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# MOTOR VEHICLES AND TRAFFIC Drivers Licenses: Mandate Implied Consent Warnings and Applicable Intoxication Levels for Georgia Drivers; Provide for Certification of Testing Equipment and Personnel; Provide for Taking and Admission of Sequential Breath Samples

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## MOTOR VEHICLES AND TRAFFIC

### *Drivers' Licenses: Mandate Implied Consent Warnings and Applicable Intoxication Levels for Georgia Drivers; Provide for Certification of Testing Equipment and Personnel; Provide for Taking and Admission of Sequential Breath Samples*

CODE SECTIONS: O.C.G.A. §§ 40-5-67.1, 40-6-392 (amended)  
 BILL NUMBER: HB 610  
 ACT NUMBER: 480  
 GEORGIA LAWS: 1995 Ga. Laws 1160  
 SUMMARY: The Act requires law enforcement officers to give a specific warning to drivers stopped for driving under the influence. The Act codifies different warnings for different classes of drivers on Georgia roads. Further, the Act establishes certification standards for breath-testing instruments and for the personnel administering the test. Finally, the Act requires the taking of two sequential samples and conditions admissibility of the test results on the differences.

EFFECTIVE DATE: April 21, 1995<sup>1</sup>

#### *History*

In 1994, the defense bar successfully lobbied the General Assembly for changes in Georgia's driving under the influence (DUI) laws.<sup>2</sup> Among other things, the 1994 legislation contained what is commonly known as "Tagucci cell language."<sup>3</sup> The pertinent language provided that breath tests were to be given on

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1. The Act became effective upon approval by the Governor. The requirement for two breath samples will not apply to arrests made prior to January 1, 1995. 1995 Ga. Laws 1160.

2. Interview with Ralph T. Bowden, Jr., DeKalb County Solicitor (July 12, 1995) [hereinafter Bowden Interview]; 1994 Ga. Laws 1600 (formerly found at O.C.G.A. §§ 40-5-67.1(g)(2)(F), 40-6-392(a)(1) (1994)).

3. Bowden Interview, *supra* note 2. The Tagucci cell is a component in the Intoximeter 3000 that is designed to pick up interferants other than alcohol that may affect the breathalyzer results. Bowden Interview, *supra* 2.

a "machine [which] at the time of the test was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order."<sup>4</sup> Prior to the 1994 session, the State Crime Laboratory had authorized law enforcement personnel to bypass or disconnect the Tagucci cell because it required constant calibration.<sup>5</sup> The DUI defense bar advocated reattachment of the Tagucci cell, arguing that bypassing it could affect test results because it was designed to detect contaminants.<sup>6</sup> Thus, legislation was introduced to require all electronic parts of the testing machine to be operational.<sup>7</sup> The language added to the law would have proven enormously burdensome for the state because it would require the state to produce two additional witnesses in every DUI trial.<sup>8</sup> In order to prove that all of the machine's electronic parts were attached and in working order, the state would have to call a witness from the manufacturer of the Intoximeter 3000 and an area supervisor from the Division of Forensic Sciences of the Georgia Bureau of Investigation in every single DUI trial.<sup>9</sup> This legislation was the impetus for HB 610.<sup>10</sup>

### HB 610

The purpose of the Act is to simplify current procedural difficulties in enforcing DUI laws.<sup>11</sup> The original bill, introduced in the House, amended Code sections 40-5-67.1(g)(2)(F) and 40-6-392(a)(1) by deleting the Tagucci cell language that was inserted by the 1994 legislation.<sup>12</sup> In addition, the original bill added a

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4. 1994 Ga. Laws 1600, § 6, at 1607 (formerly found at O.C.G.A. § 40-5-67.1(g)(2)(F) (1994)).

5. Bowden Interview, *supra* note 2.

6. Bowden Interview, *supra* note 2.

7. 1994 Ga. Laws 1600 (formerly found at O.C.G.A. §§ 40-5-67.1(g)(2)(F) (1994)); *id.* (formerly found at O.C.G.A. § 40-6-392(1)(a) (1994)).

8. Bowden Interview, *supra* note 2.

9. Bowden Interview, *supra* note 2.

10. Bowden Interview, *supra* note 2.

11. Bowden Interview, *supra* note 2; *Lawmakers '95* (GPTV broadcast, Mar. 6, 1995) (videotape available in Georgia State University College of Law Library). Rep. Tommy Chambliss of House District No. 163 noted that HB 610 would relieve the onerous burden to produce extraneous witnesses in a DUI trial that was placed on prosecutors by requirements imposed by the 1994 legislation. *Id.*

12. Compare HB 610, as introduced, 1995 Ga. Gen. Assem. with 1994 Ga.

new provision to Code section 40-6-392(a)(1) that provided for the taking of two sequential samples.<sup>13</sup> This provision was added because of a change in testing equipment that occurred at the end of 1994.<sup>14</sup> If the readings differed by more than .020 grams, the test results would not be admissible in the state's or plaintiff's case in chief.<sup>15</sup>

Most importantly, the original bill required that its provisions apply to all pending cases.<sup>16</sup> This retroactivity provision was designed to effect a smooth transition between old and new law, completely bypassing the requirements of the 1994 legislation.<sup>17</sup> The provision requiring sequential sampling, however, applied only to arrests made on or after January 1, 1995.<sup>18</sup>

HB 610 was assigned to the House Judiciary Committee, which added a provision codifying the wording of the implied consent warning to be given to drivers stopped for DUI.<sup>19</sup> The substitute mandated different warnings which were based on the driver's classification.<sup>20</sup> Each implied consent warning was

Laws 1600 (formerly found at O.C.G.A. § 40-5-67.1(g)(2)(F) (1994) and O.C.G.A. § 40-6-392(a)(1) (1994)); *see also*, Bowden Interview, *supra* note 2. A minor change in wording, requested by the Georgia Crime Laboratory, was also included in the original draft of HB 610. Bowden Interview, *supra* note 2. The words "a machine" were changed to "an instrument." Compare 1994 Ga. Laws 1600 (formerly found at O.C.G.A. § 40-5-67.1(g)(2)(F) (1994)), with HB 610, as introduced, 1995 Ga. Gen. Assem.

13. HB 610, as introduced, 1995 Ga. Gen. Assem.

14. Bowden Interview, *supra* note 2. The old machine, the Intoximeter 3000, was obsolete, out of production, and had the Tagucci cell problem. Bowden Interview, *supra* note 2. In January 1995, the State Crime Laboratory switched to the Intoxilyzer 5000, which automatically takes two samples. Bowden Interview, *supra* note 2.

15. HB 610, as introduced, 1995 Ga. Gen. Assem.

16. *Id.*; *see* Bowden Interview, *supra* note 2.

17. Bowden Interview, *supra* note 2. The 1994 legislation did not become effective until January 1, 1995. 1994 Ga. Laws 1600, § 12, at 1616. By adding a retroactive provision to HB 610, making it applicable to all pending cases, the state could avoid requirements imposed by the 1994 legislation in those DUI cases tried between January 1, 1995 and the effective date of the Act. Bowden Interview, *supra* note 2.

18. 1995 Ga. Laws 1600, § 5, at 1164. The Intoxilyzer 5000 machine was not in operation until January 1995. Bowden Interview, *supra* note 2. Thus, there was no requirement for sequential sampling prior to that date. Bowden Interview, *supra* note 2.

19. HB 610 (HCS), 1995 Ga. Gen. Assem.

20. *Id.* The enumerated classifications were: suspects under 18, commercial

tailored to the particular driver's specific liability under the law.<sup>21</sup>

The committee substitute also provided for certification of the testing instrument's inspection, calibration, and validity.<sup>22</sup> A properly prepared certificate is self-authenticating and, therefore, admissible into evidence at trial.<sup>23</sup> Furthermore, the Committee modified the sequential breath-testing provisions, requiring that the lower of the two samples be determinative for indictment and license suspension purposes.<sup>24</sup>

In the House, Representative Tommy Chambless offered a floor amendment.<sup>25</sup> This amendment clarified the language of the implied consent warning.<sup>26</sup> In addition, the amendment revised the provisions for the admissibility at trial of a suspect's refusal to submit to the tests.<sup>27</sup> The provision was simply rephrased for

driver suspects, suspects who hold out of state driver's licenses, and all other suspects. *Id.*

21. *Id.* For example, suspects under eighteen would be warned that they are legally intoxicated with a blood alcohol level of 0.04 grams, while commercial drivers would be warned that they are legally intoxicated when their blood alcohol level reaches 0.10 grams. *Id.*

22. HB 610 (HCS), 1995 Ga. Gen. Assem. This provision was added as a compromise between the increasing pressure of the DUI defense bar to ensure the accuracy of the testing equipment and the state's need for speedy, efficient, and economical DUI trials. Bowden Interview, *supra* note 2. DUI lawyers argued that there was a need to verify the accuracy of the machine because the lowered legal alcohol limits left little room for error. Bowden Interview, *supra* note 2; see also *Legislative Review*, 11 GA. ST. U. L. REV. 215, 222 (1994).

23. HB 610 (HCS), 1995 Ga. Gen. Assem. Since HB 610, as originally introduced, was designed to reduce the number of witnesses required in a DUI trial, the self-authenticating requirement was needed. Bowden Interview, *supra* note 2.

24. *Compare*, HB 610, as introduced, 1995 Ga. Gen. Assem. *with* HB 610 (HCS), 1995 Ga. Gen. Assem.

25. HB 610 (HFA), 1995 Ga. Gen. Assem.

26. *Id.* The amendment also eliminated one category of implied consent warnings: those given to suspects holding out of state driver's licenses. *Compare* HB 610 (HCS), 1995 Ga. Gen. Assem. *with* HB 610 (HCSFA), 1995 Ga. Gen. Assem. The categories were reduced to: suspects under 18, suspects over 18, and commercial driver suspects. HB 610 (HCSFA), 1995 Ga. Gen. Assem.

27. *Compare* HB 610 (HCSFA), 1995 Ga. Gen. Assem. *with* 1994 Ga. Laws 1600 (formerly found at O.C.G.A. § 40-5-67.1(b)(4)-(5) (1994)).

clarity.<sup>28</sup> The Committee substitute modified by the floor amendment passed both the House and Senate.<sup>29</sup>

### *Martin v. State*

On July 13, 1995, the Georgia Court of Appeals interpreted the language of Code section 40-5-67.1 in *Martin v. State*.<sup>30</sup> The court adopted a bright line rule, holding that the arresting officer was required to give the implied consent warning codified in Code section 40-5-67.1(b)(1) to (3) even though the arrest occurred on September 10, 1994, prior to the codification of Code section 40-5-67.1(b)(1) to (3).<sup>31</sup> Consequently, the results of the breath test were inadmissible.<sup>32</sup> The impact of this ruling was devastating.<sup>33</sup> Theoretically, the ruling jeopardized more than 10,000 pending DUI cases.<sup>34</sup> Tragically, vehicular homicides in the first degree<sup>35</sup> could also have been jeopardized by the ruling.<sup>36</sup> Clayton County Solicitor Keith Martin filed a motion for reconsideration.<sup>37</sup>

### *1995 Special Session*

The General Assembly responded to *Martin v. State* by passing HB 10EX during the 1995 Special Session.<sup>38</sup> Governor Zell Miller responded to entreaties by legislators and prosecutors

28. Bowden Interview, *supra* note 2.

29. Final Composite Status Sheet, Mar. 17, 1995.

30. *Martin v. State*, Docket No. A95A0989 (Ga. Ct. App. 1995).

31. *Id.* 1995 Ga. Laws 1160 provides that the Act shall apply to all pending cases. The court found this language dispositive. *Id.*

32. *Id.*

33. Doug Monroe, *Lawyer Counts Ways to Free DUI Suspects*, ATLANTA J. & CONST., July 21, 1995, at A1. Ralph Bowden, Dekalb County Solicitor, stated that the ruling could affect every DUI case that was open on April 21, 1995. *Id.*

34. Doug Monroe & Scott Marshall, *Asphalt Outlaws: A Special Report from the Atlanta Journal-Constitution and WSB/TV. A New Loophole: Police Struggle to Make DUI Arrests Under Flawed Law*, ATLANTA J. & CONST., July 21, 1995, at D4.

35. 1992 Ga. Laws 2093 (codified at O.C.G.A. § 40-6-393(a) (1994)).

36. Monroe & Marshall, *supra* note 34.

37. Monroe & Marshall, *supra* note 34.

38. The Special Session was called to remedy the redistricting problem that emerged after the United States Supreme Court decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

across the state by amending the special session's agenda, thus allowing the General Assembly to consider an amendment to Code section 40-5-67.1.<sup>39</sup> Since the problem was one of simple retroactivity, the General Assembly was able to quickly introduce and enact HB 10EX.<sup>40</sup>

HB 10EX amended Code section 40-5-67.1 by adding subsection (b.1), which provided that subsection (b) would not apply to any case in which the offense was committed before April 21, 1995.<sup>41</sup> Law enforcement officers began using the newly codified implied consent warning language on April 21, 1995.<sup>42</sup>

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39. Ken Foskett, *Legislature to Take Up DUI Law*, ATLANTA CONST., Aug. 9, 1995, at B1.

40. '95 *Georgia Legislature Special Session: Governor Signs Bill that Attempts to Save Threatened DUI Cases*, ATLANTA CONST., Aug. 19, 1995, at C8.

41. O.C.G.A. § 40-5-67.1(b.1) (Supp. 1995).

42. Foskett, *supra* note 39.