



CaseLaw Update

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CaseLaw This Week

Week Ending December 24, 2004

- **Chemical Testing**
- **Search & Seizure**

Chemical Testing - Implied Consent Rights

Handschuh v. State, A04A0838 (12/1/04),
2004 Ga. App. LEXIS 1586

**MAJOR CHANGE IN LAW - Police must
arrest the suspect before giving implied
consent.**

Defendant was driver of vehicle in single vehicle wreck. Defendant was trapped in vehicle. Officer arrived on scene and smelled alcohol. Officer attempted to question defendant. Defendant unresponsive to questioning but requested officer tell his parents he loved them and advised officer that he was a blood donor. Defendant was freed from vehicle and transported to the hospital. Subsequent to transport, the police officer found an open bottle of liquor in the Defendant's truck. When the officer went to hospital to question Defendant, officer smelled alcohol on Defendant's breath and noticed that Defendant was combative with medical personnel, had slurred speech and demanded to be released. Based on serious injury to the Defendant, the officer read Defendant implied consent and the Defendant refused to take any test. Six days later, the Defendant was arrested for DUI, Failure to Maintain Lane, and violation of the Open Container law. At trial, Defendant's refusal was admitted after Defendant's motion to suppress refusal was denied. A jury convicted

the Defendant of DUI. Defendant appealed the denial of his motion to suppress.

In the seven to five en banc decision the Court 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." (Emphasis added)

Search & Seizure

State v. Bibbins, A04A1305 (12/1/04)

Defendant's motion to suppress drugs found pursuant to an alleged consent search conducted during the course of a valid traffic stop was granted. The trial court did not make a factual finding about whether consent was actually obtained but found that the detaining officer "exceeded the scope" of the traffic stop by asking for consent. Therefore the consent was a product of an "illegal detention." The State appealed. The issue: Whether asking for consent to search during the course of a brief, on-going traffic stop is a violation of the Fourth Amendment?" The evidence showed that the traffic stop lasted nine minutes. The request was made immediately after the license was checked and just before the ticket was written. **The Court held that the request did not cause unreasonable delay and that the traffic stop had not concluded at the time the request to search was made.** The case was remanded for determination of whether consent was given and whether consent was voluntary.