DPS Legal Review

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READING OF IMPLIED CONSENT NOTICE GIVES PROPER CONSEQUENCE OF REFUSAL

On March 30, 2014, an officer arrested the defendant for driving under the influence, following too closely, and no proof of insurance. After the officer verified that the defendant was over the age of twenty-one (21), the officer read verbatim to the defendant the implied consent notice contained in O.C.G.A. §40-5-67.1(b)(2). The Code provides, in pertinent part:

> "Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year."

The officer asked the defendant if he had any questions about the notice and the defendant indicated that he did not. The defendant agreed to submit to a State-administered chemical test of his breath for the presence of alcohol. The results of the test indicated an alcohol concentration of .157 grams. The defendant filed a motion to suppress the result of the breath test arguing that the implied consent notice is misleading and overstates the penalty for a refusal because a minimum one-year suspension is not a certainty. The defendant pointed out that other portions of the statute contemplate other scenarios concerning his driver's license that he was not advised of during the stop. The trial court granted the motion to suppress "concluding that the implied consent notice is 'inaccurate, misleading, and overstate(s) the penalty for refusing to submit to the State's test' because it informed the defendant that his license would be suspended for a minimum of one year if he refused, when it was only true that [his license] might." The State appealed.

HOLDING: The Court held that the trial court erred in granting the defendant's motion to suppress the breath results. The Court determined "…whether the notice [that was] given was substantively accurate so as to permit [the defendant] to make an informed decision about whether to consent to testing." In this case, the officer read the notice verbatim which provided that the suspect's Georgia driver's license would be suspended if he refused to submit to testing. The Court reasoned that although the suspension may be subject to administrative or judicial review does not mean that the notice is misleading or overstates the consequence for such refusal. State v. Oyeniyi, 2016 WL 418039 (Ga.App).

CONSIDERATION FOR REQUEST FOR INDEPENDENT CHEMICAL TEST

In January 2014, the defendant was driving a Ford F-150 with two passengers. The defendant drove the vehicle off the road and crashed into a tree. The two passengers were injured and transported to the hospital.

The defendant was employed as a Deputy Sheriff for a law enforcement agency. About 30 minutes after the accident, a Georgia State Patrol Trooper arrived on the scene and spoke with the responding deputies who were investigating the accident. The defendant was sitting in the back of one of the deputy's patrol cars so that she could stay warm due to the cold weather. The defendant was not handcuffed. The Trooper asked the defendant if she was under arrest and she replied that she was not. The Trooper smelled a strong odor of alcohol coming from the defendant's breath and person and noticed that her eyes were watery. The Trooper had the defendant perform the horizontal gaze nystagmus test and she exhibited all six clues on the test. The Trooper also had the defendant blow into a portable Alco-Sensor and she tested positive for alcohol. Based upon his observations of the defendant and his training, knowledge, and experience, the Trooper determined that the defendant was under the influence of alcohol to the extent that she was less safe to drive.

The defendant was placed under arrest for DUI and read the Georgia Implied Consent notice. The Trooper asked the defendant if she was willing to submit to a chemical test of her breath. The defendant said that she would take a urine test. The Trooper then explained that he was asking her to submit to a breath test and the defendant agreed to submit to the designated test. To make sure there was no confusion, the Trooper asked the defendant if she was requesting an independent test. The defendant responded that the breath test was fine because she was "screwed either way." The defendant gave no further response. The defendant did not request an independent test at any time during the encounter. The Trooper conducted an Intoxilyzer 5000 test to determine the alcohol concentration of the defendant's breath. The

first sample showed an alcohol concentration of .171 and the second sample showed an alcohol concentration of .180.

The defendant filed a motion to suppress the results of the State-administered test. The trial court denied the motion. The defendant was convicted of DUI-per se and failure to maintain lane. The defendant appealed contending that the trial court erred in denying the motion to suppress the results of the State-administered breath test because she was not given an independent chemical test.

HOLDING: The Court held that the defendant declined an independent urine test. O.C.G.A. §40-6-392(a)(3) provides that "a person who is accused of DUI and who undergoes a chemical test at the request of a law enforcement officer has the right to have a qualified person of his own choosing administer the test. If an individual requests an independent test but is unable to obtain it, the results of the State-administered test cannot be used by the State as evidence against him unless the failure to obtain the test is justified. An accused's right to have an additional, independent chemical test administered is invoked by some statement that reasonably could be construed…to be an expression of a desire for an additional, independent test."

The Court focused on the circumstances surrounding the defendant's comment about a urine test. On the facts of the case, the Court determined that the defendant did not request an independent test of her urine, blood, or breath. When the Trooper asked the defendant if she was willing to submit to a breath test the defendant responded that she would take a urine test. The defendant's statement was a request to designate a urine test, rather than a breath test, as the State-administered test. The Court concluded that the defendant declined an independent urine test and affirmed the denial of the defendant's motion to suppress the results of the State-administered test. Farmer v. State, 2016 WL 534888 (Ga.App.).

CONSENT TO BREATH TEST UNDER WILLIAMS V. STATE

On May 24, 2014, an officer pulled the defendant over for failing to stop at a stop sign and maintain her lane. The officer conducted several field sobriety tests on the defendant. While the defendant generally performed well on most of the tests, her performance on one test indicated a possibility of intoxication. The defendant was arrested for DUI, read the implied consent notice for suspects age 21 or over, and agreed to submit to the state administered test of her breath by responding "yes." The defendant did not make any other comments, did not ask any questions, and did not request an attorney. The breath test results indicated that the defendant had an alcohol concentration level of .15.

The defendant filed a motion to suppress the breath test results contending that she did not freely and voluntarily consent to the breath test as required under Williams v. State. The trial court denied the defendant's motion and held that "under a totality of the circumstances" the defendant voluntarily consented to the breath test. The defendant appealed.

HOLDING: The Court held that the trial court properly considered the totality of the circumstances in finding that the defendant voluntarily consented to the breath test. Consent is a valid basis for a warrantless search if it is freely and voluntarily given under the totality of the circumstances. Some of the circumstances considered by the Court included the following: 1) there was no evidence that fear, intimidation, threat of physical punishment, or lengthy detention was used to obtain consent; 2) the officer and the defendant both acted calmly; 3) defendant did not argue youth, lack of education, or low intelligence negated the voluntariness of her consent; 4) once the defendant responded "yes" to the implied consent question, she did not change her answer during the time that elapsed before the test, did not appear to be so impaired that she did not understand the question, did not express any objection to the test, and the officer did not force defendant to take the test; 5) being in handcuffs does not eliminate the ability to give consent; and 6) the difficulty of having to make a choice does not render consent involuntary. Kendrick v. State, 2016 WL 701207 (Ga.App.).

ALS REMINDERS

- If an additional witness assisted with a DUI case, please remember to include the witnesses name and contact information in the report. For example: 1) on roadblock cases, include both the name of the supervisor that organized the roadblock, 2) in blood test cases, include the name of the person that drew the blood and facility where the blood was drawn, and 3) if an officer from another agency assisted with the case, include the name of the officer and agency.

QUOTABLE WORKS

"Success is to be measured not so much by the position that one has reached in life as by the obstacles which he has overcome while trying to succeed."

~ Booker T. Washington

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