HERNANDEZ v. The STATE.

The Implied Consent: "Is that just like a Georgia thing?

Hernandez v. State, No. A18A1638, (Ga. Ct. App. Feb. 11, 2019)

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The Defendant, Amanda Hernandez, appealed the denial of her motion to suppress the results of her blood test following her arrest for DUI. Because her consent to the blood test was premised on inaccurate information as to the consequences of refusing consent, the Court of Appeals reversed the trial court's ruling.

The Court of Appeals, Judge Barnes, Presiding Judge, found that: "[O]n a motion to suppress, the State has the burden of proving that a search was lawful." *State v. Hammond*, 313 Ga. App. 882, 883-884, 723 S.E.2d 89 (2012) Thus, "when relying on the consent exception to the warrant requirement, the State has the burden of proving that the accused acted freely and voluntarily under the totality of the circumstances." *Williams v. State*, 296 Ga. 817, 821, 771 S.E.2d 373 (2015). Where, as here, the relevant facts are undisputed, this Court's review is de novo. *State v. Oyeniyi*, 335 Ga. App. 575, 575-576, 782 S.E.2d 476 (2016)".

As per the testimony at the hearing, Hernandez was stopped by a Georgia State Patrol trooper for speeding on October 2, 2015. At the stop, Hernandez produced a valid Washington State driver's license, but when the trooper noticed the odor of alcohol, he began a DUI investigation. A portion of the conversation exchange was included:

Trooper: No, you don't have to. You asked—
Hernandez: But if I don't, you'll—suspend my license?
Trooper: Yes.
Hernandez: If what? No matter what?
Trooper: Yes.
Hernandez then again agreed to the blood test in the following exchange:
Hernandez: Is that just like a Georgia thing?
Trooper: That's—pretty much an everybody thing.
Hernandez: So—really?
Trooper: Uh-huh.
Hernandez: So—I guess, whatever.

The trooper transported Hernandez to a nearby hospital for the blood draw. At the hearing, he testified that Hernandez did not rescind her consent in the "two to three minutes" drive to the hospital or at the hospital. The Defendant did not testify at the hearing.

The trial court denied the Defendant's motion to suppress the results of the test, and found that the trooper read all portions of the implied consent law in a timely manner after arrest, and did so more than once and explained the options when the defendant asked questions; that the defendant was not under duress when she agreed to give a sample of her blood; that she voluntarily provided her arm for the blood draw and was not forced or coerced to do so.

On appeal, the Defendant argued that the trial court erred in denying her motion to suppress because although she had initially consented to providing a blood sample after the implied consent notice was read, during the ensuing discussions with the trooper, she withdrew her consent and only consented again when the trooper erroneously told her that her Washington license would be suspended if she refused. The opinion set out the Implied consent notice for drivers age 21 in full.

OCGA § 40-5-51 (a) provides that, "[t]he *privilege* of driving a motor vehicle on the highways of this state given to a **nonresident** under this chapter shall be subject to suspension or revocation by [Georgia's Department of Driver Services ("DDS")] only when suspension or revocation is required by law for the violation." (Emphasis supplied.) Thus, generally, "DDS has no authority to suspend or revoke the driver's license of a nonresident motorist." *State v. Barnard*, 321 Ga. App. 20, 23 (1), 740 S.E.2d 837 (2013). Emphasis supplied.

The Defendant argued that the trooper made a misstatement of the implied consent, and that such was so material as to invalidate her consent.

The Court of Appeals found: "[t]he determinative issue ... is whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing. Even when the officer properly gives the implied consent notice, if the officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing, the defendant's test results or evidence of his refusal to submit to testing must be suppressed. The suppression of evidence, however, is an extreme sanction and one not favored in the law."

The Court further stated: "We have held that an implied consent notice that misinforms the holder of an out-of-state driver's license that refusal to submit to state testing will result in revocation of the out-of-state license is "the type of misleading information" that impedes a suspect's ability to make an informed choice under the implied consent statute and thereby renders ensuing test results inadmissible. *Kitchens v. State*, 258 Ga. App. 411, 414 (1), 574 S.E.2d 451 (2002); accord *State v. Peirce*, 257 Ga. App. 623, 625 (1), 571 S.E.2d 826 (2002)."

The Court found that although the trooper told Defendant Hernandez twice, and accurately, that a refusal to submit to a blood test would result in the suspension of her driving privileges in Georgia, the last two exchanges indicated that Hernandez believed that her Washington driver's license would be suspended if she refused a blood test. After Hernandez asked, "Is that just like a Georgia thing?", the trooper told her that that it is "pretty much an everybody thing."

The State argued that the Defendant had consented to the blood tests twice, "thus had already made her decision before the misleading statement". The Court found, however, the evidence also showed that the Defendant had rescinded her consent more than once during the exchange. She finally consented only after she appeared to believe that her Washington license would be revoked if she refused. Therefore, the Court of Appeals could not find that "the statement did not coerce Defendant Hernandez to consent to the state-administered test, and thus the trial court erred in denying her motion to suppress", thus reversing the trial court's ruling.