

5/15/01

# SUPREME COURT OF LOUISIANA

No. 00-KK-0536

*STATE OF LOUISIANA*

*versus*

*CARL E. ALCAZAR*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON

VICTORY, J., DISSENTING\*

Carl Alcazar was Mirandized and then arrested for driving while intoxicated after being observed driving erratically and after he performed poorly on a field sobriety test. No one disputes that there was probable cause for his arrest. At the police station he was administered a breathalyzer test. The test results confirmed that his blood alcohol level exceeded the legal limits. Defendant filed a motion to suppress the test results, arguing that application of the exclusionary rule is the proper remedy in this case for failure of the police to comply with La. R.S. 32:661(C)(1) and 32:666(A) by not advising defendant, prior to the test, of his right to refuse the test, and the consequences of taking or refusing the test. The administering officer testified that he **did** give the statutory advices in advance of the test. However, the trial judge suppressed the evidence without issuing reasons, evidently finding that the statutory advices were not given before the test.

It is clear that the conduct of the police did not violate defendant's state

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\* Philip Ciaccio, Justice Pro Tempore, sitting for Associate Justice Harry T. Lemmon.

or federal constitutional right against self-incrimination. **Schmerber v. California**, 384 U.S. 757 (1966); **State v. Allen**, 40 So. 2d 1330 (La. 1983). Moreover, the majority agrees that the right to refuse the breath test was not protected by a state or federal constitutional right to be free from unreasonable search and seizure. **South Dakota v. Neville**, 459 U.S. 553 (1983); **State v. Edwards**, 525 So. 2d 313 (La. App. 1<sup>st</sup> Cir. 1988). In this case, there has been no violation whatsoever of defendant's constitutional rights by the administration of the breath test. Nor is there any violation of his constitutional rights by use of the evidence at trial.

The majority acknowledges that a defendant's right to refuse a breath test is purely a "matter of grace that the legislature has bestowed." It then leaps to the conclusion that the only way to effectively enforce that "grace" is to exclude the results of the test when defendant is not first advised of the statutory right to refuse the test and the attendant consequences of refusal. I do not agree.

The invocation of the exclusionary rule is an extreme remedy, the use of which is being increasingly circumscribed even in cases that involve constitutionally protected rights. It is a judicially created means of deterring illegal searches and seizures. However, it applies only in cases where its deterrence benefit outweighs its substantial social costs. It does not prohibit the use of illegally seized evidence in all cases or against all persons, even where constitutional rights have been violated. See e.g., **Pennsylvania Bd. of Probation and Parole v. Scott**, 524 U.S. 357 (1998); **Ohio v. Robinette**, 519 U.S. 33 (1996); **Arizona v. Evans**, 514 U.S. 1 (1995); **United States v. Leon**, 468 US 897 (1984); **Stone v. Powell**, 428 US 465 (1976).

As the United States Supreme Court explained in **Scott, supra**:

Because the exclusionary rule precludes consideration of reliable probative evidence, it imposes significant costs: it undeniably detracts from the truth finding process and allows many who would otherwise be incarcerated to escape the consequences of their actions [citation omitted]. Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's "costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of this rule. **Id.** at 365.

The United States Supreme court has made it clear that even in the case of constitutional violations, the exclusionary rule will not be applied in the absence of a strong showing that its deterrence value and the rights to be protected outweigh the social value of admitting reliable and probative evidence. In this case there has been no showing that the statute in question is not followed in the normal course of police investigation of those suspected of driving while intoxicated. And there is no evidence that the administering officer in this particular case was in bad faith or intentionally failed to advise defendant of his rights. There is no record to support a conclusion that the application of the exclusionary rule is needed to deter police conduct. Nor is there any reason to believe that application of the rule would substantially alter police conduct in the future, particularly since the police are already motivated to follow the statute in order to obtain the benefit of the statutory presumptions afforded when it is followed.

We are not dealing here with a core constitutional right of the defendant; we are only dealing with a statutory right granted by the legislature. The legislature itself specifically rejected use of the exclusionary rule as a means to enforce the statute when it amended La. 32:661 in 1984 to **delete the sanction of inadmissibility** that

had previously been in the statute. The legislature has acted to remove the penalty of exclusion of evidence, clearly indicating its intent that such an extreme penalty is **not** warranted. Its judgment that the deterrence value of the exclusionary rule is outweighed by the social cost of excluding otherwise legally obtained probative evidence should be honored.

Denial of defendant's motion to suppress the evidence does not mean that the statute will be violated with impunity. As previously noted, when officers follow the guidelines in the statute, the state is entitled to certain valuable presumptions at trial, including the presumption that a defendant who tests at a certain level is legally intoxicated. When the state does not follow the statute, it does not get the benefit of the presumption and must bear a more difficult evidentiary burden. Thus, violation of the statute carries with it self-executing negative consequences. In addition, citizens whose statutory rights have been violated may complain to the authorities, request discipline of the offending officers, exercise their powers at the ballot box, and in some instances may have civil remedies.

Since use of the exclusionary rule to enforce compliance with La. R.S. 32:661 **et. seq.** has been rejected by the legislature and is unwarranted, I respectfully dissent.