CAMMINO DIRITTO
Rivista di informazione giuridica
https://rivista.camminodiritto.it

ALCOHOL TEST: NULL AND VOID IF THERE IS NO "WARNING"

The Cassation of joint session defines the inspection related to the BAC (Blood Alcohol Level) as invalid if the driver has not received any information about the right to be assisted by a defence lawyer.

di **Martina Pavarese**
IUS/17 - DIRITTO PENALE
Articolo divulgativo - ISSN 2421-7123

Direttore responsabile
Raffaele Giaquinto

Pubblicato, Venerdì 17 Giugno 2016

CamminoDiritto.it
ISSN 2421-7123

With sentence n. 5396/2015, the Cassation of joint session expressed its opinion about the validity of the alcohol test.

In the "country of laws but not of rights" a breakthrough was made.

Drink-driving rarely consists of a simple violation of rules and, precisely, only if the BAC is between 0,51/0,80 gram/litre. When this limit is overtaken, a regular felony is committed and the alcohol test results as "unrepeatable inspection". Here-hence the need of the notice about "the right to be assisted by the defence lawyer", stated in art. 114 of the implementing provisions of C.C.P.

Consequently, even **before being exposed to the alcohol test**, the appointed person is obliged to inform the driver. **If the notice is omitted** or that person omits to report it in the acts whose addressee is the magistrate of the Public Prosecutor, **the inspection can be nullified** and the nullity can count up to the judgment at first instance. The decision is important, therefore police officers need to be more careful to avoid the repetition of such case. According to the Law, it is obvious that, once the duty of information is fulfilled, the police officer can in any case proceed with the inspection if the defence lawyer does not come after a short period of time to ensure that the deferment does not modify the test results, in case it is not suitable for reporting the current situation when driving.

If the notice is omitted, the act is characterised by nullity at intermediate speed, as foreseen by Art. 178, 1 letter c., C.C.P. However, the Law debated about the time period within which nullity should be objected. A first line of thought asserted that nullity should be objected by the interested party before the fulfillment of the act itself, or right after, to avoid the forfeiture ex Art. 182.2 C.C.P; on the other hand, a second line of thought considered the defence lawyer as legitimate immediately after his/her designation by the end of 5 days given by Art. 366 in order to analyse the acts.

The Civil Court of Cassation, instead, established that the "provision of art. 182, par. 2, first sentence, C.C.P. (according to which when the party attends, the nullity of an act should be objected before its fulfillment, that is, if it is not possible, right after) cannot be related under any circumstances to the indicted or defendant for not being informed about the rules of the law and in particular for not being informed about the cases in which the law connects some nullity to a given act or its lacking fulfillment". Consequently, **it is not the driver who has to object to nullity but the defence lawyer**, because objecting to nullity before or right after the fulfillment of the act reveals that the driver knows the right exposed in Art. 114 implementing provisions C.C.P.

CamminoDiritto.it
ISSN 2421-7123

The Civil Court also added that "once it is excluded that the limit of deductibility of nullity cannot be applied according to ex Art. 182, par. 2, first sentence, C.C.P., there is no normative basis to anchor the limit of promptness of the deduction of nullity immediately after the designation of the defence lawyer through remembrances, immediately after the deadline of 5 days limit from the filing of the act of the inquiry ex Art. 366 C.C.P. or even immediately after the fulfillment of the consecutive first act of the procedure".

In conclusion, in accordance with articles 180 and 182, par. 2, second sentence, C.C.P., the nullity exception can be quickly submitted within the time limit of the deliberation of the judgment at first instance.
