



GEORGIA COURT HOLDS DRUNK DRIVER TOO INTOXICATED TO CONSENT TO BREATH TEST

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On July 7, 2016, the Court of Appeals of Georgia decided *the State v. Jung*ⁱ, which in which the court of appeals upheld a trial court's grant of a motion to suppress because of a lack of actual consent to the breath test due to level of intoxication of the defendant. The relevant facts of *Jung*, taken directly from the case, are as follows:

[T]he record shows that at approximately 4:30 a.m. on October 2, 2014, the Gwinnett County Police Department responded to a motor vehicle accident on Dublin Ridge Trail in Duluth. The responding officer observed one vehicle with significant rear-end damage pushed onto a curb. He also observed a white convertible with front-end damage nearby. The driver, identified as Jung, was leaning against the vehicle. When the officer approached Jung, he noticed a strong odor of alcohol and saw that his eyes were bloodshot and watery. Jung explained that he was driving down the street after leaving his girlfriend's house and hit the other car. Jung's speech was slurred and mumbled, and he had trouble walking or even standing on his own without support.

When the officer asked if he had been drinking, Jung responded, "Yes, but I don't drinking and driving." He denied needing medical attention and did not appear to have any injuries. Jung agreed to participate in field sobriety evaluations, but the officer had to assist him in walking to a nearby driveway because he was stumbling and staggering. Once away from the road, the officer performed the horizontal gaze nystagmus ("HGN") test and observed six out of six clues, indicating an alcohol concentration of .08 grams or more. The officer then instructed Jung on how to perform the walk and turn evaluation, which indicated eight out of eight clues. Lastly, the officer had Jung perform the one leg stand and observed three of four clues. Based on the results of the field evaluations, the officer asked Jung to blow into a portable breath test. Jung replied, "Yes," and his breath tested positive for alcohol.

Believing that Jung was driving under the influence of alcohol with an alcohol concentration of .08 grams or more, the officer placed him under arrest. After placing Jung

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in the back of his patrol vehicle, the officer read him Georgia's implied-consent notice for drivers over the age of 21. When asked, "Will you submit to the state-administered chemical test of your breath under the implied consent law," Jung responded, "Yes." The officer later testified that he read the notice in a "steady and monotone" voice. He further testified that Jung appeared to understand all of his questions and never indicated that he did not understand or that he needed an interpreter. He denied ever yelling at, using force against, or making promises or threats to Jung. In a supplemental police report, the officer indicated that Jung appeared "confused" and failed to follow instructions on the HGN and one leg stand tests.

At the police station, another officer administered the breath test after instructing Jung in an even tone on how to perform the test. That officer testified that Jung appeared to understand the instructions, did not ask any questions about the test, and never stated that he wished to refuse the test. He also denied ever raising his voice or using force against Jung. Jung was later charged, via accusation, with driving under the influence to the extent it was less safe for him to drive (OCGA § 40-6-391 (a) (1)), driving under the influence per se (OCGA § 40-6-391 (a) (5)), and following too closely.ⁱⁱ

Jung filed a motion to suppress the results of the breath test and argued that he did not voluntarily consent to the breath test. The trial court considered both officer's testimony as well as the fact that one officer testified that Jung seemed confused during HGN and the walk and turn and seemed to have a difficult time following instructions. The court then held that the state was only able to prove that Jung acquiesced to request for a breath test but was unable to prove actual consent to the breath test, and as such, granted the motion to suppress the breath test.

The State appealed the grant of the motion to suppress to the Court of Appeals of Georgia. The State argued that the trial court focused exclusively on the Jung's level of intoxication and did not consider the totality of the circumstances regarding actual consent.

The court of appeals first examined recent precedent from the Supreme Court of Georgia, particularly *Williams v. State*.ⁱⁱⁱ The court stated

Historically, we considered a defendant's affirmative response to the reading of the implied consent notice as sufficient to allow a search of his or her bodily fluids without further inquiry into the validity of the defendant's consent." (Citations omitted.) *Kendrick*, 335 Ga. App. at 769. However, **in *Williams*, the Georgia Supreme Court rejected this rule automatically equating an affirmative response with actual consent to search, holding instead that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant."** *Williams*, 296 Ga. at 822. **Thus, the State is required "to demonstrate actual consent [for state-administered testing] for the purpose of exception to the warrant requirement."** (Emphasis in original.) *Id.* **And in determining whether the defendant gave actual consent to a state-administered breath test, the trial court is required to address "the voluntariness of the consent under the totality of the circumstances."** *Id.* at 823. [emphasis added]

Thus, the rule in Georgia is that acquiescence to the Georgia Implied Consent warning and request for a state administered test does not establish "actual consent." Actual consent to the state administered test must be proven in court and this is based on the "totality of the circumstances. The court then described various factors to be considered in the totality of the circumstances. The court stated

Under Georgia law, "voluntariness must reflect an exercise of free will, not merely a submission to or acquiescence in the express or implied assertion of authority." (Citation and punctuation omitted.) *State v. Bowman*, ___ Ga. App. ___ (Case No. A16A0555, decided on June 7, 2016). **In making this determination, we consider a number of factors, including "prolonged questioning; the use of physical punishment; the accused's age, level of education, intelligence, length of detention, and advisement of constitutional rights; and the psychological impact of these factors on the accused."** (Citations omitted.) *Id.* at ___. And "no single factor is controlling." (Citation omitted.) *State v. Tye*, 276 Ga. 559, 560 (1) (580 SE2d 528) (2003). **Thus, the trial court must "consider whether a reasonable person would feel free to decline the officers' request to search or otherwise terminate the encounter."** (Citations and punctuation omitted.) *Kendrick*, 335 Ga. App. at 769. **"Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent."** (Citations and punctuation omitted.) *Id.*^{iv} [emphasis added]

Further, the court of appeals noted that a person's level of intoxication is a relevant factor to consider in the totality of the circumstances in making a determination of actual consent. The court stated

[A] defendant's level of intoxication may be an appropriate factor in determining the voluntariness of consent under the totality of the circumstances. See *Bowman*, ___ Ga. App. at ___ (affirming trial court's grant of motion to suppress blood test results where trial court relied on evidence that defendant was "significantly intoxicated" when he gave consent to the test). **Our Supreme Court has also held that a high level of intoxication may be sufficient to support a trial court's finding that a statement is involuntary.** *Clay v. State*, 290 Ga. 822, 826 (1) (B) (725 SE2d 260) (2012).^v [emphasis added]

Thus, the court held that it was proper for the trial court to consider the officer's testimony that Jung appeared confused and unable to follow instructions during the HGN evaluation and the walk and turn.

Lastly, court of appeals noted that, although the Supreme Court of Georgia, in *Williams*, was deciding the admissibility of a blood test based on actual consent, that case still applies in the case of a breath test, such as the one in Jung's case.

The court of appeals, then noted that the trial court properly considered the totality of the circumstances in determining whether Jung provided actual consent for breath test. Further, the court of appeals observed that there was no evidence that demanded a finding contrary to the trial court's decision and as such, they will not reverse that court's decision.

Therefore, the court of appeals affirmed the grant of the motion to suppress.

What should Georgia LEO's take from this case?

- Officers must establish that a DUI suspect provided actual consent to a state administered chemical test, rather than simply acquiescing to the Implied Consent Warning.
- Officers should consider, and document through reports and video/audio, all factors relevant to the totality of the circumstances. Write good reports and use video/audio if you have it.
- If a DUI suspect is severely intoxicated to the point the evidence indicates they are confused and unable to comprehend instructions, an officer may consider obtaining a search warrant to obtain a blood sample for the state administered chemical test of the suspect's blood to prevent the argument that the suspect did not provide "actual consent."

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ A16A0527 (Ga. App. Decided July 7, 2016)

ⁱⁱ Id.

ⁱⁱⁱ 296 Ga. 817 (771 SE2d 373)(2015)

^{iv} Id.

^v A16A0527