Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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FYI: STATE v. HENRY

The Georgia Supreme Court holds that in determining whether an officer's failure to obtain an additional, independent chemical test was "justifiable" under OCGA § 40-6-394 (a)(3), a "reasonably would" standard applies and overrules the "reasonably could" standard set forth in Ladow v. State, 256 Ga. App. 726 (2002).

In *State v. Henry*, S20G1399 (10/19/21), after Henry was arrested for DUI, the officer read him the age-appropriate implied consent notice. Henry asked the officer "[s]o you're gonna let me do the breathalyzer one more time?" The officer responded that "[w]e're past that bridge. We're past it." The officer read Henry the implied consent notice again, after which Henry said "so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?" The officer responded to Henry's question by stating, "I need a yes or a no right now. I did not ask anything about your doctor. I said the State. Yes or no." Henry's response on the dash camera video was inaudible. The officer then asked Henry "[i]s that a yes?" and Henry's response was again inaudible on the dash camera video. Although it was not discernable on the video, the officer testified that Henry consented to a blood test in a soft voice. Henry did not receive an additional, independent test.

The trial court denied Henry's motion for new trial based on ineffective assistance of counsel. Henry appealed, arguing that his counsel had provided constitutionally ineffective assistance by failing to object to the admission of the blood test because Henry had been denied his right to independent chemical testing upon request. Relying on the "reasonably could" standard set forth in *Ladow v. State*, 256 Ga. App. 726 (2002), the Court of Appeals reversed the trial court's denial of the motion for new trial, agreeing that Henry's trial counsel was ineffective for failing to object to the introduction of the blood test result on the basis that Henry was denied the independent testing he requested. See *Henry v. State*, 355 Ga. App. 217, 219-222 (2) (2020). The Court granted the State's petition for certiorari to consider whether the Court of Appeals set forth the proper standard for determining when a person accused of driving under the influence has invoked his or her right to additional, independent chemical testing under OCGA § 40-6-392 (a) (3).

The Court stated that Georgia law allows the results of chemical tests performed on the blood, urine, breath, or other bodily substances of persons accused of driving under the influence of alcohol, drugs, or other substances in violation of OCGA § 40-6-391 to be admitted into evidence. When such tests are performed at the behest of the State, OCGA § 40-6-392 (a) (3) provides that a suspect "may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own

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choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer." Where an additional, independent chemical test is requested but not given, the law allows for the State's test to remain generally admissible as evidence against the driver where the failure to secure the independent test is "justifiable." OCGA § 40-6-392 (a) (3).

The Court noted that while there may be various excuses or reasons that could justify a law enforcement officer's failure or inability to obtain additional, independent chemical testing, the only relevant excuse at issue here is a law enforcement officer's explanation that the officer did not understand that the defendant wanted such testing. When a reasonable officer would understand that a suspect has requested an additional, independent chemical test but ignores that request, that failure is not justifiable. But when a reasonable officer would not understand that a suspect has made a request for additional, independent chemical testing, the failure to obtain such testing is justifiable. An officer does not unjustifiably fail to obtain an additional, independent chemical test when a suspect makes only an unclear, ambiguous, or equivocal statement that could have been, with the benefit of hindsight, interpreted as a request for additional testing. Whether a clear request was made is determined by examining the words used by the suspect, the context of the conversation between the officer and the suspect regarding chemical testing, and other circumstances relevant to whether or not the suspect expressed a desire for such testing.

In *Ladow*, the Court of Appeals stated that a suspect invokes his "right to have an additional, independent chemical test or tests administered" when he or she makes "some statement that *reasonably could* be construed, in light of the circumstances, to be an expression of a desire for such test." (Emphasis supplied.) 256 Ga. App. at 728. But, the Court stated, its view of what is justifiable in this context is similar to the evaluation of how clearly a suspect must invoke his or her right to counsel during a custodial interview. In those circumstances, the court considers whether the suspect made a request clearly and unambiguously so as to avoid transforming the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity. And, the bright-line rule also is more easily applied by officers in the real world without hampering their legitimate law enforcement activity.

In reviewing the legal underpinning of *Ladlow*, the Court found nothing in *Ladow* and its progeny which undermined the Supreme Court's analysis of the proper standard for determining if an officer's failure to obtain an additional, independent chemical test was "justifiable." Therefore, the Court rejected the "reasonably could" standard set forth by the Court of Appeals in *Ladow*, and overruled *Ladow* and all other decisions of the Court of Appeals holding that a suspect's right to an additional, independent test is invoked by a statement to a law enforcement officer that "reasonably could" - rather than "*reasonably would*" - be construed as an expression of a request for such a test. See *Sigerfoos v. State*, 350 Ga. App. 450 (2019); *Wright v. State*, 338 Ga. App. 216 (2016); *Farmer v. State*, 335 Ga. App. 679

(2016); *Avery v. State*, 311 Ga. App. 595 (2011); *England v. State*, 302 Ga. App. 12 (2009); *Waterman v. State*, 299 Ga. App. 630 (2009); *Mathis v. State*, 298 Ga. App. 817 (2009); *Fowler v. State*, 294 Ga. App. 864 (2008); *Collins v. State*, 290 Ga. App. 418 (2008); *Brooks v. State*, 285 Ga. App. 624 (2007); *Anderton v. State*, 283 Ga. App. 493 (2007); *State v. Gillaspy*, 270 Ga. App. 111 (2004); *Johnson v. State*, 261 Ga. App. 633 (2003).

Consequently, because Henry's claim of ineffective assistance of counsel was considered by the Court of Appeals under the wrong standard, the Court reversed the judgment of the Court of Appeals and remanded the case for reconsideration of the ineffective assistance of counsel claim under the proper standard.

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