**DUI #3 EPISODE NOTES**

**(ICW Law and “Actual Consent”)**

**Wade: Hello folks, and welcome to episode #3 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 continue to have the benefit of Judge Studdard’s experience and expertise through his guest expert appearance.**

*Tain: He might be our newest FOP (Friend of the Podcast) with this third appearance.. 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: In episode #2, we discussed the recent changes to DUI law and the appellate decisions that have framed those changes. Honestly, if you missed episode #1 or 2 of this DUI series, you need to listen to those episodes first.*

***Ben: Today, we are going to discuss Implied Consent Law and the idea of “actual consent” that must be proven if the prosecution intends to rely upon the consent exception to the Warrant Requirement.***

*Tain: Done like a true host – nice job Judge Studdard.*

**Wade: We need to define some terms before launching into this episode. You may hear us refer to “ICW” – that is the shorthand for Implied Consent Warnings that can be found in O.C.G.A. § 40-5-67.1. You may also hear us reference the Warrant Requirement. Tain, tell the people what we mean by the “Warrant Requirement.”**

*Tain: The US Constitution (and Ga. Constitution, for that matter) provides that no search shall be conducted without a search warrant, issued by a neutral and detached magistrate. The 4th Amendment, therefore, establishes that, generally, a warrant is required before a search can be conducted – hence the shorthand phrase "Warrant Requirement”*

***Ben: However, there are recognized exceptions to the Warrant Requirement that are well-defined and established by law. We are going to discuss some of those exceptions to the Warrant Requirement in this episode – but this is no constitutional law 101 so we are really only going to focus on the consent exception to the Warrant Requirement. There are others, but that is our focus.***

1. One thing that needs to be said as we continue this series is that officers who have probable cause can always apply for a search warrant to obtain a sample of the blood of someone suspected of DUI.
   1. The presence of a search warrant really eliminates much discussion concerning ICW and consent to search
   2. The reason we do not see more search warrants in DUI cases is because they take time and effort to obtain – usually waking a judge in the middle of the night – and if the defendant consents to the search of his breath, blood or urine, there is no need for a search warrant.
   3. We also need to be clear that even if the defendant refuses to submit to post-arrest testing, the officer can seek a search warrant and obtain the sample without the defendant’s consent. (usually blood – can’t really get a forced sample of breath or urine – that would be a rather messy procedure….)
2. We also need to quickly address the collateral penalties associated with refusal to consent to a test. We have established that refusal cannot be admitted into evidence – but there is a wholly separate procedure known as the Administrative License Suspension ("ALS") that comes into play here.[[1]](#endnote-1)
   1. If the officer makes the arrest for DUI (and can prove probably cause for the arrest), and the ICW are read, if the defendant refuses to consent to testing, his/her “driver’s license or right to drive in Georgia” will be suspended for 1 year (additional suspensions if 2nd or subsequent suspension in previous 5 years).[[2]](#endnote-2)
   2. We do not want to venture off topic too much here but understand that even if the refusal is not admissible in court in the DUI prosecution, the refusal can be used to administratively suspend the driver’s license (if a Ga. licensee) or right to drive in Ga. (if licensee of another state).
   3. What we are focused on today is the situation where an officer has made a traffic stop and, through investigation, believes the driver may be under the influence of alcohol or drugs.
      1. The officer is seeking the defendant’s consent to perform a search of the defendant’s blood, breath, or urine – exception to the warrant requirement
   4. In Episode 2 of this series, we discussed O.C.G.A. § 40-5-67.1 that was rewritten after the *Elliott* decision. But today, we are more focused on the mechanics of reading the warnings found in §40-5-67.1 and how those ICW must be read.
      1. Then we are going to discuss the concept of “actual consent”
3. ICW are premised on a legislative finding that anyone who drives on Georgia’s roads have impliedly consented to testing of his/her blood, breath or urine to determine the presence of intoxicating substances if: 1) he is arrested for violation of § 40-6-391; or 2) he is involved in any traffic accident involving serious injuries or fatalities.[[3]](#endnote-3)
   1. The US Supreme Court has found that state ICW are not improper unless they impose some sort of criminal penalty for refusing to submit to the requested testing.[[4]](#endnote-4)
   2. As we have discussed in episodes 1 and 2 of this series, Ga’s ICW was rewritten in 2019 in response to several appellate decisions that found that Ga’s ICW included language that was actually incorrect statements of law. Listen to those episodes for a complete discussion of how the former version was found to be flawed.
4. Therefore, Ga’s ICW have been found to be valid but exactly how and when must those warnings be read?
5. Georgia law provides that when a suspect is arrested for the offense of DUI, the suspect must be advised of the Georgia implied consent warnings (“ICW”) immediately upon that suspect’s arrest or if the driver is involved in any traffic accident resulting in serious injuries or fatalities and the officer has probable cause to believe the driver was under the influence of alcohol or drugs.[[5]](#endnote-5)
   1. There are three ICW, one for drivers under the age of 21, one for drivers age 21 or over, and a third for drivers of commercial vehicles. The ICW must be read substantially as they appear within the statute.
6. In most cases, the arresting officer will advise the defendant of his/her ICW by reading them directly from a card.
   1. As judges, we wish that the officer read the rights perfectly from the card and the defendant responded with a clear “yes” or “no” response. This would be far easier than what we usually see in court.
      1. Frequently, the officer reads the card – usually correctly – and a constitutional law debate ensues where the defendant asks the officer his/her opinion as to whether the defendant should take the test, etc. etc.
      2. The “ad lib” is what makes this area of the law so difficult.
7. Occasionally, the officer will make a misstatement or otherwise “misread” the warnings. Defendants may file a motion to suppress, arguing that because the ICW were not read verbatim as listed in § 40-5-67.1, the resulting testing should be inadmissible.
   1. “The determinative issue with the implied consent notice 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.”**[[6]](#endnote-6)**
   2. Where the officer immediately corrects a misstatement, there is no violation of the intent of ICW and the motion should be denied.**[[7]](#endnote-7)**
      1. By comparison, where the officer “drastically overstated” the provisions of the ICW, the motion may be granted if the trial court finds that the misstatement affected the actual consent of the defendant to submit to testing.**[[8]](#endnote-8)**
8. The next logical question becomes what happens if the officer reads the ICW perfectly but then elaborates and makes other statements that are not found within the ICW statute?
   1. “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.”[[9]](#endnote-9)
9. ***Sigerfoos v. State*** : The mere fact that the officer made additional statements beyond those contained within the four corners of the officer’s ICW card does not render the defendant’s consent to testing invalid.
   1. Consider *Sigerfoos v. State* where the officer asked the defendant to submit to a blood test and the defendant responded that he would consent to a breath test.**[[10]](#endnote-10)**
   2. The officer made it clear that the defendant was not being asked whether he wanted to submit to a breath test and, instead, was being asked to consent to a blood test. The defendant indicated that he did not want to submit to a blood test.
   3. The officer then responded by telling the defendant that if he did not submit to the requested blood test, the defendant would be placed in a holding cell while the officer applied for a search warrant for the defendant’s blood.
      1. The defendant responded, “so if I say no, then you're going to take [my blood] anyway?”
      2. The officer then responded that if the requested blood test was refused, the officer would apply for a search warrant and only would take the defendant’s blood sample if the warrant was approved by a judge.
      3. The officer told the defendant that he was not attempting to threaten or coerce the defendant and that the decision was “totally up to [the defendant],” that the test was voluntary and that the defendant was allowed to say no.
      4. The defendant indicated that he would really like to keep his driver’s license and the officer responded that he did not know what would happen in court but that the license would not immediately be suspended if the defendant submitted to the testing.
      5. The defendant responded, “I'll go along with it if my license won't get suspended, that way I can at least continue to go to work.”
      6. The officer reiterated, “if you do the voluntary blood draw, then I don't send anything in for your license to get suspended today.” [the defendant] stated, “Alright, then I'll do that, that way I can at least continue to work.”
   4. The Georgia Court of Appeals found that the officer’s statements relating to the suspension of the defendant’s driver’s license were correct statements, particularly where the officer told the defendant that he did not know what would happen to the defendant’s license as a result of court proceedings.
      1. “In instances where the officer properly gives the implied consent notice, justice requires suppression of the acquired evidence only when the ‘officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing.’”**[[11]](#endnote-11)**
   5. In relation to the defendant’s claim that the threat of obtaining a search warrant was coercive and made his eventual consent invalid, the *Sigerfoos* Court held that merely making “a true and informative description of what would happen if [the defendant] refused the required testing” would not render the consent that was eventually given involuntary.**[[12]](#endnote-12)**
10. If the officer fails to advise the defendant of his/her right to such independent testing, the state-administered test results must be suppressed.[[13]](#endnote-13)
    1. We are not going to spend substantial time discussing all of the case law dealing with independent testing – but we do want to reiterate that the right to an independent test is a part of ICW.
    2. Once an appropriate request for an independent test is made by the defendant, failure of the officer to have that independent test performed will result in the state-administered test results being excluded during trial.[[14]](#endnote-14)
    3. The only exception to the rule that requires state-administered test results from being excluded when an independent test is not performed following a valid request is where the “failure or inability to obtain an additional test was ‘justifiable.’”[[15]](#endnote-15)
       1. By way of an example, if the officer did not understand the defendant’s statement to be a request for an independent test, failure to secure that independent test may be justifiable.[[16]](#endnote-16)
    4. It is important to understand that while the state-administered breath test requires two breath samples, if the defendant provides one sample and then refuses to provide the second sample, that is not a refusal under this law and the defendant is still entitled to an independent test.**[[17]](#endnote-17)**
11. **WHAT IS “ACTUAL CONSENT”**
    1. We have discussed the concept of consent as being a recognized exception to the warrant requirement. What must be established to prove whether the consent given was valid?
12. Consent must be given freely and voluntarily – seems self-explanatory
    1. Some of the cases began using the phrase “actual consent” when attempting to clarify that consent must be voluntarily given for this exception to the Warrant Requirement to be applicable.
    2. “Actual consent” requires more than proof that the officer asked the defendant to give a sample and the defendant complied.
    3. If the court determines that the defendant was “forced,” “coerced,” or something else occurred that made the defendant’s consent involuntary, the subsequent search is invalid and any evidence secured from that invalid search must be suppressed.
       1. Stated another way, if the alleged consent to search was not voluntarily given, it really is not a consensual search and that exception to the Warrant Requirement is not applicable.
13. In the context of a DUI case, it is possible for the officer to read the appropriate ICW to the defendant, the defendant to provide a sample of his/her blood, breath or urine but, despite what appears to be valid consent, to complain that his/her consent was involuntary under law.
    1. That complaint usually is made via a pretrial motion to suppress.
    2. When the defendant argues that his/her consent was not voluntarily given, the prosecutor will be required to prove that the consent was voluntarily given at the time the sample was secured.
14. When a DUI case is before a court and there is testimony that establishes that the officer requested a sample from the driver after reading the proper ICW, the judge’s ruling on the motion to suppress should include an analysis of all of the circumstances surrounding the consent or refusal.
    1. It is important that the trial court acknowledge that he/she is required to consider the totality of the circumstances in deciding whether consent was voluntarily given.
    2. For example, the decision of the trial court should include findings that answer the following questions:
       1. How old was the driver?
       2. Was the driver threatened with physical harm?
       3. Was the defendant in custody when the implied consent warnings were read to the defendant?
       4. Did the defendant understand the English language?
       5. Had the defendant been injured in a car collision and did those injuries impair the defendant’s ability to give voluntary consent to testing?
       6. Had the defendant been combative with the officer?
       7. Did the defendant participate in SFST?
       8. What was the defendant’s demeanor during his/her interaction with the officer?
       9. Did the defendant ever seek to withdraw his/her agreement to voluntarily provide a sample?
    3. A list of the sorts of issues the trial judge should consider in these types of cases is set forth in *Diaz v. State.***[[18]](#endnote-18)**
       1. In short, the prosecutor should not ask the officer if he/she read the ICW to the defendant, establish that the defendant said “yes,” and then simply sit down.
       2. The prosecutor should elicit testimony about all of the circumstances of the case and not simply elicit testimony that the officer read implied consent warnings to the suspect and then either took the defendant for testing or, in a refusal case, took the defendant to jail.**[[19]](#endnote-19)**
       3. Remember that when a defendant argues that the ICW were read incorrectly or that other factors rendered his/her consent to submit to state-administered testing involuntary, the court must look at the ***totality of the circumstances*** in an attempt to determine whether the defendant’s consent to testing qualified as voluntary.[[20]](#endnote-20)
       4. In ruling on such an argument, the court must keep in mind that he/she is being asked to decide whether the defendant voluntarily consented to give up his/her constitutional right against self-incrimination.[[21]](#endnote-21)
       5. There is no suggestion that the trial judge should decide whether, in retrospect, the defendant made a good decision.
          1. Instead, the question that the judge must decide is whether the defendant gave his/her consent and whether that consent was voluntarily given.
15. The cases on this subject suggest that the judge’s ruling on whether the defendant gave actual and voluntary consent to the search in this context should include factors such as:
    1. “the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.”[[22]](#endnote-22)
16. “On a motion to suppress, the State has the burden of proving that a search was lawful. 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.”[[23]](#endnote-23)
    1. The fact that an officer advises the suspect of his/her implied consent rights and, thereafter, the suspect provided a breath sample is only a portion of the analysis required of the trial court.
    2. Stated another way, even if the ICW read to the defendant was flawed, that fact is but one of the factors that the trial court should consider when deciding whether the consent was voluntary.
    3. Mere compliance with the implied consent procedures does not mean that the suspect gave “actual and voluntary consent to a particular test.”[[24]](#endnote-24)
17. Post-*Williams*, there has been a great deal of consternation by law enforcement officials on how to prove consent was freely and voluntarily made in connection with a DUI test.
    1. The stereotypical case (if there is such a thing) includes an officer placing the defendant under arrest for DUI and then reading the ICW to the defendant. The defendant either responds “yes” or “no” when the officer concludes advising the defendant of the relevant version of the ICW.
    2. Where the defendant does not follow that script and asks other questions of the officer, nods off, becomes belligerent, cries, asks to call his/her parent/lawyer, or takes some similar action beyond the standard “yes” or “no” response, the trial court’s duty of determining whether consent to the testing was voluntarily given becomes more difficult.
    3. But the analysis cannot end by finding that the defendant responded in the affirmative and a sample was taken.
       1. The appellate courts will almost immediately remand that case back to the trial court for the judge to make a finding under the “totality of the circumstances.”
18. In relation to a defendant’s claim that the threat of obtaining a search warrant was coercive and made his eventual consent invalid, the *Sigerfoos* Court held that merely making “a true and informative description of what would happen if [the defendant] refused the required testing” would not render the consent that was eventually given involuntary.**[[25]](#endnote-25)**
    1. The important lesson for judges to learn from this appellate decision is that what is actually said between the defendant and the officer truly matters.
    2. As we noted earlier, while these cases would be much easier to decide if the defendant merely answered the reading of ICW with a “yes” or “no,” the truth is that such a clear response is rarely provided by a defendant.
       1. Therefore, it is important for the judge to listen closely to the evidence and determine whether the officer’s responses to non-responsive statements made by a defendant were true or whether the officer’s responses were deceptively false or misleading.
19. Where a defendant claims that he/she was forced (i.e. physical force) to submit to the testing, rarely is there a claim that the officer stuck the defendant or committed similar overt acts of physical force.
    1. More often, a claim of “force” involves something more nuanced such as refusal to allow the defendant to use the bathroom before providing a sample.[[26]](#endnote-26)
       1. In such a case, the judge should consider whether the defendant had indicated a need to use the bathroom before or after the ICW were read to the defendant.
       2. If the alleged force, whether it be direct or more nuanced, was not a factor in the defendant’s decision to submit to state-administered testing, the “force” cannot be deemed to have been part of the totality of the circumstances that would render the subsequent consent involuntary.[[27]](#endnote-27) (i.e. the ICW was already read and answered before the issue with using the bathroom was ever raised)
20. When ruling upon the motion to suppress that is premised upon an allegation that the defendant’s consent was not voluntarily given, the judge’s order should include language that shows that the judge was aware that he/she is required to consider the ***totality of the circumstances*** in determining whether the consent was voluntarily given.[[28]](#endnote-28)

**Wade: Well let’s recap what we’ve learned today. ICW are statutory and must be read at the time of the defendant’s arrest for DUI.**

*Tain: The ICW need to be read substantially as written in O.C.G.A. § 40-5-67.1. The ad lib between the officer and the suspect can be vitally important to an ultimate determination whether the defendant was properly informed of his/her rights.*

***Ben: When the prosecutor is claiming that the defendant consented to the testing, it is important that the trial judge look at the totality of the circumstances and not merely rely upon a finding whether ICW were read and a sample was given. Instead, use the analysis of “actual consent” and ensure that the order shows that the judge considered the totality of the circumstances.***

**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 although it was not mentioned earlier, this topic was suggested by our loyal listener(s). Please follow The Good Judge-ment podcast on your favorite platform and “like” us, it helps others find our work!*

**I’m Wade Padgett**

***I’m Ben Studdard***

*And I’m Tain Kell… [insert funny thing – consider something about consent – but be careful….]*

1. O.C.G.A. §§ 40-6-67.1 and 67.2. [↑](#endnote-ref-1)
2. O.C.G.A. § 40-5-67.2. Terms for reinstatement are also outlined in this statute. [↑](#endnote-ref-2)
3. O.C.G.A. § 40-5-55(a). [↑](#endnote-ref-3)
4. *Olevik v. State*, 302 Ga. 228, 234 (2017), citing *Birchfield v. North Dakota*, \_\_ U.S. \_\_, 136 S. Ct. 2160 (2016). [↑](#endnote-ref-4)
5. O.C.G.A. § 40-5-55(a); *Diaz v. State*, 344 Ga. App. 291, 302 (2018) (“’[W]here an individual has been involved in a traffic accident resulting in serious injuries or fatalities [(as in the instant case)] and the investigating law enforcement officer has probable cause to believe that the individual was driving under the influence of alcohol or other drugs, ... the ensuing search is both warranted and constitutional[,]’ regardless if the individual is under arrest at the time the implied consent notice is given under OCGA §40-5-55 (a)”). See § 40-6-67.1(a)(“ The test or tests required under Code Section 40-5-55 shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391 and the officer has arrested such person for a violation of Code Section 40-6-391, any federal law in conformity with Code Section 40-6-391, or any local ordinance which adopts Code Section 40-6-391 by reference or the person has been involved in a traffic accident resulting in serious injuries or fatalities”) [↑](#endnote-ref-5)
6. *Travis v. State*, 314 Ga. App. 280, 282 (2012), citing  *In the Interest of R.M.,* 305 Ga.App. 483, 485 (2010). [↑](#endnote-ref-6)
7. *Travis v. State*, 314 Ga. App. 280, 282 (2012). [↑](#endnote-ref-7)
8. *Kitchens v. State*, 258 Ga. App. 411, 412-413 (2002)(in *Kitchens*, the officer reading the ICW indicated the applicable “legal limit” as being 10 grams as opposed to the then-applicable per se limit of .10 grams). [↑](#endnote-ref-8)
9. *Humphries v. State*, 327 Ga. App. 542, 543 (2014), citing *Page v. State*, 296 Ga. App. 431, 433 (2009). [↑](#endnote-ref-9)
10. *Sigerfoos v. State*, 350 Ga. App. 450 (2019). [↑](#endnote-ref-10)
11. *Sigerfoos v. State*, 350 Ga. App. 450, 453-454 (2019), citing *Anderton v. State*, 283 Ga. App. 493, 496 (2007). [↑](#endnote-ref-11)
12. *Sigerfoos v. State*, 350 Ga. App. 450, 454 (2019), citing *Anderton v. State*, 283 Ga. App. 493, 496 (2007). [↑](#endnote-ref-12)
13. *Chamberlain v. State*, 246 Ga. App. 423, 424 (2000) (“The unjustified failure to provide the [independent] test is a violation of the statute and precludes the state from introducing evidence regarding its test.”); *Whittle v. State*, 282 Ga. App. 64 (2006). [↑](#endnote-ref-13)
14. *State v. Henry*, 312 Ga. App. 632, 636 (2021). [↑](#endnote-ref-14)
15. *State v. Henry*, 312 Ga. App. 632, 636 (2021) (this decision goes into some detail in attempting to define the term “justifiable”). [↑](#endnote-ref-15)
16. *State v. Henry*, 312 Ga. App. 632, 637 (2021). [↑](#endnote-ref-16)
17. *Chamberlain v. State*, 246 Ga. App. 423, 424 (2000). [↑](#endnote-ref-17)
18. *Diaz v. State*, 344 Ga. App. 291 (2018), citing *Steele v. State*, 337 Ga. App. 562, 564 (2016) and *Kendrick v. State*, 335 Ga. App. 766, 769 (2016). See also *State v. Reid*, 337 Ga. App. 77, 78 (2016); *State v. Osterioh*, 342 Ga. App. 668, 672-674 (2017); *State v. Stephens*, 289 Ga. App. 167, 167-168 (2008). [↑](#endnote-ref-18)
19. This is a prime example of why the probate courts and other courts that hear DUI cases need independent prosecutors. The judge should not ask questions of the parties that effectively prove the case of one party or the other. The officers will not generally be properly informed of these requirements to provide the necessary testimony under *Williams* without questioning by the prosecutor. [↑](#endnote-ref-19)
20. *Leggett v. State*, 354 Ga. App. 877, 881 (2020). [↑](#endnote-ref-20)
21. *Leggett v. State*, 354 Ga. App. 877, 880 (2020), citing *Fofanah v. State*, 351 Ga. App. 632, 635 (2019). It is easy to “get lost in the weeds” of such an argument – the judge is being asked to decide whether the defendant’s act of voluntarily giving up the right to avoid self-incrimination. [↑](#endnote-ref-21)
22. *Melton v. State*, 354 Ga. App. 828, 830 (2020), citing *Olevik v. State*, 302 Ga. 228, 251 (2017); *Fofanah v. State*, 355 Ga. App. 895 (2020). [↑](#endnote-ref-22)
23. *Melton v. State*, 354 Ga. App. 828, 828-829 (2020), citing *Hernandez v. State*, 348 Ga. App. 569 (2019). [↑](#endnote-ref-23)
24. *Melton v. State*, 354 Ga. App. 828, 830 (2020), citing *Elliott* and *Olevik*. [↑](#endnote-ref-24)
25. *Sigerfoos v. State*, 350 Ga. App. 450, 454 (2019), citing *Anderton v. State*, 283 Ga. App. 493, 496 (2007). [↑](#endnote-ref-25)
26. *State v. Bradberry*, 357 Ga. App. 60, 62 (2020). [↑](#endnote-ref-26)
27. *State v. Bradberry*, 357 Ga. App. 60, 63 (2020). [↑](#endnote-ref-27)
28. *Melton v. State*, 354 Ga. App. 828, 829 (2020); *State v. Henderson*, 356 Ga. App. 473, 476 (2020). [↑](#endnote-ref-28)