

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

v.

[REDACTED]

Defendant.

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CRIMINAL ACTION FILE

Numbers [REDACTED]

ORDER

The above case came before the Court on November 14, 2011, on Defendant's Motion in Limine to suppress the refusal to submit to the State administered breath test.

The arresting officer, Officer Dunn, is a member of the DUI Task Force with extensive experience in DUI arrests. His car is equipped with a video recording system, but he testified he was not using his vehicle, but was instead using another car that was not able to record the stop of the Defendant and the administration of field sobriety testing. Officer Dunn testified that he did not know whether the later, pivotal conversation between the Defendant and the officer in the intox administration room was recorded.

Thus, the only evidence presented at the hearing on the motion was the testimony of Officer Dunn and of the Defendant. In the factual setting of this case, the Court finds no reason to prefer the officer's account of the words used in their conversations over the Defendant's account.

Officer Dunn testified that he read to the Defendant the Implied Consent warning. Instead of replying, Defendant stated that he couldn't afford to be arrested or lose his license and asked if the officer couldn't give him a break. The Defendant never responded yes or no to the question of

whether he would take the test, although conversation continued from the Defendant about whether the officer could give him a break and his pressing need to be able to drive for his job. Additionally, it appears that the Defendant made intermittent inquiries about the effect of his arrest or taking or refusing the test on his license.

About an hour later at the Police Department Officer Dunn was filling out the 1205 Form in the intox administration room, and the Defendant still had not indicated whether he would or would not submit to the test. At that point the Defendant asked whether he had to take the test, and Officer Dunn responded he could not force him to take the test. The officer further testified that the Defendant then asked whether he would still be able to get a “permit to drive” if he refused the State administered test. The officer testified that he answered “Yes” — because the 1205 Form allows him to drive until the ALS hearing.<sup>1</sup> The implied consent warning which was read one hour earlier was not repeated, nor did the officer make any reference to the language in the warning about the effect of refusing the test upon the driver’s license.

The Defendant testified that he asked whether he would still be able to have a “license” and doesn’t believe that he used the word “permit.” Had he used the word “permit,” the Defendant testified that he did not know about permits and would not have understood the difference. The Defendant testified that he thought he asked whether he would lose his “license,” but it is possible he may have asked if he would lose the privilege or the ability to drive.

Defendant testified that because the answer he received was “Yes,” that he would still be able to drive, he refused the State administered test. His testimony about his own thinking is

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<sup>1</sup> In actuality, this is true only if a hearing is requested within 10 days. Otherwise, it becomes ineffective after 30 days.

clearly supported by the circumstantial evidence of both witnesses' testimony concerning the rest of the conversation and the sequence of events. The Court finds that the Defendant consented to the test only because of the response to his question.

Relying on *State v. Terry*, 236 Ga. App. 248, 511 S.E.2d 608 (1999), the defense argued that the officer's inaccurate information about the Defendant's ability to continue driving misled him into his refusal to take the State administered test.

The State relied on *McHugh v. State*, 285 Ga. App. 131, 645 S.E.2d 619 (2007), which held that a vague and indefinite introductory statement preceding the reading of the Informed Consent warning was only meant to draw the Defendant's attention to the recitation of the statutory notice and thus did not constitute grounds for excluding the breath test results.

The Court finds that *McHugh* is distinguishable from this case because the misleading statement at issue was more than just an attention getting device. Further, in *McHugh*, the more specific language of the implied consent warning followed the vague statement. Here the Defendant asked questions about licensing and his ability to drive, which was necessary to his work. The Court does not find it necessary to determine whether the word "license" or "permit" was used in the ultimate question from the Defendant. It is clear from the preceding conversation between the Defendant and the officer that the Defendant was asking whether he could drive in the long term, not until he received an ALS hearing to determine whether his consent to or refusal of the test was valid. Any reasonable person in the position of the officer would have understood that the Defendant was not asking about driving for 30 days or until he had an ALS hearing - an unknown procedure to the average driver. The Defendant refused the test because

the officer gave a response that falsely implied that the Defendant would be able to drive in the long term, even if it was couched in terms that could be argued were technically not false - the 1205 Form paperwork that allows a Defendant to drive for thirty days being a "permit."

O.C.G.A. §40-5-67 (b) (1). The Court finds that any reasonable officer would understand that the Defendant was asking about the long term ability to drive to work,<sup>2</sup> regardless of the exact wording used.

Thus, for the foregoing reasons, the Court finds that the officer's responses to the Defendant's questions were misleading and were relevant to his decision whether or not to agree to the State administered test.

ACCORDINGLY, the Motion in Limine is GRANTED.

SO ORDERED, this 16th day of November, 2011.

[REDACTED]

STATE COURT OF DEKALB COUNTY

Copy to: All Parties [REDACTED]

cc Solicitors  
cc Public Def  
ATY for Def

FILED IN THIS OFFICE  
THIS ~~TODAY~~ 15<sup>th</sup> OF NOV 2011  
[Signature]  
Clerk, State Court, DeKalb County

<sup>2</sup> For someone with a modicum of understanding about license suspensions, a question about a "permit" would have likely referred to a temporary permit to drive to work and other specified locations during a license suspension.