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DWI Case Turns on Access to Counsel Before Breath Tests

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ALBANY - Some Court of Appeals judges shared concern Wednesday that Nassau County police officers may have breached the attorney-client relationship by not telling a suspect in a fatal drunk driving crash that her lawyer had just called them.

The suspect, Jonai Washington, claimed that had she known a lawyer was available, she may have reconsidered submitting to an alcohol breath test. But the officers' refusal to let the attorney talk to her just before taking the test has led two lower courts to suppress the results as evidence against her, and led to Wednesday's arguments in *People v. Washington*, 65, before the state's highest court.

Chief Judge Jonathan Lippman ([See Profile](#)) asked a prosecutor whether the state law requiring alcohol breath tests, and an automatic license suspension if a driver refuses, "give you the wherewithal to interfere with the attorney-client relationship?"

"There is no attorney-client relationship that has kicked in at this point," Assistant Nassau County District Attorney Yael Levy said.

"It hasn't kicked in because you wouldn't let it," Judge Eugene Pigott Jr. ([See Profile](#)) replied.

"Your honor, it hasn't kicked in because she expressly and unhesitatingly consented to take the test," Levy countered.

The officers, Levy argued, were not bound to tell Washington that an attorney was on the phone with police headquarters objecting to her taking the test and demanding that authorities not question her about the fatal accident. "The police had no legal obligation to do so," she said.

Challenged by Lippman whether that attitude "makes sense" from a public policy perspective of the fair administration of justice, Levy said it was fair because Washington's decision to take the breath test was "completely voluntary. There was no hint of compulsion. There was no hint of coercion."

Washington's attorney, Frederick Brewington of Hempstead, countered that police are obliged to tell suspects when their attorneys have contacted authorities and declared that they are representing clients.

Brewington said [People v. Pinzon](#), 44 NY2d 458 (1978), was particularly germane to Washington's case. It found that contacting a dispatcher for a police agency provided sufficient notice that a suspect in police custody had legal representation.

"In this situation, the police are not the gatekeepers as to whether or not a client in custody has a right to speak to counsel," Brewington told the court.

"Your view is that the attorney has gotten through, and at that point, your adversary said the [attorney-client] relationship hadn't joined," Lippman asked. "Your view is it hadn't joined because they hadn't let it join?"

"Absolutely," Brewington responded.

According to the attorneys and the briefs in the case, Nassau County police responding to an Aug. 30, 2010 collision found Washington, then 25, standing next to her vehicle on Uniondale Avenue in Hempstead, crying and talking on a cell phone.

The body of an injured pedestrian, Plutarco Caceres of Uniondale, laid on the ground 50 to 75 feet away. He later died of his injuries.

At about 3:30 a.m., Washington signed a form agreeing to submit to a breath test after police said she displayed signs of drunkenness.

Almost simultaneously, at 3:31 a.m., attorney Anthony Mayol of Forest Hills called Nassau County police headquarters, saying he was a lawyer representing Washington and cautioning officers, "You have to stop all questioning and we're not consenting to any form of testing whatsoever."

However, records indicated that at 3:39 a.m., the breath test was administered to Washington, who was not notified by police that Mayol had contacted them, according to court filings.

The lawyer stayed on the line until about 3:39 a.m., when he was told that someone would call him back. Not getting that call, Mayol called police about an hour later, but was not permitted to talk to Washington, according to court papers.

Authorities say Mayol was initially called into the case that night by Washington's relatives.

She was charged with second-degree manslaughter, second-degree vehicular manslaughter and two counts of operating a motor vehicle while under the influence of alcohol.

Her attorneys have maintained that she was not impaired when the accident occurred and that she could not avoid the 66-year-old Caceres, who ran at her vehicle in the dark.

At a hearing on whether to suppress the test results, prosecutors argued that it would have been impossible to halt the breath test in the eight minutes between Mayol's call and when the test was administered.

Nassau County Supreme Court Justice George Peck granted Washington's motion to suppress the test results, finding that police had not shown the test could have been stopped once police knew Washington's attorney had called.

[An Appellate Division, Second Department panel upheld](#) Peck's suppression determination. Three of the four judges on the panel held that police are "obligated to exercise reasonable efforts" to inform a motorist that their attorney has stepped forward unless such notification "will not substantially interfere with the timely administration of the test" ([NYLJ, April 18, 2013](#)).

The majority of the Appellate Division justices said Washington's "indelible right to counsel" attached when Mayol first contacted police. Writing for the majority, Justice John Leventhal ([See Profile](#)) said that the absence of "reasonable" efforts by police to inform her of Mayol's presence in the case, the court must assume that Washington would have withdrawn her consent to the breath test.

Prosecutors argued in briefs before both the Second Department and the Court of Appeals that once Washington gave her consent, she could not take it back unless she expressly asked to do so. The district attorney's office argued that in the case of the arrests of drunken driving suspects like Washington, there is no time to allow extended deliberations between clients and lawyers because the tests must be administered within two hours of an accident to give an accurate reading of the driver's impairment level.

The Court of Appeals is expected to hand down a ruling in early May.

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