Providing Notice of Implied Consent Rights to Persons Who Do Not Speak English (Part I)

Author : Shea Denning

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Several earlier posts a (here, here, and here) address the requirement that a person arrested for an implied consent offense be informed of statutory implied consent rights before being asked to submit to a chemical analysis. Posts (here and here) address the remedy for failure to adhere to these statutory requirements.

None of those posts, and indeed no North Carolina appellate court decision, addresses the circumstance in which a chemical analyst advises a defendant of the implied consent rights by reading them and providing a copy in writing, but the oral advice and the writing are in English, a language the defendant does not speak or comprehend.

If such a defendant submits to a chemical analysis, are the results subject to suppression at trial? What if the defendant refuses? Is the refusal admissible at trial as evidence of the defendant's guilt?

G.S. 20-16.2 does not require that notice of implied consent rights be provided in any particular language, though the practice is to read the rights in English and provide a copy of the rights written in English. Perhaps the inquiry ends there, at least for determining whether results of a chemical analysis are admissible at trial. The argument in support of this view is that notice provided in English is provided in accordance with the statute; thus, there is no basis for suppression. This view is supported by the purpose of the warnings, which is "to provide scientific evidence of intoxication not only for the purpose of convicting the guilty and removing them from the public highways for the safety of others, but also to protect the innocent by eliminating mistakes from objective observation such as a driver who has the odor of alcohol on his breath when in fact his consumption is little or those who appear to be intoxicated but actually suffer from some unrelated cause." Seders v. Powell, 298 N.C. 543, 552 (1979). The warnings "ensure[] cooperation in providing scientific evidence and avoid[] incidents of violence in testing by force." *Id.*

Since notice is provided to secure submission to a chemical analysis rather than to procure a knowing, voluntary and intelligent waiver of rights, the statutory purposes are met when the person submits to testing, regardless of whether the person knew of the right to refuse testing. See *Yokoyama v. Commissioner of Public Safety*, 356 N.W.2d 830, 831 (Minn. App. 1984) (rejecting the argument of a petitioner who "willingly blew into the testing machine" that he had a statutory right to have the implied consent advisory read to him in Japanese and finding that he "understood he was being asked to take the test," which was the only understanding required). Adherents of the view that informing a defendant of the rights in English is sufficient, regardless of the person's subjective understanding, might further conclude that such a person can refuse testing by exhibiting a positive intention to disobey the chemical analyst's instructions, regardless of whether the person understands the consequences of that conduct. *See Martinez v. Peterson*, 322 N.W.2d 386, 388 (Neb. 1982) (holding that person is required to understand only that he or she has been asked to take a test and that "[t]here is no defense to refusal that [the person] does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take").

Assuming, for now, that the arguments set forth above reflect how a North Carolina court would analyze the admissibility of a chemical analysis or evidence of refusal in a criminal trial on impaired driving charges, let's progress to the more complicated question. May a person who does not speak the language in which the notice of implied consent rights is provided be deemed to have *willfully refused* a chemical test?

Recall that a willful refusal occurs when a person (1) is aware that he or she has a choice to submit to or refuse a chemical analysis, (2) is aware of the time limit within which he or she must submit, and (3) voluntarily elects not to submit or knowingly permits the prescribed thirty minute time limit to expire before electing to submit. Etheridge v. Peters, 301 N.C. 76, 81 (1980). What does it mean for a person to be "aware" of the choice and time limit? Given that there must be probable cause to believe that a person has committed an implied consent offense—many of which require proof of impairment— before a person may be requested to submit to such a test, the legislature must have anticipated that some defendants' abilities to understand the warnings would be compromised by their present condition. Presumably, the legislature did not intend for the very defendants whose behavior is targeted by the law to escape the sanction of a twelve-month license revocation for willfully refusing a chemical analysis.

Indeed, the state supreme court in Joyner v. Garrett, 279 N.C. 226 (1971), rejected the defendant's contention that he was too drunk to have willfully refused the breath test, finding the officer's testimony that defendant refused to submit saying "'he was a taxpayer and he didn't have to take it'" sufficient evidence of willful refusal. The officer's testimony that he did not know whether the defendant understood what he told him did not figure in the court's analysis. Likewise, in Rice v. Peters, 48 N.C. App. 697 (1980), the court of appeals rejected the defendant's argument that he had not willfully refused a breath test when he refused to cooperate by speaking in "a loud and boisterous manner drowning out [the chemical analyst's] words" and making no response when the chemical analyst said he was being marked as a refusal, notwithstanding the defendant's assertion at the time the rights were read that he did not understand them. Explaining that the purpose of the implied-consent testing statute is fulfilled when a person is given the opportunity to submit or refuse to submit to a chemical analysis and his decision is made after having been advised of his rights in a manner provided by statute, the court held that the defendant had willfully refused by refusing to cooperate. The court did not inquire into the defendant's subjective understanding of his rights. Thus, it would be a departure from precedent to conclude that subjective understanding of the warnings on the part of the defendant is required; moreover, such an interpretation would absurdly afford relief to the obstreperous or highly intoxicated defendant, a result the legislature surely did not intend.

If subjective understanding is not relevant and G.S. 20-16.2 does not require that implied consent rights be conveyed to a defendant in a language that he or she understands, then the matter of willful refusal isn't any more complicated than that of refusal, discussed earlier in this post. *See, e.g.*, People v. Wegielnik, 605 N.E.2d 487, 491 (Ill. 1992) (finding "no meaningful distinction between a motorist who cannot comprehend the statutory warnings because of injury or intoxication, and one who does not understand them due to insufficient English language skills."). Yet I wonder whether our courts would view lack of understanding resulting from a language barrier differently from lack of understanding caused by intoxication or belligerence. *See, e.g.*, People v. Garcia-Cepero, 2008 WL 4681928 (N.Y. Sup. Ct. October 23, 2008) (distinguishing case of a defendant who does not speak or understand English from that of a person too intoxicated to understand implied consent warnings). Moreover, might our courts find a constitutional violation in the failure to afford non-English speaking defendants notice of implied consent rights? Part II of this Post will explore these issues.