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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 prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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feature article >

O.C.G.A. § 40-5-67.1 (d.1) became effective on July 1, 2006 and allows an officer to obtain a search warrant or voluntary consent in impaired driving cases in spite of the Implied Consent Law. For the first time, the Georgia Court of Appeals addresses this piece of legislation in the case of Williams v. State.

additional features

Implied Consent vs. Voluntary Consent/Search Warrant

By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council

On April 23, 2009, in *Williams v. State*, A09A0836, the Court of Appeals of Georgia comes close to interpreting O.C.G.A. § 40-5-67.1(d.1): *Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States.* The legislature passed this amendment to the Implied Consent Law after the decision by the Georgia Supreme Court in *State v. Collier*, 279 Ga. 316, (2005). In *Collier*, the Supreme Court held that the legislature granted Georgia drivers the right to refuse a state-administered chemical test and that the police had no right to obtain a search warrant and forcibly conduct the testing that had been refused.

In *Williams*, the defendant was involved in a fatal car accident in May 2006. Suspecting that he might have been under the influence of drugs, the investigating officer requested a blood sample from the defendant without administering the implied consent warning. The sample showed the presence of marijuana in defendant's system. Williams was charged with vehicular homicide, reckless driving, driving while under the influence of a drug, following too closely, and serious injury by vehicle. He moved to suppress results of a blood test that police obtained from him without first informing him of his implied consent rights. The trial court denied his motion but certified the order for immediate review, and the Court of Appeals granted Williams' application for interlocutory review.

The Court suppressed the test results by following their decision in *State v. Morgan*, 289 Ga. App. 706 (2008), which held that in all cases in which police request a chemical test of a person's blood for the purpose of determining whether the driver was under the influence of alcohol or drugs, they must give the notice required by the implied consent statute. In *Morgan*, the Court noted that the implied consent statute affords a suspect the opportunity to refuse testing and stated that it will not permit or encourage police to circumvent the mandatory implied consent statute by simply asking individuals, without reading the notice, if they will consent to testing.

The state argued that O.C.G.A. § 40-5-67.1(d.1) which became effective on July 1, 2006, should be applied retroactively. The Court of Appeals disagreed, stating that a statutory amendment may be applied retroactively if the changes do not affect constitutional or substantive rights and if the legislature did not express a contrary intention. The Court went on to explain the difference between substantive and procedural law:

> *Substantive law is that law which creates rights, duties, and obligations. Where a statute governs only court procedure, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations.*

The Court of Appeals pointed out that Georgia's Supreme Court has construed the implied consent law as granting a substantive right of refusal, citing *Allen v. State*, 254 Ga. 433 (1985).

> *In Georgia, the state may constitutionally take a blood sample from a defendant without his consent. Strong v. State, 231 Ga. 514 (202 SE2d 428) (1973). Our "Implied Consent Statute" (O.C.G.A. § 40-5-55) thus grants a suspect an opportunity, not afforded him by our constitution, to refuse to take a blood-alcohol test. O.C.G.A. § 40-6-392 and O.C.G.A. § 40-5-55 grant, rather than deny, a right to a defendant.*

Id. at 434.

continued >

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The Court disagreed with the state's argument that the amendment at issue in this case simply expands the scope of evidence admissible at trial and merely constitutes a procedural change. To support its position, the state cited cases holding that a different amendment to the implied consent statute was merely procedural and therefore applied retroactively. The Court said that the amendment in those cases, however, affected only the non-substantive specific content of the implied consent warnings and whether the warnings had to be given verbatim. *State v. McGraw*, 237 Ga. App. 345, 345-346 (1999); *Rojas v. State*, 235 Ga. App. 524, 526 (1998). The amendment changed neither the substance of the warnings themselves nor the substance of a defendant's rights as stated in the warnings. *State v. Moncrief*, 234 Ga. App. 871, 873 (1998). Ruling against the State's position, the Court of Appeals stated:

> *The amendment at issue here, however, is different. It states that nothing in the implied consent law precludes the state from acquiring a defendant's voluntary consent to chemical testing, or admitting into evidence the results of that testing. The implied consent statute grants drivers the right to refuse to take a state-administered test, with one of the consequences of exercising that right being that evidence of such refusal is admissible at trial. Unlike the amendment at issue in the cases relied upon by the state, the amendment here eliminates the need to give the notice where an individual "voluntarily" agrees to testing. This amendment not only changes the substance of the implied consent warning, it does away with the requirement that the warning be given at all where an officer manages to otherwise lawfully obtain consent to testing. This is not merely a procedural or evidentiary change, but one eliminating a defendant's substantive right to refuse to submit to testing. Therefore, the trial court erred in applying the amendment retroactively and in denying Williams' motion to suppress. (Citations omitted)*

The importance of this case is that the Georgia Court of Appeals is indicating that O.C.G.A. § 40-5-67.1(d.1) passes constitutional muster. It just cannot be applied to cases occurring before July 1, 2006.

····> fact

- In 2007, 275 people died while riding in pickup trucks in Georgia. Of these, 74 percent died while not wearing their seat belts compared to 68 percent nationwide.
- Over 49 percent (805/1,641) of Georgia's motor vehicle traffic fatalities occur in rural areas, and the fatality rate per 100 million vehicle miles traveled is almost 2 times higher in rural areas than in urban areas.
- In 2007, 79 percent of nighttime pickup truck fatalities in Georgia were unrestrained compared to 70 percent of daytime pickup truck fatalities.

(2007 FARS Data)

State Agency Department Spotlight: Department of Driver Services

The Department of Driver Services (DDS) was created in 2005 following the enactment of House Bill 501. This legislation disassembled the Department of Motor Vehicle Safety which was created only four years earlier and transferred its functions to other agencies.

Responsibility for driver's licenses and identification cards was given to DDS. In addition to issuing driver's licenses and ID cards, DDS also maintains driving records for anyone to whom a driver's license or identification card has been issued and driving record information on nonresidents who have received a traffic ticket in Georgia. Additionally, DDS regulates driver training schools, commercial driving schools, driver improvement clinics, DUI risk reduction programs, ignition interlock providers and limousine chauffeurs.

DDS' Legal Services Section is made up of the General Counsel Jennifer Greene Ammons, Deputy General Counsel Latoya Graham, Assistant General Counsel Lillie McLean and paralegal Karen Brooks. Their duties frequently involve researching and analyzing a vast array of legal issues beyond mere driver's license eligibility, including issues related to employment law, criminal law and procedure, constitutional law, administrative law, bankruptcy law, domestic relations law, and the Americans with Disabilities Act. Not limited to transactional work, the staff of DDS Legal Services serves as hearing review officials and litigates appeals before the Office of State Administrative Hearings. Like many government attorneys, they find that they are constantly confronted with new and novel legal questions. In short, an analogy can be drawn to life in a general practice firm, yet with only one "client."

"We have been heavily engaged in the procurement and implementation of the DDS' new systems," said Ms. Ammons. "These systems include the design and construction of a new driver's license issuance system that will result in greater security to prevent counterfeiting and identity theft and overall better customer service" Once the new system is implemented, DDS will have the capability to access and process paper documents that have been stored in digital format resulting in streamlined processing and a reduction in physical storage space. Finally, the creation of a new document management system will improve data integrity with a reduction of processing errors.

The Legal Service Section's involvement in these projects required active participation in the development and drafting of the requests for proposals, review of submissions from vendors, negotiation of contracts, and response to Open Records requests about the procurement process.

"The Legal Services team at DDS is particularly proud of the fact that all three (3) procurements were accomplished simultaneously without any protests being filed," said Ms. Ammons.

DDS' Legal Services Section can be reached at 678-413-8765.

Arizona v. Gant: Supreme Court Limits Warrantless Searches of Vehicles Incident to Arrest

Issue: Can the police always search the recently occupied vehicle of an arrestee as part of their search incident to arrest?

Rodney Gant was apprehended by Arizona state police on an outstanding warrant for driving with a suspended license. After the officers handcuffed Gant and placed him in their squad car, they went on to search his vehicle, discovering a handgun and a plastic bag of cocaine. At trial, Gant asked the judge to suppress the evidence found in his vehicle because the search had been conducted without a warrant in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures. The judge declined Gant's request, stating that the search was a direct result of Gant's lawful arrest and therefore an exception to the general Fourth Amendment warrant requirement. The court convicted Gant on two counts of cocaine possession.

The Arizona Court of Appeals reversed, holding the search unconstitutional, and the Arizona Supreme Court agreed. The Court stated that exceptions to the Fourth Amendment warrant requirement must be justified by concerns for officer safety or evidence preservation. Because Gant left his vehicle voluntarily, the court explained, the search was not directly linked to the arrest and therefore violated the Fourth Amendment. In seeking certiorari, Arizona Attorney General Terry Goddard argued that the Arizona Supreme Court's ruling conflicted with the Court's precedent, as well as precedents set forth in various federal and state courts.

The U.S. Supreme Court held that police may search the vehicle of its recent occupant after his arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. With Justice John Paul Stevens writing for the majority and joined by Justices Antonin G. Scalia, David H. Souter, Clarence Thomas, and Ruth Bader Ginsburg, the Court reasoned that "warrantless searches are per se unreasonable" and subject only to a few, very narrow exceptions. Here, Mr. Gant was arrested for a suspended license and the narrow exceptions did not apply to his case.

Drug Recognition Expert Training

By Sgt. Pete Lamb, Richmond County Sheriff's Office and Bruce Stanford, Georgia Police Academy

The 25th Drug Recognition Expert School was conducted at the Georgia Police Academy in Forsyth in March. Sixteen students from police agencies all over the state attended this training which consisted of two separate schools over a period of nine days. This 72-hour course of study utilized the talents of fourteen different instructors, involved two separate alcohol workshops and a lot of hands-on student practice.

The agencies which sent officers for this training included: Johns Creek Police Department, Richmond County Sheriff's Office, Columbia County Sheriff's Office, Georgia State Patrol, Alto Police Department, Forsyth County Sheriff's Office, Marietta Police Department, Roswell Police Department, Habersham County Sheriff's Office, East Dublin Police Department, Fayetteville Police Department and Laurens County Sheriff's Office.

During this training, students learned to identify signs and symptoms of drug used in the seven drug categories and the role of the nine major indicators with each category. The skills which were learned during this training included learning how to take blood pressure and measure pulse rate, make estimates of pupil sizes under three different lighting conditions, and how to estimate the Blood Alcohol Concentration of an individual based on the onset of Nystagmus in the eyes. Students also became familiar with all the basics of the 12 steps involve in a Drug Influence Evaluation.

This program was started in California in the 1970's and is taught not only in most of the states in the U.S. but also in Great Britain and Canada. There are several hundred DREs in Georgia and about two dozen DRE instructors in this state.

Top right: Bruce Stanford demonstrates the difference between HGN and Optokinetic Nystagmus using the Hawk Eye system. **Above:** DRE Instructor Matt Myers watches as two students practice taking blood pressure.

In addition to the nine-day classroom training, students also have to participate in at least 12 drug evaluations in the field under supervision of a DRE Instructor. Of these training evaluations, the student must be the primary evaluator in six of them and correctly identify at least three separate drug categories. Drug confirmation is accomplished by using a Med-tox kit. After completing the field certification phase of training, the students have to undergo the Final Knowledge Test. This examination is largely essay in form and asks the student to state what they would expect from particular drug evaluations. These evaluations are conducted on subjects who are actually under the influence of drugs. This examination usually lasts anywhere from six to 12 hours, depending on the writing skills of the student.

Once the DRE is certified, he has to re-certify every two years. All of the drug evaluations conducted by DREs in Georgia are entered into a national database where drug evaluations can be tracked according to confirmation rates, demographics and the category or categories of drugs involved.

····> drugged driver training

PAC is offering the training course Prosecuting the Drugged Driver to prosecuting attorneys and law enforcement officers September 15-17, 2009 at GPSTC. Expenses will be paid from a grant provided by the Governor's Office of Highway Safety. Please stay tuned to our website (www.pacga.org) for details or contact Fay McCormack at 404-969-4001.

Montejo v. Louisiana: Supreme Court Overturns Previous Ruling

Issue: Defendant's exercise of right to counsel under Miranda, Edwards and Minnick.

On May 26, 2009, the U.S. Supreme Court, in a five to four decision written by Justice Scalia, in *Montejo v. Louisiana*, 2009 U.S. LEXIS 3973, took the opportunity to overturn its previous ruling in *Michigan v. Jackson*, 475 U.S. 623; 106 S. Ct. 1404; 89 L. Ed. 2d 1986; 1986 U.S. LEXIS 91.

The Court held: "In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not 'pay its way,' (Cite). *Michigan v. Jackson* should be and now is overruled." *Montejo*, at 32-33.

The Rule announced in *Michigan v. Jackson* required trial courts to presume that any waiver of the right to remain silent was involuntary if received by law enforcement after the defendant obtained counsel or was appointed counsel. Therefore, any confession or admission so obtained was inadmissible.

The *Montejo* decision determined that the Jackson Rule was designed to preclude the State from badgering defendants into waiving their Fifth and Sixth Amendment rights to have counsel present during a custodial interrogation after counsel had been obtained. Reasoning that this purpose was already secured by the trilogy of *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Minnick v. Mississippi*, 498 U.S. 897 (1990) the Court found that *Jackson* was simply superfluous.

Under the announced *Montejo* Rule, law enforcement is now allowed, after *Mirandizing* a defendant and receiving a knowing and intelligent voluntary waiver, to interrogate a defendant who is represented by counsel if one of the two following conditions exists:

1. The defendant **has not** previously exercised his or her *Miranda* right to counsel; or,

2. The defendant HAS previously exercised his or her *Miranda* right to counsel but the defendant himself or herself initiates further communication, exchanges, or conversations with law enforcement.

NOTE: The *Montejo* Rule applies only to law enforcement. Prosecutors are still bound by the State Bar Rule 4.2. Pursuant to this Rule, any prosecutor who instructs a law enforcement officer to approach a represented defendant has made the officer an agent of the prosecutor and the prosecutor is subject to discipline under Rule 4.2.

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····> fact:

Drunk driving is the nation's most frequently committed violent crime, killing someone every 30 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 2006, an estimated 17,602 people died in alcohol-related traffic crashes in the USA. These deaths constituted 41 percent of the nation's 42,642 total traffic fatalities.

-Statistics courtesy NHTSA (www.nhtsa.gov)

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 Editor Fay McCormack at PAC.