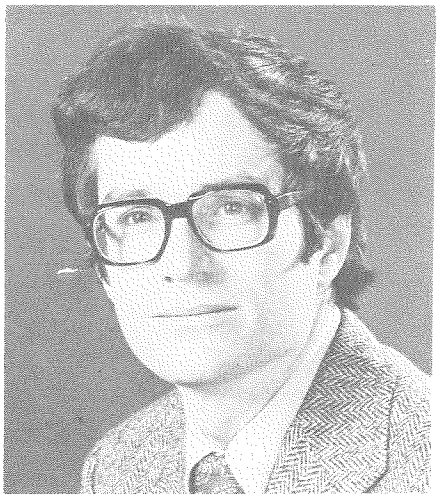
JANUARY-FEBRUARY 1982

ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY



MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

As most of you are well aware, the Law Enforcement Assistance Administration (L.E.A.A.) will be terminating on April 15, 1982. Although the end of LEAA has been in the offing for some period of time, April 15 will be the death knoll, and with it the era of a seemingly endless flow of federal dollars to local law enforcement agencies will end.

What this means is that local law enforcement agencies will have to rely on each other and the State agencies to carry out their functions. To do so, such non-productive pursuits as worrying about "turf" and who gets the credit will have to be cast aside in favor of a spirit of cooperation and mutual assistance.

Our office stands ready to help in the area of training by providing to the extent we can, given our own mission and financial restraints, whatever legal training and advice local departments may feel they need. We have recently put on a two-day seminar on police use of force for one local department and would happily consider similar sessions for other departments in the future.

Please contact Jim Brannigan, Deputy Attorney General in charge of the Criminal Division to explore the possibility of our conducting a training session for your department.

Jim Tierney

JAMES E. TIERNEY
Attorney General

THE NEW O.U.I. LAW II

AND RELATED PROVISIONS

The first part of this article appeared in the November-December 1981 issue of ALERT and discussed primarily the arrest and summons procedures under the recent amendments to Maine's laws dealing with operating a motor vehicle under the influence of intoxicating liquor O.U.I. The first part of the article also began a discussion of procedures relating to the obtaining of a blood-alcohol test and included guidelines for giving warnings with respect to a person's choosing or refusing to take a blood-alcohol test. This issue of ALERT continues that discussion with an explanation of the consequences of a person's choosing or refusing to take the test. Officers are encouraged to review the November-December 1981 issue before reading this issue.

Person Chooses Test

The person who has been arrested or summonsed for operating under the influence and who has been warned as described above has three choices available to him. He may (1) choose a blood test, (2) choose a breath test, or (3) refuse to take any test.

If the person chooses the blood test, the person may, at his request have the blood test administered by a physician of his choice, if the physician is reasonably available. The officer should assist the person in making arrangements to have the test administered by the personal physician. If the person does not request that the test be administered by a physician of his choice, the officer must choose a duly licensed physician, a registered nurse, or a person cer-

tified by the Department of Human services to administer the blood test. No person other than those specified may administer the *blood* test.

If the person arrested or summonsed for operating under the influence chooses the breath test, the new law allows the law enforcement officer to determine which type of breath test to be administered. This clears up a question under the prior law whether the person who selected a breath test could then choose *which* breath test. The person has no such choice under the new law; it is solely the officer's decision.

If the officer chooses the breathalyzer (balloon) test, he may administer the test himself. The officer should make sure that the equipment he uses bears the stamp of approval affixed by the Department of Human Services. After the breathalyzer test has been administered, the officer should submit the sample specimen by certified or registered mail to the Department of Human Services, or a person certified by the Department, for analysis.

The officer may choose to utilize, as an alternate breath testing method, the self-contained breath-alcohol testing apparatus (also called the Intoxylizer), provided it is reasonably available. If the Intoxylizer is not reasonably available, the officer should use the breathalyzer or balloon test. Also, the Intoxylizer test may be administered *only* by a person certified to operate the apparatus by the Maine Criminal Justice Academy. If the officer who arrests or issues a uniform traffic ticket for O.U.I. is not so certified, he should make sure that a certified person is available to administer the Intoxylizer test. Otherwise, the breathalyzer test should be used.

The person certified to operate the Intoxylizer should make sure that it bears the stamp of approval affixed by the Department of Human Services before using it. After the certified person administers the Intoxylizer test, he should issue a certificate stating the results of the analysis. That certificate, when duly signed and sworn to by the certified person, will be admissible in evidence in any court of the State and will be prima facie evidence that the percentage by weight of alcohol in the blood of the defendant was, at the time the breath sample was taken, as stated in the certificate. A sample certificate appears below:

SELF CONTAINED BREATH-ALCOHOL TESTING APPARATUS DETERMINATION OF BLOOD ALCOHOL LEVEL

NAME —
ADDRESS —
DATE OF BIRTH —

OFFICER —
POLICE DEPARTMENT —
DATE/TIME OF OFFENSE —
DATE/TIME OF TEST —
CERTIFIED OPERATOR —

Self contained breath-alcohol apparatus result showed an amount of alcohol corresponding to: _____ percent alcohol by weight in the blood.

STATE OF MAINE
,SS.

Date: _____
Personally appeared before me the above named _____ and made oath that the statements contained in the foregoing certificates are true.

_____
Notary Public
My Commission Expires:

_____
Signature
Certified Operator

Date: _____

Regardless of which blood-alcohol test is used, if the person tested so requests, the law enforcement officer must make available full information concerning the test or tests to the person or person's attorney.

Person Refuses Test

The person who has been arrested or summonsed for operating under the influence and who has been warned as described earlier may refuse to take any blood alcohol test. If the person refuses, no test may be given. The new law requires the law enforcement officer to notify the Secretary of State of the refusal within 72 hours of the refusal, excluding Saturdays, Sundays and holidays. (The prior law allowed the officer 20 days to notify the Secretary of State.) The notification must be a written statement under oath stating that the law enforcement officer had probable cause to believe that the person was operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor, and that the person had revoked his consent by refusing to submit to a chemical test to determine the blood-alcohol level by analysis of his blood or breath. The form appearing on page 4 of the November-December 1981 issue of ALERT should be used to notify the Secretary of State of a person's refusal to take a blood or breath test.

The reason for the new law's shorter 72-hour notification period is to ensure that the license suspensions for refusal to take a blood or breath test will be imposed as soon as possible. It should be noted that an officer's failure to comply with the 72-hour requirement will not affect the Secretary of State's authority to suspend a person's license, unless the officer's delay prejudices the person's ability to prepare or participate in a suspension hearing. Although such a prejudicial delay would be a rare occurrence, the officer should strictly comply with the 72-hour notification requirement and not take unnecessary risks. More importantly, if for some reason an officer fails to

meet the 72-hour deadline, he should still send the notification of refusal.

RIGHT TO COUNSEL

Under Maine law, there is no constitutional or statutory right to consult with an attorney, or even to call one, before deciding whether or not to take a chemical test. An officer may honor a defendant's request to speak with an attorney, however, but not if it would interfere with the administration of the test:

(1) Because of the delay involved in contacting the attorney;

(2) Because of the inability to provide secure facilities to prevent the ingestion of material to mask the test sample; or

(3) For any other legitimate reason.

The inability to contact an attorney is not a valid reason for refusing to take a chemical test and such a conditional refusal will be taken as a refusal under the implied consent law.

CHARGING

Among the more publicized aspects of the new O.U.I. law have been (1) the provisions allowing the prosecuting attorney to choose between charging criminally for operating under the influence or charging the offense civilly as a traffic infraction and (2) the provisions providing that a person is automatically guilty of operating a motor vehicle with an excessive blood-alcohol level if test results show 0.10% or more by weight of alcohol in his blood. These provisions have not been discussed so far in this article because they do not affect the law enforcement officer's powers and duties during the investigation, arrest, summons, or blood-alcohol testing stages of an O.U.I. case.

These provisions do indirectly affect the law enforcement officer's input to the charging decision of an O.U.I. case, however. Although the prosecuting attorney has the sole responsibility for deciding what charges will be brought, his decision in many instances will depend on information supplied by the law enforcement officer. For example, 29 M.R.S.A. §1312-C(5) requires the prosecuting attorney to charge criminally if the defendant:

A. Was tested as having a blood-alcohol level in excess of 0.20%;

B. Was driving more than 30 miles per hour over the speed limit;

C. Attempted to elude an officer; or

D. Had a prior conviction or civil adjudication for operating under the influence or operating with an excessive blood-alcohol level.

Furthermore, under 29 M.R.S.A. §1312-C(7), the prosecuting attorney *may* elect to charge criminally instead of civilly in any other circumstances, including but not limited to, when the defendant:

"A. During the course of the operation which resulted in the prosecution for operating under the influence:

(1) Was operating between one and 30 miles an hour in excess of the speed limit;

(2) Failed to stop for an officer, as defined in section 2501-A, subsection 2;

(3) Was involved in a traffic accident; or

(4) Committed any other moving violation which the attorney for the State believes warrants criminal prosecution; or

B. Had revoked his implied consent to take a blood or breath test by refusing to take one within the immediately preceding 6 years."

Law enforcement officers should consult their local District Attorney's Office to determine what information is required in O.U.I. cases and when that information is required. Officers should strictly comply with local prosecutorial policy in O.U.I. cases because the prosecuting attorney must have specific information at a specific time in order to decide how the defendant will be charged.

RELATED PROVISIONS

The First Regular Session of the 110th Maine Legislature also enacted several new provisions designed to strengthen the operation after suspension laws and the habitual offender laws. These provisions also affect the law enforcement officer's powers and duties. One of these provisions, 29 M.R.S.A. §2241-I, requires that "[i]n the event that a law enforcement officer, in the course of stopping or detaining a motor vehicle, obtains from the operator of the motor vehicle a license which is under suspension, the officer shall retain physical custody of the license and shall transmit the license, together with a report stating the circumstances under which it was obtained, to the Secretary of State."

Also, a newly enacted 29 M.R.S.A. §2184(1) provides for a mandatory imprisonment term for operating after suspension if the suspension resulted from a criminal conviction for operating under the influence or operating with an excessive blood-alcohol level, or for a revocation of implied consent by refusing to take a blood-alcohol test. Therefore, the prosecuting attorney needs to know the reason for the suspension when charging operating after suspension. Officers should include a teletype of the defendant's record along with a request for a charge of operating after suspension.

Finally, 29 M.R.S.A. §2298-A requires a law enforcement officer, who has arrested or charged a person under 29 M.R.S.A. §2298 with having operated a motor vehicle while the revocation prohibiting operation is in effect, to notify the Secretary of State of the arrest or proceeding.

This concludes the discussion of the amendments to Maine's laws dealing with operating a motor vehicle under the influence of intoxicating liquor and with related provisions regarding operation after suspension and habitual offenders. Because of the complexity of the laws and the degree of discretion involved in enforcing and prosecuting them, many questions remain unanswered by this article. Officers are encouraged to consult their local prosecuting attorney to resolve legal and policy issues with respect to the laws discussed.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State Office Building, Station #6, Augusta, Maine 04333.

ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

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