Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

fyi

FEBRUARY 18, 2019

FYI: ELLIOTT v. STATE

The Georgia Supreme Court holds that a defendant's refusal to submit to a state administered breath test following implied consent may not be used in evidence at a criminal trial.

In *Elliott v. State*, S18A1204 (2/18/19), the Georgia Supreme Court ruled that a defendant's refusal to submit to a state administered breath test is inadmissible in a criminal trial. In *Elliott*, the defendant, validly arrested upon probable cause, was timely read the proper implied consent warning, after which she refused a request for a breath test. The Supreme Court held that the trial court improperly denied her motion to suppress her refusal, as it violated Article I, § I, Paragraph XVI of the Georgia Constitution.

Much of the language in Justice Peterson's opinion focuses on the history of Georgia's protection against self-incrimination, in re-holding that it goes beyond federal protections in applying to acts as well as statements made in custody. The Supreme Court holds that its prior decision in *Olevik v. State*, 302 Ga. 228 (2017) was correct in finding that suspects had a constitutional right to refuse testing under Paragraph XVI. The Court also holds that the U.S. Supreme Court's ruling in *South Dakota v. Neville*, 459 U.S. 553 (1983), that admission of refusal evidence does not violate the Fifth Amendment, is irrelevant to their analysis of whether such evidence is admissible in Georgia.

The Court holds that because the defendant had the right to refuse testing, admission of her refusal violates Georgia's provision against compelled self-incrimination. The Court also notes their holding here may affect future considerations about whether a defendant's consent was voluntary under the current implied consent law, which contains language advising that refusals may be admissible at trial. Based on this, it would be dangerous to expect consent given under the implied consent law to be affirmed in future appellate proceedings. In a footnote, the Court mentions that Paragraph XVI does not apply to the act of removing blood from a defendant. The Court reaffirms that part of the holding in *Strong v. State*, 231 Ga. 514 (1973) that Paragraph XVI is not implicated by a blood test. A concurring opinion by Justice Boggs restates this decision's inapplicability to blood tests, and also states that their ruling does not affect the administrative license suspension scheme of the implied consent law, although the concurrence also restates the majority's concern that the current language of the implied consent warning is likely to become an issue in future cases, and points out that the wording of the implied consent warning is set by statute (OCGA § 40-5-67.1 (b) and would need to be changed by the Legislature.

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ https://pacga.org/ ▪
Facebook: https://www.facebook.com/GAProsecutingAttorneys
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

This case also has the potential to affect any evidence obtained from the defendant while in custody, potentially affecting evidence such as handwriting exemplars, voice samples, and requesting defendant demonstrate any relevant action they describe.

A suspect's refusal to submit to a breath test following implied consent may no longer be used as evidence against them in a criminal trial. And any consent to a breath test will be suspect as the current implied consent warning contains language that *Elliott* has fond to be incorrect – namely that a person's refusal may be used against them at trial.

At the request of Georgia's Solicitors-General, prosecutors are asked to consider instructing officers to read the current version of the implied consent warning – omitting the reference to breath. Officers should request a ***blood test***. If a suspect, on their own initiative, requests a breath test – either as an independent test or as an alternative to the blood test, those results may still be admissible. If suspect simply refuses the blood test, that refusal should still be admissible at trial. Officers are also reminded of the search warrant option and are encouraged to make decisions about warrants being mindful of local protocol and circumstances.[1]

[1] *Revised February 21, 2019*