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GEORGIA traffic PROSECUTOR

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

···> our mission

The goal of PAC's Traffic Safety Program 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.

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feature article >

The Intoxilyzer 5000 manufactured by CMI Inc., is the only instrument approved by the State of Georgia for administering breath tests to determine the blood alcohol content of a person arrested for Driving Under the Influence of Alcohol. This instrument has recently become the object of challenges as defendants are demanding that prosecutors provide them with the computer source code. CMI refuses to reveal the source code arguing that the source code is a trade secret. How will the State respond to motions to provide the Intoxilyzer's source code? Our feature article addresses this issue.

additional features

Those Pesky Intoxilyzer Source Code Motions

By Fay McCormack, Traffic Safety Coordinator, Prosecuting Attorneys' Council of Georgia and Angela Couch Nguyen, Assistant Solicitor-General, Gwinnett County

In computer science source code (commonly just source or code) is any sequence of statements and/or declarations written in some human-readable computer programming language. The source code which constitutes a program is usually held in one or more text files, and may also appear as code snippets printed in books or other media. A computer program's source code is the collection of files needed to convert from human-readable form to some kind of computer-executable form. The source code may be converted into an executable file by a compiler, or executed on the fly from the human readable form with the aid of an interpreter.

-Wikipedia, the free encyclopedia
"source code," http://en.wikipedia.org/wiki/source_code.

Pursuant to O.C.G.A. § 40-6-392(a)(1)(A), the Georgia Division of Forensic Sciences of the Georgia Bureau of Investigation specifies that breath tests "shall be conducted on an Intoxilyzer Model 5000 manufactured by CMI, Inc." Ga. Comp. R. & Regs. r. 92-3-.06 (2006).

In ***State of Florida v. Muldowny***, 871 So. 2d 911 (2004), the defendants sought to determine whether the intoxilyzer actually used to establish their driving impairment, pursuant to Fla. Stat. § 316.1932(1)(f)4 Fla.Stat. (2002), had been substantially modified from the version as approved. When the State failed to produce the documents, the trial court suppressed the machine's breath results. The appellate court held that under Florida's discovery statute, the defendants were entitled to inspect, copy, and potentially use the operator's manuals, maintenance manuals, and schematics of the intoxilyzer used to test them. The court found that the State's discovery violation caused prejudice and harm to defendants' ability to make a determination of the subject machine's internal makeup and prevented them from properly preparing their cases for trial. Thus, the trial court was within its discretion in excluding the breath test results.

Also, in ***State v. Bjorkland***, No. 2004 CT 014406 (Fla.Cir.Ct. Nov. 2, 2005) a Florida trial court held that the State of Florida must produce the software source code for the erasable programmable read only memory (EPROM) in the Intoxilyzer machine used to test the defendants' blood alcohol content. Contrary to the arguments of the State, the Court ruled, the production of the source code was material to the defendant's theory of defense and the State could be compelled to produce the source code even though it was maintained as a confidential trade secret by CMI, Inc., the vendor who manufactured the machines. In order to protect CMI's trade secrets, the court ordered that the source code be disclosed only to the expert witness for the defense, and that he should return the information to the State after his examination without making any copies of it.

After these cases, Georgia prosecutors were inundated with discovery motions requesting the source code for the Intoxilyzer 5000 on which their client was tested. However, ***Bjorkland*** has been overruled and ***Muldowny*** explained in ***Moe v. State,*** 2006 WL 332759 (Fla.App. 5 Dist. 2006). The defendant in ***Moe*** was arrested, tried and convicted of DUI based, in part, on the result of a breath test administered using the Intoxilyzer 5000. The parties stipulated that the machine had been tested in accordance with applicable regulations and that all of the tests revealed that the machine's test results were within acceptable tolerances. Through a discovery motion filed pursuant to Fla. R. Crim. P. 3.220, defendant sought from the State the source code for the Intoxilyzer's software in order to verify whether it had been substantially modified from a prior, approved version. The trial court later denied defendant's motion to compel the source code. The appellate court found that the State did not have possession of the source code because it was the property of the manufacturer. The code was a trade secret and the manufacturer invoked its statutory

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and common law privileges protecting it from disclosure. Therefore, because the State could not obtain possession of the code, pursuant to § 316.1932(1)(f)4, Fla. Stat. (2004), defendant was not entitled to its discovery.

As of the time of publication of this newsletter, there is no knowledge of any Georgia appellate decision on the Intoxilyzer source code but a ruling is expected during 2007.

Here is an example of a State's Response to one of these source code motions prepared by Angela Couch Nguyen, Assistant Solicitor in the office of the Gwinnett County Solicitor-General:

State's Response to Motion for Discovery Of The Intoxilyzer 5000 Software "Source Code"

Comes Now, the State of Georgia and requests that the Court deny Defendant's Motion for Discovery of the Intoxilyzer 5000 Software "Source Code." In support of said request, the State submits that the Defendant is not entitled to the "source code" under any of the legal authority relied upon by the Defendant.

Initially, it should be noted that the Defendant has not cited any specific authority finding that the "source code" of the Intoxilyzer 5000 is discoverable. While the State has been unable to locate any Georgia cases on this issue, in Moe v. Florida, _____ So.2d _____ (2006 WL 3327597, Fla. App.5 Dist., Nov. 17, 2006), the Florida District Court of Appeals held that the state was not required to disclose the "source code" of the Intoxilyzer 5000 to the defendant Moe. In so finding, the court noted that it was undisputed that the state did not have the software in its possession and that the source code is a trade secret of the manufacturer of the machine.[1]

Similarly, in the instant case before the Court, the State does not have the Intoxilyzer 5000 "source code" in its possession. Under O.C.G.A. § 17-16-1 *et seq.*, the State is required only to furnish items that are in its possession, custody, or control or in the possession, custody, or control of any law enforcement agency involved in the investigation of the case being prosecuted. *See* O.C.G.A. 17-16-1 (1); Xulu v. State, 256 Ga. App. 272, 273 (2002). Further, the "source code" is not required under O.C.G.A. § 17-16-20 *et seq.* as scientific evidence. "Georgia appellate courts have not interpreted the term 'scientific reports' under [O.C.G.A. § 17-16-23] to include 'all reports of a general scientific nature. Rather, our Supreme Court construed 'written scientific reports' under former OCGA § 17-7-211, which contains the same terms as § 17-16-23, to mean written scientific reports of tests which generally are carried out during the course of the investigation of a crime." Putnam v. State, 270 Ga. App. 45, 45-46 (2004) (internal citations and punctuation omitted.) *See also* Harmon v. State, 224 Ga. App. 890, 893(3) (a) (1997) (certificates of inspection for an intoxilyzer were not scientific reports within the meaning of § 17-16-23). Moreover, the software the Defendant seeks would meet Georgia's definition of a trade secret under O.C.G.A. § 10-1-761 (4), and the mere use of the machine by a government agency would not cause the loss of trade secret status. *See generally* Theragenics Corp. v. Dept. of Natural Resources, 244 Ga. App. 829 (2000) (filing of trade secret information with government agency, and thus making it available to the public, does not cause loss of trade secret status). As such, the disclosure of the "source code" is not required under Georgia's criminal discovery statute and would otherwise be inappropriate under Georgia's trade secrets law. Therefore, the Defendant's Motion for Discovery should be denied.

Specifically responding to the Defendant's brief, the Defendant argues that the Sixth Amendment of the United States Constitution and of the Georgia Constitution provide a basis for the State to produce the "source code" that he seeks, as does Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004); Brady v. Maryland, 373 U.S. 83 (1963); and O.C.G.A. § 40-6-392. Each of these arguments is addressed below.

First, the Confrontational Clauses of the U.S. Constitution and the Georgia Constitution are inapplicable to the "source code" at issue here. Contrary to Defendant's assertion, there is no Sixth Amendment right of confrontation to machines. Burks v. State, 195 Ga. App. 516, 518 (1990) (citing Kuptz v. State, 179 Ga. App. 150 (1986)). As such, the Defendant's Motion for Discovery should be denied on this ground.

The Defendant's reliance on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) also is misplaced. An application of the holding in Crawford depends upon a determination of whether the evidence at issue is "testimonial" in nature. While the Crawford Court did not define "testimonial," it did provide some insight at to what type of evidence would qualify:

[N]ot all hearsay implicates the Sixth Amendment's core concerns. . . . The text of the Confrontation Clause. . . applies to "witnesses" against the accused, in other words, those who "bear testimony." "Testimony," in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. Various formulations of this core class of "testimonial" statements exist: ex parte in-court testimony or its functional equivalent, that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements. ..contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 1364 (internal punctuation omitted). The "source code" at issue here is not in the "core class" of testimonial evidence contemplated by Crawford. Confrontation in a criminal trial is the right to ask questions and secure answers from witnesses confronted. *See* Lingerfelt v. State, 235 Ga. 139 (1975). Georgia courts have previously held that information concerning the Intoxilyzer 5000 is not the type of evidence that deserves protection under the Sixth Amendment, and the Georgia Supreme Court has recently confirmed these holdings in Rackoff v. State, 281 Ga. 306, 637 S.E.2d 706 (2006). There, the Supreme Court of Georgia noted that the Georgia Court of Appeals correctly found that an inspection certificate for the Intoxilyzer 5000 is admissible due to the fact that it is a business record made in the regular course of business and "is not made in an investigatory or adversarial setting; nor is it generated in anticipation of the prosecution of a particular defendant." Accordingly, the Court found that the inspection certificate is not testimonial hearsay under Crawford, *supra*. Likewise, the "source code" that Defendant seeks here is not made in an investigatory or adversarial setting; nor is it generated in anticipation of the prosecution of a specific defendant. Accordingly, it is not testimonial in nature, and the Defendant is not entitled to the information he seeks as a means to confront an instrument.

The Defendant also claims that the "source code" should be revealed as part of the "full information" standard of discovery as set forth in Brady v. Maryland, 373 U.S. 83 (1963). However, Brady is inapplicable to the software sought here. "It is elementary that counsel for the State can make available only such evidence as it has in its file, or of which it has knowledge, and is under no requirement to conduct an investigation on behalf of a defendant…" McBee v. State, 210 Ga. App. 182, 182 (1993). *See also* Zant v. Moon, 264 Ga. 93, 100 (1994) (State is required by law to turn over only exculpatory material in its possession and because the defendant failed to prove that the information was in the hands of the prosecutors, he was entitled to no relief under Brady). It is undisputed in this case that the information the Defendant seeks is not in the possession of the State. Otherwise, there is nothing "exculpatory" about the "source code" that would bring this information under the ambit of Brady. As such, the Defendant's Motion for Discovery should be denied on this ground.

Finally, the Defendant claims entitlement to the "source code" pursuant to O.C.G.A. Section 40-6-392(a)(4). This section provides that "[u]pon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney. The arresting officer at the time of arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section." By its own terms, this narrowly-drawn statute is confined to information regarding the ***test*** taken by a person upon the request of an officer and is generally referred to when the issue of implied consent is raised. *See, e.g.*, Naik v. State, 277 Ga. App. 418 (2006). Further, the cases upon which the defendant relies under this statute are inapplicable here, because those cases deal with the test results and a printout of the same. In the instant case, the Defendant previously has been provided his test results in response to his initial discovery motion. The Defendant has cited no case that requires disclosure of the proprietary software of the machine that is used in performing the test. The courts have never determined that this statute requires disclosure of information behind the test, such as in the case of a blood test, that the software programming that allows the instruments used in gas chromatography must be disclosed to the person who submitted to the blood test. Likewise, State v. Meza, 50 P.3d 407 (2002), relied on by the Defendant, is inapposite here, because that is an Arizona case decided under Brady, *supra*, not O.C.G.A. § 40-6-392 nor any Arizona law similar to the Georgia statute at issue here. Accordingly, the Defendant's Motion for Discovery should be denied on this ground.

Wherefore, the State respectfully requests that this Court DENY Defendant's Motion for Discovery of the Intoxilyzer 5000 Software "Source Code."

[1] It also distinguished State v. Muldowny, 871 So.2d 9111 (2004), a case relied upon by the Defendant in this case, by noting that the information required to be produced in Muldowny was not the "source code" of the Intoxilyzer 5000 and that the case was otherwise different procedurally and factually. Moe, supra at *1.

Analyzing the Head-on Collision

By John Kwasnoski, Professor Emeritus of Forensic Physics, Western New England College, reprinted with permission

The momentum of a vehicle is defined by multiplying its weight by its speed, and then giving the directionality of the motion a mathematical description as well. For this reason, the momentum equations look very complex and much more intimidating than most other reconstruction equations. The momentum analysis is based on a fact that is derived from Newton's Third Law of Motion: The total momentum of all vehicles or objects before an impact is equal to the total momentum after the impact.

There are eight variables in the general momentum equation and six must be known to calculate the other two. Usually, the two unknowns are the pre-impact speeds of both vehicles. The momentum analysis is independent of any damage or energy loss that occurs during the collision and it is therefore a method of checking on energy calculations. If enough information has been collected at the scene to do both energy and momentum analyses, the results of the two speed calculations should be in agreement, although they rarely give exactly the same results.

It should be obvious that the numerous values needed to make the calculations require very complete processing of the scene, and an appreciation of how the uncertainties in each of the values might affect the calculated speeds. As with every other accident reconstruction methodology the results of a linear momentum analysis are only as accurate as the data used as input to the calculations – the success of the momentum calculation depends almost entirely on the level of investigation and how good the evidence is at the scene. When the calculation is completed the reconstructionist should go back over the calculation and do a sensitivity analysis to check if possible uncertainties in the data will produce significant changes in the calculations.

In a near head-on collision one vehicle drifts across the center line and strikes an oncoming vehicle in a violent collision that results in the deaths of two people. There is virtually no evidence of the pre-impact directions of either vehicle, but in an attempt to determine the speed of the vehicle that crossed the center line the reconstructionist assumes the oncoming vehicle to be traveling at the posted speed with a heading of 0°, and assigns an approach angle

"The application of the conservation of momentum theory to head-on or near head-on collisions requires very accurate approach angle data, since the calculations are extremely dependent upon the approach angles."

of 185° to the vehicle that crossed the center line. The momentum calculations yield a speed approximately 13 mph over the posted speed at that location, and the operator of the car that crossed the center line is charged with a MV homicide.

Issue: Is the momentum calculation in a head-on collision a reliable means for determining the speeds of the vehicles?

The application of the conservation of momentum theory to head-on or near head-on collisions requires very accurate approach angle data, since the calculations are extremely dependent upon the approach angles. In this particular case changing the approach angle of MV#1 by plus or minus 1° would change the calculated speed for MV#1 by as much as 80%.

Daily [(1)] best warns in his text that, "we must take great care in establishing our approach angle(s)." The numerical example Daily uses shows that for a change in the approach angle of 1° for one of the vehicles, the speed calculated for one of the vehicles changed by 23 mph. Be very careful when applying the momentum equations to near head-on collisions, as the calculation is very sensitive to the approach angles; and without corroboration be expecting a vigorous cross examination of the estimated speed.

[1] Daily, Fundamentals of Traffic Accident Reconstruction, IPTM, 1988, p. 235

Editor's Note: *This was a significant issue in a recent murder charge of an intoxicated driver in Long Island, New York. In that case a limousine and a car were involved in a head on collision, the driver of the car going the wrong way with a .28 BAC. Some of the people in the limousine were killed. With limited information on the approach angle – close to head-on or straight into each other – the speed calculations by the State's own experts varied significantly. Ultimately, no speed calculations were presented to the jury because of the difficulties of this issue.*

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Case Law After Cooper V. State (Obtaining blood samples after an automobile crash)

Before ***Cooper v. State,*** 277 Ga. 282 (2003), there were three ways to obtain a blood sample from a DUI suspect: (1) After a finding of probable cause that the person is under the influence and is arrested, the suspect gets the appropriate implied consent warning and agrees to a chemical test; (2) The person voluntary consents to the test; and (3) Under O.C.G.A § 40-5-55(B), if the person is dead, unconscious, or otherwise unable to give consent, he was deemed not to have withdrawn the consent and a sample could be extracted.

In ***Cooper*** the defendant appealed his conviction for driving under the influence of cocaine challenging the constitutionality of the implied consent statute, requiring chemical testing of the operator of a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities. Cooper argued that the implied consent provision allowed the State to require a person to consent to a search of his bodily substances without probable cause and was, therefore, unconstitutional. The Court stated that while special needs exceptions to the probable cause requirement had been recognized, the implied consent provision's purpose was primarily to gather evidence for a criminal prosecution. No matter how important that purpose might be, the court cautioned, it did not create a special need to depart from the probable cause requirement. The implied consent provision compelled chemical testing merely due to involvement in a traffic accident resulting in serious injury or death, and did not require probable cause of impaired driving.

The Court said that the legislature has the power to condition the privilege of driving on submitting to a chemical test if a driver is involved in an accident resulting in serious bodily injury or death, and the State can suspend that privilege if the driver does not submit. However, the Court stated, the legislature cannot abrogate a person's Fourth Amendment right to be free from unreasonable searches and seizures, as defined by the United States Supreme Court. To hold that the legislature could nonetheless pass laws stating that a person impliedly consents to searches under certain circumstances where a search would otherwise be unlawful, would be to condone an unconstitutional bypassing of the Fourth Amendment

The Court held that to the extent that O.C.G.A. § 40-5-55(a) requires chemical testing of the operator of a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities regardless of any determination of probable cause, it authorizes unreasonable searches and seizures in violation of the Georgia and United States Constitutions. Cooper was not under arrest when he was read the implied consent notice, and the trooper's sole basis for administering the blood test to him was because he believed that O.C.G.A. § 40-5-55(a) mandated that he do so. The trooper did not find probable cause that defendant was driving in violation of O.C.G.A. § 40-6-391; therefore, the defendant's consent was invalid and the blood test results should have been suppressed.

Fortunately, the aftermath of Cooper is that Georgia's appellate courts have been sticking to the specific holding in that case, and no further attempt has been made to whittle away the implied consent law. The following are some of the cases on implied consent decided after ***Cooper v. State:***

HOUGH v. STATE; STATE v. HANDSCHUH, 279 Ga. 711 (2005)

Hough argued that he was not properly placed under arrest before the reading of his implied consent rights. The appellate court found that before the reading of his implied consent rights, defendant was involved in a traffic accident resulting in serious injuries to himself and the investigating officer had probable cause to believe that defendant was driving under the influence. Under these circumstances, the investigating officer was not required to arrest defendant before the reading of implied consent rights, and defendant's consent to the blood test was valid. In ***Handschuh*** the State argued that the Court of Appeals erred by reversing the trial court and finding that Handschuh's refusal to submit to a blood test following a traffic accident should have been suppressed. The Supreme Court, however, found that because Handschuh was not involved in a traffic accident resulting in serious injuries or fatalities as set forth in O.C.G.A. § 40-5-55(a), his refusal should have been suppressed. O.C.G.A.§ 40-5-55(a) was not applicable because as defendant's paralysis was not listed as one of the maladies on the very specific list provided by the statute. Accordingly, the rules associated with the reading of implied consent rights to a suspect following a traffic accident with serious injuries or fatalities did not apply, and the trial court erred by denying defendant's motion to suppress

FERGUSON v. THE STATE, 277 Ga. 530; 590 S.E.2d 728 (2004)

Defendant appealed her convictions for serious injury by vehicle, DUI, driving with a suspended license, and giving a false name to a law enforcement officer. She argued that the trial court erred in denying her motion to suppress the results of the chemical tests performed on her blood after the accident. The court found that the testing of defendant was not performed pursuant to probable cause to believe that she was driving under the influence. Instead, it was performed pursuant to Ga. Code Ann. § 40-5-55(a), which required chemical testing, even in the absence of probable cause, of anyone driving a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities. Because the court had recently declared § 40-5-55 unconstitutional to the extent that it allowed chemical testing without a determination of probable cause, the trial court erred in denying the motion to suppress. The convictions for serious injury by vehicle and DUI were reversed.

OLIVER v. THE STATE, 268 Ga. App. 290; 601 S.E.2d 774 (2004)

When a police officer arrived at the scene of a motorcycle accident, he saw defendant standing over the motorcycle and detected a strong smell of an alcoholic beverage coming from him. The officer informed defendant of his rights under Georgia's implied consent statute and read defendant his Miranda rights. The officer decided to arrest defendant after he performed poorly on field sobriety tests defendant agreed to perform. The officer then transported defendant to a hospital where he informed defendant a second time of his rights under the implied consent law. Defendant consented to a blood test but filed a motion in limine to exclude testimony regarding the results of the blood test before he was tried. The appellate court held that (1) the officer had probable cause to believe that defendant drove a vehicle under the influence of alcohol and the Supreme Court of Georgia's ***Cooper*** decision did not require suppression of the test results; and (2) under the facts, the officer complied with O.C.G.A. §§ 40-5-55, 40-5-67.1(a), and 40-6-392(a)(4) when he informed defendant of his rights under Georgia's implied consent law.

THE STATE v. BASS, 273 Ga. App. 540; 615 S.E.2d 589 (2005)

Defendant was driving a motorcycle and was involved in an injury accident. A deputy went to the hospital where the unconscious defendant was being treated. The deputy read the unconscious defendant his implied consent rights, but did not arrest him. Then, a nurse drew blood from him which was analyzed for alcohol content. The State argued that because defendant was unconscious, he did not have to be under arrest at the time the implied consent notice was read to him. The appellate court held that, before an unconscious person could have been deemed not to have withdrawn his implied consent, that implied consent must have first existed as provided by O.C.G.A. § 40-5-55(a). Consent was implied only if a person was arrested for a violation of O.C.G.A. § 40-6-391. Defendant was not arrested for any such violation before the blood test was conducted. Rather, he was arrested some two-and-a-half months after his blood was drawn at the hospital. Under O.C.G.A. § 40-5-55(a), the implied

consent test was only upheld where an arrest had actually been effectuated. The trial court correctly granted defendant's motion to suppress evidence of those results.

ELLIS v. THE STATE. 275 Ga. App. 881; 622 S.E.2d 89 (2005)

Defendant veered into an oncoming lane of traffic and collided with an oncoming vehicle, causing the death of one vehicle occupant and severe injury to another. An emergency medical technician (EMT) who assessed defendant's medical condition reported defendant's statements that he was "smoking marijuana and drinking all night" to police. The officer's observations of defendant led him to suspect that defendant was under the influence of alcohol or drugs. At the hospital, defendant again indicated that he had smoked marijuana, and he consented to blood and urine testing for alcohol and drugs after being given the implied consent warning under O.C.G.A. § 40-5-55. Defendant's suppression motion as to the chemical test was denied, and he was convicted in a bench trial. On appeal, the court found that the trial court properly admitted the results of the State-administered chemical test, as the police had probable cause that defendant was impaired under O.C.G.A. § 40-6-391. The admission of testimony from the EMT was proper as statements made for purposes of medical treatment pursuant to O.C.G.A. § 24-3-4. The State properly used a search warrant to obtain defendant's medical records.

COSTLEY v. THE STATE. 271 Ga. App. 692; 610 S.E.2d 647 (2005)

Defendant argued that the test results obtained under the implied consent statute were improperly admitted. The appellate court noted that defendant was not arrested after the fatal crash for any offense in violation of O.C.G.A. § 40-6-391 nor was there probable cause to arrest him for any such violation. The Georgia Supreme Court had held that the implied consent provisions of O.C.G.A. § 40-5-55(a) were unconstitutional to the extent they required a defendant to submit to a search of his bodily substances without probable cause. Thus, the trial court erred by denying defendant's motion to suppress the test results. Without the test results, there was no evidence to support defendant's conviction for vehicular homicide while under the influence. The new rule regarding implied consent testing applied retroactively to defendant's case as the conviction was not final when the new rule was announced.

JENKINS v. THE STATE, 282 Ga. App. 106 (2006)

Defendant argued that there was no evidence that she was involved in an accident resulting in serious injuries under O.C.G.A. § 40-5-55 and she was not placed under arrest before the reading of her implied consent rights. The victim suffered a broken kneecap. At the scene of the accident, an officer spoke with defendant and noticed the odor of alcohol on her person and that her eyes were watery and glossy. She told the officer that she had consumed about 19 beers the previous night. Another officer observed that defendant's eyes were glossy and that the smell of alcohol in the hospital room became more pronounced as she approached defendant. Defendant was read her implied consent rights and informed of her Miranda rights. She was not arrested until later. The appellate court held that the victim was seriously injured under § 40-5-55(c) and that the officers had probable cause based on defendant's statements, her glossy eyes, and the odor of alcohol on her person to believe that she was DUI. The officer was not required to arrest defendant before the reading of implied consent. The consent to the blood test was valid, and the denial of the suppression motion was proper.

THE STATE v. NORRIS. 281 Ga. App. 193; 635 S.E.2d 810 (2006)

After the officer stopped defendant for weaving in and out of his lane of travel and saw indicia of intoxication, the officer asked defendant to provide a breath sample by blowing into an alco-sensor machine. Defendant refused. The officer then told defendant to turn around and put his hands behind his back. Defendant asked whether he had to give the breath sample. The officer responded in the affirmative. Defendant then performed the breath test. The trial court properly suppressed this evidence. When the officer told defendant to turn around and place his hands behind his back, a reasonable person in defendant's position would have thought that he was going to be handcuffed and formally arrested or restrained to a degree associated with a formal arrest. Thus, the detention ripened into a custodial arrest for driving under the influence. O.C.G.A. § 40-5-55, which applied to alco-sensor tests and to custodial arrests, permitted withdrawal of consent. When defendant asked the officer if he had to take an alco-sensor test, the officer gave him inaccurate information depriving him of the ability to make an informed decision as to whether to take the test.

HANNAH v. THE STATE. 280 Ga. App. 230; 633 S.E.2d 800 (2006)

Defendant contended that the trial court erred by denying suppression of the results of a chemical test showing the level of alcohol in his blood. The appeals court held that evidence of the test results was admissible. The trial court properly denied suppression of the chemical test results, as the vehicle accident herein constituted a traffic accident resulting in serious injury as contemplated by the implied consent statute. Further, the ensuing search was supported by probable cause, and a formal arrest of defendant prior to reading the implied consent rights was not warranted because the defendant was being administered medical care, making his consent to the blood test valid.

McGRATH v. THE STATE. 277 Ga. App. 825; 627 S.E.2d 866 (2006)

Defendant, who was under the influence of methamphetamine, drove the wrong way on a highway, injuring a motorist. Another person assisting the motorist was killed by another oncoming vehicle, resulting in defendant's vehicular homicide charge. He claimed he did not proximately cause the victim's death. The appellate court held the jury's finding rejecting defendant's claim was not insupportable as a matter of law because it could find defendant's negligence proximately caused the death, despite other factors. When, after the incident, he was given an implied consent advisement, under O.C.G.A. § 40-5-55(a), and then, four hours later, his statement was taken, the statement was admissible because the advisement and resulting seizure of his blood sample was not improper, given probable cause to think that he drove under the influence, and, given the amount of time between the advisement and the statement and the fact that different officers were involved, any illegality in the advisement was attenuated. Giving a rescue doctrine instruction was not error, as it was for the jury to decide if defendant's acts substantially contributed to the victim's death.

PAC's Traffic Safety Resource Division Offers Training Classes for Prosecutors and Law Enforcement Officers

Protecting Lives Saving Futures **is rapidly approaching! This joint prosecutor–law enforcement training course is sponsored by the Governor's Office of Highway Safety and the Prosecuting Attorneys' Council of Georgia. The course is designed to jointly train police officers and prosecutors in the detection, apprehension and prosecution of impaired drivers. It will be held March 5, 2007 through March 7, 2007 at the Georgia Public Safety Training Center in Forsyth, Georgia. For more information, please contact Fay McCormack or Debbie Brown at 404-969-4001.**

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····> fact:

Drunk driving is the nation's most frequently committed violent crime, killing someone every 31 minutes. Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2003, an estimated 17,013 people died in alcohol-related traffic crashes in the USA. These deaths constituted 40 percent of the nation's 42,643 total traffic fatalities.

-Statistics courtesy MADD

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 Editors Fay McCormack or Patricia Hull at PAC.