DPS Legal Review

October 2020|Volume 19 No. 10

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

Georgia Court of Appeals

EVIDENCE OF REFUSAL TO TAKE ALCO-SENSOR PRELIMINARY BREATH TEST INADMISSIBLE

Gwinnett County police responded to a traffic accident on October 14, 2018. At the scene, an officer asked Jeffery Bradberry whether he would submit to an Alco-Sensor preliminary breath test. Although Bradberry at first agreed to take the test, Bradberry changed his mind after the officer demonstrated how Bradberry should blow into the device. Bradberry did consent to performing other field sobriety tests. At the conclusion of these other tests, the officer again asked whether Bradberry would agree to an Alco-Sensor test. Bradberry declined to take the test.

After the officer placed Bradberry under arrest for DUI, he read Bradberry the implied consent notice that was in effect at that time (the orange implied consent card) and requested a breath test. The notice included language indicating "that Georgia law required Bradberry to submit to a state administered chemical test to determine if he was under the influence of alcohol and that his refusal to submit to the required testing may be offered into evidence against him at trial." Bradberry agreed to take a state-administered breath test.

After agreeing to take the Intoxilyzer breath test, Bradberry advised the officer that he needed to urinate. The officer responded that he had to do some things "real quick, then we'll see what we can do." The officer transported Bradberry to a nearby precinct and, once inside the building, Bradberry asked the officer if he could use the bathroom after the test. The officer said that he could. Bradberry's breath test results indicated that his blood alcohol concentration was over the legal limit. After submitting to the Intoxilyzer test, Bradberry was allowed to use a restroom in the precinct.

Bradberry was subsequently charged with DUI with an unlawful blood alcohol concentration, DUI to the extent he was a less safe driver, and following too closely. Bradberry filed a motion to suppress evidence regarding his refusal to take the Alco-Sensor test and the results of his state-administered Intoxilyzer test. The trial court heard testimony from both Bradberry and the officer at the suppression hearing. The court also reviewed footage from the officer's body camera. The trial court <u>denied</u> Bradberry's motion to suppress evidence regarding his refusal to take the Alco-sensor test but <u>granted</u> the motion to suppress as to the results of his state-administered Intoxilyzer test.

Bradberry appealed the trial court's ruling regarding the Alco-Sensor, and the State appealed the court's decision to suppress the Intoxilyzer breath test results.

The Court of Appeals agreed with the State that the trial court's factual finding in support of its ruling on the Intoxilyzer results was "clearly erroneous": "[I]t is undisputed, and plainly shown on the officer's body camera video of the encounter, that Bradberry had already consented to the test *before* he asked to use the restroom."

The Court of Appeals flatly rejected the trial court's conclusion that, although the officer used no actual physical force against Bradberry,

> [t]he officer's refusal to allow him to use the bathroom until the test was

> completed amounted to substantial *indirect* physical force against Bradberry. (Emphasis in original). The trial court found that this physical force, coupled with the reading of the implied consent notice in effect at the time***, but a portion of which has now been held to violate the Georgia Constitution by *Elliott v. State*, 305 Ga. 179 (2019), rendered Bradberry's consent to the test involuntary.

(***This implied consent card read, in part: "Your refusal to submit to the required testing may be offered into evidence against you at trial." After the *Elliott* decision, this sentence was reworded to read: "Your refusal to submit to blood or urine testing may be offered into evidence against you at trial.")

The Court of Appeals vacated the portion of the trial court's order suppressing Bradberry's Intoxilyzer results and remanded the case to the trial court. **The Court of Appeals directed the trial court to then determine whether, under the totality of the circumstances (not including any bathroom delay), Bradberry's consent to the breath test "was given freely and voluntarily." In *Olevik*, the Georgia Supreme Court held in 2017 that**

> the voluntariness of a consent to search is determined by such factors as the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.

In the *Olevik* case, the Georgia Supreme Court further recognized

> that requiring a defendant to submit a breath sample violates Georgia's constitutional right against compelled self-incrimination. The Supreme Court rejected, however, the argument that the implied consent notice – the same notice used here – was so inherently coercive that the mere reading of the statute precluded use of any breath test obtained. Rather, the Supreme Court adopted a totality of the circumstances test for determining whether a defendant voluntarily consented to a breath test.

The Court of Appeals also reviewed the Georgia Supreme Court's decision in the *Elliott* case, which, unlike *Olevik*, addressed "the constitutional implications of a defendant's refusal to submit to testing." In *Elliott*, the Supreme Court

> held that our constitutional guarantee against self-incrimination precludes the admission of evidence that a driver refused to submit to a breath test. The Supreme Court went on to note that its holding in Elliott may affect a totality of the circumstances inquiry into whether a defendant voluntarily submitted to a breath test where the [s]tate first threatened that, if the defendant refused, that would be evidence against the defendant at trial. But the Supreme Court declined to address how its ruling affected the totality of the circumstances inquiry.

Regarding Bradberry's appeal of the trial court's decision not to suppress evidence of his refusal to submit to an Alco-Sensor test, the Court of Appeals agreed that the trial court erred in its ruling.

Under the Georgia Constitution Paragraph XVI, "no person shall be compelled to give testimony tending in any manner to be self-incriminating." This protection applies to testimony and it also "protects [a person] from being forced to perform acts that generate incriminating evidence." That is: Using "a refusal to provide incriminating evidence by the side of the road" to support a criminal prosecution is prohibited by the Georgia Constitution.

The Court of Appeals also cited the Georgia Supreme Court's 2020 decision in *Dunbar v. State*, for the proposition that both the *Olevik* and *Elliott* cases "were careful to distinguish that their scope does not extend to all types of searches, but is limited to breath tests." The Court of Appeals concluded

> We recognize that the issue before us involves an alco-sensor preliminary breath test, rather than the type of breathalyzer breath tests involved in *Elliott* and *Olevik*. Nevertheless, we do not find that distinction to be controlling since the evidence plainly shows that Bradberry would have been required to perform the affirmative act of blowing into the alco-sensor device for a sustained period of time. Because Bradberry had the right to refuse to provide incriminating evidence by performing such an affirmative act under Paragraph XVI, the admission of evidence of his refusal violates the state constitutional right against self-incrimination.

For these reasons, the Court of Appeals reversed the trial court's decision to allow Bradberry's refusal to submit to the Alco-Sensor into evidence. *State v. Bradberry, and vice versa,* No. A20A1460 and A20A1461, 2020 WL 5939110 (Ga. Ct. App. Oct. 7, 2020).

TRIAL COURT ERRED IN DECISION TO SUPPRESS URINE TEST REFUSAL IN DUI CASE

Omar Jamal Awad was arrested and charged with driving under the influence of drugs, improper stopping, and failure to wear a seat belt. The officer read the proper implied consent warning, requesting a urine test. Awad refused to consent to the test. The day his trial was to begin, Awad made a motion to suppress evidence of his refusal to submit to a urine test.

At the suppression hearing, Awad argued: (1) that allowing evidence of his refusal to be admitted at trial would violate the Georgia Constitution's provision that "No person shall be compelled to give testimony tending in any manner to be self-incriminating"; and (2) that the U.S. Constitution protected evidence of his refusal. The trial court granted Awad's motion, finding that allowing evidence of Awad's refusal would violate the Georgia Constitution:

> I believe I've got to grant the defendant's motion to exclude evidence of the refusal of the defendant to produce any form of sample, whether it's blood, breath, or urine -- in this case, urine – under the theory that that would violate his privilege against self-incrimination that's guaranteed by the Georgia Constitution, not the Fourth Amendment of the United States Constitution.

The State appealed the trial court's decision to suppress evidence of Awad's refusal. The Georgia

Supreme Court transferred the matter to the Georgia Court of Appeals for its consideration. The Court of Appeals reasoned that two Georgia laws allow a defendant's refusal to submit to a urine test to be used in evidence:

1. O.C.G.A. § 40-6-392(d): "In any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him." and
2. O.C.G.A. § 40-5-67.1(b) – This code section includes the verbatim text of the implied consent warnings, including: "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. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial."

The Georgia Supreme Court held: "[T]he trial court provided no express ruling on the constitutionality of OCGA §§ 40-5-67.1 (b) and 40-6-392 (d)." The Court of Appeals agreed: "Whether these statutes are unconstitutional with regard to urine tests is not before us . . . Accordingly, the two statutes govern the admissibility of Awad's refusal to submit to a urine test."

The Georgia Court of Appeals considered the Georgia Supreme Court's holding in *Elliot v. State* that: "OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit **to a breath test** to be admitted into evidence at a criminal trial." However, the Court of Appeals noted that the *Elliott* decision applied only to a breath test refusal---not to refusal of a blood or urine test.

The Court of Appeals relied upon *Green v. State*, a 1990 case in which the Georgia Supreme Court "established that use of a suspect's urine sample does not violate the suspect's right against self-incrimination under Paragraph XVI [of the Georgia Constitution]." The Court of Appeals also contrasted Awad's case from the holding of the Georgia Supreme Court in the *Olevik* case, decided in 2017. In *Olevik*, the Court held that "submitting to a breath test implicates a person's right against compelled self-incrimination under the Georgia Constitution," and that "Georgians do have a constitutional right to refuse to consent to warrantless blood tests, absent some other exception to the warrant requirement."

The Court of Appeals concluded that neither the *Elliott* nor the *Olevik* holdings affected the *Green* court's holding that evidence of a defendant's refusal to submit to a blood or urine test could be offered into evidence at trial. Therefore, the Court of Appeals held that "the trial court erred by concluding that refusing to submit to a urine test was inadmissible under the theory that it would violate his privilege against self-incrimination under Paragraph XVI of the Georgia Constitution."

The Court of Appeals also considered Awad's contention that

> the trial court's order should be upheld as right for any reason*** because allowing evidence of his refusal to submit to a urine test would violate his rights under the federal constitution. He argues that a urine test is a search under the Fourth Amendment and that using a refusal to submit to such a search as evidence of guilt would violate his right against self-incrimination under the Fifth Amendment.

(***In a 2018 decision, Burkes v. State, the Georgia Court of Appeals held: "A trial court's ruling on a motion to suppress will be upheld if it is right for any reason.")

The Court of Appeals agreed that a urine test is a search, under the Fourth Amendment.

However, the Court found that "the production of bodily fluid samples is not communicative or testimonial in nature and thus does not implicate a defendant's privilege against self-incrimination under the Fifth Amendment."

For the foregoing reasons, the Court of Appeals reversed the trial court's grant of Awad's motion to suppress his refusal to submit to a urine test. *State v. Awad,* No. A20A1490, 2020 WL 6144579 (Ga. Ct. App. Oct. 20, 2020).

ALS REMINDER

Take the implied consent card to the ALS Hearing that was read to the DUI defendant. When testifying at the ALS Hearing, provide testimony regarding how you determined the age-appropriate implied consent notice to read to the DUI defendant. The implied consent notice must be read into the record at the ALS Hearing.

Published with the approval of
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