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SUPREME COURT OF GEORGIA

LINDSAY WATERS

v.

THE STATE

Case No. S19C0968

Court of Appeals Case No. A18A2031

The Supreme Court today denied the Petition for Certiorari in this Case

All the Justice concur.

Court of Appeals Case No. A18A2031

OPINION OF COURT OF APPEALS OF GEORGIA (MARCH 4, 2019)

IN THE COURT OF APPEALS OF GEORGIA

WATERS

v.

THE STATE

No. A18A2031

Before: DILLARD, C.J., DOYLE, P.J., and MERCIER, Judge.

After being convicted of driving under the influence (per se and less safe) and failure to maintain lane, Lindsay Waters filed an appeal in the Supreme Court of Georgia "to challenge the constitutionality of Georgia's Implied Consent . . . scheme, OCGA § 40-5-67.1, both on its face and as applied." The Supreme Court transferred the appeal to this Court, stating in its transfer order: "[T]his Court recently rejected facial and as-applied constitutional challenges like those raised here to OCGA § 40-5-67.1(b)(2) in *Olevik v. State*, 302 Ga. 228, 246-252 (3)(a), (b) (806 SE.2d 505) (2017). To the extent [Waters] attempts other constitutional arguments, any such challenges were neither raised nor ruled on below." Case No. S18A0423 (decided April 30, 2018). Further, the Court stated: "[A]s in *Olevik*, [Waters's] as-applied challenge is in reality a challenge to the admission of the blood test results, rather than a challenge to the statute." *Id.*

Waters did not submit a new brief after the case was transferred to this Court, so our review is based on the briefs she submitted to the Supreme Court. In those briefs, Waters challenges the constitutionality of Georgia's implied consent "scheme" (facially and as applied) and argues that her consent was not voluntary due to the "inherent[ly] coercive pressures of a custodial environment." As set out above, the Supreme Court expressly rejected Waters's facial and as-applied challenges to the implied consent law. Therefore, our review is limited to her challenge to the admission of the blood test results to the extent the challenge is unrelated to the constitutionality of the implied consent law (either on its face or as it was applied in this case))[1]

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[1] We note that on February 18, 2019, the Supreme Court of Georgia decided *Elliott v. State*, 2019 Ga. LEXIS 112 (Case No. S18A1204). In *Elliott*, the Court held that the protection against compelled self-incrimination provided by Article I, Section I, Paragraph XVI of the Georgia Constitution of 1983 affords a defendant the right to refuse a chemical breath test and that such refusal cannot be admitted in evidence against him or her. *Elliott*, *supra* at *1-2. The *Elliott* decision does not affect our decision in this case for two reasons. First, the Supreme Court specifically stated in its transfer order in this case that it recently rejected in *Olevik* the facial and as-applied constitutional challenges Waters raises in this appeal; in *Elliott*, the Court expressly "adhere[s] to [its] decision in *Olevik*, *Elliott*, *supra* at *20. Waters is bound by the Supreme Court's ruling in her case. *See* OCGA § 9-11-60 (h) ("[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be."). Second, the *Elliott* Court reiterated that its Paragraph XVI analysis was limited to *breath* tests, and that Paragraph XVI "was not implicated by a *blood* test." *Id.* at *90, n.30 (emphasis supplied). As the Court noted in *Olevik*, the extraction of blood does not implicate a

Although Waters's challenge is almost entirely based on the unconstitutionality of the implied consent scheme, she raises, to some extent, a separate issue by asserting that her consent to the blood test was not voluntary in light of "the inherently coercive environment of a custodial arrest." Waters states that she was in custody for 90 minutes before agreeing to submit to the blood test and that the officer "testified that she did not want to take the blood test." The argument is without merit.

Before trial, Waters moved to suppress the blood test results. After hearing evidence and argument, the trial court denied Waters's motion finding, *inter alia*, that Waters voluntarily consented to the blood test. The test results were admitted at trial.

> In reviewing a trial court's ruling on a motion to suppress, this Court must construe the record in the light most favorable to the factual findings and judgment of the trial court and accept the trial court's findings of disputed fact unless they are clearly erroneous.

State v. Turner, 304 Ga. 356 (818 SE.2d 589) (2018) (citations omitted). "[T]he trial court's application of the law to undisputed facts is subject to *de novo* review." *State v. Clay*, 339 Ga. App. 473 (793 SE.2d 636) (2016) (citation and punctuation omitted); *see Bergstrom v. State*, 347 Ga. App. 295 (819 SE.2d 84) (2018).

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defendant's right under Georgia law against compelled self-incrimination. *Olevik*, *supra* at 232 (2)(a), n.2.

Because the extraction of a suspect's blood is a search within the meaning of the Fourth Amendment, absent a warrant, the State must show that the extraction falls into one of the specifically established exceptions to the warrant requirement, such as voluntary consent. *See Williams v. State*, 296 Ga. 817, 819-821 (771 SE.2d 373) (2015); *Kendrick v. State*, 335 Ga. App. 766, 768 (782 SE.2d 842) (2016).

> Consent is a valid basis for a warrantless search where it is given freely and voluntarily . . . . [T]he only question in regard to the validity of the search is whether the State met its burden of proving that [Waters] actually consented freely and voluntarily under the totality of the circumstances.

Kendrick, supra (citation and punctuation omitted). "A consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent." *Id.* at 769 (citation and punctuation omitted). "[W]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." *Id.* Notably, the use of handcuffs does not negate a person's ability to give consent. *See MacMaster v. State*, 344 Ga. App. 222, 227 (1) (a) (809 SE.2d 478) (2018).

In this case, the evidence shows that a police officer initiated a traffic stop after seeing the car that Waters was driving "weaving." The officer detected a smell of alcohol coming from Waters's person and noticed that Waters's speech was slurred and her eyes were "glassed-over." Waters said she was on her way to or

from a bar. At the officer's request, Waters exited the car. She was unsteady on her feet. The officer and a supervisor who arrived on the scene asked Waters to perform various field sobriety tests. Waters agreed to submit to some of the tests (horizontal gaze nystagmus and Romberg) and refused to submit to other tests (Alco-Sensor, walk-and-turn, and one-leg stand). Based on Waters's performance on the field tests and the officer's observations, the officer concluded that Waters was under the influence of alcohol (less safe) and placed her under arrest for DUI. The officer then read to her the implied consent warning, and Waters gave her consent to take a blood test. The roadside encounter, from the stop to the arrest, lasted approximately 33 minutes. The officer then transported Waters to a hospital for the blood test, where she used the restroom and asked hospital personnel and the officer numerous questions about the test; Waters was handcuffed at the time. Because they had been at the hospital waiting for about one to one-and-a-half hours before the blood was drawn and Waters repeatedly asked questions about the test, the officer read the implied consent warning to her again "so that it was fresh in her mind so she would have another opportunity to consent to it or not consent to it." He then asked Waters again if she consented to the test, to which she replied that she did, and her blood was drawn.

Despite Waters's contention, the evidence shows that she initially consented to the blood test after 33 minutes, not 90 minutes; it was after approximately 90 minutes that she stated her consent a second time (while waiting at the hospital for her blood to be drawn). Her claim (in her first supplemental brief) that

the officer "testified that she did not want to take the blood test" is not accurate. Instead, the officer testified that he thought Waters was asking and repeating questions at the hospital as a "stalling" tactic, and that he "felt" or "thought" that she was repeating questions to avoid the test. There is no evidence that Waters ever said she did not want to take the test or that she ever withdrew the consent she gave at the roadside (and again in the hospital) after being read the implied consent notice. Although Waters asserts that she was not advised of her constitutional rights before she gave her consent, her knowledge of those rights or of her right to refuse consent are factors to be considered in assessing the voluntariness of her response—they are not in and of themselves determinative. *See Olevik*, *supra* at 251-252 (3)(b). The evidence does not show that the officers used fear, intimidation, threat of physical punishment or lengthy detention to obtain Waters's consent. *See Kendrick*, *supra*; *Oh v. State*, 345 Ga. App. 729, 737-738 (3) (815 SE.2d 95) (2018) (trial court did not err by denying motion to suppress based on claim that consent to testing was not voluntary where, *inter alia*, traffic stop lasted under 40 minutes and did not appear to be unreasonably or needlessly extended); *Diaz v. State*, 344 Ga. App. 291, 301(1) (810 SE.2d 566) (2018) (trial court did not err in concluding that, under the totality of circumstances, appellant voluntarily consented to blood test after being read implied consent notice, where appellant was at hospital more than two hours and had been given medications for his injuries). In light of the totality of circumstances surrounding Waters's consent to the blood test, the trial court did not err by concluding that her consent was voluntarily given. *See Oh*, *supra*. Thus, the trial court did not err

by denying her motion to suppress. *See generally id.*; *Olevik, supra* at 252 (3)(b).

Judgment affirmed. Dillard, C. J., and Doyle, P. J., concur.

ORDER OF SUPREME COURT OF GEORGIA (APRIL 30, 2018)

SUPREME COURT OF GEORGIA

LINDSAY WATERS

v.

THE STATE

Case No. S19C0968

Court of Appeals Case No. A18A2031

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

LINDSAY WATERS v. THE ST ATE

Appellant appeals her conviction for driving under the influence and seeks to invoke this Court's constitutional question jurisdiction. The trial court rejected appellant's facial and as-applied Fourth Amendment/ search and seizure constitutional challenges to the implied consent law, OCGA § 40-5-67.1(b) (2), which she contends is coercive. However, this Court recently rejected facial and as-applied constitutional challenges like those raised here to OCGA § 40-5-67.1(b)(2) in *Olevik v. State*, 302 Ga. 228, 246-252 (3)(a), (b) (806 SE.2d 505) (2017). To the extent appellant attempts other constitutional arguments, any such challenges were neither raised nor ruled on below.

Our constitutional question jurisdiction does not extend to challenges to laws previously held to be constitutional against the same attack. *See City of Decatur v. DeKalb County*, 284 Ga. 434, 435-437 (668 SE.2d 247) (2008). And, as in *Olevik*, appellant's as-applied challenge is in reality a challenge to the admission of the blood test results, rather than a challenge to the statute. *Id.* at 250-251(3)(b). Therefore, the as-applied challenge does not invoke this Court's jurisdiction.

As no other basis for this Court's jurisdiction appears in the record, *see* Ga. Const. of 1983, Art. VI, Sec. VI, Par. II-III; OCGA § 15-3-3.1, this case is hereby transferred to the Court of Appeals.

All the Justices concur.

ORDER OF THE STATE COURT OF COBB COUNTY OF THE STATE OF GEORGIA (SEPTEMBER 17, 2014)

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

LINDSAY WATERS

Case No. 13-T-10704

Before: Henry R. THOMSON,
Judge, State Court Cobb County

Upon hearing evidence and argument of counsel, the Court makes the following findings on the Defendant's Motion to Suppress:

1.

The Defendant was stopped after honking her car horn at a passing patrol car. Therefore, reasonable, articulable suspicion existed which justified a traffic stop under O.C.G.A. 40-8-70(a).

2.

After the arresting officer stopped the Defendant's vehicle and spoke with the Defendant, the odor of alcohol and the Defendant's slurred speech provided

sufficient evidence to expand the scope of the stop to an investigation for Driving Under the Influence.

3.

The totality of the circumstances, including the odor of alcohol, slurred speech, the performance on field sobriety tests, and the Defendant's admission of coming from a bar, supplied sufficient probable cause to justify the arrest for Driving Under the Influence.

4.

The Implied Consent notice was properly read, and the Defendant voluntarily consented to the test.

5.

There is nothing in the evidence that suggests the Defendant's blood was improperly drawn, handled, or tested.

6.

The Defendant's argument that the Georgia Implied Consent law is unconstitutional is without merit.

Based upon the above findings of fact and law, the Defendant's Motion to Suppress is hereby DENIED.

So ordered this 17th day of September, 2014

/s/ Henry R. Thompson
Judge
State Court Cobb County

ORDER OF THE STATE COURT OF COBB COUNTY DENYING MOTION TO RECONSIDER (SEPTEMBER 2, 2015)

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

LINDSAY WATERS

Case No. 13-T-10704

Before: Henry R THOMPSON,
Judge, State Court Cobb County

ORDER ON MOTION TO RECONSIDER

Upon hearing evidence and argument of counsel, the Court makes the following findings on the Defendant's Motion to Suppress:

1.

The ORDER which was filed on September 18, 2014 denying Defendant's Motion to Suppress is hereby incorporated in its entirety.

2.

The Georgia Implied Consent notice which was read to the Defendant is not so necessarily coercive in nature that it negates the possibility of actual consent being obtained. The Supreme Court of Georgia, in

Williams v. State, S14A1625, remanded the case to the trial court for a determination of whether "actual, and therefore voluntary" consent was obtained after the Implied Consent notice was read to the arrestee. It necessarily follows that the Supreme Court is of the opinion that "actual, and therefore voluntary" consent is indeed possible after a reading of the Implied Consent notice.

3.

Based on a totality of the circumstances, the consent obtained after the reading of the Implied Consent notice in this case was freely and voluntarily made by the Defendant, and was not the product of duress, coercion, or hope of benefit, and was, therefore, "actual" consent.

Based upon the above findings of fact and law, the Defendant's Motion to Reconsider is hereby DENIED.

So Ordered this 2nd day of September, 2015

/s/ Henry R. Thompson
Judge
State Court Cobb County

OPINION OF THE SUPREME COURT OF GEORGIA IN *OLEVIK V. STATE (OF GEORGIA)*, 302 GA. 228, 806 S.E.2D 505 (OCTOBER 16, 2017)

SUPREME COURT OF GEORGIA

OLEVIK

v.

THE STATE

No. S17A0738

Before: PETERSON, Justice.

Peterson, Justice.

The Georgia Constitution protects each of us from being forced to incriminate yourself. Unlike the similar right guaranteed by the Fifth Amendment to the U.S. Constitution, this state constitutional protection applies to more than mere testimony; it also protects us from being forced to perform acts that generate incriminating evidence. This case calls this Court to decide whether this state constitutional protection prohibits law enforcement from compelling a person suspected of DUI to blow his deep lung air into a breathalyzer. A nearly unbroken line of precedent dating back to 1879 leads us to conclude that it does, although the appellant here still loses because the language of the implied consent notice statute he challenges is not per se coercive.

Frederick Olevik was convicted of DUI less safe, failure to maintain a lane, and no brake lights.[1] Olevik appeals from his DUI conviction, challenging the denial of his motion to suppress the results of a state-administered breath test on the grounds that the implied consent notice statute, OCGA § 40-5-67.1(b), is unconstitutional on its face and as applied to him. Olevik argues that his right against compelled self-incrimination preserved by the Georgia Constitution was implicated when law enforcement asked him to expel deep lung air into a breathalyzer, that the materially misleading language of the implied consent notice is coercive per se and in fact did compel him to perform this act, and thus the admission of his breath test results violated his right against compelled self-incrimination under the Georgia Constitution and his due process rights. We agree with Olevik that submitting to a breath test implicates a person's right against compelled self-incrimination under the Georgia Constitution, and we overrule prior decisions that held otherwise. We nevertheless reject Olevik's facial challenges to the implied consent notice statute, because the language of that notice is not per se coercive. Our previous decisions prevented the trial court from fully considering Olevik's argument that, based on a totality of the circumstances in this case, the language of the implied consent notice actually coerced him to incriminate himself. Nevertheless, because Olevik offered the trial court no evidence in support of his claim beyond the mere language of the statute (which, standing alone, is not coercive), he could not prevail on remand and so we affirm.

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[1] Olevik also was found guilty of DUI per se, but the trial court merged this count into the DUI less safe count.

1. Background

Before proceeding to the legal issues Olevik raises, we begin with a brief overview of Georgia's DUI laws. We then turn to the factual context of this case.

(a) Georgia's Statutory Framework on Implied Consent and DUI Arrests

The scourge of people operating motor vehicles under the influence of alcohol, drugs, or other intoxicating substances has plagued us as long as people have been driving, leading states to enact criminal laws to combat this problem. *See Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). In Georgia, driving with a blood alcohol content ("BAC") of 0.08 grams or more is per se unlawful (DUI per se), and regardless of BAC, it is unlawful for a person to drive under the influence of alcohol or drugs to the extent it is less safe to do so (DUI less safe). *See* OCGA § 40-6-391(a). Measuring a person's BAC is accomplished through a chemical test of the person's breath, blood, or urine, and these tests typically require the cooperation of the suspect. To elicit such cooperation, the General Assembly has enacted an implied consent statute, providing that drivers have agreed to submit to chemical testing as a condition of receiving a driver's license and that a person's driving privilege will be suspended if he or she refuses to take a chemical test after being arrested for a DUI offense or having been involved in a traffic accident resulting in serious injuries or fatalities. OCGA §§ 40-5-55 (a); 40-5-67.1(d). When drivers are arrested for DUI, police officers ask them to submit to a chemical test; the implied consent statute prescribes the language the officers are required to use. For

drivers aged 21 years or older (like Olevik), that language 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?

OCGA § 40-5-67.1(b)(2).

(b) Olevik's Traffic Stop

The facts are largely undisputed. After observing that Olevik failed to maintain his lane while driving and had an inoperable brake light, police initiated a traffic stop. During the stop, police observed that Olevik's eyes were bloodshot and watery, his speech

was slow, and he smelled strongly of alcohol. Olevik admitted to the police that he had consumed four or five beers prior to driving. He agreed to undergo field sobriety tests and exhibited six out of six clues on the horizontal gaze nystagmus test. The walk-and-turn and one-leg-stand tests were not conducted because Olevik had certain physical limitations. After Olevik also tested positive for alcohol on a portable alco-sensor machine, police arrested Olevik and read him the statutorily mandated, age-appropriate implied consent notice. Olevik agreed to submit to a state-administered breath test, the results of which revealed that he had a BAC of 0.113.

In support of his motion to suppress the breath test results, Olevik stipulated that the officers were not threatening or intimidating in requesting the breath test. He nevertheless argued that his consent to the test was invalid because the language of the implied consent notice was misleading, coercing him to take the test in violation of his right against compelled self-incrimination. After several hearings, the trial court denied Olevik's motion to suppress, concluding that his right against compelled self-incrimination was not violated because he voluntarily consented to the breath test. The court found him guilty of the charged offenses following a bench trial. Olevik then brought this appeal.

2. The Georgia Constitution's Right Against Compelled Self-Incrimination Applies to Breath Tests

On appeal, Olevik argues that the trial court erred in denying his motion to suppress because the implied consent notice is unconstitutional on its face

and as applied, coercing him to submit to a breath test in violation of his right against compelled self-incrimination under the Georgia Constitution. As Olevik conceded at oral argument, our decision in *Klink v. State*, 272 Ga. 605, 533 S.E.2d 92 (2000), precludes his claims. But recent decisions of the Supreme Court of the United States and this Court have shaken the analytical underpinnings of *Klink*, and so, as Olevik urges us to do, we reexamine whether Klink remains good law. *See Kendrick v. State*, 335 Ga. App. 766, 770 n.3, 782 S.E.2d 842 (2016) ("[S]ubsequent development of the law may have substantially eroded *Klink*'s analytical foundation[.]"). We conclude that *Klink* was wrongly decided at least to the extent that it concluded that a breath test did not implicate the state constitutional right against compelled self-incrimination and, after determining that stare decisis does not counsel preserving *Klink*, overrule it to that extent.

(a) Klink's Foundation Has Been Undermined

In *Klink*, we upheld the implied consent notice statute against claims indistinguishable from Olevik's. We did so on the basis that "compelling a defendant to submit to [blood and] breath testing [is not] unconstitutional under Georgia law[,]" and thus "[t]he right to refuse to submit to state administered testing is not a constitutional right, but one created by the legislature." *Klink*, 272 Ga. at 606 (1), 533 S.E.2d 92. *Klink* relied on two prior decisions—*Allen v. State*, 254 Ga. 433, 330 S.E.2d 588 (1985) and *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990)—for these conclusions. In *Allen*, we held that, "[i]n Georgia, the state may constitutionally take a blood sample from a defendant without his consent. Our 'Implied Consent Statute' thus grants a suspect an opportunity, not afforded him

by our constitution, to refuse to take a blood-alcohol test." 254 Ga. at 434 (1)(a), 330 S.E.2d 588 (citations omitted). And in *Green*, we held that urine testing did not violate the right against self-incrimination because it was merely "the use of a substance naturally excreted by the human body." 260 Ga. at 627 (2), 398 S.E.2d 360. We went on in *Klink* to explain that the implied consent notice did not violate the Due Process Clause because "[t]he choice provided by the statute at question is not coercive because it is not 'so painful, dangerous, or severe, or so violative of religious beliefs' that no real choice exists." *Id.* at 606(1), 533 S.E.2d 92 (quoting *South Dakota v. Neville*, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)). Moreover, we explained, because the General Assembly created the right to refuse the test, the General Assembly's limitation of that right through the implied consent language was unobjectionable. *Id.* *Klink*'s holding rests in part on cases that are not good law.

For the proposition that the Georgia Constitution does not protect citizens from compelled blood testing, *Klink* relied on *Allen*, which in turn relied on *Strong v. State*, 231 Ga. 514, 202 S.E.2d 428 (1973). Allen cited Strong for the principle that "the state may . . . take a blood sample from a defendant without his consent." *Allen*, 254 Ga. at 434 (1)(a), 330 S.E.2d 588. Allen's pronouncement that "the state may take a blood sample from a defendant without his consent" was an accurate assessment of Strong, but we now understand it not to be an accurate statement of the law.

As has been made clear in more recent decisions, Strong's analysis concerning warrantless blood tests

was incorrect.[2] In *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2186 (VII), the Supreme Court of the United States explained that the natural dissipation of alcohol from the bloodstream is not a per se exigent circumstance always justifying the warrantless taking of a blood sample, and concluded that although breath tests fall within the search incident to arrest exception to the warrant requirement, blood tests do not. And even before Birchfield, we held in *Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (2015), that exigent circumstances are not categorically present in every DUI case and reiterated that the constitutional protections under Article I, Section I, Paragraph XIII ("Paragraph XIII") of the Georgia Constitution, like the Fourth Amendment which contains similar language, require the extraction of blood to be conducted either pursuant to a search warrant or under a recognized exception to the warrant requirement. *Williams*, 296 Ga. at 821,

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[2] In Strong, we considered a defendant's challenge to the police's withdrawal of a blood sample from the defendant while he was unconscious on two grounds: (1) unreasonable search and seizure and (2) violation of the right against compelled self-incrimination. As to the first ground, we concluded that the warrantless search was proper as a search incident to an arrest, and even if the defendant was not under arrest, the "evanescent nature of alcohol in the blood" supported the extraction. *Strong*, 231 Ga. at 518, 202 S.E.2d 428. As to the second ground, we concluded that extracting blood did not cause the defendant to be a witness against himself under the Fifth Amendment and "similar provisions of Georgia law," approvingly citing cases to the effect that the removal of evidence from a defendant's body does not implicate his right against compelled self-incrimination. *Id.* at 519, 202 S.E.2d 428. The holding as to the first ground is not good law, as these more recent decisions have explained. Nothing we say here should be understood as casting any doubt on *Strong*'s self-incrimination holding.

771 S.E.2d 373. We ruled that the only exception to the warrant requirement at issue in *Williams* was the purported consent of the suspect, disapproving *Strong* to the extent it held that the natural dissipation of blood categorically supports a finding of an exigent circumstance justifying a warrantless search. *Williams*, 296 Ga. at 821, 771 S.E.2d 373. We remanded the case for a determination of the voluntariness of the defendant's consent because merely submitting to a state-administered test after having been read the implied consent notice did not per se establish voluntary consent for constitutional purposes. *Id.* at 821-823, 771 S.E.2d 373.

Thus, Georgians do have a constitutional right to refuse to consent to warrantless blood tests, absent some other exception to the warrant requirement. Because we now know that *Klink* erred in holding that the Georgia Constitution does not preserve such a right, doubt naturally arises about the soundness of our parallel statement in *Klink* that the Georgia Constitution also does not protect against compelled breath testing. *Klink*, 272 Ga. at 606 (1), 533 S.E.2d 92. We take this opportunity to revisit *Klink*'s analysis regarding the applicability to breath tests of both the state constitutional right against unreasonable searches and seizures and the state constitutional right against compelled self-incrimination. The latter of these rights requires a more extended analysis.

(b) Neither the Fourth Amendment to the U.S. Constitution nor Paragraph XIII of the Georgia Constitution Prohibits Warrantless Breath Tests as Searches Incident to Arrest

The Fourth Amendment to the United States Constitution and Paragraph XIII of the Georgia Constitution protect against unreasonable searches and seizures. *Cooper v. State*, 277 Ga. 282, 285 (III), 587 S.E.2d 605 (2003). A warrantless search is per se unreasonable unless it falls within a recognized exception to the warrant requirement. *Williams*, 296 Ga. at 819, 771 S.E.2d 373. A warrant is not needed where consent is given, and in some cases the doctrine of search incident to lawful arrest also obviates the need for a warrant. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Williams*, 296 Ga. at 821, 771 S.E.2d 373.

Here, Olevik's claim that the language of the implied consent notice rendered his consent invalid is not cognizable on Fourth Amendment and Paragraph XIII grounds. The Supreme Court of the United States concluded in *Birchfield* that the Fourth Amendment permits warrantless breath tests as searches incident to a DUI arrest. *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2184-2185 (V)(C)(3). Because the search incident to arrest exception to the warrant requirement applies to breath tests in that context, there is no need to obtain consent for a breath test to support a warrantless search for Fourth Amendment purposes after a valid arrest. Consequently, even assuming that the implied consent notice was coercive, securing a breath test after arrest based on reading the implied consent notice would not violate the Fourth

Amendment, because the warrantless breath test is permitted as a search incident to arrest.

Because we generally interpret Paragraph XIII consistent with the Fourth Amendment, under *Birchfield*, our Constitution also would allow warrantless breath tests as searches incident to arrest. Olevik offers no reason that we should interpret Paragraph XIII differently in this context.[3]

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[3] We have said that because Paragraph XIII contains the same language as the Fourth Amendment, it "is [to be] applied in accord with the Fourth Amendment." *See Williams*, 296 Ga. at 818 n.5, 771 S.E.2d 373. But interpreting Paragraph XIII in a manner consistent with the Fourth Amendment does not mean that our interpretation of Paragraph XIII must change every time the Supreme Court of the United States changes its interpretation of the Fourth Amendment. "Questions of the construction of the State Constitution are strictly matters for the highest court of this state. The construction of similar federal constitutional provisions, though persuasive authority, is not binding on this state's construction of its own Constitution." *Pope v. City of Atlanta*, 240 Ga. 177, 178 (1), 240 S.E.2d 241 (1977). State constitutional provisions may, of course, confer greater protections than their federal counterparts, provided that such broader scope is rooted in the language, history, and context of the state provision. *See Grady v. United Govt. of Athens-Clark Cty.*, 289 Ga. 726, 731 (2)(b), 715 S.E.2d 148 (2011). In the same way, a state constitution may also offer less rights than federal law, so long as it does not affirmatively violate federal law. *See Massachusetts v. Upton*, 466 U.S. 727, 738, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) (Stevens, J., concurring specially) ("The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case, the court must go on to decide the claim under federal law, assuming it has been raised." (citation and punctuation omitted)); *Malyon v. Pierce County*, 131 Wash.2d 779, 935 P.2d 1272, 1281 n. 30 (1997) (noting "that the level of protection of rights under the state constitutions can be the same as, higher than, or lower than that provided by the federal constitution" (citation and punctuation

(c) Paragraph XVI, Properly Understood, Applies to Breath Tests

The Georgia Constitution provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." Ga. Const. 1983, Art. I, Sec. I, Par. XVI ("Paragraph XVI"). If we were construing Paragraph XVI in the first instance, we might conclude that the scope of Georgia's right against compelled self-incrimination is coterminous with the right guaranteed by the Fifth Amendment to the United States Constitution, which is limited to evidence of a testimonial or communicative nature. *See Muhammad v. State*, 282 Ga. 247, 250-251 (3), 647 S.E.2d 560 (2007); *see also Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (right against compelled self-incrimination bars compelling "communications" or "testimony," but "compulsion which makes a suspect or accused the source of real or physical evidence does not violate it" (punctuation omitted)). But we are not meeting Paragraph XVI for the first time; this constitutional provision has been carried over from prior constitutions, and it has brought with it a long history of interpretation. The State argues that our historical interpretation of this provision is wrong, both as a matter of text and in the light of the legislative history of a previous

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omitted)). Real federalism means that state constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution. *See State v. Kennedy*, 295 Or. 260, 666 P.2d 1316, 1323 (1983) (state constitutional rights were "meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics").

constitution. Nevertheless, this history compels our conclusion today.

(i) Principles of Constitutional Interpretation Counsel Us to Construe Paragraph XVI in the Light of Case Law Interpreting Similar Text Prior to Ratification of the 1983 Constitution

We interpret a constitutional provision according to the original public meaning of its text, which is simply shorthand for the meaning the people understood a provision to have at the time they enacted it. This is not a new idea. Indeed, there are few principles of Georgia law more venerable than the fundamental principle that a constitutional provision means today what it meant at the time that it was enacted. "[T]he Constitution, like every other instrument made by men, is to be construed in the sense in which it was understood by the makers of it at the time when they made it. To deny this is to insist that a fraud shall be perpetrated upon those makers or upon some of them." *Padelford, Fay & Co. v. Savannah*, 14 Ga. 438, 454 (1854) (emphasis in original). "A provision of the constitution is to be construed in the sense in which it was understood by the framers and the people at the time of its adoption." *Collins v. Mills*, 198 Ga. 18, 22, 30 S.E.2d 866 (1944) (citing *South Carolina v. United States*, 199 U.S. 437, 448, 26 S.Ct. 110, 50 L.Ed. 261 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."), overruled on other grounds by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)).

In determining the original public meaning of a constitutional provision, we consider the plain and ordinary meaning of the text, viewing it in the context in which it appears and reading the text in its most natural and reasonable manner. *See Georgia Motor Trucking Assn. v. Ga. Dept. of Revenue*, 301 Ga. 354, 356 (2), 801 S.E.2d 9 (2017). And although the text is always our starting point for determining original public meaning (and often our ending point, as well), the broader context in which that text was enacted may also be a critical consideration. "Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption." *Clarke v. Johnson*, 199 Ga. 163, 166, 33 S.E.2d 425 (1945) (citation and punctuation omitted); *see also DeJarnette v. Hosp. Auth. of Albany*, 195 Ga. 189, 205 (7), 23 S.E.2d 716 (1942) (the meaning and effect of constitutional amendments "is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts" (citation and punctuation omitted)).

One key aspect of that broader context is the body of pre-enactment decisions of this Court interpreting the meaning of certain text that the framers of our Constitution subsequently chose to use. In such cases, the text the framers chose had already been definitively interpreted. When the framers of our Constitution considered language that had already been definitively interpreted and kept it without material alteration, they are strongly presumed to have kept with the text its definitive interpretation. This principle, too, is not new to us. In a case decided shortly before the ratification of the 1983 Constitution, Justice Gregory

acknowledged in a concurrence that this well-established principle precluded his preferred interpretation of constitutional text:

> [R]egardless of the interpretation we might now place on these words, it is clear that our courts have in the past given them the meaning the majority opinion now gives them. It is this interpretation of these words which was incorporated into the Constitution of 1945. A constitutional provision is to be construed in the sense in which it was understood by the framers and the people at the time of its adoption. Where the language in our [C]onstitution does not indicate an intention to declare some new principle, sound construction requires that it be construed to have intended no more than merely to state the law as it existed at that time. The interpretation we might give these words today is unimportant. Only that interpretation incorporated into the Constitution concerns us in this particular case.

McCafferty v. Med. Coll. of Ga., 249 Ga. 62, 70, 287 S.E.2d 171 (1982) (Gregory, J., concurring specially) (citations omitted), overruled on other grounds by *Self v. City of Atlanta*, 259 Ga. 78, 79 (1), 377 S.E.2d 674 (1989) (adopting special concurrence). *See also Griffin v. Vandegriff*, 205 Ga. 288, 291 (1), 53 S.E.2d 345 (1949); Scalia & Garner, Reading Law: The Interpretation of Legal Texts 322-326 (West 2012) (explaining the prior-construction canon that if a provision is enacted with words or phrases that had previously received authoritative construction by a jurisdiction's court of last resort, the words and phrases

are to be understood according to that construction). Indeed, we have even previously applied this principle to the self-incrimination provision of the 1945 Constitution. Because many "decisions of this [C]ourt had construed the word 'testimony' to embrace any evidence" even before "the identical clause containing this word was written into the 1945 Constitution," we concluded that "the framers of that Constitution intended for it to have the meaning theretofore given it by construction." *Aldrich v. State*, 220 Ga. 132, 135, 137 S.E.2d 463 (1964).

When we consider the original public meaning, we necessarily must focus on objective indicators of meaning, not the subjective intent of particular individuals that the language mean something idiosyncratic. The importance of this objective approach is plain when we consider our similar focus in statutory construction. When we consider the meaning of statutes enacted by 236 members of the General Assembly, we determine meaning from text and context, "not the subjective statements of individual legislators." *Gibson v. Gibson*, 301 Ga. 622, 632 (3)(c), 801 S.E.2d 40 (2017) (quoting *Malphurs v. State*, 336 Ga. App. 867, 871-872, 785 S.E.2d 414 (2016)). This focus on the objective meaning of statutory text is by necessity, for how can we possibly determine the subjective intent of 236 legislators (and a governor) by any method other than focusing on the text they enacted? Indeed,

> how, putting aside the text, are we to figure out what "intention" was in the head of the legislators when they voted? And are we searching for the intention of the entire legislature? A majority of the members who voted? Just the key members or sponsors of

> the bill or others who spoke or wrote about the bill at some point before (or after) passage, in some way that was publicly reported? What if no majority of members voted on it with the same intention? And what of the intention of the Governor who signed the bill?

Merritt v. State, 286 Ga. 650, 656-657, 690 S.E.2d 835 (2010) (Nahmias, J., concurring specially). Determining the "intent" of the legislature by means other than considering the text and context of properly enacted statutes would be futile.[4]

Our objective focus is even more important when we interpret the Constitution. Unlike ordinary legislation, the people—not merely elected legislators—are the "makers" of the Georgia Constitution. *See* Ga. Const. of 1983, Art. X, Sec. I, Par. II (proposals to amend or replace constitution require a vote of the people); *see also Wheeler v. Bd. of Trs. of Fargo Consolidated School Dist.*, 200 Ga. 323, 333 (3), 37 S.E.2d 322 (1946) ("The fiat of the people, and only the fiat of the people, can breathe life into a constitution."). If the subjective intent of one legislator out of 236 casts little light on the meaning of ordinary legislation, such subjective views can hardly carry more weight for a Constitution that had hundreds of thousands of citizens who voted on its ratification. *See* Ga. L. 1983, p. 2070 (1983 Constitution ratified with 567,663 yes votes and 211,342 no votes). That

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[4] Or worse, it would be an invitation for judges "to read their own policy preferences into the law, as we all believe that our own policy views are wise and reasonable, which tempts us to assume, consciously or unconsciously, that the legislature could not have intended differently." *Merritt*, 286 Ga. at 656, 690 S.E.2d 835 (Nahmias, J., concurring specially).

said, considering what the framers of our Constitution understood the words they selected to mean can be a useful data point in determining what the words meant to the public at large. *See Gwinnett County School Dist. v. Cox*, 289 Ga. 265, 307-308, 710 S.E.2d 773 (2011) (Nahmias, J., dissenting) ("In construing our Constitution, we . . . sometimes look to the understanding expressed by people directly involved in drafting the document . . . The best evidence [of their intent], of course, is not what various framers said to each other at various points during the process, but what they ultimately drafted together—the actual Constitution that the citizens of Georgia then ratified.").

(ii) Paragraph XVI Has a Nearly Unbroken History of Application to Compelled Acts, Not Merely Testimony

Applying these principles, we construe the right against compelled self-incrimination preserved by Paragraph XVI in the light of the meaning of Paragraph XVI's materially identical ancestors. The right against compelled self-incrimination achieved constitutional status in Georgia for the first time in the 1877 Constitution. Paragraph XVI provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating"; the 1877 provision provided that "[n]o person shall be compelled to give testimony tending in any manner to criminate himself." Ga. Const. 1877, Art. I, Sec. I, Par. VI. Other than replacing the archaic phrase "to criminate himself"[5]

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[5] At the time of the 1877 Constitution, the word "criminate" was defined as "[t]o accuse or charge with a crime; to impeach." Noah Webster, A Dictionary of the English Language 98 (1878). This is the same meaning that "incriminate" had at the time

with the more modern phrase "to be self-incriminating," Paragraph XVI is identical to the constitutional provision adopted in 1877. A case we decided just two years after the 1877 Constitution was adopted (and have never since overruled) is thus critical to the understanding of the scope of the right against compelled self-incrimination. In *Day v. State*, 63 Ga. 668, 669 (2) (1879), we held that this constitutional right protected a defendant from being compelled to incriminate himself by acts, not merely testimony.

Although *Day* did not explain its broad interpretation,[6] *see id.*, several years later we more fully explained the basis for such a broad scope. In *Calhoun v. State*, 144 Ga. 679, 680-681, 87 S.E. 893 (1916), we explained that the self-incrimination provision of the 1877 Georgia Constitution was modeled after the common law principle that "no man is bound to accuse himself of any crime or to furnish any evidence to

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our 1983 Constitution was adopted. See Webster's New World Dictionary 713 (2d College ed. 1980) (defining "incriminate" as "(1) to charge with a crime; accuse; (2) to involve in, or make appear guilty of, a crime or fault"). Although usage of "criminate" was common through the 19th century, the word has since become merely an archaic variant of "incriminate." See Bryan A. Garner, A Dictionary of Modern American Usage 366 (1998). And notes from the drafting of the 1983 Constitution also reflect this understanding. See Select Committee on Constitutional Revisions, 1977-1981, Transcript of Meetings, Committee to Revise Article I, meeting of the Subcommittee on Origin and Structures of Government, October 26, 1979, pp. 33-34.

6 There is no indication that "testimony" had a substantially broader definition in 1877. See Noah Webster, A Dictionary of the English Language 434 (1878) (defining "testify" as "[t]o make a solemn declaration; to establish some fact; to give testimony" and "[t]o witness to; to affirm or declare solemnly, or under oath").

convict himself of any crime[.]" Recognizing that the constitutional guaranty against compelled self-incrimination was as broad as the common law right from which it was derived, we noted that the right "protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature." *Id.* at 681, 87 S.E. 893.

The self-incrimination provision has been carried forward with no material change from the 1877 Constitution through several intervening constitutions to our current 1983 Constitution. *See* Ga. Const. 1945, Art. I, Sec. I, Par. VI ("No person shall be compelled to give testimony tending in any manner to criminate himself."); Ga. Const. 1976, Art. I, Sec. I, Par. XIII (same); Ga. Const. 1983, Art. I, Sec. I, Par. XVI ("No person shall be compelled to give testimony tending in any manner to be self-incriminating."). At no point through this history was the constitutional language changed to abrogate Day's interpretation, nor did we reconsider *Day*. To the contrary, we have consistently and repeatedly applied the state constitutional protection against compelled self-incrimination in accord with *Day*. *See, e.g., Brown v. State*, 262 Ga. 833, 836 (10), 426 S.E.2d 559 (1993) (1983 Constitution); *Raines v. White*, 248 Ga. 406, 284 S.E.2d 7 (1981) (1976 Constitution); *Aldrich*, 220 Ga. at 135, 137 S.E.2d 463 (1945 Constitution); *Blackwell v. State*, 67 Ga. 76, 78-79 (1) (1881) (1877 Constitution). Thus, although Paragraph XVI refers only to testimony, its protection against compelled self-incrimination was long ago construed to also cover incriminating acts and, thus, is more extensive than the Supreme Court

of the United States's interpretation of the right against compelled self-incrimination guaranteed by the Fifth Amendment.

Notwithstanding this well-aged precedent recognizing that the state right against compelled self-incrimination applies beyond mere testimony, the State argues that we should construe Paragraph XVI according to its plain text and limit the right to only what is commonly understood today to be "testimony," *i.e.*, spoken or written statements of certain kinds. The State argues that we erred in *Day* by ignoring the plain language of the constitutional provision and cites legislative history surrounding the creation of the 1877 Constitution as evidence that the framers of that constitution intended for the right against self-incrimination to be limited to testimony.[7]

But even if the State were right that *Day* (and all the other cases that have since followed it) misread the constitutional text, we are no longer governed by the 1877 Constitution that *Day* interpreted. Since issuing our decisions in *Day* (1879) and *Calhoun* (1916), the people of Georgia have adopted three new constitutions (1945, 1976, and 1983). Our current constitution adopted in 1983 contains self-incrimination language that is identical in all material respects to the language interpreted in *Day* and *Calhoun*. Thus, even

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[7] In its well-researched briefing, the State points us to comments made by John Matthews Guerard, a delegate to the 1877 Constitutional Convention, in proposing the self-incrimination provision. The State focuses particularly on Guerard's statement that the provision would ensure that, at trial, a citizen "shall not be compelled to testify to anything tending to criminate himself." Because Guerard used the term "testify," the State argues, he meant for the self-incrimination provision to apply only to testimony.

if we were wrong in *Day* and *Calhoun* to extend the right against compelled self-incrimination beyond spoken and written statements, the subsequent ratifications of new constitutions with the same language are strongly presumed to have carried forward the interpretation of that language provided by *Day* and *Calhoun*. *See Aldrich*, 220 Ga. at 135, 137 S.E.2d 463 (framers of 1945 Constitution intended for constitutional privilege against self-incrimination to have same meaning as that given by our construction in *Day*, *Calhoun*, and other cases). As we explained above, the adoption of a new constitution containing materially identical language already clearly and authoritatively construed by this Court is strongly presumed to have brought with that language our previous interpretation. This is so regardless of whether those holdings were well-reasoned at the time they were decided. The people of Georgia, by ratifying that constitutional text, ratified the scope of Paragraph XVI as *Day* explained it.

(iii) Breathing Deep Lung Air Into a Breathalyzer Is a Self-Incriminating Act That Paragraph XVI Prevents the State From Compelling

Although the scope of our right against compelled self-incrimination extends to acts, it is only compelled acts of the defendant that fall within the protections of Paragraph XVI. For example, we have held that a defendant's right against compelled self-incrimination was violated when he was compelled to place his foot in certain footprints located near the crime scene. *Day*, 63 Ga. at 668-669 (2). We also have held that a defendant's right against compelled self-incrimination was violated when he was required to stand up at trial

so that a witness could verify that the defendant's leg had been amputated in a way that corresponded to tracks left at the crime scene. *Blackwell*, 67 Ga. at 78-79 (1). We have concluded that a defendant's right against compelled self-incrimination was violated when he was required to drive his truck onto scales in order to determine whether he was operating a vehicle weighing more than permitted by law. *Aldrich*, 220 Ga. at 135, 137 S.E.2d 463. We have also ruled that requiring a defendant to produce a handwriting exemplar violates the self-incrimination provision. *Brown*, 262 Ga. at 836 (10), 426 S.E.2d 559 (1993); *see also State v. Armstead*, 152 Ga. App. 56, 57 (2), 262 S.E.2d 233 (1979) (same).[8]

In contrast, the right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him. *Batton v. State*, 260 Ga. 127, 130 (3), 391 S.E.2d 914 (1990).[9] Consequently, we have ruled that the right is not violated by removing clothing from a defendant. *See, e.g., id.* (taking shoes from defendant); *Drake v. State*, 75 Ga.

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[8] Given our conclusion in *Brown* that compelling a defendant to provide a handwriting exemplar violates the defendant's right against self-incrimination under the Georgia Constitution, the Court of Appeals's earlier decision in *Davis v. State*, 158 Ga. App. 549, 552 (5), 281 S.E.2d 305 (1981), that compelled voice exemplars do not violate that right seems something of an outlier. But the continued validity of *Davis* is not before us today.

[9] It is important to recognize that while these situations do not implicate the right against compelled self-incrimination, the taking of physical evidence from a suspect often will constitute a search under the Fourth Amendment and Paragraph XIII, for which a warrant or an exception to the warrant requirement, such as consent or search incident to arrest, is required.

413, 414-415 (2) (1885) (taking blood-stained clothes from defendant); *Franklin v. State*, 69 Ga. 36, 43-44 (3) (1882) (pulling boots off a defendant). Similarly, the right is not violated when evidence is taken from a defendant's body or photographs of the defendant are taken. *See, e.g., Quarterman v. State*, 282 Ga. 383, 386 (4), 651 S.E.2d 32 (2007) (statutory requirement that convicted felon provide DNA sample did not violate his right against compelled self-incrimination because it does not force the convicted felon to remove incriminating DNA evidence from his body himself but only to submit to having the evidence removed); *Ingram v. State*, 253 Ga. 622, 634 (7), 323 S.E.2d 801 (1984) (right was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body); *State v. Thornton*, 253 Ga. 524, 525 (2), 322 S.E.2d 711 (1984) (taking impression of defendant's teeth did not compel defendant to perform an act); *Strong*, 231 Ga. at 519, 202 S.E.2d 428 (withdrawal of blood from unconscious defendant did not violate right); *Creamer v. State*, 229 Ga. 511, 517-518 (3), 192 S.E.2d 350 (1972) (right not violated where defendant required to undergo surgery to remove a bullet from his body because the defendant was not forced to remove the bullet himself).

In other instances, even if the right was implicated, we concluded that no violation had occurred where the defendant consented to the act rather than being compelled. *See, e.g., Scott v. State*, 274 Ga. 476, 478 (2) (b), 554 S.E.2d 488 (2001) (accused's right against compelled self-incrimination was not violated when he agreed to hold up sleeve to allow police to photograph tattoos on his arm); *Whippler v. State*, 218 Ga. 198, 203 (6), 126 S.E.2d 744 (1962) (defendant's

right against compelled self-incrimination not violated where he voluntarily and without objection cooperated in giving fingerprints to police); *Foster v. State*, 213 Ga. 601, 604 (3), 100 S.E.2d 426 (1957) (suspect's right was not violated when he agreed to go with police to the crime scene for identification purposes); *see also State v. J.T.*, 155 Ga. App. 812, 273 S.E.2d 214 (1980) (student complied with assistant principal's instruction to "empty her pockets").

In sum, Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence; it does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence. *See Creamer*, 229 Ga. at 517 (3), 192 S.E.2d 350 ("You cannot force a defendant to act, but you can, under proper circumstances, produce evidence from his person."). And, like other constitutional rights, a suspect may consent to take actions that Paragraph XVI would prevent the State from compelling. Having set forth the scope of Georgia's right against compelled self-incrimination, we now consider whether *Klink* was correct to hold that compelling a suspect to submit to a breath test does not violate that right. The answer to this question depends on the details of the test.

The police officer who administered the test in this case testified that a proper breath test requires deep lung breath, and that a suspect has to "blow sufficient volume to get the deep, inner-lung breath" to provide a sufficient sample for testing. Deep lung or alveolar air provides the most reliable sample because it is in the alveolar region of the lungs where "alcohol vapor and other gases are exchanged between blood and breath." *Birchfield*, ___ U.S. at ___, 136 S.Ct.

2160. As the Supreme Court of the United States has recognized, obtaining this deep lung breath requires the cooperation of the person being tested because a suspect must blow deeply into a breathalyzer for several seconds in order to produce an adequate sample. *See id*. As the State conceded at oral argument, merely breathing normally is not sufficient.

The State argues that no compelled act is involved because a breath test only captures a "substance" naturally excreted by the human body, in the same way that collecting a urine sample does not violate a defendant's right against compelled self-incrimination. *See Green*, 260 Ga. at 627 (2), 398 S.E.2d 360; *see also Robinson v. State*, 180 Ga. App. 43, 50-51 (3), 348 S.E.2d 662), reversed on other grounds by *Robinson v. State*, 256 Ga. 564, 350 S.E.2d 464 (1986) (concluding that "procurement" of defendant's urine did not violate the defendant's right because there was no evidence that he was "forced" to produce the urine sample). But *Green* and *Robinson* do not apply here.[10] Although a person generally expels breath from his body involuntarily and automatically, the State is not merely collecting breath expelled in a natural manner. For a breath test, deep lung breath is required.

It is true that "all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test." *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2177 (V)(B)(1). If the State sought to capture and test a person's naturally exhaled breath, this might well be a different case. But this is not how a breath test is performed.

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[10] Given their inapplicability, we do not consider whether *Green* and *Robinson* were rightly decided.

Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself. Indeed, for the State to be able to test an individual's breath for alcohol content, it is required that the defendant cooperate by performing an act. *See Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2168 (I) ("Measurement of BAC based on a breath test requires the cooperation of the person being tested."). Compelling a defendant to perform an act that is incriminating in nature is precisely what Paragraph XVI prohibits. *Calhoun*, 144 Ga. at 681, 87 S.E. at 893 (the right against compelled self-incrimination protects one from "doing an act against his will which is incriminating in its nature").

To the extent we said otherwise in *Klink*, we did so with no analysis. With a mere citation to *Green*'s "natural excretion" principle, we summarily concluded in *Klink* that "compelling a defendant to submit to breath testing [is not] unconstitutional under Georgia law." *Klink*, 272 Ga. at 606 (1), 533 S.E.2d 92. As discussed above, Green cannot support a conclusion that the forced and unnatural breathing required here does not implicate a person's right against compelled self-incrimination. *Klink*'s reasoning, therefore, is unsound. But because *Klink* is still binding precedent, we must decide whether the doctrine of stare decisis nevertheless counsels against overruling Klink.

(iv) We Overrule *Klink*

Under the doctrine of stare decisis, courts generally stand by their prior decisions, because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process." *State v. Hudson*, 293 Ga. 656, 661, 748 S.E.2d 910 (2013) (citation omitted). Stare decisis, however, is not an "inexorable command." *Id.* "Courts, like individuals, but with more caution and deliberation, must sometimes reconsider what has been already carefully considered, and rectify their own mistakes." *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 733, 13 S.E. 252 (1891). In reconsidering our prior decisions, we must balance "the importance of having the question decided against the importance of having it decided right." *State v. Jackson*, 287 Ga. 646, 658 (5), 697 S.E.2d 757 (2010) (emphasis in original). To that end, we have developed a test that considers "the age of precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning." *Id.* The soundness of a precedent's reasoning is the most important factor. *Id.*

We have also said that stare decisis carries less weight when our prior precedent involved the interpretation of the Constitution, which is more difficult than statutory interpretation for the legislative process to correct. *See Ga. Dept. of Natural Resources v. Center for a Sustainable Coast, Inc.*, 294 Ga. 593, 601 (2), 755 S.E.2d 184 (2014). This doesn't mean that we disregard stare decisis altogether, though; what it actually means is that the first stare decisis factor (soundness of reasoning) becomes even more critical. The more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it.

The stare decisis factors counsel that we overrule *Klink*. We already have established that the reasoning of *Klink* was unsound, cutting heavily in favor of over-

ruling it. On the second factor, *Klink* was decided 17 years ago, and we have overruled decisions older than that. *See, e.g., Woodard v. State*, 296 Ga. 803, 808-814, 771 S.E.2d 362 (2015) (overruling 24-year-old interpretation of justification defense statute); Sustainable Coast, 294 Ga. at 601-602 (2), 755 S.E.2d 184 (reversing 19-year-old decision on sovereign immunity); *Jackson*, 287 Ga. at 659-60 (5), (6), 697 S.E.2d 757 (overruling nearly 29-year-old interpretation of felony murder statute).

Klink also does not involve substantial reliance interests. Substantial reliance interests are an important consideration for precedents involving contract and property rights, "where parties may have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *see also Savage v. State*, 297 Ga. 627, 641 (5)(b), 774 S.E.2d 624 (2015) (substantial reliance interests are most common in contract and property cases). To be sure, the State has some sort of interest in preserving *Klink* so that pending DUI cases are not disturbed. And in the wake of *Williams* and *Birchfield*, police officers may have relied on *Klink* to ask more drivers to submit to breath tests as opposed to blood tests, believing that compelled breath tests are unprotected by the State Constitution. But these sorts of reliance interests do not

> outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement entitlement to its persistence.

> "The mere fact that law enforcement may be made more efficient can never by itself justify disregard of [constitutional rights]".

Gant, 556 U.S. at 349-350, 129 S.Ct. 1710 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (punctuation omitted)).

The remaining factor of workability is not reason enough to preserve *Klink*. Under *Klink*, compelled breath tests are permitted regardless of how coercively cooperation may have been obtained. By rejecting *Klink*, law enforcement may have to consider whether a suspect has validly waived his right against self-incrimination under the totality of the circumstances. We recognize that requiring this determination before administering a breath test is more difficult than simply waiting for an affirmative response after reading the implied consent notice. But this difficulty is not reason enough to persist in *Klink*'s constitutional error.

Accordingly, we overrule *Klink* and other cases to the extent they hold that Paragraph XVI of the Georgia Constitution does not protect against compelled breath tests or that the right to refuse to submit to such testing is not a constitutional right.[11] We next must decide whether Olevik's claims prevail under the applicable law.

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[11] *See, e.g., Sauls v. State*, 293 Ga. 165, 167, 744 S.E.2d 735 (2013); *Cooper*, 277 Ga. at 290 (V), 587 S.E.2d 605 (2003); *Lutz v. State*, 274 Ga. 71, 73 (1), 548 S.E.2d 323 (2001); *Fantasia v. State*, 268 Ga. 512, 514 (2), 491 S.E.2d 318 (1997); *Oliver v. State*, 268 Ga. App. 290, 294 (2), 601 S.E.2d 774 (2004); *State v. Coe*, 243 Ga. App. 232, 234 (2), 533 S.E.2d 104 (2000); *State v. Lord*, 236 Ga. App. 868, 870, 513 S.E.2d 25 (1999); *Nawrocki v. State*, 235 Ga. App. 416, 417 (1), 510 S.E.2d 301 (1998).

3. We Reject Olevik's Facial and "As-Applied" Challenges to the Implied Consent Notice

Olevik raises several challenges to OCGA § 40-5-67.1(b) in claiming that he did not validly consent to the breath test. First, he argues that the statute is unconstitutionally coercive, both on its face and as applied, in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Paragraph XIII of the Georgia Constitution, because it is materially misleading and did not adequately inform him of his rights. Olevik also raises what he describes as an as-applied challenge to the implied consent notice statute, claiming that the notice language coerced him to submit to a breath test in violation of Paragraph XVI; this claim isn't really a challenge to the statute itself, but is instead merely a claim that his breath test results are inadmissible. We reject Olevik's facial challenges because the statute is not per se coercive. We reject his as-applied claim because he offers no basis for a finding of coercion beyond the language of the notice.

(a) Olevik's Facial Challenges Fail

Olevik's argument that OCGA § 40-5-67.1(b) is facially coercive is essentially a claim that the implied consent notice is so misleading and inaccurate that no person can validly consent to a state-administered test once the notice has been read. Outside the First Amendment context, a plaintiff faces a difficult task in mounting a successful facial challenge to a statute, "because it requires one to establish that no set of circumstances exists under which the statute would be valid, *i.e.*, that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate

sweep." *Bello v. State*, 300 Ga. 682, 686 (1), 797 S.E.2d 882 (2017) (punctuation and citation omitted); *see also Blevins v. Dade Cty. Bd. of Tax Assessors*, 288 Ga. 113, 118 (3), 702 S.E.2d 145 (2010). Where a statute has a "plainly legitimate sweep," a facial challenge must fail. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Olevik has failed to satisfy this exacting standard.

(i) The Implied Consent Notice Is Not Per Se Coercive on Its Face

Olevik argues that the misleading language of the implied consent notice violates the due process guarantees of the United States and Georgia Constitutions.[12] Specifically, Olevik argues that the implied consent notice inaccurately tells suspects that Georgia law requires them to submit to a state-administered chemical test and provides misleading information about the consequences for submitting or refusing to submit to a test.

Before addressing Olevik's specific arguments, we note that the implied consent statute has a "plainly legitimate sweep," practically dooming Olevik's facial challenge. All 50 states have adopted some form of an implied consent law that requires "motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving

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[12] Although Olevik cites both federal and state constitutional due process provisions, he does not argue that they offer different protections or that his claims are to be analyzed differently in this context.

offense." *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2169 (I) (quoting *Missouri v. McNeely*, 569 U.S. 141, 161, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (punctuation omitted)). The Supreme Court of the United States has approved the "general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at ___, 136 S.Ct. at 2185 (VI). The *Birchfield* Court, however, struck down implied consent laws that impose criminal penalties for refusing to submit to blood testing. *Id.* at ___, 136 S.Ct. at 2184-2185 (V)(C)(3). Georgia's implied consent statute does not impose criminal penalties for refusing to submit to chemical testing, squarely putting our implied consent notice within the category of statutes that the Supreme Court of the United States has deemed not unconstitutionally coercive.

Aside from failing to show a lack of a legitimate sweep, Olevik has failed to demonstrate that the implied consent notice is unconstitutional in all of its applications. "In determining whether a defendant's statement was voluntary as a matter of constitutional due process, a trial court must consider the totality of the circumstances." *Welbon v. State*, 301 Ga. 106, 109 (2), 799 S.E.2d 793 (2017); *see also State v. Chulpayev*, 296 Ga. 764, 779 (3)(b), 770 S.E.2d 808 (2015) (violation of a statute rendering a confession inadmissible does not automatically amount to a constitutional violation). As we explain below in Division 3 (b), the totality of the circumstances test to determine the voluntariness of an incriminating statement or act for due process purposes is the same test used to determine the voluntariness of a consent to chemical testing in the DUI context. After our decision in

Williams, mere acquiescence to a blood test after being read the implied consent notice is not per se voluntary consent to a warrantless search; the State must show that a suspect voluntarily consented to a blood test under the totality of the circumstances. *Williams*, 296 Ga. at 822-823, 771 S.E.2d 373.

Because evaluating whether self-incrimination was compelled depends on the totality of the circumstances, Olevik cannot establish that the implied consent notice is materially misleading and substantively inaccurate in every application such that the notice invariably compels submission to the requested breath test. For example, Olevik argues that the implied consent notice misinforms a defendant that he is required to submit to a state-administered chemical test without informing suspects about their right to refuse testing. By its plain terms, the first sentence of the notice ("Georgia law requires you to submit to state administered chemical tests") tells a suspect that Georgia law requires him to take a chemical test of his blood, breath, urine, or other bodily substance. This warning is, of course, true in the sense that the implied consent law has provided that drivers have agreed to submit to chemical tests as a condition of having a driver's license. If you don't submit to a test, you lose your license.

The implied consent notice also refers to the testing as "required" twice more. *See* OCGA § 40-5-67.1 (b)(2). Olevik would have us accept that every suspect would focus only on the notice's repeated references to "required" testing at the exclusion of other language contained in the notice. But following the first instruction that "Georgia law requires you to submit to state administered chemical tests," the notice states, "If <u>you refuse</u> this testing, your Georgia driver's

license or privilege to drive . . . will be suspended for a minimum period of one year." The next sentence begins "Your refusal to submit to the required testing may be offered into evidence against you at trial." After giving other information, the notice ends with, "Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?" Because the notice refers to a right to refuse, advises suspects of the consequences for doing so, and concludes with a request to submit to testing, a reasonable suspect relying solely on the notice should understand that the State is asking for a suspect's cooperation, rather than demanding it, and that they have a right to refuse to cooperate.

Olevik next asserts that the notice is per se coercive because it contains misleading information about the consequences of taking a chemical test or refusing to do so. Specifically, Olevik observes that the notice warns suspects that a refusal to submit to testing will result in a license suspension and that a test result indicating a BAC of 0.08 grams or more only may result in a suspension. Olevik is correct that this information is not entirely accurate, as suspensions are mandated in either case. *See* OCGA § 40-5-67.1(c) (providing that the Department of Public Safety "shall suspend" the license of a driver (21 or older) who has an alcohol concentration of 0.08 grams or more), (d) (the department "shall suspend" for a period of one year the license of a person who refuses to submit to a chemical test). But the mere fact that the notice misstates the likelihood of a license suspension does not, by itself, render the notice per se coercive regardless of other circumstances. We cannot say that the notice's use of "may" instead of "shall" with respect

to the likelihood of license suspension is likely to play a dispositive role in a reasonable person's decision; when arrested and facing jail, the relative likelihood of also facing a civil administrative penalty may well recede into the background.

Olevik also challenges OCGA § 40-5-67.1(b)'s failure to advise suspects that the test results will be used against him at trial. But he concedes that the primary purpose of seeking the test is to collect evidence to support a criminal prosecution. Olevik points to no law requiring a full and explicit explanation of all possible consequences no matter how obvious.[13] The Supreme Court of the United States has rejected the claim that the admission of evidence that a defendant refused to take a chemical test violated a defendant's due process rights where he was not fully warned of the consequences of refusal. *See Neville*, 459 U.S. at 564-566, 103 S.Ct. 916. In rejecting a claim that an implied consent statute, similar to the one at issue here, was coercive, the *Neville* Court concluded that the statute did not create a situation "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession'" via submission to a chemical test. *Neville*, 459 U.S. at 563, 103 S.Ct. 916.

Olevik's facial claim rests on the premise that the notice would deceive a reasonable person. On the

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[13] To the extent Olevik argues that we should impose a *Miranda*-style prophylactic rule to protect suspects' Paragraph XVI rights (rights the scope of which, as we have explained, were well-established long before the Supreme Court's decision in *Miranda*), he does not point us to a single decision of this Court or any textual or historical basis supporting such a step. In the absence of a more complete argument, we decline to address this issue.

record before us, although Olevik points out deficiencies in the implied consent notice,[14] there is no evidence that OCGA § 40-5-67.1(b) creates widespread confusion about drivers' rights and the consequences for refusing to submit to a chemical test or for taking and failing that test. Because we cannot assume that the implied consent notice standing alone will coerce reasonable people to whom it is read, Olevik's facial challenge fails. *See Washington State Grange*, 552 U.S. at 457, 128 S.Ct. 1184 (rejecting facial challenge to primary election system initiative because each of the plaintiffs' arguments "rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, we cannot assume that Washington's voters will be misled").

(b) Olevik's "As-Applied" Self-Incrimination Claim Also Fails

Olevik also raises an "as-applied" challenge to the implied consent notice, arguing that the application of the statute violated his due process rights. Regardless of whether the reading of a notice compels a defendant to incriminate himself, it is not the reading of the notice that would constitute a due process violation or a violation of the right against compelled self-incrimination. Instead, it is the admission of a compelled breath test that would amount to a constitutional violation. *See Chavez v. Martinez*, 538 U.S. 760, 767, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) ("Statements compelled by police interrogations of course may not be used

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[14] The General Assembly may wish to amend the implied consent notice statute; if it does, among the changes it may consider would be a clearer explication of the right to refuse testing, and a more accurate articulation of the likelihood of license suspension.

against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." (citation omitted; emphasis supplied)); *Payne v. Arkansas*, 356 U.S. 560, 561, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (the use of a defendant's confession obtained by coercion, whether physical or mental, violates due process). Accordingly, this claim isn't really a challenge to the statute, but is instead a challenge to the admission of the results of the breath test against him.

As stated above, whether a defendant is compelled to provide self-incriminating evidence in violation of Paragraph XVI is determined under the totality of the circumstances. Determining the voluntariness of (or lack of compulsion surrounding) a defendant's incriminating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We have said that the voluntariness of a consent to search is determined by such factors as

> the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.

Dean v. State, 250 Ga. 77, 80 (2) (a), 295 S.E.2d 306 (1982); *see also Schneckloth*, 412 U.S. at 226, 93 S.Ct. 2041 (noting that in considering whether a defendant voluntarily incriminated himself, the Court "determined

the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted"). Just as the voluntariness of consent to search includes an assessment of the "psychological impact of all the factors on a defendant," a significant factor in a due process inquiry is whether a deceptive police practice caused a defendant to confess or provide an incriminating statement. *See United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir. 2010) ("While we look to the totality of the circumstances to determine the voluntariness of [a defendant's] confession, a significant aspect of that inquiry here involves the effect of deception in obtaining a confession."); *Chulpayev*, 296 Ga. at 779 (3)(a), 770 S.E.2d 808 (citing *Lall*, 607 F.3d at 1285)). And although "knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." *State v. Tye*, 276 Ga. 559, 560 (1), 580 S.E.2d 528 (2003) (citation and punctuation omitted); *see also Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041 ("While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative.").

This totality test is not foreign to trial courts. Trial courts already use the test to determine the voluntariness of a defendant's consent to chemical testing as an exception to the warrant requirement under the Fourth Amendment and Paragraph XIII. The trial court here in fact considered the totality of the circumstances in concluding that Olevik consented to the breath test under Fourth Amendment principles.

Although the trial court erred in in concluding that Olevik's constitutional right against compelled self-incrimination was not at issue, its ruling is understandable; indeed, the outcome was required by binding case law. *See* Ga. Const. of 1983, Art. VI, Sec. VI, Par. VI ("The decisions of the Supreme Court shall bind all other courts as precedents."). But we have now overturned that case law because it erred in stating that breath tests do not implicate the right against self-incrimination. Paragraph XVI protects against compelled breath tests and affords individuals a constitutional right to refuse testing.

Nevertheless, the trial court's ultimate conclusion that Olevik was not compelled into submitting to the breath test must be affirmed. The court said it considered all the relevant factors to determine the voluntariness to consent to search, and these same factors are used in determining whether an incriminating act or statement was voluntary. The only consideration that Olevik argues the court failed to consider properly is the allegedly coercive and misleading nature of the implied consent notice. But we have already concluded above in rejecting his facial challenge that the notice, standing alone, is not per se coercive. Olevik identifies no other factors surrounding his arrest that, in combination with the reading of the implied consent notice, coerced him into performing a self-incriminating act. Indeed, Olevik stipulated that the officer's actions were not threatening or intimidating. Because the reading of the implied consent notice is not, by itself, coercive, and Olevik has offered nothing else, Olevik's claim must fail. Accordingly, we affirm the trial court's order denying Olevik's motion to suppress and affirm his convictions.

Judgment affirmed.

All the Justices concur.