



# DPS Legal Review

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## 11<sup>th</sup> Circuit Court of Appeals

### COUNTY DID NOT VIOLATE DRIVERS' RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

On separate occasions, four drivers were arrested by the same Cobb County police officer for driving under the influence of cannabis. When state administered blood tests for each driver “returned negative results for cannabis ingestion,” prosecutors dismissed the drivers’ charges. All four drivers (or “plaintiffs”) sued Cobb County “for violating their rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments because the officer based his probable-cause determinations on unreliable eye examinations.”

**The district court granted summary judgment in favor of the county. On appeal, the drivers argued that “the blood draws, their detentions, and the prosecutions against them were not based on probable cause” and, therefore, the county had violated their rights.** The drivers contended that an expert witness’s testimony proved the eye examinations conducted by the officer on each of the drivers to be “untrustworthy.” Further, the drivers asserted, since the county trained the officer to use the “unreliable” eye examinations, the county “‘cause[d] [the officer] to violate [their] constitutional rights.’” (Citations omitted)

**The 11<sup>th</sup> Circuit Court of Appeals (the “Court”) was not persuaded by the drivers’ arguments. The Court found that, separate from the results of the eye examinations in dispute, there was “independent evidence” from which a “reasonable officer” could arrive at an opinion that each plaintiff drove under the influence of cannabis:**

[T]he officer knew that each driver failed to maintain their lane and that each driver displayed numerous clues of impairment from the non-eye-related field sobriety examinations. The clues of impairment ranged from turning incorrectly, missing heel-to-toe, taking an incorrect number of steps, walking off the line, and raising arms for balance. . . . Based on these facts alone, ‘a reasonable officer could conclude ... that there was a substantial chance’ that the individuals were driving under the influence of cannabis. Because the drivers ‘ha[ve] failed to establish that [their] constitutional rights were violated, [they] ha[ve] necessarily failed to establish the C[ounty]’s liability.’

(Citations omitted)

The plaintiffs’ reply brief cited **another** expert’s testimony

that questioned the validity of the non-eye-related field sobriety tests ‘because they have never been studied for th[e] purpose’ of detecting cannabis impairment and ‘it’s really up in the air as to what the results of each individual test should mean to an officer as to [whether there is] probable cause.’

The Court ruled that, since the plaintiffs failed to raise this as an issue on appeal, “[a]ny challenge to the inherent unreliability of the non-eye-related field sobriety tests was forfeited[.]” The Court also reasoned that “probable cause does not require that officers have enough evidence to make a correct medical diagnosis or that they investigate and rule out all other possible innocent causes of suspicious facts.”

Based on the foregoing, the Court affirmed the district court’s ruling. *Ebner v. Cobb County*, No. 20-11318, 2021 WL 6118169 (11<sup>th</sup> Cir. Dec. 27, 2021).

## ***Supreme Court of Georgia***

### **TRIAL COURT PROPERLY SUPPRESSED DEFENDANT’S REFUSAL TO SUBMIT TO STATE ADMINISTERED URINE TEST**

On November 13, 2018, a police officer discovered Awad “sleeping in the driver’s seat of a vehicle that was stopped in the middle of an intersection.” After arresting Awad, the officer read the Georgia Implied Consent Notice, requesting that Awad submit to a state-administered chemical test of his urine. Awad refused to consent.

Awad was charged with driving under the influence of any drug to the extent that it was less safe for him to drive. He was also charged with improper stopping and failure to wear a safety belt. Awad filed a pretrial motion to suppress evidence of his refusal to submit to the urine test. The trial court granted Awad’s motion, and the State appealed from this decision. The Georgia Court of Appeals reversed the trial court’s decision.

The Georgia Supreme Court granted certiorari to review whether the trial court improperly concluded that the State was not permitted to introduce evidence at trial of Awad’s refusal to provide a urine sample for chemical testing, based on his right against self-incrimination afforded by Article I, Section I, Paragraph XVI of the Georgia Constitution of 1983. Paragraph XVI reads: “No person shall be compelled to give testimony tending in any manner to be self-incriminating.”

In its 2017 decision in *Olevik v. State* (302 Ga. 228), the Georgia Supreme Court held that the scope of “testimony” referenced in Paragraph XVI “was not ‘limited to evidence of a testimonial or communicative nature.’” The *Olevik* Court held that “Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence.” Therefore, the Court determined: “Paragraph XVI protects against compelled [deep lung] breath tests and affords individuals a constitutional right to refuse testing.”

The *Olevik* Court distinguished “normal” breath exhalations from those required for a person to provide a breath sample at law enforcement’s request: “Although exhaling breath generally occurs ‘involuntarily and automatically,’ . . . “[s]ustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself.”

In 2019, the Georgia Supreme Court decided *Elliott v. State* (305 Ga. 179), in which the issue was “when a defendant’s refusal to submit to such a [compelled breath] test should be suppressed.” The *Elliott* Court held that “Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test.”

In its review of Awad’s case, the Supreme Court reasoned:

Under *Olevik* and *Elliott*, the right against compelled self-incrimination protected by Paragraph XVI prohibits the State from admitting into evidence a defendant’s refusal to submit to a urine test when doing so would require a defendant to urinate into a collection container to generate a sample for chemical testing. ***This collection method necessarily requires a defendant to cooperate with the State by performing an act that generates self-incriminating evidence. Specifically, a defendant must urinate into a container, at the time and in the manner directed by the State, to ensure that the State can***

**obtain a usable test sample for chemical analysis.** Although urination, like breathing, is a natural bodily function, “the State is not merely collecting [urine] expelled in a natural manner” when it asks a defendant to produce an adequate amount of urine in a collection container at a specific time.

(Emphasis added)

The Georgia Supreme Court held that “because Awad had a right to refuse the State’s request that he provide a urine sample in a collection container, the trial court properly granted his motion to suppress evidence of his refusal to submit to the test.” Therefore, the Court reversed the Court of Appeals’ decision and remanded the case “for further proceedings consistent with this opinion.” *Awad v. State*, No. S21G0370, 2022 WL 162796 (Ga. Sup. Ct. Jan. 19, 2022).

#### ALS REMINDER

The OSAH website ([www.osah.ga.gov](http://www.osah.ga.gov)) has a calendar of upcoming court dates and cases that are scheduled for an ALS Hearing. Go to the “Court Calendar” section of the website and under the section titled “Docket #,” type in the docket number of the case and click “Search” in order to confirm the date that a case is scheduled. The cases scheduled for a certain date can also be confirmed by going to “Advanced Search Options” on the Court Calendar page of the website. Under “Hearing Date,” put the date in the “From” and “To” boxes as well as the Judge’s name in the drop-down box titled “Judge,” then click “Search.” The cases scheduled for that Judge on the selected date can then be viewed. A list of cases scheduled for the arresting officer can also be located by typing in your last name in the box titled “Last Name” and then click “Search.”

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