

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

State v. Ernest Spell (A-99-07)

Argued October 20, 2008 -- Decided November 10, 2008

PER CURIAM.

Defendant Ernest Spell was convicted in municipal court of refusing to submit to a Breathalyzer® test, in violation of N.J.S.A. 39:4-50.2. At a trial de novo before the Superior Court, Law Division, defendant was convicted anew.

The Appellate Division affirmed the conviction. State v. Spell, 395 N.J. Super. 337 (2007). The panel also held that whenever a person detained for driving while intoxicated refuses to take a Breathalyzer® test immediately upon request, police officers must read the additional, final paragraph of the New Jersey Motor Vehicle Commission Standard Statement for Operators of a Motor Vehicle – N.J.S.A. 39:4-50.2(e).

The Supreme Court granted the State's petition for certification and denied defendant's cross-petition for certification. 194 N.J. 269 (2008).

HELD: The Court affirms defendant's conviction substantially for the reasons expressed by the Appellate Division. The Court vacates that part of the Appellate Division's holding that requires police officers to read the final, additional paragraph of the standard statement whenever a defendant refuses to provide a breath sample immediately upon request.

1. The record supports the finding that defendant unequivocally refused to take the Breathalyzer® test. (p. 2)
2. The additional paragraph of the standard statement to which the Appellate Division referred is, according to its instructions, to be read aloud by police officers only if, after all other required warnings have been provided, a person detained for driving while intoxicated either conditionally consents or ambiguously declines to provide a breath sample. That paragraph reiterates some of the prior warnings, including that the person's right to remain silent and right to counsel do not apply to the taking of breath samples and do not give the person the right to refuse to provide them; and that if the person does not unconditionally agree to provide breath samples, the person will be charged with refusal to submit to the test. That paragraph concludes by again asking if the person will submit to giving breath samples. The Appellate Division's holding that requires police officers to read that paragraph in all cases was not necessary to the determination of this case. To that extent, it is vacated. (pp. 2-3)
3. The Legislature has vested in the Chief Administrator of the Motor Vehicle Commission the authority to determine the contents and procedure to be followed in respect of the standard statement. The Court refers the procedure outlined by the Appellate Division to the Chief Administrator for consideration. (p. 4)
4. Because the decision to amend the standard statement is vested in the sound discretion of the Chief Administrator, the Court does not retain jurisdiction over that aspect of the judgment. (pp. 4-5)

The judgment of the Appellate Division is **AFFIRMED, as MODIFIED.**

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS join in this opinion.

SUPREME COURT OF NEW JERSEY
A-99 September Term 2007

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ERNEST SPELL,

Defendant-Respondent.

Argued October 20, 2008 - Decided November 10, 2008

On certification to the Superior Court,
Appellate Division, whose opinion is
reported at 395 N.J. Super. 337 (2007).

Boris Moczula, Assistant Attorney General,
argued the cause for appellant (Anne
Milgram, Attorney General of New Jersey,
attorney; Natalie A. Schmid Drummond, Deputy
Attorney General, on the brief.

John Vincent Saykanic argued the cause for
respondent.

Jeffrey S. Mandel argued the cause for
amicus curiae Association of Criminal
Defense Lawyers of New Jersey
(PinilisHalpern, attorneys).

PER CURIAM.

Defendant Ernest Spell was convicted in municipal court of
refusing to submit to a Breathalyzer[®] test, in violation of
N.J.S.A. 39:4-50.2. At a trial de novo before the Law Division
of the Superior Court, defendant was convicted anew, and that
conviction was affirmed by the Appellate Division. State v.

Spell, 395 N.J. Super. 337 (2007). We granted the petition for certification filed by the State of New Jersey, 194 N.J. 269 (2008), and denied defendant's cross-petition for certification. Ibid. We also granted to the Association of Criminal Defense Lawyers of New Jersey leave to appear as amicus curiae.

We affirm defendant's conviction substantially for the reasons expressed by the Appellate Division. As the panel succinctly noted, "defendant was found to have unequivocally refused to take the breathalyzer test[and t]he record supports such a finding[.]" Spell, supra, 395 N.J. Super. at 347. We add only the following.

In further holding "that, effective on October 1, 2007,¹ officers must read the additional paragraph of the [New Jersey Motor Vehicle Commission Standard Statement for Operators of a Motor Vehicle - N.J.S.A. 39:4-50.2(e) (rev. & eff., April 26, 2004)] whenever the defendant refuses to immediately take the breathalyzer exam upon request[.]" id. at 348, the Appellate

¹ The State moved for a stay of the Appellate Division's decision "pending disposition and resolution of the State's petition for certification." Defendant joined in that application and separately moved for a stay pending consideration of its cross-petition for certification. The Appellate Division granted the State's motion and issued "a stay pending proceedings on the State's petition for certification." It also provided that "[i]f certification is granted, the stay shall continue pending the outcome of the appeal unless the Supreme Court decides otherwise." It likewise granted defendant's application, noting that the "stay shall continue through proceedings if the defendant's cross-petition is granted, and shall be automatically vacated if denied."

Division exceeded its mandate. The additional paragraph of the standard statement to which the Appellate Division referred is to be read aloud only if, after all other warnings have been provided, a person detained for driving while intoxicated either conditionally consents or ambiguously declines to provide a breath sample. It provides, in full, as follows:

I previously informed you that the warnings given to you concerning your right to remain silent and your right to consult with an attorney, do not apply to the taking of breath samples and do not give you a right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Your prior response, silence, or lack of response, is unacceptable. If you do not agree, unconditionally, to provide breath samples now, then you will be issued a separate summons charging you with refusing to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood.

Once again, I ask you, will you submit to giving samples of your breath?

[New Jersey Motor Vehicle Commission Standard Statement for Operators of a Motor Vehicle - N.J.S.A. 39:4-50.2(e) (rev. & eff., April 26, 2004).]

The Appellate Division's holding that requires that police officers read that final, additional paragraph of the standard statement in all cases was not necessary to the determination of this case. To that extent, it is vacated. We take that action

because the Legislature has vested in the Chief Administrator of the Motor Vehicle Commission (formerly the Director of the Division of Motor Vehicles) the authority to determine the contents and procedure to be followed in respect of that standard statement. N.J.S.A. 38:4-50.2(e) (providing that the "standard statement [that] shall be read by the police officer to the person under arrest" is to be prepared by the Chief Administrator of the Motor Vehicle Commission). Rather, in keeping with the express legislative allocation of responsibilities set forth in N.J.S.A. 39:4-50.2(e), we refer the procedure outlined by the Appellate Division to the Chief Administrator of the Motor Vehicle Commission for consideration. See State v. Widmaier, 157 N.J. 475, 498-99 (1999) (recognizing that when "it may be in the interest of both law enforcement officials and the driving public to amend the standard statement in order to eliminate any ambiguity concerning a motorist's intent to submit to the test[,] judiciary may "recommend a modification to the instructions accompanying the statement[;]" it may "urge [that Chief Administrator of the Motor Vehicle Commission] consider revising the standard statement" as recommended; and it may "encourage [that Chief Administrator] simplify and clarify" statement). And, because the decision to amend the standard statement is vested in the sound discretion

of the Chief Administrator, we do not retain jurisdiction over that aspect of this judgment.

As modified, the judgment of the Appellate Division is affirmed.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS join in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-99

SEPTEMBER TERM 2007

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ERNEST SPELL,

Defendant-Respondent.

DECIDED November 10, 2008

Chief Justice Rabner PRESIDING

OPINION BY Per Curiam

CONCURRING/DISSENTING OPINIONS BY _____

DISSENTING OPINION BY _____

CHECKLIST	AFFIRM AS MODIFIED	
CHIEF JUSTICE RABNER	X	
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE WALLACE	X	
JUSTICE RIVERA-SOTO	X	
JUSTICE HOENS	X	
TOTALS	7	