

Go Ahead, Test Me

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Most people stopped on suspicion of impaired driving would rather avoid the trip to the police station. Some suspects attempt to dispel officers' suspicions by answering questions about whether they have been drinking and how much they've had to drink. Others perform field sobriety tests. A few cut right to the chase, demanding that officers transport them immediately to the station for breath testing. That way, the person who is not impaired by alcohol can resolve the encounter without the indignity--and the record--that accompanies arrest.

Right to pre-arrest test. The implied consent testing statutes afford a person stopped or questioned by a law enforcement officer who is investigating an implied consent offense the right to a breath test before being arrested or charged. [G.S. 20-16.2\(i\)](#). There is no requirement that an officer inform a person of this right. While no specific wording is required to request a pre-arrest test, the person must articulate the request in terms that a reasonable officer would understand. By making such a request, the person consents to being transported to the breath testing room, where he or she must confirm the request in writing.

Notice of rights. Before conducting a pre-arrest breath test, a chemical analyst must provide a suspect with an abbreviated notice of implied consent rights. The chemical analyst must inform the person that:

1. the test results are admissible in evidence and may be used against the defendant in any implied consent case that may arise;
2. the person's driving privileges will be revoked if the test results equal or exceed the per se level;
3. if the person fails to comply with testing procedures, he or she may be charged with any offense for which the officer has probable cause; and
4. if the person is charged with an implied consent charge, his or her refusal to submit to testing required as a result of that charge will result in the revocation of his or her driving privilege.

Unlike the notice of implied consent rights that follows a suspect's arrest, the notice for pre-arrest testing does not include the right to call an attorney for advice or to select a witness to view testing procedures; nor does it provide for a delay in testing for these purposes.

What's the remedy? Not surprisingly, very few suspects request pre-arrest testing. Likely because such requests are rare, officers do not always honor them when they are made. Questions then arise about the potential remedy for denial of this statutory right.

Frankly, I'm not sure there is one.

The apparent intent of the pre-arrest testing provision is to prevent charges against a person who registers less than a per se level on a chemical test. *See North Carolina Legislation 1977*. But, if a person registers a breath alcohol concentration that meets or exceeds the per se level or an officer otherwise develops probable cause supporting the defendant's arrest, the person who is arrested without being afforded a pre-arrest test suffers no violation of constitutional significance. *Cf. Moore v. Cease*, No. 703-CV-144 FL 1, 2005 WL 5322794, at *12 (E.D.N.C. July 5, 2005) (unpublished op.) (concluding in federal civil rights suit that even if the police officer violated state law by not

affording the suspect a breath test before she was arrested, the violation did not subject the officer to liability under § 1983 as the Fourth Amendment permits the arrest of a suspect based on probable cause regardless of state law procedures). Moreover, in a circumstance in which the police ultimately develop probable cause, the denial of a pre-arrest test does not prejudice the defendant.

Might the failure to afford a defendant the right to a pre-arrest test be deemed a substantial violation of a statutory procedural right, thereby warranting suppression of evidence under [G.S. 15A-974](#)? I don't think so. It is difficult to conceive of a circumstance in which any evidence is obtained **as a result of** the violation of G.S. 20-16.2(i). To the contrary, the evidence of a defendant's impairment gathered during the investigation and after his or her arrest would be gathered regardless of whether the pre-arrest test was performed. Thus, the evidence does not flow directly from the statutory violation.

Given, however, that I have been asked on several occasions asked about the significance of a request for pre-trial testing, I'm guessing that some readers may have a different view of the appropriate remedy. Please use the comment feature to share your perspective.