TIMOTHY O'ROURKE *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 36714)

Sheldon, Keller and Lavery, Js.

Argued January 8—officially released April 14, 2015

(Appeal from Superior Court, judicial district of New Britain, Prescott, J.)

Jeremiah Donovan, for the appellant (plaintiff).

Eileen M. Meskill, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Raul Antonio Rodriguez*, assistant attorney general, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Timothy O'Rourke, appeals from the judgment of the Superior Court dismissing his appeal from the decision of the defendant, the Commissioner of Motor Vehicles (commissioner), ordering the six month suspension of his license to operate a motor vehicle pursuant to General Statutes § 14-227b for his refusal to submit to a chemical alcohol test. First, he claims that the determination of the hearing officer, that he refused to submit to a chemical alcohol test, was not supported by substantial evidence. Second, he claims that, even if the evidence adequately supported the hearing officer's determination that he had refused to submit to a chemical alcohol test, this court should recognize as a matter of law that he subsequently had rescinded his refusal. We affirm the judgment of the trial court.

The record reflects that, following the plaintiff's arrest for operating a motor vehicle while under the influence of alcohol on April 20, 2013, Trooper Martin Lane of the state police prepared an incident report in which he stated that, following the plaintiff's arrest, he refused to submit to a chemical alcohol test. After this report was forwarded to the commissioner, the commissioner duly notified the plaintiff that his license was to be suspended for a period of six months. The plaintiff availed himself of his statutory right to contest the suspension at an administrative hearing before the commissioner. On May 31, 2013, the plaintiff, represented by counsel, appeared before a hearing officer designated by the commissioner to determine whether he was subject to a penalty in accordance with § 14-227b[1] for failing to submit to a chemical alcohol test following his arrest on April 20, 2013.

On June 3, 2013, the hearing officer issued a decision in which she found: (1) that the police officer involved in the plaintiff's arrest had probable cause to arrest the plaintiff for violating § 14-227b; (2) that the plaintiff had been placed under arrest; (3) that the plaintiff refused to submit to a chemical alcohol test; and (4) that the plaintiff was the operator of the motor vehicle at issue. In addition to setting forth these four findings of fact mandated by § 14-227b (g), the hearing officer made an additional subordinate finding, namely, that "[t]he [plaintiff] was provided a reasonable amount of time to take the [chemical alcohol test] and any acceptance cannot have any conditions on it. In addition, although the [plaintiff] eventually agreed to take a test, there was not [a] reasonable amount of time left to administer it." The hearing officer ordered that the plaintiff's operator's license be suspended for a period of six months. The commissioner denied the plaintiff's petition for reconsideration of the hearing officer's decision.

The plaintiff appealed the commissioner's decision

suspending his operator's license to the Superior Court. See General Statutes § 4-183. On March 21, 2014, the court held a hearing, following which it rendered an oral decision in which it dismissed the appeal.[2] In its decision, the court stated, initially, that the subordinate finding of fact made by the hearing officer, namely, that there was not enough time left to administer a chemical alcohol test when the plaintiff agreed to submit to such test, was not supported by substantial evidence in the record. The court went on to conclude, however, that the facts apparent in the record demonstrated that, following the plaintiff's arrest, the police had afforded the plaintiff more than a reasonable amount of time in which to decide whether to submit to a chemical alcohol test and that he did not so submit. Specifically, the court observed that Lane first asked the plaintiff to submit to a test at 8:11 p.m., and that, twenty-five minutes later, the plaintiff still had not stated a decision in this regard, even though Lane had advised the plaintiff that his indecision would be deemed a refusal. The court stated that the law required the police to have afforded the plaintiff a reasonable amount of time in which to submit to a test unconditionally. Applying the facts to this legal standard, the court concluded that the record revealed a substantial basis on which to uphold the commissioner's decision, and dismissed the appeal.[3] This appeal followed.

Before discussing the merits of the appeal, we set forth our familiar standard of review in administrative appeals. "We review the issues raised by the plaintiff in accordance with the limited scope of judicial review afforded by the [Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.] . . . . Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and . . . provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . [I]t is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . .

"[A]s to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Spitz* v. *Board of Examiners of Psychologists*, 127 Conn. App. 108, 114–16, 12 A.3d 1080 (2011); see also *Winsor* v. *Commissioner of Motor Vehicles*, 101 Conn. App. 674, 679–80, 922 A.2d 330 (2007).

The scope of license suspension hearings following an operator's refusal to submit to chemical alcohol testing is governed by § 14-227b, commonly referred to as the implied consent statute. Such hearings are limited to a consideration of the four issues set forth in § 14-227b (g). See, e.g., *Volck* v. *Muzio*, 204 Conn. 507, 512, 529 A.2d 177 (1987); *Buckley* v. *Muzio*, 200 Conn. 1, 7, 509 A.2d 489 (1986); *Santiago* v. *Commissioner of Motor Vehicles*, 134 Conn. App. 668, 674, 39 A.3d 1224 (2012). That enactment provides in relevant part: "The hearing shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating the motor vehicle." General Statutes § 14-227b (g).

The plaintiff raises two distinct claims. We will address each claim in turn.

I

First, the plaintiff challenges the third required finding made by the hearing officer pursuant to § 14-227b (g), claiming that the determination of the hearing officer that he refused to submit to a chemical alcohol test was not supported by substantial evidence. We disagree.

Consistent with the standard of review set forth previously in this opinion, we observe that "[w]hether the plaintiff's actions constituted a refusal to submit to [a chemical alcohol] test presents a question of fact . . . and, therefore, our review is limited to determining whether the hearing officer's finding was supported by substantial evidence." (Citations omitted.) *Altschul* v. *Salinas*, 53 Conn. App. 391, 397, 730 A.2d 1171, cert. denied, 249 Conn. 931, 761 A.2d 751 (1999).

Before reviewing the evidence before the hearing

officer, we first consider relevant appellate precedent concerning the issue of what constitutes a refusal to submit to a chemical alcohol test for purposes of § 14-227b. This court, rejecting a vagueness challenge to an earlier revision of General Statutes § 14-227a (e),[4] had occasion to interpret what it means to refuse to submit to a chemical alcohol test, and that interpretation is relevant to our understanding of § 14-227b: "The legislature did not provide a definition for refused . . . . It is not necessary to define a word that carries an ordinary, commonly understood meaning, is commonly used and is defined in standard dictionaries. . . . The word refuse is defined as to show or express unwillingness to do or comply with. . . .

"We construe the word refuse to have a sufficiently definite meaning that places an individual on adequate notice as to what conduct is prohibited. . . . Consequently, the dictionary definition makes it clear that 'refusing' to take a [chemical alcohol] test may be accomplished by a failure to cooperate as well as by an expressed refusal." (Citations omitted; internal quotation marks omitted.) *State* v. *Corbeil*, 41 Conn. App. 7, 18–19, 674 A.2d 454, cert. granted on other grounds, 237 Conn. 919, 676 A.2d 1374 (1996) (appeal dismissed September 18, 1996); see also Regs., Conn. State Agencies § 14-227b-5.[5]

"This court has held that an operator's refusal to [submit to a chemical alcohol test] pursuant to § 14-227b need not be express and that a hearing officer may consider the operator's conduct in determining whether [the operator] refused to take the test. Refusal to [submit to a chemical alcohol test] can occur through conduct as well as an expressed refusal." (Internal quotation marks omitted.) *Sanseverino* v. *Commissioner of Motor Vehicles*, 79 Conn. App. 856, 859, 832 A.2d 80 (2003); see also *Wolf* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 76, 82, 797 A.2d 567 (2002) (noting that refusal need not be express but can occur through conduct); *Tompkins* v. *Commissioner of Motor Vehicles*, 60 Conn. App. 830, 832–33, 761 A.2d 786 (2000) (same).

Thus, this court has held that "[w]hen a plaintiff delays deciding whether to submit to a chemical alcohol test or expressly declines to take the test on the ground that he or she was unable to contact an attorney, such behavior may amount to a refusal to submit to a chemical alcohol test." *Pizzo* v. *Commissioner of Motor Vehicles*, 62 Conn. App. 571, 582, 771 A.2d 273 (2001). In *Pizzo*, police officers informed the plaintiff about implied consent and testing and afforded him multiple opportunities to contact an attorney. Id., 581. The plaintiff, unable to reach his attorney by telephone, refused to submit to testing. Id., 575. This court upheld the commissioner's finding that a refusal had occurred. Id., 582.

This court also has determined that substantial evidence of a refusal existed where, following a plaintiff's arrest, he was provided with an implied consent advisory, he was afforded a reasonable opportunity to contact an attorney before deciding whether to submit to a chemical alcohol test, he was unable to contact an attorney, and he responded to the officer's request to submit to a test by stating that, without legal counsel, he could neither refuse nor submit to a chemical alcohol test. *Altschul* v. *Salinas*, supra, 53 Conn. App. 393–94, 398. In so reasoning, this court applied the familiar principle that a refusal "may be accomplished by a failure to cooperate as well as by an expressed refusal." (Internal quotation marks omitted.) Id., 397.

Our case law reflects that "regardless of the ostensible reason for the plaintiff not submitting to the chemical test, *any failure to submit to the test* constitutes a refusal pursuant to subdivision (3) [of § 14-227b (g)]." (Emphasis added.) *Fitzgerald* v. *Commissioner of Motor Vehicles*, 142 Conn. App. 361, 365 n.3, 65 A.3d 533 (2013); see also *Dalmaso* v. *Dept. of Motor Vehicles*, 47 Conn. App. 839, 844, 707 A.2d 1275 (court's determination that substantial evidence of refusal existed not affected by evidence that plaintiff was not afforded reasonable opportunity to contact attorney pursuant to § 14-227b [b]), appeal dismissed, 247 Conn. 273, 720 A.2d 885 (1998); *Piorek* v. *DelPonte*, 28 Conn. App. 911, 911–12, 610 A.2d 201 (1992) (same); *Kramer* v. *DelPonte*, 26 Conn. App. 101, 102, 598 A.2d 670 (1991) (same). In *Dalmaso*, this court rejected a claim that substantial evidence of a refusal did not exist because the police did not grant the plaintiff's request to telephone his attorney before deciding whether to submit to chemical alcohol testing. *Dalmaso* v. *Dept. of Motor Vehicles*, supra, 47 Conn. App. 840–41. The court held that the issue of whether the police had complied with § 14-227b (b) by affording the plaintiff with a reasonable opportunity to telephone an attorney prior to the performance of testing was beyond the scope of the issues properly before the commissioner. Id., 844.

Among the evidence before the hearing officer was the investigation report prepared by Lane. That report sets forth the following facts: At 7:08 p.m. on April 20, 2013, the plaintiff was operating a motor vehicle in Old Lyme when Lane stopped him to investigate a suspected expired registration for his motor vehicle. As a result of certain observations made by Lane while conversing with the plaintiff, he asked the plaintiff if he had anything to drink prior to driving. Initially, the plaintiff stated that he had not had anything to drink, but later stated that the opposite was true. Lane administered a number of field sobriety tests to the plaintiff, including an exercise in reciting the alphabet from the letters "D" to "W," the walk and turn test, the one leg stand test, and the horizontal gaze nystagmus test. The plaintiff

did not complete these tests in a satisfactory manner. Lane, intending to transport the plaintiff to the Troop F state police barracks in Westbrook, placed handcuffs on the plaintiff and seated him in his police cruiser.

At 7:16 p.m., during transport, the plaintiff informed Lane that he was experiencing chest pain and exhibited shortness of breath. Consequently, Lane drove the plaintiff to the Middlesex Shoreline Clinic. Upon their arrival at the clinic at 7:30 p.m., medical personnel began to render medical treatment to the plaintiff. Lane did not interact with the plaintiff while he was receiving treatment.

At 7:45 p.m., the plaintiff stated in Lane's presence that his arrest was "bullshit," and Lane advised the plaintiff of his *Miranda* rights.[6] At 8:08 p.m., the plaintiff contacted his wife via his personal telephone. At 8:11 p.m., Lane requested that the plaintiff submit to a blood test. At 8:13 p.m., when Lane afforded the plaintiff an opportunity to contact an attorney, the plaintiff stated "that his spouse was doing that at the moment." At 8:19 p.m., the plaintiff received a telephone call from an unknown party. At 8:30 p.m., Lane advised the plaintiff that he needed to make a decision about submitting to a blood test shortly, regardless of whether he received advice from his attorney. At 8:40 p.m., Lane asked the plaintiff if he would submit to a blood test or, alternatively, a urine test. The plaintiff responded: "I don't know what to do." According to Lane, "[t]he [plaintiff] was advised that approximately 25 minutes had passed since [Lane] initially asked him [to submit to a chemical alcohol test]. The [plaintiff] stated that he needed to speak with his spouse first. The [plaintiff] was advised that his failure to make a decision would be considered a refusal to submit to chemical analysis. The [plaintiff] failing to submit to a blood or urine test was witnessed by Connecticut State Police Trooper W. Rochette . . . ."

At 8:55, Debra Carney, the plaintiff's wife, arrived at the clinic, and she, not the plaintiff, informed Lane that the plaintiff would submit to a blood test. Lane advised Carney that the plaintiff's opportunity to submit to chemical alcohol testing had passed. Carney represented that the plaintiff was confused and that he believed that blood drawn upon his arrival at the clinic was for police purposes. Lane informed Carney that any blood drawn was for medical, rather than for police, purposes.

At oral argument before this court, the plaintiff acknowledged that there may be factual scenarios in which it is reasonable to infer that an operator's failure to submit immediately to chemical alcohol testing, such as by making a request to speak with an attorney, is a ploy by which to cause delay or by which he or she effectively may refuse to be tested while not doing so explicitly. The plaintiff argues, however, that the facts

of this case do not support such an inference because, at the time of Lane's request, he was suffering from an adverse medical condition, and, upon Carney's arrival, he submitted to the test. The plaintiff argues that at no point did he expressly refuse to be tested, but conditioned his decision on being able to speak with his wife, which only could occur once she arrived at the clinic; he submitted to the test "within the time within which the test must be commenced"; and it would be unfair to consider his conduct a refusal simply because he failed to submit to testing within an "artificial and arbitrary" deadline established by Lane.

There is no dispute that, within two hours of operation, Lane asked the plaintiff, on three occasions, whether he would submit to testing and that the plaintiff did not consent on any of these three occasions. Rather, the plaintiff expressed uncertainty as to what he should do and conditioned the decision to submit to testing on his ability to speak with his wife when she arrived at the clinic. Nor is there a dispute that Lane advised the plaintiff of the legal consequences of his refusal to submit to testing, Lane afforded him an opportunity to seek legal advice, and the plaintiff availed himself of this opportunity by speaking to his wife via telephone to tell her to call his attorney.[7] To the extent that the plaintiff relies on his version of events as opposed to that of Lane, we observe that the hearing officer, in her role as finder of fact, reasonably relied on the facts set forth in Lane's report.[8] The facts in Lane's report support a finding that Lane first asked the plaintiff to submit to testing at 8:11 p.m., that the plaintiff thereafter made and received telephone calls, and that, at 8:40 p.m., twenty-nine minutes later, the plaintiff did not submit to testing when he was asked to do so, but stated that he desired to speak to his wife.[9] In line with the authorities set forth previously in this opinion, especially *Altschul* and *Fitzgerald*, the record amply supported the hearing officer's finding that the plaintiff had refused to submit to chemical alcohol testing.[10] *Altschul* stands for the proposition that delaying one's decision to submit to chemical alcohol testing or expressly declining to consent until one has had the ability to speak with an attorney may amount to a refusal to submit to testing. *Altschul* v. *Salinas*, supra, 53 Conn. App. 396–98. We logically may extend this rationale to the case of an operator who delays his decision or declines to consent until he has had the ability to speak personally with his spouse.

Section 14-227b (c) provides that chemical alcohol testing must be "commenced," if at all, "within two hours of the time of operation." Nothing in § 14-227b or our case law interpreting that statute, however, stands for the proposition that, following operation, an operator must be afforded two hours in which to determine whether to submit to chemical alcohol testing or that, absent an express refusal, it is unreasonable

to conclude that a refusal has occurred prior to the expiration of such time period. Section 14-227b (b) provides, among other things, that an arresting officer must inform the operator of the consequences of a refusal to submit and afford the operator "a reasonable opportunity to telephone an attorney prior to the performance of such test," but neither that provision nor our case law interpreting it stands for the proposition that an arresting officer must wait a prescribed period of time before determining that a refusal to submit to testing has occurred.[11] As our previous discussion of § 14-227b (g) and relevant precedent makes clear, considerations as to whether an operator understood the consequences of his decision, or had an opportunity to obtain advice related to that decision, are not within the proper scope of the issues before the hearing officer. Thus, we are not persuaded by the plaintiff's argument that a refusal did not occur because he was subjected by Lane to an "artificial and arbitrary" deadline by which to make a decision.

Finally, we are not persuaded by the plaintiff's argument that the hearing officer's finding was unsupported by substantial evidence because of the undisputed evidence demonstrating that, within the two hour time period in which a test must be commenced, Carney indicated to Lane that the plaintiff was willing to submit to testing. We have determined that there was substantial evidence that, prior to this event, the plaintiff had refused to submit to testing. That there also was conflicting evidence, in the form of Carney's representations to Lane, that the plaintiff subsequently was willing to submit to testing in no way diminished the hearing officer's ability to rely on the evidence of refusal as controlling.[12] Accordingly, we reject the plaintiff's claim that the hearing officer's finding was not supported by substantial evidence.

II

The plaintiff's second claim is that, even if the evidence adequately supported the hearing officer's determination that he had refused to submit to a chemical alcohol test, this court should recognize as a matter of law that he subsequently had rescinded his refusal. Stated otherwise, the plaintiff argues that the evidence of his "almost immediate rescission of that refusal should be recognized by Connecticut law as vitiating his earlier refusal."[13]

The plaintiff correctly observes that, regardless of whether one looks to Lane's report or to the evidence on which the plaintiff relied at the hearing, Carney arrived at the clinic and indicated that the plaintiff was willing to submit to testing within minutes of the time at which Lane determined that a refusal had occurred. Also, the plaintiff correctly observes that, regardless of whether one looks to Lane's report or to the evidence on which the plaintiff relied at the hearing, Carney's

statements concerning testing were made within two hours of the plaintiff's operation of his motor vehicle.

The plaintiff correctly asserts that there is no appellate authority in this state concerning the issue of whether and under what circumstances an operator may rescind a refusal to submit to chemical alcohol testing. Also, the plaintiff correctly asserts that relevant statutory authority does not support his claim. Relying on his view of the public policy underlying § 14-227b, which, the plaintiff believes, favors testing in as many cases as possible, he urges this court to join those states that recognize that an operator's consent to testing may, in certain circumstances, invalidate a previous refusal to be tested.[14]

As a preliminary matter, we observe that the plaintiff did not raise this issue concerning rescission distinctly before the hearing officer or the trial court. Although the commissioner urges us to view the issue as being unpreserved and not properly before this court, we recognize that because the issue before the hearing officer and the trial court was, essentially, whether there was substantial evidence that the plaintiff had refused to submit to testing, both the hearing officer and the court were obliged to apply § 14-227b correctly to the facts of the present case. Because the plaintiff argues that the proper application of the statute required the hearing officer and the court to consider rescission, we will consider the present claim. Additionally, we recognize that, despite the fact that the plaintiff did not expressly argue before the hearing officer and the court that a rescission of his prior refusal had occurred, he nonetheless relied in part on the evidence that, through Carney, he agreed to submit to testing when there was still time in which such testing properly could be commenced.

To the extent that the plaintiff, relying on public policy and the law of other states, urges this court to interpret § 14-227b to permit an operator to rescind a refusal to be tested, we decline to do so. First, we are obliged to interpret and to apply § 14-227b as it is written. That statute provides that after the events set forth in subsection (b) have occurred, an operator's license may be suspended following an operator's refusal. Nothing in that enactment recognizes an operator's ability to rescind a refusal. "It is our duty to interpret statutes as they are written. . . . Courts cannot, by construction, read into statutes provisions which are not clearly stated. . . . The legislature is quite aware of how to use language when it wants to express its intent to qualify or limit the operation of a statute." (Internal quotation marks omitted.) *State* v. *Miranda*, 274 Conn. 727, 754–55, 878 A.2d 1118 (2005). Second, as discussed previously in this opinion, subsection (g) of § 14-227b and our case law strictly construing that provision limit the hearing officer to a determination

of the issues set forth therein. Relevant precedent in this regard includes decisions of our Supreme Court. We, as an intermediate appellate court, are unquestionably bound by those decisions. See, e.g., *State* v. *Gode*, 145 Conn. App. 1, 11 n.7, 74 A.3d 497, cert. denied, 310 Conn. 933, 79 A.3d 888 (2013). In light of this established precedent, we are bound to conclude that it was not the prerogative of the hearing officer to consider whether the plaintiff had rescinded his refusal. Nor can this court overturn her decision for having failed to consider that issue. The hearing officer was limited to a consideration of whether Lane's determination that the plaintiff refused to submit to testing was supported by substantial evidence. Thus, we reject the plaintiff's claim that the trial court should have sustained his appeal in light of the evidence that he rescinded his earlier refusal to submit to testing.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 14-227b provides in relevant part: "(a) Any person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine and, if such person is a minor, such person's parent or parents or guardian shall also be deemed to have given their consent.

"(b) If any such person, having been placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test, or if such person submits to such test and the results of such test indicate that such person has an elevated blood alcohol content, and that evidence of any such refusal shall be admissible in accordance with subsection (e) of section 14-227a and may be used against such person in any criminal prosecution, refuses to submit to the designated test, the test shall not be given; provided, if the person refuses or is unable to submit to a blood test, the police officer shall designate the breath or urine test as the test to be taken. The police officer shall make a notation upon the records of the police department that such officer informed the person that such person's license or nonresident operating privilege may be suspended if such person refused to submit to such test or if such person submitted to such test and the results of such test indicated that such person had an elevated blood alcohol content.

"(c) If the person arrested refuses to submit to such test or analysis or submits to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicate that such person has an elevated blood alcohol content, the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license or, if such person is a nonresident, suspend the nonresident operating privilege of such person, for a twenty-four-hour period. The police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. The report shall contain such information as prescribed by the Commissioner of Motor Vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of subsection (a) of section 14-227a and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such

person had an elevated blood alcohol content. . . .

* * *

"(e) (1) Except as provided in subdivision (2) of this subsection, upon receipt of such report, the Commissioner of Motor Vehicles may suspend any operator's license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of such person's arrest by the police officer. Any person whose operator's license or nonresident operating privilege has been suspended in accordance with this subdivision shall automatically be entitled to a hearing before the commissioner to be held in accordance with the provisions of chapter 54 and prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that such person's operator's license or nonresident operating privilege is suspended as of a date certain and that such person is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the Department of Motor Vehicles not later than seven days after the date of mailing of such suspension notice. . . .

* * *

"(g) If such person contacts the department to schedule a hearing, the department shall assign a date, time and place for the hearing, which date shall be prior to the effective date of the suspension . . . . The hearing shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating the motor vehicle. In the hearing, the results of the test or analysis shall be sufficient to indicate the ratio of alcohol in the blood of such person at the time of operation, provided such test was commenced within two hours of the time of operation. . . .

"(h) If, after such hearing, the commissioner finds on any one of the said issues in the negative, the commissioner shall reinstate such license or operating privilege. If, after such hearing, the commissioner does not find on any one of the said issues in the negative or if such person fails to appear at such hearing, the commissioner shall affirm the suspension contained in the suspension notice for the appropriate period specified in subsection (i) or (j) of this section. The commissioner shall render a decision at the conclusion of such hearing and send a notice of the decision by bulk certified mail to such person. The notice of such decision sent by bulk certified mail to the address of such person as shown by the records of the commissioner shall be sufficient notice to such person that such person's operator's license or nonresident operating privilege is reinstated or suspended, as the case may be.

"(i) Except as provided in subsection (j) of this section, the commissioner shall suspend the operator's license or nonresident operating privilege of a person who did not contact the department to schedule a hearing, who failed to appear at a hearing, or against whom, as the result of a hearing held by the commissioner pursuant to subsection (h) of this section, as of the effective date contained in the suspension notice, for a period of: (1) . . . (C) six months if such person refused to submit to such test or analysis . . . ."

[2] In accordance with Practice Book § 64-1 (a), the court created and filed a memorandum of its oral decision for use in this appeal.

[3] The court stayed the suspension of the plaintiff's operator's license pending the present appeal.

[4] In a criminal prosecution for operating a motor vehicle under the influence of intoxicating liquor pursuant to § 14-227a, "evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b shall be admissible" if statutory requirements have been satisfied. General Statutes § 14-227a (e).

[5] Section § 14-227b-5 of the Regulations of Connecticut State Agencies provides: "(a) A person shall be deemed to have refused to submit to a chemical analysis if he remains silent or does not otherwise communicate his assent after being requested to take a blood, breath or urine test under circumstances where a response may reasonably be expected.

"(b) A person shall be deemed to have refused to submit to a chemical analysis if he communicates his assent but thereafter does not undertake

or complete the test procedure in accordance with the instructions of the officer administering the test."

[6] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] The plaintiff presented evidence before the hearing officer that, while he was at the clinic, he telephoned Carney and that, as a result of that conversation, she immediately obtained advice from an attorney. The plaintiff presented evidence that, after Carney spoke with an attorney but before she arrived at the clinic, the plaintiff telephoned Carney a second time. During this second telephone conversation, Carney informed the plaintiff that she would be arriving at the clinic within a few minutes, a fact that the plaintiff promptly conveyed to Lane.

Beyond testifying that he did not believe that a further brief delay regarding his decision would "make any difference," the plaintiff has not set forth a satisfactory explanation as to why, in light of the immediacy of Lane's inquiries concerning testing, he insisted on speaking to Carney *in person*, rather than obtaining relevant advice from her on the telephone. The plaintiff's evidence reflects that he prompted his wife to seek legal advice, which she did immediately, and that any delay was occasioned solely by his desire to speak with her in person, so that she could convey such advice to him personally.

[8] In this regard, we observe that the plaintiff urges us to rely on evidence that he presented at the hearing before the hearing officer that Carney arrived at the clinic earlier than 8:55 p.m., as appears in Lane's report. Also, relying on his testimony before the hearing officer, the plaintiff states that Lane informed him that he would have until 8:45 p.m. to make a decision.

[9] Although it does not affect our decision, the record fully supported a finding that Lane complied with § 14-227b (b), thereby affording the plaintiff an opportunity to obtain advice. There is no argument advanced by the plaintiff that, as a result of his medical condition or otherwise, he did not understand the consequences of his actions. Relying on Lane's report and evidence before the hearing officer concerning his medical condition at the time of these events, however, the plaintiff states that "it seems somewhat unreasonable to require someone in [his] condition at the clinic to make such an important decision [concerning chemical alcohol testing] on his own." (Emphasis omitted.) As our Supreme Court has explained, such an argument based on the plaintiff's ability to understand the consequence of his decision is unpersuasive in this context: "The requirement that an intoxicated motorist understand the consequences of a refusal to submit to chemical testing would render . . . § 14-227b functionally unworkable. Intoxicated persons invariably contend that they did not comprehend the nature of their acts. . . . While . . . § 14-227b (b) requires the arresting officer to inform the motorist of the consequences of a refusal to submit, there is no additional requirement that the motorist understand what he or she has been told. A refusal to submit to chemical testing for purposes of an administrative sanction need not be knowing and intelligent, for it is not analogous to the waiver of constitutional rights by a person accused of a crime. A person has no constitutional right to withhold nontestimonial evidence when the state's demand is supported by probable cause. . . . The legislature has prescribed the circumstances under which chemical testing for intoxication is mandatory. That a motorist is given the choice to refuse the test, and thereby suffer the consequences, means only that the legislature has chosen to enforce mandatory testing for intoxication by the least oppressive means, and in such a manner as to avoid hostile encounters between the motorist and police.

"[Section] 14-227b does not provide a judicial or administrative remedy for the failure of an arresting officer to inform the motorist of the consequences of a refusal to submit to chemical testing. . . . We hold . . . that General Statutes (Rev. to 1983) § 14-227b (d) [now § 14-227b (g)] means what it says and accordingly, that the commissioner, before suspending the plaintiff's license, was not required to find that she understood the consequences of a refusal to submit to chemical testing." (Citations omitted; emphasis omitted.) *Buckley* v. *Muzio*, supra, 200 Conn. 7–8.

[10] As a component of his claim, the plaintiff suggests that the hearing officer and the court misconstrued the law in that they improperly deemed it *necessary* to infer that a refusal had occurred once a reasonable period of time had transpired after Lane had asked the plaintiff to submit to testing and he did not agree to do so. There is nothing in the record to suggest that the hearing officer or the trial court construed the law in this manner or that the hearing officer's decision was not based on a careful assessment of the evidence in its entirety.

[11] Nor does § 14-227b require a busy police officer to always wait a full two hours from the time of operation before determining that an operator has refused to submit to testing.

[12] In challenging the correctness of the commissioner's decision, the plaintiff also relies on the court's determination that the hearing officer's subordinate finding, that once he agreed to be tested there was not a reasonable amount of time in which to administer such test, was unsupported by the record. This finding of the hearing officer was not mandated by § 14-227b (g), because the issue before the hearing officer was whether a refusal had occurred. Additionally, we are not persuaded that, as a matter of law or logic, this extraneous finding calls into doubt the propriety of her unambiguous finding that, prior to the time that the plaintiff demonstrated a willingness to be tested, he had refused to be tested after he was provided a reasonable amount of time in which to submit to testing unconditionally. In this regard, we observe that the hearing officer did not suggest that her finding under § 14-227b (g)—*that the plaintiff had refused to submit to testing*—was influenced by or conditioned on the superfluous finding that, once the plaintiff agreed to be tested, there was not a reasonable amount of time in which to administer such test to him. Thus, the plaintiff's arguments in this regard are not persuasive.

[13] Couching his claim in somewhat different terms, the plaintiff also states that this court should recognize that "a driver may rescind a refusal," that, in the present circumstances, the law did not "require an administrative or judicial inference of refusal," and that "a driver's consent can vitiate his earlier refusal to undergo testing."

[14] Although he cites case law from other jurisdictions, the plaintiff relies heavily on a decision of the Vermont Supreme Court in *State* v. *Bonvie*, 182 Vt. 216, 936 A.2d 1291 (2007). The court in *Bonvie* adopted what it deemed to be a flexible approach to permitting an operator to rescind a refusal to submit to chemical alcohol testing. With slight modifications, the court adopted the five part test set forth by the Kansas Supreme Court in *Standish* v. *Dept. of Revenue*, 235 Kan. 900, 903, 683 P.2d 1276 (1984). *State* v. *Bonvie*, supra, 182 Vt. 228. That test provides that "later consent to [chemical alcohol] testing cures an initial refusal if made:

"(1) within a very short and reasonable time after the prior first refusal;

"(2) when a test administered upon the subsequent consent would still be accurate;

"(3) when testing equipment is still readily available;

"(4) when honoring the request will result in no substantial inconvenience or expense to the police; and

"(5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest." Id., 219–20.

The court in *Bonvie* modified this test by holding, with regard to the first prong, that the rescission must fall within the thirty minute period in which an operator must determine whether to submit to testing from the time of his or her initial attempt to contact an attorney, as mandated by Vermont law. Id., 231. With regard to the fifth prong, the court held that "we do not require that the officer continuously observe the operator during the consultation with the lawyer. Nor are we concerned about continuous observation before the lawyer consultation unless there is some reason to believe that events during that period made the delay in giving consent more significant." Id., 233.