DUI UPDATE

Is There Life After MVA v. Jones?

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The Court of Appeals recently decided the case of *Motor Vehicle Admin. v. Jones*, 2004 WL 432481 (2004) and held that under rules of statutory construction, only the issues enumerated in Transp. Art., § 16-205.1(f)(7) can be raised at an implied consent or administrative per se license suspension hearing before the Office of Administrative Hearings. For the reasons set forth below, *Jones* should be strictly limited to its facts and holding.

Jones was a refusal case. He claimed he had not been offered a test within two hours of apprehension as required by Cts. & Jud. Proc. Art., § 10-303. Since the two hour time limit is not an issue listed under § 16.205.1(f)(7), Jones argued he was entitled to relief under § 16-205.1(a)(2). Section 16-205.1(f)(7) provides:

> (7) (i) At a hearing under this section, the person has the rights described in §§ 12-206 of this article, but at the hearing the only issues shall be:
> 1. Whether the police officer who stops or detains a person had reasonable grounds to believe the person was driving or attempting to drive while under the influence of alcohol, while impaired by alcohol, while so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while impaired by a controlled dangerous substance, in violation of an alcohol restriction, or in violation of §§ 16-813 of this title;
> 2. Whether there was evidence of the use by the person of alcohol, any drug, any combination of drugs, a combination of one or more drugs and alcohol, or a controlled dangerous substance;
> 3. Whether the police officer requested a test after the person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test is ineligible for modification of a suspension or issuance of a restrictive license under subsection (n)(1) and (2) of this section;
> 4. Whether the person refused to take the test;
> 5. Whether the person drove or attempted to drive a motor vehicle while having an alcohol concentration of 0.08 or more at the time of testing; or
> 6. If the hearing involves disqualification of a commercial driver's license, whether the person was operating a commercial motor vehicle.
> (ii) The sworn statement of the police officer and of the test technician or analyst shall be prima facie evidence of a test refusal or a test resulting in an alcohol concentration of 0.08 or more at the time of testing.

Section 16-205.1(a)(2) provides:

> (2) Any person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State is deemed to have consented, subject to the provisions of §§ 10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a test if the person should be detained on suspicion of driving or attempting to drive while under the influence of alcohol, while impaired by alcohol, while so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while impaired by a controlled dangerous substance, in violation of an alcohol restriction, or in violation of § 16-813 of this title.

The Court of Appeals held that since the issue of whether Jones had refused the test within the two hour apprehension requirement of Cts. & Jud. Proc. Art., § 10-303 fell under subsection (a)(2) and not under subsection (f)(7), that the issue could not be raised at the implied consent hearing. It resolved this under the rules of statutory construction. As this article demonstrates, the decision in *Jones* raises many more questions than it answers.

Section 16-205.1 is an implied consent statute. Persons subject to it are allowed to refuse testing and, with few exceptions, must give express consent before submitting to a chemical test of breath or blood to determine alcohol content. By its language § 16-205.1(a)(2) defines the class of persons subject to the implied consent law. Not once in the *Jones* opinion did the Court mention the word "jurisdiction." Under the clear language of subsection (a)(2) many drivers are simply not subject to Maryland's implied consent laws. Is it possible that somebody not subject to the law could have his or her license suspended and be precluded from arguing that the law did not apply to him or her? The Court's opinion, if taken to its logical conclusion, would preclude a litigant from claiming that the MVA lacked jurisdiction over him or her. Is that what the Court of Appeals really intended? Some of the issues that must survive *Jones* appear to be too obvious to require much discussion, but now as a result of *Jones*, they do require discussion, and attorneys must be prepared to articulate why these issues survive *Jones*. What follows is a list of issues that are arguably imperiled by *Jones*, and brief arguments in support of raising these issues after *Jones*. For each issue it will be necessary to generally argue first, that the argument survives *Jones* pursuant to § 16-205.1(a)(2), and second, that the argument can be made under § 16-205.1(f)(7) anyway. This article will demonstrate an approach that can be taken on the first issue discussed here, territorial jurisdiction. The other issues will simply be listed along with some relevant citations and parenthetical comments.

After Jones, may a person argue the offense did not occur in Maryland? Section 16-205.1(a)(2) subjects only persons driving a motor vehicle "in this State," to Maryland's implied consent law. The "in this State" language does not appear in § 16-205.1(f)(7). A literal reading of *Jones* allows a Maryland State Trooper to arrest a person in Virginia or on a federal enclave subject to exclusive federal jurisdiction and the location of the offense would not be a defense. Since "jurisdiction" apparently was not raised in *Jones*, arguably *Jones* does not preclude jurisdictionally based arguments, even if they are made under § 16-205.1(a)(2). Many Maryland cases recognize that

jurisdiction can be raised at any time, including on appeal. *E.g.*, *Stewart v. State*, 287 Md. 524, 527-28, 413 A.2d 1337 (1980). If § 16-205.1 establishes the jurisdiction from which the power to suspend flows, then the Court's statutory construction has extremely limited applicability, because every conceivable issue suggested by § 16-205.1(a)(2) is a jurisdictional issue.

The second argument to support a defense to suspension of territorial jurisdiction is that the *Jones* holding is necessarily limited to its own facts. The Court's opinion failed to address Jones' argument that § 16-205.1(f)(7) should not be held to preclude all other issues because if that was the case, then a person could not argue he or she changed his or her mind under § 16-205.1(g), and after an initial refusal elected to take a test. That section provides in pertinent parts:

> (g) (1) An initial refusal to take a test that is withdrawn as provided in this subsection is not a refusal to take a test for the purposes of this section.
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> * * *
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> (3) In determining whether a person has withdrawn an initial refusal for the purposes of paragraph (1) of this subsection, among the factors that the Administration shall consider are the following: . . . .

Since the same statute expressly provided for a way to litigate an issue not included in the list of six issues set forth in § 16-205.1(f)(7), one would think the Court of Appeals would have wanted to address this issue to explain a possible inconsistency between the two provisions.

While the Court could have held that the question of whether a person refused the test was one of the issues listed in § 16-205.1(f)(7) and that subsection (g) related back to that section, the Court instead deflected that argument saying it did not apply to Jones because Jones did not attempt to change his mind. By avoiding the issue, the Court could be read to imply that the subsection (g) issue is an issue separate from subsection (f)(7), and that in an appropriate case, subsection (g) could be raised as a defense, notwithstanding *Jones*' holding. By distinguishing the subsection (g) issue the Court in effect arguably said, "*Jones* only applies to Jones."[1]

Fall back arguments include that the officer did not have the "reasonable grounds" required under § 16-205.1(f)(7)(i)(1) and that outside of his jurisdiction he is not a "police officer" as is also required under that section.

Here, in no particular order, is a list of other defenses arguably imperiled by *Jones*. This list is not to be construed as including all issues that probably survive *Jones*, or the arguments that may

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[1]A similar limitation was announced by the Supreme Court with respect to the equal protection argument in *Bush v. Gore*, 121 S.Ct. 525, 532 (2000)("Our consideration is limited to the present circumstances....").

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be made in support of a licensee's continued ability to litigate these issues. The arguments, which will not be repeated in full for each issue below are specifically: (1) *Jones* does not address "jurisdictional" issues, which may still be raised under § 16-205.1(a)(2); (2) *Jones* is necessarily limited to its own facts and non-jurisdictional issues under § 16-205.1(a)(2) may still be raised; (3) the defense may still fit under a broad reading of the issues listed under 16-205.1(f)(7); (4) the defense may be allowed by due process; and (5) the defense may be allowed by the relevant COMAR regulations.

The driver was not driving "on a highway or private property used by the public in general." A person on a lawn tractor cannot be compelled to take a test. Are these drivers now subject to suspension without any defense? *See*, *Walmsley v. State*, 35 Md. App. 148, 370 A.2d 107 (1977); *Akins v. State*, 35 Md. App. 155, 370 A.2d 111 (1977). In *Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 796 A.2d 75 (2002), the Court of Appeals recently addressed this issue. Has *Atterbeary* now been overruled without any mention of it in *Jones*?

The driver was denied his due process right to consult with counsel. Maryland has distinguished itself in cases such as *Sites v. State*, 300 Md. 702, 481 A.2d 1292 (1984) and *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986). The Court of Appeals impliedly recognized the ability to litigate the right to counsel issue in an MVA implied consent hearing recently in *Atterbeary*. Certainly the legislature would not be able to act in derogation of the federal and state due process protections. Are all of these right to counsel cases, which were decided with § 16-205.1(f)(7) on the books, now limited in application to the criminal case?

The driver was denied due process by the misleading or false advise of the police officer. This issue was considered valid by the Court of Appeals in many cases including, *Hare v. Motor Vehicle Admin.*, 326 Md. 296, 604 A.2d 914 (1992)(rejecting the defense in that case) and *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 630 A.2d 753 (1993)(suspension reversed). Is it possible that *Jones* has reversed *Forman*? *Jones* did not mention due process.

The equipment used in the test was not approved by the toxicologist, § 16-205.1(a)(2), Cts. & Jud. Proc. Art., § 10-304(b) and *the person who submitted to a breath test was not observed for 20 minutes prior to the administration of the test by the test technician.* These two issues under § 10-304 are close to the issue in *Jones*, a violation of Cts. & Jud. Proc. Art., § 10-303. Does *Jones* now mean that a hospital blood test for medical purposes or a preliminary breath test can be used as a basis for a suspension? Does *Jones* mean that procedures established to assure the reliability and accuracy of tests cannot be raised? It is hard to imagine that even these issues fail to survive *Jones*. The COMAR regulations dealing with tests expressly mention breath test equipment "deemed reliable" and provide for a rebuttable presumption of accuracy. The licensee can obviously offer evidence showing the result is inaccurate or malfunctioning. COMAR § 11.11.03.08.

The driver who initially refused withdrew the refusal under § 16-205.1 (g). This is the issue the Court of Appeals avoided deciding. The provision, which was enacted well after § 16-205.1(f)(7), goes so far as to provide guidance as to how the issue should be decided at the hearing. By the Court of Appeals avoiding this issue, it seemed to concede that the issue lives on despite its holding in *Jones*.

The driver was not issued a temporary license as required by § 16-205.1(b) or the MVA failed to issue a license extension before a timely request hearing. The operative COMAR regulations require a dismissal of the hearing if the suspension begins before the hearing. COMAR § 11.11.03.08 provides:

> A. Scheduling.
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> (1) A hearing shall be provided by the Administration within the time periods required in Transportation Article, §§16-205.1, Annotated Code of Maryland.
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> (2) If the Administration cannot provide a hearing within the time periods required by Transportation Article, §§16-205.1, and the suspension period has not begun by the time the hearing is provided, or the Administration stays the suspension under Regulation .04A(2), the Administration or administrative law judge may not dismiss the case.
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> (3) If the Administration cannot provide a hearing within the time periods required by Transportation Article, §§16-205.1, and the suspension period has begun as a result of the Administration's delay or oversight, the case shall be dismissed.

This is a provision that was put in place when the police started seizing licenses in 1990 and issuing paper temporary licenses. The issue limitation of § 16-205.1(f)(7) had been in place for years prior to that. Additionally, the Court of Appeals in *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 597 A.2d 939 (1991) held that the failure to provide a timely hearing did not require a dismissal in the absence of prejudice to the licensee. Administrative law judges have routinely been applying the COMAR provision and *Shrader* to grant dismissals where the licensee is prejudiced because he or she could not drive, where the MVA has negligently failed to timely issue a license extension pending a timely requested hearing. Did *Jones* do away with the COMAR requirements and *Shrader* without an acknowledgement that it was doing it or consideration of this issue? It is doubtful.

The officer improperly gave Miranda warnings prior to the DR-15 Form, confusing the driver as to his or her rights before a refusal. Although the Court of Appeals did not decide whether this was a valid defense to refusal in *Forman*, Judge Chasanow's opinion acknowledged the "*Miranda* confusion" defense as an example of how other jurisdictions have recognized due process issues in license suspension hearings. The Court cited other opinions that recognize this defense. Arguably this defense, as well as other due process defenses, survives anyway under § 16-205.1(f)(7) on the theory that if the officer improperly advised the driver, what occurred was not a "refusal."

The stop was made by the officer in "bad faith." This is another issue recognized in the COMAR regulations, COMAR § 11.11.02.10 provides:

> H. Notwithstanding the fact that evidence may have been seized or obtained in violation of a licensee's Fourth Amendment constitutional rights, the evidence is admissible unless the:
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> (1) Police officer, in obtaining or seizing the evidence, acted in bad faith and not as a reasonable officer should act in similar circumstances; or
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> (2) Evidence is otherwise inadmissible under this regulation.

It is unlikely the MVA intended to eviscerate this issue, in light of its history, that it was the MVA that put this provision in the COMAR so that cases would not be dismissed where no basis for the stop was indicated. Nonetheless, this is also part of the reasonable grounds for the detention, which

is an issue under § 16-205.1(f)(7).

The person who refused was not driving, although there may have been reasonable grounds to believe the person was driving. There is a difference in § 16-205.1(f)(7) as to the level of proof required to show the person was driving in refusal cases as opposed to test cases. Refusal requires only "reasonable grounds," where a test reading of .08 or more requires "driving." The argument in refusal cases, prior to *Jones*, was that more than mere "reasonable grounds" is required as a result of the language in § 16-205.1(a)(2), providing that a person who "'drives' a motor vehicle . . . is deemed to consent...." This is another issue that the Court considered, just two years ago, in *Atterbeary*. Since *Atterbeary* was a refusal case the Court framed the issue as: "Respondent's primary contention in his cross-appeal is that he was not driving or attempting to drive as set forth in Section 16- 205.1(a)(2)." In *Atterbeary*, the Court had no difficulty deciding the issue on the merits. The question again is whether the Court of Appeals intended to overrule *Atterbeary* without so much as a mention of it.

For each of these issues, and this is not intended to be a complete list, there are a host of reasons why an administrative law judge should consider them, notwithstanding *Jones*. It is worth mentioning that the Court did no historical analysis of § 16-205.1(f)(7). The limitation of issues contained in that section were in place before many of the provisions in the current version were enacted. Additionally, given the extensive history of Court of Appeals cases recognizing the validity of many of the issues listed above, it is unlikely they would have overruled all of those cases without even mentioning *one* of them. For this reason, it appears likely the Court did not intend, and perhaps was not aware, that its opinion could be construed as completely shattering the existing legal landscape at MVA hearings. Unfortunately, some ALJs may seize on *Jones* as a basis to suspend licenses that should not be suspended. In the short run *Jones* will probably have the exact opposite of its intended effect, it will increase litigation.

Hopefully, at some point in the future, the Court of Appeals will explain what it meant to do in *Jones*, and whether it intended to allow the MVA to suspend drivers who are not subject to a suspension under § 16-205.1(a)(2), or even worse, to allow the MVA to suspend persons who refused a test because they never drove at all. Unless and until the Court more explicitly says otherwise and explains itself, yes, it appears there is life after *Jones*.