



DPS Legal Review



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LANGUAGE BARRIER – ACTUAL CONSENT STANDARD

Defendant was charged with DUI less safe, DUI unlawful alcohol concentration, and following too closely after he was involved in an accident with another vehicle. Defendant sought to have the intoxilyzer results suppressed.

The officer who responded to the accident smelled alcohol on Defendant's breath and Defendant said that he had been drinking but had stopped drinking an hour and a half prior to the accident. The officer observed that Defendant "had an accent. His speech was slow, a little thick, like he had a hard time getting words out....He was speaking English, but he had an accent, as if his native language was Spanish." At the officer's request, Defendant performed field sobriety tests and communicated in English regarding the tests.

The officer arrested Defendant based upon the field sobriety evaluations, unsteadiness on his feet, smell of alcohol and positive alco-sensor reading. After the officer read the implied consent warning in English and requested a breath test, Defendant responded, "No English." This response was the first time during the officer's 30-40 minute encounter with Defendant that Defendant indicated trouble understanding the officer.

After transporting Defendant to the police precinct, the officer again read the implied consent warning and a second officer presented the test to him. Defendant nodded and gave two breath samples while still handcuffed. The second officer did not recall the implied consent warning being read at the precinct but said that Defendant "stood up under his own power and walked over."

The trial court suppressed the intoxilyzer test results and held that under Williams v. State, Defendant did not give actual, knowing, and voluntary consent to the administration of the

state's breath test. According to the trial court, Defendant's conduct did not establish that he sufficiently understood English and the state only showed that Defendant acquiesced to the officers' claims of lawful authority. The state appealed the suppression of the breath test results.

The appellate court determined that the trial court used an incorrect standard. Under Williams, the proper standard in determining whether a defendant understood the implied consent notice and the consequences for refusal to take the designated test is whether the defendant acted "freely and voluntarily" in giving "actual consent." Knowing consent is not required. In making a determination, the court should consider the "totality of the circumstances." The case was remanded to the trial court to consider the motion to suppress under the proper standard. State v. Flores-Gallegos, 2016 WL 2726842 (Ga. App.)

"FREELY AND VOLUNTARILY" STANDARD FOR CONSENT TO TESTING

A GSP trooper stopped Defendant for speeding and suspected that Defendant had been driving under the influence. After conducting several field sobriety tests, he arrested Defendant, read her the implied consent notice and transported her to the fire department to have a blood test. Defendant signed a form which read, "I hereby consent to allow SSFD/EMS, acting at the request of the Officer identified below and as an agent of a licensed law enforcement agency, to draw a blood sample for the purpose of determining the presence of alcohol or any other drug." The trooper signed the form below Defendant's signature, stating that his request for a blood draw was pursuant to Georgia's implied consent law.

Defendant agreed to submit to the requested test and also executed a written consent

which specifically stated that the purpose of the test was to determine the presence of alcohol in Defendant's blood. The video of the stop and administration of the field sobriety tests show that Defendant "clearly understood the situation and articulately pleaded with the officer not to arrest her. The video also fails to show any coercive circumstances that would undercut the voluntariness" of her consent. Considering the totality of the circumstances, the court found that Defendant's consent was free and voluntary and reversed the trial court's suppression of the blood test results. State v. Reid, 2016 WL 1602789 (Ga. App.)

WARRANTLESS SEARCH: METAL CAN WITHIN SUITCASE ON A PASSENGER BUS

A FHP trooper observed an El Expreso bus that was traveling from Texas to Florida at a TA Travel Center. The passengers consented to a search of their luggage. The trooper noticed an oversized metal can of food inside Defendant's suitcase, but he did not check the contents, although he remembered reading that heroin had been concealed inside canned goods that appeared to be factory sealed. The trooper released the occupants of the bus.

Twelve days later, the trooper encountered another El Expreso bus at a TA Travel Center. The bus was traveling from Texas to Florida and Defendant was again a passenger. Around 8:38 a.m., the bus driver permitted a police canine and his handler to walk around the exterior of the bus. The canine indicated that he detected drugs on the bus and the driver and all passengers gave consent to unload the luggage from the undercarriage of the bus to allow the canine to smell each suitcase.

The canine alerted on Defendant's suitcase, which the trooper then searched. The suitcase contained two large metal cans labeled as containing whole jalapeno peppers and whole serrano peppers. The trooper recalled that Defendant had a large metal can in his belongings two weeks earlier. The trooper shook the cans and heard liquid sloshing but did not hear food "flopping." The trooper asked for permission to

unseal the cans, but Defendant refused. The trooper opened one can and saw a large black cylinder floating in liquid and believed the cylinder contained contraband. At 9:41 a.m., the trooper arrested Defendant and released the remaining passengers.

Two troopers took Defendant and the metal cans to a DEA office. Around noon, a federal agent opened the sealed can, removed a cylinder and tested samples of the substances inside both cylinders, which were positive for the presence of cocaine.

Defendant argued that the cocaine should be suppressed because the troopers lacked probable cause to search the bus and claimed that the troopers were required to obtain a warrant to search his suitcase when he and his property were "literally in police custody" and he had no mobility and no chance to flee.

The court found that the trooper did not violate Defendant's Fourth Amendment rights. The "inherent mobility of the bus and the probable cause created by the positive responses of the police canine" were sufficient to justify the warrantless search of the suitcase and the opening of the can found inside Defendant's suitcase. U.S. v. Pina, 2016 WL 1612801 (11th Circuit).

ALS REMINDERS

If you have an ALS Hearing scheduled and you will be in training, on vacation, or otherwise unavailable for the ALS Hearing, a written motion for continuance must be filed as soon as possible with the OSAH Judge but no less than approximately seven to ten days prior to the scheduled ALS Hearing.

On Intoxilyzer cases, please remember to bring to the ALS Hearing the ORIGINAL test results and a COPY of your permit to operate the Intoxilyzer.

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, and Dee Brophy, ALS Attorney. Send questions/comments to ddscott@gsp.net.