

State v. Banks



LEGISLATIVE FIX

IMPLIED CONSENT



- All 50 states have implied consent laws that require motorists, as a condition to drive, to consent to a breath (blood/urine) test if arrested for DUII
- A person is informed about the consequences of passing, failing or refusing a test – includes potential license suspensions and state's ability to comment on a breath test failure or refusal in court (specified in law)
- **Goal:** to enforce the DUII laws without having to resort to non-consensual blood draws

State v. Banks



- Oregon statute interpreted to say that a person revokes their implied consent upon arrest and refusal to take a test - therefore the state cannot comment on a person's refusal to take a breath (blood/urine) test based on how implied consent is given
- The current advice of rights and consequences and being asked, “Will you take a breath test?”, as required under ORS 813.130, is “ambiguous”
- Law enforcement is required to make it clear whether a person is being asked for voluntarily consent to take a test or simply being asked to physically cooperate because there are other lawful means to obtain a test

Consequences



The state cannot comply with the statutes the way they are currently written

1. ORS 813.130 outlines the rights and consequences given to a person
 - a. Any significant changing/adding is forbidden – threatens license suspensions
 - b. The current language informs the person that a refusal can be used against them – threatens consent as a basis for admission of breath test results - requires litigation to establish other lawful basis

Consequences



The state cannot comply with the statutes the way they are currently written

2. The S.C. recognized simply voluntary consent to provide a test without implied consent read (ORS 813.140)
 - a. Various statutes only reference test results given “under implied consent”
 - b. Ex.: Urine statute
 - c. Ex.: IID on diversion

Consequences



Inconsistent rulings on like cases/burden on courts

- State is receiving countless motions to suppress:
 1. Breath/blood tests provided based on Implied Consent
 2. Breath/blood test refusals
 3. Field sobriety test refusals
 4. Urine tests
 5. Urine test refusals

The Fix



1. Implied Consent

- a. **Restore the intent of Implied Consent to be a statutory tool to encourage informed physical cooperation and not infringe on a constitutional right to refuse**

The Fix



1. Implied Consent

b. Clarify the statutory rights and consequences given to a person to comply with the Supreme Court's opinion in *Banks*

1. Inform person of consequences of passing or failing a test and first ask if the person will consent to a test – a refusal of this consent will not be commented on
2. Only if a person refuses, inform person of consequences of refusing a test and ask for physical cooperation based on statutory implied consent and other lawful means – a refusal can be commented on

The Fix



2. Voluntary Consent

- a. Fix the statutes that interfere with the existing statute that allows a person to provide a test strictly by voluntary consent – i.e., IID on diversion and urine testing**