

**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

MAR 28 2006

**MICHAEL S. RICHIE**  
CLERK

MICHAEL W. BOLER, )  
)  
Appellee, )  
)  
vs. )  
)  
STATE OF OKLAHOMA *ex rel.* )  
DEPARTMENT OF PUBLIC SAFETY, )  
)  
Appellant. )

Case No. 102,438

APPEAL FROM THE DISTRICT COURT OF  
MCCLAIN COUNTY, OKLAHOMA

HONORABLE NOAH EWING, TRIAL JUDGE

**REVERSED AND REMANDED WITH INSTRUCTIONS**

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For Appellee

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For Appellant

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OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

The State of Oklahoma ex rel. Department of Public Safety (DPS) appeals an order of the trial court setting aside the revocation of Michael W. Boler's driver's license. The issue on appeal is whether the trial court erred in finding that the revocation should be set aside due to the arresting officer's failure to inform Boler that a separate testing of a breath sample taken by an intoxilizer can be analyzed by Boler at his own expense within 60 days of the test date. Upon review of the record on appeal and applicable law, we find that the trial court erred in concluding that the revocation should be set aside, and we therefore reverse the trial court's decision. We remand the matter with instructions to the trial court to consider Boler's request for a modification of the revocation.

**FACTS AND PROCEDURAL BACKGROUND**

The facts in this case are undisputed. On July 24, 2004, Newcastle Police Officer Jonathan May stopped Boler after observing him drive his vehicle across lanes of traffic onto the shoulder and then correct himself back across the lanes without signaling. May testified that Boler nearly struck a vehicle he was overtaking on the left before he corrected himself back into his original lane. After stopping Boler, May testified that he "detected a strong odor of intoxicating beverage emanating from the vehicle, and that [Boler] was speaking with kind of a

slurred speech and appeared to have red, watery eyes.” May asked Boler how much Boler had had to drink and Boler replied that “he’d had two beers.” May tried to administer a field sobriety test but discontinued the test after he determined “because of the proximity of the roadway, that it would be unsafe for [Boler] to continue on with the test.” May then placed Boler under arrest. Shortly after the arrest, May read to Boler “the Implied Consent from [his] card.” The implied consent request which May read states the following:

1. You have been arrested and the arresting officer has reasonable grounds to believe that you were driving or in actual physical control of a motor vehicle while under the influence of intoxicants.
2. You are requested to submit to a test or tests for the purpose of determining the presence and concentration of intoxicants in your body.
3. The test will be a (BREATH)(BLOOD) test and will be administered at no cost to you.
4. In addition to this test, you may at your own expense have an additional test of your choice, provided that a sufficient quantity of any specimen obtained shall be available to the state for testing.
5. You are not entitled to consult with an attorney prior to making your decision on whether or not to submit to the state’s test.

6. You may refuse state's test, but as a consequence your driver's license will be revoked or denied by the Department of Public Safety.

7. If you consent to testing, are 21 years of age or older and the test result is 0.08 or more alcohol concentration, your driver's license will be revoked or denied by the Department of Public Safety. If you are under the age of 21 and consent to testing and the test result is 0.02 or more alcohol concentration, your driver's license will be revoked or denied by the Department of Public Safety.

8. Will you take the state's test?

May offered Boler the breath test. Boler stated, "No" in response to the implied consent request. Boler signed a form stating that he refused the test. Boler was booked and placed in jail.

DPS revoked Boler's license for 180 days due to his refusal to submit to the chemical test. Boler requested a hearing with a DPS hearing officer. The hearing officer sustained the revocation.

Boler filed a petition in the District Court of McClain County seeking to have the revocation set aside. Boler asserted that Officer May did not comply with 47 O.S. § 754(F)(1)(d), as amended effective July 1, 2004, which provided the following:

F. The hearing before the Commissioner of Public Safety or a designated hearing officer shall be conducted in the county of arrest or may be conducted by telephone

conference call. The hearing may be recorded and its scope shall cover the issues of whether the officer had reasonable grounds to believe the person had been operating or was in actual physical control of a vehicle upon the public roads, highways, streets, turnpikes or other public place of this state while under the influence of alcohol, any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance as prohibited by law, and whether the person was placed under arrest.

1. If the revocation or denial is based upon a breath or blood test result and a sworn report from a law enforcement officer, the scope of the hearing shall also cover the issues as to whether:

d. the person was informed that a separate testing of the sample taken by the intoxilyzer can be analyzed by the person at his or her own expense within sixty (60) days of the test date . . . .

Boler asserted that Officer May's failure to comply with subsection (d) required that the District Court set aside the revocation.

At trial, May admitted that, if the language contained in subsection was not contained on the "Implied Consent" card, he did not inform Boler of the right to a separate testing of the sample taken by the Intoxilizer. The District Court set aside the revocation because Boler "was not informed 'that a separate testing of the sample taken by the Intoxilizer can be analyzed by the person at his or her own

expense within 60 days of the test date' pursuant to 47 O.S. § 754(F)(1)(d)."

DPS appeals.

### STANDARD OF REVIEW

When reviewing an order on an implied consent revocation, this Court may not reverse or disturb the trial court's decision unless it is "erroneous as a matter of law" or without "sufficient evidentiary foundation." *Abdoo v. State ex rel. Dep't of Pub. Safety*, 1990 OK CIV APP 2, ¶ 11, 788 P.2d 1389, 1393. Where the facts are not in dispute and the trial court's decision turns on the application of law, we conduct an independent *de novo* review. *See Manning v. State ex rel. Dep't of Pub. Safety*, 2003 OK CIV APP 57, ¶ 5, 71 P.3d 527, 528.

### ANALYSIS

The law of implied consent in Oklahoma provides that "[a]ny person who operates a motor vehicle upon the public roads, highways, streets, turnpikes or other public place or upon any private road . . . within this state shall be deemed to have given consent to a test or tests of such person's blood or breath, for the purpose of determining the alcohol concentration." 47 O.S. Supp. 2005 § 751(A)(1). If a driver, reasonably suspected of driving while under the influence of alcohol, refuses to consent to the State's test, the DPS "shall revoke" his or her

driver's license. 47 O.S.2001 § 753. *See, e.g., Pletcher v. State ex rel. Dep't of Pub. Safety*, 2003 OK 117, ¶ 4, 84 P.3d 725, 727.

It is undisputed that Boler refused to submit to a test of his blood or breath. May also signed the implied consent request form which listed the behavior and circumstances which led to a reasonable belief that Boler was driving under the influence of alcohol. Therefore, DPS properly revoked Boler's license.

We find that the trial court erred as a matter of law in deciding that 47 O.S. Supp. 2004 § 754(F)(1)(d) required that the revocation be overturned. By its own terms, § 754(F)(1)(d) applied only where the requirements of § 754(F)(1) had been met. Section 754(F)(1) provided that, "*If the revocation or denial is based upon a breath or blood test result*" then "*the scope of the hearing shall also cover the issues*" addressed in subsection (d). (Emphasis added.)

Clearly, Boler's revocation was not based upon a breath or blood test result because Boler refused to take a breath or blood test. Therefore, § 754(F)(1)(d) did not apply and we must reverse the decision of the District Court. We remand the matter for the trial court to consider Boler's request for a modification of the revocation to allow him to drive to his place of employment.

## CONCLUSION

The trial court erred in finding that the revocation of Boler's driver's license must be set aside because of the requirements of 47 O.S. Supp. 2004 § 754(F)(1)(d). Accordingly, the order of the trial court is reversed. The matter is remanded for the District Court to consider Boler's request for a modification of the revocation.

REVERSED AND REMANDED WITH INSTRUCTIONS.

GOODMAN, J., and REIF, J. (sitting by designation), concur.

March 28, 2006