

OWI REFUSALS – THE LEGAL ANOMOLY



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THE LEGAL FRAMEWORK

Iowa Code Section 321J.16

If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle in violation of [section 321J.2](#) or [321J.2A](#).

The Jury Instruction - Iowa Model Criminal Jury Instruction 2500.7

The defendant was asked to give a breath sample so it could be analyzed to determine the percent of alcohol in his blood. It is alleged the defendant refused.

A person is not required to give a sample of any bodily substance; however, you may consider a refusal in reaching your verdict.

The Faulty Premise

The justification for permitting the admissibility of the test refusal in those situations is that a defendant does not have the right to refuse a legally authorized search. See *Schmerber v. California*, 384 U.S. 757 (1966) (law enforcement may forcibly extract blood sample from individual under arrest when probable cause and exigent circumstances exist); *South Dakota v. Neville*, 459 U.S. 553 (1983); see also *Srala v. Municipality of Anchorage*, 765 P.2d 103, 105 (Alaska Ct. App., 1988) (“a person legally arrested for driving while intoxicated does not have a fourth amendment right to refuse a breath or blood test.”).

Since one does not have a constitutional right to refuse a properly authorized search, rather than run the risk of violent confrontations between suspects and law enforcement, the Iowa Legislature as well as many other states, passed statutory provisions permitting the individual to refuse chemical testing in exchange for harsher license suspension periods and statutory provisions providing for the admissibility of the refusal against the individual in a criminal prosecution. *State v. Knous*, 3134 N.W.2d 510, 512 (Iowa 1981).

Basic Constitutional Principals

Absent a search warrant or a valid exception to the warrant requirement, a person has the absolute constitutional right to withhold consent to a search of their person. This is because consent to search is a voluntary waiver by a defendant of his fundamental rights under the Fourth Amendment to the United States Constitution. *State v. Ahern*, 227 N.W.2d 164, 166 (Iowa 1975) citing *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Johnson v. United States*, 333 U.S. 10 (1948); and *Amos v. United States*, 255 U.S. 313 (1921).

It has long been established that testimony pertaining to a defendant's invocation of his constitutional rights is inadmissible at trial and constitutes reversible error if admitted over defendant's timely objection. See *State v. Decker*, 733 N.W.2d 346, 354 (Iowa 2008); see also *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976); *State v. Allen*, 224 N.W.2d 237 (Iowa 1974); *State v. Kyseth*, 240 N.W.2d 671 (Iowa 1976); *State v. Porter*, 283 N.W.2d 351 (Iowa 1979).

As it specifically pertains to an individual's constitutional right to withhold consent to search, the Fourth Amendment "gives him a constitutional right to refuse to consent to entry and search. . . . His asserting it cannot be a crime *nor can it be evidence of a crime.*" (emphasis added) *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). "One cannot be penalized for passively asserting this right, regardless of one's motivation. . . . Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, [citations omitted] so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing." *Id.*

In the published Iowa Court of Appeals decision of *State v. Thomas*, 766 N.W.2d 263 (Iowa, 2009), the Iowa Court of Appeals determined that a defendant's refusal to grant law enforcement consent to search is "too ambiguous to be relevant" even in a possession of narcotics case where knowledge of the presence of narcotics is an essential element of the offense. *Thomas*, 766 N.W.2d at 271-72. "Under these ordinary rules of evidence, generally exercising one's privilege to be free from warrantless searches is simply not probative (or has low probative value) to a determination of guilt and is unfairly prejudicial. Thus, the defendant's right not to be penalized for exercising such a privilege is paramount." *Id.* See also *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000) (Fourth Amendment entitles a defendant to withhold consent to search and admitting evidence of that refusal is inconsistent with due process); *United States v. Runyan*, 290 F.3rd 223, 250 (5th Cir.) ("The circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt."); *State v. Maddox*, 670 N.W.2d 168, 173 (Iowa 2003) (mere refusal to consent to a search does not establish probable cause); and *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa App. 1994) ("Defendant's refusal to consent to a blood test cannot be used to support probable cause because such use denies the defendant's Fourth and Fifth Amendment rights.").

The Hope for a Better Tomorrow

When an exception to the warrant requirement does not authorize a forced search of a person's body, the "legislative gift" justification for use of a defendant's refusal against him at trial no longer exists.

Both the Iowa Supreme Court and the United States Supreme Court have now definitively stated that the body's natural dissipation of alcohol does not create a *per se* exigency that forgoes the need to obtain a search warrant. *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008); *State v. Harris*, 763 N.W.2d 269 (Iowa 2009); and *Missouri v. McNeely*, 133 S.Ct 1552, 1558 (2013).

- **CASE WATCH – *Bernard v. Minnesota***, 14-1470 - <http://www.scotusblog.com/case-files/cases/bernard-v-minnesota/>
- If no exigent circumstances, what exception would justify a forced search?

BUT IT IS COMING IN – DEALING WITH REFUSAL AT TRIAL

- **Must be addressed at ALL STAGES of trial.**
 - **Themes to Use Throughout Trial**
 - Constitutional right
 - Given a choice – made a decision
 - Tricky cop – Never advised refusal would be used against the defendant.
 - Miranda advisory
 - Better safe than sorry – Now DOT and arrest decisions are made. Embrace the process. Criminal process is different – MY FAVORITE
 - Completely ignore the refusal
 - Really a refusal? Don't care what case law says – who was the asshole in the room and did defendant really refuse?
 - Proves sober if new better than to incriminate himself.
1. **Pretrial – Object to using defendant's exercise of a constitutional right against him as evidence of guilt.**
 - PROTECT YOUR RECORD – Article 1 section 8!!!!
 2. **Jury Selection**
 - a. Prosecutor – would you consider it ... blah blah blah
 - b. Talk about refusals of searches – Go deeper than will you consider it?
 - i. DO NOT ARGUE with Jurors about their views – get them talking about it and debating amongst themselves – figure out who you need to cut.
 1. Cops coming to house – Want to come through – House is a mess
 2. If you have stones – ask an elderly female juror if it's ok to for you to look through her purse real quick – Stand back
 3. Ask young juror if you can peruse through their cell phone.

- c. Talk about what Miranda means to them.

3. Opening

- Address refusal right out of the shoot - Pick a theme and stick with it.
- Focus on the evidence that will cast doubt on States claims of under the influence.
- Don't dwell on the refusal – focus on evidence of sobriety.

4. Cross

- Throughout your cross you are using the officer as your witness.
 - Highlighting the good things your client did that would be consistent with sobriety.
 - Good driving?
 - Good stop sequence
 - License/Reg/Ins produced timely and appropriately
 - Exited the car ok
 - Polite and cooperative (hopefully)
 - Agreed to perform field sobriety exercises
 - Didn't throw a fit when arrested - cooperative
- In dealing with the refusal - let the officer help you!

Sample Cross Dealing With Refusal

- Officer, you read Mr. Defendant the implied consent advisory?
 - Why don't you go ahead and read it for us right now, slow enough for the court reporter to keep up (he'll always go too fast). (mark as an exhibit if you want to)
- That is quite a bit of information?
 - Gave it to him relatively quickly?
 - 2-3 minutes by my count?
- Mr. Defendant have any questions about it?
 - Seemed to comprehend what you read to him?

- Any concerns regarding his cognitive functioning or mental abilities at all?
- Never asked to call or ask anyone for help on his decision (if applicable)
 - Didn't try to lawyer up (if applicable)
- Did you give him any information about the consequences of his decision beyond what is included in that advisory?
 - So you never told him that if he refused to take the test that would someone mean he is guilty of operating while intoxicated?
 - Read him his Miranda rights?
 - Advised him he didn't have to say or do anything without a lawyer present?
 - Never told him that if he declined to take the test you would tell a jury it meant he was intoxicated?
 - Certainly not doing that now are you?
- You have him the information required by law to give him about his decision?
 - He was required to choose one of the options you gave him?
 - Chose to decline the test?
 - Well within his right to do so?
 - Again, you aren't saying he is guilty of OWI because he chose one of the options you gave him are you?

5. Jury Instructions.

- **PROTECT YOUR RECORD**
 - Object to giving refusal instruction.

- Uses defendant's exercise of a constitutional right against him in violation of article 1 section 8 of the Iowa Constitution.
- Unnecessarily highlights and emphasizes one piece of evidence over all others.

6. **Closing** – Should be reiterating your theme from opening.

- Going through and focusing on why have failed to prove “Under the Influence”
- Always remind jurors of instruction saying they can accept or reject whatever evidence they find reliable or unreliable.
- SAY PLEASE – Ask nicely, you get farther. ☺