

IN THE SUPERIOR COURT FOR LAURENS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
v.	:	Case No. _____
	:	
_____,	:	
	:	
Defendant.	:	

BRIEF IN SUPPORT OF DEFENDANT’S MOTION IN LIMINE TO EXCLUDE
BLOOD TEST RESULTS ON STATUTORY GROUNDS

Comes Now, the Defendant in the above-styled case, by and through the undersigned counsel, and files this brief in support of her previously filed motion in limine to exclude blood test results on statutory grounds. In furtherance of her motion, the Defendant respectfully shows this Honorable Court the following:

On July 3, 2009 at approximately 3:47 p.m., the Defendant was stopped for speeding by Officer Steve Vertin of the Laurens County Sheriff’s Department. After approaching the Defendant’s vehicle, Officer Vertin asked the Defendant to exit her vehicle. At the rear of her vehicle, the Defendant submitted to field sobriety testing, including the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. At approximately 3:55:30 p.m., the Defendant submitted to a preliminary breath test.

Subsequent to the Defendant submitting to the preliminary breath test at approximately 3:56:30 p.m., Officer Vertin read the Defendant the Implied Consent Warning for subjects age 21 and over and asked that she submit to a state-administered blood test. At the time that the Defendant was read the Implied Consent Warning, she was sitting on the guard rail where she was sitting during her submission to the preliminary breath test. The Defendant was not handcuffed prior to the reading of the Implied Consent Warning by Officer Vertin. Prior to the reading of the Implied

Consent Warning, there was no discussion between Officer Vertin and the Defendant regarding whether she was under arrest or subject to anything further than an investigatory detention. After the reading of the Implied Consent Warning, Officer Vertin and the Defendant engaged in a conversation about whether the Defendant was under arrest, and Officer Vertin then informed the Defendant that he could not permit her to leave and that she was going to jail whether she submitted to the state-administered blood test or not.

This case does not involve a traffic accident resulting in serious injuries or fatalities. Accordingly, under *Hough v. State*, 279 Ga. 711, 620 S.E.2d 380 (2005)¹, the Implied Consent Warning provided to the Defendant must have been given after the Defendant was under arrest:

[B]ased on the plain, unambiguous wording of Georgia's implied consent statutes, we must find, employing the standard rules of statutory construction, that a suspect who is not involved in a traffic accident resulting in serious injuries or fatalities must be under arrest before implied consent rights are read to him.

(Emphasis supplied.) Because the Implied Consent Warning given to the Defendant in this case was read prior to her arrest, the results of the state-administered blood test garnered pursuant to it should be excluded from the evidence at trial.

The *Hough* Court analyzed the provisions of O.C.G.A. § 40-5-55, O.C.G.A. § 40-6-392(a)(4), O.C.G.A. § 40-5-67.1, and the text of the Implied Consent Warnings in reaching its conclusion that a defendant must be under arrest at the time that Implied Consent Warnings are given where no accident involving serious injury or a fatality has occurred.

- I. O.C.G.A. § 40-5-55 requires that a suspect be advised of the Implied Consent Warnings after arrest if the case does not involve serious injuries or fatalities.

¹ For the purposes of brevity, any reference herein to *Hough v. State*, 279 Ga. 711, 620 S.E.2d 380 (2005), shall include the case styled *State v. Handschuh*, which was consolidated on appeal and is also found at 279 Ga. 711, 620 S.E.2d 380 (2005).

This case does not involve a serious injury or fatality. Therefore, an arrest must have preceded the reading of the Implied Consent Warning. “In circumstances where there has been no traffic accident resulting in serious injuries or fatalities, but the investigating law enforcement officer has probable cause to believe that the suspect was driving under the influence of alcohol or other drugs, the statutory mandates of OCGA § 40-5-55 are quite different and require an arrest prior to any reading of implied consent rights.” *Hough v. State*, 279 Ga. 711, 620 S.E.2d 380 (2005).

As stated in *Hough*, O.C.G.A. § 40-5-55(a), in relevant part, provides

[A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391.

279 Ga. at 715 (emphasis supplied).

II. O.C.G.A. §§ 40-6-392(a)(4) and 40-5-67.1 require a suspect be arrested prior to advisement of Implied Consent Warnings.

In analyzing O.C.G.A. §§ 40-6-392(a)(4) and 40-5-67.1, the *Hough* court found that those statutory provisions support the Court’s conclusion that O.C.G.A. § 40-5-55 requires that a suspect be arrested prior to the advisement of Implied Consent Warnings:

O.C.G.A. § 40-6-392(a)(4) also states that “[t]he arresting officer at the time of arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section.” In addition, OCGA § 40-5-67.1, which sets forth the text of the implied consent warnings, contemplates that these notices will be read after arrest. For example, OCGA § 40-5-67.1(c) begins: “If a person under arrest...submits to a chemical test upon the request of a law enforcement officer ...” (Emphasis supplied.) Code Section 40-5-67.1(d) similarly starts: “If a person under arrest...refuses, upon the request of a law enforcement officer, to submit to a chemical test...”

Id. (emphasis supplied).

III. Georgia's Implied Consent Warnings contemplate a suspect being under arrest at the time that the warnings are given.

The Hough Court further recognized that the provisions of the Implied Consent Warnings supported its conclusion that an arrest was to precede the warnings:

Finally, the text of the implied consent warnings themselves contemplate an arrest. All three versions of the statutory implied consent warnings include the following admonition: 'Your refusal to submit to the required testing may be offered into evidence against you at trial.' This admonition is more meaningful in the context where an arrest has occurred. After an arrest, an individual would believe that he or she would be actually facing charges. Otherwise, any warnings regarding a future trial would be superfluous.

279 Ga. at 715-16.

IV. Those cases holding that the "proximity concept" permitted Implied Consent Warnings to be given before any arrest has occurred were overruled by Hough v. State.

Cases which previously permitted the reading Implied Consent Warnings prior to arrest were overruled by Hough v. State. Cases prior to Hough had suggested that *Perano v. State*, 250 Ga. 704, 300 S.E.2d 668 (1983), permitted the Implied Consent Warnings "at the time of arrest, or at a time as close in proximity to the instant of arrest as the circumstances of the individual case might warrant..." and this permitted the reading of the Implied Consent Warnings when a defendant was not under arrest. See, *State v. Lentsch*, 252 Ga. App. 655, 658, 556 S.E.2d 248 (2001). In Hough, the Court stated, "Those cases where the 'proximity concept' has been expanded to the reading of implied consent not only after arrest, but also before any arrest has occurred, are hereby overruled." 279 Ga. 711, 716-17 (emphasis supplied).

The Implied Consent Warning given to the Defendant was read prior to her arrest. Because this case did not involve a serious injury or fatality, the Implied Consent Warning was untimely given to the Defendant. Based

on O.C.G.A. § 40-5-55, O.C.G.A. § 40-6-392(a)(4), O.C.G.A. § 40-5-67.1, and Hough v. State, 279 Ga. 711, 620 S.E.2d 380 (2005), the results of the state-administered blood test in this case should be excluded from the evidence at the trial of this case.

Wherefore, the Defendant respectfully prays that this Honorable Court grant her motion in limine to exclude the results of the state-administered blood test in this case.

Respectfully submitted, this ____ day of April, 2010.

D. Benjamin Sessions
Georgia Bar No. 141280
Attorney for Defendant

Address: 3155 Roswell Road, Suite 220
Atlanta, Georgia 30305
Telephone: (470) 225-7710
Facsimile: (678) 348-7165

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel in the above-styled case a true and accurate copy of the foregoing Brief in Support of Motion in Limine to Exclude the State-Administered Blood Test on Statutory Grounds by depositing same in the U.S. mail with adequate postage affixed thereon to ensure delivery to: Mr. _____ Pritchett, Assistant District Attorney, Laurens County, P.O. 2029, Dublin, Georgia 31040.

This ____ day of April, 2010.

D. Benjamin Sessions