

Casenote

***Rodriguez v. State*: Addressing Georgia's Implied Consent Requirements for Non-English-Speaking Drivers**

In *Rodriguez v. State*¹ the Georgia Supreme Court held that a non-English-speaking defendant convicted of driving under the influence of alcohol was not denied equal protection or due process under the United States Constitution or the Georgia Constitution when the results of his blood-alcohol tests were admitted at trial, even though the implied consent warning required under the Official Code of Georgia Annotated

1. 275 Ga. 283, 565 S.E.2d 458 (2002).

("O.C.G.A.") section 40-5-67.1² was not read or interpreted in a language that defendant could understand.³

I. FACTUAL BACKGROUND

Omar Rodriguez was arrested and convicted of driving under the influence of alcohol ("DUI") in Dekalb County, Georgia. Rodriguez's native language was Spanish, and he did not speak English. The arresting officer read the required implied consent warning to Rodriguez in English. Rodriguez subsequently submitted to a blood alcohol test, and the trial court admitted the results of that test as evidence at trial.⁴

On appeal, Rodriguez contended that the results of his blood-alcohol tests should have been suppressed at trial. He argued that O.C.G.A. section 24-9-103⁵ violates equal protection because it does not require the state to provide a qualified interpreter to non-English-speaking DUI defendants. Rodriguez further contended that O.C.G.A. section 40-5-67.1⁶ and section 40-6-392(a)(3)⁷ violate equal protection because English-speaking DUI defendants have their implied consent warning read to them in English, whereas non-English-speaking defendants do

2. O.C.G.A. § 40-5-67.1 (2001) provides that the arresting officer must read to the driver, at the time a chemical test is requested, the appropriate implied consent notice. There are three notices provided under the statute. Subsection (b)(1) provides the appropriate notice for drivers under the age of twenty-one. Subsection (b)(2) provides the appropriate notice for drivers age twenty-one and older. Subsection (b)(3) provides the notice to be given to commercial motor vehicle drivers. Because Rodriguez was over the age of twenty-one, the required notice that he was given under subsection (b)(2) is as follows:

Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Id. § 40-5-67.1(b)(2).

3. 275 Ga. at 284, 565 S.E.2d at 460.

4. *Id.* at 283-84, 565 S.E.2d at 459-60.

5. O.C.G.A. § 24-9-103 (1995).

6. O.C.G.A. § 40-5-67.1 (2001).

7. O.C.G.A. § 40-6-392 (2001).

not have their implied consent warning read to them in a language that they understand. Lastly, Rodriguez contended that his due process rights were violated because the implied consent warning was not read to him in a language that he could understand, and therefore, he was unable to exercise those rights in a meaningful manner.⁸

The court addressed each of Rodriguez's contentions on appeal and held that Rodriguez's first equal protection claim failed because he, as a non-English-speaking defendant, was not similarly situated to hearing-impaired persons.⁹ Rodriguez's second equal protection claim also failed because sections 40-5-67.1 and 40-6-392 do not create a classification between English-speaking defendants and non-English-speaking defendants, and Rodriguez failed to show that the statutes were enacted or applied with a discriminatory purpose.¹⁰ Finally, the court held that Rodriguez's due process claim failed because due process does not encompass a requirement that a defendant be meaningfully informed of his rights under the implied consent statute so that he can exercise those rights in a meaningful manner—the implied consent warning is a matter of legislative grace rather than due process.¹¹ For those reasons, the supreme court concluded that the trial court did not err in allowing the results of Rodriguez's chemical blood-alcohol test into evidence, and consequently, the court affirmed Rodriguez's conviction under section 40-6-391.¹²

II. LEGAL BACKGROUND

Many states that have laws criminalizing DUI also have implied consent statutes.¹³ These implied consent statutes, although slightly different from state to state, commonly provide that a person driving on state highways is deemed to have impliedly consented to a test of his blood, breath, urine, or other bodily substance upon arrest for the commission of any offense while driving under the influence of alcohol.¹⁴ The arrested individual usually has the option of refusing such testing on condition that the individual's driving privileges will be revoked for a substantial period of time.¹⁵ In addition, there is

8. *Rodriguez*, 275 Ga. at 283-84, 565 S.E.2d at 459-60.

9. *Id.* at 284-85, 565 S.E.2d at 460.

10. *Id.* at 286, 565 S.E.2d at 461.

11. *Id.* at 287-88, 565 S.E.2d at 462.

12. *Id.* at 284, 565 S.E.2d at 460.

13. See 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1085 (2002) for a more detailed discussion of implied consent statutes nationwide.

14. *Id.*

15. *Id.*

typically a provision that an individual arrested for an offense while driving under the influence of alcohol shall be issued a verbal warning informing the individual of his rights under the implied consent statute.¹⁶

The constitutionality of using chemical analysis evidence obtained over a defendant's objection has been challenged at the federal level. The United States Supreme Court has held that the use in evidence of the results of a chemical analysis of blood taken involuntarily from a defendant after his arrest for DUI does not violate the defendant's privilege against self-incrimination under the Fifth Amendment¹⁷ or the defendant's right to due process under the Fourteenth Amendment.¹⁸ Furthermore, the evidentiary use of such blood test results does not violate a defendant's right against unreasonable searches and seizures under the Fourth Amendment when the police officer was justified in believing the defendant to be intoxicated and when the test was performed in a reasonable time, place, and manner.¹⁹

In *Schmerber v. California*,²⁰ the Court emphasized that the blood was withdrawn from defendant in a "simple, medically acceptable manner in a hospital environment," and therefore, the blood test did not violate defendant's due process rights under the Fourteenth Amendment.²¹ The Court also held that defendant's right against self-incrimination under the Fifth Amendment was not violated because the privilege only protects a defendant from being required to testify against himself or from being required to provide the State with evidence of a "testimonial or communicative nature."²² Because the analysis of a blood sample taken from a defendant does not fall within that category of evidence, the privilege against self-incrimination is not violated by admission of such evidence against a defendant.²³ Finally, the Court held that the police officer did not violate defendant's right against unreasonable searches and seizures under the Fourth Amendment because the officer had probable cause to arrest defendant for DUI; the officer could have reasonably believed that unless a blood test were

16. *Id.*

17. *Schmerber v. California*, 384 U.S. 757, 760-61 (1966).

18. *Id.* at 772.

19. *Id.* at 768-72.

20. 384 U.S. 757 (1966).

21. *Id.* at 759; *see also* *Breithaupt v. Abram*, 352 U.S. 432, 434-38 (1957) (holding that the results of tests of blood taken from unconscious defendant who could not physically consent to testing was admissible over objection that it offended principles of due process under the Fourteenth Amendment).

22. 384 U.S. at 761.

23. *Id.*

taken immediately, the evidence of alcohol would have been destroyed, and the means by which the blood was taken and tested was reasonable.²⁴ Therefore, based upon the Court's holding in *Schmerber*, unless there is a state statute or constitutional provision that provides otherwise, the use of chemical analysis evidence obtained in the absence of defendant's consent will generally be admissible against the defendant and will not be held to violate the federal constitutional right against self-incrimination, the right to due process, or the right to be free from unreasonable searches and seizures.²⁵

Courts in some states have held that the results of a chemical test are only admissible against a defendant charged with DUI if the defendant consents or submits to the test without objection.²⁶ However, most states have circumvented the judicial question of whether such evidence is admissible by legislatively enacting implied consent statutes that imply a defendant's consent to chemical testing.²⁷

Georgia is one state that has chosen to imply a defendant's consent to chemical testing as a matter of law.²⁸ Georgia's implied consent statute was first enacted in 1968, and the language and meaning of the statute have changed very little over the years.²⁹ The present implied consent statute is found at O.C.G.A. section 40-5-55.³⁰ Under the language of that statute

any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.³¹

24. *Id.* at 770-72.

25. *See id.* at 760-72.

26. *See State v. Duguid*, 72 P.2d 435, 437-38 (Ariz. 1937); *People v. Todd*, 322 N.E.2d 447, 453 (Ill. 1975).

27. *See* 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1085 (2002).

28. *See* O.C.G.A. § 40-5-55 (2001).

29. *See* 1968 Ga. Laws 448.

30. O.C.G.A. § 40-5-55.

31. *Id.* As noted in the language of the statute, section 40-5-55 is subject to the provisions of O.C.G.A. section 40-6-392 (2001). That statute establishes the guidelines and procedures for administering chemical tests and provides, inter alia, that the law enforcement officer inform the defendant about the tests being administered, that the defendant has a right to request testing by someone of his own choosing in addition to the state administered test, and that the results of such tests are admissible for purposes of a prosecution under O.C.G.A. section 40-6-391.

In requiring such implied consent for determining the presence of alcohol, the legislature intended to promote the welfare and safety of the general public.³² The statute provides that such test(s) shall be administered at the request of any law enforcement officer who has reason to believe that a person was driving in violation of O.C.G.A. section 40-6-391.³³ Furthermore, the test(s) shall be administered as soon as possible once the officer has established reasonable grounds for his belief that a person was driving in violation of O.C.G.A. section 40-6-391.³⁴ The statute also expressly states that if a person is "dead, unconscious, or otherwise in a condition rendering such person incapable of refusal" then that person's consent shall not be deemed to have been withdrawn, and the proper test(s) shall still be administered.³⁵ At the time a chemical test is requested by the law enforcement officer, the appropriate implied consent warning found at O.C.G.A. section 40-5-67.1 must be read to the defendant.³⁶

The constitutionality of O.C.G.A. section 40-5-55 has been addressed by the Georgia courts on several occasions. In *Allen v. State*,³⁷ the Georgia Supreme Court held that the State may constitutionally take a blood sample from a defendant in the absence of the defendant's consent.³⁸ The court reasoned that section 40-5-55 gives a defendant the right to refuse to take a blood-alcohol test; therefore, the statute actually grants a right not afforded by the state constitution.³⁹ The courts have also established that the choice afforded a defendant under section 40-5-55 of whether to submit to or refuse a chemical test is not protected under the privilege against self-incrimination.⁴⁰ Furthermore, a police officer's request under section 40-5-55 for multiple

32. O.C.G.A. section 40-5-55(a) also states, "The State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of Code Section 40-6-391 constitutes a direct and immediate threat to the welfare and safety of the general public."

33. O.C.G.A. § 40-5-55(a). O.C.G.A. section 40-6-391 (2001) prohibits driving under the influence of drugs or alcohol.

34. *Id.* § 40-5-55(a).

35. *Id.* § 40-5-55(b).

36. *See* O.C.G.A. § 40-5-67.1 (2001) and discussion *supra* note 2.

37. 254 Ga. 433, 330 S.E.2d at 588 (1985).

38. *Id.* at 434, 330 S.E.2d at 589 (citing *Strong v. State*, 231 Ga. 514, 202 S.E.2d 428 (1973)).

39. *Id.* The court further explained in note 1 that O.C.G.A. section 40-5-55 creates the right to refuse testing, whereas O.C.G.A. section 40-6-392 defines the extent of the right. *Id.* at 434 n.1, 330 S.E.2d at 589 n.1.

40. *See* *Kehinde v. State*, 236 Ga. App. 400, 401, 512 S.E.2d 311, 312 (1999).

chemical tests from a defendant does not violate a defendant's protection from unreasonable searches and seizures.⁴¹

As stated earlier, Georgia law requires an officer to read the appropriate implied consent warning under O.C.G.A. section 40-5-67.1 to a defendant at the time a chemical test is requested. The courts first addressed the situation of a non-English-speaking defendant who was read his implied consent warning in English in *State v. Tosar*.⁴² In that case, Tosar, a non-English-speaking defendant, was observed weaving on a state highway, and he failed several field sobriety tests administered by the arresting officer. The officer subsequently read Tosar the implied consent warning in English pursuant to O.C.G.A. sections 40-5-55 and 40-6-392. Following the reading of his implied consent rights, Tosar submitted to a chemical test of his breath and requested no other tests under O.C.G.A. section 40-6-392(a). Tosar moved to suppress the results of his chemical breath test, and the trial court granted his motion, concluding that Tosar understood very little English and that the State failed to meet its burden of properly informing Tosar of his implied consent rights.⁴³

The court of appeals first noted that a failure to inform a defendant of his right to have a separate chemical test performed by someone of his own choosing, in addition to the state-administered test, invalidates the result of any chemical test administered by the State and precludes its admission into evidence.⁴⁴ However, the court also noted that section 40-5-55(b) provides an exception for those individuals who are "dead, unconscious, or otherwise ... incapable of refusal."⁴⁵ The State argued that Tosar fell within that exception because he could not speak English and was therefore noncommunicative, but the court chose not to decide the case based upon the exception granted by section 40-5-55(b).⁴⁶ The court held that the State carried its burden of proving that the officer informed Tosar of his rights and that the State was under no additional burden to prove that Tosar affirmatively waived his right to an additional test.⁴⁷ In addition, the court held that the facts of the case fell within the meaning of section 40-6-392(a)(3), which provides "[t]he

41. See *McKeown v. State*, 187 Ga. App. 685, 686, 371 S.E.2d 243, 244 (1988).

42. 180 Ga. App. 885, 350 S.E.2d 811 (1986).

43. *Id.* at 885-86, 350 S.E.2d at 811-12.

44. *Id.* at 887, 350 S.E.2d at 812; see also *Garrett v. Dep't of Public Safety*, 237 Ga. 413, 413-14, 228 S.E.2d 812, 813 (1976); *Nelson v. State*, 135 Ga. App. 212, 214, 217 S.E.2d 450, 452 (1975).

45. *Tosar*, 180 Ga. App. at 887, 350 S.E.2d at 812 (quoting O.C.G.A. § 40-5-55(b)).

46. *Id.*

47. *Id.*; see *Cunningham v. State*, 255 Ga. 35, 334 S.E.2d 656 (1985); *Snelling v. State*, 176 Ga. App. 192, 335 S.E.2d 475 (1985).

justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.”⁴⁸ The court concluded that in cases when the defendant cannot speak English, and as a result, cannot communicate with the officer, the failure to obtain an additional test, other than the state-administered test, is justifiable.⁴⁹ As a matter of policy, the court also refused Tosar’s suggestion to compel the State to print the implied consent warning in Spanish or in the number of other languages in which the driver’s examination test is given.⁵⁰ The court reasoned that such a requirement would place too great a burden upon law enforcement officers.⁵¹

In *Furcal-Peguero v. State*,⁵² the appellant challenged the decision in *Tosar*. Furcal-Peguero was a Spanish-speaking defendant who was arrested and convicted under O.C.G.A. section 40-6-391(a)(5) for DUI. The parties stipulated to facts that showed the arresting officer knew that Furcal’s native language was Spanish, the officer read the implied consent warning to Furcal in English, and a telephonic translating service was immediately available to the officer had it been requested. Furcal moved to suppress the evidence of the chemical test to which he submitted at the time of his arrest, arguing that the implied consent warning was not conveyed to him as required by law. Furcal conceded that *Tosar* was controlling on the issue of the giving of the implied consent warning, but he argued that the court’s decision in *Tosar* should be overruled or at least modified to address his situation when a translator was immediately available to the police officer giving the implied consent notice. The trial court implicitly denied Furcal’s motion to suppress by finding him guilty.⁵³

In deciding the issue on appeal, the court first explained that under section 40-5-67.1, the arresting officer must inform a defendant of his right to have an independent chemical test performed in addition to the state-administered test and that his refusal to submit to the state-administered test can be used as evidence against him at trial.⁵⁴ Therefore, under section 40-5-67.1, a defendant can “withdraw his implied consent by refusing to submit to testing.”⁵⁵ The court then

48. 180 Ga. App. at 888, 350 S.E.2d at 813 (quoting O.C.G.A. § 40-6-392(a)(3)).

49. *Id.*

50. *Id.*

51. *Id.*

52. 255 Ga. App. 729, 566 S.E.2d 320 (2002).

53. *Id.* at 729-32, 566 S.E.2d at 321-23.

54. *Id.* at 731, 566 S.E.2d at 323.

55. *Id.* (quoting *Hernandez v. State*, 238 Ga. App. 796, 798, 520 S.E.2d 698, 700 (1999)).

addressed Furcal's contention that *Tosar* should be overruled because non-English-speaking defendants are denied equal protection because hearing-impaired defendants are provided with the aid of an interpreter under section 24-9-103 when they are given the implied consent warning.⁵⁶ The court noted that the requirements of section 24-9-103 apply to DUI arrests just as they do to any other offense of the state.⁵⁷ However, the court also emphasized that "a hearing impaired driver does not have greater rights and privileges than a hearing driver."⁵⁸ The court reasoned that section 24-9-103, which requires a police officer to request an interpreter for a hearing impaired defendant, does not "vitiolate [the] implied consent' of a hearing impaired driver arrested for DUI."⁵⁹ The court pointed to its prior decisions in *State v. Webb*⁶⁰ and *Tosar* in which it held that, under the implied consent laws of Georgia, all drivers are only entitled to be advised of their rights and that the law does not require an officer to ensure that a driver understands the rights read to him.⁶¹ In applying those prior holdings to the facts of the case, the court held that the results of Furcal's chemical tests were admissible because Furcal consented to the testing, the officer properly issued the implied consent warning to Furcal, and Furcal did not at anytime withdraw his consent to be tested.⁶² The court also reaffirmed its decision in *Tosar* that non-English-speaking defendants do not fall within the limited category of persons defined under section 40-5-55(b), who are determined under law to be incapable of withdrawing their implied consent.⁶³

56. *Id.* at 731-32, 566 S.E.2d at 323. O.C.G.A. section 24-9-103 (2002) states that "[t]he arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state . . ." Furthermore, "[n]o . . . informing of rights . . . shall be undertaken until a qualified interpreter has been provided," but "[i]f a qualified interpreter is not available one hour after the hearing impaired person has been taken into custody . . . the arresting officer may interrogate or take a statement from such person, provided that such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense." *Id.*

57. *Id.* at 732, 566 S.E.2d at 323 (citing *Allen v. State*, 218 Ga. App. 844, 846-47, 463 S.E.2d 522, 524 (1995); *State v. Woody*, 215 Ga. App. 448, 450, 449 S.E.2d 615, 616-17 (1994)).

58. *Id.* (quoting *State v. Webb*, 212 Ga. App. 872, 873-74, 443 S.E.2d 630, 632 (1994)).

59. *Id.*, 566 S.E.2d at 323-24 (quoting *Webb*, 212 Ga. App. at 874, 443 S.E.2d at 632).

60. 212 Ga. App. 872, 443 S.E.2d 630 (1994).

61. *Furcal-Peguero*, 255 Ga. App. at 732-33, 566 S.E.2d at 324 (citing *Webb*, 212 Ga. App. at 873-74, 443 S.E.2d at 632; *Tosar*, 180 Ga. App. at 888, 350 S.E.2d at 813).

62. *Furcal-Peguero*, 255 Ga. App. at 733, 566 S.E.2d at 324.

63. *Id.* at 733 n.7, 566 S.E.2d at 324 n.7. The court went into great detail in explaining its reasoning for refusing to hold that a non-English-speaking defendant is incapable of

III. THE COURT'S RATIONALE

The supreme court granted certiorari to address Rodriguez's claims that his constitutional rights were violated as a result of the trial court's failure to grant his motion to suppress the results of his chemical blood alcohol tests.⁶⁴ First, Rodriguez argued that O.C.G.A. section 24-9-103 violates equal protection because it does not require a qualified interpreter to be provided to non-English-speaking DUI defendants. Second, Rodriguez argued that O.C.G.A. sections 40-5-67.1 and 40-6-392(a)(3) violate equal protection because English-speaking DUI defendants have their implied consent warning read to them in English, whereas non-English-speaking defendants do not have their implied consent warning read to them in a language that they can understand. Lastly, Rodriguez contended that his due process rights were violated because the implied consent warning was not read to him in a language that he could understand, and therefore, he was unable to exercise those rights in a meaningful manner.⁶⁵

A. *Rodriguez's Equal Protection Claims*

In addressing Rodriguez's first equal protection argument, the court explained that O.C.G.A. section 24-9-103 requires a police officer to request a qualified interpreter to assist a hearing-impaired defendant and that "[n]o . . . informing of rights . . . shall be undertaken until a qualified interpreter has been provided."⁶⁶ Thus, in the case of

withdrawing his consent. The court stated:

To the greatest extent possible, every driver suspected of DUI should be given the opportunity to exercise the choice of withdrawing his consent to testing (and suffering the evidentiary consequences) or submitting to the test and requesting an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver, even those seemingly incapable of understanding spoken English, may seem like a hollow formality, but it is not. Suppose an officer believes an apparently non-English-speaking driver would not be able to understand the implied consent notice and so forgoes giving the notice. The driver might later claim he could have understood the notice and, if given the notice, he would have withdrawn his consent or requested an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver relieves those officers of the unreasonable burden of evaluating a driver's communication ability before testing his breath or blood.

Id.

64. See *Rodriguez*, 275 Ga. at 284, 565 S.E.2d at 459-60.

65. *Id.* at 283-84, 565 S.E.2d at 459-60.

66. *Id.* at 284, 265 S.E.2d at 460 (quoting O.C.G.A. § 24-9-103 (2002)) (brackets in original).

hearing-impaired defendants charged with DUI, an officer must attempt to find a qualified interpreter to assist in interpreting the implied consent warning for the hearing-impaired defendant.⁶⁷ The court noted that the statute applies only to hearing-impaired defendants and does not require the same for non-English-speaking defendants.⁶⁸

The Georgia and United States Constitutions require that those persons similarly situated be treated in a similar manner.⁶⁹ A defendant alleging an equal protection violation, therefore, must first show that he is similarly situated to other defendants who are treated differently.⁷⁰ If a defendant cannot show that he is similarly situated and that he is treated differently, then his equal protection claim must fail.⁷¹ In this case, the court determined that Rodriguez failed to show that he was similarly situated with hearing-impaired defendants charged with DUI.⁷² The court explained,

because hearing impaired persons physically cannot learn to understand an implied consent warning read to them in English, whereas non-English-speaking persons such as Rodriguez have no hearing disability and have the potential to understand such a warning, we conclude that Rodriguez is not similarly situated to a hearing impaired person.⁷³

Therefore, the court held that Rodriguez's equal protection claim failed.⁷⁴

The court next addressed Rodriguez's argument that his equal protection rights were violated because the implied consent warning was read to him in English as opposed to Spanish and, therefore, an English-speaking defendant could have understood those rights whereas Rodriguez could not.⁷⁵ In support of his argument, Rodriguez cited *State v. Tosar*⁷⁶ in which the court of appeals reversed the trial court's order granting defendant's motion to suppress the results of his blood-alcohol test.⁷⁷ Rodriguez contended that the court's interpretation of

67. *Id.*

68. *Id.*

69. *Id.* (citing *Old South Duck Tours v. Mayor & Alderman of Savannah*, 272 Ga. 869, 873, 535 S.E.2d 751, 755 (2000)).

70. *Id.*

71. *Id.* at 284-85, 565 S.E.2d at 460.

72. *Id.* at 285, 565 S.E.2d at 460.

73. *Id.*

74. *Id.*

75. *Id.*

76. 180 Ga. App. 885, 350 S.E.2d 811 (1986).

77. *Id.* at 888, 350 S.E.2d at 813.

O.C.G.A. sections 40-5-67.1 and 40-6-392(a)(3) in *Tosar* requires a police officer to read the implied consent warning only in English. Thus, the statutes classify defendants as English-speaking and non-English-speaking and accord dissimilar treatment to each group.⁷⁸ The court disagreed with Rodriguez's interpretation of the decision in *Tosar*.⁷⁹ In distinguishing *Tosar*, the court reasoned that the court of appeals did not require police officers to give the implied consent warning in English only.⁸⁰ The decision in *Tosar* "required the officer to advise the defendant of his implied consent warnings and did not require the officer to make sure that the defendant understood those rights."⁸¹ The court in *Tosar* simply refused to hold that a police officer must read the implied consent warning to a defendant in his native language.⁸² Furthermore, the court in *Tosar* declined to require the State to print the implied consent warnings in languages other than English.⁸³

The court also examined the statutes on their face and held that the language of sections 40-5-67.1 and 40-6-392(a)(3) does not require that the implied consent warning be read only in English.⁸⁴ Therefore, the court concluded, no classification is made between English-speaking defendants and non-English-speaking defendants from the language of the statutes.⁸⁵ The court explained that when a statute does not create a classification on its face, the only way a defendant can show an equal protection violation is to show that the statute was enacted or applied with a discriminatory purpose.⁸⁶ The court held that Rodriguez failed to show such a purpose.⁸⁷

Although the court held that Rodriguez's second equal protection argument failed, the court opined that Rodriguez's argument would also fail even if the statutes in question did create a classification between English-speaking defendants and non-English-speaking defendants.⁸⁸ If such were the case, Rodriguez would have to show that he was similarly situated with English-speaking defendants for purposes of the

78. *Rodriguez*, 275 Ga. at 285, 565 S.E.2d at 460.

79. *Id.* at 285-86, 565 S.E.2d at 461.

80. *Id.* at 286, 565 S.E.2d at 461.

81. *Id.* at 285, 565 S.E.2d at 461 (citing *Tosar*, 180 Ga. App. at 887-88, 350 S.E.2d at 813).

82. *Id.* at 286, 565 S.E.2d at 461.

83. *Id.* at 285, 565 S.E.2d at 461.

84. *Id.* at 285-86, 565 S.E.2d at 461.

85. *Id.* at 286, 565 S.E.2d at 461.

86. *Id.* (citing *Stephens v. State*, 265 Ga. 356, 357-58, 456 S.E.2d 560, 561 (1995); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)).

87. *Id.*

88. *Id.*

implied consent warning.⁸⁹ The court conceded that the two groups of defendants are similarly situated and that the reading of the implied consent warning only in English would disadvantage non-English-speaking defendants.⁹⁰ In examining whether such differential treatment would be unconstitutional, the court determined the proper scrutiny level by which to review the different treatment.⁹¹ If the different treatment adversely impacts a suspect class or if the different treatment burdens a fundamental right, then the court would have to apply strict scrutiny review.⁹² If strict scrutiny is not warranted, the court would only have to apply the rational relationship test.⁹³ Rodriguez contended that a suspect classification was involved because the statutes accord different treatment on the basis of language, which is equivalent to national origin.⁹⁴ However, the court disagreed and held instead that a language classification by itself is not the equivalent of a classification based on national origin, particularly in this case when the classification is broadly defined as English-speaking versus non-English-speaking.⁹⁵

Applying the rational relationship test, the court determined that the implied consent classification was constitutional for three reasons.⁹⁶ First, the court reasoned that by reading the implied consent warning in English, the majority of drivers would effectively be informed of their rights under the statute.⁹⁷ Second, the court reasoned that the logistical problems and administrative costs associated with requiring police officers to read the implied consent warning in every language spoken by Georgia drivers or to provide access to interpreters who could give the warning would place too great a burden on the State.⁹⁸ Finally, as a practical matter, requiring police officers to obtain access to an interpreter to read a non-English-speaking defendant his implied consent warning could lead to delays in obtaining a driver's blood-alcohol level, which decreases over time.⁹⁹ Such delays, the court held, would interfere with the purposes of the implied consent warning statute.¹⁰⁰

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 287, 565 S.E.2d at 461-62.

96. *Id.*, 565 S.E.2d at 462.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

Therefore, the court held that Rodriguez's second equal protection claim would fail even if O.C.G.A. section 40-5-67.1 and section 40-6-392(a)(3) did create a classification between English-speaking defendants and non-English-speaking defendants.¹⁰¹

B. *Rodriguez's Due Process Claim*

The court addressed Rodriguez's final contention on appeal—that “due process requires that a driver be meaningfully advised of the implied consent rights so that he or she can exercise those rights in a meaningful fashion.”¹⁰² The court disagreed with this argument as well and held that the implied consent warning is a matter of “legislative grace.”¹⁰³ Essentially, because due process does not require that implied consent warnings be given in the first place, due process does not require that they be given in a language so that the defendant will meaningfully understand the warning.¹⁰⁴ Therefore, Rodriguez's due process claim also failed.¹⁰⁵

The court's opinion in this case was unanimous, but Justice Hunstein delivered a short concurring opinion.¹⁰⁶ She suggested that “[i]n light of the growing international diversity of drivers in Georgia” the Legislature should consider requiring law enforcement agencies to provide adequate resources to their officers so that the officers could make good-faith attempts to properly inform non-English-speaking defendants of their rights under the implied consent statute.¹⁰⁷

IV. IMPLICATIONS

The Georgia Supreme Court's decision in *Rodriguez* provides a clear answer to the question that the court of appeals faced in *Tosar* and *Furcal-Peguero*.¹⁰⁸ The failure of an arresting officer to inform a non-English-speaking defendant of his implied consent rights in a language other than English is not violative of constitutional rights, nor is such failure, by itself, sufficient to support a motion to suppress the results

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 287-88, 565 S.E.2d at 462 (citing *People v. Wegielnik*, 605 N.E.2d 487, 491 (Ill. 1992); *Klink v. State*, 272 Ga. 605, 606, 533 S.E.2d 92, 94 (2000) (“right to refuse to submit to state-administered testing is not a constitutional right, but one created by the legislature”).

105. *Id.*

106. *Id.* at 288, 565 S.E.2d at 462-63 (Hunstein, J., concurring).

107. *Id.* (Hunstein, J., concurring).

108. *Id.* at 284, 565 S.E.2d at 460.

of the defendant's chemical alcohol test.¹⁰⁹ The court's unanimity in deciding the case suggests that the issue is one that will likely survive further challenges. Indeed, shortly after its decision in *Rodriguez*, the court revisited the issue under similar facts and unanimously upheld the DUI conviction of a non-English-speaking defendant.¹¹⁰

The court's decision in *Rodriguez* has important implications for non-English-speaking defendants charged with DUI, as well as the attorneys who represent them. Although the court in *Rodriguez* held that implied consent warnings are a "matter of legislative grace,"¹¹¹ it is clear that they provide a defendant with substantial rights. The failure of a defendant to understand those rights can result in serious consequences in his ability to present a strong defense to the charge of driving under the influence.

For example, one right granted to a defendant under section 40-5-67.1 is the right to refuse testing and to withdraw his implied consent.¹¹² However, a defendant's refusal to submit to a state-administered chemical test is admissible against him at trial.¹¹³ The implied consent warning that officers must read to a defendant charged with DUI informs the defendant that if he refuses to submit to the state-administered test, evidence of his refusal may be used against him at trial.¹¹⁴ Therefore, it is quite possible that a non-English-speaking defendant who does not understand the implied consent warning will refuse testing and have to suffer the evidentiary consequences of his refusal at trial.

Another consequence of refusing testing is that the defendant's driving privileges are suspended for a minimum period of one year.¹¹⁵ The suspension of driving privileges can pose transportation problems for defendants charged with DUI. Furthermore, for defendants who possess commercial drivers licenses and earn a living driving commercial vehicles, the suspension of driving privileges can result in loss of employment and income.

Defendants are also granted the right to request an additional chemical test following arrest for DUI.¹¹⁶ As the court of appeals noted in *Tosar*, the failure of an officer to advise a defendant of his right to

109. *See id.*

110. *See Lucas v. State*, 275 Ga. 508, 508, 570 S.E.2d 337, 337 (2002).

111. *Rodriguez*, 275 Ga. at 287, 565 S.E.2d at 462.

112. O.C.G.A. § 40-5-67.1(d).

113. *Id.* § 40-6-392(d).

114. *Id.* § 40-5-67.1(b).

115. *Id.* § 40-5-67.1(d).

116. *Id.* § 40-6-392(a)(3).

request an additional chemical test invalidates the results of the state-administered test and prevents the results of such test from being admitted into evidence.¹¹⁷ However, the court held that non-English-speaking defendants fall within the exception of section 40-6-392(a)(3), which states “[t]he justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.”¹¹⁸ The court in *Rodriguez* did not address the issue of whether an officer’s inability to communicate with a non-English-speaking defendant constitutes a “justifiable” failure to obtain an additional test under section 40-6-392(a)(3), but the court did emphasize that under *Tosar* an officer has no duty to ensure that a defendant understands his right to request an additional chemical test. Therefore, a non-English-speaking defendant who cannot understand the implied consent warning read by an officer will not be aware of his right to request an additional chemical test. As a result, it is highly unlikely that a non-English-speaking defendant will request an additional test to challenge the results of the state-administered test. This is another decision that can have substantial evidentiary consequences for a defendant charged with driving under the influence.

From a policy standpoint, the court’s decision in *Rodriguez* fails to present a bright-line rule with regard to how law enforcement officers are to deal with non-English-speaking defendants charged with DUI. The decision thus presents serious problems with regard to consistent application and enforcement of the law. Justice Hunstein suggested in her concurring opinion that the legislature might consider requiring law enforcement agencies to provide foreign language versions of the implied consent warning to law enforcement officers.¹¹⁹ She suggested that this would allow officers to make a good-faith attempt to actually inform non-English-speaking defendants of their rights.¹²⁰ Such an approach would result in more non-English-speaking defendants being informed of their rights. As it stands now, whether a non-English-speaking defendant is meaningfully informed of his rights depends on whether the arresting officer has the ability to inform the defendant in his native language and whether he so chooses to inform the defendant. For example, in *Rodriguez*’s case, had he been arrested by an officer who spoke both English and Spanish, it is quite possible that the officer

117. *Tosar*, 180 Ga. App. at 887, 350 S.E.2d at 812 (citing *Garrett v. Dep’t of Public Safety*, 237 Ga. 413, 228 S.E.2d 812 (1976)).

118. *Id.* at 888, 350 S.E.2d at 813 (quoting O.C.G.A. § 40-6-392(a)(3)).

119. *Rodriguez*, 275 Ga. at 288, 565 S.E.2d at 463 (Hunstein, J., concurring).

120. *Id.*

would have meaningfully informed Rodriguez of his rights under the implied consent statute in Spanish. The court in *Rodriguez* actually suggested the possibility that police departments might require officers to inform defendants of their rights in a language other than English, or individual officers could choose to do so on their own.¹²¹ Such an approach would result in some non-English-speaking defendants being informed of their rights in their native language, whereas other non-English-speaking defendants will only be informed of their rights in English. To avoid this inconsistent informing of rights, the legislature should perhaps heed Justice Hunstein's suggestion and require that all law enforcement officers be provided with the resources necessary to give the implied consent warning in every language that the Georgia's driver examination is given.

Unless the legislature takes action on this issue, either by requiring interpreters to be provided for non-English-speaking defendants or by requiring law enforcement agencies to provide officers with the resources necessary to give the implied consent warning in multiple languages, it is likely that most non-English-speaking defendants will not be meaningfully informed of their rights upon arrest for driving under the influence of alcohol. As the court held in *Rodriguez*, non-English-speaking defendants are not similarly situated with hearing-impaired defendants because of the former's potential to learn to understand an implied consent warning given in English.¹²² In so holding, the court sent a clear message to non-English-speaking defendants charged with DUI—either learn to understand the implied consent warning when given in English or risk the evidentiary consequences that might result from the failure to understand such warning.

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121. *Id.* at 286, 565 S.E.2d at 461.

122. *Id.* at 285, 565 S.E.2d at 460.