"Motorists' refusal to attempt field sobriety tests not admissible in drunk driving case"

CASE NAME: Commonwealth v Brown (Mass. Appeals Court June 20, 2013 - Docket No. 12-P-614)

FACTS:
At approximately 1:30 a.m. on March 23, 2010, Wakefield, Massachusetts police officer Kelly Tobyne observed the defendant's vehicle travelling on the wrong side of a street as it came around a turn. Kelly activated her cruiser's blue lights. The defendant did not stop. Officer Tobyne then activated her siren and pursued the defendant's vehicle for approximately three-tenths of a mile; where ultimately, she observed it pull into a driveway. Upon interrogation the defendant stated that he had only consumed a couple of beers. Officer Tobyne noted that the defendant's speech was slurred, his eyes were glassy and there was an odor of alcoholic beverage about his person.

Subsequently, the defendant was asked to step out of his vehicle and to perform some field sobriety tests. The defendant agreed to performed field sobriety tests; and in attempting to perform these tests made statements about the difficulty of completing the tests and his inability to perform these tests.

PROCEDURAL HISTORY:
Prior to the trial of the case the defendant argued and presented a pre-trial motion to prohibit the prosecution from referencing the defendant's statements made while attempting field sobriety tests. This motion was denied by the trial judge. The defendant was ultimately convicted of operating a motor vehicle while under the influence of alcohol (DUI/drunk driving). This appeal followed.

ISSUE:
When a driver who is suspected of DUI/drunk driving refuses to submit to field sobriety tests, is evidence of his refusal admissible against him at trial?

HOLDING:
No. When a person who is suspected by the police of operating a motor vehicle on a public road while under the influence of alcohol refuses to submit to roadside tests, evidence of his refusal is not admissible at trial because it is regarded as compelled testimony in violation of the Massachusetts State Declaration of Rights. However, for reasons which we further defined below, the Court concluded that statements of a person's difficulty or inability to perform a field sobriety test are not the product of compulsion within the meaning of the Massachusetts Declaration of Rights; and thus are available for use against the defendant at trial.

"Article 12 of the Massachusetts Declaration of Rights prohibits the use in a criminal proceeding of evidence that is the product of governmental compulsion. In cases involving the refusal to perform a field test, the element of governmental compulsion is required whether the police inform the defendant that he may take the test, request that he take the test or command him to take the test. Critically, the accused (in cases like this) is thus placed in a "Catch-22" situation: take the field test and perhaps produce potentially incriminating evidence; or refuse and have adverse testimonial evidence used against him at trial. Where every "choice" is a course of conduct that the State could not compel an individual to take, mandating by law that an individual make a "choice" among these alternatives clearly constitutes compulsion in the constitutional sense.

Evidence of the refusal, however, stands on a different footing than purely testimonial evidence. As the Court noted: "Ordinarily, a prosecutor wants to admit evidence that the defendant refused to take a field sobriety test so that the jury may infer that it is the equivalent of his statement, such as, "I have had so much to drink that I know at least suspect that I'm unable to pass the test" or something similar to that type statement. Again, the admissibility of such a refusal would place the defendant in a coercive "Catch-22" type situation: take the test and furnish incriminating real evidence against one's self or refuse to take the test and produce adverse testimonial evidence of consciousness of guilt. For these reasons, evidence of the refusal to perform field sobriety tests when directed or requested by the police to do so violates the privilege against self-incrimination as articulated in Article 12 of the Massachusetts Declaration of Rights.

However, the Court did conclude that statements made by a person regarding the difficulty of attempted field sobriety test or referencing their inability to perform field sobriety tests (like those involved in the case at bar) are not the product of compulsion within the meaning of the Massachusetts Declaration of Rights and thus are available and can be used against the defendant at trial. Statements made by the defendant while he was attempting to perform the field sobriety tests are admissible in the trial of the case.

Once the defendant agrees to take the test and attempts it there is no "Catch-22" situation compelling him to furnish evidence against himself. In the case at bar the defendant did not refuse to perform field sobriety tests; instead he attempted unsuccessfully to do so. In such circumstances, the defendant's comment ("I can't do this"), while testimonial, was not the result of governmental compulsion and thus is admissible in evidence against him.

ACCORDINGLY, THE JUDGMENT OF THE LOWER COURT IS HEREBY AFFIRMED.