

Effective Use of Motions to Attack the Admissibility of State-Administered Tests¹

1st Annual DUI Super Symposium
Alpharetta, Georgia

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¹ I want to give thanks and credit to the following brilliant DUI trial attorneys whose original ideas I have borrowed for this presentation: W. TROY McKINNEY of Schneider & McKinney in Houston, Texas; GEORGE A. STEIN, ERIN H. GERSTENZANG, and T. KEVIN MOONEY of Stein & Ward in Atlanta, Georgia.

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Pursuing motions can be one of the most frustrating exercises in your practice, particularly if your goal is always to simply hear “motion granted.” Many lawyers talk themselves out of pursuing motions. If you look hard enough, I am convinced that you can find a case that cuts against you on any issue that seems favorable in a DUI case. Fear, anxiety, and laziness are all factors that probably lead to this decision.

A great deal of the anxiety associated with motions is derived from a failure to define the purpose of the hearing. I pursue motions in nearly every case that I have. It takes time, effort, and a willingness to tolerate deriding comments from prosecutors and eye-rolling from some judges. On the basis of the very minimal discovery that we receive in DUI cases, I very frequently do not have a well-founded basis to believe that the trial court will grant my probable cause motion, but I pursue those motions the vast majority of the time. So, short of being a glutton for punishment, I recognize that I must have some alternative motivation.

There are 5 basic purposes of motions:

(1) Exclusion of unfavorable evidence;²

² While it is outside of the scope of this paper, motions in limine may also be used to ensure that items of questionable admissibility are ruled on prior to trial. If you have prejudicial or character evidence which you fear the court may refuse to admit during the course of trial, consider addressing the issue at a pre-trial hearing.

- (2) Trial preparation;
- (3) Improving the plea offer;
- (4) Diversion; and
- (5) Dismissal of the charges.

Exclusion of Unfavorable Evidence

Criminal defense lawyers laugh all of the time about filing “Motions to Change the Facts.” Often, we recognize that there are some facts that, if introduced to the jury, will create a problem for the most well-presented defense. Larry Pozner and Roger Dodd have referred to these as facts beyond change. “Facts beyond change are facts that will be believed by the jury as fair, accurate, and highly relevant regardless of best efforts to dispute or modify them.”³

A motion to suppress or motion in limine is your opportunity to change the facts of the case.

A motion to suppress evidence [or motion in limine] is a motion to delete certain facts beyond change. To the extent that a motion to suppress evidence [or motion in limine] succeeds in a whole or in part, these facts beyond change disappear from the lawsuit. Since the suppressed facts are never available to the fact finder, they cannot be facts in dispute. They cannot be facts of the lawsuit. They cannot be facts beyond change.⁴

³ Larry S. Pozner and Roger J. Dodd, *Cross Examination: Science and Techniques*, § 2.20 (2nd Ed.).

⁴ *Id.*, at § 2.44.

For example, in a DUI-refusal case, if your client makes a statement after arrest that he “should not have been driving.” You unquestionably want to attack the admissibility of this statement. If the statement is admitted during the course of the trial, it is highly likely that the jury will treat this statement as an admission that your client was “less safe” to drive.

Creating a Trial Advantage and Improving the Plea Offer

If success at a motion to suppress is defined in terms of having the motion granted, success is seldom achieved. The most common use of motions to suppress is to develop a trial advantage and, consequently, improve the plea offer.

We develop a trial advantage by demonstrating to the prosecutor various problems with their case. For example, let us look at a case in which the arrest report described a defendant as “faking” when attempting to blow into the breath testing machine. However, the discovery showed that our client submitted “sufficient” samples, but the first sample produced an “invalid sample” result at 12:03 a.m. The officer subsequently tested our client at 12:08 a.m. and 12:11 a.m., which produced results of .099 and .110. The performance of the defendant’s breath test directly violates the 20 minute waiting period. However, these results are admissible in Georgia.⁵ Use the motions

⁵ See, ***State v. Palmaka***, 266 Ga. App. 595, 596, 597 S.E.2d 630 (2004) (“Any deviation from the operator's manual goes to the weight to be given the test results and not to their admissibility.”).

hearing as an opportunity to have the officer tell the prosecutor that he failed to adhere to his training in the administration of the breath test and he incorrectly recorded the evidence in his incident report.

Cases improve during the course of live testimony. During motion hearings, issues are developed and some just arise which were previously unknown. Cases that seem hopeless develop hope. Be rigorous in your preparation, and you will uncover favorable evidence. When you develop favorable evidence, plea offers improve (i.e., the DUI is frequently dismissed or “reduced”).

Even in a motion hearing where the evidence does not change substantially during the hearing, you have an opportunity to lock the officer into his testimony. You have an opportunity to observe the officer’s testimony and to observe his demeanor. Learning how the officer addresses difficult issues prior to the trial can be the difference between winning and losing at trial.

There is one final note on the use of motions to prepare for trial: have the motions taken down and transcribed. See, Rule 11 of the Dirty Dozen Rules (below). Having a transcript to prepare from for trial is invaluable.

Use of a Motion Hearing as a Diversion

Officers remember those of us who rigorously cross-examine them. Have you ever had an officer who knew nothing about the administration of the horizontal gaze nystagmus test during a motion hearing, testify as if he was an expert on the horizontal gaze nystagmus test during trial? No, most officers do not undergo a SFST

refresher course immediately prior to a trial. Instead, officers (and prosecutors) remember the painful attack that they underwent at a motion hearing and they prepare accordingly. Frequently, this results in what appears to be a contrived over-emphasis. You can use their preparation to your advantage over the course of the trial.

Perhaps you observe an officer performing a phase of the HGN test too slowly. You recognize the problem, but you also recognize that your trial judge will not likely exclude this evidence based on *Tousley* or *Sultan*. Rigorous cross-examination of the officer at the motion on the importance of strict compliance with the NHTSA protocol for the administration of the HGN test can cause the prosecution to over-emphasize the deviation from the guidelines in the course of the trial. You can then change your attack on the HGN from administration to a “So what?” approach.⁶

Dismissal of the Charges

Other than demurrers, a motion to suppress remains the only tool available to Georgia criminal defendants to attack the ability of the state to proceed to trial. Unless otherwise agreed to by the parties, in Georgia, the criminal defendant cannot avail himself of what is known as a “motion for summary judgment.” *Ewell v. State*, 245 Ga. App. 610, 538 S.E.2d 523 (2000); *Schuman v. State*, 264 Ga. 526, 448 S.E.2d 694 (1994); *Jackson v. State*, 208 Ga. App. 391, 392, 430 S.E.2d 781 (1993). However, a motion to suppress provides us with the ability to force the state to produce a threshold level of evidence prior to trial.

⁶ See, Bruce Kapsack, *Innovative DUI Trial Skills*, § 3.22.

The general rule of law governing scrutiny of warrantless searches was stated by the Georgia Supreme Court in *State v. Slaughter*, 252 Ga. 435, 436, 315 S.E.2d 865 (1984):

Searches are conducted either with or without a search warrant. 'The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek ... that the exigencies of the situation made that course imperative.' **"[T]he burden is on those seeking the exemption to show the need for it."** *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (citations omitted).

Because the burden is on those officers who conduct a search without a warrant to show that the search was conducted pursuant to an exception to the Fourth Amendment warrant requirement, it can be said that a search without a warrant is presumed to be invalid and **"the burden is on the state to show that the warrantless search was valid."** *Mincey v. Arizona*, 437 U.S. 385, 390-391, 98 S.Ct. 2408, 2412-2413, 57 L.Ed.2d 290 (1978); *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948).

"Once a defendant files a motion to suppress alleging an illegal search and seizure, the state bears the burden of proving that the search is lawful." *State v. Kuhnhausen*, 289 Ga. App. 489, 657 S.E.2d 592 (2008), citing *State v. King*, 287 Ga. App. 680, 652 S.E.2d 574 (2007).

What is sufficient "particularization" of a motion to suppress?

If you regularly file motions to suppress, you will undoubtedly run into a prosecutor who will argue that your motion is not sufficiently particularized. Motions to suppress are authorized by O.C.G.A. § 17-5-30, which provides:

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property, the possession of which is not otherwise unlawful, and to suppress as evidence anything so obtained on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face, there was not probable cause for the issuance of the warrant, or the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing that the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion; and the burden of proving that the search and seizure were lawful shall be on the state. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment, or special presentment is filed and pending.

Dean v. State, 246 Ga. App. 263, 540 S.E.2d 246 (2000), directly addresses the requirements of particularity of O.C.G.A. 17-5-30. In Dean, the defendants motion(s) to suppress included the following:

Each motion alleged that on or about the date set forth in the accusation, Dean was approached, questioned, unlawfully detained, and arrested by (unnamed) law enforcement officers; that these actions were taken without probable cause and without specific and articulable facts reasonably warranting an investigatory stop under *Terry v. Ohio*; that incident to each stop he was frisked and a small bag allegedly containing marijuana was taken from the front pocket of his jacket; and that each frisk was conducted without his consent or probable cause.

Id. at 263 (citations omitted).

The trial court in *Dean* relied upon *Rouse v. State*, 241 Ga. App. 167, 567 S.E.2d 360 (1999), in dismissing the defendant's motion(s) to suppress based upon a lack particularization. Reversing the trial court's dismissal of the motions, the Court of Appeals held:

In cases involving warrantless searches, the factual showing required by OCGA § 17-5-30 need not be made in great detail, because in such cases 'many of the necessary allegations are negative facts (e.g., the search was conducted without a warrant, the movant did not consent to the search) and conclusions based upon mixed questions of law and negative fact (e.g., the officer lacked probable cause to arrest or search).' [Cit.] In such cases, **motions to suppress are held sufficient if they 'put the state on notice as to the type of search involved (without warrant vs. with warrant), which witness to bring to the hearing on the motion, and the legal issues to be resolved at that hearing.'**

Id., quoting, *Young v. State*, 225 Ga. App 208-209, 483 S.E.2d 636 (1997) (emphasis added).

Dean is also helpful in addressing the sufficiency of a motion where we cannot identify the names of all of the officers that participated in the stop and investigation of our clients. In *Dean*, the defendant's motion did not identify the officers that participated in his

arrest. Nonetheless, the Court held that the state was put on sufficient notice as to which officers were required to satisfy its burden of proof:

Did the suppression motions put the State on notice as to the witnesses whose testimony was required? For essentially two reasons, we conclude that they did. To begin with, the transcript of the hearing on the motions shows that the State did bring law enforcement officers to testify. **“Moreover, the State did not argue at the hearing that deficiencies in the motions left it unable to ascertain the identity of needed witnesses.”** Therefore, failure of the motions to identify the officers conducting the stops and frisks, and to more fully detail the attendant facts, was not fatal to the sufficiency of the motions.

Id., citing *Lavelle v. State*, 250 Ga. 224, 226, 297 S.E.2d 234 (1982); *State v. Barnett*, 233 Ga.App. 496(1), 504 S.E.2d 531 (1998); see also, *Hill v. State*, 222 Ga.App. 839, 476 S.E.2d 634 (1996).

Relying upon *Dean* for the proposition that motions to suppress need not identify the officers involved in the case can be harrowing experience. Look to *State v. Goodman*, 220 Ga. App. 169, 469 S.E.2d 327 (1996), for a clear statement as to what is a sufficiently particularized motion to suppress. Motions to suppress which include the following information garnered express approval from the Court of Appeals:

- (1) the date of the stop,
- (2) the identity of the person stopped,
- (3) the identity of the officer who made the stop,
- (4) the law enforcement organization with which he was affiliated,
- (5) the nature of the stop (e.g., traffic stop),
- (6) the offenses with which Goodman was charged, and

(7) the conclusion that no such violations occurred which would justify the stop.

Id.

A sample motion to suppress is attached hereto as Exhibit A.

Motion to Suppress or Motion in Limine: Yes, It Does Matter

There is a great deal of confusion among lawyers, judges, and even our case law as to what evidence is subject to a motion to suppress. This debate is not an academic one that is inconsequential to our clients.

Motion to Suppress

O.C.G.A. § 17-5-30, which is also referred to in older case law as Section 13 of an Act of 1966 (Ga.L.1966, pp. 567, 571; Code Ann. 27-313),

makes no provision for pre-trial suppression of evidence deemed illegal for reasons other than unlawful search and seizure. *Norrell v. State*, 116 Ga.App. 479(3), 157 S.E.2d 784. By its clear terms, Section 13 furnishes a procedural device for the protection of constitutional guaranties against unreasonable search and seizure only. The protection of other rights which might have been violated by a transaction is merely coincidental. A single transaction may amount to a concurrent violation of constitutional guaranties against unreasonable search and seizure and constitutional guaranties against compulsory self-incrimination. See *Hammock v. State*, 1 Ga.App. 126, 127, 58 S.E. 66. Thus evidence obtained by compulsory self-incrimination might be subject to suppression pursuant to a pre-trial motion under the 1966 Act. However, the basis for suppression is that the evidence was obtained by unlawful search and seizure, not that it was obtained by compulsory self-incrimination.

Hawkins v. State, 117 Ga. App. 70, 71, 159 S.E.2d 440 (1967) (emphasis added).

A great deal of the confusion between the issues that may be litigated by a motion to suppress arises out of those cases which make reference to a motion made pursuant to O.C.G.A. § 17-5-30 only applying to tangible evidence. “A motion to suppress is to be aimed at tangible evidence, not confessions or identification testimony.” Robinson v. State, 208 Ga. App. 528, 430 S.E.2d 830 (1993), citing Martin v. State, 201 Ga. App. 643, 644, 411 S.E.2d 788 (1991). It should be noted that Robinson and Martin specifically address the applicability of a motion to suppress to identification evidence, and our appellate courts have repeatedly held that identification evidence is not subject to a suppression motion.

Motion in Limine

“‘In limine’ means ‘at the threshold’ or before the trial begins. State v. Johnston, 249 Ga. 413, 414 (fn. 3), 291 S.E.2d 543 (1982), quoting, Stevens v. State, 265 Ind. 411, 354 N.E.2d 727, 733 (1976).

A motion in limine is a pretrial motion which may be used two ways: 1) The movant seeks, not a final ruling on the admissibility of evidence, but only **to prevent the mention by anyone, during the trial, of a certain item of evidence** or area of inquiry until its admissibility can be determined during the course of the trial outside the presence of the jury[; and] 2) **The movant seeks a ruling on the admissibility of evidence prior to the trial.** The trial court has an absolute right to refuse to decide the admissibility of evidence, allegedly violative of some ordinary rule of evidence, prior to trial. If, however, the trial court decides to rule on the admissibility of evidence prior

to trial, the court's determination of admissibility is similar to a preliminary ruling on evidence at a pretrial conference, and it controls the subsequent course of action, unless modified at trial to prevent manifest injustice.

Gaston v. State, 227 Ga. App. 666, 669, 490 S.E.2d 198 (1997) (citations and punctuation omitted), quoting, *State v. Johnston*, 249 Ga. 413, 415, 291 S.E.2d 543 (1982) (emphasis added).

“A motion in limine is the proper vehicle by which to interpose an objection to the admissibility of chemical test results on the basis urged by appellant herein, non-compliance with the provisions of OCGA § 40-6-392(a)(1)(A).” *Gaston v. State*, 227 Ga. App. 666, 669, 490 S.E.2d 198 (1997).

“Any challenge to the procedures used in reading [the defendant] his statutory implied consent warning, OCGA § 40-5-67.1(b)(2), and the proper working of the Intoxilyzer 5000 machine would have been appropriately raised by a motion in limine, which was not done here.” *Goddard v. State*, 244 Ga. App. 730, 731, 536 S.E.2d 160 (2000).

“Those portions of [the defendant’s] motion to suppress alleging non-compliance with Code Ann. § 68A-902.1 or regulations of the Department of Public Safety do not involve ‘constitutional guarantees against unreasonable search and seizure.’ Thus, a motion to suppress is not a proper procedural device to deal with such allegations. That does not mean, however, that such allegations may not be considered prior to trial.” *State v. Johnston*, 249 Ga. 413, 414, 291 S.E.2d 543 (1982), quoting, *Hawkins v. State*, 117 Ga. App. 70, 159 S.E.2d 440 (1967).

A sample motion in limine to exclude breath test results on statutory grounds is attached hereto as Exhibit B.

Effectively Arguing Probable Cause Motions

Success in most probable cause hearings requires us to call into question the credibility of the evidence or the arresting officer.

Credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony.

Tate v. State, 264 Ga. 53, 56, 440 S.E.2d 646 (1994).

A rational trier of fact can choose to reject even “undisputed” testimony if that fact finder believes that witness's testimony to be unreliable. Factors such as demeanor, contradictory or inconsistent statements and evidence that an officer had “ulterior motives” can all lead a finder of fact to disregard testimony by an officer that an accused was violating the law.

Tate v. State, 264 Ga. 53, 56 (fn. 5), 440 S.E.2d 646 (1994).

A Dirty Dozen Rules
by
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1. We influence and-or control most issues that get litigated.
2. We should influence and-or control how most issues get litigated.
3. You do not have to win a motion to have it aid you in the case.
4. Not all issues must be litigated. What we do not litigate may be more important than what we do litigate.
5. Choose your battles. The goal is to win the war.
6. Do not ever underestimate the power of giving the other side the opportunity to muck up.
7. Know when and why to walk away from an issue. Plan on it.
8. Do not assume that the opposition knows anything about what you know.
9. Gratuitously being obnoxious usually accomplishes nothing. Planned obnoxiousness is different.
10. Be careful what you ask for, you may get it.
11. A half-cocked effort will usually produce half-assed results.

not smart enough to make it themselves, you should be smart enough not to teach them their own argument.

To Brief or Not to Brief - That is not really a question.

If you have an issue prior to motions that appears promising, brief it. If the issue is worth researching, it is certainly worth briefing. Preparing a bench brief in support of your motion will help you develop your oral argument and it gives the trial judge something a quick reminder of the arguments in favor of exclusion of the evidence.

Attached as Exhibit C is a bench brief that I prepared in anticipation of a probable cause motion.

Necessary Cases for Every Motions Hearing

Carry your favorite collection of probable cause cases with you to every motions hearing. Know those cases and possess the ability to “fit” your case within those cases. A table, such as the one below, can be useful tool in preparation for a motion to suppress hearing:

	State v. Handley 294 Ga. App. 236 (2008)	State v. Gray 267 Ga. App. 753 (2004)	State v. Batty 259 Ga. App. 431 (2003)	State v. Ellison 271 Ga. App. 898 (2005)	Case at Bar
Basis for Stop	Tag Violation	Traffic Accident	Red light violation and following too closely	Roadblock	Speeding
Odor of Alcohol	Odor of Alcohol (Noted on Test Printout as “Very Strong” but no testimony)	Odor of Alcohol	Odor of Alcohol	Strong Odor of Alcohol	Odor of Alcohol

Admission of Drinking	Initial Denial of Drinking but Later Admission	Admission of Drinking	Admission of Drinking	Initial Denial of Drinking but Later Admission	Admission of Drinking
Appearance of Eyes	Noted on Test Printout as Bloodshot Eyes but no testimony	Bloodshot Eyes	None	Red, Bloodshot, and Watery Eyes	Red and Bloodshot Eyes
Ability to Stand and Walk Normally	No indication	Unsteady Gait	Slight unsteadiness but walked to rear of car fine	No awkward or loss of balance when exiting vehicle	No trouble exiting vehicle, standing, and walking
Alco-Sensor Result	Positive Alco-Sensor Result	Positive Alco-Sensor Result	Positive Alco-Sensor Result	None	Positive Alco-Sensor Result
Dazed	No indication	Dazed Manner	No indication	No indication	No indication
HGN	None	Failed HGN Test	None	Refused and Stated "I've been arrested for DUI before, and I do not think I can do them"	Not Administered
Speech	No indication	Slurred Speech	No indication	No indication	No Slurred Speech
Walk and Turn	No Walk and Turn	No Walk and Turn	Passed	Refused and Stated "I've been arrested for DUI before, and I do not think I can do them"	Not Administered

One Leg Stand	No One Leg Stand	No One Leg Stand	Passed	Refused and Stated "I've been arrested for DUI before, and I do not think I can do them"	Not Administered
Ability to Produce License	Failed to Produce License	No indication	No indication	No indication	Produced license
Summary of Holding	No credibility determination or disputed Facts. Held insufficient to establish probable cause	Affirmed trial court's decision granting motion to suppress.	Affirmed trial court's decision granting motion to suppress	Affirmed trial court's decision granting motion to suppress	

Implied Consent

The implied consent issues identified below are by no means all-inclusive. Further, the cases cited here are those which I have found to be frequently useful. Georgia DUI practitioners are very fortunate in that we have at least two (2) excellent DUI treatises that are updated annually. If you do not have them in your library already, purchase William C. Head and Frank T. Gomez's ***The Georgia DUI Trial Practice Manual*** (West Publishing) and George A. Stein's ***Georgia DUI Law: A Resource for Lawyers and Judges*** (LexisNexis).

Timing of the Implied Consent Warning: After 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.

Hough v. State, 279 Ga. 711, 620 S.E.2d 380 (2005) (emphasis added).

Delay in the Advisement of Implied Consent Warning

[U]nder ordinary circumstances, where advice is not given 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, the results of the state-administered test will not be admissible at trial to show that the accused was driving under the influence of alcohol or drugs.

Perano v. State, 250 Ga. 704, 708 (1983).

Delay in the advisement of the implied consent warning is justified only if there is an indication that the defendant is too intoxicated to understand the warnings or too emotionally distraught, or that the exigencies of the officer's duties warrant delay, or the officer is unaware that the defendant will be charged with violating O.C.G.A. § 40-6-391. *See e.g., Clapsaddle v. State*, 208 Ga.App. 840, 842 (1993); *State v. Fleming*, 202 Ga.App. 774, 776, (1992).

For example, in **Brown v. State**, 265 Ga. App. 129 (2004), a four minute and forty-seven second delay following arrest was warranted only because the officer was required to take several precautionary measures prior to advising the defendant of his implied consent rights, including ensuring that the defendant's motorcycle contained no weapons, ensuring bystanders nearby posed no threat, and searching for the defendant's identification. **Brown** illustrates the necessity of strict compliance, as even a delay of less than five

minutes following arrest must be justified by circumstances warranting a delay.

Misstatement Regarding the Legal Limit

If the defendant submitted to the state-administered test and the officer overstated the legal limit, the results are subject to exclusion. *Kitchens v. State*, 258 Ga. App. 411, 574 S.E.2d 451 (2002).

If the defendant submitted to the state-administered test and the officer understated the legal limit, the results are not subject to exclusion. *Mauer v. State*, 240 Ga. App. 145, 525 S.E.2d 104 (1999).

Coercion to Submit to the Breath Test: “Blow Below and You Go Home”

May an officer induce a defendant to rescind a prior refusal by stating that if he blows below the legal, he will be permitted to leave? No, ***see, State v. Roswell***, 299 Ga. App. 238, 682 S.E. 2d 343 (2009). Be prepared to contrast ***Rowell*** with ***Economos v. State***, 298 Ga. App. 561, 680 S.E. 2d 591 (2009) (an officer’s statement that in order to keep your license, you have to take the state administered test was not misleading information that confused and the defendant into taking the state administered test).

Rescission of the Refusal

A defendant may initially refuse the state-administered test and later rescind the refusal. *State v. Highsmith*, 190 Ga.App. 838, 380 S.E.2d 272 (1989).

What are the circumstances in which a defendant will be deemed to have made an effective rescission of a refusal? See, *Department of Public Safety v. Seay*, 206 Ga. App. 71, 424 S.E.2d 301 (1992), citing, *Standish v. Dept. of Revenue, Motor Vehicle Div.*, 235 Kan. 900, 683 P.2d 1276, 1280 (1984):

A subsequent consent after a refusal to take a chemical test must be made:

- (1) within a very short and reasonable time after the prior first refusal;
- (2) when a test administered upon the subsequent consent would still be accurate;
- (3) when testing equipment is still readily available;
- (4) when honoring the request would result in no substantial inconvenience or expense to the police; and
- (5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest.

Statements Regarding Out-of-State License Being Suspended

Georgia law clearly establishes that when a person that possesses out-of-state license is given incorrect information regarding the effect of a refusal of the state-administered test and the defendant subsequently submits to the state-administered test, the results of the test should be suppressed. ***Kitchens v. State***, 258 Ga. App. 411, 574 S.E.2d 451 (2002)(the trial court erred in failing to exclude the results

of the state-administered breath test where the officer told an Alabama driver's license hold that if she did not submit to the state-administered test, your license is going to be suspended). ***See also, State v. Coleman***, 216 Ga. App. 598, 599, 455 S.E.2d 604 (1995) (suppression of state-administered test required where an out-of-state driver was wrongly told that he would lose his driver's license if he refused testing).

In addressing this issue, the Court in *Deckard v. State*, 210 Ga. App. 421, 423, 436 S.E.2d 536 (1993), stated, "[s]ince the consent was based at least in part on deceptively misleading information concerning 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.'" *Deckard v. State*, 210 Ga. App. 421, 423, 436 S.E.2d 536 (1993).

Independent Test Requests

"O.C.G.A. § 40-6-392(a)(3) gives one accused of driving under the influence the right to 'have a...qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer.'

(Emphasis supplied.) “There can be no question that by judicial interpretation of [O.C.G.A. § 40-6-392] the results of an intoximeter (breath) test which is taken in violation of the protections afforded by [that section] may not be used in evidence against the defendant.”

State v. Hughes, 181 Ga. App. 464, 352 S.E.2d 643, 644 (1987), quoting State v. Johnston, 160 Ga. App. 71, 73, 286 S.E.2d 47 (1981), aff’d on other grounds, 249 Ga. 413, 291 S.E.2d 543 (1982).

OCGA § 40-6-392(a)(3) provides that a person who is accused of DUI and who undergoes a chemical test at the request of a law enforcement officer has the right to have a qualified person of her own choosing administer an additional test. Law enforcement officers have a corresponding duty not to refuse or fail to allow an accused to exercise that right. ‘If an individual requests an independent test but is unable to obtain it, the results of the State-administered test cannot be used by the State as evidence against [her] unless the failure to obtain the test is justified.’

Ladow v. State, 256 Ga. App. 726, 728, 569 S.E.2d 572 (2002) (citations omitted).

The statutory scheme which requires that a DUI suspect be provided with the opportunity to obtain an independent test is intended to “safeguard the Defendant’s equal protection and due process rights to gather exculpatory evidence, i.e., an independent test.” Allen v. State, 229 Ga. App. 435, 438, 494 S.E.2d 229 (1997).

The purpose of providing of a suspect with the right to independent test pursuant to O.C.G.A. § 40-6-392(a)(3) “helps dissipate any feelings the DUI suspect may have of collusion, fraud, or inaccuracy in the [s]tate-administered testing. It also enables the

suspect to obtain independent evidence to refute a possible erroneous [s]tate test result.” Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823 (2008), citing OCGA § 40-6-392(a)(3).

Timing of the Request for an Independent Test

May an independent test be requested prior to implied consent advisement and prior to arrest? Yes, see McGinn v. State, 268 Ga. App. 450, 602 S.E.2d 209 (2004).

Prior to the implied consent warning being read, the defendant stated that he had “heard all that” and requested a blood test. The defendant reiterated his request during the advisement. The officer requests a blood test and the defendant consents to the test. Was this a sufficient independent test request? Yes, see Ladow v. State, 256 Ga. App. 726, 569 S.E.2d 572 (2002).

“An accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.” Ladow v. State, 256 Ga. App. 726, 728, 569 S.E.2d 572 (2002)(citations omitted).

Limitations on Facilities for the Administration of Independent Test

The defendant receives an additional test at a hospital, but he did not receive the test at the hospital he wanted. The arresting agency had a policy which designated where independent tests were to be provided. Is this a sufficient accommodation of an independent

test? No, see *State v. Hughes*, 181 Ga. App. 464, 352 S.E.2d 643 (1987).