

**IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,	:	
	:	
v.,	:	Case No. _____ NUMBER
	:	
_____ ,	:	
	:	
<i>Defendant.</i>	:	

BENCH BRIEF IN SUPPORT OF EXCLUSION OF THE STATE-ADMINISTERED
CHEMICAL TEST BASED UPON AN INCOMPLETE AND MISLEADING
IMPLIED CONSENT ADVISEMENT

Our appellate courts have stated that

[T]he purpose of the implied consent law is to notify drivers of their rights so that they can make informed decisions. Accordingly, we have suppressed the results of chemical tests where the driver was misinformed of his rights and **where that misinformation may have affected his decision to consent.**

State v. Becker, 240 Ga. App. 267, 271, 523 S.E.2d 98 (1999), citing *Garrett v. Dept. of Public Safety*, 237 Ga. 413, 415, 228 S.E.2d 812 (1976) (emphasis added). In determining whether the information provided by the implied consent advisement so misleading as to lead to the exclusion of the state-administered chemical test, our courts evaluate “whether the notice was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing.” *Kitchens v. State*, 258 Ga. App. 411, 413, 574 S.E.2d 451 (2002), quoting, *Becker*, 240 Ga. App. at 271.

Georgia courts have consistently held that misinformation regarding the impact of a refusal of the requested chemical test (or a test result in excess of the applicable legal limit) upon an out-of-state licensee should result in the exclusion of the state-administered chemical test or refusal thereof. In *Deckard v. State*, 210 Ga. App. 421, 436 S.E.2d 536 (1993), the Court of Appeals reversed the trial court’s ruling that denied the defendant’s motion to exclude the state-administered chemical test based upon the officer

misinforming the defendant that a refusal would result in a six-month suspension of his out-of-state driver's license.

[The defendant in *Deckard*] was misinformed as to the consequences of his failure to submit to chemical analysis because the Georgia Department of Public Safety is without authority to absolutely suspend or revoke a nonresident's driver's license. OCGA § 40-5-51 (a) provides that as to a nonresident driver of a motor vehicle, Georgia may suspend or revoke only the "privilege of driving a motor vehicle on the highways of this state ... in like manner and for like cause as a driver's license issued under this chapter may be suspended or revoked." *Id.*

210 Ga. App. at 422. "Since the consent was based at least in part on deceptively misleading information concerning a penalty for refusal, which the State was unauthorized to implement," the decision to submit to the requested chemical test was not "an informed choice under the Implied Consent Statute." *Id.* Accordingly, the test results were rendered inadmissible. *Id.* It is important to note that the *Kitchens* court found the lack of intent to mislead by the officer to be irrelevant to its decision:

[A]lthough we find no suggestion that the officer *intentionally* misinformed [the defendant] concerning the penalty for refusal ... we cannot conclude that his misstatement of the law did not induce the consent. It directly impacted [the defendant's] options under the Implied Consent Statute.

Id.

In *Kitchens v. State*, the defendant possessed an Alabama license. The arresting officer properly read the implied consent notice to the defendant. However, subsequent to the reading of the implied consent notice, the defendant expressed confusion regarding implied consent, and the officer eventually stated if she refused the requested chemical test, "you're automatically charged with DUI and your license [is] going to be suspended." 258 Ga. App. at 412. The Court of Appeals held in *Kitchens* that

we have previously recognized that misinforming the holder of an out-of-state driver's license that refusal to submit to the state's test would result in revocation of the out-of-state license is the type of misleading information which may affect

the decision to submit to the test, and may require suppression of the test results. ‘Since the consent was based at least in part on deceptively misleading information concerning a penalty for refusal, which the State was unauthorized to implement, [defendant] was deprived of making an informed choice under the Implied Consent Statute. Accordingly, the test results were rendered inadmissible.’

258 Ga. App. at 414-15 (citations omitted); *see also*, *State v. Pierce*, 257 Ga. App. 623, 571 S.E.2d 826 (2002) (affirmed exclusion of breath test where Defendant was told after the reading of the implied consent warning, but prior to making decision to submit to the test, that his out-of-state license would be suspended for refusal); *State v. Renfroe*, 216 Ga. App. 709, 455 S.E.2d 383 (1995) (relied upon *State v. Coleman*, 216 Ga. App. 598, 455 S.E.2d 604 (1995) in affirming exclusion of the refusal of the state-administered chemical test based upon the failure to inform the defendant that only his privilege to driver in the State of Georgia could be suspended as a result of the refusal).

The implied consent advisement provided to the Defendant stated, in substance, the following:

Implied consent notice for commercial motor vehicle driver suspects:

Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate the presence of any alcohol, you will be issued an out-of-service order and will be prohibited from operating a motor vehicle for 24 hours. If the results indicate an alcohol concentration of 0.04 grams or more, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?”

The Defendant in this case did not possess a commercial driver's license. He possessed a non-commercial driver's license issued by the State of Alabama. In reading the implied consent advisement applicable to commercial motor vehicle driver suspects, the Defendant was provided with several pieces of misleading information that were material to his decision to submit to the state-administered chemical test:

1. "If you refuse this testing, you will be disqualified from operating a commercial motor vehicle for a minimum period of one year." – The Defendant was informed that he would be disqualified from operating a commercial motor vehicle for a minimum period of one year. However, the implied consent advisement read to the Defendant failed to provide any information regarding the implications of a refusal upon the Defendant's *non*-commercial driver's license, which was the only type of license he possessed. Further, the implied consent notice read to the Defendant failed to include any limitation regarding the disqualification resulting from a refusal only applying to the Defendant's privilege to drive in the State of Georgia, as required under *Deckard*, *Coleman*, *Renfroe*, and *Pierce*.

2. "If you submit to testing and the results indicate the presence of any alcohol, you will be issued an out-of-service order and will be prohibited from operating a motor vehicle for 24 hours." - This provision of the Implied Consent advisement is a requirement of O.C.G.A. 40-5-154, which states:

A person who drives, operates, or is in physical control of a commercial motor vehicle while having any measurable alcohol in his or her system or who refuses to take a test prescribed by Code Section 40-5-55 to determine his or her alcohol content must be placed out of service for 24 hours.

As discussed previously in the Defendant's Bench Brief in Support of Exclusion of the State-Administered Chemical Test Based Upon the Selection and Reading of the

Inappropriate Implied Consent Notice, O.C.G.A. § 40-5-154 applies to drivers of commercial motor vehicles as defined in O.C.G.A. § 40-5-142, and the Defendant's does not fall within the definition of a commercial motor vehicle under O.C.G.A. § 40-5-142. Accordingly, the State was without the authority to place the Defendant out of service for 24 hours as a result of a refusal or having any detectable amount of alcohol in his system.

The implied consent notice provided to the Defendant in this case included misinformation about the effect of a refusal upon his out-of-state driver's license and about being place out of service as a result of a refusal. Because this misinformation may have affected the Defendant's decision to submit to the state-administered chemical test, the results of that test should be excluded from evidence in the trial of this case.

Respectfully Submitted, this ____ day of December, 2013.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the Morgan County District Attorney's Office with a true and accurate copy of the foregoing BENCH BRIEF IN SUPPORT OF EXCLUSION OF THE STATE-ADMINISTERED CHEMICAL TEST BASED UPON AN INCOMPLETE AND MISLEADING IMPLIED CONSENT ADVISEMENT by _____-delivery of same to Ms. _____ Burleson, Assistant District Attorney, Morgan County.

Respectfully Submitted, this ____ day of December, 2013.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant