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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TERRY TROPPMAN, Plaintiff and Respondent, v. STEVEN GOURLEY, as Director, etc., Defendant and Appellant.	A105287 (San Mateo County Super. Ct. No. CIV434258)

For more than 12 years, California appellate courts have been split as to whether the license of a suspected drunk driver may be suspended or revoked for refusal to submit to a chemical test, pursuant to Vehicle Code section 13353,[1] in the absence of a finding that the person was actually driving a vehicle at the time of the alleged offense. (See *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 769, fn. 24 [noting this issue has "divided the Courts of Appeal"] (*Mercer*); see also 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes, § 228, p. 774 [discussing the split of authorities].) Although the First Appellate District held in *Rice v. Pierce* (1988) 203 Cal.App.3d 1460 (*Rice*) that proof of actual driving is not required to support a license suspension or revocation in chemical refusal cases, the superior court in this case relied on contrary authority from the Fifth Appellate District and granted respondent Terry Troppman's petition for writ of mandate. The court ordered the suspension of Troppman's driver's license set aside based on the absence of proof that Troppman was driving a vehicle while intoxicated.

On appeal, the Department of Motor Vehicles (DMV) urges us to reverse based on *Rice, supra,* 203 Cal.App.3d 1460, and a decision following *Rice* from the Sixth Appellate

[1] All statutory references are to the Vehicle Code unless otherwise stated.

District, *Machado v. Department of Motor Vehicles* (1992) 10 Cal.App.4th 1687 (*Machado*). Troppman argues we should follow the contrary line of cases from the Fifth Appellate District. (*Jackson v. Pierce* (1990) 224 Cal.App.3d 964 (*Jackson*); *Medina v. Department of Motor Vehicles* (1987) 188 Cal.App.3d 744 (*Medina*).) We conclude the DMV has the better argument and reverse.

BACKGROUND

Around 10:45 p.m. on January 2, 2003, Belmont Police Officer Richard Wheaton noticed a person sitting slumped over in the driver's seat of a parked van. After Wheaton knocked and pounded on the driver's side window, Troppman (the sole occupant of the vehicle) raised her head and began mumbling incoherently. Wheaton knocked again to get Troppman's attention and asked her to roll down the window. When she could not do so, Wheaton opened the unlocked driver's door and immediately noticed a strong smell of intoxicants coming from inside the vehicle. Troppman, who gave nonsensical responses to several of the officer's questions and could not provide her date of birth, admitted she had consumed a "little bit" of alcohol. Using the door and side of the vehicle to balance herself, Troppman exited the vehicle and performed a series of field sobriety tests. Officer Wheaton noticed Troppman's eyes were bloodshot and watery, her speech was slurred, and her physical movements were extremely slow. After Troppman failed each of the field sobriety tests, she was placed under arrest. Another Belmont police officer who had been called in to assist searched Troppman's vehicle, with her consent, and found a half-empty 1.5 liter bottle of wine inside a plastic bag lying on the floor next to the driver's seat. Keys to the vehicle were also inside the bag. Troppman admitted she had been drinking the wine and described herself as an alcoholic.

Troppman was transported to a testing facility and made two unsuccessful attempts to take a chemical breath test. She then refused to continue or submit to either a breath or blood test. Troppman also refused to answer questions on the required forms, and she physically resisted police officers' attempts to place her in handcuffs. She was transported to jail and booked on charges of driving while under the influence of alcohol (§ 23152,

subd. (a)), possessing an open alcoholic container in a vehicle (§ 23222, subd. (a)), and resisting arrest (Pen. Code, § 148, subd. (a)(1)).

A DMV administrative hearing was held on February 19, 2003. Troppman, who was represented by counsel, testified that she was an alcoholic but had managed to abstain from drinking during the holidays. While she was driving on January 2, 2003, she had an "uncontrollable urge" to consume alcohol. She stopped at a grocery store to purchase wine and a corkscrew and then drove around looking for a place where she could drink the wine "safely." She parked in a dirt area she noticed off the side of the road, turned her vehicle off, put the keys in the bag with the wine, and proceeded to drink "quite a few" glasses of wine. She fell asleep and was awakened by a police officer knocking on the window. Troppman testified she had consumed no alcohol before driving.

The administrative hearing officer concluded good cause existed to suspend Troppman's license based on four findings of fact: (1) Officer Wheaton had reasonable cause to believe Troppman was driving a motor vehicle in violation of section 23152 or section 23153 of the Vehicle Code; (2) Troppman was lawfully arrested; (3) Troppman was told her privilege to operate a motor vehicle would be suspended or revoked if she refused to submit to or failed to complete a chemical test; and (4) Troppman did refuse to submit to a chemical test. Troppman petitioned the superior court for a writ of mandate, arguing the decision was an abuse of discretion because there was no evidence she was driving the vehicle at or near the time of her arrest. After a hearing, the superior court granted the petition and ordered the suspension of Troppman's license set aside. This appeal from Steven Gourley, as Director of the DMV, followed.

DISCUSSION

This case squarely presents an issue that has split the appellate courts in this state for several years: whether a person's driver's license may be suspended for failing to submit to a chemical test absent a finding that the person was actually driving at the time of the alleged offense. Because this is a pure question of law, based on statutory construction, we exercise independent judgment and do not defer to the superior court's decision. (*Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 554.)

Before discussing the relevant statutes and case law, it is important to emphasize that Troppman has never challenged the lawfulness of her arrest based on the police officer's failure to observe her car in motion. In 1991, our Supreme Court held that a lawful arrest for drunk driving requires some volitional movement of the vehicle to be observed by the arresting officer. (*Mercer*, *supra*, 53 Cal.3d at pp. 768-769.) The court reasoned that such observation of motion was necessary because Penal Code section 836, subdivision (1) authorizes warrantless misdemeanor arrests only when there is reasonable cause to believe an offense has been committed in the officer's presence. (*Id.* at pp. 761, 769.) However, in 1996 the Legislature amended the Vehicle Code in direct response to the *Mercer* opinion. (*People v. Schofield* (2001) 90 Cal.App.4th 968, 974.) As amended, section 40300.5, subdivision (e) creates an express exception to the "presence" requirement of Penal Code section 836 for drunk driving arrests where evidence maybe destroyed by the passage of time. (*People v. Schofield*, *supra*, 90 Cal.App.4th at pp. 974-975; see also *id.* at p. 973 ["Due to metabolic destruction of alcohol and/or drugs in the bloodstream over time, this offense has unique proof problems requiring swift police action"].)[2]

Thus, although the factual circumstances in her case fall squarely within those discussed in *Mercer*, Troppman has not challenged the lawfulness of her arrest. Instead, she argues the DMV did not have authority to suspend her driver's license because the hearing officer made no finding that she was driving at or near the time of her arrest. Relying on California's implied consent law, Troppman contends a finding of actual driving is a necessary prerequisite to punishment for refusal to submit to chemical testing. We disagree.

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[2] Section 40300.5 states, in relevant part: "In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug when any of the following exists: [¶] . . . [¶] (e) The person may destroy or conceal evidence of the crime unless immediately arrested."

A. Applicable Statutes and Case Law

Section 13353, subdivision (a)(1), authorizes the DMV to suspend a person's driving privilege if the person "refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153, and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer. . . ." Subdivision (c) of this statute expressly requires the administrative hearing officer to review four specific issues before affirming any license suspension on this ground: (1) whether the officer had reasonable cause to believe the person had been driving a vehicle while under the influence of drugs or alcohol; (2) whether the person was placed under arrest; (3) whether the person refused to submit to, or failed to complete, a chemical test; and (4) whether the person was told that his or her license would be suspended or revoked if he or she refused to submit to, or failed to complete, such a test.

The authority for section 13353 rests on the "implied consent" statute, section 23612 (formerly section 23157). (See *Jackson v. Pierce*, *supra*, 224 Cal.App.3d at p. 970.) Section 23612 provides, in relevant part: "(a)(1)(A) A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153. . . . [¶] . . . [¶] (C) The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153. [¶] (D) The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year. . . ."

A panel of the Fifth Appellate District first considered whether a finding of actual driving is necessary to support a license suspension in *Medina*, *supra*, 188 Cal.App.3d 744.

In addition to the four factual findings required by section 13353, the administrative hearing officer in *Medina* found that the person arrested was in fact driving a motor vehicle. (*Medina*, *supra*, 188 Cal.App.3d at p. 748.) Upon review in mandate proceedings, the superior court concluded this fifth finding was not supported by a preponderance of the evidence; nevertheless, the superior court upheld the suspension because the evidence supported a finding that the officer had reasonable cause to believe the person had been driving—i.e., because the four findings required by section 13353 were sufficiently supported. (*Medina*, *supra*, 188 Cal.App.3d at p. 749.) The appellate court reversed. (*Id.* at p. 746.) Relying on *Weber v. Orr* (1969) 274 Cal.App.2d 288, which construed an older version of the implied consent statute, the appellate court in *Medina* reasoned a person's consent to chemical testing can only be inferred from the person's act of driving, and not from a police officer's reasonable belief that such driving has occurred. (*Medina*, *supra*, 188 Cal.App.3d at pp. 750-751.) Because implied consent "is in essence a jurisdictional prerequisite to the license suspension proceedings under section 13353," the court held that proof of actual driving is required to sustain a license suspension for a driver's refusal to submit to chemical testing. (*Id.* at p. 751.)

The following year, Division Five of the First Appellate District reached the opposite conclusion. In *Rice*, *supra*, 203 Cal.App.3d at p. 1464, the court rejected *Medina*'s construction of the statutes "as paying inadequate deference to the state's broad police power to legislate for the common health and welfare—i.e., ' "to fulfill the need for a fair, efficient and accurate system of detection and prevention of drunken driving." [Citation.]' [Citation.]" Instead, the Court of Appeal in *Rice* held the four findings enumerated in section 13353 are sufficient to support a license suspension, and no additional finding of "actual driving" is required. (*Rice*, *supra*, 203 Cal.App.3d at p. 1466.)

Rice disagreed with *Medina* based on the language of the implied consent statute (§ 23162, formerly § 23157) and its view of legislative intent. With regard to statutory language, the *Rice* court noted that the implied consent statute "refers to any 'person' lawfully arrested" for driving under the influence, and "does not speak in terms of the

lawful arrest of a 'driver.' [Citation.]" (*Rice, supra,* 203 Cal.App.3d at p. 1465.) A lawful arrest requires only reasonable cause to believe a person was driving, not proof the arrestee was actually driving. (*Id.* at pp. 1465-1466; see also § 40300.5.) The court reasoned: "The statute is unambiguous and states that upon a lawful arrest for driving under the influence, a person must submit to one of the chemical tests administered at the direction of a peace officer. Upon failure to submit, the person shall suffer loss of his driving privileges. This interpretation is consistent with the very important purpose of the statute to keep persons who are reasonably suspected of operating a vehicle while intoxicated off the road and to secure the civil cooperation of all persons privileged to drive by providing objective proof of their sobriety when suspected of driving under the influence. [Citations.]" (*Rice, supra,* 203 Cal.App.3d at p. 1466.)

Furthermore, with regard to the legislative goals of deterring drunk driving and encouraging cooperation in chemical testing, the *Rice* court observed: "It would serve no useful policy to permit an intoxicated person suspected of driving a vehicle to refuse to take a chemical test for alcoholic content. To require an additional finding that the arrestee was actually driving, would undermine the important goals of cooperation and deterrence. Rather than carve out an exception, the legislative policy tries to get these people off the road and out of harm's way. In light of the severity of the problem and the difficulty of detection, the law encourages compliance with the implied consent law in situations where the officer reasonably suspects the arrestee to have been driving while under the influence of alcohol or drugs. To bar license suspension of persons who are lawfully arrested but are subsequently found not to be the actual driver would render enforcement more difficult at a time when society deserves increased protection in eradicating a problem which unfortunately has become all too common in our modern, mobile culture." (*Rice, supra,* 203 Cal.App.3d at p. 1465.)

Two years after *Rice* was decided, the Fifth Appellate District had occasion to revisit the issue but chose not to abandon its holding in *Medina, supra,* 188 Cal.App.3d 744. (*Jackson, supra,* 224 Cal.App.3d at pp. 966, 970.) The court in *Jackson* disagreed with *Rice*'s focus on the use of the word "person" instead of "driver" in the implied

consent statute's reference to the individual who may be tested. (*Jackson*, *supra*, 224 Cal.App.3d at p. 970.) Instead, *Jackson* read former section 23157, subdivision (a)(1) as providing that " 'any person who drives' is considered to have consented to chemical testing, if lawfully arrested," such that "the person" referred to in later subdivisions of section 23157 and in section 13353 (as the "person who refuses") is one "who drives." (*Jackson*, *supra*, 224 Cal.App.3d at p. 971.)

The *Jackson* court also distinguished between the showing necessary to authorize a police officer to administer a chemical test and that required to suspend a person's driver's license. Because the implied consent law serves the important purpose of "permit[ting] an officer to administer a test if he or she has lawfully arrested one who is suspected of driving under the influence," the court reasoned, "The Legislature has . . . made the officer's reasonable suspicion enough to warrant giving the tests to every individual who may have been driving while intoxicated." (*Jackson*, *supra*, 224 Cal.App.3d at p. 971.) "However, the suspension of an individual's license is another matter. Suspension is the result of the person's failure to do what he or she has consented to do—submit to a test. The first 19 words of section 23157 clearly proclaim that the consent is implied by law from the act of driving. If the person was not driving, he or she did not impliedly agree to submit to the test and, under the statute, has every right to refuse to take it. A person who has no obligation to comply with a law should not be punished for failing to comply with it." (*Ibid.*)

The final published decision weighing in on this issue is *Machado*, *supra*, 10 Cal.App.4th 1687, a case from the Sixth Appellate District. After considering the views expressed in *Rice*, *Medina* and *Jackson*, *Machado* agreed with the analysis in *Rice*. (*Machado*, *supra*, 10 Cal.App.4th at pp. 1694-1696.)

The *Machado* court based its conclusion in part on insight it gleaned from the Supreme Court's decision in *Mercer*, *supra*, 53 Cal.3d 753 as to the legislative purpose behind the implied consent law. (See *Machado*, *supra*, 10 Cal.App.4th at pp. 1696-1697.) *Mercer* explained that the Legislature enacted section 13353 as an alternative to forcible removal of a blood sample (which is permissible so long as the person has been lawfully

arrested, the officer has probable cause to believe the person is intoxicated and the sample can be obtained in a reasonable, medically approved manner). (*Mercer, supra,* 53 Cal.3d at p. 759-760.) The alternative method of compulsion offered by section 13353 is the provision that a person arrested for drunk driving " 'will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication.' " (*Mercer, supra*, 53 Cal.3d at p. 760, quoting *People v. Superior Court* (1972) 6 Cal.3d 757.) " 'The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion. It is noteworthy that in so doing, the Legislature took pains to condition its use upon a lawful arrest for driving under the influence of intoxicating liquor and upon the reasonable belief of the peace officer that the arrestee was in fact so driving.' [Citation.]" (*Ibid.*) Viewing the statutes from this perspective, the *Machado* court observed: "[I]t is apparent that the Legislature intended to draft a law to require all persons lawfully arrested for drunk driving to submit to testing or lose their driver's license. The focus of this law is on whether the officer had probable cause to believe the person was driving while intoxicated, and therefore was lawfully arrested." (*Machado, supra,* 10 Cal.App.4th at p. 1697.)

Machado also responded to the analysis of statutory language set forth in *Jackson,* asserting the statutory language is in fact consistent with the legislative goal of providing an alternative method of compulsion for chemical testing. (*Machado, supra,* 10 Cal.App.4th at p. 1697.) The court reasoned: "Considered in its entirety, the language of sections 13353 and 23157 plainly applies to persons who are lawfully arrested for drunk driving when the arresting officer has probable cause to believe the person was driving. The introductory language of section 23157 ('Any person who drives a motor vehicle') operates to describe the general class of persons to whom the law applies—those who drive. The language does not limit application of the laws to those who are proved to be actually driving at the time of the lawful arrest. Rather, the language of the sections specifically conditions their application on whether a peace officer has probable cause to believe a person was driving." (*Machado, supra,* 10 Cal.App.4th at p. 1698.)

B. Analysis

We agree with the reasoning of *Rice* and *Machado*. It is apparent the Legislature enacted section 13353 to give police officers a tool to obtain chemical testing from drunk driving suspects without having to resort to physical compulsion. Although the Legislature expressly conditioned the use of section 13353 upon a lawful arrest for driving under the influence and upon the officer's reasonable belief that the arrestee was so driving, nowhere does the statute make suspension of the arrestee's license conditional upon proof that he or she was actually driving at the time of the alleged offense. While the distinction between proof necessary to administer a chemical test and proof necessary to suspend a person's driver's license may hold some rhetorical appeal (see *Jackson*, *supra,* 224 Cal.App.3d at p. 971), we find no support for such a distinction in the language of the statutes. If the Legislature wished to make suspension of a person's license under section 13353 conditional upon a finding that the person was actually driving at the time of the alleged offense, it could have easily added this subject to the required findings enumerated in subdivision (c) of the statute. Instead, under the language of section 13353, it is sufficient that the arresting officer has "reasonable cause to believe the person had been driving" while under the influence of drugs or alcohol. (§ 13353, subd. (c)(1).)[3]

Nor do we believe a requirement of proof of actual driving can be imported from the implied consent statute. Although section 23612 refers initially to a "person who drives a motor vehicle" (§ 23612, subds. (a)(1)(A) & (a)(1)(B)), the statute refers several times thereafter to a person "lawfully arrested." (§ 23612, subds. (a)(2)(A), (a)(2)(B), (a)(3) & (d)(1).) We believe the *Machado* court reached the correct interpretation of the implied consent statute. The introductory language of section 23612 describes the general class of persons who drive, and later provisions limit the application of the statute's

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[3] Indeed, reading in this additional requirement would arguably run counter to the Legislature's demonstrated tendency to *expand* the reach of laws designed to punish drunk driving. (See, e.g., *People v. Schofield*, *supra*, 90 Cal.App.4th at p. 972 [noting the Legislature's "continuous expansion" of exceptions to permit warrantless arrests in drunk driving cases pursuant to section 40300.5].)

consent provisions to persons lawfully arrested where the peace officer has reasonable cause to believe the person was driving while intoxicated. (§ 23612, subds. (a)(1)(A)-(C); see *Machado*, *supra*, 10 Cal.App.4th at p. 1698.)

Moreover, consistent with *Rice*, *supra*, 203 Cal.App.3d 1460, we believe it would defeat the important policy goals of sections 13353 and 23612 to permit suspected drunk drivers to claim a "right" to refuse chemical testing (see *Jackson*, *supra*, 224 Cal.App.3d at p. 971) based on a claim that they were not in fact driving a vehicle. In enacting these statutes, the Legislature intended to require all persons lawfully arrested for driving under the influence to submit to chemical testing or else lose their privilege to drive. (*Machado*, *supra*, 10 Cal.App.4th at p. 1697.) When a person has been lawfully arrested and the peace officer has reasonable cause to believe the person was driving under the influence of drugs or alcohol, imposing an additional requirement that the DMV prove actual driving as a prerequisite to license suspension (i.e., the enforcement "stick" of section 13353) would undermine the policy goals of encouraging cooperation in testing and deterring drunk driving. (See *Rice*, *supra*, 203 Cal.App.3d at p. 1465.)

Finally, our conclusion is supported by long-settled authority permitting the compulsory seizure of blood samples for chemical testing where the police have probable cause to believe a person has been driving under the influence of intoxicants. (*Schmerber v. California* (1966) 384 U.S. 757, 769-771.) Indeed, our Supreme Court has observed that "the implied consent statute—and its attendant license suspension or revocation 'penalty'—is an adjunct to the preexisting, and still valid rule of *Schmerber*, *supra*, 384 U.S. 757. In other words, *regardless whether the terms of the implied consent statute are met*, forcible, warrantless chemical testing may occur under the authority of *Schmerber* if the circumstances require prompt testing, the arresting officer has reasonable cause to believe the arrestee is intoxicated, and the test is conducted in a medically approved manner incident to a lawful arrest." (*Mercer*, *supra*, 53 Cal.3d at p. 760; see also *Cupp v. Murphy* (1973) 412 U.S. 291, 294-296 [extending *Schmerber* rule in the absence of a formal arrest]; *People v. Deltoro* (1989) 214 Cal.App.3d 1417, 1422-1423 [same]; *People v. Trotman* (1989) 214 Cal.App.3d 430, 435 [same].) Given that police officers have

authority to forcibly seize blood samples for chemical testing based upon probable cause to believe the suspect was driving while intoxicated, it would be illogical to conclude that something *more*—i.e., proof of actual driving in the officer's presence—is required before resort may be had to the gentler compulsion provided by the license suspension statute.

Because the DMV was not required to prove Troppman was actually driving at or near the time of her arrest, and because there is no dispute that Troppman was lawfully arrested and Officer Wheaton had reasonable cause to believe she had been driving, the superior court erred in granting the petition for writ of mandate.

DISPOSITION

The order granting the petition for writ of mandate is reversed, and the superior court is directed to enter an order denying the writ petition.

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McGuiness, P.J.

I concur:

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Corrigan, J.

POLLAK, J.—I concur in casting our lot with *Rice v. Pierce* (1988) 203 Cal.App.3d 1460 (*Rice*) and *Machado v. Department of Motor Vehicles* (1992) 10 Cal.App.4th 1687 (*Machado*), rather than with the conflicting decisions in *Medina v. Department of Motor Vehicles* (1987) 188 Cal.App.3d 744 (*Medina*) and *Jackson v. Pierce* (1990) 224 Cal.App.3d 964 (*Jackson*). I agree with the conclusion in *Rice, Machado,* and the majority opinion here that it is unnecessary to establish that a person was actually driving in order to suspend or revoke that person's privilege to operate a motor vehicle pursuant to Vehicle Code[4] section 13353. However, I consider the reasoning in *Medina* and *Jackson* to be correct as to why section 23612 cannot be read to imply consent by a person not shown to have been driving. Nonetheless, despite the longstanding assumption that "[t]he authority for section 13353 rests on the 'implied consent' statute, section 23612 (formerly section 23157)" (maj. opn., *ante,* p. 5),[5] I do not believe that it is necessary to engage in the fiction of implied consent to uphold the validity of section 13353.

Section 23612, subdivision (a)(1)(A) provides that "[a] person who drives a motor vehicle" is deemed to have given his or her consent to chemical testing for intoxication if lawfully arrested for certain driving under the influence offenses. Since "it is the *act of driving* a motor vehicle, rather than the act of obtaining a California driver's license" that creates the implied consent (e.g., *Jackson*, *supra*, 224 Cal.App.3d at p. 970),[6] a person who

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[4] All statutory references are to the Vehicle Code.

[5] This premise underlies both lines of the conflicting authorities. (Compare *Jackson, supra,* 224 Cal.App.3d at p. 970 with *Rice, supra,* 203 Cal.App.3d at p. 1465.)

[6] The two cases cited in *Jackson* for this proposition were considering whether the statute suspending a driver's license for failure to consent to a chemical test was an ex post facto law when applied to a person who had obtained a driver's license before enactment of the statute. In rejecting this contention, the court observed, "It is not the act of obtaining a driver's license which brings the statute into play, but instead the act of driving a motor vehicle upon a California highway is the conduct from which the driver's implied consent to a chemical test flows." (*Serenko v. Bright* (1968) 263 Cal.App.2d 682, 687; *Spurlock v. Department of Motor Vehicles* (1969) 1 Cal.App.3d 821, 828-829.) This interpretation is reinforced by the fact that a much earlier version of the statute applied to "[a]ny person

was not driving has not, under section 23612, impliedly consented to the chemical tests. Certainly the court in *Medina* was correct that "[c]onsent must be implied from some act of the arrestee, not from a peace officer's 'reasonable belief' that the arrestee has so acted." (188 Cal.App.3d at p. 750.) Regardless of the fact emphasized in *Rice* that section 23612 repeatedly refers to a "person," rather than a driver, who is lawfully arrested for certain offenses (203 Cal.App.3d at pp. 1465-1466), it is clear that the person to whom reference is made is a "person who drives a motor vehicle," who section 23612, subdivision (a)(1)(A) provides is deemed to have given consent. (See *Jackson*, *supra*, 224 Cal.App.3d at p. 971.) Therefore, if tethered to section 23612, section 13353 does not authorize the termination of the license of a person who was not driving, even if the person was lawfully arrested based on a peace officer's reasonable belief that she had been driving under the influence.[7]

Where *Medina* and *Jackson* go wrong, in my view, is in the premise that the authority section 13353 confers on the Department of Motor Vehicles (the department) to suspend or revoke the driver's license of a person lawfully arrested based on a peace

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who drives a motor vehicle *upon a highway*." (Stats. 1966, 1st Ex. Sess. 1966, ch. 138, § 1, p. 635, italics added; see *Medina*, *supra*, 188 Cal.App.3d at p. 750.) The legislative history tends to confirm that the highway restriction was not removed for the purpose of predicating implied consent on the act of obtaining a driver's license, but to extend the reach of the statute to persons driving anywhere and not simply on public highways. (Stats. 1982, ch. 53, § 18, p. 167; Legis. Counsel's Dig., Assem. Bill No. 542, Stats. 1982 (1981-1982 Reg. Sess.) Summary Dig., p. 22; see also *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 761, 763-768.)

[7] An alternative theory, suggested at oral argument, is that consent may be implied by the act of driving at any time, not only during the time period immediately preceding the individual's arrest. Under this interpretation of section 23162, Troppman's consent could be implied from her admission that she drove to the grocery store where she purchased the wine that she consumed, even if she did not drive after drinking the wine. Although novel, this interpretation is consistent with a literal reading of section 23162 and would uphold the application of section 13353 in this case even if implied consent is considered necessary to do so.

officer's reasonable belief that he or she was driving under the influence, and who after proper warning refuses to take or complete a chemical test, is dependent on the person having impliedly consented to take such a test under those circumstances.[8] There is no constitutional or other impediment to the Legislature authorizing the forfeiture of a driver's license if the person, lawfully arrested for suspected drunken driving and properly warned of the consequences pursuant to section 23612, subdivision (a)(1)(D), refuses to submit to a chemical test of intoxication.

"[C]ase law predating adoption of the implied consent statute continues to allow for such testing without a warrant, and without the consent of the person tested, so long as (i) the testing is incident to a lawful arrest, (ii) the circumstances require prompt testing, (iii) the arresting officer has reasonable cause to believe the arrestee is intoxicated, and (iv) the test is conducted in a medically approved manner." (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 757, 760 (*Mercer*), citing *Schmerber v. California* (1966) 384 U.S. 757, 766-772 (*Schmerber*) & *People v. Superior Court* (1972) 6 Cal.3d 757, 761-765 (*Hawkins*).)[9] The predecessor to section 23612 was enacted to provide "an additional

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[8] According to *Jackson*, *supra*, 224 Cal.App.3d at page 971, "The first 19 words of section 23157 [now section 23162] clearly proclaim that the consent is implied by law from the act of driving. If the person was not driving, he or she did not impliedly agree to submit to the test and, under the statute, *has every right to refuse to take it.* A person who has no obligation to comply with a law should not be punished for failing to comply with it." (Italics added.)

[9] Well after *Hawkins*, *supra*, 6 Cal.3d 757 was decided, California passed Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), which among other things brought California's exclusionary rule into line with federal constitutional authority. Subsequent to *Schmerber*, *supra*, 384 U.S. 757, the taking of physical evidence from a suspect when collecting the evidence requires only a minor intrusion and the evidence is evanescent has been recognized to be permissible under the federal constitution even when the suspect has not been arrested, so long as there is probable cause to believe that the suspect committed the offense in question. (*Cupp v. Murphy* (1973) 412 U.S. 291, 296.) *Cupp* was decided a year after *Hawkins*, and is considered, along with the passage of Proposition 8, to have abrogated the rule of *Hawkins* insofar as it required that there be a lawful arrest prior to the taking of a blood sample. (See, e.g., *People v. Trotman* (1989) 214 Cal.App.3d 430;

or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such a person will lose his automobile driver's license . . . if he refuses to submit to a test for intoxication. The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion." (*Hawkins, supra*, 6 Cal.3d at p. 765; *Mercer, supra*, 53 Cal.3d at p. 760.)

The involuntary removal of blood or other body fluids from an individual is protected by the Fourth Amendment. (*Schmerber, supra*, 384 U.S. at pp. 769-770 ["The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained"]; *Hawkins, supra,* 6 Cal.3d at pp. 761-764.) The state undoubtedly may not terminate one's driving privilege because the person refuses to waive the right to resist an unconstitutional search of his or her person. (Cf. *Sherbert v. Verner* (1963) 374 U.S. 398, 404-406; *Frost Trucking Co. v. R. R. Com.* (1926) 271 U.S. 583, 594 [state "may not impose conditions which require the relinquishment of constitutional rights"]; see Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent* (1988) 102 Harv. L.Rev. 5.) However, since the police may, under the conditions specified in *Schmerber* and *Hawkins,* compel a suspected drunk driver, incident to the person's arrest, to submit to a chemical test without that person's consent, there is no reason why the state may not penalize such a person for refusing to submit to the test, even if prior consent is not implied. Because the statute imposes this penalty only if one refuses to submit to the test after being lawfully arrested for driving under the influence, when the suspected violator has no right to prevent the chemical testing, the driving privilege is not being conditioned on the waiver of any constitutional rights, nor is it being terminated for refusing to waive such rights.

People v. Deltoro (1989) 214 Cal.App.3d 1417.) It is unnecessary to pursue the limits of these cases because section 13353 requires a finding that the person whose license is to be suspended or revoked was under lawful arrest when he or she refused the chemical test.

If one's driver's license is to be forfeited for failure to submit to chemical testing, the requirements of due process, including proper notice and a fair hearing, must be observed. (*Bell v. Burson* (1971) 402 U.S. 535; see *Illinois v. Batchelder* (1983) 463 U.S. 1112, 1118; *Mackey v. Montrym* (1979) 443 U.S. 1, 17.) But neither due process nor any other rule of law requires an individual's prior consent to testing before a driver's license may be taken from one who refuses to submit to a chemical test that she has no right to refuse.

I, like the majority, agree with *Machado* that in construing section 13353, "it is apparent that the Legislature intended to draft a law to require all persons lawfully arrested for drunk driving to submit to testing or lose their driver's license. The focus of this law is on whether the officer had probable cause to believe the person was driving while intoxicated, and therefore was lawfully arrested." (10 Cal.App.4th at p. 1697; see also *Rice*, *supra*, 203 Cal.App.3d at pp. 1465-1466.) This intention is made most clear, in my view, by the fact that section 13353, subdivision (c) specifies the four factors that are to be considered in an administrative review and does not include whether the person was in fact driving the vehicle.[10] (See also § 13557, subd. (b).) If the Legislature had intended to limit the authority of the department to suspend or revoke the license of a suspected drunk driver who refused a chemical test to those shown to have been driving when their sobriety was in question, this issue would have been included in the scope of the administrative

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[10] Section 13353, subdivision (c) provides as follows: "Upon the receipt of the officer's sworn statement, the department shall review the record. For the purposes of this section, the scope of the administrative review shall cover all of the following issues: [¶] (1) Whether the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153. [¶] (2) Whether the person was placed under arrest. [¶] (3) Whether the person refused to submit to, or did not complete, the test or tests after being requested by a peace officer. [¶] (4) Whether, except for a person described in subdivision (a) of Section 23612 who is incapable of refusing, the person had been told that his or her driving privilege would be suspended or revoked if he or she refused to submit to, or did not complete, the test or tests."

review specified in subdivision (c). It is not, and there is no reason to suspect that any such limitation was intended. Therefore, section 13353 authorized the department to suspend Troppman's license for refusing to submit to a chemical test, whether or not she was driving immediately before she was requested to submit to the test, and whether or not she impliedly consented to such testing.

This analysis, it should be noted, does not render superfluous the condition in section 13353, subdivision (a) that the person has refused an officer's request to submit, or to complete, a chemical test "pursuant to Section 23612." Subdivision (a)(1)(C) of section 23612 requires that the testing "be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of" specified Vehicle Code provisions. Subdivision (a)(1)(D) prescribes the advice that must be given to the person concerning the consequences of failing to submit to the testing. Other subdivisions specify, among other things, choices that must be given to the person concerning the type of testing to be administered and certain persons who are exempt from such testing. Section 13353 thus authorizes suspension or revocation of the driving privilege only if these conditions of section 23612 have been met. Indeed, these are the very issues that section 13353, subdivision (c) provides shall be the scope of the administrative review.

In short, I concur with the conclusion that Troppman's license was properly suspended pursuant to section 13353, not because she impliedly consented to submit to a chemical test under the circumstances, but because the validity and enforceability of section 13353 does not require such consent on her part.

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Pollak, J.

Trial Court	San Mateo County Superior Court
Trial Judge:	Hon. Barbara J. Mallach
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