STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-v-

KALVIN LEE FRANTZ,

Defendant/Appellant.
_____________________________/

Circuit Court File No.
97-7317-AR
HON. PHILIP E. RODGERS, JR.
District Court File No.
97-3720-1-SD

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DECISION AND ORDER

Defendant/Appellant (hereinafter Defendant) timely filed an appeal of the 86th District Court's denial of his Motion to Suppress the results of the breathalyzer tests administered on April 6, 1997. The People timely filed a response in opposition to the motion. This Court hereby dispenses with oral argument pursuant to MCR 2.119(E)(3). This Court has reviewed the motion, the briefs, the transcript of the hearing held on May 7, 1997, and the Court file.

On May 7, 1997, the lower court held a hearing on Defendant's motion to suppress the results of breathalyzer tests taken by Grand Traverse Sheriff's Deputy Drogowski after the officer stopped Defendant on M-72 east of Acme, Michigan on April 6, 1997. At the conclusion of the hearing, Honorable James R. McCormick denied the motion. In his brief on appeal, Defendant argued that the breathalyzer test results accepted by the lower court in the aforementioned hearing

were based on a single sample, the results of which were invalidated by the results of subsequent tests which produced lower readings.

Administrative Rule 325.2655(f)(1988) governs breath alcohol tests. This Court provides a *de novo* review of Defendant's suppression motion. The Court of Appeals, in *People v Tomko*, 202 Mich App 673, 675-677; 509 NW2d 868 (1993), discussed the administration of chemical tests, including the admissibility of initial and subsequent test results, and made the following instructive comments:

> MCL 257.625a; MSA 9.2325(1)1 provides for testing to determine the amount of alcohol in a person's blood, urine, or breath. Section 625g (now § 625a[5][g]), provides that the Department of State Police may promulgate uniform rules for administering the chemical tests. The pertinent administrative rule, 1988 AACS, R 325.2655(1)(f), was amended in 1988 to read in part:
>
> > A second breath alcohol analysis may be administered, except when the person refuses to give the second sample. Obtaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in the implied consent statute, being § 257.625c of Act No. 300 of the Public Acts of 1949 [subsequently amended and renumbered], as amended. The purpose of obtaining a second sample is to confirm the result of the first sample.
>
> This Court has previously held that Breathalyzer test results should be suppressed where a second Breathalyzer test required by administrative rule is not administered. *People v Willis*, 180 Mich App 31; 446 NW2d 562 (1989). However, Willis concerned violations of the version of the administrative rule that preceded the 1988 amendment. For the following reasons, we conclude that Willis does not control cases falling under the provisions of the administrative rule as it was amended in 1988.
>
> We apply the usual rules of statutory construction to administrative rules. *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993). One such rule is that a change in the wording is presumed to reflect a change in the meaning. *In re Childress Trust*, 194 Mich App 319, 326; 486 NW2d 141 (1992). Before the amendment at issue, the rule provided that "[a] second breath alcohol analysis shall be administered." The change from "shall" to "may" supports the conclusion that the use of the word "may" denotes discretionary activity. Childress, supra; People v Kelly, 186 Mich App 524, 529; 465 NW2d 569 (1990).
>
> Accordingly, we hold that the admissibility of Breathalyzer test results under § 625a(1) (now § 625a[6][d]) does not hinge on the administration of a second test as long as the subject was offered a second test. As the administrative rule indicates, the

> purpose of administering a second test is simply to confirm the result of the first sample, a confirmation that is at least as likely to be in the best interest of the subject taking the test as it is in the interest of the police or the public. *People v Dicks*, 190 Mich App 694, 698-699; 476 NW2d 500 (1991). If a subject prefers not to take a second test, it need not be administered, and we see nothing in the language of either the statute or the administrative rule that creates a duty on the part of the police to urge the subject to take a second test.
>
> However, we decline to extend this reasoning so far as to say that a second test need not be administered if the police simply prefer not to administer it. The first sentence of the rule anticipates that it is the person being tested who has the power to decide whether a second test will be taken, not that the police have the power to decide whether it will be administered. To hold otherwise would render the phrase "except when the person refuses to give the second sample" nugatory, a construction that is to be avoided. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Further, read in the context of the drunken driving statute, our construction of the administrative rule produces an harmonious whole and avoids absurd or unreasonable consequences. *People v Weatherford*, 193 Mich App 115; 483 NW2d 924 (1992); *People v Downey*, 183 Mich App 405, 409; 454 NW2d 235 (1990).

Tomko, supra at pp 675-677.

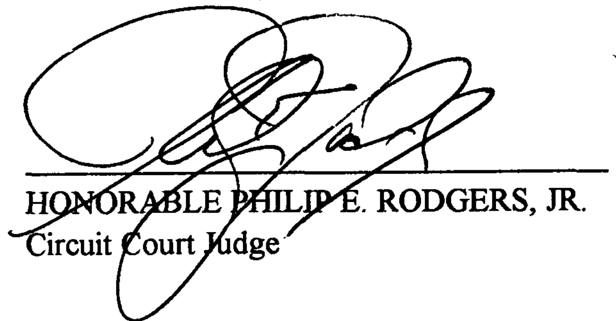
The following facts are uncontroverted. The Defendant was properly advised of his chemical test rights prior to the test administration. When the officer administered the first breathalyzer test the resultant reading was 0.200. Deputy Drogowski asked the Defendant to take a second and a third test. In the latter tests , for whatever reason, Defendant failed to supply sufficient air for the machine to measure. After the second and third tests, the results were readings of "refused" and the numeric results were 0.000. Defendant did not assert his right to an independent test, such as a blood or urine test. At the motion hearing below, the deputy explained the protocol regarding the first and subsequent tests and his knowledge that the machine was properly maintained, calibrated and appeared to be in good working order.

In this case, the second and third test samples were technically "refused" as insufficient samples to register any blood alcohol content. It is the view of this Court that the first breathalyzer test reading of 0.200 is admissible and cannot be excluded where the second test or third tests are "refused" intentionally or for lack of effort. *Tomko, supra* at pp 676-677. To determine otherwise would yield an absurd result. As succinctly stated by the People, on page 4 of its brief,

> [If] a second measurement of Blood Alcohol Content is required in order for the Blood Alcohol Content to be admissible, then each time a person takes a breath test and learns that the result is an unlawful Blood Alcohol Content, that person could pretend to supply an adequate sample on the next test, and the test results will have to be suppressed because only one measurable sample will be obtained. *People v Tomko* clearly states that this is not the correct interpretation of the Administrative Rule. *Tomko, supra* at p 677. A technical refusal should be treated as the equivalent of a refusal to take the second breath test and the first breath test should be admissible.

Deputy Drogowski fairly and properly offered the second and third tests to Defendant. After hearing the evidence, the trial court exercised its discretion and refused to suppress of the Defendant's first blood alcohol level test. R 325.2655(1)(f) (1988). Defendant's motion to suppress the first breathalyzer test was properly denied. The trial court is affirmed, and this case is hereby remanded to the trial court for further proceedings.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

10/02/97
Dated