

## ***DWI and “Flat-out Refusals”***

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Recently, in *State v. Spell* (N.J. 11-10-2008), the New Jersey Supreme Court rejected the previous ruling of the Appellate Division, and held that the police ***are not required*** to read the second portion of the NJ MVC standard statement in every case. According to the Court, the law only requires the reading of the second portion of the standard statement when the suspect either remains silent, asks for an attorney, or provides an ambiguous answer to the officer’s request to submit to breath testing. In those cases where the arrestee flat-out refuses to provide a breath sample, it is not necessary to read the second portion of the standard statement.



***THE CASE:*** At about 3:00 a.m., defendant, Ernest Spell, crashed his automobile into the rear of another car which had stopped in the middle lane of the Garden State Parkway. The responding State trooper, John Salvato, “detected an odor” of alcohol on Spell, and noticed that his face was “flushed” and his eyes were “bloodshot.” Spell admitted to having “a few beers.” At the scene, the trooper performed the “the horizontal gaze,” “alphabet,” “heel to toe,” and “one-legged stand” field sobriety tests. Spell failed the tests, and Trooper Salvato arrested him for DWI.

At the barracks, Trooper Salvato asked Spell to give a breath sample. According to the trooper’s testimony, Spell said, “I refuse.” About an hour later, Spell changed his mind and requested the breath test, but Troop Salvato declined because Spell had already refused the test.

In this appeal, Spell argued that his refusal conviction was improper because the State did not prove each and every element beyond a reasonable doubt. The Court disagreed.

***THE LAW:*** Preliminarily, the New Jersey Supreme Court agreed with the Appellate Division that Spell “unequivocally refused” to take the breath test. There was no dispute that Trooper Salvato read the NJ MVC “Standard Statement for Operators of Motor Vehicles” to Spell. The last paragraph of this statement provides:

**11.** I repeat, you are required by law to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Now, will you submit the samples of your breath?

There was also no dispute that the trooper did not read the additional paragraph which should be read *if* “the person: remains silent; or states, or otherwise indicates, that he/she refuses to answer on the grounds that he/she has a right to remain silent, or wishes to consult with an attorney, physician or any other person; *or if the response is ambiguous or conditional*, in any respect whatsoever.”

The text of the additional statement is as follows:

I previously informed you that the warnings given to you concerning your right to remain silent and your right to consult with an attorney, do not apply to the taking of breath samples and do not give you a right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Your prior response, silence, or lack of response, is unacceptable. If you do not agree, unconditionally, to provide breath samples now, then you will be issued a separate summons charging you with refusing to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Once again, I ask you, will you submit to giving samples of your breath?

The law requires that police officers read to all defendants arrested for DWI the above standard statement, prepared (at the time) by the Director of the Division of Motor Vehicles, before endeavoring to administer a breath test. In this regard, the Legislature has “provided a procedural safeguard to help ensure that defendants understand the mandatory nature of the [breath] test, their limited rights to counsel for purposes of the test, and the need for unequivocal, affirmative consent.” DWI arrestees must be informed of the consequences of refusing to submit to such a test, because “anything substantially short of an unconditional, unequivocal assent to an officer’s request” would “undermine law enforcement’s ability to remove intoxicated drivers from the roadways,” and impede their ability to conduct the test in a timely manner.

In this case, the New Jersey Supreme Court rejected the Appellate Division’s ruling that police officers must read the additional paragraph of the NJ MVC “Standard Statement for Operators of a Motor Vehicle, *N.J.S.* 39:4-50.2(e),” any time a DWI defendant “refuses to immediately take the Breathalyzer exam upon request.” Said the Supreme Court:

The additional paragraph of the standard statement to which the Appellate Division referred is to be read aloud only if, after all other warnings have been provided, a person detained for driving while intoxicated either conditionally consents or ambiguously declines to provide a breath sample. \* \* \* The Appellate Division's holding that requires that police officers read that final, additional paragraph of the standard statement in all cases was not necessary to the determination of this case. To that extent, it is vacated. We take that action because the Legislature has vested in the Chief Administrator of the Motor Vehicle Commission (formerly the Director of the Division of Motor Vehicles) the authority to determine the contents and procedure to be followed in respect of that standard statement. *N.J.S.* 38:4-50.2(e) \* \* \*

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