, was denied because defendant's consent was not a prerequisite for the admission of a blood test; the claim did not implicate the Fourth Amendment of the U.S. Constitution or Conn. Const. art. 1, § 7 because the blood test was ordered by defendant's doctor, and so there was no state action. *State v. Eberl*, 2000 Conn. Super. LEXIS 2222 (Conn. Super. Ct. Aug. 25 2000).

Evaluating the defendant's motion in limine to exclude the results of his field sobriety tests, a court concludes that the scientific community generally accepts the "horizontal gaze nystagmus" test as a reliable indicator of alcohol impairment and admits the evidence as satisfying the standards set forth in the state Supreme Court's 1997 decision, *State v. Porter*, 241 Conn. 57, 694 A. 2d 1262 (1997) (Opinion withdrawn

for filing of subsequent dissents.) See *State v. Carlson*, 4 Conn. Ops. 949, 45 Conn. Supp. 461 (1998).

At the administrative hearing, toxicologists testified for the driver that the breath tests may have been skewed and that his blood alcohol content was probably below the legal limit at the time he was driving. The driver argued on appeal that the trial court improperly dismissed his appeal, because, in light of his experts' testimony, the record lacked substantial evidence sufficient to permit the hearing officer to suspend his motor vehicle operator's license. The appellate court held that (1) because the hearing officer was not required to accept as true the unrebutted opinions of the driver's experts and because there was other ample evidence independent of the experts' testimony to establish the driver's intoxication during the relevant time period, the hearing officer did not act unreasonably, arbitrarily, or illegally and did not abuse its discretion in suspending the license; (2) the driver's expert testimony did not automatically rebut the statutory presumption of intoxication which arose from the driver's failure of the breath tests; and (3) based on the facts and law, the trial court properly dismissed the driver's appeal. *Simard v. Comm'r of Motor Vehicles*, 62 Conn. App. 690 (Conn. App. Ct., 2001)

In *Bostrom v. Commissioner of Motor Vehicles*, 3 Conn. Ops. 572 (1997), the plaintiff's cross-examination of an expert from the State Department of Public Health and Addictions Services on the issue of possible faulty results of the Intoxilyzer machine was terminated by the hearing officer as irrelevant. The Court held this was a denial of due process because the cross-examination was relevant to the hearing officer's ultimate decisions to suspend the plaintiff's license. *Id.* at 572-73.

In *Silver v. Commissioner of Motor Vehicles*, 3 Conn. Ops. 243 (1997), the arresting officer failed to appear for cross-examination after two subpoenas were issued and the plaintiff had agreed to a continuance to ensure the witness' appearance. However, the police report was admitted over the plaintiff's continual hearsay objection under Conn. Gen. Stat §4-178, and denial of the opportunity to cross-examine the author of the report. The Court held the officer's statements

were ripe for cross-examination: and that the report was not inherently reliable to be admitted. *Id.* at 244.

Hearing officer at the motor vehicle department did not abuse his discretion in admitting the police report of an absent arresting officer at a license suspension hearing of a driver who refused to submit to a chemical test of the alcohol content of his blood after his arrest for driving while under the influence of alcohol; the driver's due process rights were not violated because the hearing officer offered the driver a continuance, which was rejected by the driver. *Woodmancy v. Comm'r of Motor Vehicles*, 1995 Conn. Super. LEXIS 583 (Conn. Super. Ct. Feb. 28 1995).

DRIVER'S LICENSE COMPACT

In *Currier v. Commissioner of Motor Vehicles*, 3 Conn. Ops. 363 (1997), the plaintiff's license was suspended under the Driver License Compact for an alleged conviction for "operating under the influence of liquor or drugs." in New Jersey. The only evidence at the hearing was a computer printout entitled "State of New Jersey Division of Motor Vehicles Out of State Driver Violation Report: which did not contain a seal, signature or any other form of authentication. The court held that the document was not sufficiently reliable to satisfy the hearsay requirements of Conn. Gen. Stat. §4-178, *Id.* at 364; see also *Cassella v. Civil Service Commission*, 4 Conn. App. 359, 362 (1985); *aff'd* 202 Conn. 28, 33 (1987). "The document in question is simply a computer printout which may or many not represent the final, edited and corrected record pertaining to the plaintiff." *Currier*, 3 Conn. Ops. At 364.

AUTHORITY OF POLICE OFFICERS

University police officer was a police officer within the meaning of Conn. Gen. Stat. § 14-227b(g)(1), authorized to arrest the driver for driving under the influence, where the stop occurred on a public street, not on campus, because the city, acting through its board of police commissioners, could appoint persons designated by the university to act as university police officers and such officers, having duly qualified under Conn. Gen. Stat. § 7-294d and having been sworn, had all the powers conferred upon municipal police officers. *Mahon v. Comm'r, DMV*, 2001 Conn. Super. LEXIS 1566 (Conn. Super. Ct. June 8 2001).

Driver's operator's license was improperly administratively suspended because a police officer's stop of the driver, outside of the officer's jurisdiction, for a possible speeding infraction was illegal, and thus the driver's arrest for DUI was illegal; the requirement in Conn. Gen. Stat. § 14-227b(f) that the police have probable cause to arrest a person for violation of Conn. Gen. Stat. § 14-227a required that the initial stop of the driver be lawful. *Duncan v. Goldberg*, 1993 Conn. Super. LEXIS 1439 (Conn. Super. Ct. June 3 1993).

Order suspending a driver's license was proper when the stop for which the driver was arrested occurred outside the officer's jurisdiction but was based on an offense and pursuit that occurred and began within the officer's jurisdiction. *Yarrington v. Kozlowski*, 1996 Conn. Super. LEXIS 72 (Conn. Super. Ct. Jan. 5 1996).

ENHANCED PENALTY FOR PRIORS

Even though the Department of Motor Vehicles did not introduce the driver's driving history into the record, the state was entitled to consider the driver's history in suspending her license for driving under the influence under Conn. Gen. Stat. § 14-227b. *Hatcher v. Comm'r of Motor Vehicles*, 1996 Conn. Super. LEXIS 2735 (Conn. Super. Ct. Oct. 23 1996).

Under Conn. Gen. Stat. § 14-227b, the Commissioner of the Department of Motor Vehicles has not only the right, but the obligation to consider driving histories; thus, in suspending a motor vehicle operator's license for two years after the motor vehicle operator refused to submit to a urine test for blood alcohol content when he was arrested for driving under the influence of alcohol, the commissioner properly considered the motor vehicle operator's prior history in imposing the two year suspension. *Gorham v. Comm'r of the DMV*, 1998 Conn. Super. LEXIS 775 (Conn. Super. Ct. Mar. 23 1998).

RIGHT TO TALK TO ATTORNEY

Trial court reasonably concluded that the evidence adduced at the suppression hearing amply supported a finding that Defendant had a reasonable opportunity to consult with an attorney prior to taking chemical breath tests as required by Conn. Gen. Stat. § 14-227b(b) where defendant was given Miranda warnings informing him

that he had the right to consult with an attorney before answering any questions; the determination of what constituted a reasonable opportunity was a question of fact for the trial court. *State v. Rutledge*, 17 Conn. App. 250, 552 A.2d 435, 1989 Conn. App. LEXIS 8 (1989).

TIMING OF REQUEST FOR HEARING

Motorist waived the right to a hearing on the suspension of his operator's license for one year by the Commissioner of Motor Vehicles, for failure to comply with Conn. Gen. Stat. § 14-227b(d),(e) by way of a timely request for a hearing after the suspension notice was sent; it was reasonable to infer a waiver from the fact that the motorist left the state, without arranging for the mail to be checked, after refusal to submit to a chemical alcohol test, and from a subsequent arrest for driving while under the influence of alcohol. *Bower v. Comm'r of DMV*, 1998 Conn. Super. LEXIS 957 (Conn. Super. Ct. Apr. 6 1998).

LOW INCREASING READINGS

Pursuant to Conn. Gen. Stat. §§ 14-227b(f), the sobriety test result is sufficient only to indicate blood alcohol content at the time of operation if the result of the second required test is not 0.12 percent or less and is higher than the result of the first test, and if such results do occur, there must be additional evidence demonstrating that the results accurately indicate the blood alcohol content at the time of operation; thus, § 14-227b(f) creates a rebuttable, as opposed to a conclusive, presumption.

MISCELLANEOUS

Alleged failure to inform a driver of the consequences of his refusal to submit to chemical blood alcohol testing or his failure of such a chemical test could not serve as a basis for overturning the suspension of his driver's license; whether he was fully informed was not one of the issues to be adjudicated in a license suspension hearing pursuant to Conn. Gen. Stat. § 14-227b(d). *McManus v. Del Ponte*, 1993 Conn. Super. LEXIS 693 (Conn. Super. Ct. Mar. 3 1993).

Police officer's failure to comply with Conn. Gen. Stat. § 14-227b(c) by transmitting a driver's license to the Connecticut Department of Motor Vehicles within three business days was not a sufficient ground for overturning a

determination of the Connecticut Commissioner of Motor Vehicles that suspended the driver's license.

Where a drunk driver provided no case law or other authority to support his contention that the suspension of his vehicle operator's license amounted to cruel and unusual punishment, and Conn. Gen. Stat. § 14-227b specifically required the Commissioner of Motor Vehicles to order the suspension, the drunk driver did not sustain his burden to prove that the suspension amounted to unconstitutional punishment. *Goodman v. Comm'r of Motor Vehicles*, 1997 Conn. Super. LEXIS 1573 (Conn. Super. Ct. June 4 1997).

Implied consent provision of Conn. Gen. Stat. § 14-227b did not authorize the admission of the test results during defendant's trial for misconduct of a motor vehicle operator in violation of former Conn. Gen. Stat. § 53-17 (now Conn. Gen. Stat. § 53a-57) where the defendant was not under arrest when the blood was taken, and did not either consent to the chemical test or refuse to submit to it because he was unconscious. *State v. Towry*, 26 Conn. Supp. 35, 210 A.2d 455, 1965 Conn. Super. LEXIS 144 (Conn. Super. Ct. 1965).

In the appeal of the administrative suspension of a motorist's license to operate a motor vehicle in accordance with the provisions of Conn. Gen. Stat. § 14-227b, the trial court's finding that the motorist was operating a motor vehicle while under the influence of intoxicating liquor was supported by substantial evidence, and given the state trooper's testimony and the certification of the machine by the health department, the trial court had ample evidence to conclude that the machine was functioning properly. *Dumont v. Comm'r of Motor Vehicles*, 48 Conn. App. 635, 712 A.2d 427, 1998 Conn. App. LEXIS 203 (1998).

ATTORNEY JAY RUANE

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AUTHORITY

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REFUSAL

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