

Is the Breathalyzer Mouthpiece a Foreign Substance Requiring a New 20 Minute Observation Period?

By Sean D. Brady

Is the Breathalyzer mouthpiece a foreign substance requiring a new 20 minute observation period? This issue was addressed in the case of People v. Wilhelm, 803 N.E.2d 1032 (2nd Dist. 2004). The facts in Wilhelm are as follows: Lois Wilhelm was arrested and charged with driving under the influence of alcohol under 625 ILCS 5/11-501(a)(2) and also with having a BAC over 0.08 under 625 ILCS 5/11-501(a)(1). After the 20 minute observation period, Ms. Wilhelm submitted to a Intox EC/IR breathalyzer. She placed the machine's mouthpiece in her mouth blew into the machine. However, her attempt to blow in the machine resulted in a deficient sample. She then removed the mouthpiece, talked to the officer, replaced the mouthpiece and then mad a second attempt on the machine. Her second attempt at the breathalyzer also resulted in a deficient sample. She again removed the mouthpiece and the replaced it. She then made a third attempt to blow in the machine. Her third attempt resulted in a sufficient sample and yielded a BAC result over 0.08. The total time it took for Ms. Wilhelm to make her three attempts and finally get a sufficient sample was approximately four minutes.

The trial court held that the mouthpiece used in the breathalyzer was a foreign substance as defined under. 20 Ill. Adm. Code § 1286.10 (2003). The trial court declared that because a foreign substance entered Ms. Wilhelm's body, a new 20 minute observation period had to be commenced before each subsequent attempt at the breathalyzer. Accordingly, the trial court rescinded the statutory summary suspension. The State then appealed the recision order.

On appeal, the Appellate Court reversed. The Illinois Administrative Code states that "During the 20[-]minute observation period the subject shall be deprived of alcohol and foreign substances and shall not have regurgitated or vomited." 20 Ill. Adm. Code § 1286.310(a)(1) (2003). In fact the Code defines a foreign substance as, "any substance not in the subject's body when a 20-minute observation period is commenced, excluding a substance introduced due to normal breathing." 20 Ill. Adm. Code § 1286.10 (2003). The appellate court found the language of the Code to be ambiguous and therefore the court looked at the intent behind the regulation. The court stated that the central purpose behind the regulation is to insure that a subject gives an accurate breath sample. The appellate court went on to say that to follow the trial court's ruling would ignore the overall purpose of the regulation - to get an accurate breath sample. "If the breathalyzer's mouthpiece is a 'foreign substance,' one could argue that even the initial breath test can never be performed." 803 N.E.2d at 1035. The appellate court found that interpretation of the code to be "preposterous an clearly contrary to the drafters' intent." 803 N.E.2d at 1035. The appellate court also cited a regulation from the state of Washington which specifically stated that the mouthpiece was not a foreign substance. Wash. Adm. Code § 448-13-040 (2003). The appellate court held that the drafters of the regulation did not intend for the mouthpiece to be a foreign substance which would require a new 20 minute observation period. Accordingly, the appellate court reversed the trial court's recision order.

In Wilhelm, the appellate court focused on the drafter's intent behind the regulation which was to obtain accurate breath test results. Obviously, if Ms. Wilhelm presented evidence that using the same mouthpiece for three attempts at the breathalyzer actually made her breath test result unreliable, the court probably would have ruled differently. Accordingly, until someone offers evidence that the cumulative effect of using the same mouthpiece for successive

attempts at a breathalyzer test can skew the breath test result, the mouthpiece is unlikely to be deemed a “foreign substance” which would require a new 20 minute observation period.