Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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Olevik v. State

The Georgia Supreme Court overrules Klink v. State and holds that Georgia's State Constitution Protects against Compelled Breath Tests and Affords Individuals a Constitutional Right to Refuse Breath Testing

In *Olevik v. State*, S17A0738 (10/16/17), appellant was convicted of DUI (less safe), failure to maintain lane and no brake lights. He contended that the trial court erred in denying his motion to suppress the results of his state-administered breath test. Specifically, he contended, law enforcement violated his state constitutional right against self-incrimination when law enforcement asked him to expel deep lung air into a breathalyzer. He also argued that OCGA § 40-5-67.1 (b) is unconstitutional on its face and as applied to him.

In determining whether coercing appellant to submit to a breath test is a violation of his state constitutional right against self-incrimination, the Court noted that the right against self-incrimination achieved constitutional status in Georgia for the first time in the 1877 Constitution: "No person shall be compelled to give testimony tending in any manner to criminate himself." Ga. Const. 1877, Art.I, Sec. I, Par. VI. Georgia's present Constitution provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." Ga. Const.1983, Art. I, Sec. I, Par. XVI ("Paragraph XVI"). Thus, other than replacing the archaic phrase "to criminate himself" with the more modern phrase "to be self-incriminating," Paragraph XVI is identical to the constitutional provision adopted in 1877. The Court stated that a provision of the constitution must be construed in the sense in which it was understood by the framers and the people at the time of its adoption. Moreover, when the framers of our present Constitution considered language that had already been definitively interpreted, and kept it without material alteration, they must be strongly presumed to have kept with the text its definitive interpretation.

Using this as guidance, the Court noted that in *Day v. State*, 63 Ga. 668,669 (2) (1879), it held that this constitutional right protected a defendant from being compelled to incriminate himself by acts, not merely testimony. This self-incrimination provision was carried forward with no material change from the 1877 Constitution through several intervening constitutions to our current 1983 Constitution. At no point through this history was the constitutional language changed to abrogate *Day*'s interpretation or to reconsider *Day*. To the contrary, the Court consistently and repeatedly applied the state constitutional protection against compelled self-incrimination in accord with *Day*. Thus, the Court held, although Paragraph XVI refers only to testimony, its protection against compelled self-incrimination was long ago construed to also cover incriminating acts and, thus, is more extensive than the U. S. Supreme Court's interpretation of the right against compelled self-incrimination guaranteed by the Fifth Amendment.

The Court then addressed the issue of compelling breath samples for evidentiary testing purposes. The Court state that although a person generally expels breath from his body involuntarily and automatically, the State is not merely collecting breath expelled in a natural manner. Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for generating evidence against himself. Indeed, for the State to be able to test an individual's breath for alcohol content, it is *required* that the defendant cooperate by *performing an act*. Therefore, requiring a defendant to submit to a breath test is uncon-

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stitutional because compelling a defendant to perform an act that is incriminating in nature is precisely what Paragraph XVI prohibits. In so holding, the Court overruled *Klink v. State*, 272 Ga. 605 (2000) and its progeny to the extent these cases hold that Paragraph XVI of the Georgia Constitution does not protect against compelled breath tests or that the right to refuse to submit to such testing is not a constitutional right.

Next, the Court addressed appellant's facial and "as applied" challenges to Georgia's implied consent notice under OCGA § 40-5-67.1 (b). As to his facial challenge, appellant argued that the implied consent notice inaccurately tells suspects that Georgia law requires them to submit to a state-administered chemical test and provides misleading information about the consequences for submitting or refusing to submit to a test. However, the Court stated, because evaluating whether self-incrimination was compelled depends on the totality of the circumstances, appellant cannot establish that the implied consent notice is materially misleading and substantively inaccurate in every application such that the notice invariably compels submission to the requested breath test. Furthermore, because the notice refers to a right to refuse, advises suspects of the consequences for doing so, and concludes with a request to submit to testing, a reasonable suspect relying solely on the notice should understand that the State is asking for a suspect's cooperation, rather than demanding it, and that they have a right to refuse to cooperate.

Nevertheless, appellant argued, the notice warns suspects that a refusal to submit to testing *will* result in a license suspension and that a test result indicating a BAC of .08 grams or more only *may* result in a suspension. The Court agreed that this information is not entirely accurate, as suspensions are mandated in either case. However, the mere fact that the notice misstates the likelihood of a license suspension does not, by itself, render the notice per se coercive regardless of other circumstances. Thus, the Court could not say that the notice's use of "may" instead of "shall" with respect to the likelihood of license suspension is likely to play a dispositive role in a reasonable person's decision; when arrested and facing jail, the relative likelihood of also facing a civil administrative penalty may well recede into the background.

Consequently, the Court held, although there are deficiencies in the implied consent notice, there was no record evidence that OCGA §40-5-67.1 (b) creates widespread confusion about drivers' rights and the consequences for refusing to submit to a chemical test or for taking and failing that test. And, because the Court could not assume that the implied consent notice standing alone will coerce reasonable people to whom it is read, appellant's facial challenge failed. In so holding, however, the Court noted that "[t]he General Assembly may wish to amend the implied consent notice statute; if it does, among the changes it may consider would be a clearer explication of the right to refuse testing, and a more accurate articulation of the likelihood of license suspension."

Finally, the Court addressed appellant's "as applied" contention that the application of the statute violated his due process rights. The Court stated that appellant's contention is not really a challenge to the statute, but instead a challenge to the admission of the results of the breath test against him. Whether a defendant is compelled to provide self-incriminating evidence in violation of Paragraph XVI is determined under the totality of the circumstances. Determining the voluntariness of (or lack of compulsion surrounding) a defendant's incrimi-

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nating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search.

Here, the Court noted, the trial court said it considered all the relevant factors to determine the voluntariness to consent to search, and these factors are the same ones used in determining whether an incriminating act or statement was voluntary. The only consideration that appellant argued the court failed to consider properly was the allegedly coercive and misleading nature of the implied consent notice. But, the Court stated, it already concluded in rejecting his facial challenge that the notice, standing alone, is not per se coercive. Moreover, appellant stipulated that the officer's actions were not threatening or intimidating. Therefore, because the reading of the implied consent notice is not, by itself, coercive, and appellant offered nothing else, his "as applied" claim failed. Accordingly, the Court affirmed the trial court's order denying appellant's motion to suppress and affirmed his convictions.

Prosecutors handling DUI cases involving state-administered breath tests obtained based on an affirmative response to the Implied Consent warning are strongly encouraged to analyze the facts of each case for circumstances demonstrating the free and voluntary nature of the defendant's submission to testing. Defendants are likely to challenge the admission of breath test results using similar arguments when challenging warrantless blood test results under *Williams* (e. g., the defendant was "too impaired" to be able to give actual consent). Furthermore, prosecutors should work with their local law enforcement agencies to develop a protocol whereby officers can establish free and voluntary consent pursuant to the Paragraph XVI of the Georgia Constitution in addition to the Implied Consent statute.

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