# JACKSON V. THE STATE. A16A1807
# FEBRUARY 15, 2017, Georgia Court of Appeals:

## Was the Test for Alcohol or Drugs? Or Both?

**by: Margaret Gettle Washburn, Sr. Cont. Ed.**

In the recent case of Jackson v. State, the Court of Appeals held that the evidence supported finding that defendant provided actual consent for warrantless blood draw to check for alcohol and drugs. In writing for the Court, Presiding Judge Barnes stated that the Defendant, Abraham Lincoln Jackson was charged with driving under the influence of drugs to the extent he was a less safe driver, possession of less than an ounce of marijuana, and speeding. The Defendant filed a motion to suppress, which the trial court denied after a hearing. The Court of Appeals granted Jackson's application for an interlocutory appeal, and after reviewing the hearing transcript, the Court affirmed the trial Court.

In his first enumeration of error, the Defendant Jackson argued that the trial court erred in finding that he gave actual consent to have his blood drawn, and erred in holding that OCGA § 40–6–392 (a) (2) authorizes the testing of blood for drugs as well as alcohol.

The Defendant moved to suppress the results of his blood test on the grounds that no exigent circumstances supported a warrantless search and that he did not give actual consent to the blood withdrawal, citing *Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (2015). The Supreme Court in *Williams* noted that a warrantless search is constitutional only if exigent circumstances are present or the suspect consents to the search, and "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."

The State did not contend that exigent circumstances were present in this case. Thus, one issue was whether or not the Defendant Jackson gave actual consent to the search. The Defendant contended that the State failed to produce evidence addressing the issue of actual consent other than strict compliance with the implied consent law, and since mere compliance alone is legally insufficient to establish actual consent, the trial court erred. The Court of Appeals disagreed.

The Court considered a “host of factors” in determining if the consent was voluntary. A consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. The defendant's affirmative response to the implied consent notice may itself be sufficient evidence of actual and voluntary consent, absent reason to believe the response was involuntary. The defendant's failure to express an objection to the test or change his or her mind also is evidence of actual consent. See *Jacobs v. State*, 338 Ga.App. 743, 749 (2), 791 S.E.2d 844 (2016).

The trial court correctly found under the totality of the circumstances that Defendant Jackson freely and voluntarily consented to the blood test. The arresting officer testified that he stopped Jackson for speeding and spoke with the Defendant and found probable cause that he was under the influence. He stated that after he arrested Jackson and read him the implied consent language, the Defendant “agreed to the testing.” That affirmative answer to the question posed by the implied consent language is necessarily part of the totality of the circumstances to be considered by the trial court.

The officer testified that the Defendant was transported to the sheriff's office, and he voluntarily extended his arm to have his blood drawn. No evidence indicates that the officer “used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent.” *Cuaresma v. State*, 292 Ga.App. 43, 47 (2), 663 S.E.2d 396 (2008). Further, the Defendant did not argue that youth, lack of education, or low intelligence somehow “negated the voluntariness of his consent”.

The Defendant also argued that law officers are not authorized to request blood testing for drugs, but may request “blood testing for alcohol only.” However, the Defendant did not contend in this appeal that the results of his blood test should be suppressed because an unqualified person drew his blood. The trial court found that “the consent, based upon Georgia's statutory scheme for DUI as a whole and OCGA § [40-6-392 (a) (2) ] in particular is not limited to testing for alcoholic content only, and the State is authorized to test the substance for the presence of drugs.”

The Defendant’s argument was based solely on the language of OCGA § 40–6–392 (a) (2), considered in isolation, which provides, in part: “When a person shall undergo a chemical test at the request of a law enforcement officer, only a physician, registered nurse, laboratory technician, emergency medical technician,

*or other qualified person may withdraw blood for the purpose of determining the alcoholic content therein…"*

The Court of Appeals disagreed with the Defendant's "view of the plain meaning of this subsection. It does *not* provide that the State may only draw blood for the purpose of determining the alcoholic content; instead, it states *who* may draw blood "for the purpose of determining the alcoholic content therein." OCGA § 40–6–392 (a) (2). The fact that only qualified persons may withdraw blood to ascertain the presence of alcohol does not mean that the law enforcement officers have no authority to obtain a blood draw for the purpose of detecting drugs."

The Court noted: "40-6-392 provides, in pertinent part: (a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40–6–391, *evidence of the amount of* alcohol or *drug in a person's blood*, urine, breath, or other bodily substance at the alleged time, *as determined by a chemical analysis of the person's blood*, urine, breath, or other bodily substance *shall be admissible*…"

Further: "OCGA § 40–6–392 "provides for the procedures to be used where the [S]tate administers the test. Thus, if a State-administered test complies with the statutory requirements in OCGA § 40–6–392 (a), the test results 'shall be admissible,' and conversely, if the State-administered test does not comply with the statute, it is inadmissible." *State v. Padgett*, 329 Ga.App. 747, 750 (1), 766 S.E.2d 143 (2014)."

The Court of Appeals found that the Defendant did not present evidence showing that the State-administered blood test for drugs did not comply with the statute; and found: "OCGA § 40–6–392 (a) (2) does not apply. And contrary to Defendant **Jackson's** argument on appeal, the fact that the Legislature did not mandate particular procedures for a chemical analysis of blood to detect the presence of drugs does not render such chemical analysis inadmissible".

The Court considered the law and the facts in the record, including that the trial court that heard the officer's testimony first-hand. Accordingly, the trial court did not err in denying the Defendant's **motion** to **suppress**.