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# Handschuh v. State

**CHANGE IN THE LAW:** *Handschuh v. State*, A04A0838, 2004 Ga. App. LEXIS 1586, Decided December 1, 2004.

**TO:** All District Attorneys and Solicitor Generals  
**FROM:** Trial Support Division - J.F. Burford

Pursuant to this case, as set forth in OCGA § 40-5-55(a), in order for a chemical test result or a refusal to take the chemical test, is admissible at trial, the defendant must have been arrested BEFORE implied consent is read.

The facts of *Handschuh* are that police responded to a single vehicle accident and found Handschuh's truck overturned 200 feet off the side of the embankment of a main road. The officer smelled alcohol as he approached the vehicle. Handschuh was trapped in the truck. Handschuh stated that he was an organ donor and requested that the officer notify his parents that he loved them. Handschuh was unresponsive to any questions posed by the officer. The officer thought that Handschuh either was intoxicated or suffered head injury. Handschuh was freed from the vehicle and transported to the hospital. Subsequent to transport, upon a search of the vehicle, the officer found an open container of liquor and several unopened cans of beer.

When the officer went to the hospital to question Handschuh, he smelled alcohol on Handschuh's breath and noted that Handschuh had slurred speech, was combative with medical personnel and continually demanded to be released. Thereupon, because of the seriousness of Handschuh's injuries, the officer read Handschuh Implied Consent. Handschuh refused. Six days later, Handschuh was arrested and charged by accusation with driving under the influence, failure to maintain a lane and violating the open container law. Handschuh was convicted of DUI by jury. Handschuh's motion to suppress the refusal to submit to a blood test was denied and he appealed the denial.

In a seven to five en banc decision, the Court of Appeals, Justice Barnes writing, held "[The] language [of OCGA § 40-5-55(a)] is plain and unambiguous .... Therefore, a driver must be arrested before he shall be deemed to have given consent to have a chemical test performed to determine the presence of alcohol or other drug and the existence of mere probable cause is not sufficient."

The Court then overruled all cases holding that an arrest is not required before implied consent can be given. Additionally, the Court disapproved of any statements in any case which could be read to support the conclusion that probable cause without an arrest is sufficient to trigger implied consent warnings in OCGA § 40-5-55(a).

**Be aware.** Many officers will not arrest a suspect while the suspect is in the hospital. Therefore it is necessary to supply the officers with alternative methods to obtain evidence of dui from hospitalized suspects. (Ie: search warrant without giving suspect implied consent)

The prosecuting attorneys' council staff recommends that all law enforcement in your jurisdiction be notified immediately of the ruling.