North Carolina Criminal Law Blog: Failing to advise a defendant of his implied consent rights requires suppression of the test results . . . except when it doesn't

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Article: http://nccriminallaw.sog.unc.edu/failing-to-advise-a-defendant-of-his-implied-consent-rights-requires-suppression-of-the-test-results-except-when-it-doesnt/

This entry was posted on January 07,2015 and is filed under Crimes And Elements,Evidence,Motor Vehicles

In opinions spanning four decades, North Carolina's appellate courts have suppressed chemical analysis results in impaired driving cases based on statutory violations related to their administration. When the violation consists of the State's failure to advise a defendant of her implied consent rights, the appellate courts' jurisprudence has been straightforward and consistent: The results of an implied consent test carried out without the defendant having first been advised of her implied consent rights are inadmissible. Indeed, the court of appeals reaffirmed that principle last June in State v. Williams, __ N.C. App. ___, 759 S.E.2d 350 (2014), holding that the State's failure to re-advise the defendant of his implied consent rights before conducting a blood test under the implied consent statutes required suppression of the test results. A court of appeals opinion issued in the waning hours of 2014 indicates, however, that the rule is subject to at least one exception.

The case is State v. Sink. The issue before the court was whether the State's failure to re-advise the defendant (who earlier had refused to submit to a breath test) of his implied consent rights before withdrawing his blood for chemical analysis required suppression of the blood test results. Sound familiar? The court of appeals confronted the same basic facts in *Williams*, and deemed them to require suppression of the blood test results as G.S. 20-139.1(b5) requires that a person "again be advised of the implied consent rights in accordance with G.S. 20-16.2(a)" "if a subsequent chemical analysis is requested."

The *Williams* court rejected the State's argument that suppression was not warranted as the statutory violation was "'technical and not substantial and the defendant has shown no prejudice.'" *Williams* stated that that such a failure to advise "cannot be deemed a mere technical and insubstantial violation," since "[t]he State was *required* to re-advise defendant of his implied consent rights prior to the second chemical analysis test—a blood test."

Yet in *Sink* the court concluded that suppression of the blood test results was not required. The court distinguished *Williams* on the basis that Mr. Sink told the officer, after initially being advised of his implied consent rights, that he would not take a breath test, but "would give a blood test." Mr. Williams, in contrast, made no such statement, though he did sign a consent form for the blood test.

Why is Mr. Sink's statement significant? The court concluded that Mr. Sink ***volunteered*** to submit to a blood test; thus, because the officer did not ***request*** the test, Mr. Sink's statutory right to be re-advised of his implied consent rights "was not triggered." I'm skeptical of this explanation. Defendants never choose the type of chemical testing they are offered. That choice is the law enforcement officer's. *See* G.S. 20-16.2(c) (stating that the "law enforcement officer or chemical analyst must designated the type of test or test to be given). Indeed, had Mr. Sink requested a blood test for his own purposes, the officer would not have transported him to the hospital and the State Crime Lab would not have expended its limited resources in analyzing the blood. *Cf.* State v. Bumgarner, 97 N.C. App. 567 (1990) (concluding that law enforcement officers' refusal to take the defendant to the hospital for additional testing or to withdraw blood for later testing did not violate the defendant's statutory rights under G.S. 20-139.1). The *Sink* court reported that Mr. Sink was taken to a local hospital, where he was placed on a gurney and fell asleep. A technician came in, awakened him, and told him his blood was going to be withdrawn. This sequence of events is consistent with the withdrawal of blood pursuant to an officer's request—not the defendant's.

Notwithstanding my skepticism about the court's reasoning, requiring suppression in *Sink* would elevate form over substance in a more significant way than *Williams*. Mr. Sink's behavior indicates that he understood his testing rights and his options, including the right to refuse testing. He had reason to know. He was indicted for habitual impaired driving for the latest incident, meaning that he had been convicted of impaired driving three times in the previous ten years.

Suppressing the results of a test to which Mr. Sink preemptively consented on the basis that he was not formally advised of his right to refuse the test strikes me as a bit like awarding relief for error the defendant invited.

The safest course of action for law enforcement officers pre- and post-*Sink* is to always re-advise defendants of their implied consent rights before carrying out subsequent testing. But when officers err, *Sink* affords the State a new argument against suppression.