**DUI #2 EPISODE NOTES**

**(Recent Changes to DUI Law)**

**Wade: Hello folks, and welcome to episode #2 of our DUI series here on The Good Judge-ment Podcast. I’m Wade Padgett**

*Tain: And I’m Tain Kell. Still, the happily retired former judge.*

**Wade: We have fooled Judge Studdard into staying with us to serve as our guest expert on DUI law. We hope to keep fooling him into hanging around for the whole series.**

*Tain: His impressive background and expertise has been discussed on a prior episode. Welcome back, Judge Studdard!*

***Ben: \_\_\_\_\_\_ (your call)***

**Wade: In episode #1 of this series, we discussed the relevant statutes, elements of proof and penalties relating to DUI.**

*Tain: Today, we are going to address some of the recent changes to DUI law that began with a series of appellate decisions and ended with some modifications to the relevant statutes by the Georgia Legislature. Honestly, if you missed episode #1 of this DUI series, you need to listen to that episode first.*

**Wade: We began episode #1 with a reminder that DUI is a criminal offense and that the constitutional provisions that apply to felony cases equally apply to DUI cases. That painfully obvious point is going to be discussed in some detail in this episode.**

1. The landscape of DUI has really changed in the last few years and for those who may not have been keeping a close eye on the developments, we wanted to spend some time discussing a few appellate cases and the resulting changes made by the Ga. Legislature.
2. Specifically, we plan to discuss a few cases that are important to understand:
   1. *Elliott v. State, Olevik v. State, Williams v. State, Awad v, State* and *State v. Bradberry* are all going to be discussed during this episode.
      1. We know that *Elliott* alone is several hundred pages in length – we are going to get into the weeds a bit, but not the roots of the weeds.
   2. Let’s start with *Elliott* because that is the case that most people discuss but understand that it was not the first case decided within this series of decisions.
3. ***Elliott*:** Decided Feb, 2019.[[1]](#endnote-1) Supreme Ct. of Ga. noted that the defendant has the right to refuse to submit to state-administered breath testing and the defendant’s decision to refuse testing **cannot** be admitted into evidence in the subsequent trial.
   1. A criminal defendant in any criminal proceeding (including DUI) is not required to perform any act which might incriminate him/her and, therefore, the fact that the defendant exercised his/her right to refuse to participate in an “act” cannot be introduced into his/her trial.
      1. “So Elliott argues to us that Paragraph XVI gives her protection that the Fifth Amendment does not, and thus renders invalid the portions of the statutes allowing her refusal to be admitted against her. We agree.”**[[2]](#endnote-2)**
   2. O.C.G.A. § 40-5-67.1 requires officers seeking to have a defendant submit to state-administered testing read verbatim the applicable Implied Consent Warnings (“ICW”) at the time of the arrest for DUI.
      1. A part of the statutory ICW in effect when *Elliott* was decided required the officer to advise the defendant, “[y]our refusal to submit to the required testing may be offered into evidence against you at trial.” However, that statement was actually an incorrect statement of law.
      2. The defendant cannot be compelled to perform an incriminating act – see Ga. Const. discussion in Episode #1 of this series. (We discussed a def. charged with armed robbery can elect not to speak with officers and that decision cannot be admitted – no difference for DUI case)
      3. His/her decision to exercise that right to refuse testing cannot be introduced at trial.
      4. Therefore, the defendant was making a decision as to whether he/she would provide a breath sample based upon faulty information.
   3. This legal problem forced the *Elliott* Court to find that “O.C.G.A. §§ 40-5-67.1 and 40-6-392 are unconstitutional to the extent that they allow a defendant’s refusal to submit to a breath test to be admitted into evidence at a criminal trial.”**[[3]](#endnote-3)**
4. ***ELLIOTT* WAS NOT COMPLETELY UNEXPECTED:** In 2015, the Supreme Court issued their opinion in *Williams v. State*.**[[4]](#endnote-4)**
   1. In *Williams*, the State argued that because a person naturally metabolizes alcohol, the “evidence” of the defendant’s level of intoxication will eventually disappear due to natural metabolism. Prosecutors argued that the “exigent circumstances” exception to the Warrant Requirement should be applicable.[[5]](#endnote-5) The Court in *Williams* rejected that argument.
   2. The Supreme Court of Georgia rejected the “exigent circumstances” argument and found that the State must either be granted a search warrant for the defendant’s bodily fluids or obtain the sample under one of the other recognized exceptions to the Warrant Requirement.**[[6]](#endnote-6)**
      1. Of course, one of those recognized exceptions is a search conducted with the consent of the defendant.
   3. **“Consent” Exception to Warrant Requirement:** No warrant is required prior to conducting a search where a defendant consents to the search.[[7]](#endnote-7) However, for that consent to be valid, the consent must be given “freely and voluntarily under the totality of the circumstances.”**[[8]](#endnote-8)**
      1. That showing is required in all cases where it is alleged that the defendant consented to a search, whether it is a breath test in a DUI case,[[9]](#endnote-9) or a search of a vehicle in a drug case.
      2. Therefore, the Court in *Williams* remanded the case back to the trial court for a determination of whether the defendant gave “actual consent” to the testing of his blood. They directed the trial court to conduct a hearing and determine the voluntariness of the consent under the totality of the circumstances.**[[10]](#endnote-10)**
5. The Supreme Court decided the case of *Olevik v. State* in 2017.[[11]](#endnote-11) The *Olevik* Court found that Georgia’s Constitutional provisions provide more rights than are included in the U.S. Constitution (sound familiar? Listen to episode #1 of this podcast series on DUI law).
   1. Those additional rights include the right to not be required to provide a “deep lung air” sample as part of a criminal investigation. When the Intoxilyzer 9000 is being used, the defendant must provide “deep lung air” to create a breath sample that is capable of being analyzed by the machine. It is insufficient for the sample submitted to consist of air captured through “regular” breathing.[[12]](#endnote-12)
   2. The *Olevik* Court reaffirmed its prior decisions that provided that there is no constitutional violation where a defendant is compelled only to be present so that incriminating evidence can be procured from him/her.[[13]](#endnote-13) However, requiring the defendant to perform an act (i.e. sustained blowing into a machine) is unconstitutional under the **Georgia** Constitution.
      1. “In sum, Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence; it does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence.”[[14]](#endnote-14)
      2. The *Olevik* Court found that requiring a defendant to perform the act of blowing into a machine with sufficient volume to produce a sample adequate for testing is different from requiring the defendant to be present and have a blood sample taken. The Court also made another important point.
   3. “It is important to recognize that while these situations do not implicate the right against compelled self-incrimination, the taking of physical evidence from a suspect often will constitute a search under the Fourth Amendment and Paragraph XIII, for which a warrant or an exception to the warrant requirement, such as consent or search incident to arrest, is required.”[[15]](#endnote-15)
6. In short, the Supreme Court had been narrowing the scope and admissibility of state-administered testing for several years before deciding *Elliott*. The decisions in *Olevik* and *Elliott* made references to prior cases where the Supreme Court found several aspects of the existing ICW to be problematic.
   1. Specifically, the Court noted that the portions of the ICW that inform a driver that her refusal to submit to testing could be offered into evidence and that refusal “may lead to a driver’s license suspension” (as opposed to “shall result in suspension”) were problematic for the Court.
7. The majority decision and the concurring opinion in *Elliott* both hold that this decision only affects cases involving ***breath*** testing and does not impact ***blood*** testing.
   1. Footnote 30 of the majority opinion in *Elliott* states, “Although as we discussed in *Olevik*, this Paragraph XVI analysis is limited to breath tests.” (cits omitted)
   2. They note that in *Olevik*, they held “’Nothing we say here should be understood as casting any doubt on *Strong’s’* holding that Paragraph XVI was not implicated by a blood test.”**[[16]](#endnote-16)** The concurring opinion noted, “[T]he scope of these decisions is limited to chemical tests of a driver’s breath; they do not apply to tests of a driver’s blood.”**[[17]](#endnote-17)**
   3. Stated another way, taking blood from a suspect does not require the suspect to give self-incriminating “testimony” under the Georgia Constitution. The cases on this subject make a large distinction between requiring a suspect to “testify” by performing an act (like providing a deep lung breath sample) and requiring a suspect to present himself for the authorities to collect naturally occurring evidence such as blood.
   4. However, those decisions addressed compelled breath tests (*Olevik*) and refusal to submit to compelled breath tests (*Elliott*). There remained a question as to how the law would treat urine tests, the third available state-administered testing option. That question has now been answered.
8. When *Elliott* was decided, there was a real question presented relating to ***urine tests*** and whether they would be valid under the logic of the *Elliott* decision.[[18]](#endnote-18)
   1. *Elliott* made it clear that Article I, Section I, Paragraph XVI of the Georgia Constitution prohibits “the State from admitting into evidence both the results of a compelled state-administered breath test and a defendant’s refusal to submit to a state-administered breath test.”[[19]](#endnote-19)
   2. The focus of the *Elliott* decision, as noted above, was the Georgia Constitution’s provisions relating to self-incrimination that exceed those afforded under the U.S. Constitution.
   3. If requiring a defendant to provide a sample of “deep lung” air was prohibited, would not it also be prohibited for a defendant to be required to urinate upon an officer’s demand into a collection cup?
   4. The Supreme Court had the opportunity to address that exact issue in *Awad v. State* and held that the right against compelled self-incrimination protected by Georgia’s Constitution would also result in the exclusion from evidence any refusal of a defendant to submit to a state-administered test of his/her urine.[[20]](#endnote-20)
9. Although the decision in *Awad* is rather detailed, it merely restates many of the principles announced in *Olevik*, *Elliott*, and the decisions that followed. Because providing a urine sample requires the defendant to urinate into a collection cup “on demand,” it is barred by the right against self-incrimination afforded under the Georgia Constitution.
10. **GA. LEGISLATURE REWROTE O.C.G.A. § 40-5-67.1 IN RESPONSE TO *ELLIOTT***
    1. During 2019 Session, Ga. Legislature rewrote the Implied Consent Warnings (“ICW”) (§ 40-5-67.1) to match the holding in *Elliott*.
    2. The new version of § 40-5-67.1 retained the general style of the prior ICW (i.e. different ICW for drivers under 21, drivers over age 21 and different ICW for drivers of commercial motor vehicles).**[[21]](#endnote-21)**
    3. The revised § 40-5-67.1(b)(2) (ICW for drivers over the age of 21), provides:

(b)(2) Implied consent notice for suspects age 21 or over:

The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state-administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state ***will be*** suspended for a minimum period of one year. Your refusal to submit to ***blood or urine*** testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state-administered chemical tests of your (designate which test)? (emphasis supplied).

* + 1. There are corresponding new provisions applicable to drivers under the age of 21 and drivers of commercial vehicles.
  1. The new statute specifically addressed the concerns expressed in *Elliott* and *Olevik*.
     1. The new ICW statute clarified that a refusal to submit to the state-administered testing ***will*** result in a suspension of the driver’s license or privilege of driving on the highways of this state. The new statute also provides that refusal to submit to blood or urine testing ***may*** be offered into evidence. [[22]](#endnote-22)
     2. The new ICW statute omits the language from the prior version of the statute which the *Elliott* Court found was improper - that refusal to commit the acts necessary to generate breath testing would be offered into evidence.

1. **REFUSAL TO SUBMIT TO PRE-ARREST TESTING ALSO INADMISSIBLE FOLLOWING *ELLIOTT***
   1. The decisions in *Williams, Olevik, Elliott* and *Awad* clarify that a defendant’s refusal to submit to state-administered testing (post-arrest testing) cannot be introduced into evidence against the defendant.
   2. The logical next question is how those decisions apply to standardized field sobriety testing – pre-arrest testing or screening that law enforcement officers typically use in determining whether there is probable cause to make an arrest.
      1. Tests such as the Walk and Turn (“WAT”), One Legged Stand (“OLS”) and Horizontal Gaze Nystagmus (“HGN”) are considered standardized field sobriety tests. The Alco-sensor is also considered a valid field sobriety test
      2. (One day, we will record an episode that gets into the weeds on these tests – for now, just understand these are the only field sobriety tests we are discussing today)
   3. If a defendant’s decision to refuse to participate in post-arrest testing cannot be introduced into evidence, do those same principles apply to pre-arrest testing?
      1. Logic says “yes” but now the Georgia Court of Appeals has specifically answered the question in the affirmative.
   4. In *State v. Bradberry*,[[23]](#endnote-23) the defendant refused to provide a breath sample for an alco-sensor test. The defendant in *Bradberry* reused to provide a breath sample and, during trial, that ruled inadmissible by the trial court. State appealed.
      1. Understand there was existing case law that had held that refusal to submit to a field sobriety test *was* admissible.[[24]](#endnote-24) All decided long before *Elliott*.
   5. On appeal, the Ga. Ct. of App. held in *Bradberry* that, based upon the logic of *Elliott* the trial court made the correct decision – refusal to submit to pre-arrest testing is NOT admissible.
      1. They acknowledged that pre-arrest testing via field sobriety tests are different from post-arrest state-administered testing. But they concluded the principles applicable to post-arrest testing applies equally to pre-arrest testing.
   6. A subsequent decision in *State v. Ortiz*[[25]](#endnote-25) reaffirmed the *Bradberry* decision that refusal to submit to standardized field sobriety testing is not admissible at trial. (yes, *Ortiz* was decided in May 2022 – we are mighty current here on the Good Judge-ment Podcast).

**Wade: Well let’s recap what we’ve learned today. Georgia appellate courts have found that refusal to submit to post-arrest testing is not admissible at trial.**

*Tain: As a result of those decisions addressing post-arrest testing in a DUI case, the Ga. appellate courts have concluded that refusal to participate in pre-arrest testing is also inadmissible at trial.*

***Ben: All of these decisions are consistent with older Ga. precedent that concluded that the rights afforded by the Ga. Constitution are greater than those afforded by the US Constitution. Any time a defendant is asked to perform an “act” that might tend to incriminate him/her, the defendant can refuse that request. And that refusal is not admissible at trial.***

**Wade: As always, our episode outline that can be found at goodjudgepod.com, together with citations to authority for all of these different points of law we have discussed.**

*Tain: We are going to continue this series on DUI law and it will ultimately include several different episodes. You don’t want to miss any part of this exciting series, so be sure to follow The Good Judge-ment podcast on your favorite platform and “like” us, just for fun!*

**I’m Wade Padgett**

***I’m Ben Studdard***

*And I’m Tain Kell… [insert funny thing – consider comedian Ron White’s bit about having the right to remain silent, but not having the ability to do so]*

1. *Elliott v. State*, 305 Ga. 179 (2019). [↑](#endnote-ref-1)
2. *Elliott v. State*, 305 Ga. 179 (2019). [↑](#endnote-ref-2)
3. *Elliott v. State*, 305 Ga. 179 (2019), p. 91 of slip opinion. [↑](#endnote-ref-3)
4. *Williams v. State*, 296 Ga. 817 (2015). [↑](#endnote-ref-4)
5. Exigent circumstances is another recognized exception to the Warrant Requirement. Not frequently relied upon but it was discussed extensively in *Williams*. [↑](#endnote-ref-5)
6. *Williams v. State*, 296 Ga. 817, 821 (2015), as discussed in *Olevik v. State*, 302 Ga. 228, 233 (2017). [↑](#endnote-ref-6)
7. *Olevik v. State*, 302 Ga. 228, 234 (2017), citing *Williams v. State*, 296 Ga. 817, 821 (2015). [↑](#endnote-ref-7)
8. *Williams v. State*, 296 Ga. 817, 821-822 (2015), citing *Cooper v. State*, 277 Ga. 282, 285 (2003). [↑](#endnote-ref-8)
9. *State v. Bradberry*, 357 Ga. App. 60, 62-63 (2020). [↑](#endnote-ref-9)
10. *Williams v. State*, 296 Ga. 817, 823 (2015). [↑](#endnote-ref-10)
11. *Olevik v. State*, 302 Ga. 228 (2017). [↑](#endnote-ref-11)
12. *Olevik v. State*, 302 Ga. 228, 242-244 (2017) (“If the State sought to capture and test a person's naturally exhaled breath, this might well be a different case. But this is not how a breath test is performed. Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself. Indeed, for the State to be able to test an individual's breath for alcohol content, it is required that the defendant cooperate by performing an act.”) [↑](#endnote-ref-12)
13. *Olevik v. State*, 302 Ga. 228, 242 (2017); See *Drake v. State*, 75 Ga. 413, 414-415 (1885) (taking blood-stained clothes from defendant); *Quarterman v. State*, 282 Ga. 383, 386 (2007) (taking DNA sample from defendant); *State v. Thornton*, 253 Ga. 524, 525 (1984) (taking impression of defendant’s teeth); *Strong v. State*, 231 Ga. 514 (1973) (taking blood from unconscious defendant). [↑](#endnote-ref-13)
14. *Olevik v. State*, 302 Ga. 228, 243 (2017). [↑](#endnote-ref-14)
15. *Olevik v. State*, 302 Ga. 228, n. 9 (2017). [↑](#endnote-ref-15)
16. *Elliott v. State*, 305 Ga. 179 (2019), p. 90, n. 30 of slip opinion. [↑](#endnote-ref-16)
17. *Elliott v. State*, 305 Ga. 179 (2019), p. 1 of concurrence in slip opinion. [↑](#endnote-ref-17)
18. We have specifically discussed this exact issue during judge training and I opined that urine testing requires the defendant to perform an act (i.e. urinate) which is prohibited under the Georgia Constitution. This section of the bench book confirms that my suspicions were correct. [↑](#endnote-ref-18)
19. *Awad v. State*, \_\_ Ga. \_\_, 868 S.E.2d 219 (2022). [↑](#endnote-ref-19)
20. *Awad v. State*, \_\_ Ga. \_\_, 868 S.E.2d 219 (2022). [↑](#endnote-ref-20)
21. HB 471, 2019-2020 Regular Session of the Georgia Legislature, passed March 21, 2019. [↑](#endnote-ref-21)
22. Although the decisions clearly indicate that the refusal to submit to state-administered testing cannot be admitted at trial, the revised version of § 40-5-67.1 retained the language, “Your refusal to submit to blood or urine testing may be offered into evidence against you at trial.” We offer no opinion as to whether the continued inclusion of this language will impact future cases. [↑](#endnote-ref-22)
23. *State v. Bradberry*, 357 Ga. App. 60, 65-66 (2020). [↑](#endnote-ref-23)
24. *Long v. State*, 271 Ga. App. 565 (2004); *Keenan v. State*, 263 Ga. 569 (1993). The *Bradberry* Court did not attempt to distinguish or even address the decision in *Keenan*. Admittedly, *Keenan* was decided long before *Elliott* and *Olevik* were decided. However, in another decision, the Supreme Court commented on the holding in *Keenan* with approval while discussing the impact of *Elliott* and *Olevik* on another argument in a DUI case. *State v. Turnquest*, 305 Ga. 758, 771-772 (2019). [↑](#endnote-ref-24)
25. *State v. Ortiz*, No. A22A0474, 2022 WL 1492851, at \*6-7 (Ga. Ct. App. May 4, 2022). [↑](#endnote-ref-25)