

GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

----> contents



feature article >

Does a DUI suspect have the right to withdraw his consent to a blood test after the blood has been sent to the crime lab? See "Give Me Back My Blood" (right)

additional features

- Top Ten List for Effective Prosecution of DUI Cases 2
- A Surprise About Listerine® PocketPals 2
- Kudos to Coweta County Solicitor-General 3
- Governor's Office of Highway Safety Declares Summer Campaign a Success 3
- Don't Miss this Training Opportunity 4

----> our mission

Our goal is to effectively assist and be a resource to our fellow prosecutors in keeping our highways safe by helping to prevent deaths and accidents on the roads in Georgia.

----> resources

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"Give Me Back My Blood"

Consent Withdrawal

By Jody L. Peskin, Assistant Solicitor General
Fulton County

There is a new argument being used by the DUI defense bar which has only recently been ruled on by the Court of Appeals. The issue is whether a DUI suspect may withdraw his consent to a blood test after the blood has been drawn and sent to the GBI Crime Lab for analyses. In a case of first impression, the Court of Appeals determined that the Implied Consent statute does not allow for the withdrawal of consent to a blood test once the consent has been given and is an accomplished fact.

In *State v. Simmons*, A04A1671 (decided October 19, 2004), the defendant was stopped on suspicion of DUI at approximately 2:30 a.m. and subsequently performed poorly on several field sobriety evaluations. The defendant was placed under arrest and was read the appropriate implied consent notice. The officer asked for a blood test and the defendant consented. He was taken to a nearby hospital and the blood was drawn. The test tubes were labeled and sent to the GBI crime lab for analysis.

At some point within the next 10 to 11 days, the defendant hired an attorney who wrote a letter to the GBI crime lab withdrawing consent to the blood test and demanding the return of the blood sample. This request was denied by the GBI crime lab even though the blood samples **had not yet been analyzed**.

The oral argument made by the defendant prior to trial, and accepted by the trial court, was that a defendant has the right to withdraw consent to the testing of his blood at any time up to the moment when the analysis of the blood has been completed. The trial court compared this with consent searches and seizures generally (consent may be withdrawn at any time up until the moment suspected contraband has been discovered).

The Court of Appeals acknowledged that OCGA § 40-5-67.1 allows a reasonable opportunity to **rescind a refusal** of a state-administered test, but found no basis in the law that permits the **withdrawal of consent** to state testing after the blood samples have been taken.

The Court of Appeals found these concepts were not analogous because withdrawing consent to State testing, once consent has been given, is **contrary**

to public safety policy mandating that drivers suspected of being DUI submit to State testing subject to OCGA § 40-6-392 to determine the presence of alcohol or drugs in their systems." Therefore, the Court of Appeals determined that the trial court's ruling that the defendant was entitled to withdraw his consent on the theory that the chemical analysis of his blood sample had not yet begun was contrary to the implied consent law and reversible error.

Judge Ruffin in a special concurrence agreed with the decision adding that under OCGA § 40-5-55(a) "it is apparent that the legislature intended a refusal to submit to a chemical test-or the withdrawal of the implied consent - be communicated in close proximity to the time of arrest and the officer's request for testing." Ruffin stated that it was important for a DUI suspect "to make the decision (consent or refusal) known before he or she actually submits to the test and the testing process begins." Ruffin held that a "blood test begins with the withdrawal or collection of the blood," unlike defendant's argument that the testing hasn't begun until the blood sample has been analyzed. Ruffin pointed out that OCGA §40-6-392 supports this interpretation in setting forth the testing guidelines, showing that the legislature viewed the drawing of blood as part of the process.

----> update:

APRI's National Traffic Law Center (APRI-NTLC) recently created a multi-disciplinary Forum for prosecutors and other law enforcement officers, toxicologists, traffic safety personnel, physicians, victim groups, coalitions and others committed to eradicating impaired driving. If you would like to join this forum, please send your name, title, business contact, and e-mail address to trafficlaw@ndaa-apri.org.

This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmcormack@pacga.org or Patricia Hull at phull@pacga.org.



Quick Facts About Drunk and Drugged Driving:

- An alcohol-related motor vehicle crash kills someone every 31 minutes and non-fatally injures someone every two minutes (NHTSA 2004).
- Drugs other than alcohol (e.g., marijuana and cocaine) are involved in about 18% of motor vehicle driver deaths. These other drugs are generally used in combination with alcohol (NHTSA 1993).
- Each year, alcohol-related crashes in the United States cost about \$51 billion (Blincoe et al. 2002).
- Most drinking and driving episodes go undetected. In 2002, about 1.5 million drivers were arrested for driving under the influence of alcohol or narcotics (NHTSA 2004). That's slightly more than one percent of the 120 million self-reported episodes of alcohol-impaired driving among U.S. adults each year (Dellinger et al. 1999).
- During 2003, 17,013 people in the U.S. died in alcohol-related motor vehicle crashes, representing 40% of all traffic-related deaths (NHTSA 2004a).
- In 2002, about 1.5 million drivers were arrested for driving under the influence of alcohol or narcotics (NHTSA 2004a). That's slightly more than one percent of the 120 million self-reported episodes of alcohol-impaired driving among U.S. adults each year (Dellinger 1999).
- More than two-thirds of child passengers ages 14 and younger who died in alcohol-related crashes during 1997–2002 were riding with the drinking driver; only 32% of them were properly restrained at the time of the crash (Shults 2004).

- Courtesy CDC, www.cdc.gov

Top Ten List

For Effective Prosecution of DUI Cases

Adapted from an article featured in "Between the Lines," APRI National Traffic Law Center, Volume 12, Number 3, Summer 2003.

1. Visit the Scene

You are the only one who hasn't been there. Do you really want the defendant to know more about the scene than you?

2. Get Booking Photographs

Often they are in stark contrast to the defendant's sober appearance in court. Also, compare defendant's drunken scribble on the booking log with his/her straight, sober signature on his/her driver's license.

3. Take the Same SFST Training as Officers

To explain standardized field sobriety tests (SFSTs) to a jury, you had better know them inside and out. For the latest on SFSTs, see the newly released CD-ROM from the National Highway Traffic Safety Administration (NHTSA), complete with instructions, validation studies and digital video suitable for demonstrative purposes in court. Check with the Traffic Safety Resource Prosecutor in your area, or visit www.dot.nhtsa.gov.

4. Spend Time with Your Toxicologist

More prosecutors need to understand retrograde extrapolation of blood alcohol tests. Can you explain the difference between a medical blood sample versus a forensic blood sample? Learn the research and limits of toxicology and what you can reasonably expect from a toxicologist. Check out *Alcohol Toxicology for Prosecutors* from APRI's Special Topic Series, available on-line.

5. Review Police Agency Checkpoint Policies

Are your local agencies complying with state and federal constitutional requirements?

6. Take a Breathalyzer Test

Take a field trip to your local police station, sheriff's office or state police office and spend twenty seconds blowing into the Intoxilyzer 5000.

7. Know Procedures Regarding Medical Records

Know how to obtain medical records. Also, many hospitals are slow to release records because of Health Insurance Portability and Accountability Act of 1996 (HIPAA).

8. Develop Strong Visual Skills

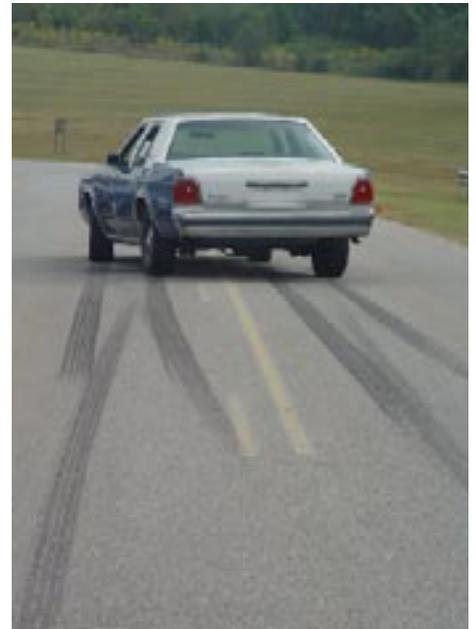
Seeing is believing. If you don't use visual aids, juries will only retain 20% of what you say. Check with the Traffic Safety Resource Prosecutor if you need help or suggestions.

9. Build a Strong Relationship with Law Enforcement Agencies

Do ride-a-longs or spend time at a sobriety checkpoint. Understand how your cases originate on the road and move into court. Participate in police in-service training. Invite officers to observe a DUI trial from jury selection to verdict. As in most things, a team approach makes everyone's job easier.

10. Remember, You Are Not Alone

While a cadre of defense attorneys may await your next visit to court, you are not outnumbered. A strong national, state and local community of prosecutors and other professionals is waiting to help you in a number of ways. Contact the Traffic Safety Resource Prosecutor for more information.



Visiting the scene of your DUI case could be just the thing you need to get a "guilty" verdict.

Listerine® PocketPaks DO NOT Contain Alcohol

"Between the Lines," Vol. 13, No. 1, Winter, 2004. APRI National Traffic Law Center.



A simple glance at the label of Listerine® Pocket Paks proves they are alcohol-free.

Everyone knows that Listerine contains alcohol, right? So, it must stand to reason that Listerine PocketPaks contain alcohol as well, right? So when a drunk driver uses a PocketPak prior to blowing into the Intoxilyzer, it will surely show up as blood alcohol, right? WRONG. According to Pfizer, Inc. the manufacturer of Listerine PocketPaks, the little strips are sugar-free, calorie-free and alcohol-free. You need only look at the label to notice the absence.

But if that isn't enough, two prosecutors in Florida demonstrated this fact for a jury. A drunk driver alleged that she was so worried about her bad breath during the twenty-minute observation period that she slipped one into her mouth just before blowing into the machine. She argued that this must be the reason her breath sample was over .08 BAC. The prosecutors had a witness place two of the PocketPak strips in his mouth and blow into the Intoxilyzer. The results were astounding:

0.00. GUILTY.

Kudos to Coweta County Solicitor-General

By Fay McCormack, Traffic Safety Coordinator
Prosecuting Attorneys' Council of Georgia

Kudos to Coweta County Solicitor General Robert Stokely. A case out of that office, *Overton v. State*, A04A1604 (2004), was decided on November 1. Overton appealed his conviction for DUI less safe and DUI per se but the Court of Appeals affirmed the convictions.

This case is excellent reading for new prosecutors as it addresses many of the issues that will arise in the prosecution of driving under the influence cases. The appellant argued that the trial court erred when it (1) denied his motion to exclude evidence derived from a roadblock because the prosecution failed to prove that the roadblock was well identified, that all cars were stopped, and that the delay to motorists was minimal; (2) denied his motion for a directed

verdict and; (3) allowed the prosecution to reopen its case to present additional evidence. He also argued that his convictions should be reversed because the evidence was insufficient.

Robert Stokely has generously provided PAC with a copy of transcript of the proceedings, and copies of briefs of both the State and the Appellant. Please contact either of the Traffic Safety Prosecutors if you are interested in any of these documents.

In the next issue of "Georgia Traffic Prosecutor" there will be an analysis of Handschuh v. State, A040838 (2004) decided December 1, 2004. Please contact Patricia Hull at PAC Macon if you would like to contribute to this discussion.

fact:

Motor vehicle crashes are the leading cause of death among children in the U.S. In 2002 1,543 children, ages 14 and younger, died as occupants in motor vehicle crashes and approximately 227,000 were injured. That's an average of four deaths and more than 622 injuries each day. Of children ages 14 and younger who were fatally injured in 2002, 50% were completely unrestrained. Most of these injuries could have been prevented by placing children in age-appropriate restraint systems which reduces serious and fatal injuries by more than half (NHTSA 2003).

-Courtesy CDC, www.cdc.gov

Governor's Office of Highway Safety Declares Campaign a Success

By Rob Mikell, Deputy Director
Governor's Office of Highway Safety



The Governor's Office of Highway safety used an aggressive media campaign to promote their "100 Days of Summer Heat" safety initiative. The success of the program was reflected in a reduced number of fatalities on Georgia roads this summer.

"100 Days of Summer H.E.A.T." was successfully launched during the summer of 2004 by the Governor's Office of Highway Safety (GOHS) with the support of its many partners, including PAC. Summer H.E.A.T. (Highway Enforcement of Aggressive Traffic) became the largest and most comprehensive traffic education and enforcement campaign in the state's history. The campaign began on Memorial Day weekend with "Click it or Ticker" and continued steadily into the summer with sustained enforcement through the Labor Day holiday, ending with Operation Zero Tolerance and "You Drink & Drive. You Lose."

GOHS preceded the kick-off of Summer H.E.A.T.'s heightened statewide enforcement for impaired driving, failure to use safety belts, and speeding with a million dollar media blitz in May, utilizing television and radio public service announcements that blanketed the entire state. GOHS ensured that all drivers were given fair notice of the campaign, eliminating the remote viability of the "I did not know" defense, which is all too common to prosecutors. GOHS also added an additional \$600,000 of diverse and targeted media in all major markets through the remainder of the campaign.

The heightened enforcement began immediately after the initial press conference which featured Ben Richardson, Solicitor-General of Muscogee County, as one of the speakers. The Solicitor-General emphasized that, on average, 29 people are killed in motor vehicle crashes in Georgia every week. He went on to point out that a recent study shows increased speeding has caused approximately a 35 percent increase in U.S. highway death rates. The economic cost to society of speed-related crashes in our country is now estimated at \$40.4 billion every year.

Many drivers are unaware that unsafe or illegal speed is now cited as a contributing factor in more Georgia crash deaths than alcohol. Therefore, more than 530 Georgia police agencies focused their enforcement efforts on speed in particular during

Summer H.E.A.T. As a result, some prosecutors will experience an influx of speeding citations in their local courts. While many drivers may consider speeding to be acceptable, those in traffic safety know that speed is involved in more than one-third of the traffic crashes that kill Georgians each year. That's an average of 530 speed-related traffic deaths annually.

Early indicators show that Summer H.E.A.T. was an apparent success. The predicted number of fatalities for the Memorial Day holiday period was thirteen, and unfortunately there were 15 deaths. However, as the momentum of the campaign grew, the fatalities dropped. The July 4th holiday brought a prediction of 14 fatalities, and only eleven resulted. Similarly, nineteen fatalities were predicted for the Labor Day weekend, and only thirteen occurred. Although one fatality is unacceptable, these deaths show even greater progress when compared to the fact that there were 20 fatalities during Labor Day in 2003.

GOHS is grateful to all of the government offices, non-profit organizations, private companies, and law enforcement agencies that contributed to the success of this initiative. We also extend special thanks to the prosecutors who will see these cases through to closure and who will ensure that the message of driving sober, buckling-up, and slowing down is fully enforced.

> Visit GOHS at www.gohs.ga.us.

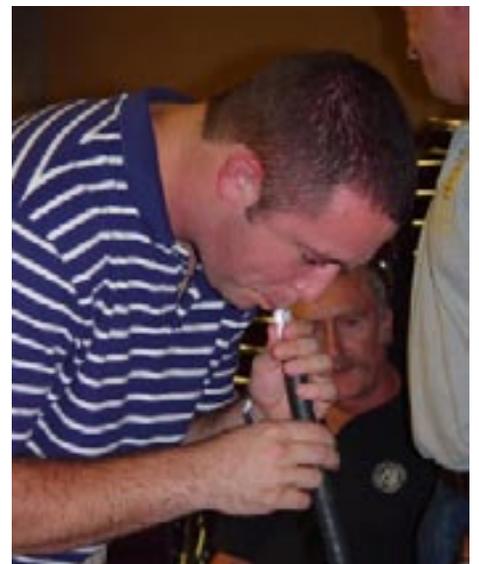
blood test = breath test:



Volunteers use the Intoxilyzer® breath alcohol instrument. In performing a breath alcohol test, it is important to analyze an alveolar or deep lung air sample. If not, the sample analyzed could be diluted with breath of a lower than optimum test result. When correctly operated, all results from an Intoxilyzer® will be obtained from a deep lung sample.

Courtesy CMI, Inc. Manufacturer of Intoxilyzer®
www.alcoholtest.com

The blood:breath ratio of 2100:1 has been widely accepted for use in computing blood alcohol concentration from breath. This means that 2,100 milliliters of deep lung air will contain the same amount of alcohol as one milliliter of blood. Therefore, a Breath Alcohol Concentration (BrAC) is as accurate as a blood test or a Blood Alcohol Concentration (BAC). A breath alcohol analysis expresses alcohol concentration by indicating a weight by volume relationship. Specifically, the instrument found a weight of alcohol expressed in grams per 210 liters of breath from the person who was tested.



GEORGIA traffic PROSECUTOR

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Don't Miss this Exciting Training Opportunity

The Georgia Association of Solicitors General will be holding a DUI Conference for P.O.S.T. and C.L.E. credits, April 7-8, 2005. The Henry County Solicitor's Office is hosting and coordinating the conference which will be geared toward prosecutors and law enforcement. **The Association welcomes any suggestions for topics and speakers for both groups either as a whole or for separate breakout sessions.**

The following sessions will be offered:

- Field Sobriety Test training with 2-3 prosecutors learning to use FST to evaluate intoxicated individuals. We will have a pull-over simulation with the prosecutors mentioned above administering FST to a control group and then writing a report. We will have a mock trial with defense attorneys, prosecutors and a judge where the prosecutor and police officer will be subjected to both direct- and cross-examination.
- Ethics & Professionalism for C.L.E. Credits.
- Tentative: report writing using police chase videos.

Please forward all suggestions to Michelle Ferguson at mferguson@co.henry.ga.us or 678-583-3342.

Curious about what is going on at PAC?
Come and see at www.pacga.org



The screenshot shows the homepage of the Prosecuting Attorneys' Council of Georgia. The header features a large image of a statue of Lady Justice holding scales and a sword, with the PAC logo in the top right corner. Below the header is a navigation menu with links for About PAC, Training, Find Your Prosecutor, Victims Services, Publications, and Resources. The main content area is divided into three columns: 'PAC Locations' (State Bar of Georgia Building in Atlanta), 'News and Events' (2005 Legislative Training System, Free Internet Legal Research), and 'PAC Hosts the Annual Winter Conference of the NACP'. The footer contains the address: 104 Marietta Street NW, Suite 400 | Atlanta, Georgia 30303-2743, phone: 404-969-4000, fax: 404-969-0023, and copyright information for 2004.

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic related matters. If you have suggestions or comments, please contact Fay McCormack or Patricia Hull at PAC.