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## Law Enforcement Confiscation of Driver License Before Arraignment

When a driver is arrested for DWI and refuses the breath test, law enforcement officers in some New York State jurisdictions recently have adopted the practice of confiscating that driver's license at the time of arrest. As a result, these drivers are left without any driver license prior to arraignment, which often does not occur until several weeks later in a local criminal court. In this issue, we explore the legal basis for this practice to determine whether it is supportable under New York State law.

The rules regarding the procedure to be followed upon a defendant's refusing to submit to a chemical test are set forth in section 1194 of the Vehicle and Traffic Law. VTL § 1194[2](b)(1) provides in relevant part:

If: (A) such person having been placed under arrest; or (B) after a breath test indicates the presence of alcohol in the person's system...and having thereafter been requested to submit to such chemical test and *having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked...for refusal to submit to such chemical test or any portion thereof*, whether or not the person is found guilty of the charge for which such person is arrested or detained, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to subdivision three of this section, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made. (Emphasis added.)

On its face, this statute would appear to provide for the *immediate suspension* of a driver's license by the police officer when the defendant refuses to submit to a chemical test. Section 1194[2](b) of the Vehicle and Traffic Law, however, goes on to more thoroughly explain the procedure to be followed when suspending a license for refusing a breath test:

(2) The report of the police officer shall set forth reasonable grounds to believe such arrested person...had been driving in violation of any subdivision of section eleven hundred ninety-two or eleven hundred ninety-two-a of this article, that said person had refused to submit to such chemical test, and that no chemical test was administered pursuant to the requirements of subdivision three of this section. The report shall be presented to the court upon arraignment of an arrested person....

(3) For persons placed under arrest for a violation of any subdivision of section eleven hundred ninety-two of this article, the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be *temporarily suspended by the court* without notice pending the determination of a hearing as provided in paragraph (c) of this subdivision. Copies of such report must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties. Such report shall be forwarded to the commissioner within forty-eight hours of such arraignment. (Emphasis added.)

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So which is right, to “immediately” take the license of the defendant prior to arraignment, as indicated by the language of VTL § 1194[2](b)(1), or to follow the procedure set forth in VTL § 1194[2](b)(3) prior to the initiation of any suspension? While there has been no direct ruling on this subject, a review of the case surrounding driver licenses clearly indicates the latter.

In *Bell v. Burson*, 402 U.S. 535 (1971), the US Supreme Court addressed a Georgia law allowing for the suspension of a driver license of an uninsured driver involved in an accident if that driver did not post security to cover the cost of damages. The Court held that the license of such a driver may *not* be suspended without conducting a “meaningful” administrative hearing addressing the issue of liability and stated that:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

*Bell v. Burson* at p. 539.

This ruling was followed by the New York State Court of Appeals in *Pringle v. Wolfe, et al.*, 88 NY2d 426 (1996) when addressing “suspension pending prosecution” laws for individuals who had taken a breath or blood test in DWI cases. In mirroring the analysis set forth in *Bell, supra*, the court stated that “[i]t is well established that a driver's license is a substantial property interest that may not be deprived without due process of law,” *Pringle v. Wolfe* at p. 431.

Given that allowing law enforcement officers to take a driver's license prior to any court appearance or administrative hearing does not provide *any* process protecting the “substantial property interest” of holding a driver's license, VTL § 1194 *cannot* provide a basis for immediate suspension of a driver license by members of law enforcement. VTL § 1194[2](b)(1) sets forth the requirement that drivers be informed that refusal to take a chemical test will result in suspension and subsequent revocation of their right to drive in New York State. Although the statute characterizes the suspension as “immediate,” a review of the subsequent sections sets forth the proper steps that must be undertaken before a driver license may be suspended. These include the preparation of a report by the arresting officer setting forth the basis for suspension, and the presentation of the report to the court at the defendant's arraignment. Only by following these steps can due process requirements be satisfied. Thus, there is no legally supported basis for taking the driver license of an individual arrested for DWI by a police officer prior to that person's arraignment. Action against a driver license should be handled by the judge presiding over the case.

If the license has been improperly taken by the arresting officer and counsel verifies that the motorist has a valid license according to DMV, a duplicate license may be properly and immediately obtained by the motorist by filing a MV-44 at a local DMV office. For some drivers, a valid photo ID license may be needed for travel purposes, especially if he or she needs to fly from international airports and does not have a passport for photo identification. Although the initial duplicate license is not a photo ID, a photo ID license will be mailed to the motorist within weeks.