

STATE OF GEORGIA

STATE OF GEORGIA,

V.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE TO
EXCLUDE BREATH TEST RESULTS ON STATUTORY GROUNDS

Comes Now, _____, Defendant in the above-styled cases, by and through the undersigned attorney, and files this brief in support of his previously filed motion in limine to exclude the results of the state-administered breath test on statutory grounds. In furtherance of this motion, the Defendant respectfully shows the Court the following:

On February 27, 2010, at approximately 1:52 a.m., Officer Rogers of the Milledgeville Police Department stopped the Defendant for speeding. The Defendant was licensed to drive by the State of Florida (License No.: N620-_____). After speaking with the Defendant, Officer Rogers smelled an odor of alcohol and asked the Defendant to exit his vehicle. The Defendant exited his vehicle and submitted to Officer Rogers's request for a preliminary breath test, which showed positive for the presence of alcohol. Officer Rogers then placed the Defendant in handcuffs. After placing the Defendant under

formal arrest, Officer Rogers attempted to inform the Defendant of his rights under O.C.G.A. § 40-5-67.1.

The following is rough transcript (taken from the video recording of the stop in this case) of the warnings issued by Officer Rogers to the Defendant prior to requesting that the Defendant submit to the state-administered breath test:

This is the Georgia Implied Consent for persons over the age of 21. Alright? Georgia law requires you to submit to a state-administered chemical test of your breath or other bodily substances for the purpose of determining if you are under the influence of alcohol or other drugs. If you refuse this testing, actually your Florida license or privilege to drive on the highways of the state will be suspended 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 the testing and the results indicate an alcohol concentration of .8 (uh-hm) .08 grams or more, your driver's license or privilege to drive on the highways may be suspended for a minimum period of one year. After first submitting to the required test, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances, at your own expense, from a qualified personnel of your choosing. Will you submit to the state-administered test under the Georgia Implied Consent law? Alright.

Georgia Law Requires the Exclusion of the State-Administered Test Results When An Out-of-State Licensee Is Misinformed that a Refusal to Submit to the Test Will Result in the Suspension of Their Driver's License

Georgia law clearly establishes that when an individual that possesses an 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 holder 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 a 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).

The issue is not whether the officer "intentionally misinformed" the Defendant of his Implied Consent rights. Rather, the consideration for the Court is whether the misstatement impacted the Defendant's decisions afforded him by Georgia's Implied Consent notice. *Deckard*, 436 S.E.2d at 538. In *Deckard*, the Court "[found] no suggestion that the officer intentionally misinformed [the Defendant] concerning the penalty for refusal[,]" but excluded the breath test results because "the consent was based at least in part on deceptively misleading information concerning a penalty for refusal, which the State was unauthorized to implement...." *Id.*

In this case, the Implied Consent notice issued to the Defendant by Officer Rogers did not track the language of O.C.G.A. § 40-5-67.1. Officer Rogers incorrectly advised the Defendant that a refusal to submit to the state-administered test

would result in the suspension of his Florida license for a minimum period of one year. The Defendant, relying on the officer's statement, consented to a state-administered breath test. Accordingly, under Deckard, Coleman, and Kitchens, the results of the state-administered breath test should be inadmissible at the trial of this case.

Wherefore, the Defendant respectfully prays that this Honorable Court exclude the results of the state-administered breath test administered upon the Defendant from evidence in the trial of this case.

Respectfully submitted, this ____ day of May, 2010.

D. Benjamin Sessions
Attorney for Defendant
Ga. Bar No.: 141280

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 pleading by depositing it in the United States mail with adequate postage affixed thereon and addressed as follows:

Mr. _____
Cansino
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Respectfully submitted, this ____ day of May, 2010.

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