



# DPS Legal Review

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## COMMERCIAL VEHICLE/ IMPLIED CONSENT INAPPLICABLE

The defendant was driving a pickup truck displaying a hazardous materials placard on an interstate highway. A MCCD officer stationed at a commercial vehicle inspection station saw the pickup truck drive past without stopping. The MCCD officer pursued the defendant and stopped him. As the officer spoke with the defendant and directed him back to the inspection station, he noticed an odor of alcohol on the defendant's breath. When the officer asked the defendant if he had consumed any alcohol, the defendant said that he had done so eight hours before he was stopped.

The officer asked the defendant to blow into an alco-sensor to detect the presence of alcohol. The defendant consented, and he registered positive for alcohol. The officer allowed the passenger to drive the truck to the inspection station where an inspection for compliance with commercial vehicle standards was conducted. The defendant was issued a citation for DPS rules violations based upon exhibiting a detectable level of alcohol while driving a commercial vehicle and having a broken rear brake light/turn signal. The defendant moved to suppress the evidence, alleging: 1) the State failed to demonstrate the basis for the investigating officer's suspicion justifying the initial stop, and 2) the investigating officer administered an alco-sensor test without first giving the defendant an implied consent warning.

**HOLDING:** The Court denied the suppression motion. The Court held that the Georgia Public Service Commission has formally adopted motor carrier safety regulations issued by the Federal Motor Carrier Safety Administration. The DPS is charged with enforcing federal motor carrier regulations which have been adopted under Georgia law. Under these rules, the Court held that the MCCD officer was authorized to stop commercial motor vehicles to conduct safety

inspections. The Court held that the State met its burden to demonstrate the officer's authority to conduct the traffic stop.

Additionally, the Court held that the alco-sensor test is designed to test for the presence of alcohol. No blood alcohol concentration was at issue. The Court held that the implied consent warning requirement does not apply to alco-sensor tests detecting the presence, not concentration, of alcohol. The Court held the officer was not required to give the implied consent warning under O.C.G.A. § 40-5-153. Tunali v. State, \_\_ S.E.2d \_\_, 2011 WL 4552410 (Ga.App.).

## MEDICAL RECORDS

The defendant, the victim, and several members of the defendant's family went to the Hideaway bar in Buford, Georgia, to celebrate the defendant's birthday. The defendant drank shots of liquor and began to disturb other customers. Around midnight, police responded to a call from the Hideaway. Personnel from the bar reported that the defendant had struck the victim and needed to leave. The defendant was in the parking lot. At first he refused to leave, but eventually he left in a van driven by the victim.

A few hours later, a Gwinnett County police officer responded to a traffic accident. When the officer arrived, he saw a van that had crashed into the right front corner of a house. He saw the defendant standing over the victim, who was lying in the driveway with a large amount of blood around her head. When the officer asked the defendant what happened, the defendant said that he accidentally shot the victim when a gun discharged from his ankle, and the victim, who was driving, lost control of the van.

Initially, the defendant claimed that he did not know the location of the gun, but he eventually told officers the gun was under the seat. The officer located the loaded .380 caliber handgun six to eight feet from the van's passenger door under the window of the house. The defendant

and the victim were taken to the hospital. The victim died the following day from a gunshot wound to her head.

While he was being treated at the hospital, the defendant asked the officer to come into the room. While the officer was present, the defendant told the doctor that he was in the car with the victim while she was driving and a gun accidentally went off. As part of his treatment, the defendant's blood and urine were drawn and analyzed. The lab results showed his blood alcohol content was .142. The defendant's drug screen was positive for cocaine, marijuana, opiates, and benzodiazepines. The defendant was placed under arrest. At the hospital and en route to jail, the defendant told three different officers, without prompting, that the gun went off accidentally.

While he was out on bond, the defendant told his roommate that he sent the victim to buy cocaine, but the substance was not cocaine. The defendant had the victim drive him back to the seller. He brandished his gun and demanded his money or the drugs. The victim "started freaking out . . . so he turned the gun on her and told her to quit tripping and she knocked his arm back." At that point, he shot her. The investigator with the district attorney's office obtained and executed a search warrant authorizing a search of the hospital records regarding the examination, treatment, and care of the defendant. The defendant asserted that the search warrant was unconstitutional and the medical records should have been suppressed at trial.

**HOLDING:** The Court held that neither the Fourth Amendment privacy guarantees nor the Georgia Constitution prohibited the search and seizure of the defendant's personal medical records. The Court held that the defendant's attempt to establish a reasonable expectation of privacy failed because he invited two officers into the room where he was being treated. The defendant could not claim an expectation of privacy in the medical records to the extent that they contain information he disclosed to medical personnel or they disclosed to him in the presence of the officers. The Court further held that the search and seizure of those records pursuant to a valid warrant was lawful. Federal law, under 42 CFR § 2.63(a)(2), authorizes a court to order disclosure of confidential communications on the ground that "(t)he disclosure is necessary in connection with

investigation or prosecution of an extremely serious crime. . . including homicide." State law, under O.C.G.A. § 24-9-40(a), authorizes the release of confidential medical information "on appropriate court order." The Court declined to consider whether the Fifth Amendment protected the contents of the medical records as private papers. The Court held that the medical records were not the defendant's "private papers" because he did not own or possess them. The Court also held that the self-incrimination clause of the Fifth Amendment was not within the scope of the analyses performed on the defendant's blood and urine. The Court held that evidence of the defendant's drug and alcohol use around the time of the shooting was admissible and relevant to show his state of mind at the time of the crimes. Bowling v. State, \_\_\_ S.E.2d \_\_\_, 2011 WL 4905698 (Ga.).

### **INQUIRING MINDS**

**QUERY:** Is the Department of Revenue ("DOR") making changes to the way temporary permits are issued?

**ANSWER:** Yes. Beginning December 1, 2011, the DOR will revise its Temporary Permit Procedures and launch a new Electronic Title and Registration Process. Further details about the new process can be found by clicking on the icon below:



DOR Announcement  
Concerning TOP & ETI

### **ALS REMINDER**

⚠ Please remember to check the OSAH website at [www.osah.ga.gov](http://www.osah.ga.gov) for a list of all of your upcoming ALS cases. Once you are on the website, you can find the list of scheduled ALS cases by selecting the court date and the judge. **New hearing notices are not sent out when the case is continued while you are in court.** The website is the best source for confirmation of your upcoming ALS cases. Contact Dee or Beverly with any questions regarding ALS or the website.

### **QUOTABLE WISDOM WORKS**

*"If you wish to forget anything on the spot, make a note that this thing is to be remembered."*

~ Edgar Allen Poe

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and

