COERCION IN FIELD SOBRIETY AND BREATH TESTING CASES IN LIGHT OF *SPONAR* AND *SHAW*

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Picture this…your client is on the roadside being asked to take field sobriety tests, or is in a breath test room where he/she is being asked to submit to a DataMaster test. The client wants to refuse but is intimidated, coerced, tricked or misled into complying. What is the remedy? Can the evidence be suppressed?

In *Sponar v. South Carolina Department of Public Safety*, 361 S.C. 35, 603 S.E.2d 412, Ct. App. (2004), the South Carolina Court of Appeals was confronted with that exact issue. Sponar was arrested and charged with DUI and refused a DataMaster test. During the observation period Sponar asked whether he would still go to jail if he took the test, and the officer replied that it did not matter whether he took the test, because he would be going to jail either way. In *Town of Mount Pleasant v. Shaw*, 315 S.C. 111, 432 S.E.2d 450 (1993), the Supreme Court adopted the following rule:

> [I]f the arrested person is reasonably informed of his rights, duties and obligations under our implied consent law and he is neither tricked nor misled into thinking he has no right to refuse the test to determine the alcohol content in his blood, urine or breath, the test will generally be held admissible.

The court found the officer's statement to Sponar that he would be going to jail regardless of his decision on whether to submit to the breath test did not inadequately advise Sponar pursuant to South Carolina's implied consent statute. Finally, the statements made by Officer Whitcomb to Sponar did not "trick or mislead" Sponar into refusing the breath test. Such a statement indicated only that his decision, either way, would be of no consequence to his subsequent immediate incarceration. This statement was true because, as will be discussed more fully below, once he was incarcerated only a judge could have bonded him out. See S.C. Code §14-25-45.

What is the remedy however when the client *is* intimidated, coerced, tricked or misled into taking tests? Consider the following statements, all of which arguably are coercive.

Field Sobriety Tests

- State law requires you to take these tests.
- SC Highway Patrol policy requires you to take these tests.
- If you don't take the tests you are going to go to jail.
- Take these tests and prove you're not drunk.

Video

- You have to take this test.
- If you're not drunk prove it to me now.
- If you pass this you can go home.
- Everybody blows – why aren't you?

A number of jurisdictions have ruled that such statements violate due process and that suppression of evidence was an appropriate remedy where officers failed to give proper implied consent warnings or gave erroneous information in addition to or in place of implied consent warnings. Some examples include *Kitchens v. State*, 574 S.E.2d 451 (Ga.App. 2002); *State v. Wilson*, 987 P.2d 268 (Haw.1999); *Cooper v. Dept. of Licensing,* 810 P.2d 1385 (Wash. 1991); *Smith v. State of Nebraska, Department of Motor Vehicles,* 535 N.W.2d 694 (Neb. 1995); *Graves v. Commonwealth,* 535 A.2d 707 (Pa. 1988); *Beem v. State*, 805 P.2d 495 (Ida.App.1991); *Buchanan v. Registrar, Ohio Bureau of Motor Vehicles*, 619 N.E.2d 523 (Oh. 1993); *Bennett v. Director of Revenue,* 889 S.W.2d 166 (Mo.App.1994); *State v. Sells,* 798 S.W.2d 865 (Tex.App.1990); *State v. Kozel*, 505 A.2d 1221 (Vt. 1986); *State v. Spencer*, 750 P.2d 147 (Or. 1988); *State v. Stade*, 683 A.2d 164 (Me. 1996); *Forman v. Motor Vehicle Admin.*, 630 A.2d 753 (Md. 1993); *Hare v. Motor Vehicle Admin.*, 604 A.2d 914 (Md. 1992).

Many states have implied consent statutes to which officers must adhere while administering field sobriety and breath tests. When officers deviate from the parameters of these statutes, often times the appropriate remedy is suppression of the evidence collected in administration of the tests. In many jurisdictions, failure to comply with the requirements of the implied consent statute can result in exclusion of the test results in evidence. *State v. Loscomb*, 435 A.2d 764 (Md. 1981); *State v. Coleman,* 455 S.E.2d 604 (Ga.App. 1995); *State v. Stade*, 683 A.2d 164 (Me. 1996) (suppression of test results at trial affirmed where an officer failed to read the implied consent advisory and gave false and misleading advice).

Coercion, Misleading Information and Substantial Compliance

Sometimes officers unknowingly give false information to motorists concerning the consequences of refusing a test. Sometimes officers purposefully mislead and threaten defendants. Sometimes officers persuade defendants to blow when it is in their best interest to refuse, and sometimes they persuade defendants to refuse when they should blow. Any of these scenarios may, depending on the facts, lead to suppression of evidence. In *Sponar*, the court addressed whether an officer persuaded the defendant to refuse the test through trickery or deceit, and noted that where trickery or deceit exists, suppression is appropriate. *Sponar v. South Carolina Department of Public Safety*, 361 S.C. 35, 603 S.E.2d 412, Ct. App. (2004). When viewing how other jurisdictions have ruled in similar cases, it is valuable to analyze a variety of breathalyzer coercion cases to gain a better picture of this developing area of criminal law.

Normally, if an officer is engaging in coercive behavior, the officer is not in compliance with his state's implied consent statute. *Daniels v. Arkansas,* 84 Ark. App. 263; 139 S.W.3rd 140 ().

However, of even more importance appears to be whether an officer is found to be in "substantial compliance" with the state's implied consent statute. For instance, *State v. Huntley*, 349 S.C. 1; 562 S.E.2d 472 (2002) requires substantial compliance to South Carolina's implied consent statute. Under the 2009 version of the S. C. Code, defendants must be advised in writing, and must be given a copy of the implied consent form. S.C.

Code Ann. § 56-5-2950 (B) mandates "No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed…" ("Advised in writing" does not apply to cases made prior to noon February 10, 2009.)

Jurisdictions vary on the level to which officers must adhere to implied consent statutes. Some jurisdictions, such as Kansas, require substantial compliance similar to South Carolina, while others require strict compliance. *Kansas v. Krogler*, 38 Kan.App.2d 159, 163 P.3d 330 (), provides an example where officers did not substantially comply with the applicable implied consent statute. In *Krogler*, an officer gave a driver misleading information on which he relied in submitting to a breath test. The court held that the officer did not *substantially* comply with statutory notice requirements, and added that the defendant was not required to show actual prejudice in order for testing evidence to be suppressed. *Id*.

It seems evident that motorists who are not fully apprized of their options would be unable to make decisions in their best interest, and would be more easily coerced. Where an officer did not inform the defendant that only his driving privileges in Georgia and not his home state of Florida would be affected, evidence was suppressed. *Georgia v. Renfro*, 216 Ga.App. 709, 455 S.E.2d 383.

> Defendant contended the arresting officer "did not inform the Defendant that as an out-of-state (Florida) license holder only his privilege to drive in the State of Georgia could be suspended. Consequently, ... informing the Defendant that his *license* may be suspended for 'a minimum period of one year' ... [was] erroneous information which made it impossible for the Defendant to make an informed decision…" *Id.*

Relying on the misinformation given to him by the officer, the defendant refused to blow. The court determined that the instructions given by the officer were so confusing that the defendant was deprived of the ability to make an informed decision. Similarly, the Georgia Court granted a motion to suppress based on an officer's statement that refusal to take a breath test would result in suspension of his Texas license. *Georgia v. Pierce*, 257 Ga. App. 623, 571 S.E.2d 826 (2002). According to the court, "[t]he information given to Pierce contained substantial misleading, inaccurate information and confused him as to his implied consent rights."

Likewise, suppression was the appropriate remedy where a defendant was misled because an officer told him that refusal to submit to the test would result in a 90 day suspension of his license, but in fact, it would result in a suspension of not less than 180 days. *State v. Woehst* 175 S.W.3d 329, Tex. App., 2004. Further, an "erroneous deprivation…consists of attaching sentencing consequences to a choice that an individual may not have made had the state provided him…with accurate information." *Roberts v. Maine*, 609 A.2d 702 (1992) (suppressing evidence where a defendant refused to submit to a blood test and the penalty for refusal was 2 days in jail, but the officer did not tell the defendant about the mandatory jail time).

Erroneous information regarding the amount of time a defendant's license will be suspended seems to be a recurring theme. In *Meigs v. Kansas Dept. of Revenue*, 251 Kan. 677, 840 P.2d 448 (1992), an officer gave false information to a defendant about the length of time her license could possibly be suspended for refusal to submit to a test, and the court held that the evidence should have been suppressed.

Take the Test, or I'll Take You to Jail

A common form of coercion is a threat of jail time if the defendant does not acquiesce to requests of an officer. *Erdman v. State,* 861 S.W.2d 890 (Tex. App. 1993). The problem is that once an officer requests a field sobriety test, the officer almost always takes the motorist to jail, regardless of whether he takes the test or not. In essence, the officer's offer is illusory because he is going to take the motorist to jail regardless of how the motorist responds to the request to take a field sobriety test. *Vermont v. Kozel*, 505 A. 2d. 1221 (Vt. 1986), is a case where the defendant was coerced into taking a test because police told him he would be lodged overnight if he refused. The Vermont Supreme Court held that:

> To sanction the evidentiary use of a test obtained under these conditions was error…The statute does not state that the defendant may be lodged for refusing to submit to a breath test…[C]oercion of this sort is improper, and the results of the breath test should have been suppressed. *Id.*

It is generally accepted that defendants *do* have the right to refuse a test. *Smith v. State*, 378 So.2d 281(1979), *State v. Leviner*, 213 Ga.App. 99, 443 S.E.2d 688 (1994), *Keenan v. State,* 263 Ga. 569, 571, 436 S.E.2d 475 (1993), and *Sambrine v. State*, 386 So. 2d. 546 (Fla. 1980). In addition, officers are usually required by statute to inform defendants of this right. S.C. Code Ann. § 56-5-2950 (B).

PHYSICAL COERCION

In addition to its verbal counterpart, physical coercion also exists. In *Georgia v. Collier*, 266 Ga.App. 762, 598 S.E.2d 373 (2004), the court ruled that Georgia Code 40-5-67 restricts the ability of a law enforcement officer to obtain a refused test. In *Collier*, the defendant refused blood and urine tests and the officer threatened that if defendant refused, the urine test would be taken with a catheter. This case relied on *Cooper v. The State,* 277 Ga. 282; 587 S.E.2d 605 (2003) to interpret the Georgia statute. The police had obtained a search warrant, but the court ruled that police may not use a search warrant to circumvent a defendant's refusal of a urine test.

Also, an officer should not indicate that he will obtain a warrant he has no legal basis to obtain in order to induce a defendant to submit to a breath test. *Hays v. Driver and Motor Vehicle Services Div*., 228 Or. App. 689, 209 P.3d 405 (2009). In *Hays*, the court remanded the case to the DMV because it was necessary to determine whether deputy's threat to obtain a warrant for petitioner's blood and urine induced petitioner to recant his refusal to take a breath test. The court noted that "[c]learly, the officer may not threaten physical compulsion," which appears to indicate that if the officer's threat caused the defendant to submit to a breath test, then a violation of the implied consent statute was present.

The Minnesota Supreme Court found that where an officer did not trick or mislead a defendant into submitting to a test, but physically took blood from the defendant without a warrant and without gaining her consent, there was coercion, and thus, no consent. *Minnesota v. Shriner*, 751 N.W.2d 538 (2008). The state in *Shriner* argued that exigent circumstances excused the officers' failure to obtain a warrant, but the court disagreed, stating:

> … the district court did not find that exigent circumstances existed to dispense with the warrant requirements. As already noted, the totality of the circumstances do not support an exigency determination. Officer Yakovlev testified that he was not concerned about the dissipation of alcohol from Shriner's blood. The scene of the arrest was near the hospital; the time needed to make a blood draw was minimal. The officer was not faced with competing responsibilities. Equally significant, the district court did not find that obtaining a nighttime search warrant was time consuming or created exigent circumstances. The record is silent on the local warrant process and the state does not claim that there is any difficulty in obtaining nighttime or telephonic warrants. On this record, when neither the prosecution nor the district court judge was concerned with the officer's ability to promptly obtain a warrant, and the district court held a warrant should have been obtained, we are unwilling to reverse the district court and assume that the time needed to obtain a warrant created an exigent circumstance. *Id*.

The court granted a new trial, and on the point of whether the officer gave proper instructions to the driver, ruled that:

> The State does not dispute appellant's contention that the rights form used in this case was identical to the one that the court of appeals [has previously] found to be defective … For the reasons set out in the first point, we find that the trial court erred in admitting the breathalyzer results over the objection of appellant. *Id.*

Prosecutorial Misconduct

Prosecutorial misconduct is also an unfortunate reality within our criminal justice system. *U.S. v. Jannotti*, 673 F.2d 578, 614 (3d Cir. 1982) noted "There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice ... " Where a defendant shows that the state has engaged in some sort of action making a fair trial impossible, a motion of dismissal may be granted. The defendant in *State v. Barwick*, 280 S.C. 45, 310 S.E.2d 428 (1983), was convicted of four crimes, all arising from an incident involving insurance fraud. The main issue on appeal was whether the trial judge should have dismissed the indictment because of prosecutorial misconduct. In affirming the judgment, the court stated:

> A motion for judgment of dismissal on the grounds of government misconduct… is grounded on the allegation that the defendant cannot receive a fair trial [at the time of trial] … *or at any time in the reasonable foreseeable future* and, thus, cannot be afforded due process of law.

In light of *Barwick*, it appears Prosecutorial Misconduct may be easier to prove than thought, at least in the areas of Field Sobriety Testing and Breath Testing. If the defendant shows the state cannot correct the error or problem now or at any time in the foreseeable future, the case arguably should be dismissed. Although the court in *Barwick*

did not grant the motion for dismissal, it lends guidance as to when such a remedy is available.

Conclusion

This is certainly a complex area of the law, and the brevity of this article necessarily precludes it from an exhaustive analysis. Perhaps such is fortuitous for DUI practitioners, as the more steps officers must comply with to process a driver suspected of DUI, the more likely officers are to miss steps in the process. Many drivers may not be aware that they have the right to refuse a test; a right that exists, and one that officers must make known, just as they must adhere to other steps of verbally informing drivers of their rights under South Carolina's implied consent statute.