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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 46

DONALD ODUM,

Respondent.

20 Eagle Street
Albany, New York
March 27, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 46, the People of
2 the State of New York v. Donald Odum.

3 MR. KAPLAN: May it please the court, Stanley
4 Kaplan for appellant, People of the State of New York.
5 Your Honor, this case - - -

6 CHIEF JUDGE DIFIORE: Do you care, Mr. Kaplan - -
7 -

8 MR. KAPLAN: I'm sorry.

9 CHIEF JUDGE DIFIORE: - - - to reserve any
10 rebuttal time?

11 MR. KAPLAN: Oh, yes, ma'am. May I please have
12 one minute for rebuttal?

13 CHIEF JUDGE DIFIORE: One minute? And, Mr.
14 Kaplan, what's the evidence in the record that - - - of
15 this defendant's persistent refusal?

16 MR. KAPLAN: Well, the video - - - the videotape
17 which I provided to the court is he was initially asked if
18 he wanted to take the test. He said no. I believe when
19 asked again he said no. But when the officer said to him,
20 well, these are the ramifications, you can have your
21 license suspended or you will have your license suspended
22 and this can be used against you in court, he then after
23 that said, okay, I'll take the test.

24 JUDGE STEIN: So is there any real issue about
25 the refusal and that - - - and its admissibility? Aren't



1 we really just talking about the test results?

2 MR. KAPLAN: Well, the - - - well - - -

3 JUDGE STEIN: Because the refu - - -

4 MR. KAPLAN: Yes.

5 JUDGE STEIN: The only time he refused was before
6 he was ever warned, right?

7 MR. KAPLAN: That - - - that's true. But - - -
8 but there's also another factor which is a refusal, as
9 courts have indicated, is a consciousness of guilt. And
10 that we feel that when someone refuses to take the test
11 that is in effect an admission I'm feeling bad about this
12 and I don't want to take the test.

13 JUDGE STEIN: But - - - but aren't there rules in
14 the statute about the admissibility of - - - of the
15 refusal? Why is this different from the circumstances that
16 the statute addresses, the VTL?

17 MR. KAPLAN: Well - - - well - - -

18 JUDGE STEIN: Isn't it always a question of
19 consciousness of guilt in other words?

20 MR. KAPLAN: It is.

21 JUDGE STEIN: Okay. So - - -

22 MR. KAPLAN: It is.

23 JUDGE STEIN: So here you have - - - you have a
24 refusal, another refusal unwarned, right?

25 MR. KAPLAN: Yeah.



1 JUDGE STEIN: Right?

2 MR. KAPLAN: Yes.

3 JUDGE STEIN: And so according to the statute
4 they're not admissible, are they?

5 MR. KAPLAN: Well, under sub (f) I don't see why
6 not. There's no time limit on a refusal.

7 JUDGE STEIN: But there had been no warning.

8 MR. KAPLAN: Are you saying because he ultimately
9 consents - - -

10 JUDGE STEIN: Because there was no warning before
11 the refusals.

12 MR. KAPLAN: Well, she - - - well, he refused and
13 then he did refuse again. And before he consented he was
14 given - - - he was given the ramifications.

15 JUDGE STEIN: Right, so don't we then - - -

16 MR. KAPLAN: But that often can happen.

17 JUDGE STEIN: Don't we then move to the question
18 of whether the test results themselves - - - whether that
19 consent was voluntary?

20 MR. KAPLAN: Sure.

21 JUDGE STEIN: Okay.

22 MR. KAPLAN: I agree with you. But - - - but I
23 don't think it's either or. I think that the consent
24 should allow for the test results to go forward. He was
25 0.09 blowing in the breathalyzer, but I think that before



1 you get to that point if someone persists in refusing I
2 think it's something which it's incumbent upon an officer
3 to ask him do you know the ramifications? Do you know what
4 will happen? Then if he changes his mind and consents,
5 good, but I think the fact that he - - -

6 JUDGE STEIN: Isn't that what happened here?

7 MR. KAPLAN: It did.

8 JUDGE STEIN: Oh, so - - -

9 MR. KAPLAN: But I - - - but I think that the
10 fact that he initially refused should not be obscured from
11 the record. I think it's something which indicates that
12 only when he was given these - - - the ramifications of
13 what would happen that he then said yes, and I think that's
14 pertinent. That does indicate that he had an initial
15 unwillingness because of a consciousness of guilt. So I
16 don't think that should be expunged from the record. I
17 think that's part of the history of the case. And
18 therefore that should be something that's allowed to be
19 admitted for - - - for the court to consider, for a jury to
20 consider.

21 JUDGE STEIN: So if it's within - - - so your - -
22 - your position is if it's within the first two hours that
23 refusal is not admissible if it's unwarned, right? But if
24 it's after two hours it is now admissible?

25 MR. KAPLAN: No, the two hours means nothing.



1 The two hours is only a rule - - - a procedural rule where
2 someone is so intoxicated that they cannot - - -

3 JUDGE STEIN: Where does it say that?

4 JUDGE FEINMAN: Where did it come - - - where did
5 you come - - -

6 MR. KAPLAN: Well, that comes from case law that
7 I've cited in - - - in my brief that it moved - - - the
8 history of this rule moved from an additional evidentiary
9 rule back a long time ago where it was something that
10 within the two hours you didn't need a physician because of
11 evidentiary. But then it was moved to 1194 and under that
12 provision, it's a deemed - - - it says in the statute it's
13 deemed consent.

14 CHIEF JUDGE DIFIORE: So what are the scenarios
15 that you envision under the deemed consent?

16 MR. KAPLAN: Someone is so intoxicated they can't
17 speak. They're semi-conscious or comatose. And - - - but
18 they need to get a blood test. In fact, waiting only
19 serves a defendant because blood alcohol diminishes over
20 time. Waiting past the two hours is not hurting a
21 defendant, actually.

22 JUDGE STEIN: So - - - so the police officers in
23 the field - - -

24 MR. KAPLAN: Yes.

25 JUDGE STEIN: - - - are supposed to make a



1 determination as to how intoxicated the person is and as to
2 whether their level of intoxication renders them able to -
3 - -

4 MR. KAPLAN: That's right.

5 JUDGE STEIN: - - - give consent or not - - -

6 MR. KAPLAN: That's right.

7 JUDGE STEIN: - - - consent? And - - - but
8 doesn't that defeat - - - the whole purpose of the statute
9 was to not have the police forcing someone to - - - to take
10 a test?

11 MR. KAPLAN: No, it's - - - no, the purpose is
12 that under the deemed consent provision the law as a
13 procedural matter, not an evidentiary matter, has said that
14 when someone is not responsive. It's in the statute, and I
15 mean it's been interpreted this way. That's why it's
16 deemed consent because it can't be given by the - - - the
17 subject because that person - - -

18 JUDGE STEIN: Or else it's deemed consent because
19 we don't want the police to be making those determinations
20 and having a situation in which somebody's required to
21 submit to a test.

22 MR. KAPLAN: The case law has interpreted that
23 section, which I cite in my brief, as - - - as a change
24 from an evidentiary rule to a procedural rule and that the
25 purpose of it, the deemed consent, is for people who are so



1 intoxicated they cannot offer expressed consent.

2 JUDGE FAHEY: You know, I'm - - - I'm kind of
3 losing the argument here.

4 MR. KAPLAN: Oh, okay. So - - -

5 JUDGE FAHEY: So let's just take a step back.
6 The way I understand it is basically on the cases preceding
7 Robinson and Atkins is what you're talking about, correct?

8 MR. KAPLAN: Yes. Yes.

9 JUDGE FAHEY: All right. And that 1194(2)(a)(1)
10 is the - - - is the deemed consent provision that has a
11 two-hour limitation.

12 MR. KAPLAN: That's right.

13 JUDGE FAHEY: All right. And - - - and
14 1194(2)(f) contains no limitation.

15 MR. KAPLAN: That is correct.

16 JUDGE FAHEY: All right. So - - - and the fact
17 that - - - that the two-hour limitation occurs and the
18 deemed consent provision and whereas here we have an
19 expressed voluntary consent that contains no such
20 limitation.

21 MR. KAPLAN: That's right.

22 JUDGE FAHEY: That's the core of your argument,
23 right?

24 MR. KAPLAN: Yes, sir.

25 JUDGE FAHEY: Okay.



1 MR. KAPLAN: And so the - - - the fact they - - -

2 JUDGE RIVERA: Yeah, but doesn't provision (f) -

3 - -

4 MR. KAPLAN: I'm sorry.

5 JUDGE RIVERA: Doesn't provision (f) refer to
6 such chemical tests so it's referring back to the two-hour
7 window?

8 MR. KAPLAN: No.

9 JUDGE RIVERA: No?

10 MR. KAPLAN: No.

11 JUDGE RIVERA: Then what's the "such" referring
12 to?

13 MR. KAPLAN: Well, let me - - - I - - - it has
14 been interpreted that (2) (f) - - - and I've seen this in a
15 number of cases, (2) (f) does not have a time requirement.

16 JUDGE RIVERA: Well, no, I'm not - - -

17 MR. KAPLAN: It's - - -

18 JUDGE RIVERA: I'm not - - - yes, that was not my
19 question.

20 MR. KAPLAN: Okay.

21 JUDGE RIVERA: My question is you've got the word
22 "such" chemical test, and as you know, this statute talks
23 about chemical tests - - -

24 MR. KAPLAN: Yes.

25 JUDGE RIVERA: - - - that fall within this two-



1 hour window, and it talks about compulsory chemical tests
2 where you need a court order. But (f) is referring to
3 "such chemical tests" which is referring back to the
4 chemical tests that fall within the two-hour window.

5 MR. KAPLAN: No, I don't believe so. I don't
6 believe so.

7 JUDGE RIVERA: I'm - - - I'm asking you why.

8 MR. KAPLAN: Well, I - - - because I think - - -

9 JUDGE RIVERA: What's the point of the word
10 "such"?

11 MR. KAPLAN: Well, if you'll give me a moment.
12 Let me see if I can go through this. I don't have the - -
13 - do you have the - - - the statute?

14 JUDGE RIVERA: Well, it does say "such".

15 MR. KAPLAN: Well, I - - - I'm not disputing. I
16 mean you - - -

17 JUDGE RIVERA: Well, hopefully not.

18 MR. KAPLAN: I know that you're reading, but I -
19 - - my review of these cases, and I've gone through all the
20 cases - - -

21 JUDGE RIVERA: Well, have we ever said otherwise?
22 Let me ask you that.

23 MR. KAPLAN: I don't think you've addressed - - -
24 this court has not addressed this issue. That's why it's
25 cardinal that this court - - - because we have a split



1 between the Second Department and the First Department.
2 And the First Department is predicated on outdated law, and
3 it's interesting to note that there's even repudiation by
4 criminal courts in the Bronx which are not following Odum
5 and are not following Rosa.

6 JUDGE RIVERA: Let me ask you a different
7 question - - -

8 MR. KAPLAN: Okay.

9 JUDGE RIVERA: - - - if the Chief Judge will
10 permit me.

11 CHIEF JUDGE DIFIORE: Yes, please.

12 JUDGE RIVERA: Because you've already hit your
13 red light.

14 MR. KAPLAN: Yes, ma'am.

15 JUDGE RIVERA: Where is the authority to request
16 a person to take a chemical test after two hours? Where's
17 that authority?

18 MR. KAPLAN: The authority in case law has
19 derived from Atkins in which they say if you can give
20 express consent that it's permissible that by the same
21 token it would be illogical not to allow a refusal.

22 JUDGE RIVERA: I'm sorry. I wasn't clear.

23 MR. KAPLAN: Okay.

24 JUDGE RIVERA: My question is where in the
25 statute does it say a police officer can ask you after two



1 hours to take the test?

2 MR. KAPLAN: I don't think - - - I don't think it
3 expressly says that. But I think (f) - - - but sub (f) - -
4 - and I'd have to look at the "such" language, but I have
5 not seen any case - - - in fact, they all say (f) is a no-
6 time-limit provision. And if under Atkins you can - - -
7 you can - - - after two hours there's nothing sacrosanct
8 about the two-hour rule. That has a very limited
9 application, and it doesn't appear anywhere else in the
10 provision, only in the deemed consent provision. And since
11 this court in Atkins has moved past the two-hour consent
12 rule as sacrosanct that a refusal should also be permitted.
13 What if someone refuses? They can't - - - they can't hear
14 ramifications of what it would mean? Why is that fair to a
15 defendant? If he says I refuse, the police should say
16 nothing to him after two hours and say, oh, you refuse,
17 that's quite all right? I mean that doesn't make sense
18 because - - -

19 CHIEF JUDGE DIFIORE: Counsel, a last question
20 for you.

21 MR. KAPLAN: Yes, yes.

22 CHIEF JUDGE DIFIORE: Did the Supreme Court's
23 decision in Birchfield change the statutory parameters of
24 the two-hour rule?

25 MR. KAPLAN: I'm not familiar with that case.



1 I'm sorry.

2 CHIEF JUDGE DIFIORE: Where the Supreme Court
3 said that warrantless breath tests are permitted as
4 incident to arrest?

5 MR. KAPLAN: Well, they - - - there's certainly -
6 - - and in our own statute, chemical tests are part of the
7 VTL part of the - - - the provision when police take the
8 person into custody and they are offered the chance for a
9 chemical test. That is certainly part of our
10 jurisprudence, and I don't see any issue that would work
11 against this. The First Department - - - the critical
12 point I would just leave with, although I did have rebuttal
13 time, but is that there's something radically wrong with a
14 case that where the - - - even the lower courts are saying
15 this makes no sense. I provided those courts - - - those
16 cases to this court.

17 CHIEF JUDGE DIFIORE: Yes, we have them.

18 MR. KAPLAN: And - - - yes, I know. And they
19 have repudiated them which is very unusual in a case where
20 there's - - - where something is so outdated it makes no
21 policy sense why you would do this.

22 JUDGE STEIN: So isn't it then up to the
23 legislature to - - -

24 MR. KAPLAN: I'm sorry?

25 JUDGE STEIN: If the legislature - - - if that's



1 - - - if it's a policy question isn't it for the
2 legislature then to remove the two-hour rule?

3 MR. KAPLAN: No, I think this court can do it. I
4 think this court has the power to say that the Second
5 Department's reasoning is correct. There should - - - this
6 is a false split. It's based on bad law and that it should
7 be expunged.

8 CHIEF JUDGE DIFIORE: Thank you, Mr. Kaplan.
9 Counsel.

10 MS. MEIS: Thank you. May it please the court,
11 Marika Meis, Bronx Defenders, for respondent Donald Odum.
12 This case falls squarely in line with Atkins and the
13 statutory language. This court has repeatedly recognized
14 that under this statutory scheme there is a period where a
15 driver is required to consent to a chemical test. That's
16 in the statutory language, and the legislature chose a two-
17 hour period in that deemed consent provision.

18 JUDGE GARCIA: Counsel, I'm sorry. Just to go
19 back I think to what Judge Stein was asking originally. I
20 had this issue here as there's a refusal, maybe one or two
21 refusals, and then there is a warning given that if you
22 don't submit to this test, X and Y will happen. One in
23 relation to your license, two, relation to what can - - -
24 they can do with a refusal to submit in terms of being used
25 as evidence. And I thought the issue here was whether that

1 warning was coercive because those things weren't true.

2 MS. MEIS: That is the issue, Your Honor.

3 JUDGE GARCIA: Okay.

4 MS. MEIS: But in order to understand why that is
5 so it's important to understand - - -

6 JUDGE GARCIA: I get it.

7 MS. MEIS: - - - the unique statutory scheme.

8 JUDGE GARCIA: I understand. So there were two
9 things. Do you dispute the license part of the warning?

10 MS. MEIS: You mean in light of the DMV memo of -
11 - - of 2012? I think that memorandum is a reflection that
12 DMV may have changed their internal policy and may suspend
13 refusals. But the DMV cannot override the statutory scheme
14 here that the legislature established and how during this
15 period a driver is presumed to consent. So by not taking
16 the test, they are revoking that presumed consent, and it
17 is only within that context that a refusal then has meaning
18 as consciousness of guilt. When you're in the post-two-
19 hour-period, as we were here, Mr. Odum had a choice.

20 JUDGE GARCIA: Refusal for a second, I'm really
21 more focused on the admission of the test results. So if -
22 - - so I understand your argument on the license. So going
23 towards can the refusal be used because the - - - really
24 the only issue I see here is is that true or not, right.
25 Because if it's true then there's no coercion in getting



1 the consent to take the test, right?

2 MS. MEIS: Well, Your Honor - - -

3 JUDGE GARCIA: If those two things are true.

4 MS. MEIS: Right. If the - - - if the warnings
5 are either misleading or false then it - - -

6 JUDGE GARCIA: Right.

7 MS. MEIS: - - - would have an impact on the
8 court's analysis of whether Mr. Odum - - -

9 JUDGE GARCIA: Volunteers.

10 MS. MEIS: - - - voluntarily consented.

11 JUDGE GARCIA: I agree.

12 JUDGE STEIN: But couldn't - - -

13 JUDGE GARCIA: So - - -

14 JUDGE STEIN: Couldn't the warnings themselves be
15 coercive because you're saying either you take this test or
16 else? So after you get beyond the two-hour deemed consent
17 time period, right, doesn't it make the warnings coercive?

18 MS. MEIS: Yes, the - - - the warnings are
19 designed to be coercive because that's the statutory
20 scheme. They want people to comply.

21 JUDGE GARCIA: So what is the authority for after
22 two hours if you say I'm not taking this test it's - - -
23 you know, there's no field test available, it's rural,
24 whatever, they're driving back, they get traffic, by the
25 time they get to the precinct it's two hours and five



1 minutes, now you say I'm not taking the test. Now that
2 can't be used against you.

3 MS. MEIS: Because you're no longer in the period
4 of deemed consent. A driver has a choice. The only reason
5 the refusal warnings are given and the refusal is
6 admissible is because the driver is deemed to consent
7 during that period. And as Justice Rivera pointed out,
8 although the language in subdivision (f) making refusals
9 admissible does not say two hours it says such chemical
10 tests - - -

11 JUDGE GARCIA: So what is your best authority - -
12 -

13 MS. MEIS: - - - meaning a test administered
14 within the period. I'm sorry, Your Honor.

15 JUDGE GARCIA: That's okay. I'm talking over
16 you. What is the best authority you have for the deemed
17 consent provision informs the fact that you can use the
18 refusal? Because there could be a lot of reasons for you
19 really use a refusal, right? I don't want to take a test,
20 that's kind of consciousness of guilt anyway because you're
21 afraid of the results. But - - - so what is your direct
22 tie - - - because you look at the statute, that thing is in
23 one provision. The two-hour rule is in one provision. It
24 was moved to that provision. I follow that argument. What
25 is your best authority for saying that two-hour provision



1 goes to the fact that you can use the refusal because of
2 this idea that you really already have consented and you're
3 kind of revoking consent or - - - I don't see that
4 anywhere.

5 MS. MEIS: Well, Your Honor, the statutory
6 language is plain on its face, and I think it designs the
7 scheme such that you only have a two-hour period when
8 you're deemed to consent. So - - -

9 JUDGE GARCIA: But isn't there logic in - - - you
10 have a two-hour period, you get in a car accident, you're
11 unconscious, and they want to take blood. And you're going
12 to suppress that because there's no way you could have
13 consented. So if they get to an accident scene and there's
14 - - - and you're unconscious and they think you've been
15 drinking and caused the accident, they can draw blood and
16 you've deemed to consent. That makes a lot of sense to me
17 read that way. I don't follow putting it into an arbitrary
18 time limit on when you can voluntarily consent or not
19 consent based on this warning that failure to do so could
20 be used against you.

21 MS. MEIS: Because reading the deemed consent
22 provision as applying only to incapacitated drivers is
23 wrong. It's not what the statute says, and it's not what
24 prior decisions of this court have said. In Kates where
25 that provision was discussed, it's the right of refusal



1 that incapacitated drivers do not have. Everybody is
2 deemed to consent. But those who are deemed to consent and
3 are conscious are still asked do you wish to take the test,
4 and when they say no that refusal, if persistent and if
5 given warnings, is admissible because it is a revocation of
6 that previously deemed consent.

7 JUDGE RIVERA: Where - - -

8 MS. MEIS: I'm sorry.

9 JUDGE RIVERA: Where's the authority to ask after
10 two hours?

11 MS. MEIS: The authority to ask after two hours
12 is just as the police could ask to obtain evidence from
13 anyone. So it's a normal consent. May I search your
14 person? May I search your car? So this statutory scheme
15 in order to protect both the police and drivers and to
16 balance all of the complicated issues at hand, the
17 legislature chose this to require drivers to consent, but
18 they put a limit on it. And that makes sense. And
19 therefore, the refusal provision is tied to the deemed
20 consent provision.

21 JUDGE RIVERA: Right. Because if you don't want
22 to be subject to the deemed consent you just don't drive.

23 MS. MEIS: True. And also, the - - - the
24 legislature could have put a broader time period on it.
25 They chose two hours. That's a reasonable period. But the



1 two provisions have to be read together - - -

2 JUDGE WILSON: But you're not - - -

3 MS. MEIS: - - - in the entire scheme. When
4 you're after two hours a driver can be asked do you wish to
5 take the test and when they say no, that's it. They don't
6 - - -

7 JUDGE WILSON: And if they say yes, you're not
8 saying that's not admissible?

9 MS. MEIS: I'm sorry, Your Honor?

10 JUDGE WILSON: If they say yes at that point
11 that's admissible or not admissible?

12 MS. MEIS: It is if it's truly voluntarily.

13 JUDGE WILSON: Okay.

14 MS. MEIS: Then you're in the normal world where
15 judges analyze is this consent with the rules of Gonzalez
16 and all of the other tools that lower courts have to
17 analyze what happened here. Was the person threatened?
18 Was the person given inherently coercive warnings? And
19 those factors as applied to Mr. Odum suggest that his
20 consent to take this test was not voluntary because it was
21 based on warnings that were both misleading and false and
22 that were intended and actually did change his decision
23 from no to yes where there was no clear statutory scheme
24 that that would have been admissible. It would not have
25 been consciousness of guilt. A person's refusal to submit



1 to a search of their body or property in general is not
2 admissible evidence just like a person's refusal to speak
3 to police. It is only by this unique statutory scheme that
4 was put into place balancing both the interests of police
5 and not having to coerce intoxicated drivers and have to
6 get consent that makes this refusal admissible as
7 consciousness of guilt. And this statutory scheme is
8 clear, and it's been interpreted this way by this court
9 before.

10 In addition, Your Honors, the second warning, as
11 appellant agrees, in Bronx County where Mr. Odum was being
12 prosecuted was particularly false and misleading because at
13 that time courts were uniformly suppressing refusals. And
14 so as applied to Mr. Odum as well as the language actually
15 used here by the police officer which was will be
16 suppressed - - - will be admissible in court, as opposed to
17 may be, makes this decision as to Mr. Odum correct. And
18 the lower courts scrupulously examined these warnings and
19 in context found that they were indeed false and
20 misleading.

21 JUDGE FAHEY: Let me ask this. I don't know if
22 it can be done, but can you reconcile the two provisions
23 here, 1194(2)(a) and then 1194(f) I believe? Are - - - are
24 they reconcilable?

25 MS. MEIS: Yes, Your Honor. Because (2)(a) sets



1 out the scheme by which the police can take a chemical test
2 within two hours, and during that period, as - - - as
3 noted, the driver is deemed to consent. If you withdraw
4 that consent, it becomes a revocation, and that is called a
5 refusal which becomes admissible under subdivision (f).

6 JUDGE FAHEY: But - - - I had thought that (f)
7 had no two-hour limitation on it.

8 MS. MEIS: It does not, Your Honor, but it says
9 such chemical tests, as your colleague pointed out earlier.
10 And that language is - - -

11 JUDGE FAHEY: What do you - - - let me just ask -
12 - -

13 MS. MEIS: - - - in the statute.

14 JUDGE FAHEY: Slow down.

15 MS. MEIS: Sorry.

16 JUDGE FAHEY: Slow down. What - - - what do you
17 think "such" - - - "such" - - - the word "such" means in
18 that context?

19 MS. MEIS: I agree with Justice Rivera. In
20 subdivision (a) it says "chemical test." Subdivision (f)
21 says "such chemical test." Using the same language, it's
22 the same subdivision - - - subdivisions of the same
23 statute. The intervening subdivisions have to do with the
24 due process protections that were added to the statute
25 after challenges the - - - that people made about this



1 deemed consent provision, like, the right to a hearing and
2 due process before a license suspension could follow. So
3 the - - - the subdivisions must be read in connection with
4 each other and that there is no additional two-hour
5 language does not mean that it - - - that that provision
6 isn't intertwined and related - - -

7 JUDGE FAHEY: I see.

8 MS. MEIS: - - - to the (2)(a) provision.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. MEIS: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 JUDGE STEIN: Counselor, can I - - -

13 MR. KAPLAN: Yes?

14 JUDGE STEIN: - - - can I give you a little
15 hypothetical here for a minute?

16 MR. KAPLAN: All right.

17 JUDGE STEIN: So what if the police knock on your
18 door and they say we want to search your apartment, and you
19 say no, I'm not going to let you search my apartment. And
20 the police say, well, I'm going to warn you that if you
21 don't let us search your apartment - - -

22 MR. KAPLAN: Right.

23 JUDGE STEIN: - - - we're going to arrest you,
24 we're going to incarcerate you, and we're going to get a
25 search warrant, and we're going to - - - and we're going to



1 search your apartment anyway.

2 MR. KAPLAN: Right.

3 JUDGE STEIN: Now - - - now will you consent. Is
4 that - - - if he consents or she consents - - -

5 MR. KAPLAN: I think the police can - - -

6 JUDGE STEIN: - - - is that voluntary?

7 MR. KAPLAN: I think the police can induce
8 consent if they give them the ramifications of what they're
9 going to do.

10 JUDGE STEIN: So you think that would be a
11 voluntary consent to a search?

12 MR. KAPLAN: If they say if you do not now we
13 will arrest you and we will subject your apartment to a
14 search warrant, the person might say it's in my interest
15 not to allow it. I don't think that is violative. But
16 here the - - - the refusal is something which has no time
17 limit. And I was looking at the statute - - -

18 JUDGE FEINMAN: So on her hypothetical - - -

19 MR. KAPLAN: Yes.

20 JUDGE FEINMAN: - - - what if they knock on your
21 door and say by the way, we saw that there's a crashed car
22 in front of your house.

23 MR. KAPLAN: Right.

24 JUDGE FEINMAN: Will you come take a breathalyzer
25 because we - - - we want to see if you were driving drunk



1 last night.

2 MR. KAPLAN: No, no that would be far afield. I
3 don't think that that would be appropriate. But - - -

4 JUDGE FEINMAN: Okay. So now they come across
5 him, you know, and it's not the - - - the next day but
6 it's, you know, five hours after the crash.

7 MR. KAPLAN: Well, that may - - - these may be
8 interesting hypotheticals, but they're not the case at hand
9 that this court has to decide. I mean the issue here is
10 they can get a refusal.

11 JUDGE FEINMAN: But my concern is that what
12 you're proposing - - -

13 MR. KAPLAN: Yes, sir.

14 JUDGE FEINMAN: - - - is that just ignore the
15 two-hour rule and it means nothing.

16 MR. KAPLAN: The two-hour rule has no application
17 in any other provision of the VTL. It is limited solely to
18 a situation in which there's deemed consent. And why would
19 there be deemed consent? Because the person can't give
20 expressed consent. That's why in Atkins this court said we
21 go past the two-hour rule where a person can give expressed
22 consent.

23 JUDGE FAHEY: Counselor - - - counselor - - -

24 MR. KAPLAN: But if they can give expressed - - -

25 JUDGE FAHEY: Counselor - - - counselor, take a



1 deep breath.

2 MR. KAPLAN: Okay.

3 JUDGE FAHEY: All right.

4 MR. KAPLAN: I got excited.

5 JUDGE FAHEY: Go ahead. Yeah.

6 MR. KAPLAN: I'm sorry. I apologize.

7 JUDGE FAHEY: It's all right.

8 MR. KAPLAN: But if - - - if the person can give
9 expressed consent then they also logically should be able
10 to refuse. I looked at the section that Justice Rivera was
11 talking about, and the chemical test merely means the
12 chemical test that's under this provision. I don't think
13 it means the two-hour rule. And in fact, for - - -

14 JUDGE RIVERA: Well, it is - - - it is Section 2,
15 correct?

16 MR. KAPLAN: I'm sorry?

17 JUDGE RIVERA: It - - - it's (f) of Section 2,
18 correct?

19 JUDGE FEINMAN: It's (a) and (f) of 2.

20 MR. KAPLAN: Well, yes, but - - -

21 JUDGE RIVERA: Yes, so it's - - -

22 MR. KAPLAN: But - - -

23 JUDGE RIVERA: Excuse me.

24 MR. KAPLAN: Yes, I'm sorry.

25 JUDGE RIVERA: It's all about Section 2, correct?



1 MR. KAPLAN: Yes. Yes.

2 JUDGE RIVERA: All right. So why isn't the
3 reading the one your adversary suggests which is these are
4 all subdivisions of Section 2? They're all relating back
5 to (2)(a) because that's - - - excuse me - - -

6 MR. KAPLAN: Yes, I'm sorry.

7 JUDGE RIVERA: That's the chemical test that all
8 of them are referring to.

9 MR. KAPLAN: Well, we know this is a section
10 involving chemical tests but Atkins goes past the two-hour
11 rule. This court has said you can give consent past the
12 two hours. If it was sacrosanct you wouldn't have had that
13 decision in Atkins.

14 JUDGE STEIN: Well, but in Atkins, they actually
15 consented within the two hours, didn't he?

16 MR. KAPLAN: Yes, but we're saying that the mere
17 fact that you're - - - you give a refusal and then you're
18 given the ramifications doesn't negate your expressed
19 consent. In fact, Your Honor has said how can you give two
20 hours after? I invite Your Honor to look at the Morales
21 case.

22 JUDGE STEIN: Well, but doesn't that then bring
23 us back to the question of voluntariness - - -

24 MR. KAPLAN: But I don't think it negates - - -

25 JUDGE STEIN: - - - after the two hours?



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MR. KAPLAN: It doesn't negate voluntariness. In fact, it says the two-hour - - -

JUDGE STEIN: That's the question.

MR. KAPLAN: - - - rule is where they're too intoxicated to give consent so it's deemed. It allows police to administer. I gave this court about - - - okay, I got too excited again. I gave this court about five cases or more, Coludro, Ward, Morris, Hurtado, Harvin where all these cases say what I'm saying. I'm not just saying it. These cases are saying it, that you can give a refusal after two hours because it's both - - - it's two sides of the same coin. If you can give consent then you can give refusal. And - - -

CHIEF JUDGE DIFIORE: Thank you, Mr. Kaplan.

MR. KAPLAN: So thank you, ma'am.

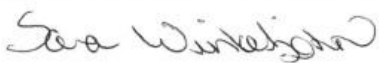
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Donald Odum, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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