**FLASH EPISODE-REFUSALS IN DUI CASES - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

We recently had a lengthy series published that dealt with many aspects of a typical DUI case.

*Shout out to a real FOP, Judge Ben Studdard, for his help with that series.*

Since the date that series published, I have come across some cases dealing with refusals of chemical testing that I felt we needed to share with you as soon as possible to ensure there was no confusion or misunderstandings.

*This episode is going to be shorter and more direct than our usual episodes because we want to get this information to our listener(s) as soon as possible.*

You will hear us discuss the case of *State v. Randall* which was decided on October 25, 2022. We are recording this episode on October 27, 2022. Nothing but the best for our listeners.

**REFUSAL OF CHEMICAL TESTING IN GENERAL**

1. You may recall that we discussed the appellate decisions in *Elliott[[1]](#endnote-1)* and *Olevik[[2]](#endnote-2)* which really changed the landscape of DUI cases
	1. In summary, those cases held that the existing Implied Consent Warnings (ICW) were flawed, rendering testing (or refusals of testing) that followed those warnings inadmissible
		1. The ICW’s were changed by the legislature
2. However, the main takeaway from those cases was that if a defendant refused a breath test or, later, a urine test (the *Awad* case), that refusal would not be admissible.
	1. We hope we made that clear in the DUI series
3. Today, we need to discuss and bring to your attention later cases that followed those landmark cases in the arena of DUI law.

**WADE’S TRIAL**

1. Fast forward a few weeks from when we published the DUI series and Wade has a *pro se* jury trial on a DUI case
	1. During opening statement, the prosecutor told the jury that the defendant refused the blood test
	2. The *pro se* defendant did not blink so I began scurrying around, looking for my DUI law – but without any objection being raised
	3. Then the defendant gives his opening statement and essentially “testifies” that he did not take the tests because a lawyer once told him to never submit to testing because it is so unreliable….
		1. I am having a slight coronary thinking reversible error is happening all around me
	4. We broke for lunch and I asked the parties, outside the presence of the jury, what was happening?
		1. That’s when I got an education I want to share with all of you today…

**THE MORE RECENT DUI LAW RE: REFUSALS**

1. In *Davis v. State*,[[3]](#endnote-3) the Court of Appeals followed up on the decisions of *Olevik* and *Elliott* and held that the special concurrence in *Elliott* noted that those decisions were limited to breath tests and do not apply to blood tests.[[4]](#endnote-4)
	1. The *Davis* Court noted that after *Olevik* and *Elliott*, they had held in other decisions that *Olevik* and *Elliott* did not prohibit the introduction of evidence that a defendant refused a ***blood*** test.[[5]](#endnote-5)
		1. You may recall that, during the DUI series, we noted that the Ga. Supreme Court had recently held in *Awad v. State*,[[6]](#endnote-6) had held that refusal of a ***urine*** test was also inadmissible because it violated the Georgia Constitution’s provisions relating to self-incrimination.

**UNDERSTANDING THE DIFFERENCE**

1. The decisions in *Elliott* and *Olevik* are lengthy and worthy of your review if you have a few hours to kill
	1. Seriously though, they are very thoughtful and lengthy decisions
2. To understand why refusal of a blood test might be admissible, while refusal of a breath test or urine test might be inadmissible under Georgia’s Constitution, requires a little understanding of the history of decisions relating to Georgia’s constitutional prohibition against self-incrimination
	1. Easier still, to understand the difference may only require a citation to one sentence from *Olevik*:
		1. “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.”[[7]](#endnote-7)
	2. Historically, Paragraph XVI has been interpreted to NOT prohibit things such as:
		1. Removing clothing from the defendant
		2. Taking shoes from the defendant
		3. Taking blood-stained clothes from the defendant
		4. Pulling boots off of a defendant
		5. Requiring a convicted felon to provide a DNA sample
		6. Requiring defendant to strip to the waist to allow photographs to be taken of the defendant’s tattoos
		7. Taking an impression of the defendant’s teeth
		8. Withdrawing blood from an unconscious defendant
		9. Requiring defendant to undergo surgery to remove a bullet from his body
	3. As you can see, all of these activities deemed allowable under the Georgia Constitution required the defendant to merely be present for someone else to do something – the defendant is not required to do anything other than be present
		1. The focus is not on how intrusive the procedure might be – I cannot imagine anything more intrusive than requiring a defendant to undergo surgery
		2. Instead, the focus is on whether the defendant had to “act”
	4. Applying that logic to the DUI scenario, the courts held that providing a deep lung breath sample required the defendant to breath “abnormally”
		1. Requiring a urine sample requires the defendant to urinate on demand
3. By comparison, when a blood test is requested, the defendant merely needs to be present while an EMT, doctor or other medical professional withdraws a blood sample from the defendant
	1. Therefore, according to the logic, the Georgia Constitution’s prohibition against self-compelled acts is not violated by a blood test whereas it may be violated by a breath test or urine test.

***STATE v. RANDALL***

1. Enter into the fray the case of *State v. Randall*.[[8]](#endnote-8)
	1. This case bears some explanation
		1. Randall was stopped in Athens-Clarke County for failing to maintain his lane. The officer performing the traffic stop smelled an odor of alcohol, noticed the defendant had trouble with balance and had glassy eyes. The officer arrested him for DUI and after reading the appropriate ICW, the defendant refused testing.
		2. The defendant filed a motion to suppress where he argued that admitting the refusal into evidence would be a violation of the Georgia Constitution. (We all have expected this argument following the other DUI cases of *Elliott*, *Olevik* and *Awad*). The trial court granted the motion to suppress, suppressing the refusal from evidence. The trial court reasoned that the ICW statute “needlessly and unnecessarily chills a defendant’s exercise of the constitutional right to refuse a warrantless search….” The trial court found the statute to be unconstitutional.
		3. In what I would described as ingenuity, the prosecutor argued that because the public is aware of the availability of chemical testing in connection with DUI, the State wanted to introduce the refusal but not request the jury charge on the inference that can be made from a refusal.
			1. Side note – The pattern instruction on refusals tells the jury that if the defendant refused the test, they may infer that the test would have shown the presence of (alcohol)(drugs), but not that the (alcohol) (drugs) impaired the defendant’s driving. The inference can be rebutted and the refusal is not sufficient to convict the defendant of DUI.
		4. The State argued that they wanted to introduce the refusal “to explain the absence of test results” They submitted that the jury charge authorizing the rebuttable inference would not be sought.
	2. In a relatively brief decision authored by Justice Ellington and joined by all of the Justices, they found that the State could have the refusal admitted for the sole purpose they argued and that the trial court could not give the “inference” charge. They further held that the defendant may want to have a limiting instruction given, and that issue is to be addressed by the trial judge.
	3. Finally, the Ga. Supreme Court held, “We emphasize that, in vacating the trial court’s ruling in this case, we express no opinion about the important and difficult constitutional questions that remain unresolved.”[[9]](#endnote-9)

**DISCUSSION**

1. Before going further, we are expressing our opinions without the benefit of the wealth of knowledge we had when Judge Studdard was with us
2. With that disclaimer, we dive in:
	1. If we were discussing a drug case and the officer asked for consent to search which the defendant refused, would that refusal be allowed into evidence?
		1. As argued by the defendant in *Randall*, admitting the refusal would more likely be treated by the jury as a “consciousness of guilt” issue
		2. But, as we have discussed in this podcast, consciousness of guilt is allowed when we allow evidence of escape, flight, hiding from law enforcement, etc.
	2. Remember something very important – most of these “new” DUI decisions have been based upon unique aspects of the Georgia Constitution’s version of the 4th and 5th Amendments.
		1. The US Supreme Court has held that, under the 4th Amendment to the US Constitution, breath tests are allowed without a warrant as a search incident to arrest – but warrantless blood tests are NOT allowed under the 4th Amendment
			1. Complete opposite conclusion from analysis under the Georgia Constitution!
		2. So breath tests (and, assumably, refusal of those tests) would be allowed in evidence under the US Constitution because those results, or the lack thereof, are not protected under the 5th Amendment to the US Constitution.[[10]](#endnote-10)
	3. We apologize if this is becoming difficult to follow but this is complicated stuff.
		1. In summary, the Georgia Constitution (at least for now) allows for blood tests and for refusal of those tests to be admitted into evidence, along with a charge relating to the limited inference that may be made by the jury.
		2. These arguments have largely been focused on the Georgia Constitution’s provisions relating to self-incrimination
		3. The Ga Supreme Court has decided in *Randall* that the refusal can be offered into evidence, not to raise an inference that the refusal was related to “consciousness of guilt,” but to explain why there was no chemical testing performed.
			1. However, if the refusal is offered into evidence under that theory, no jury charge can be given on the inference that might be made and a limiting instruction may be appropriate to ensure the jury does not make that leap in logic.
		4. The Ga. Supreme Court has already ruled (*Elliott and Olevik*) that even if breath tests (and refusals) are allowed under the U.S. Constitution, they are prohibited under the Georgia Constitution.
			1. *Awad* clarified that same rule applies to urine testing
			2. But under US Const, blood tests violate the US Const
				1. So….
		5. So, where does all of that deep legal thought leave us?
		6. We may well be returning to search warrants, which solve all of these issues.

We thought this episode would be a quick and easy flash episode relating to clarification from the DUI series

We found ourselves involved in a deep dive into Constitutional law – not where we thought we were headed

These are important issues but we understand if you think we have found ourselves in the weeds to a painful extent – we apologize to all of you who are not involved in DUI cases

But there are more chapters to be written in the coming months and years – so stay tuned.

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…you know The Captain and Tenille actually were married to each other for 39 years. Unfortunately, love could not keep them together and they divorced in 2014. (if you are old, you will get the irony)*

1. *Elliott v. State*, 305 Ga. 179 (2019). [↑](#endnote-ref-1)
2. *Olevik v. State*, 302 Ga. 228 (2017). [↑](#endnote-ref-2)
3. *Davis v. State*, 358 Ga. App. 832 (2021). [↑](#endnote-ref-3)
4. *Davis*, at 837. [↑](#endnote-ref-4)
5. *Davis v. State*, 358 Ga. App. 832, 837 (2021), citing *State v. Johnson*, 354 Ga. App. 447, 454 (2020) and *State v. Voyles*, 355 Ga. App. 903, 904-905 (2020). [↑](#endnote-ref-5)
6. *Awad v. State*, 313 Ga. 99 (2022). [↑](#endnote-ref-6)
7. *Olevik*, at 243. [↑](#endnote-ref-7)
8. *State v. Randall*, S22A0664 (Ga. 10/25/2022). [↑](#endnote-ref-8)
9. *State v. Randall*, pp. 6-7 of slip opinion. [↑](#endnote-ref-9)
10. In *State v. Johnson*, 354 Ga. App. 447, 454 (2020), the Court of Appeals noted that *Birchfield v. North Dakota*, 579 U.S. 438, 476-477 (2016), the US Supreme Court held, “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. [cits omitted] Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.” [↑](#endnote-ref-10)