Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 20, 2013

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THIS WEEK:

Search & Seizure; DUI

State v. Hughes, A13A1399 (11/21/13)

Hughes was charged with DUI. The trial court granted his motion to suppress the results of his blood test, finding that there was no probable cause to invoke the implied consent statute. The State appealed and a divided en banc Court reversed.

The evidence showed that Hughes, then 17 years old, drove through a red-light and struck another driver before ultimately hitting a utility pole. The airbag in Hughes's vehicle had deployed during the accident, filling the cabin of his pickup truck with a white powder. The driver of the other vehicle died as a result of injuries sustained in the collision. After the accident, one of the first responding officers saw Hughes standing off to the side of his vehicle and asked him if he was okay. Hughes said was, and told the officer that he believed he had fallen asleep while driving. The officer observed that Hughes was unsteady on his feet, that his eyes were red and glassy with dilated pupils, and that he was slow and evasive in his responses to questioning.

Shortly thereafter, a corporal arrived at the scene and took over the investigation. While speaking with Hughes, the corporal also observed that Hughes was slow to answer questions, that he was unsteady on his feet, and that he seemed to have trouble staying awake. Hughes stated that he had had a long day before the accident, which started out with an early morning practice and a baseball game that ended at 11 a.m., followed by work from 12 p.m. to 4 p.m. Hughes further stated that he took a short nap after work and then went to a party with friends from about 9 p.m. to 3 a.m., then slept in his vehicle from about 3 a.m. to 5 a.m. Hughes admitted that there was alcohol present at the party, but he denied consuming any. When questioned about what had happened in the accident, Hughes stated that he had hit a telephone pole; he was unaware that he had struck another vehicle.

At this point, the corporal did not believe that Hughes was under the influence, and Hughes was not asked to perform any field sobriety tests. Nevertheless, he arrested Hughes for a red-light violation and homicide by vehicle. After providing *Miranda* warnings to Hughes, the corporal performed a search of his person incident to arrest. During this search, the officers found socks in Hughes's pockets that contained several pills. There was no evidence that Hughes was asked to identify the pills or asked whether he had recently ingested any of them. The corporal suspected that some of the pills were Ecstasy and, when taking into consideration his earlier observations of Hughes's demeanor and appearance, he believed that Hughes may be under the influence of drugs. The corporal then read the implied consent warning to Hughes, and Hughes submitted to a State-administered blood test.

The Court stated that in determining whether the evidence is sufficient to invoke the implied consent statute, the relevant inquiry is whether an officer had "reasonable grounds" to believe that a defendant had been driving a motor vehicle in violation of O.C.G.A. § 40-6-391. Here, the fact that Hughes had drugs in his possession was not the only credible evidence that he may have been driving while impaired. The undisputed evidence also showed that Hughes was incapable of driving his vehicle safely and that he exhibited manifestations consistent with being impaired. The fact that drugs were found in his possession put into context his disjointed demeanor, and the combination of these facts provided the officers with a reasonable basis for believing that Hughes was driving under the influence. Although the officers did not perform any field sobriety testing, based upon the totality of the circumstances the officers reasonably believed that drugs may have been involved, and they asked Hughes to submit to a blood test.

Although the trial judge, as the trier of fact on the motion to suppress, was not obligated to believe the officers' uncontradicted testimony regarding their observations of Hughes's demeanor and appearance, the trial court's order neither made any specific findings about the officers' credibility nor rejected the officers' testimony as to any of the above facts. Rather, the trial court found that Hughes's manifestations "were consistent with the after-effects of an automobile collision where an airbag deployed[.]" But, the Court stated, the trial court's "finding" that Hughes's physical manifestations were consistent with the after-effects of the accident was not a fact that is central to whether the officers had probable cause to ask for a drug test, but rather represented the trial court's conclusion as to whether it could be proven that Hughes was in fact impaired. Ultimately, that decision is for the jury. The trial court should have limited its inquiry simply to whether the police officers had reasonable grounds to believe that drugs were likely involved.

Under the totality of the circumstances, when viewed objectively from the standpoint of the officers at the time, the Court found that the facts were sufficient to give the officers probable cause upon which to request a blood test under the implied consent statute, regardless of whether a jury might later disagree with their suspicions as to why the collision occurred Accordingly, the trial court's ruling was reversed.

Search & Seizure; Prolonged Detention

Heard v. State, A13A0853 (11/22/13)

Appellant was charged with possession of cocaine. He contended that the trial court erred in denying his motion to suppress. The Court, in a 4-3 decision, agreed and reversed.

The evidence showed that an officer received a BOLO about an "older model, two-wheel drive, blue Chevy S-10" vehicle that may have been involved in "illegal narcotics." The officer saw a vehicle matching that description and began following it. He noticed a 2007 registration decal on the license plate, but he saw no current (2009) decal. The officer initiated a traffic stop based on the suspected tag violation. The officer approached appellant, who was the vehicle's driver and sole occupant, and told him that he had stopped the vehicle because of the 2007 decal. Appellant replied that he had a valid decal. At the officer's request, appellant produced his driver's license and proof of insurance. The officer observed that appellant was shaking, and he asked appellant if he was nervous. Appellant replied that he was not. As the officer returned to his vehicle, he noticed that appellant did in fact have a current decal, but the plate was bent and the decal was on the wrong side. The officer checked GCIC, NCIC and whether there were any outstanding warrants. The officer testified that, at that point, his traffic investigation had ended and "[h]ad [appellant] denied consent, he would have been free to leave."

Upon returning appellant's documents, the officer asked appellant if there was any reason he was so nervous. Appellant replied that the blue lights and the traffic stop made him nervous. The officer asked appellant if he was nervous because he had illegal narcotics or weapons in the vehicle. When appellant said no, the officer asked for consent to search. Appellant replied that he did not want the vehicle searched, and then stepped out of the vehicle. The officer frisked appellant for weapons and then asked appellant again if he could search the vehicle. This time, appellant consented. The search of the vehicle resulted in the discovery of cocaine. A total of about four minutes elapsed from the time appellant stopped his vehicle to the time he consented to the search.

Appellant did not dispute that the initial traffic stop for the suspected tag violation was valid, but argued instead that the officer prolonged the traffic stop to conduct a drug investigation without having a legal basis for doing so. The Court stated that it must examine whether the officer diligently pursued a means of investigation that was likely to confirm or dispel his suspicions quickly, during which time it was necessary to detain appellant. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, registration, and to complete any paperwork connected with the citation or a written warning. A reasonable time also includes the time necessary to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers.

Here, the traffic investigation ended when the officer determined that the vehicle's registration was valid and that, absent consent to search, appellant was "free to leave" when the officer returned his documents. In fact, the Court found, the officer could lawfully verify the registration, driver's license and insurance information, and check for outstanding warrants; but any subsequent interrogation or request for consent had to be supported by reasonable suspicion of criminal activity. And, the Court determined, the basis of the officer's suspicion was insufficient to justify the continued or second detention. Thus, the officer had no information about the reliability of the lookout information, such as who had provided the information or how recently it had been provided. Also, the officer was given only a general description of the vehicle, not information sufficiently detailed that it would have allowed him to verify that the information was inherently reliable. Moreover, nervousness is not sufficient to justify an investigative detention. Even considering together the lookout information and appellant's nervousness, the Court stated that it could not conclude that the officer was aware of circumstances sufficient to create a reasonable suspicion that appellant was involved in criminal activity other than the suspected traffic violation.

Nevertheless, the State argued that the stop was not unlawfully prolonged as no

more than four minutes elapsed from the time appellant stopped his vehicle until he consented to the search. However, the Court stated, in assessing the reasonableness of an investigative stop, no "bright-line" or rigid time limitation is imposed. In considering whether the length of a detention was reasonable, it is appropriate to examine whether, after the stop of the vehicle, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. Here, the purpose of the traffic stop had been effectuated, and no developments occurred after the vehicle was validly stopped which provided the officer with a reasonable basis to suspect that there were illegal drugs in the vehicle. Yet, the officer continued to question appellant about his nervousness and whether he possessed drugs or weapons, and to seek consent to a search. Therefore, the detention lasted longer than was necessary to effectuate the purpose of the stop, and was not lawful.

Finally, because the officer lacked reasonable suspicion of criminal activity to justify detaining appellant after the traffic investigation ended, appellant's consent to search the vehicle, given after the traffic investigation concluded, was the product of an illegally prolonged detention, and no circumstances intervened to purge the taint of that illegal detention. Accordingly, the trial court erred in denying the motion to suppress.

Search & Seizure; Pat-downs

McCormack v. State, A13A1390 (11/22/13)

Appellant was convicted of two counts of possessing a controlled substance (alprazolam and hydrocodone), two counts of possessing drugs not in the original containers, and being a pedestrian on the roadway. Appellant contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his VGCSA convictions.

The evidence showed that an officer responded to a report of a "person walking in the roadway causing a traffic hazard." When the officer arrived, he saw appellant walking in the roadway, and saw vehicles "stop to avoid hitting him." The officer approached and asked appellant what he was doing in the roadway. Appellant "appeared to be under the influence of something, his speech was slurred and he didn't seem . . . coherent." The officer saw a pocket knife clipped to the outside of appellant's pants pocket. He then conducted "a pat-down to make sure [appellant] didn't have anything on him, any illegal substances or [other] weapons." The officer felt a small square hard box in appellant's pants pocket. The officer testified that he did not believe that the object was a weapon, instead "believ[ing] it to be contraband" because people "put narcotics and illegal substances in those containers" and appellant appeared to be "under the influence of something." The officer testified that he was not certain from patting down appellant's clothing that the pill box, a type which he confirmed could be purchased at a store and which people also use to store medication such as aspirin, was contraband. The officer asked appellant what the object was. Appellant replied that it was a box for his pills. The officer asked appellant if he (the officer) could remove the box from the pocket, and appellant replied "yes." The officer removed the box and asked appellant what was inside. Appellant replied that the box contained Xanax and Loratab pills. The officer opened the box and found pills inside; the pills were not in their original containers. The parties stipulated below that the pills were alprazolam and hydrocodone, and that appellant did not have prescriptions for the drugs.

The Court first addressed whether the opening of the box was justifiable as part of a *Terry* pat-down. The narrow purpose of a *Terry* pat-down is to ensure the safety of the officer and others at the scene, and its purpose is not to obtain evidence of crimes for use at trial. If, during a lawful pat-down search, an officer feels an object whose contours or mass makes it immediately identifiable as contraband, that officer may seize the item. But, nothing in *Terry* can be understood to allow a generalized cursory search for weapons or, indeed, any search whatsoever for anything but weapons. Here, the Court found, the officer saw a pocket knife clipped to appellant's pants pocket as he walked in the middle of the roadway and was authorized to undertake a protective pat down of the outer surface of clothing for weapons if he had reasonable apprehension that appellant was armed or dangerous, and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. Assuming arguendo that the officer's apprehension that appellant had other weapons was reasonable and the pat-down for weapons was thus permitted, the officer could not have lawfully either removed the box or opened it as part of a *Terry* pat-down for weapons. The officer testified that he did not believe that the small box he felt in appellant's pocket during the pat-down was a weapon, and he was not able to immediately identify it as contraband; he testified that he was not certain that the pill box was contraband, and asked appellant what the box was and what it contained. Thus, the opening of the box would have to have been justified based on appellant's consent.

The Court then addressed whether the opening of the pill box was lawful based on appellant's consent. The Court found that while the removal of the pill box from the pocket was justifiable based on consent, the opening was not. Although the trial court found that appellant had consented to the officer removing the pill box from his pocket, the State introduced no evidence that appellant consented to the officer's opening of the box. Therefore, the State failed to show, and the court erred by finding, that the search of the box was valid because appellant had consented. Thus, the State failed to meet its burden of proving that the search was lawful in this case.

Nevertheless, the State contended, the officer was also authorized to open the box incident to appellant's arrest, and that the officer had probable cause to believe that the box contained contraband based on appellant's behavior and his voluntary admission regarding his possession of Lortab and Xanax. But, the Court determined, since the State did not make these arguments at the trial level, they were waived on appeal. Accordingly, the trial court erred in denying appellant's motion to suppress, and the judgment of conviction as to the VGCSA counts was reversed.

Search & Seizure; BOLOs

Allen v. State, A13A1051 (11/22/13)

Appellant was charged with possession of marijuana with intent to distribute. He argued that the trial court erred in denying his motion to suppress. The Court agreed and reversed.

The evidence showed that an officer on patrol received a "be on the lookout" (BOLO) for a silver or dark colored Dodge Charger,

and in a certain area of Flat Shoals in an unincorporated part of the county. The officer noticed a vehicle matching that description, and he followed it and attempted to pull it over. The vehicle pulled into a business parking lot, and the officer then conducted his traffic stop.

The Court noted that the officer explained that the BOLO was issued because, "[t]here were armed robberies in the area just off Flat Shoals Road. A subdivision in that area, and approximately three miles from the area that [he] pulled the vehicle over which is at Flat Shoals and Old National Road." The armed robberies "had been occurring for a couple of days up until the actual time that [he] actually pulled the vehicle over. The last time . . . it was earlier that day or just the day before. Earlier that morning or the evening of. . . ." In any event, the last armed robbery had occurred "more than three" hours before the stop. The stop occurred "at night. Probably . . . three in the morning . . . , something like that." The officer further testified that the BOLO did not give the car's direction of travel or the number of occupants; the only description of the occupants was "black males." The stop uncovered no information about the robberies, but the officer smelled marijuana when he approached the car and later found marijuana inside.

The Court stated that the proper question is whether the stop was justified by reasonable suspicion. Although an officer may conduct a brief investigative stop of a vehicle, such a stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. This suspicion need not meet the standard of probable cause, but must be more than mere caprice or a hunch or an inclination.

Here, the Court determined, the only specific piece of information was the make and model of the car, a Dodge Charger. The other information was so general as to be essentially useless. The color was described as "silver or dark," a description that excludes very little. There was no information about the approximate year of manufacture or the condition of the car. The only facts known about the occupants were their race and gender; not even the number of occupants was known. No particular street or direction of travel was communicated, and the vehicle was said to have been associated with a crime at least three hours old, much longer than the period of time between the BOLOs and stops found illegal in *Vansant v. State*, 264 Ga. 319 (1994) and *State v. Dias*, 284 Ga.App. 10 (2007). And, the vehicle carrying appellant was stopped approximately three miles from the crime scene, a greater distance from the crime scene than the stops in *Vansant* (one mile) and *Dias* (two miles). Under these circumstances, the Court held, the BOLO was too generalized to justify the stop.

Right to Jury Trial; Waiver

Budeanu v. State, A13A1384 (11/22/13)

Appellant was convicted after a bench trial of two counts of attempting to entice a child for indecent purposes. He contended that he did not voluntarily, knowingly and intelligently waive his right to a jury trial. The Court stated when a defendant challenges his purported waiver of the right to a jury trial, the State bears the burden of showing that the waiver was made both knowingly and intelligently, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made.

Here, the Court found, there was nothing in the record signed by appellant to indicate a valid waiver of a jury trial. Further, there was no record of any colloquy showing that the trial court asked appellant sufficient questions on the record to ensure that his waiver of a jury trial was knowing, voluntary, and intelligent. The trial court's only statement regarding this issue was at the beginning of the bench trial when he stated: ". . . it's my understanding, [trial counsel] . . . that your client has previously waived his right to a jury trial and agreed to a trial by the Court sitting without a jury." Trial counsel responded "[t]hat is correct, Your Honor." Although appellant voiced no objection at this point, the Court found that his failure to object to a bench trial showed, at most, only that such waiver was voluntary, not that it was also knowing and intelligent.

Moreover, the Court found, appellant was Romanian and did not speak english well; his family retained an interpreter to attend attorney/client meetings. An interpreter also participated in his trial. Asked if he had ever explained his rights to appellant, trial counsel stated that "I did not really discuss with him. I just told him that we could do it either way. I did not ever tell him that, distinguish where those rights came from, whether they were statutory or constitutional or by precedent. I just told him we would do it either way and we had to decide; it was an important issue to decide." Also, when specifically asked whether he ever told appellant that he had a constitutional right to a trial by jury, defense counsel responded: "I did not tell him that, no."

Thus, the Court found, the record was devoid of any testimony from trial counsel indicating that appellant understood that he had a right to a jury trial and made a conscious choice to waive that right. Furthermore, there was no inquiry by the trial court as to appellant's understanding of his rights or the ramifications of the waiver. Accordingly, in the absence of a written waiver, colloquy with the trial court, or any extrinsic evidence of a waiver, the State failed to meet its burden of proving that appellant knowingly and intelligently waived his right to a jury trial. Therefore, the Court reversed his convictions for attempted enticing a child for indecent purposes.

Identity Fraud; Corporate Victims

Martinez v. State, A13A1445 (11/21/13)

Appellant was convicted of five counts of forgery in the first degree and two counts of identity fraud. One of the identity fraud counts was reversed on motion for new trial. Appellant argued that the other identity fraud count should also have been reversed. The Court agreed.

The evidence showed that the criminal acts in question occurred in 2007. Appellant argued that the crime of identity fraud, as applicable to the August 2007 incident at issue, protected only the identifying information of natural persons and not corporations. And here, appellant was convicted of identity fraud for obtaining the bank account number of a corporate victim. Thus, he contended, the evidence was necessarily insufficient to show that he violated O.C.G.A. § 16-9-121 (2007), as then applicable.

The Court stated that it was undisputed that before May 24, 2007, a victim of the crime

of identity fraud was not limited to natural persons. Under O.C.G.A. § 16-9-121(1), as amended in 2002, a person committed identity fraud if, inter alia, he or she "with the intent unlawfully to appropriate resources of or cause physical harm to that person . . . [o]btains or records identifying information of a person which would assist in accessing the resources of that person or any other person." Under O.C.G.A. § 16-1-3, which contains the definitions of certain words used in Title 16, and which has not been amended since 1982, a "person" is "an individual, a public or private corporation, an incorporated association, government, government agency, partnership, or unincorporated association." Thus, a "person," which was not separately defined for purposes of the article governing identity fraud, necessarily included corporate victims before May 24, 2007.

Under the current version of the statute, O.C.G.A. § 16-9-121(a)(1), a person commits the crime of identity fraud when, inter alia, "he or she willfully and fraudulently . . . [w]ithout authorization or consent, uses or possesses with intent to fraudulently use identifying information concerning a person." Again, the Court emphasized, in light of the definition of the term for purposes of Title 16, there is no doubt that a "person" encompasses corporate victims.

But in August 2007, when appellant used the identifying information of corporate victim, the law provided that a person commits the offense of identity fraud when, as applicable here, "he or she willfully and fraudulently . . . [w]ithout authorization or consent, uses or possesses with intent to fraudulently use, identifying information concerning an *individual*." O.C.G.A. § 16-9-121(a)(1) (2007) (emphasis supplied), effective May 24, 2007. And unlike "person," there is no definition for "individual" in Title 16. Thus, the Court stated, the question squarely presented, was whether the fraudulent use or possession of the identifying information of a corporation was punishable as the crime of identity fraud under O.C.G.A. § 16-9-121 (2007).

The Court first considered the ordinary meaning of "individual," as it is not a term of art or a technical term. In its common meaning, an "individual" is an actual human being. And this appears to be the way "individual" is used in the definition of "person" in O.C.G.A. § 16-1-3(12), so as to differentiate a natural person from other entities, such as corporations. O.C.G.A. § 16-9-121 (2007) also used the term "person," but in the context of the perpetrator or in the context of fraud committed "on another person," but not in the context of the victim whose identifying information was being used or possessed. This, of course, is entirely consistent with the General Assembly having intended that "individual" refer to a natural person, not a corporation.

Furthermore, and of some significance, the Court noted, when the General Assembly again changed the law in 2010, it was "[t]o amend Article 8 of Chapter 9 of Title 16 of the Official Code of Georgia Annotated, relating to identity fraud, so as to revise a term so as to include businesses as potential identity theft victims." And tellingly, the law was then amended so as to substitute "person" for "individual" in the text of O.C.G.A. § 16-9-121(a)(1), (4), and (5). Therefore, the Court concluded, no rational trier of fact could have found beyond a reasonable doubt that appellant committed the crime of identity fraud against "an individual" by using the identifying information of the corporate victim in a manner otherwise prohibited by O.C.G.A. § 16-9-121 (2007). Accordingly, appellant's identity-fraud conviction was reversed.

Expert Witnesses; Forensic Analysis of Telephone Data

Maldonado v. State, A13A1575, A13A1812 (11/20/13)

Appellants Maldonado and Duron were convicted of trafficking in cocaine. Duron contended that the trial court erred in qualifying the forensic analyst and allowing her to testify to matters "within the ken of the jury." The evidence showed that an intelligence analyst with a drug task force was qualified as an expert witness/forensic analyst of telephone data. The analyst testified that she was trained in the use of computer programs, charts, and notebooks used for compiling law enforcement data, as well as databases and other tools used to analyze telephone records obtained from cellular providers. The parties stipulated to the provision of the data from the telephone companies. The analyst described the manner in which her computer programs and equipment were able to extract contact lists, call activity, and text messages from multiple cell phones and analyze that information. The resulting reports showed which individuals called other individuals at particular times, and identified "common calls" or telephones in frequent communication with one another.

The analyst testified that her research and analysis led her to conclude that a particular telephone was used by Duron. She explained her findings, memorialized in a chart, to the jury. Similarly, the analyst testified that she was able to compare six cell phones used by Duron with a cell phone used during the drug transaction, and testified that the contact lists contained numerous similarities (such as Duron's father's telephone number) suggesting that Duron used that cell phone as well. Moreover, that cell phone was purchased at the same time and place as a cell phone found in Duron's possession when he was arrested, the subscriber information was the same for both telephones, and the numbers were one digit apart. Both of those cell phones were used by Duron on the day of the drug transaction, and phone records showed that he made more than 80 telephone calls with two co-conspirators while the transaction was in progress

The Court stated that in criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses. Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman. It is for the trial court to determine, as a matter of law after hearing evidence, whether a witness is competent by way of qualifications to render an opinion within their area of expertise. The requirements for qualification as an expert witness are minimal; generally, nothing more is required to qualify an expert than evidence that the person has been educated in a particular trade, science, or profession. Formal education or training in an area of expertise is not necessary, provided the witness possesses the qualifications of such area of expertise through skill and experience. It is the possession of special knowledge derived either from experience, study, or

both in a field of expertise that makes one an "expert." Thus, an expert witness can express an opinion on a matter which comes within the person's qualifications.

Here, the Court found, the witness was examined extensively on her specific training as an analyst of telephone records and the specialized computer programs used in law enforcement data compilation, as well as other information she used to perform her analysis, and the trial court did not abuse its discretion in permitting her to testify as an expert regarding the computer-assisted correlation of cellular telephone data; the weight to be given her testimony was for the jury. Moreover, the correlation and analysis of large numbers of cellular telephone calls, using specialized computer programs and other tools and resources specific to forensic analysis, is a matter beyond the ken of the average layman. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

DUI; Implied Consent Warnings

Wallace v. State, A13A0942 (11/22/13)

Appellant was charged with DUI. He contended that the trial court erred in denying his motion to suppress the results of his breath test. The Court agreed and reversed.

The evidence showed that after placing appellant under arrest for DUI, the officer read appellant the appropriate implied consent warnings. However, at appellant's request, the officer re-read the notice to appellant, then stated that he (the officer) needed a "yes or a no" response. Appellant responded "no." Then, as the officer was escorting appellant back to the police vehicle, appellant asked the officer "what would happen if I said yes?" The officer explained, "that would mean that you would submit to the . . . breath test." Appellant asked the officer, "well, if I say yes or no, that can be used against me[?]" The officer replied, "yes or no cannot be used against you." Appellant then said "yes," and submitted to the breath test.

The Court stated that the determinative issue with the implied consent notice is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing. Even when the officer properly gives the implied consent notice, if the officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing, the defendant's test results or evidence of his refusal to submit to testing must be suppressed.

Here, the Court found, the officer informed appellant that his refusal (in particular, a "no" answer) could not be used against him. That information was incorrect, and it altered the substance of the notice because indeed, a refusal can be used against a person. The Court noted, however, that appellant did not testify at the hearing, and the record contained no evidence as to whether he changed his response based, at least in part, on the misleading information the officer gave him concerning the consequences of his response. Nevertheless, the State bears the burden of showing that the implied consent requirements were met and therefore the Court could not say that the error was harmless because appellant submitted to the breath test immediately after he was misinformed about the consequences of a refusal. Moreover, the Court held, the statutory language, "Your refusal to submit to the required testing may be offered into evidence against you at trial" is not superfluous. Misinformation regarding the legitimate consequences of a refusal to submit to the state-administered test may constitute unlawful coercion. Although the Court found no suggestion that the officer intentionally misinformed appellant concerning the penalty for refusal, the Court could not conclude that his misstatement of the law did not induce the consent. It directly impacted appellant's options under the Implied Consent Statute. Therefore, the trial court erred by denying appellant's motion to suppress.