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# LEGAL LOG

STATE DOCUMENTS

FEB 7 1985

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VOL. 2 NO. 11

NOVEMBER 1984

## Don't Hold Your Breath - Martin affirmed in State v. Sawyer

In July 1980, the S.C. Supreme Court decided the case of State v. Martin (268 S.E. 2d 105) and, in doing so, attempted to clear up misunderstandings concerning the power of a law enforcement officer to arrest for misdemeanors "committed in the presence of the officer". As well, Martin attempted to clear up the question of whether a "Breathalyzer" examination conducted after an arrest for DUI must be done at the direction of an officer who actually saw the defendant driving the motor vehicle.

The facts in Martin are basically as follows: A Highway Patrolman arrived at the scene of an automobile accident after its occurrence and found two cars, each damaged on their front and rear, and showing paint flecks corresponding to the color of the other car. At the scene, the defendant was found to be highly intoxicated and admitted that he was driving one of the vehicles. After investigation of skid marks and other physical evidence, the Patrolman placed Martin under arrest for DUI, a misdemeanor, and later offered him a "Breathalyzer" examination on which he registered .26%. Martin was tried and convicted of DUI but his conviction was later set aside after a motion for new trial was granted on the basis that the "Breathalyzer" results could not be used because the Patrolman did not see him driving, as required by S.C. Code Section 56-5-2950. The S.C. Supreme Court, in an unanimous decision, ordered that Martin's conviction be reinstated in spite of Martin's objections. The high court said that "...an officer can arrest for a misdemeanor when the facts and circumstances observed by the officer give

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him probable cause to believe that a crime has been freshly committed". (Martin at 107, emphasis in original text). Accordingly, the court held in the circumstances of Martin's arrest to satisfy the requirement of Section 56-5-2950 that a breath test be administered "...at the direction of a law-enforcement officer who has apprehended a person while driving...while under the influence of intoxicating liquor". (emphasis supplied).

In other words, in the Martin case, the court concluded that the Patrolman's obser-

vations constituted sufficient facts and circumstances to give him probable cause to believe Martin was driving under the influence. Therefore, the Patrolman could lawfully arrest Martin for DUI, and since he could arrest Martin for Driving Under the Influence (DUI), he was an officer who "...apprehended a person while driving..." within the meaning of Section 56-5-2950. As such, the breath test results were admissible.

The rule in Martin recently came under challenge in the case of State v. Sawyer (Opinion No. 22174 dated October 29, 1984, S.C. Supreme Court). The facts in Sawyer may be simply stated.

Sawyer admitted being in a bar until 4:30 a.m. He left the bar and went to his car in the parking lot where he slept until 7:00 a.m. At 7:00 he drove his car towards his home and some several miles from the parking lot overturned it in a private yard. A Highway Patrolman arrived approximately 15 minutes after the accident and found Sawyer trapped in his car. Sawyer admitted to driving the car and the Patrolman noticed that Sawyer's eyes were bloodshot and his speech slurred. Sawyer was arrested for DUI and given a "Breathalyzer" test. He was convicted subsequently of DUI in Magistrate's Court and filed his appeal on the basis that the breath test results should not have been admitted at his trial. The Circuit Court agreed and reversed his conviction ordering a new trial.

The Supreme Court took the opportunity to reemphasize its holding in Martin while reversing the Circuit Court and affirming Sawyer's conviction. Specifically, the Court stated:

"Martin argues the breathalyzer test was inadmissible because the officer who directed the test did not personally see him driving while under the influence.

We rejected this argument holding the test results were admissible where respon-

dent was intoxicated and admitted he was the driver because 'no prejudice resulted to respondent from the failure of the officer to actually view respondent's arrival at the scene.' 275 S.C. at 148.

As in Martin, respondent was not seen operating his vehicle by the arresting officer but he admitted to the officer he had been driving. We hold the driver's admission should be treated as part of the officer's sensory awareness of the commission of the offense which satisfies the presence requirement argued by respondent. Having complied with the statute, the results of Sawyer's breathalyzer test were admissible."

Thus, the S.C. Supreme Court layed to rest any continuing speculation that South Carolina Code Section 56-5-2950 requires that an officer actually see a defendant driving before a breath test may be properly administered. Martin when read with the language of that Code Section clearly gives the arresting officer authority to direct that the breath test be administered and to use the results in any subsequent prosecution even though the defendant was not actually seen driving the vehicle involved.

LEGAL LOG is published monthly by the South Carolina Criminal Justice Academy of which John A. O'Leary is executive director. The academy's legal affairs and legal instruction are handled by James M. Kirby, senior staff counsel, Henry R. Wengrow, general counsel and William C. Smith, staff counsel.