



# Stone Busailah, LLP

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## **BOATER CANNOT BE COMPELLED TO TAKE BLOOD ALCOHOL TEST**

*People v. Gutierrez, CR M 17-6615*

In the Appellate Division in and for the County of Yolo, filed 2/14/19

*By Robert Rabe, Esq.*

On September 3, 2017, Yolo County Sheriff's Sergeant Machado detained the occupants of a boating vessel on the Sacramento River for speed-related violations of the Harbors and Navigation Code. During this detention, Sergeant Machado made contact with defendant Gutierrez, the operator of the vessel. Suspecting Gutierrez was operating the vessel under the influence of alcohol in violation of Harbors and Navigation Code §655, Sergeant Machado conducted various field sobriety tests, which Gutierrez failed. When Sergeant Machado asked Gutierrez if he was willing to submit to a preliminary alcohol screening test to detect the presence of alcohol, he refused. Deputy Harbaugh then arrested Gutierrez for boating under the influence.

Deputy Harbaugh advised Gutierrez that he had "a choice of a blood or breath test." It was department policy to require submission to either test. Deputy Harbaugh did not advise Gutierrez that he had the right to refuse to submit to either test. Faced with only those two options, Gutierrez chose to submit to

a blood test. A blood sample was obtained by medical staff.

Gutierrez then faced two criminal counts: Count 1, violation of Harbors and Navigation Code §655 (b), operating a vessel while under the influence of alcohol or drugs; and Count 2, a violation of Harbors and Navigation Code § 655 (c), operating a vessel at .08 percent or more.

Gutierrez filed a motion to suppress evidence. The trial court denied the motion, ruling that "under the totality of the circumstances, [Gutierrez's consent] ... was not simply an acquiescence to the police or a coercion or anything like that ... [It] was valid consent." Gutierrez filed an appeal from the denial of his motion to suppress.

The sole issue on appeal was whether Gutierrez's consent to the blood draw was voluntary under the totality of the circumstances. The Appellate Division noted, "where ... the prosecution relies on consent to justify a warrantless search or seizure, it bears the 'burden of proving that the

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defendant's manifestation of consent is a product of his free will and not a mere submission to a claim of lawful authority.”

Under Vehicle Code §23612, anyone who drives a motor vehicle is “deemed to have given his or her consent” to a chemical test of his or her blood, breath, or urine. However, that statute only applies to those who drive. In contrast to §23612, under the relevant Harbors and Navigation Code section, individuals are not deemed to have given their consent to a blood, breath, or urine test by piloting a boat under §655.1. Rather, the statute provides that an officer “... having reasonable cause to believe that any person was operating a [boat] under the influence of an alcoholic beverage or any drug ... who lawfully arrests the person for any violation ... of § 655, may request the person to submit to chemical testing of his or her blood, breath, or urine for the purpose of determining the drug or alcoholic content of the blood.” Under § 655.1 (b)(2)(B), an arrested person must also be advised that he or she has a right to refuse chemical testing. Section 655.1 confers no legal authority on an officer to require a submission to a blood or breath test.

The Appellate Division commented that “Deputy Harbaugh did not merely request that defendant submit to a blood or breath test. The Deputy told defendant he *had to* submit to a test.” The issue then became whether this misstatement by Deputy Harbaugh renders defendant's “consent” to the blood draw involuntary, and thereby invalid. The Appellate Division noted that there were no cases decided under §655.1 which examined the consequences of misadvising an arrestee.

The Appellate Division discussed a number of cases where courts had to determine whether a “consent” was voluntary and freely given. The Court explained that in this case, the officer violated § 655.1 by telling Gutierrez he had to choose, instead of requesting that he submit to a blood or a breath test. At the time Gutierrez was told he had to submit to a test, he had been detained for field sobriety tests,

taken from his boat, transported to a patrol vessel, and placed under arrest. The Court found these circumstances favored a finding of involuntariness.

The People, citing *People v. Harris* (2015) 234 Cal.App.4th 671, a case decided under the Vehicle Code, argued that since Gutierrez did not show any signs he didn't want to provide the blood sample, his “consent” to do so was voluntary. The Appellate Division, in rejecting that argument, explained there is no statutory equivalent of the implied consent in boating under the influence cases, and § 655.1 does not authorize the officer to compel an arrestee to submit to a test. Here, Gutierrez was told he **had** to take a blood or breath test. The Court held that this was a false statement which, when coupled with the other circumstances, compels a finding of involuntariness.

The reader of this training bulletin may be as surprised as Deputy Harbaugh must have been when he discovered that a suspected drunk boater has the right to refuse to take a blood alcohol test. If you are placed in a similar situation, be sure to ask the suspected intoxicated boater if he/she would consent to a blood test, or consent to a breath test, to determine the drug or alcohol content of their blood.

Stay Safe!

*Robert Rabe* is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

