

1978 WL 34788 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 21, 1978

*1 Colonel W. J. Seaborn
Director
Law Enforcement Division
South Carolina Department of Highways and Public Transportation
Box 191
Columbia, SC 29202

Dear Colonel Seaborn:

You have asked whether it is required that a defendant be advised by the officers administering a breathalyzer test of his right under the Implied Consent Law (Section 56-5-2950) to obtain an additional blood test and have the officers' assistance in contacting a qualified person to conduct such a test, if desired. The provisions of the Implied Consent Law do not specifically impose such a requirement. Our general state law is similarly silent on this point. Therefore, it must be concluded, in the absence of authority indicating otherwise, that no such requirement presently exists.

You have also asked whether the failure to advise a defendant, as discussed above, is a ground for dismissal of the charge by the court. Section 56-5-2950 provides the procedure for the administration and subsequent use of a breathalyzer test as reliable evidence of the alcoholic content of a driver's blood. Generally, if for some reason that evidence is excluded, the prosecution is merely deprived of its use. The exclusion of evidence, of course, is not necessarily a ground for dismissal of the overall charge. See 1970 Op. A.G., No. 2950, p. 209. Whereas exclusion might deal a serious blow to the strength of the State's case, the decision whether to proceed would normally rest with the prosecuting officers, unless, of course, such dismissal of the charge takes the form of a directed verdict during a trial in which absolutely no other evidence of guilt was submitted. Such a situation, in our view, would be rare in practice. Nevertheless, the Implied Consent Law does not preclude the use of other evidence in a prosecution and a defendant may be convicted on sufficient evidence, without the breathalyzer test results, even when the test results have been ruled inadmissible.

I trust the preceding discussion adequately answers your questions, however, if any further explanation is necessary, please feel free to contact me.

With best regards, I am
Very truly yours,

Richard P. Wilson
Assistant Attorney General

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