
Chapter 1

DUI — *Banks* and Beyond: Suppression of Refusals and New Strategies to Challenge Breath, Blood, and Urine Tests Under “Implied Consent”

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Available in the Chapter 1 supplemental folder in the material Dropbox:

- *Birchfield v. North Dakota*, 579 U.S. ____ (2016)
 - Memorandum of Law in Support of Motion to Suppress Refusal to Consent to Breath Test
 - Memorandum of Law in Support of Motion to Suppress Blood Alcohol Breath Test Results
 - *Missouri v. McNeely*, 569 U.S. ____ (2013)
 - Article — “Beyond *Banks*: The Future of Breath Test Refusals in DUI Prosecution” (Nora Coon)
 - Senate Bill 999 — Modifies provision requiring person to be informed about rights and consequences relating to driving under the influence of intoxicants
 - *State v. Banks*, 364 Or 332 (2019)
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State v. Banks, 364 Or 332 (2019)

Oregon Supreme Court opinion holding that ***evidence of refusal to take a breath test is subject to suppression*** under Article 1, Section 9

Three key points:

- 1) DUII arrestees have a statutory right to refuse a breath test (ORS 813.100)
- 2) Refusing a breath test is a refusal to give consent to a search
- 3) State can't rely on exigency to offer a person's refusal of consent against that person (*State v. Fish*)

Implied consent - ORS 813.100:

(1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state ***shall be deemed to have given consent***, subject to the implied consent law . . .

Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130.

(2) No chemical test of the person's breath or blood shall be given, under subsection (1) of this section, to a person under arrest for driving a motor vehicle while under the influence of intoxicants . . . if the person refuses the request of a police officer to submit to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130.

ORS 813.130: Consequences of Refusal

- 1-year license suspension (vs. 90 days)
- 90-day hardship blackout
- \$500-\$1000 fine
- “If the person refuses a test or fails, evidence of the refusal or failure may also be offered against the person”

Missouri v. McNeely, 569 US 141 (2013)

Under the Fourth Amendment, there is no *per se* exigency for a person’s blood-alcohol concentration (BAC).

Justice Sotomayor:

“...while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable ***must be determined case by case based on the totality of the circumstances.***”

Birchfield v. North Dakota, 579 U.S. ____; 136 S. Ct. 2160; 195 L. Ed. 2d 560 (2016)

- Breath tests are *categorically* valid as searches incident to arrest under the Fourth Amendment
- Blood tests are more invasive, not categorically valid as a search incident to arrest
- Search-incident-to-arrest doctrine therefore allows laws that separately penalize refusing a breath test

Sotomayor dissent: as in *McNeely*, prefer a case-by-case approach

What does *Banks* say?

- Mr. Banks challenged the use of his refusal as an improper comment on his exercise of the constitutional right to refuse consent to a search
- Oregon and US Supreme court have said that a comment on the exercise of a constitutional right at trial chills the invocation of that right and is not admissible

State's Response

- 1) Implied consent: Defendant had no constitutional right to refuse to consent to the test
- 2) Refusal was not an invocation of a constitutional right. Rather, only the defendant's *physical cooperation* was sought (***State v. Rohrs***)
- 3) Refusal can be used because the officer had probable cause and exigent circumstances

Supreme Court's Opinion

- The Defendant did have a constitutional right to refuse the breath test under Article 1, Section 9
- Implied consent expressly provides a right to refuse in ORS 813.100(2) - *State v. Swan*, 363 Or 131 (2018)
- "We reject the state's argument that, by driving on a public highway, defendant irrevocably gave his consent to a later search of his breath and had no constitutional right to refuse a request to search at the time of the arrest." *Banks*, 364 Or at 339.

Physical cooperation only?

- State argued that a breath test was merely a request for *physical cooperation*, and that evidence of a refusal was akin to a person physically resisting a search pursuant to a warrant, which can be admissible.
- Court gives a thoughtful analysis to the differences between requesting physical cooperation vs. express consent to search.
- *Will you take a breath test?* = ambiguous
- “Here, the state did not meet its burden to establish that [the officer’s] request was *solely* a request for physical cooperation...”
- *Banks*, 364 Or at 343.

Exigent circumstances do not make the refusal admissible

- State’s argument: since the officer had the constitutional authority to conduct the breath test (probable cause + exigent circumstances), admission of the refusal was admissible
- Court’s response: the state did not show whether the defendant understood the request to be for his consent to take the breath test or a demand based on probable cause and exigent circumstances
- “A suspect who is asked for consent reasonably could assume that his or her consent would not be necessary if officers already had another legal basis for conducting the search.” *Banks*, 364 Or at 345-6.

Court analyzes the right to refuse a search

- “We question the probative value of evidence of a defendant’s exercise of a constitutional right to establish the defendant’s guilt.”
- “An individual should be able to act on the presumption that a warrantless search is unreasonable. Permitting the state to adduce evidence of the exercise of that right would place an impermissible burden on its assertion.”
- *Banks*, 364 Or at 348-9.

The Dissent

Balmer and Nakamoto:

- 1) Implied consent (statutory) is **not** constitutional consent
- 2) Officer’s request is merely a request for physical cooperation
- 3) While a DUI suspect may refuse a breath test, probable cause and exigent circumstances support admission of a refusal

Kistler concurrence (Winter is Coming)

- State did not offer an argument that the breath test is valid as a search incident to arrest under *Birchfield v. North Dakota (supra)*
- That issue remains unresolved under Article 1, Section 9
- “In the absence of a considered argument that a breath test is categorically permissible as a search incident to arrest, *I concur...*”

How can we use *Banks*?

- Suppression of a breath test refusal:
- This seems pretty easy, *Banks* is a controlling opinion from the Oregon Supreme Court under Article 1, Section 9 (no SCOTUS review available)
- Be prepared for “search incident to arrest” arguments under *N.D. v. Birchfield*, Kistler’s dissent in *Banks*

Suppression of an administered test? *How??*

- Consent to a search must be voluntary, not coerced.
- A threat to do something not allowed by law is coercion
- Example: “we’ll come back with a warrant” vs. “we’re *going to apply* for a warrant.”
- *State v. Powelson*, 154 Or App 266, 273-74 (1998)
- *State v. Coen*, 203 Or App 92 (2005), *rev. den.* 341 Or 141 (2006) (*Coen I*)

So what does all that mean?

- The implied consent warning: “your refusal to take a test may be used as evidence...” is untrue under *Banks*
- If the police gain consent by making a threat to do more than the law allows, then the consent is invalid because it was coerced
- *Powelson* and *Coen I*, *supra*

Hugh Duvall – Criminal and DUI Attorney in Eugene

- Hugh generously shared a few motions with us: one challenging a refusal under *Banks* and one challenging an administered test under the coerced consent analysis (above).
- Hugh's motions are "works in progress" but are in the supplemental materials (Dropbox)
- Hugh shared that he has successfully challenged refusals under *Banks* with these motions
- Hugh shared that his motion to challenge a test result was denied without much comment from the court

Latest developments (as of May 20, 2019):

- Police agencies appear to be scrambling to work around *Banks*
- I have heard, anecdotally, that some officers/agencies are trying to modify the implied consent warning required under ORS 813.100 (this would be a problem, in my view)
- DOJ Criminal and ODAA are working to pass a bill modifying the implied consent law – SB 999
- SB 999 proposes a two-step process:
 - 1) Seek to obtain general, constitutional consent (no implied consent)
 - 2) If refused, implied consent purports to only require "physical cooperation"
- OCDLA is opposing this bill – Mary Sofia will update