

Current Status of DUI- Specific Evidence Law & Challenging Voluntariness

DODD – Winter Meeting
November 12, 2022

SESSIONS
FLEISCHMAN

Par. 16 4 th Amendment Misleading Info			
Field Tests	<i>Woods & Ammons – Voluntariness Analysis</i>	Not applicable	Not applicable
Refusal of Field Tests	Inadmissible - <i>Ammons</i>	Not applicable	Not applicable
Breath Tests	<i>Tebeest</i>	Loser - <i>Burchfield</i>	They won't address it.
Refusal of Breath Tests	Inadmissible	**	**
Blood Tests (“Consent”)	Look at the administration	Voluntariness	Cases pending*
Refusal of Blood Tests	Look at the administration	Oh 	**
Urine Tests	<i>Awad</i>	**	**
Refusal of Urine Tests	Voluntariness Analysis	**	**

Submission to Breath (and URINE) Test After *Elliott*

- Old implied consent or new?
- Old implied consent? Challenge voluntariness and misleading information.
- He/she was told refusal could be introduced. That's false, and it is the type of information that would lead to submission to the test. *Sauls, Kitchens, etc.*
- New implied consent? Voluntariness analysis.

Can the government lie to you about your rights?

- ❖ Waiver of right must be knowing, intelligent, and voluntary.
- ❖ Waiver is not knowing, intelligent, and voluntary if the government deliberately misinforms you of your rights.
- ❖ *See Hart v. Attorney General of State of Florida*, 884, 894 (11th Cir. 2003) (holding that no reasonable court could believe that a confession was voluntary where officer falsely told juvenile that “honesty will not hurt you”); *U.S. v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) (confession involuntary where officer told defendant that signing Miranda form would not hurt him)

You can lie about a lot, but not *self-incrimination*....

- ❖ “no case has ever held that it is permissible for the police to deceive or mislead a suspect about his *Miranda* rights” *U.S. v. Barraza*, No. CR05-4040-MWB, 27 (N.D. Iowa Jun. 8, 2005)

Knowledge of law in foundational SCOTUS cases

[I]t does not appear that the witness ... was ignorant of [his privilege]" *Powers v. United States*, 223 U.S. 303, 314 (1912).

"He did not testify that he did not know that he had a right to refuse to answer the questions." *Wilson v. United States*, 162 U.S. 613, 624 (1896).

Implied Consent is INTENDED to be coercive

“[D]etermining whether a driver’s BAC is over the legal Case limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed ‘implied consent laws.’ These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State’s drunk-driving laws.” *Birchfield v. North Dakota*, 579 U.S. 438, 444 (2016)

Voluntariness factors

[We consider] the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.

Olevik v. State, 302 Ga. 228, 251, 806 S.E.2d 505, 523 (2017)

Revealing changes

New language

“The State of Georgia has conditioned
your privilege to drive

Is this an admission
that the old language
was coercive?

Old language

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.

Other changes

The old card specified that failure to submit to any kind of chemical testing would be used against you in court.

The new court says only blood and urine refusals will be admissible.

Under *Awad*, this is still inaccurate.

Submission to a Blood Test

- Old implied consent or new?
- Old implied consent? Challenge voluntariness and misleading information.
- He/she was told refusal could be introduced. That's false, and it is the type of information that would lead to submission to the test. *Sauls, Kitchens, etc.*
- *Rely upon Miley, Mackey, Gardiner, etc.* for proposition that refusal of search cannot be used against a defendant.
- New implied consent? Voluntariness analysis.