



November 3, 2022

## FYI: AMMONS v. STATE

*The Georgia Supreme Court extends the holdings of Elliott, Olevik, and Awad to find that a defendant has a state constitutional right to refuse to perform a preliminary breath test and field sobriety tests and that the refusals may not be used as evidence against the defendant*

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In *Ammons v. State*, S22A0542 (11/2/22), the State charged Ammons with DUI (less safe). The record showed that during the traffic stop, Ammons refused to provide a breath sample using an alco-sensor. The officer then conducted an HGN test, which showed six out of six clues that Ammons was impaired. Ammons was also asked to perform a “walk and turn” test which she refused. The officer then arrested Ammons for DUI and read her the Georgia implied consent warning for suspects over the age of 21 and requested that she provide a blood sample. Ammons refused to answer when officer asked her if she consented.

Before trial, Ammons moved to suppress evidence from her roadside stop and her interactions with the officer, including her refusal to consent to a preliminary breath test, field sobriety tests, and a blood test. Following a hearing, the trial court denied the motion, finding that under *Keenan v. State*, 263 Ga. 569, 571-572 (2) (1993), Ammons's refusal to perform the preliminary breath test could be admitted into evidence and that her refusal to perform field sobriety tests did not implicate her rights against self-incrimination under the Georgia Constitution because she was not in custody at the time of the refusal. The trial court also rejected Ammons's argument that by allowing a defendant's refusal to consent to a warrantless blood test as evidence of guilt in a criminal case, Georgia's implied consent statutes, OCGA §§ 40-5-67.1 and 40-6-392, violate the Georgia Privileges and Immunities Clause.

The Court granted Ammons a certificate of immediate review and the Supreme Court granted her application for interlocutory review to determine 1) whether the Court should overrule its holding in *Keenan*, that admission of evidence that a defendant refused a roadside alco-sensor test does not violate the Georgia Constitution's guarantee of the right against compelled self-incrimination; 2) whether the Georgia Constitution's guarantee of the right against compelled self-incrimination applies to field sobriety tests, such that evidence that the defendant refused to submit to such tests is inadmissible; and 3) whether OCGA §§ 40-5-67.1 or 40-6-392 violate the Georgia Privileges and Immunities Clause.

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The Court stated that Article I, Section I, Paragraph XVI of the Georgia Constitution ("Paragraph XVI") provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." But, in *Olevik v. State*, 302 Ga. 228 (2017), it held that although Paragraph XVI uses the term "testimony," the constitutional provision also protects a defendant from being forced to perform affirmative acts that generate incriminating evidence. Thus, it held in *Olevik* that Paragraph XVI protects against compelled breath tests and affords a defendant a right to refuse breath testing. Two years later, in *Elliott v. State*, 305 Ga. 179 (2019), the Court extended its holding in *Olevik* in determining that admission of evidence that the defendant refused to consent to a chemical breath test likewise violates the rights protected by Paragraph XVI. And then, earlier this year the Court extended the holdings of *Olevik* and *Elliott* to find that a defendant has a constitutional right to refuse to give the State a urine sample in a collection container and that the refusal may not be used as evidence against the defendant. *Awad v. State*, 313 Ga. 99 (2022). Therefore, the Court held, under *Olevik*, *Elliott* and *Awad*, Paragraph XVI applies to preliminary breath tests using an alco-sensor and field sobriety tests that require the cooperation of the suspect.

Next, the Court addressed whether the admission of evidence that a defendant refused to provide a breath sample for a preliminary breath test using an alco-sensor or refused to submit to field sobriety tests violates the Georgia Constitution's protection against self-incrimination. First, as to preliminary breath testing, the Court noted that two decades ago, it suggested in *Keenan* that the state constitutional protection against self-incrimination did not apply to the type of preliminary breath test Ammons was asked to submit to in this case. And, the Court further noted, although it had never expressly overruled *Keenan*, it was clearly in tension with the holdings in *Olevik*, *Elliott*, and *Awad*, and it had already expressed doubts about *Keenan*'s seeming equation of the rights protected by former OCGA § 24-9-20 with those secured by Paragraph XVI and the soundness of that reasoning. Consequently, the Court held that to the extent *Keenan* purported to issue a holding on the preliminary breath testing pursuant to the Georgia Constitution, any such holding is overruled. And because the trial court's order denying Ammons's motion to suppress relied in part on *Keenan*, the Court reversed that portion of the trial court's ruling.

Second, as to field sobriety tests, the Court stated that the HGN test, the walk and turn test and the one-leg stand test plainly require the suspect to cooperate by performing affirmative acts. Therefore, the Georgia Constitution's guarantee of the right against compelled self-incrimination applies to field sobriety tests that require the suspect's cooperation, such that evidence that the defendant refused to submit to such tests is inadmissible. Thus, Ammons had the right to refuse to engage in these tests, and, except as to the HGN test, she did refuse. Consequently, the Court held, her refusal to perform

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the remaining field sobriety tests could not be used against her at trial. Accordingly, the Court reversed that portion of the trial court's order that reached a contrary result.

Finally, the Court addressed the third question posed in the appeal. Ammons argued that, by allowing her refusal to consent to a blood test to be introduced as evidence at her trial, OCGA §§ 40-5-67.1 (b) and 40-6-392, violate Article I, Section I, Paragraph VII of the Georgia Constitution of 1983 ("Paragraph VII"), the Georgia Privileges and Immunities Clause. However, the Court stated, all laws are presumed to be constitutional, and the burden is on the party claiming that the law is unconstitutional to prove it. And here, the Court found, Ammons failed to even make a prima facie showing that her novel and expansive construction of Paragraph VII met this heavy burden. Therefore, the Court rejected her contention that Paragraph VII requires the suppression of evidence of a refusal to consent to a warrantless search of her blood. Accordingly, the Court affirmed the denial of Ammons's motion to suppress the admission at trial of her refusal to submit to a blood test.

In summary, the Court held that under *Olevik*, *Elliott*, and *Awad*, the right against compelled self-incrimination protected by Paragraph XVI affords a defendant the right to refuse to blow into an alcohol sensor or perform any field sobriety tests because they require the cooperation of the defendant through affirmative acts. Furthermore, the refusals cannot be used as evidence against the defendant at trial.

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