Oregon Criminal Defense Lawyers Association

April 3, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: OCDLA Opposed Dash-1 Amendment of SB 999

Chair Prozanski and Members of the Committee,

As OCDLA's Legislative Director, I am reaching out to you to register our deep concerns with the Dash-1 amendment to SB 999 (a placeholder) that significantly changes DUII Implied Consent law.

Dash-1 Amendment of SB 999 Framed as a "Fix," Attempts to Sidestep Constitutional Law:

DOJ and ODAA are seeking to change the Implied Consent laws. They are framing this forthcoming amendment as a "fix" to DUII Implied Consent law in reaction to an Oregon Supreme Court Opinion that held that Article 1, Section 9 of the Oregon Constitution prohibits the State from using a person's refusal to consent to a search as evidence of her guilt.

This proposition that a person's exercise of their Article 1, Section 9 and 4th Amendment right to refuse a search/seizure cannot be used as evidence of guilt is longstanding and a basic tenant of constitutional law. *It's unlawful to use a person's declining a search against them at trial. (State v. Moller*, 217 Or App 49 (2007) (reversing for introduction of defendant's refusal to search car); *State v. Davis*, 133 Or App 467, 474, 891 P2d 1373, *rev den*, 321 Or 429 (1995) (same, bedroom)*; State v. Mendoza*, 264 Or App 225, 227-29 (2014) (same, pocket)).

What Are They Seeking to do and Why:

(1) deleting the statutory right given in the law (ORS 813.100(2)) for a person to revoke their "implied" consent to a search of their breath, urine, and blood;

Why:

- so that police can rely solely on someone's "implied consent" to search them;
- to relieve the officer's obligation to obtain *actual* consent, use a warrant requirement exception, or get a warrant in order to search someone if they explicitly revoke their consent.

(2) seeking to require a person to literally "physically submit" to (rather than consent to) a breath, urine, and blood test based solely on their "implied consent" to testing that they impliedly agree to engage in if they drive a car in Oregon.

Why:

- to relieve an officer from the requirement to articulate the basis for their search of an individual before conducting the search; and
- to relieve the officer's obligation to obtain actual consent, use a warrant requirement exception, or get a warrant in order to search someone if they explicitly revoke their consent.
- To use a person's physical refusal to do the test as evidence of their guilt in court.

Why Are These Changes Not Ok?

DOJ's and ODAA's desired changes to the law are lfawed and will result in litigation over constitutionality. It is well-settled law that a statute may not override the constitution, and the Oregon Supreme Court suggests that a person can ALWAYS revoke their implied or explicit consent to a search.

In other words, their sought after change to delete a person's statutory right to refuse a search or revoke their consent to search is unconstitutional. A statute cannot override an individual's Article I, section 9 right to refuse a search. *See State v. Gulley*, 324 Or 57, 62, 921 P2d 396 (1996) (statute requiring probationers submit to a probation officer's warrantless search does not authorize a search over probationer's objection); *State v. Bridewell*, 306 Or 231, 239, 759 P2d 1054 (1988) (officer's compliance with community caretaking statute would not ensure compliance with Article I, section 9).

The State's desire to rely on a person's implied consent for a search and their desire to delete a person's statutory right to decline consent to a search is flawed. The Oregon Supreme Court majority and dissent in the *Banks* opinion both note that "implied consent" is a legal fiction and that consent can be revoked at any time. *See Moore*, 318 P3d at 1138 n 7 (noting but not deciding the issue); *see also State v. Ford*, 220 Or App 247, 251 (2008) (person granting consent may revoke consent at any time).

A statute cannot divest an individual of his constitutional rights. We simply have a constitutional right to not be compelled to be witnesses against ourselves, and we can always revoke consent. Consent is revocable as a Constitutional matter – so state statutes seeking to delete a person's statutory right to consent does not remove a person's constitutional right to revoke consent.

The *Banks* opinion means that the officer must comport with constitutional law and articulate the basis for their warrantless search, obtain actual explicit consent, or get a warrant under Article 1, Section 9 of the Oregon Constitution and under the 4th Amendment of the United States Constitution.

What is the real "fix" to State v Banks?

DOJ and ODAA need to tell officers who are unclear on how to respond to *Banks* to obtain explicit consent, articulate the basis for their warrantless search, or get a warrant.

Thank you for taking time to consider these serious matters.

s/ Mary A. Sofia
Legislative Director
OCDLA