Georgia Supreme Court Holds that Implied Consent Is Not Actual Consent

Author : Shea Denning

Categories : Evidence, Motor Vehicles, Search and Seizure

Tagged as : DWI, implied consent, Missouri v. McNeely, Williams v. State

Date : April 1, 2015

Prosecuting impaired drivers in Georgia just got a little bit harder. The Georgia Supreme Court held last week in Williams v. State, __ S.E.2d __ (Ga. 2015) that the mere fact that a DUI suspect agreed to allow officers to withdraw his blood--after being told that Georgia law required him to submit to testing and that his driver's license would be revoked for a year if he refused--did not establish the sort of voluntary consent necessary to excuse the Fourth Amendment's warrant requirement. Is this a watershed moment in implied consent law?

First, the facts. Williams was arrested for driving under the influence. The officer read Williams a statutory implied consent notice and asked that Williams submit to blood and urine tests. The officer told Williams that it was a "'a yes or no question'", and Williams said "yes." Williams was then taken to a medical center where his blood was withdrawn and a urine sample obtained.

The issue. Williams moved to suppress the results of the blood test on the basis that gathering the blood without a search warrant violated his Fourth Amendment rights. He argued that Georgia's implied consent statute was unconstitutional because consent obtained solely under the statute was not voluntary consent for purposes of the Fourth Amendment. The trial court rejected his argument. Williams appealed.

The opinion. The Georgia Supreme Court's analysis is straightforward. The extraction of a defendant's blood at the direction of a law enforcement officer is a search governed by the reasonableness requirement of the Fourth Amendment. In general, there are two types of Fourth Amendment searches: those with a warrant and those without. For a warrantless search to be reasonable under the Fourth Amendment, the State must demonstrate that it falls within an established exception to the warrant requirement.

The exception relied upon by the State in *Williams* was voluntary consent. But the fact that a suspect agrees to be tested after being read the statutory implied consent notice does not establish that he gave ***actual consent*** to the extraction of his blood. Instead, when relying on the consent exception to the warrant requirement, the State must prove that the defendant acted freely and voluntarily under the totality of the circumstances.

The *Williams* court determined that the trial court failed to address whether Williams gave actual consent to the procuring and testing of his blood, and remanded the case for such a determination.

A big change. Despite the Georgia Supreme Court's insistence to the contrary, *Williams* marked a significant departure from its earlier jurisprudence in this area. Indeed, as recently as 2003, the court reiterated its view that "the Georgia Constitution does not protect citizens from compelled blood or breath testing or from the use of the results of the compelled testing at trial" and that the state's implied consent laws "grants a *suspect* an opportunity, not afforded him by our constitution, to refuse to take a blood-alcohol test." Cooper v. State, 587 S.E.2d 605, 611 (2003) (internal citations omitted). Yet there is good reason for the court to have reconsidered its view. *Williams* noted that the United States Supreme Court in Missouri v. McNeely, 133 S.Ct. 1552 (2013), rejected a per se rule for establishing an exigency exception to the Fourth Amendment's warrant requirement, instead requiring a case-by-case assessment based on the totality of the circumstances. *Williams* extended that approach to the warrant requirement's consent

exception.

What have other states said?

Williams noted that other state courts have concluded post-*McNeely* that that statutory implied consent does not equate to actual consent. While technically true, the tenor of the analysis in many such cases is markedly different. In two of the opinions relied upon by *Williams*, the state courts readily concluded that the defendant freely and voluntarily submitted to testing and that consent was not coerced by being informed of the consequences of refusal.

- People v. Harris, 184 Cal. Rptr. 3d 198, 213 (2015) ("That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment.")

- State v. Moore, 354 Or. 493, 501, 318 P.3d 1133, 1137 (2013) ("[W]e conclude that defendant expressly and voluntarily consented when [the officer] asked him to submit to the tests and that he was not coerced by the statement of rights and consequences that [the officer] read to him before seeking consent.")

A third case cited by *Williams* concludes that agreeing to testing after being advised of the state's implied consent law is actual consent.

- State v. Padley, 849 N.W.2d 867, 879 (2014) (concluding that "[c]hoosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw" and stating that "[n]owhere does [the defendant] develop a legal argument that the State cannot present a suspect with the hard choice of giving up a constitutional right or accepting a permissible penalty")

One court not cited in Williams has, however, analyzed the issue in much the same way as the Georgia court. The Arizona Supreme Court in State v. Butler, 302 P.3d 609 (Ariz. 2013) (en banc) (discussed here), held that, independent of the state's implied consent law, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw.

Significance. What happens on remand certainly is important. If the trial court determines that the defendant voluntarily consented based on the bare facts recounted by the supreme court, and that decision is upheld, the distinction between acquiescence under the state's implied consent laws and actual consent may turn out to have little practical import. If, on the other hand, the trial court determines that Williams' consent was not freely and voluntarily given, the state may have to alter its enforcement protocol.

Yet *Williams* is significant even without regard to what else occurs in the case. The Georgia Supreme Court accepted the crux of the defendant's argument, holding that implied consent is not actual consent, based in part on the United States Supreme Court's opinion in *McNeely*. If the divide among state courts regarding the relationship between the Fourth Amendment and implied consent testing continues to grow, the high court may again be called upon to weigh in

on the routine procedures utilized in the prosecution of impaired driving.