



# DPS Legal Review

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## **NOTICE FOR SUSPECTS < 21**

A Defendant driver, under the age of 21, struck another vehicle. Georgia State Patrol Trooper Jay Shirah was called to the scene of the crash. He spoke to the Defendant and noted that he had bloodshot eyes and a moderate smell of alcohol coming from his person. The Defendant admitted that he had consumed five beers in approximately one hour. Thereafter, the Trooper administered field sobriety tests to the Defendant.

The Trooper observed four out of six possible clues on the horizontal gaze nystagmus test, no clues on the one-leg stand test, and one out of eight possible clues on the walk-and-turn test. The Defendant tested positive for alcohol on the alco-sensor test. Trooper Shirah placed the Defendant under arrest and read to him the implied consent notice for suspects under 21. The Defendant was taken to jail and given a state-administered breath test which resulted in readings of 0.038 and 0.036 grams. The Defendant moved to exclude the results of the state-administered breath tests arguing that:

- 1.) the implied consent notice was misleading and inaccurate, and
- 2.) the implied consent statute cannot be applied to juveniles because notice of arrest must be given and juveniles are not subject to arrest.

**HOLDING:** As to the first argument, the Court held that a driver's eligibility to apply for possible license reinstatement before the end of the suspension period does not change the fact that the license is suspended for at least 12 months. The statutory implied consent notice for suspects under 21 provided in O.C.G.A. § 40-5-67.1(b)(1) is substantively accurate when it states that a blood alcohol concentration of 0.02 grams or more will result in a suspension of the driver's license for minimum period of one year. Hence, the state-administered breath tests were admissible.

As to the second argument, the Court held that the Defendant had been placed under arrest for purposes of the implied consent statute. A suspect who is not involved in a traffic accident resulting in serious injuries or fatalities must be under arrest before implied consent rights are read to him. The Court held that an arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. Thus, the Defendant's detention by the Trooper, following his statement that the Defendant was under arrest, was sufficient to trigger the implied consent law. In the Interest of R.M., A Child, \_\_\_ S.E.2d \_\_\_, 2010 WL 2991519 (Ga. App.).

## **SEARCH OF AN ABANDONED VEHICLE**

An Officer pulled the Defendant over for failure to wear a seat belt. The Defendant pulled his car into another person's residential driveway and walked away from his car. The Officer pulled up behind the Defendant and told him to return to his car and sit down. The Defendant returned to the car and sat on the driver's seat with the door open and his legs outside.

The Officer verified that the Defendant had no connection to the residence. Based upon the Defendant's tense nervous behavior and accelerated breathing, the Officer believed he might attempt to flee or fight. When the Officer tried to handcuff the Defendant, he resisted, knocked the handcuffs away and fought the Officer. The Defendant fled with the Officer pursuing him. The Officer notified other police units of his location and the situation. A second Officer arrived and found the Defendant's car in the driveway with the police vehicle behind it. The second Officer saw that the driver's side of the Defendant's car was open and a pair of handcuffs lay on the ground near the door, and neither the Defendant nor the first Officer were in sight. The second Officer confirmed with the land owner that he did not own the Defendant's car or know him.

Thereafter, the second Officer searched the Defendant's car and found a gun under a seat cover on the passenger side along with a machete. Ultimately, the Defendant was apprehended and charged with failure to wear a safety belt, obstruction of an officer, possession of a firearm by a convicted felon, possession of a weapon whose serial number has been removed, and other crimes. The Defendant moved to suppress the evidence arguing that the warrantless search of his car violated his Fourth Amendment rights.

**HOLDING:** The motion was denied. The Court held that leaving the car door open and fleeing police while the car was illegally parked demonstrated intent to abandon it. Because the Defendant illegally abandoned his car, he forfeited any right to challenge a search. Johnson v. State, \_\_S.E.2d\_\_, 2010 WL 3259986 (Ga. App.).

### **"AUTOMOBILE EXCEPTION"**

The City of Commerce Police Department ("CCPD") issued a "be-on-the-lookout" ("BOLO") for the Defendant. An Officer, aware of the BOLO advisory, saw the Defendant drive into a convenience store and park his car. After confirming the existence of outstanding warrants for the Defendant, the Officer followed the Defendant into the store and placed him under arrest. As he escorted the Defendant to his patrol car, a second Officer arrived, approached the Defendant's car, and looked through the front passenger side window. In plain view he saw a clear baggy containing a white powdery substance that he suspected was crack cocaine.

The second Officer reached through the partially opened window, unlocked the passenger door, and retrieved the baggy from the car. He did not obtain the Defendant's consent to search the car or a search warrant prior to seizing the baggy. The Defendant moved to suppress arguing that the search of his car was invalid because it was not supported by consent, a search warrant, or exigent circumstances.

**HOLDING:** The motion was denied. The Court held that the Defendant's consent, a search warrant, or exigent circumstances were not required to make the search constitutional. Under the "automobile exception" to the Fourth Amendment, a police officer may search a car without a warrant if he has probable cause to believe the car contains contraband, even if there is no exigency preventing the officer from getting a search warrant. The Court held that the

automobile exception applied on two grounds: 1.) the ready mobility of automobiles, and 2.) the diminished expectation of privacy that citizens have in them. State v. Sarden, \_\_S.E.2d\_\_, 2010 WL 3221885 (Ga. App.).

### **INQUIRING MINDS**

**QUERY:** Does the "automobile exception" to the Fourth Amendment's warrant requirement justify a brief search of a Defendant's lawfully-seized cell phone?

**ANSWER:** Yes. The automobile exception permits the warrantless search of any container in an operational vehicle if probable cause exists to believe that the container holds evidence of a crime, either at the time of the arrest or at some point thereafter. The Court has held that a cell phone is a "container for purposes of the automobile exception because it contains information (recent calls, telephone numbers, etc.) not readily apparent without manipulating the cell phone itself. Courts look at the totality of the facts surrounding the cell phone's seizure and ultimate search to determine whether the automobile exception applies. See U.S. v. Cole, 2010 WL 320963 (N.D. Ga.).

### **ALS REMINDERS**

⊗ When entering into an ALS plea agreement to withdraw the ALS in exchange for the defendant to enter a guilty plea to the DUI charge, please make sure that 1.) a deadline for entering the plea is indicated on the ALS plea agreement form, **and** 2.) the ALS plea agreement form located on the My DPS website is used.

⊗ If the DUI defendant enters a guilty plea to the DUI charge prior to the ALS Hearing, the ALS proceeding must still be resolved. If the agreement is to withdraw the ALS based on the DUI plea, then paperwork withdrawing the ALS must be filled out and submitted to the Administrative Law Judge. If you have any questions regarding this procedure, please contact Dee or Beverly.

### **QUOTABLE WISDOM WORKS**

**"Everyone is entitled to his own opinion, but not his own facts." ~ Daniel Patrick Moynihan**

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