

APR 15, 2021 05:14 PM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

MARTY DUSTIN WHITMAN

)
)
) Case No. 430948
)
)

NOTICE OF APPEAL

Notice is hereby given that the State of Georgia, by and through, Kristen L. Murphy, Assistant Solicitor-General, hereby appeals to the Georgia Court of Appeals from an order suppressing evidence illegally seized or excluding the results of any test for alcohol in the case of a motion made and ruled upon prior to the impaneling of a jury or the defendant being put in jeopardy, pursuant to O.C.G.A. § 5-7-1(a)(4).

The clerk will please omit nothing from the record on appeal. A transcript of the evidence and proceedings will be filed for inclusion in the record on appeal.

The Court of Appeals, rather than the Supreme Court of Georgia, has jurisdiction over this case on appeal because this is an appeal from a misdemeanor criminal case and does not raise a constitutional question and is therefore not within the exclusive jurisdiction of the Supreme Court.

Respectfully submitted this 15th day of April, 2021.



Kristen L. Murphy, Assistant Solicitor General
Bibb County Solicitor
Georgia State Bar# 913223
Bibb County Courthouse, Room 504
Macon, GA 31201
Phone: 478-621-6572; Fax: 478-621-6339
Email: kmurphy@maconbibb.us

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

MARTY DUSTIN WHITMAN

)
)
)
)
)

Case No. 430948

CERTIFICATE OF SERVICE

This shall certify that Kristen L. Murphy, Assistant Solicitor-General for Bibb County, has this day served upon defendant through his attorneys of record, Ben Sessions, a true and accurate copy of the foregoing motion via U.S. mail and electronic mail to:

Ben Sessions, Attorney for Defendant
3155 Roswell Road NE
Suite 220
Atlanta, GA 30305
ben@thesessionslawfirm.com

This 15th day of April, 2021.



Kristen L. Murphy, Assistant Solicitor General
Bibb County Solicitor
Georgia State Bar# 913223
Bibb County Courthouse, Room 504
Macon, GA 31201
Phone: 478-621-6572; Fax: 478-621-6339
Email: kmurphy@maconbibb.us

GEORGIA

UNIFORM TRAFFIC CITATION, SUMMONS AND ACCUSATION

GAGSP0000

E03660872

Court Case Number

NCIC Number

Citation Number

GEORGIA DEPARTMENT OF PUBLIC SAFETY

Upon Month **September** (Day) **2** (Year) **2020** at **2:26** ☒ AM ☐ PMOperator License No. **060201123**License Class or Type **C** State **GA** Endorsements _____ Expires **06/11/2024**Name **WHITMAN** **MARTY** **DUSTIN**
(Last) (First) (Middle)Address **105 BASS PLANTATION DRIVE APT 1404**City **MACON** State **GA** Zip Code **31210**DOB **06/11/1991** Hair **BRO** Hgt **507** Wgt **220** Sex **M** Eyes **BLU**Veh Yr **2002** Make **FORD** Style **LGT CONVTL 'F** Color **RED**Registration No. **RIJ7066** Yr **6/12/2020** State **GA**CDL ☐ YES ☒ NO ACCIDENT ☐ YES ☒ NO INJURIES ☐ YES ☒ NO FATALITIES ☐ YES ☒ NO☒ 2-LANE ROAD ☐ VASCAR ☐ Laser ☐ RadarWithin the State of Georgia, did commit the following offense: **SPEEDING** ☐ Patrol Vehicle ☐ Other

(Clock by / Serial #

Calibration/Check _____) at _____ MPH in a _____ zone

☒ DUI Test Administered ☒ BLOOD ☐ BREATH ☐ URINE ☐ OTHER (DUI Test Results) **REFUSAL**

TEST ADMINISTERED BY (If Applicable): _____

OFFENSE (Other than above) **DRIVING UNDER THE INFLUENCE**In Violation of Code Section **40-6-391(a)(1-5)** of ☒ State Law ☐ Local Ordinance

Remarks _____

WEATHER	(A) ROAD	(B) TRAFFIC	LIGHTING	COMMERCIAL VEHICLE INFORMATION
<input checked="" type="checkbox"/> Clear	<input checked="" type="checkbox"/> Dry	<input type="checkbox"/> Concrete	<input checked="" type="checkbox"/> Light	<input type="checkbox"/> 16+ Passengers
<input type="checkbox"/> Cloudy	<input type="checkbox"/> Wet	<input checked="" type="checkbox"/> Blacktop	<input type="checkbox"/> Medium	<input type="checkbox"/> Commercial Vehicle Violation
<input type="checkbox"/> Raining	<input type="checkbox"/> Ice	<input type="checkbox"/> Dnf	<input checked="" type="checkbox"/> Darkness	<input type="checkbox"/> Hazardous Material Violation
<input type="checkbox"/> Other	<input type="checkbox"/> Other	<input type="checkbox"/> Heavy	<input type="checkbox"/> Other	

County Of **BIBB** and _____ miles _____ of (city)**BOWMAN ROAD / CHADWICK TRL**

at or near _____ mile post _____ or within (city)

on _____

at on (secondary location)

OFFICER (Print) **STAFF, JOSHUA** Badge # **0183** Div **GSPD/NIGHTHAWKS MIDDLE**You are hereby ordered to appear in Court to answer this charge on **Friday, October 16, 2020**at **09:00 AM** in the **BIBB COUNTY STATE COURT**at **601 MULBERRY STREET, MACON, GA 31201**

NOTICE: This citation shall constitute official notice to you that failure to appear in Court at the date and time stated on this citation to dispose of the cited charges against you shall cause the designated Court to forward your driver's license number to the Department of Driver Services, and your driver's license shall be suspended. (Georgia Code 17-6-11 and 40-5-56) The suspension shall remain in effect until such time as there is a satisfactory disposition in this matter or the Court notifies the Department of Driver Services.

LICENSE DISPLAYED IN LIEU OF BAIL ☐ YES ☒ NO RELEASED TO **JAIL**

SIGNATURE ACKNOWLEDGES SERVICE OF THIS SUMMONS AND RECEIPT OF COPY OF SAME

SIGNATURE _____

ARRESTING OFFICER'S CERTIFICATION

The undersigned has just and reasonable grounds to believe, and does believe, that the person named herein has committed the offense set forth, contrary to law.

SIGNATURE _____

Signature of Arresting Officer

Badge # **0183**

AUTHORIZED AND APPROVED PURSUANT TO CODE 40-13-1 D.D.S. REG 375-3-450, 19

COURT COPY

DATE

COURT ACTION AND OTHER ORDERS

The within complaint has been examined and there is probable cause for filing the same. Leave is hereby granted to file the complaint.

Complaint filed

Bail fixed at \$ _____ or cash deposit of \$ _____

Signature of person taking bail

Signature of person giving bail

Fine in the amount of \$ _____ received as required by court schedule.

Signature of Clerk

Continuance to

Reason

Continuance to

Reason

Warrant Issued

Warrant Served

Waives Trial by Jury

ON ARRAIGNMENT, THE DEFENDANT PLEADS

APPEARANCE, PLEA OF GUILTY AND WAIVER

I _____ have been advised that I am being charged with _____ and that the maximum punishment that I can receive is _____ mos. imprisonment and/or a \$ _____ fine.

I have been advised of my rights to be represented by counsel and have counsel appointed to represent me if I am indigent; plead not guilty and be tried by a jury or a judge; confront the witnesses against me; and, not give incriminating evidence against myself. I hereby waive these rights; state that I have not been induced by any threat or promise to enter this plea and do freely and voluntarily enter my plea of Guilty.

This _____ day of _____

Accused _____

I _____ have advised the above-named accused as indicated above of his/her rights, the nature of the case against him/her and the possible consequences of the plea as entered. I am satisfied that there is a factual basis for the guilty plea which the accused has entered and that it was entered freely and voluntarily with understanding of the nature of the charge and the consequences of the plea.

JUDGE _____

DISPOSITION AND SENTENCE

Court _____

City _____

Defendant Pleads ☐ (3) Guilty ☐ Not Guilty ☐ (4) Nolo Cont'dTrial ☐ Jury ☐ Court Adjudicated ☐ (1) Guilty ☐ Not GuiltyOther Action ☐ (2) Bond Forfeiture ☐ Nolle Prossed ☐ No Bill ☐ No Record

Sentence, Amount Fine/Forfeiture \$ _____

Days (Months) in jail

Traffic School

Days (Months) probation

Other order _____

Appeal Bond of \$ _____

filed (for _____)

Appeal to _____

Court _____

As provided by law, I hereby certify that the information on this ticket is a true abstract of the record of this court or bureau in this case.

DISPOSITION

DATE _____

Signature of Judge or Clerk

GEORGIA

UNIFORM TRAFFIC CITATION, SUMMONS AND ACCUSATION

GAGSP0000

E03660873

Court Case Number

NCIC Number

Citation Number

GEORGIA DEPARTMENT OF PUBLIC SAFETY

Upon Month September (Day) 2 (Year) 2020 at 2:26 ☒ A.M. ☐ P.M.Operator License No. 060201123License Class or Type C State GA Endorsements _____ Expires 06/11/2024Name WHITMAN MARTY DUSTIN

(Last) (First) (Middle)

Address 105 BASS PLANTATION DRIVE APT 1404City MACON State GA Zip Code 31210DOB 06/11/1991 Hair BRO Hgt 507 Wgt 220 Sex M Eyes BLUVeh Yr. 2002 Make FORD Style LGT CONVTL 'F Color REDRegistration No. RIJ7066 Yr. 6/12/2020 State GACDL ☐ YES ☒ NO ACCIDENT ☐ YES ☒ NO INJURIES ☐ YES ☒ NO FATALITIES ☐ YES ☒ NO☒ 2-LANE ROAD ☐ VASCAR ☐ Laser ☐ RadarWithin the State of Georgia, did commit the following offense: SPEEDING ☐ Patrol Vehicle ☐ Other

(Clocked by / Serial # _____)

Calibration/Check: _____) at _____ MPH in a _____ zone

☐ DUI (Test Administered: ☐ BLOOD ☐ BREATH ☐ URINE ☐ OTHER) DUI Test Results _____

TEST ADMINISTERED BY (If Applicable): _____

OFFENSE (Other than above) FAILURE TO MAINTAIN LANEIn Violation of Code Section: 40-6-48 of ☒ State Law ☐ Local Ordinance

Remarks _____

WEATHER	(A) ROAD	(B)	TRAFFIC	LIGHTING	COMMERCIAL VEHICLE INFORMATION
<input checked="" type="checkbox"/> Clear	<input checked="" type="checkbox"/> Dry	<input type="checkbox"/> Concrete	<input checked="" type="checkbox"/> Light	<input type="checkbox"/> Daylight	<input type="checkbox"/> 16+ Passengers
<input type="checkbox"/> Cloudy	<input type="checkbox"/> Wet	<input checked="" type="checkbox"/> Blacktop	<input type="checkbox"/> Medium	<input checked="" type="checkbox"/> Darkness	<input type="checkbox"/> Commercial Vehicle Violation
<input type="checkbox"/> Raining	<input type="checkbox"/> Ice	<input type="checkbox"/> Dirt	<input type="checkbox"/> Heavy	<input type="checkbox"/> Other	<input type="checkbox"/> Hazardous Material Violation
<input type="checkbox"/> Other	<input type="checkbox"/> Other	<input type="checkbox"/> Other			

County Of BIBB and _____ miles _____ of (city) _____BOWMAN ROAD / CHADWICK TRL

at or near _____ mile post _____ or within (city) _____

on _____

at/on (secondary location) _____

OFFICER (Print) STAFF, JOSHUABadge# 0183Div. GSPD/NIGHTHAWKS MIDDLEYou are hereby ordered to appear in Court to answer this charge on Friday, October 16, 2020at 09:00 AM In the BIBB COUNTY STATE COURTat 601 MULBERRY STREET, MACON, GA 31201

NOTICE: This citation shall constitute official notice to you that failure to appear in Court at the date and time stated on this citation to dispose of the cited charges against you shall cause the designated Court to forward your driver's license number to the Department of Driver Services, and your driver's license shall be suspended. (Georgia Code 17-6-11 and 40-5-56) The suspension shall remain in effect until such time as there is a satisfactory disposition in this matter or the Court notifies the Department of Driver Services.

LICENSE DISPLAYED IN LIEU OF BAIL ☐ YES ☒ NO RELEASED TO JAIL

SIGNATURE ACKNOWLEDGES SERVICE OF THIS SUMMONS AND RECEIPT OF COPY OF SAME

SIGNATURE _____

ARRESTING OFFICER'S CERTIFICATION

The undersigned has just and reasonable grounds to believe, and does believe, that the person named herein has committed the offense set forth, contrary to law.

SIGNATURE _____

Signature of Arresting Officer

Badge # 0183

AUTHORIZED AND APPROVED PURSUANT TO CODE 40-13-1 D.D.S. REG 375 3-4570 19

COURT COPY

DATE _____ COURT ACTION AND OTHER ORDERS

The within complaint has been examined and there is probable cause for filing the same. Leave is hereby granted to file the complaint.

Complaint filed _____

Bail fixed at \$ _____ or cash deposit of \$ _____

Signature of person taking bail _____

Signature of person giving bail _____

Fine in the amount of \$ _____ received as required by court schedule.

Signature of Clerk _____

Continuance to _____ Reason _____

Continuance to _____ Reason _____

Warrant Issued _____ Warrant Served _____

Waives Trial by Jury _____

ON ARRAIGNMENT, THE DEFENDANT PLEADS _____

APPEARANCE, PLEA OF GUILTY AND WAIVER

I, _____ have been advised that I am being charged with _____ and that the maximum punishment that I can receive is _____ mos. imprisonment and/or a \$ _____ fine.

I have been advised of my rights to be represented by counsel and have counsel appointed to represent me if I am indigent; plead not guilty and be tried by a jury or a judge; confront the witnesses against me; and, not give incriminating evidence against myself. I hereby waive these rights; state that I have not been induced by any threat or promise to enter this plea and do freely and voluntarily enter my plea of Guilty.

This _____ day of _____

Accused _____

I, _____ have advised the above-named accused as indicated above of his/her rights, the nature of the case against him/her and the possible consequences of the plea as entered. I am satisfied that there is a factual basis for the guilty plea which the accused has entered and that it was entered freely and voluntarily with understanding of the nature of the charge and the consequences of the plea.

JUDGE _____

DISPOSITION AND SENTENCE

Court _____ City _____

Defendant Pleads: ☐ (3) Guilty ☐ Not Guilty ☐ (4) Nolo Cont'dTrial: ☐ Jury ☐ Court Adjudicated ☐ (1) Guilty ☐ Not GuiltyOther Action: ☐ (2) Bond Forfeiture ☐ Nolle Prossed ☐ No Bill ☐ No Record

Sentence: Amount Fine/Forfeiture \$ _____ Days (Months) in jail _____ Traffic School _____ Days (Months) probation _____

Other order _____

Appeal Bond of \$ _____ filed (for _____) Court _____

As provided by law, I hereby certify that the information on this ticket is a true abstract of the record of this court or bureau in this case.

DISPOSITION

DATE _____ Signature of Judge or Clerk _____

GEORGIA

UNIFORM TRAFFIC CITATION, SUMMONS AND ACCUSATION

GAGSP0000

E03660874

Court Case Number

NCIC Number

Citation Number

GEORGIA DEPARTMENT OF PUBLIC SAFETY

Up on Month September (Day) 2 (Year) 2020 at 2:26 ☒ A.M. ☐ P.M.

Operator License No. 060201123

License Class or Type C State GA Endorsements _____ Expires 06/11/2024

Name WHITMAN MARTY DUSTIN

(Last) (First) (Middle)

Address 105 BASS PLANTATION DRIVE APT 1404

City MACON State GA Zip Code 31210

DOB 06/11/1991 Hair BRO Hgt 507 Wgt 220 Sex M Eyes BLU

Veh Yr. 2002 Make FORD Style LGT CONVTL F Color RED

Registration No. RJ7066 Yr. 6/12/2020 State GA

CIL ☐ YES ☒ NO ACCIDENT ☐ YES ☒ NO INJURIES ☐ YES ☒ NO FATALITIES ☐ YES ☒ NO

☒ 2-LANE ROAD Within the State of Georgia, did commit the following offense: SPEEDING ☐ VASCAR ☐ Laser ☐ Radar

(Clicked by / Serial # _____) Calibration/Check: _____) at _____ MPH in a _____ zone ☐ Patrol Vehicle ☐ Other

☐ DUI (Test Administered: ☐ BLOOD ☐ BREATH ☐ URINE ☐ OTHER) DUI Test Results _____

TEST ADMINISTERED BY (If Applicable): _____

OFFENSE (Other than above) DRIVING WHILE LICENSE SUSPENDED OR REVOKED

In Violation of Code Section: 40-5-121 of ☒ State Law ☐ Local Ordinance

Remarks _____

WEATHER (A) ROAD (B) TRAFFIC LIGHTING COMMERCIAL VEHICLE INFORMATION

☒ Clear ☒ Dry ☐ Concrete ☒ Light ☐ Daylight ☐ 15+ Passengers

☐ Cloudy ☐ Wet ☒ Blacktop ☐ Medium ☒ Darkness ☐ Commercial Vehicle Violation

☐ Raining ☐ Ice ☐ Dirt ☐ Heavy ☐ Other ☐ Hazardous Material Violation

☐ Other ☐ Other

County Of BIBB and _____ miles of (city) _____

BOWMAN ROAD / CHADWICK TRL

on _____ at or near _____ mile post _____ or within (city) _____

at/on (secondary location) _____

OFFICER (Print) STAFF, JOSHUA Badge # 0183 Div. GSPDNIGHTHAWKS MIDDLE

You are hereby ordered to appear in Court to answer this charge on Friday, October 16, 2020

at 09:00 AM In the BIBB COUNTY STATE COURT

at 601 MULBERRY STREET, MACON, GA 31201

NOTICE: This citation shall constitute official notice to you that failure to appear in Court at the date and time stated on this citation to dispose of the cited charges against you shall cause the designated Court to forward your driver's license number to the Department of Driver Services, and your driver's license shall be suspended. (Georgia Code 17-8-11 and 40-5-58) The suspension shall remain in effect until such time as there is a satisfactory disposition in this matter or the Court notifies the Department of Driver Services.

LICENSE DISPLAYED IN LIEU OF BAIL ☐ YES ☒ NO RELEASED TO JAIL

SIGNATURE ACKNOWLEDGES SERVICE OF THIS SUMMONS AND RECEIPT OF COPY OF SAME

SIGNATURE _____

ARRESTING OFFICER'S CERTIFICATION

The undersigned has just and reasonable grounds to believe, and does believe, that the person named here n has committed the offense set forth, contrary to law.

SIGNATURE _____

Signature of Arresting Officer

Badge # 0183

AUTHORIZED AND APPROVED PURSUANT

COURT COPY

DATE

COURT ACTION AND OTHER ORDERS

The within complaint has been examined and there is probable cause for filing the same. Leave is hereby granted to file the complaint.

Complaint filed _____

Bail fixed at \$ _____ or cash deposit of \$ _____

Signature of person taking bail _____

Signature of person giving bail _____

Fine in the amount of \$ _____ received as required by court schedule.

Signature of Clerk _____

Continuance to _____ Reason _____

Continuance to _____ Reason _____

Warrant Issued _____ Warrant Served _____

Waives Trial by Jury _____

ON ARRAIGNMENT, THE DEFENDANT PLEADS _____

APPEARANCE, PLEA OF GUILTY AND WAIVER

I, _____ have been advised that I am being charged with _____ and that the maximum punishment that I can receive is _____ mos. imprisonment and/or a \$ _____ fine.

I have been advised of my rights to be represented by counsel and have counsel appointed to represent me if I am indigent; plead not guilty and be tried by a jury or a judge; confront the witnesses against me; and, not give incriminating evidence against myself. I hereby waive these rights; state that I have not been induced by any threat or promise to enter this plea and do freely and voluntarily enter my plea of Guilty.

This _____ day of _____

Accused _____

I, _____ have advised the above-named accused as indicated above of his/her rights, the nature of the case against him/her and the possible consequences of the plea as entered. I am satisfied that there is a factual basis for the guilty plea which the accused has entered and that it was entered freely and voluntarily with understanding of the nature of the charge and the consequences of the plea.

JUDGE _____

DISPOSITION AND SENTENCE

Court _____

City _____

Defendant Pleads: ☐ (3) Guilty ☐ Not Guilty ☐ (4) Nolo Cont'd

Trial: ☐ Jury ☐ Court Adjudicated ☐ (1) Guilty ☐ Not Guilty

Other Action: ☐ (2) Bond Forfeiture ☐ Nolle Prossed ☐ No Bill ☐ No Record

Sentence: Amount Fine/Forfeiture \$ _____

Days (Months) in jail _____ Traffic School _____ Days (Months) probation _____

Other order _____

Appeal Bond of \$ _____ filed (for _____)

Appeal to _____ Court _____

As provided by law, I hereby certify that the information on this ticket is a true abstract of the record of this court or bureau in this case.

DISPOSITION

DATE _____

Signature of Judge or Clerk _____

RECEIVED FOR FILING
STATE COURT OF
BIBB COUNTY GEORGIA

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

2020 SEP 11 AM 10:14

PATTI M. GRAVES, CLERK
Patti M. Graves

STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

:
:
:
:
:
:
:
:
:
:
:

Citation Nos.: E03660872,
E03660873, E03660874

**ENTRY OF APPEARANCE, WAIVER OF FORMAL ARRAIGNMENT,
AND PLEA OF NOT GUILTY**

COMES NOW, D. Benjamin Sessions (State Bar No. 141280) and files his Entry of Appearance on behalf of the Defendant in the above-referenced case. The undersigned's office address and contact information are as follows:

3155 Roswell Road, Suite 220
Atlanta, GA 30305
Telephone: (470) 225-7710
E-Mail: Ben@TheSessionsLawFirm.com


The Defendant waives formal arraignment upon the charges in this case. The Defendant hereby enters a plea of not guilty to the charges herein.

The Defendant requests that the Clerk of Court serve all notices, orders, calendars, and the like, upon Defendant and the undersigned counsel.

The Defendant respectfully requests that this Honorable Court permit the Defendant to amend and file supplemental motions upon receipt of discovery from the State.

RESPECTFULLY SUBMITTED, this 8th day of September, 2020.

The Sessions Law Firm, LLC




D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

3155 Roswell Road, Suite 220
Atlanta, GA 30305
Telephone: (470) 225-7710
E-Mail: Ben@TheSessionsLawFirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleading upon the prosecuting attorney in this case through depositing same in U.S. Mail with adequate postage affixed thereon to ensure delivery of same.

RESPECTFULLY SUBMITTED, this 8th day of September, 2020.



D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

NOV 02, 2020 06:08 PM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

THE STATE : **Accusation No.** _____
: _____
vs. : **COUNT 1: DRIVING UNDER THE INFLUENCE (LESS SAFE)**
: **(ALCOHOL)**
MARTY DUSTIN WHITMAN : **COUNT 2: FAILURE TO MAINTAIN LANE**
: **COUNT 3: DRIVING WHILE LICENSE SUSPENDED**

88422515521

ACCUSATION

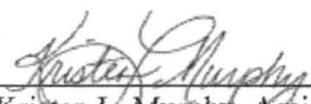
Comes now, the undersigned prosecuting attorney, of the State Court of Bibb County, Georgia, in the name and on behalf of the citizens of Georgia, who does hereby charge and accuse **MARTY DUSTIN WHITMAN** with the offense of a misdemeanor, to wit:

COUNT 1: DRIVING UNDER THE INFLUENCE (LESS SAFE) (ALCOHOL), that on or about the 2nd day of September, 2020 in Bibb County, Georgia, Defendant did drive or was in actual physical control of a moving vehicle while under the influence of alcohol to the extent that it was less safe for said Defendant to drive, in violation of O.C.G.A. 40-6-391(a)(1).

COUNT 2: FAILURE TO MAINTAIN LANE, that on or about the 2nd day of September, 2020 in Bibb County, Georgia, Defendant operated a motor vehicle upon WESLEYAN DRIVE, a roadway divided into marked lanes for traffic, and failed to keep said vehicle within a single lane, in violation of O.C.G.A. 40-6-48.

COUNT 3: DRIVING WHILE LICENSE SUSPENDED, that on or about the 2nd day of September, 2020 in Bibb County, Georgia, Defendant operated a motor vehicle upon the highways of this state at a time when said Defendant's privilege to do so was suspended, canceled or revoked, in violation of O.C.G.A. 40-5-121(a).

This 2nd day of November, 2020.


Kristen L. Murphy, Assistant Solicitor

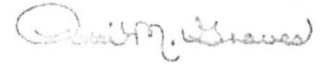
STATE'S WITNESSES (DPS00071393 (01))

Tpr. Joshua Staff 183, Georgia State Patrol (Nighthawks Middle Georgia), 281 Knight Trail, Thomaston, GA 30286

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

2021 JAN -6 AM 8:34

FATTI M. GRAVES, CLERK



STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

Case No.: 20-SCCR-430948

**ENTRY OF APPEARANCE, WAIVER OF FORMAL
ARRAIGNMENT, AND PLEA OF NOT GUILTY**

COMES NOW, D. Benjamin Sessions (State Bar No. 141280) and files his Entry of Appearance on behalf of the Defendant in the above-referenced case. The undersigned's office address and contact information are as follows:

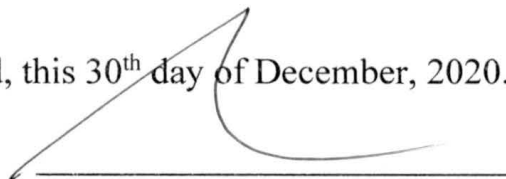
3155 ROSWELL RD.
SUITE 220
ATLANTA, GEORGIA 30305
Telephone: (470) 225-7710
E-Mail: Ben@TheSessionsLawFirm.com

The Defendant waives formal arraignment upon the charges in this case. The Defendant hereby enters a plea of not guilty to the charges herein. The Defendant further asserts his right to and demands a speedy trial consistent with the Sixth Amendment of the U.S. Constitution.

The Defendant requests that the Clerk of Court serve all notices, orders, calendars, and the like, upon Defendant and the undersigned counsel.

The Defendant respectfully requests that this Honorable Court permit the Defendant to amend and file supplemental motions upon receipt of discovery from the State.

Respectfully Submitted, this 30th day of December, 2020.

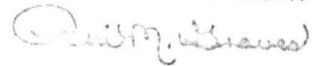


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

3155 Roswell Rd., Ste. 220
Atlanta, Georgia 30305
Tel: (470) 225-7710
Fax: (470) 745-0734

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

2021 JAN -6 AM 8:35

FATIM M. GRAYES, CLERK


STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

Case No.: 20-SCCR-430948

MOTION FOR DISCOVERY AND NOTICE TO PRODUCE

COMES NOW, Defendant in the above-styled case, by and through his counsel of record, and files this his Motion for Discovery Materials and Notice to Produce. This motion is made pursuant to the authority of *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967), and subsequent cases. Defendant moves this to require the State through the Solicitor to produce for Defendant's inspection, any and all evidence exculpatory in nature within the meaning of the foregoing cases, including but not limited to:

NOTICE TO PROSECUTOR: You are hereby requested not only to furnish the materials requested below which are in your present possession, but also to ask the investigating police trooper(s) if any of the requested materials exist (especially audio or video tapes). *See, Kyles v. Whitley*, 514 U.S. 419 (1995), holding "that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police."

- (1) any statements made by any witness regarding this matter which may be favorable to Defendant's defense;
- (2) any written reports, documents, or other physical evidence that may tend to be favorable to Defendant;
- (3) the results of any chemical tests, scientific tests, analyses or experiments performed by the arresting trooper, other trooper, the State Crime Lab, the Department of Public Safety, or the

manufacturer of the breath testing machine (CMI, Inc.), for this case or any other purpose, which may tend to show in any way the evidence of unreliability of said testing machine or of the operator thereof, the innocence of Defendant, or other evidence favorable to Defendant's case;

- (4) all tape recordings, whether audio or video, which show Defendant's physical condition at or about the time of arrest or detention, and would arguably tend to show innocence or lack of intoxication, or which would tend to show the extent of Defendant's ability to speak and respond to questions and directions by the police trooper involved in this case; and if any such tape recordings are allegedly unavailable due to malfunctioning equipment or faulty tape(s), Defendant demands that the State produce repair or replacement orders, or other evidence supporting their unavailability;
- (5) all booking slips, prisoner intake forms or other processing sheets used to obtain or record information about Defendant, including any photographs taken of Defendant;
- (6) any information regarding Defendant's request to take an additional or independent test, including any advice or notification by the trooper concerning the right to have such tests made, with specific mention of when, where and by whom such notice was given;
- (7) any other evidence of any kind or character discovered by, known by, or available to the prosecution or any State law enforcement agency or official that might be favorable to Defendant as to issues of guilt or innocence or punishment.

Defendant cannot safely go to trial, nor can Defendant's counsel adequately prepare for trial, without production of this evidence within a reasonable time prior to trial or any pre-trial hearings in this case; in the absence of such production, Defendant will be denied due process of law.

WHEREFORE, Defendant prays:

That the State be required to produce for Defendant said evidence

within a reasonable time prior to trial or any pre-trial hearing; that the Court conduct an **in camera** inspection of all such evidence, and of the State's entire file, and that Defendant's counsel be permitted to see, copy and reproduce all such evidence determined by the Court to be favorable to Defendant as to guilt or innocence, punishment, or to be useful by Defendant in cross-examining or impeaching any of the State's witnesses against Defendant; that an exact copy be made of each and every such item not made available to Defendant, and that the same be sealed and included in the record of this case in order to insure proper review of the Court's denial of Defendant's requests for lawful disclosure.

Respectfully Submitted, this 30th day of December, 2020.

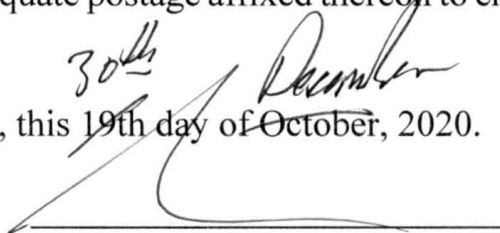


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleading upon the prosecuting attorney in this case by depositing same in the U.S. Mail with adequate postage affixed thereon to ensure delivery of same.

Respectfully Submitted, this 30th day of December, 2020.



D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

2021 JAN -6 AM 8:35

STATE OF GEORGIA,

vs.

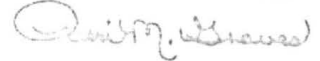
MARTY WHITMAN,

Defendant.

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Case No.: 20-SCCR-430948

FATTI M. GRAVES, CLERK



**DEMAND FOR FULL INFORMATION ABOUT DEFENDANT'S
STATE-ADMINISTERED CHEMICAL TEST**

COMES NOW, the above-named Defendant and hereby requests and demands that the information identified below be provided no later than ten (10) days prior to any motion hearing or trial:

1) Copies of the machine-printed results of any tests of Defendant's state-administered chemical test;

2) A copy of all data collected to establish that the test performed on the above-referenced sample(s) meets the requirements of precision and accuracy by the Georgia Bureau of Investigations.¹

3) All of the data from all of the records for all of the files that are printed, produced, or downloaded from headspace sampler and gas chromatograph employed in the analysis of the above-referenced test for the time period July 1, 2012 through February 1, 2013. This request includes, but is not limited to: subject files, maintenance files, diagnostic files, calibration files, operational error files, quick tests and instrument files. NOTE: File names may not be exactly as requested but the intent of this item is to receive all printed, transferred, and downloaded files. Any data fields, records or files that are not provided must be clearly identified.

4) A copy of all chromatograms produced for each sample tested in the run with the above-referenced test.

¹ As used herein, the term "Georgia Bureau of Investigations" shall include any division, department, or other agency established, maintained, or supervised under the authority of the Georgia Bureau of Investigations.

5) The complete instrument history file for the headspace sampler and gas chromatograph employed in the analysis of the above-referenced test. This request includes, but is not limited to, maintenance, repairs or calibrations conducted by the manufacturer or other service center; and any computer data collected and transferred, via modem or other means, to the Georgia Bureau of Investigations or other monitoring agency for diagnostic and or troubleshooting purposes.

6) The inlet maintenance schedule for the gas chromatograph employed in the analysis of the above-referenced sample(s). This request includes the schedule for maintenance of the septum, liners, gold seal, and the spit vent trap.

7) The department's guidelines for the parameters in the set-up of the gas chromatograph employed in the test of the above-referenced sample.

8) The raw data of all quality control tests performed during the analysis of the above-referenced sample(s).

9) Quality control data (e.g., Levi-Jennings charts) for the previous six months.

10) The raw data of analytical tests performed on the specimens themselves.

11) Calibration data for any weight and measuring device used in the analysis (i.e., pipettors and scales).

12) Sample work list for all samples analyzed.

13) All saved, downloaded, and printed files referencing the set-up parameters of the inlet on the gas chromatograph employed in the test of the above-referenced sample.

14) All documentation produced, submitted, and received in connection with the GBI's application to attain American Society of Crime Laboratory (ASCLD) certification and re-certification. This request includes, but is not limited to, reviews produced ASCLD agents or inspectors of GBI lab.

15) The ASCLD manual in the possession of the Department.

16) The curriculum vitae of the forensic toxicologist(s) that performed the above-referenced test.

17) The Department's hiring guidelines for the position of "forensic

toxicologist.”

18) The personnel file of the forensic toxicologist(s) that performed the above-referenced test. The request includes, but is not limited to, all performance reviews, reprimands, and all other documents relating to evaluation of the toxicologist’s job performance.

19) The curriculum vita of the lab director and supervisor at the time that the above-referenced test was performed.

20) The standard operating procedure for the performance of the test on the above-referenced sample(s).

Defendant seeks production of the requested information under the authority of O.C.G.A. § 40-6-392(a)(4), see, Price v. State, 269 Ga. 222 (1998), and, to the extent that any of the requested information constitutes a scientific report, under the authority of O.C.G.A. §17-16-23.

DEFENDANT HEREBY MOVES THE COURT TO ORDER PRODUCTION OF THE DOCUMENTS AND FULL INFORMATION REQUESTED ABOVE. IF THE REQUESTED INFORMATION IS NOT PROVIDED TEN (10) DAYS BEFORE TRIAL, OR ANY HEARING CONTESTING THE ADMISSIBILITY OF DEFENDANT’S TEST RESULTS, DEFENDANT WILL SEEK EXCLUSION OF THE TEST RESULTS THEMSELVES. See, Birdsall v. State, 254 Ga. App. 555 (2002).

Respectfully Submitted, this 30th day of December, 2020.

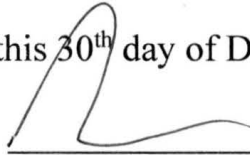
A handwritten signature in black ink, appearing to read 'D. Benjamin Sessions', written over a horizontal line.

D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleading upon the prosecuting attorney in this case by depositing same in the U.S. Mail with adequate postage affixed thereon to ensure delivery of same.

Respectfully Submitted, this 30th day of December, 2020.

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D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

2021 JAN -6 AM 8:35

FATTI M. GRAVES, CLERK
Fatti M. Graves

STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

Case No.: 20-SCCR-430948

**MOTION IN LIMINE TO EXCLUDE THE RESULTS OF THE
DEFENDANT'S STATE-ADMINISTERED CHEMICAL TEST ON
STATUTORY GROUNDS AND MOTION TO DECLARE O.C.G.A. §§
40-5-67.1, 40-5-55, AND 40-6-392 UNCONSTITUTIONAL**

COMES NOW, Defendant in the above-styled case and moves this Court in limine to exclude from evidence the results of the Defendant's state-administered blood test which was allegedly requested on or about September 2, 2020, by Officer Joshua Staff of the Georgia State Patrol. The Defendant's results of the state-administered test should be excluded from evidence based upon the following grounds and reasons:

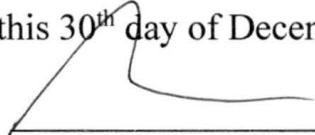
- (1) The state cannot show that the request for Defendant's breath test was preceded by a valid DUI arrest supported by probable cause;
- (2) The state cannot show that Defendant was properly and timely advised of implied consent rights as required under O.C.G.A. § 40-6-392(a)(4), *see, Perano v. State*, 250 Ga. 704 (1984);
- (3) The state cannot show that Defendant was given a reasonable opportunity to have an additional breath test performed by a person of Defendant's own choosing, as required by O.C.G.A. § 40-6-392(a)(3);
- (4) O.C.G.A. §§ 40-5-67.1, 40-5-55, and 40-6-392 are unconstitutional because they purports to grant the State the right to introduce evidence of and comment upon the Defendant's decision to exercise his/her constitutional right to refuse to consent

to a warrantless search and his/her right to not to incriminate himself; and

- (5) Defendant was misled into submitting to testing by an improperly read and misleading implied consent notice. *Maurer v. State*, 240 Ga. App. 145 (1999).

WHEREFORE, Defendant moves the Court to suppress any alleged refusal of the state-administered breath test in the above-styled case from use as evidence in the trial of the above-styled case or any other legal proceeding.

Respectfully Submitted, this 30th day of December, 2020.

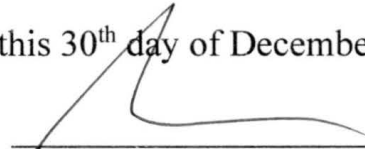


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

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Respectfully Submitted, this 30th day of December, 2020.



D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

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STATE COURT OF
BIBB COUNTY, GEORGIA
2021 JAN -6 AM 8:35

STATE OF GEORGIA,

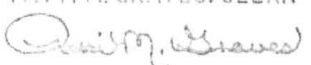
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vs.

Case No.: 20-SCCR-430948

MARTY WHITMAN,

Defendant.

PATI N. GRAVES, CLERK


**MOTION TO SUPPRESS EVIDENCE AND STATEMENTS
OBTAINED UNLAWFULLY BY POLICE**

Comes Now, the above-named Defendant, by and through counsel and hereby files his Motion to Suppress, showing this Honorable Court the following:

-1-

Upon best information and belief, the Defendant was detained on September 2, 2020, by Officer Joshua Staff of the Georgia State Patrol and others officers who are not known to the Defendant. The arresting officer proceeded to interrogate his/her and search his/her person and property without a warrant of any kind.

-2-

As a result of the aforesaid warrantless acts by police, Defendant was arrested and is now charged in the above styled action with the misdemeanor offense of driving under the influence of alcohol.

-3-

With regard to the warrantless stop of the vehicle and the detention and search of Defendant's person and property by police at the above time and place, Defendant shows as follows:

(a) The police detained Defendant without probable cause, without consent and without reasonable and articulable suspicion that the Defendant was engaged in or about to be engaged in criminal activity.

(b) The police detained Defendant beyond the time necessary and for purposes unrelated to the initial stop, and such prolonged detention was without probable cause, without consent and without reasonable articulable suspicion of criminal activity.

(c) The police searched the Defendant's person and property without probable cause, without consent, without lawful arrest, without exigent circumstances and without authority under any other recognized exception to the warrant requirement embodied in the State and Federal Constitutions.

(d) The police interrogated Defendant while she was unlawfully detained, handcuffed and held in police custody and without giving the required Miranda warnings to Defendant prior to such interrogation.

(e) The Defendant withdrew his/her purported consent to the testing of his/her blood prior to the testing of same, and the State failed to obtain a warrant for the search and testing of the blood sample.

-4-

For the foregoing reasons, the warrantless stop, detention, search and interrogation by police at the above time and place was unreasonable and violated the Defendant's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, Article I, Section I, Paragraph XIII, XIV and XVI of the Georgia Constitution, and the provisions of O.C.G.A. § 17-5-30.

Consequently, any and all evidence gathered, observed, and seized by police as a result of such unlawful actions should be suppressed by the Court, and no testimony, statements, conclusions or other references concerning such matters should be allowed or considered as evidence in the trial of this case.

WHEREFORE, the Defendant prays as follows:

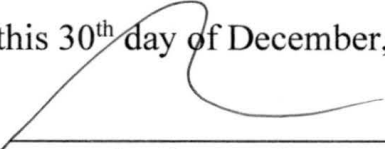
(a) That the Court hold evidentiary hearings on this motion outside the presence of the injury and as otherwise deemed appropriate; and,

(b) That the Court allow Defendant to submit written briefs and argument in support of this motion subsequent to any hearing;

(c) That the Court grant the within motion to suppress and prohibit the State from offering evidence concerning any observation of the Defendant made during the illegal stop and detention, any alleged refusal of field sobriety tests, any observation of the Defendant made during the Defendant's performance of field sobriety tests, any alleged positive result indicated by a portable breath test machine which the Defendant submitted to during the illegal stop and detention, the Defendant's refusal to submit to any field sobriety test and/or preliminary breath test, and the defendant's alleged refusal of the state-administered test, as well as any statement obtained by police in violation of the Defendant's Constitutional and statutory rights enumerated above; and,

(d) That the Court grant Defendant such other and further relief deemed just and proper in this case.

Respectfully Submitted, this 30th day of December, 2020.




D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

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Respectfully Submitted, this 30th day of December, 2020.



D. Benjamin Sessions
State Bar No. 141280

Attorney for Defendant

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

2021 JAN -6 AM 8:35

STATE OF GEORGIA,

vs.

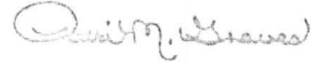
MARTY WHITMAN,

Defendant.

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Case No.: 20-SCCR-430948

FATTI M. GRAVES, CLERK



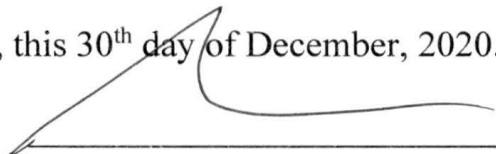
**DEFENDANT'S DEMAND FOR STATUTORY DISCOVERY
PURSUANT TO TITLE 17, CHAPTER 16, ARTICLE 2 OF THE
OFFICIAL CODE OF GEORGIA**

COMES NOW, the Defendant, by and through the undersigned counsel, and files this Demand for Statutory Discovery Pursuant to Title 17, Chapter 16, Article 2 of the Official Code of Georgia. Defendant respectfully demands production of each of the items he is entitled to pursuant to Title 17, Chapter 16, Article 2 of the Official Code of Georgia, and shows this Honorable Court that the following items should be produced in response to this request:

- (a) a copy of the accusation, as required by O.C.G.A. § 17-16-21);
- (b) a list of the witnesses on whose testimony the charge(s) against the Defendant is/are founded, as required by O.C.G.A. § 17-16-21;
- (c) oral and written statements of the Defendant, as required by O.C.G.A. § 17-16-22; and
- (d) all written scientific reports, as required by O.C.G.A. § 17-16-23.

Wherefore, the Defendant prays that the State be required to produce each of the above-referenced items in the time required by law. In the event that the State fails to provide the Defendant each of the above-referenced items in the time required by law, the Defendant requests that this Court exclude said items and witnesses from evidence in the trial of this case.

Respectfully Submitted, this 30th day of December, 2020.

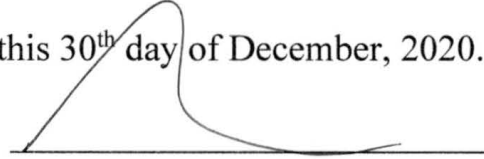


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

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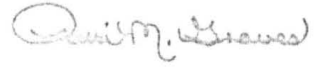


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

2021 JAN -6 AM 8:35

FATTI H. GRAVES, CLERK



STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

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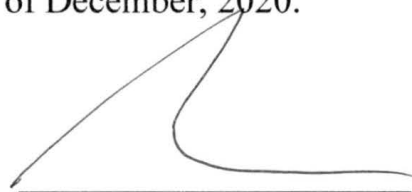
Case No.: 20-SCCR-430948

GENERAL AND SPECIAL DEMURRERS

Comes Now, the above-named Defendant, by and through the undersigned counsel, and generally demurrers to the accusatory documents and challenges each count thereof. None of the accusatory allegations sufficiently identifies a crime and each count totally fails to inform the defendant of the specific alleged improper conduct that is alleged to have been committed.

Further, the Defendant specially demurrers to each count of the accusation based upon defective form and demands that the defects be removed to allow the document to be perfect in form.

Respectfully Submitted, this 30th day of December, 2020.

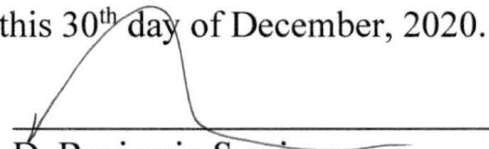


D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

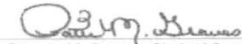
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Respectfully Submitted, this 30th day of December, 2020.



D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

FEB 23, 2021 11:05 AM



Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

v.,

MARTY D. WHITMAN,

Defendant.

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Case No. 20-SCCR-430948

**BRIEF IN SUPPORT OF THE DEFENDANT'S MOTION TO
EXCLUDE EVIDENCE OF REFUSAL TO SUBMIT TO FIELD
SOBRIETY TESTS**

While under investigation for DUI, Trooper Staff of the Georgia State Patrol requested that the Defendant submit to field sobriety tests. After beginning the horizontal gaze nystagmus test, the Defendant stopped the test and asked Trooper Staff if he had to do the test. Trooper Staff informed him that he did not have to, and the Defendant stopped the testing at that time. The Defendant moves to exclude evidence of his refusal to submit to the field sobriety testing based upon the self-incrimination clause of the Georgia Constitution.

Admissibility of the Defendant's refusal to submit to field sobriety testing should be controlled by the Court of Appeals' recent decision in State v. Bradberry, No. A20A1460, 2020 WL 5939110, at *3–4 (Ga. Ct. App. Oct. 7, 2020). In *Bradberry*, the Court held that a defendant's refusal to submit to

a *pre-arrest* breath test is inadmissible based upon the self-incrimination clause of the Georgia Constitution:

Refusal to take alco-sensor breath test.

Bradberry asserts that the trial court erred in ruling that evidence of his refusal to take an alco-sensor breath test at the scene of the accident is admissible against him. We agree.

“The Georgia Constitution provides that ‘no 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’).” *Olevik*, supra at 235 (2) (c), 806 S.E.2d 505. “[T]his state constitutional protection applies to more than mere testimony; it also protects [a person] from being forced to perform acts that generate incriminating evidence.” Id. at 228, 806 S.E.2d 505. Moreover, “Paragraph XVI generally prohibits admission of a defendant’s pretrial refusal to speak or act.” *Elliott*, supra at 210 (IV), 824 S.E.2d 265. Not only is there ample case law supporting the conclusion “that Paragraph XVI precludes admission of a defendant’s refusal to speak or act and the drawing of adverse inferences therefrom,” Id. at 218 (IV) (D), 824 S.E.2d 265, but our Supreme Court has “specifically applied Paragraph XVI to bar a criminal prosecution that was based on a refusal to provide incriminating evidence by the side of the road.” Id. at 217 (IV) (C) (ii), 824 S.E.2d 265. That “holding was consistent with an understanding that the [state] constitutional provision prohibit[s] using refusal to support a criminal prosecution.” Id. at 218-219 (IV) (D), 824 S.E.2d 265 (footnote omitted).

In this case, the arresting officer confirmed at the suppression hearing that the alco-sensor is a preliminary breath test that would have required Bradberry to provide a breath sample by blowing into the device for a sustained period of time, similar to how the Intoxilyzer requires a person to blow for a long period of time in order to catch a valid sample. The officer’s body camera video also showed the officer explaining to Bradberry how to properly blow into the device before Bradberry refused. Bradberry himself testified that he refused to blow into the alco-sensor device because he was afraid it might show that he “was over the legal limit.”

Elliott held that, because Paragraph XVI protects against self-incrimination through certain types of compelled acts, admission of the refusal to consent to a breath test (which requires the compelled act of deep-lung breathing) would violate the defendant's constitutional right against self-incrimination. See *Elliott*, [supra] at 189 (III), 209 (IV) [824 S.E.2d 265]. *Elliott* and [the Court's] underlying decision in *Olevik v. State*, [supra], were careful to distinguish that their scope does not extend to all types of searches, but is limited to breath tests. *Dunbar v. State*, — Ga. — (3), 845 S.E.2d 607 (2020) (distinguishing refusal to consent to search of a home from the refusal to take a breath test).

We recognize that the issue before us involves an alco-sensor preliminary breath test, rather than the type of breathalyzer breath tests involved in *Elliott* and *Olevik*. Nevertheless, we do not find that distinction to be controlling since the evidence plainly shows that Bradberry would have been required to perform the affirmative act of blowing into the alco-sensor device for a sustained period of time. Because Bradberry had the right to refuse to provide incriminating evidence by performing such an affirmative act under Paragraph XVI, the admission of evidence of his refusal violates the state constitutional right against self-incrimination.

State v. Bradberry, No. A20A1460, 2020 WL 5939110, at *3–4 (Ga. Ct. App. Oct. 7, 2020).

In determining whether the Self-Incrimination provision of the Georgia Constitution is implicated by the request that the Defendant submit to a battery of field sobriety tests, our courts have consistently examined whether evidence is obtained as a result of an affirmative act by the suspect. *Elliott v. State*, 305 Ga. 179, 206, 824 S.E.2d 265, 284–85 (2019). Those instances in which a defendant must perform a physical action in order to

allow the government to obtain evidence have continuously been held to implicate the Georgia Constitution's right against self-incrimination:

- requiring a defendant to place his foot in footprints located near a crime scene violated the right against self-incrimination. *Day*, 63 Ga. at 668-669 (2).
- requiring a Defendant to stand up during trial so that his amputated leg could be observed violated the right against self-incrimination. *Blackwell*, 67 Ga. at 78-79 (1).
- requiring a defendant to drive his truck onto scales violated the right against self-incrimination. *Aldrich*, 220 Ga. at 135, 137 S.E.2d 463.
- 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).

The mere removal of evidence from a defendant is not protected by the right against self-incrimination. *Elliott*, 305 Ga. at 206. “[T]he 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.” *Olevik v. State*, 302 Ga. 228, 242, 806 S.E.2d 505, 517 (2017), citing *Batton v. State*, 260 Ga. 127, 130 (3), 391 S.E.2d 914

(1990). Those cases in which evidence is obtained from a defendant's person but do not require an action by the defendant have been consistently held not to implicate the right against self-incrimination:

- removing clothing from a defendant does not violate the right against self-incrimination. See, e.g., *id.* (taking shoes from defendant); *Drake v. State*, 75 Ga. 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).
- when evidence is taken from a defendant's body or photographs of the defendant are taken the right against self-incrimination is not implicated. 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).

The horizontal gaze nystagmus test (and the one-leg stand and walk-and-turn tests) require the Defendant to voluntarily perform acts. Accordingly, each of these field sobriety tests implicate the Self-Incrimination Clause of the Georgia Constitution, and the Defendant's refusal to submit to the requested acts should be protected by the Self-Incrimination Clause of the Georgia Constitution.

CONCLUSION

For the foregoing reasons, the Defendant requests that his refusal to submit to field sobriety tests be excluded from evidence at the trial of his case.

Respectfully Submitted, this 23rd day February, 2021.

/s/D. Benjamin Sessions
D. BENJAMIN SESSIONS
State Bar No. 141280
Attorney for Defendant

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,	:	
	:	
v.,	:	Case No. 20-SCCR-430948
	:	
MARTY D. WHITMAN,	:	
	:	
<i>Defendant.</i>	:	

CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing brief to the Bibb County Solicitor's Office by e-mailing same to Ms. Kristen Murphy, Assistant Solicitor.

Respectfully Submitted, this 23rd day February, 2021.

/s/D. Benjamin Sessions
D. BENJAMIN SESSIONS
State Bar No. 141280
Attorney for Defendant

FEB 24, 2021 07:55 AM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

vs.

MARTY WHITMAN,

Defendant.

:
:
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:
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:
:

Case No. 20-SCCR-430948

**BRIEF IN SUPPORT OF MOTION TO SUPPRESS AND MOTION TO
DECLARE O.C.G.A. §§ 40-5-55, 40-5-67.1, AND 40-6-392
UNCONSTITUTIONAL**

The Defendant in this case was arrested for DUI and was informed of the Georgia implied consent advisement. The implied consent advisement the Defendant received improperly informed him that “Your refusal to submit to blood or urine testing may be offered into evidence against you at trial.” The Defendant refused to submit to the requested state-administered blood test after receiving this improper and misleading implied consent advisement. In support of the Defendant’s motion to suppress, the Defendant respectfully shows this Honorable Court the following:

I. Georgia appellate courts have routinely held that a Defendant’s refusal to submit to a warrantless search may not be used as evidence against a Defendant. O.C.G.A. §§ 40-5-67.1(b) and 40-6-392(d) are unconstitutional to the extent that they purport to allow the State to use a defendant’s decision to exercise his constitutional right to refuse to consent to a warrantless search of the his blood at trial.

A state-administered blood (or urine) test is a search governed by the Fourth Amendment:

The Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's “most personal and deep-rooted expectations of privacy.” *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); see also *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).¹

The State did not obtain a warrant for the search of the Defendant's body and blood. “It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is ‘per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’”² “[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”³ The Defendant had a constitutional right to refuse consent to the search of her body and blood.⁴

The State relies solely upon the Defendant's purported consent as the exception to the warrant requirement of the Fourth Amendment. However, the implied consent misled the Defendant by informing him that a refusal of the requested state-administered blood or urine test may be used against him at trial.

¹ *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013).

² *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854 (1973).

³ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44, 36 L. Ed. 2d 854 (1973).

⁴ See, *id.*

Established precedent holds that the State cannot use a Defendant's refusal to submit to a warrantless search against a Defendant at trial:

A defendant's refusal to consent to a warrantless search of his vehicle or other property is quite a different issue. A refusal of permission to search is analogous to the assertion of the privilege against self-incrimination. It is forbidden to "parade [a witness] in front of the jury for the sole purpose of having him invoke the Fifth Amendment. [Cit.]" *Sweat v. State*, 226 Ga.App. 88, 89(2), 485 S.E.2d 259 (1997). By analogy, an individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial. Moreover, the legislature has not yet stated that such a refusal is admissible against a defendant. Mackey's refusal to consent to the search cannot be used as evidence of guilty knowledge.⁵

The analogy that our courts have made between the assertion of the right against self-incrimination and the right to refuse consent to a search is critical. In light of the Georgia Supreme Court's recent ruling in *Elliott v. State*, if the right to refuse consent to a search is to be treated like the assertion of the right not to incriminate one's self, the State could not introduce evidence of the Defendant's refusal to submit to a blood or urine test.

This Court cannot change the Georgia Constitution, even if we believe there may be good policy reasons for doing so; only the General Assembly and the people of Georgia may do that. And this Court cannot rewrite statutes. This decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests, but revising that notice is a power reserved to the General Assembly. Having considered the text of Paragraph XVI and the context in which it was enacted, as well as all of the arguments made by the parties and the amici, we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath

⁵ *Mackey v. State*, 234 Ga. App. 554, 555, 507 S.E.2d 482, 484 (1998); see also, *Gardner v. State*, 255 Ga. App. 489, 493-494, 566 S.E.2d 329, 332 (2002) (holding that "we decline to view the exercise of a constitutional right as a factor in determining probable cause. Thus, the trial court's determination that refusal to consent to a search may be taken into account when determining probable cause is error as a matter of law.").

test.³¹ Consequently, we conclude that OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial.⁶

Elliott holds that “OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial.”⁷ Pursuant to Mackey, Gardner, and multiple other Georgia cases, we are to treat the invocation of the constitutional right to refuse consent to a search in the same manner that we treat the invocation of the right against self-incrimination. Therefore, OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a blood or urine test to be admitted into evidence at a criminal trial.

Respectfully Submitted, this 24th day February, 2021.

/s/D. Benjamin Sessions
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleadings upon the prosecuting attorney in this case by hand delivery of same.

Respectfully Submitted, this 24th day February, 2021.

⁶ Elliott v. State, No. S18A1204, 2019 WL 654178, at *26 (Ga. Feb. 18, 2019).

⁷ Id.

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MAR 10, 2021 05:47 PM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

**MARTY WHITMAN,
Defendant.**

:
:
:
:
:

ACCUSATION NUMBER: 430948

**STATE'S RESPONSE TO DEFENDANT'S BRIEFS IN SUPPORT OF MOTIONS TO
SUPPRESS AND EXCLUDE EVIDENCE**

Comes now the State of Georgia, through the Solicitor-General of Bibb County, and makes this response to Defendant's Brief in support of his previously filed motion to suppress evidence:

FACTUAL HISTORY

On or about September 2, 2020 at approximately 2:26 AM, Defendant was the subject of a traffic stop which occurred on Wesleyan Drive in Bibb County. Defendant was stopped by Trooper Joshua Staff of the Georgia State Patrol due to his observation of Defendant crossing the white fog line with the passenger side tires of his vehicle. Upon making contact with Defendant, Trooper Staff asked Defendant for his driver's license. Defendant advised that he did not have one due to his being suspended. During this interaction, Trooper Staff noted that Defendant's speech seemed to be somewhat slurred, he had blood shot and watery eyes, as well as the odor of an alcoholic beverage coming from his person.

Trooper Staff asked Defendant if he had been drinking and Defendant admitted to having come from Billy's Clubhouse, which is a bar, but denied consuming any alcohol. Staff asked Defendant to step out of the vehicle where he was asked to perform Standardized Field Sobriety Testing (SFSTs). After medically clearing Defendant, Staff placed him in position for the Horizontal Gaze Nystagmus (HGN) test and began the test. Staff completed the two passes for

equal tracking and equal pupil size, as well as the two passes for lack of smooth pursuit.

Following the passes for lack of smooth pursuit, Defendant asked if the tests were required. Staff advised that they were voluntary, and Defendant stated that he did not want to complete the tests. Prior to concluding the tests Staff observed two clues, one in each eye for lack of smooth pursuit. Due to his statement that he did not want to continue, Staff did not request any further SFSTs. Staff then retrieved his Portable Breath Test (PBT) machine. Defendant provided a sufficient breath sample for the PBT which returned a positive result for the presence of alcohol.

Based on his training, the less safe driving act and his observations of Defendant, Staff determined Defendant to be a less safe driver due to the effects of alcohol. He then placed Defendant under arrest for Driving Under the Influence of alcohol. After placing Defendant in handcuffs, Staff read the Georgia Implied Consent Notice. Defendant refused the State test of his blood.

ARGUMENTS

On December 30, 2020 Defendant filed several motions with the court, including his “Motion in Limine to Exclude the Results of the Defendant’s State Administered Chemical Tests on Statutory Grounds and Motion to Declare O.C.G.A. 40-5-61.1 Unconstitutional” as well as his “Motion to Suppress Evidence and Statements Obtained Unlawfully by Police.” Only Defendant’s Motion to Suppress Evidence and Statements was applicable to this case, as there was no State-Administered Chemical Test performed due to Defendant’s refusal of same. On February 23, 2021 Defendant filed his “Brief in Support of Defendant’s Motion to Exclude Evidence of Refusal to Submit to Field Sobriety Tests.” However, no such motion was ever filed in this case. On February 24, 2021 Defendant further filed his “Brief in Support of Defendant’s Motion to Suppress and Motion to Declare O.C.G.A. 40-5-55, 40-5-67.1, and 40-6-392

Unconstitutional.” Again, no such motion was ever filed in this case. Despite the lack of notice to the State and time to effectively prepare for motions on these grounds, Defendant was permitted to argue these issues at the Motion hearing held on February 24, 2021. The State was then granted two weeks to prepare and submit a brief supporting its positions on these issues.

In his motions, briefs, and arguments at the hearing, Defendant asserted that there was no probable cause to support the charge or arrest for Driving Under the Influence – Less Safe (Alcohol), that his refusal to submit to the Standardized Field Sobriety Tests should be suppressed pursuant to the holding in State v. Bradberry, 357 Ga. App. 60 (2020), and that his refusal to submit to the State-Administered test of his blood should be suppressed because the Georgia Implied Consent notice is misleading and unconstitutional. The probable cause argument was abandoned at the close of the hearing. Therefore, this brief will only focus on the arguments asserted during Defendant’s closing argument and in Defendant’s briefs filed just prior to the hearing.

1.

Defendant asserts that his refusal to submit to Standardized Field Sobriety Tests (SFSTs) should be suppressed because it violates his rights under the Fifth Amendment of the United States Constitution and his right against compelled self-incrimination under the Georgia Constitution. Defendant cites to State v. Bradberry, 357 Ga. App. 60 (2020), asserting that because that case extended the holdings of Olevik¹ and Elliott² to the refusal to submit to a portable breath test (PBT) this should also extend to SFSTs. However, the holding in Bradberry is based solely on the extension of Olevik and Elliott to the PBT. As such, it contains no independent analysis as to the right against compelled self-incrimination found in either the

¹ Olevik v. State, 302 Ga. 288. (2017)

² Elliott v. State, 305 Ga. 179. (2019)

Georgia or United States Constitutions. Rather, it merely regurgitates the analysis of Olevik and Elliott. Neither does it contain any mention or analysis regarding its applicability to SFSTs or any other type of pre-arrest investigatory tool.

The Court in Bradberry focused on the similarities between the “deep lung air” required to complete both the roadside PBT and the post-arrest Intoxilizer screenings for alcohol. Id. at 66. However, Bradberry is devoid of any analysis regarding whether there is a difference in the compelled nature of a pre-arrest investigative tool and a post-arrest test. Both the Fifth Amendment and the Georgia Constitution include the word “compelled” as an element of the right against self-incrimination: “No person shall be **compelled** in any criminal case to be a witness against himself...”, U.S. Const. amend. V, and “No person shall be **compelled** to give testimony tending in any manner to be self-incriminating.” GA CONST Art. 1, § 1, ¶ XVI (16) (Emphasis added.) This is an important distinction that has always controlled whether the right against self-incrimination is triggered.

DUI case law is clear that where evidence of coercion, threat, or force does not exist, the right against self-incrimination is not triggered. Ferega v. State, 286 Ga. App. 808 (2007) (holding that the element of coercion necessary to trigger Fifth Amendment protection was absent in a case where defendant was specifically told that the tests were voluntary, and he refused to take them); see also Bramlett v. State, 302 Ga. App. 527, 530 (2010) (holding that the Georgia Constitution “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”). Ferega and Bramlett make it clear that testimonial evidence includes more than mere statements, but limit exculsion to those statements or acts that are **compelled, involuntary, or procured against one’s will**.

It is clear from decades of both Federal and State precedent that post-arrest interrogations and the like have the tendency to be more compelling in nature because the custodial environment in which they occur gives the impression that cooperation is mandatory. Miranda v. Arizona, 384 U.S. 436, 465 (1966); see also Turnquest v. State, 305 Ga. 758, 761 (2019). However, pre-arrest questioning and investigative techniques are typically treated differently because of the voluntary nature of the individual's cooperation. Lankford v. State, 205 Ga. App. 405, 406-7 (1992) (which found that where DEF is not formally arrested until after the field sobriety test, there is no violation of his right against self-incrimination); Keenan v. State, 263 Ga. 569 (1993) (finding no violation of the right against self-incrimination under the fifth amendment or the Georgia Constitution where the defendant was not in custody at the time the field sobriety test was requested). The Georgia Implied Consent Law itself has been found not to be coercive on its face. Olevik v. State, 302 Ga. 228, 250-52 (2017) (holding that the Georgia Implied Consent Notice was not coercive on its face but that **compelled** breath tests are protected by the right against self-incrimination while upholding the trial court's ultimate conclusion that Olevik's submission to the breath test was not compelled and was therefore admissible). Instead, the analysis required is a case-by-case weighing of the totality of the circumstances surrounding the individual's participation, statement, or consent.

The Defendant, and the Court in Bradberry, cite Aldrich v. State, 220 Ga. 132 (1964) in support of the notion that pre-arrest/roadside compelled acts violate the right against self-incrimination. Aldrich involved a prosecution of a since-repealed statute making it a crime to refuse to drive a commercial vehicle onto the scales to be weighed for purposes of determining compliance with weight restrictions. The holding in the case was that the statute making it a crime for an accused to refuse to do an action violated the right against self-incrimination. Id.

This is an obvious conclusion because the act itself was clearly compelled by virtue of the fact that failure to comply would result in criminal prosecution. That is not the case here. There is no threat of prosecution based on Defendant's refusal to do the SFSTs, nor does the State's case rest on whether Defendant completed the SFSTs. Rather, it is one consideration, within the totality of the circumstances, that the officer used to reach his conclusion that Defendant was under the influence of alcohol to the extent that it was less safe for him to drive.

The holdings in Olevik and Elliott have been limited in their application to breath tests only. Elliott v. State, 305 Ga. 179, 224 (2019). The Court has reiterated this in subsequent decisions by declining to extend the holdings to apply to blood tests. State v. Johnson, 841 S.E.2d 91 (2020); see also Hinton v. State, 842 S.E.2d 67 (2020). As such, case law that pre-dates these decisions that pertain to SFSTs and other evidence have not been overruled and are still binding precedent. To date, there has been no case decided that holds that a refusal to submit to pre-arrest SFSTs is inadmissible or a violation of the right against compelled self-incrimination. In fact, multiple cases have held that such a refusal is not only admissible but highly relevant. Massa v. State, 287 Ga. App. 494 (2007) (holding that refusal of SFSTs is admissible as circumstantial evidence and together with other evidence would support an inference that defendant was impaired); See also, Hoffman v. State, 275 Ga. App. 356 (2005), Jones v. State, 273 Ga. App. 192 (2005), Smith v. State, 273 Ga. App. 43 (2005), Crusselle v. State, 303 Ga. App. 879 (2010). Additionally, the absence of a test, without explanation has been found to lead to a possible negative inference by the jury against the State. Wessels v. State, 169 Ga. App. 246 (1983). Furthermore, the use of a defendant's silence may be permissible for purposes other than the inference of guilt, but this requires a case-by-case analysis. State v. Orr, 305 Ga. 729 (2019); overruling Mallory v. State, 261 Ga. 625 (1991) (which held that comment

upon a defendant's silence is always more prejudicial than probative and therefore is not admissible).

Finally, the holding in Bradberry is in direct opposition to the holdings in Keenan v. State, 263 Ga. 569 (1993). Turnquest, a Supreme Court case subsequent to Olevik and Elliott, reiterated the holding in Keenan that the use of a defendant's refusal to submit to an alco-sensor test (PBT) was admissible because the defendant was not in custody when the test was requested. Turnquest v. State, 305 Ga. 758, 771 (2019). The court distinguished Keenan from the case it was examining because Keenan dealt with the refusal more so than the failure to give Miranda type warnings. Id. at 772. Therefore, the Turnquest court determined that Keenan was not controlling on the issue of whether warnings were necessary prior to requesting a test but did not disturb the holdings of Keenan regarding the use of the defendant's refusal. Id. The resulting holding was that no Miranda or other similar warnings are required to inform a defendant of his right to refuse, prior to requesting that he perform an incriminating act whether before or after arrest. Id. at 775.

The State seeks to offer the partially completed Horizontal Gaze Nystagmus test and the two clues observed during this evaluation prior to Defendant discontinuing the testing as one component of the evidence of Defendant's impairment. The officer testified that the two clues he observed prior to discontinuing the test did play a role in the totality of the circumstances that lead him to find Defendant was under the influence of alcohol to the extent that it was less safe for him to drive. There has been no argument that the portion of the testing that was completed prior to Defendant discontinuing it was not completed in substantial compliance with the officer's training. Therefore, by excluding any mention of Defendant's election not to continue with the tests the court also excludes otherwise admissible evidence. Additionally, it would be

nearly impossible for the State to present a complete picture of the case and the context of the officer's findings if the court precludes any mention of the SFSTs or why they were not completed. This is a fact that would likely be held against the State by the jury. The State is not seeking to offer Defendant's refusal to submit to SFSTs as the only evidence of impairment. This was long ago held to be insufficient. Brinson v. State, 232 Ga.App. 706 (1998). Rather, the State seeks to present Defendant's refusal as one part of the totality of the circumstances inquiry.

2.

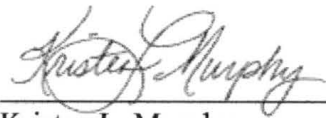
Defendant argues that the Implied Consent notice, as codified in O.C.G.A. § 40-5-67.1, and the requirements of O.C.G.A. § 40-5-55 and § 40-6-392 are unconstitutional.

This court has previously heard argument on defense counsel's assertions regarding the constitutionality of the Georgia Implied Consent Notice as it applies to a request for a blood test. See State v. Whitman, 20-SCCR-429109. That case involved the same Defendant in front of the court today. When that order was issued in July of 2020, this court declined to extend Elliott to apply to refusals of blood tests. Elliott v. State, 305 Ga. 179 (2019). Instead, this court held that applicable case law has clearly determined that the use of a defendant's refusal to submit to the State administered blood test is not a violation of a defendant's Fourth or Fifth Amendment rights, and that the Georgia Implied Consent Notice is not misleading for advising a defendant that his refusal to submit to a blood test could be used against him at trial. See State v. Johnson, 354 Ga. App. 447, 453 (2020) and Hinton v. State, 355 Ga. App. 263, 265 (2020). The State submits that there is no significant difference in the arguments raised today, and therefore would ask the court to uphold its previous decision on this argument.

CONCLUSION

The State submits that there is no basis on which Bradberry applies to Defendant's refusal to perform SFSTs. In fact, decisions of the State of Georgia's highest court directly contradict the holding of Bradberry even as applied to a refusal to submit a PBT sample. Furthermore, the statutes regarding the Georgia Implied Consent Law as it applies to the refusal of the State-Administered blood test have not been shown to be unconstitutional as applied in this case. This is consistent with binding precedent in the State of Georgia. Therefore, Defendant's Motions should be denied in their entirety.

Respectfully submitted this 10th day of March, 2021.



Kristen L. Murphy
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State Bar Number 913223

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**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

**MARTY WHITMAN,
Defendant.**

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ACCUSATION NUMBER: 430948

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing motion on the Defendant by emailing a true and accurate copy of the motion to the attorney of record:

Ben Sessions
ben@thesessionslawfirm.com

Respectfully submitted this 10th day of March, 2021.



Kristen L. Murphy
Assistant Solicitor-General
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FILED IN OFFICE
15 day of March 2021
Julia Himsley
Deputy Clerk, State Court of Bibb County

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

CASE NO. 20-SCCR-430948

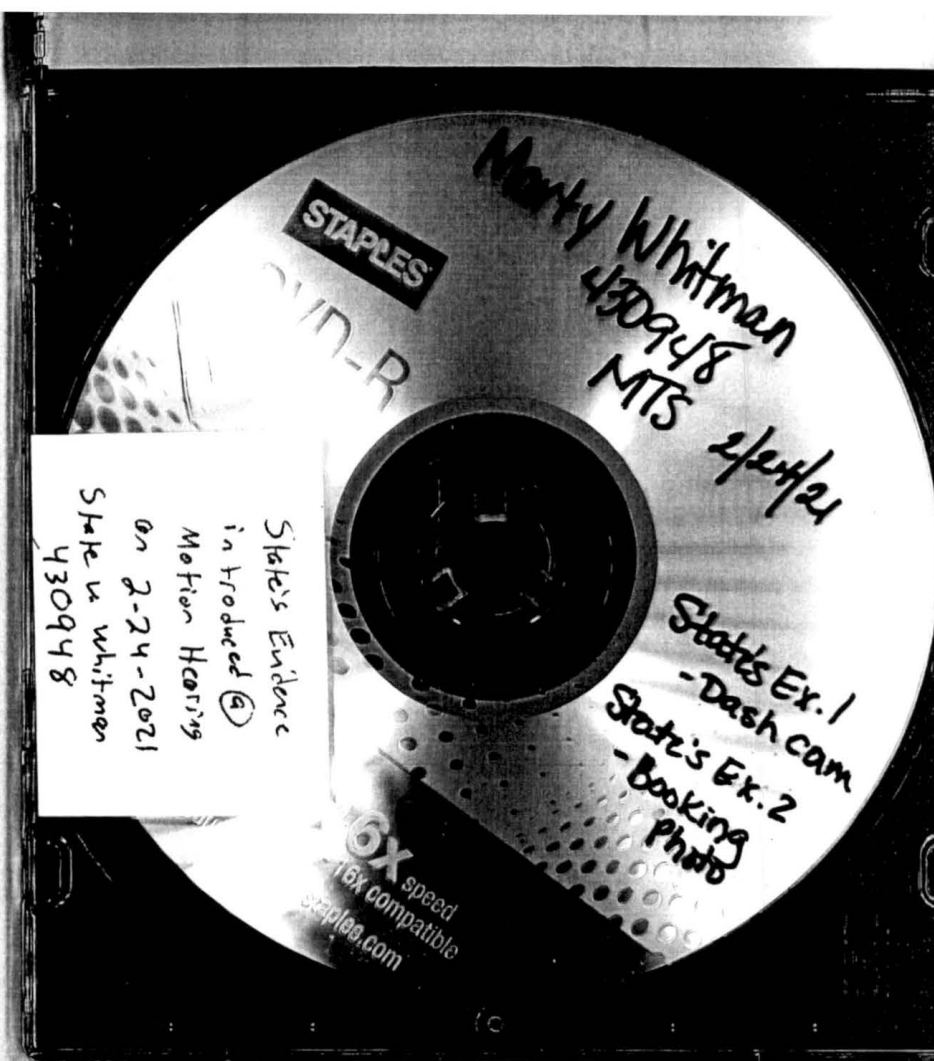
MARTY DUSTIN WHITMAN,

Defendant.

STATE'S EVIDENCE INTRODUCED AT MOTION HEARING ON FEBRUARY 24, 2021

STATE'S EXHIBIT 1 – DASH CAM

STATE'S EXHIBIT 2 – BOOKING PHOTO



MAR 17, 2021 08:24 AM

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

STATE OF GEORGIA

vs.

MARTY DUSTIN WHITMAN,
Defendant

Accusation No. 430948:

Count 1: DUI (Less Safe) (Alcohol);

Count 2: Failure to Maintain Lane; and

Count 3: Driving While License
Suspended

**ORDER ON DEFENDANT'S DEMURRERS and MOTIONS TO SUPPRESS, TO EXCLUDE EVIDENCE
and TO DECLARE STATUTES UNCONSTITUTIONAL**

Defendant Marty Dustin Whitman filed a Motion to Suppress, a Motion in Limine, and Demurrers raising a variety of challenges. The Court held a hearing on February 24, 2021. At the hearing, all issues were withdrawn, except (1) probable cause for the arrest of Mr. Whitman; (2) the admissibility of Mr. Whitman's refusal to perform field sobriety tests; and (3) the admissibility of Mr. Whitman's refusal to submit to a State administered test of his blood. The State asserts the second and third issues were not raised by written motions in advance of the hearing. At the hearing, the State requested time to file briefs on these issues. The Court asked if two weeks would be sufficient, and the State indicated two weeks would be sufficient. The State filed a brief on or about March 10, 2021. After careful consideration of the testimony, the video of the stop and roadside investigation, the arguments of counsel, the Court's file, and pertinent legal authority, the Court enters this Order.

On September 2, 2020, Trooper Staff stopped Mr. Whitman for failing to maintain his lane. Mr. Whitman did not initially stop after being blue-lighted. When Trooper Staff spoke with Mr. Whitman, he smelled the odor of an alcoholic beverage on Mr. Whitman's breath. Mr. Whitman's eyes were watery and bloodshot, and his speech was slurred. Mr. Whitman denied having consumed alcohol but indicated he had been at a local bar. Trooper Staff initiated a DUI roadside investigation. He began with the Horizontal Gaze Nystagmus (HGN) test, which involves moving a stimulus across the subject's field of vision, while the subject follows the stimulus with his eyes without moving his head. The test includes a total of eight passes of the stimulus across the field of vision to check the subject's eyes for six clues (three in each eye). After Trooper Staff began the test, Mr. Whitman stopped watching the stimulus and asked if he had to do the test. Trooper Staff told him he did not, and Mr. Whitman declined to proceed. Trooper Staff testified he observed "lack of smooth pursuit" in each eye before he terminated the test; therefore, he observed two of the six possible clues. Based on Mr. Whitman's refusal to complete the HGN Test, Trooper Staff did not attempt to perform the Walk and Turn Test or the One Leg Stand Test.¹ Trooper Staff presented an Alcosensor portable breath test device and asked Mr. Whitman to blow into it. Mr. Whitman did so. The device registered a positive result for the presence of alcohol. Trooper Staff arrested Mr. Whitman for driving under the influence, read him the Implied Consent Notice, and asked if he would submit to a State administered test of his blood. Mr. Whitman asked if he could talk to his lawyer, and Trooper Staff called Mr. Whitman's lawyer. After talking to his lawyer, Mr. Whitman refused to submit to the State's test of his blood.

¹ The HGN Test, Walk and Turn Test, and One Leg Stand Test will be collectively referenced as the "Field Sobriety Tests."

I. Probable Cause to Arrest for Driving Under the Influence

"Probable cause" means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Hughes v. State, 296 Ga. 744, 748 (2015). "The test of probable cause requires merely a probability - less than a certainty but more than a mere suspicion or possibility." Durrance v. State, 319 Ga. App. 866, 870 (2013).

The Court finds probable cause existed in the present case based on:

1. Trooper Staff observed Mr. Whitman failing to maintain his lane around 2:00 A.M.
2. Mr. Whitman did not stop immediately when he was blue-lighted.
3. Trooper Staff smelled the odor of an alcoholic beverage on Mr. Whitman's breath.
4. Trooper Staff observed Mr. Whitman's eyes were watery and bloodshot.
5. Trooper Staff observed Mr. Whitman was slurring his speech.
6. Mr. Whitman stated he had been at a local bar.
7. Trooper Staff observed two clues on the HGN Test before it was terminated.
8. Mr. Whitman's breath tested positive for alcohol on the PBT.

These factors considered collectively provide a reasonably trustworthy basis for Trooper Staff to have believed Mr. Whitman was operating a vehicle while under the influence of alcohol.

II. Refusal to Perform Field Sobriety Tests

Trooper Staff testified that the HGN Test requires the suspect to stand still, place his hands by his side, and follow the stimulus with his eyes, without moving his head, and that the HGN Test cannot be performed if the suspect refuses to perform these acts. Trooper Staff testified four or more clues on the HGN test would indicate the suspect's blood alcohol content

is .08 or higher. This incriminating information can only be obtained if the suspect engages in the affirmative acts requested by the Trooper.

As to the Walk and Turn Test and the One Leg Stand Test, the Court finds Trooper Staff did not ask Mr. Whitman to perform these tests, so Mr. Whitman did not refuse to perform them. To the extent Trooper Staff treated Mr. Whitman's termination of the HGN Test as a refusal to perform further tests, the Court notes Trooper Staff presented Mr. Whitman with the portable breath test after the termination of the HGN Test, and Mr. Whitman did not refuse it. Regardless, the Court finds the Walk and Turn Test and the One Leg Stand Test require the suspect to engage in affirmative acts to produce information which would incriminate the suspect.

Mr. Whitman seeks to exclude evidence of his refusal to perform the Field Sobriety Tests, based on Elliott v. State, 305 Ga. 179 (2019), Olevik v. State, 302 Ga. 228 (2017), and State v. Bradberry, 357 Ga. App. 60 (2020). In Olevik, the Supreme Court of Georgia held Paragraph XVI of the Georgia Constitution protects a suspect from being compelled to perform actions which might incriminate him; therefore, a suspect has a constitutional right to refuse to take a breath test. In Elliott, the Supreme Court of Georgia concluded "that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test." Id. at 223.

In Bradberry, the Court of Appeals applied the principles of Olevik and Elliott to the suspect's refusal to submit to a pre-arrest, preliminary alco-sensor breath test. The Court of Appeals found that the test would have required the suspect to perform the affirmative act of blowing into the alco-sensor device for a sustained period and held that, "because [the suspect] had the right to refuse to provide incriminating evidence by performing such an affirmative act

under Paragraph XVI, the admission of evidence of his refusal violates his state constitutional right against self-incrimination." Id. at 66.

The state constitutional principles pronounced and applied in Elliott, Olevik, and Bradberry are applicable to Mr. Whitman's refusal to incriminate himself by performing the Field Sobriety Tests. Like a breath test, whether post-arrest or a pre-arrest, and unlike a blood test, the Field Sobriety Tests require the subject to engage in affirmative actions to produce the evidence which may incriminate him. Mr. Whitman had the right under Paragraph XVI to refuse to perform the Field Sobriety Tests; therefore, admission of Mr. Whitman's refusal to perform the Field Sobriety Tests would violate his state constitutional right against self-incrimination.

III. Refusal to Submit to the State Administered Blood Test


Mr. Whitman seeks to exclude evidence of his refusal to submit to the State administered blood test based on Elliott v. State, 305 Ga. 179 and Olevik v. State, 302 Ga. 228. These cases are expressly limited to breath test cases, not to requests for a State administered blood test. As to blood test cases, these statutes and the language in the Implied Consent Notice have not been declared unconstitutional, and a refusal to submit to the State's request for a blood test remains admissible. Hinton v. State, 355 Ga. App. 263, 265 (2020); State v. Johnson, 354 Ga. App. 447 (2020) (the trial court "incorrectly found that the Georgia and United States Constitutions preclude admission of [the defendant's] refusal to submit to blood testing."). The Court finds, under present law, these statutes are constitutional.

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress and Demurrers are DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion to exclude evidence of his refusal to submit to field sobriety tests is GRANTED.

IT IS FURTHER ORDERED that the Defendant's Motion to exclude evidence of his refusal to submit to the State administered test of his blood and to declare statutes unconstitutional are DENIED.

SO ORDERED, this 17th day of March, 2021.



Jeff Hanson, Chief Judge
State Court of Bibb County, Georgia

MAR 24, 2021 01:05 PM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

v.,

MARTY D. WHITMAN,

Defendant.

Case No. 20-SCCR-430948

NOTICE OF LEAVE OF ABSENCE

COMES NOW, Ben Sessions, counsel for the Defendant in the above-styled case, and hereby notifies all Judges before whom he has cases pending, all affected Clerks of Court, and all opposing counsel or parties of record, that he will be on leave pursuant to Georgia Uniform Court Rule 16.

The period of leave during which time applicant will be away from the practice of law is:

April 2 – 12, 2021	Personal Leave
June 11 – 22, 2021	Personal Leave
July 2 – 7, 2021	Personal Leave

All affected Judges and all opposing counsel shall have ten days from the date of this notice to object to it. If no objections are filed, the leave shall be granted. The undersigned hereby certifies that a true and accurate copy of this notice has been served upon the Judge in this case, the Clerk of Court, and Opposing Counsel by e-mail, facsimile, or U.S. Mail.

RESPECTFULLY SUBMITTED, this 24th day of March, 2021.

/s/ D. Benjamin Sessions
D. BENJAMIN SESSIONS
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing pleading upon opposing counsel in this case by depositing same in the U.S. Mail with adequate postage affixed thereon to ensure delivery of same.

RESPECTFULLY SUBMITTED, this 24th day of March, 2021.

/s/ D. Benjamin Sessions

D. BENJAMIN SESSIONS

State Bar No. 141280

Attorney for Defendant

3155 Roswell Rd., Ste. 220

Atlanta, GA 30305

Tel: (470) 225-7710

Ben@thesessionslawfirm.com

APR 16, 2021 10:35 AM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

v.,

MARTY D. WHITMAN,

Defendant.

Case No. 20-SCCR-430948

MOTION TO DISMISS APPEAL

COMES NOW, the Defendant in the above-styled case, by and through the undersigned counsel of record, and moves this Honorable Court to dismiss the State's appeal. The Defendant respectfully show this Honorable Court the following:

On March 17, 2021, this Court entered an order granting the Defendant's motion to exclude from evidence in the trial of this case the Defendant's refusal to submit to field sobriety testing based upon the Self-Incrimination Clause of the Georgia Constitution. That was the only one of the Defendant's motions that this Court granted in the order dated March 17, 2021.

On April 15, 2021, the State filed a notice of appeal purporting to rely upon O.C.G.A. § 5-7-1(a)(4) as the basis for a direct appeal of this Court order dated March 17, 2021.¹ O.C.G.A. § 5-7-1(a)(4) states, in relevant part, the following:

¹ The notice of appeal does not state the order being appealed from or the ruling from which the State is seeking to appeal, but the order dated March 17, 2021 is the only order granting a Defendant's motion entered in this case.

(a) An appeal may be taken by and on behalf of the State of Georgia from the superior courts, state courts, and juvenile courts and such other courts from which a direct appeal is authorized to the Court of Appeals or the Supreme Court in criminal cases and adjudication of delinquency cases in the following instances:

(4) From an order, decision, or judgment **suppressing or excluding evidence illegally seized or excluding the results of any test for alcohol or drugs** in the case of motions made and ruled upon prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first;

The order entered by the Court does not suppress or exclude evidence *illegally seized*. To the contrary, the order precludes the State from introducing evidence purporting to explain why it was unable to seize/obtain more evidence.

The State cannot appeal an issue that is not listed in O.C.G.A. § 5-7-1, and O.C.G.A. § 5-7-1 is to be strictly construed:

Appeals by the State in criminal cases are construed strictly against the State and “the State may not appeal *any* issue in a criminal case, whether by direct or discretionary appeal, unless that issue is listed in OCGA § 5–7–1.” *State v. Martin*, 278 Ga. 418, 419, 603 S.E.2d 249 (2004) (emphasis in original). Accord *State v. Johnson*, 292 Ga. 409, 410–411, 738 S.E.2d 86 (2013); *State v. Caffee*, 291 Ga. 31, 33, 728 S.E.2d 171 (2012).

State v. Cash, 298 Ga. 90, 91, 779 S.E.2d 603, 605 (2015)(emphasis added).

An improper appeal in this case is significant. The Defendant in this case has filed a demand for a statutory speedy trial. The Court of Appeals does not have jurisdiction of an appeal that is outside of the statutory provisions of O.C.G.A. § 5-7-1:

Because OCGA § 5-7-1 (a) establishes the universe of appeals the State is permitted to seek in criminal cases, “ ‘[i]f the State attempts an appeal outside the ambit of OCGA § 5-7-1 (a), the appellate courts do not have jurisdiction to entertain it.’ ” *State v. Outen*, 289 Ga. 579, 580, 714 S.E.2d 581 (2011) (quoting *State v. Evans*, 282 Ga. 63, 64, 646 S.E.2d 77 (2007)).

State v. Wheeler, 310 Ga. 72, 74, 849 S.E.2d 401, 404 (2020).

Because the Court of Appeals lacks jurisdiction, this Court retains jurisdiction over the case, and the Defendant’s statutory speedy trial demand continues to exist and the time within which to bring him to trial continues to run.

WHEREFORE, the Defendant respectfully prays that this Honorable Court dismisses the State’s appeal in this case.

RESPECTFULLY SUBMITTED, this 16th day of April, 2021.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing motion to dismiss appeal by e-mail of same to Ms. Kristen Murphy, Assistant Solicitor, Office of the Bibb County Solicitor General.

RESPECTFULLY SUBMITTED, this 16th day of April, 2021.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

3155 Roswell Road
Suite 220
Atlanta, Georgia 30305
Tel: (470) 225-7710

APR 16, 2021 09:48 AM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

v.,

MARTY D. WHITMAN,

Defendant.

Case No. 20-SCCR-430948

DEFENDANT'S DEMAND FOR A SPEEDY TRIAL

COMES NOW, the Defendant in the above-styled case, Marty Whitman, by and through the undersigned attorney, and respectfully demands a speedy trial pursuant to O.C.G.A. § 17-7-170. This demand is being made in case number 20-SCCR-430948.

RESPECTFULLY SUBMITTED, this 16th day of April, 2021.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing Demand for Speedy Trial by mailing same to (1) the offices of the Honorable Jeff Hanson, Chief Judge, Bibb County State Court; (2) Offices of the Bibb County Solicitor General; and (3) the Office of the Bibb County State Court Clerk.

RESPECTFULLY SUBMITTED, this 16th day of April, 2021.

/s/D. Benjamin Sessions
D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

3155 Roswell Road
Suite 220
Atlanta, Georgia 30305
Tel: (470) 225-7710

MAY 07, 2021 02:10 PM



Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

MARTY DUSTIN WHITMAN

)

)

) Case No. 430948

)

)

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS STATE'S APPEAL

Comes now the State of Georgia, through the Solicitor-General of Bibb County, and makes this response to Defendant's motion to dismiss the State's appeal. The State respectfully shows the following:

On March 17, 2021, this Court entered an order granting the Defendant's motion to exclude Defendant's refusal to submit to field sobriety testing. On April 15, 2021, the State filed its Notice of Appeal to the Georgia Court of Appeals pursuant to O.C.G.A. § 5-7-1(a)(4). This section permits the State to file a direct appeal, to the Court of Appeals or the Supreme Court, in criminal cases from a pre-trial order, decision or judgement suppressing or excluding evidence illegally seized or excluding the results of any test for alcohol or drugs. The State shows that this is the appropriate subsection under which to file its appeal because the effect of the Court's order is that it excludes the results of the partially completed Horizontal Gaze Nystagmus (HGN) test.

The Court of Appeals has ruled on appeals by the State involving suppression of the results of Standardized Field Sobriety Tests (SFSTs) under the "test for the presence of alcohol or drugs" provision of O.C.G.A. § 5-7-1(a)(4). State v. Holt, 334 Ga. App. 610, 613-14 (2015) (finding that State's appeal was properly filed under O.C.G.A. § 5-7-1(a)(4) where the order appealed included suppression of the results of SFSTs). See also, State v. Smith, 329 Ga. App. 646 (2014) (physical precedent only) (State's appeal from order suppressing the results of the

Walk and Turn and One Leg Stand tests); and State v. Mosley, 321 Ga. App. 236 (2013) (disapproved on other grounds) (State's appeal from order suppressing results of SFSTs and subsequent testimonial evidence). Therefore, subsection (a)(4) is applicable to the results of SFSTs and not just the State's chemical test.

This Court acknowledged in its order that the two clues found during the partially completed HGN test were part of the basis for Trooper Staff's finding of probable cause. Further, the Court cited them among the factors it considered in finding that probable cause for arrest existed. The Court's ruling would effectively suppress this evidence because it would be impossible for the State to present evidence of the two clues observed by Trooper Staff without mentioning that Defendant refused to continue the testing. Therefore, by granting Defendant's motion to exclude the refusal, the result of the Court's order is the exclusion of the results of a test for alcohol or drugs. Furthermore, the refusal itself is testimonial evidence of the result of a SFST; that result being that he declined to perform the test. Therefore, suppression of the refusal equates to the suppression of results of a test for alcohol or drugs.

The State does not file this appeal for purposes of delay, as Defendant's motion implies. In fact, the State would point out that Defense Counsel himself requested that the Court wait to rule on his motions until after the Adams v. State case, which is currently before the Supreme Court of Georgia, is decided. So, Defendant's newfound urgency to prevent delay seems misplaced and altogether convenient. Instead, the State files this appeal due to the existence of applicable Georgia Supreme Court precedent which has determined that refusals to submit to SFSTs are admissible and do not implicate the right against self-incrimination. See Keenan v. State, 263 Ga. 569 (1993) (holding that there was no violation of the right against self-incrimination under the Fifth Amendment or the Georgia Constitution, where Defendant was not

in custody at the time the field sobriety test was requested) and Mitchell v. State, 301 Ga. 563 (2017) (holding that SFSTs are not searches that trigger Fourth Amendment protections, and that refusing to submit to SFSTs is not analogous to asserting one's right against self-incrimination). Both cases are directly applicable to the order which the State now appeals. The State would also point out that Defense Counsel was the Appellate Attorney on Mitchell v. State, which was decided less than 6 months before Olevik v. State, 302 Ga. 228 (2017). Had the Supreme Court deemed its holding in Mitchell erroneous, it had the opportunity to overrule it at that time and in several subsequent cases. Therefore, it is the State's belief that the holding in Mitchell is still controlling on this issue.

For these reasons, the State should be allowed to appeal the decision of this Court excluding evidence of Defendant's refusal to submit to field sobriety testing to the Georgia Court of Appeals. The State asks the Court to deny Defendant's motion to dismiss.

Respectfully submitted this 7th day of May, 2021.

A handwritten signature in cursive script, reading "Kristen L. Murphy". The signature is written in dark ink and is positioned above a horizontal line.

Kristen L. Murphy, Assistant Solicitor General
Bibb County Solicitor
Georgia State Bar# 913223
Bibb County Courthouse, Room 504
Macon, GA 31201
Phone: 478-621-6572; Fax: 478-621-6339
Email: kmurphy@maconbibb.us

**IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA)	
)	
v.)	Case No. 430948
MARTY DUSTIN WHITMAN)	
)	

CERTIFICATE OF SERVICE

This shall certify that Kristen L. Murphy, Assistant Solicitor-General for Bibb County, has this day served upon defendant through his attorneys of record, Ben Sessions, a true and accurate copy of the foregoing motion via U.S. mail and electronic mail to:

Ben Sessions, Attorney for Defendant
3155 Roswell Road NE
Suite 220
Atlanta, GA 30305
ben@thesessionslawfirm.com

This 7th day of May, 2021.



Kristen L. Murphy, Assistant Solicitor General
Bibb County Solicitor
Georgia State Bar# 913223
Bibb County Courthouse, Room 504
Macon, GA 31201
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JUL 08, 2021 02:19 PM


Patricia M. Graves, Clerk of State Court
Bibb County, Georgia

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

ACCUSATION NO. 20-SCCR-430948

MARTY DUSTIN WHITMAN,


Defendant.

ORDER DENYING MOTION TO DISMISS APPEAL

The Court entered an "Order on Defendant's Demurrers and Motions to Suppress, to Exclude Evidence and to Declare Statutes Unconstitutional" on March 17, 2021. The State filed a Notice of Appeal on April 15, 2021, pursuant to O.C.G.A. § 5-7-1(a)(4). The Defendant filed a Motion to Dismiss Appeal and Speedy Trial Demand on April 16, 2021. The State filed a Response to the Motion to Dismiss Appeal on May 7, 2021. After careful consideration of the Motion, the Response, and pertinent legal authority, the Court enters this Order.

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Appeal is DENIED. The Clerk is directed to prepare the record, including a transcript, for appeal.

SO ORDERED, this 8th day of July, 2021.


Jeff Hanson, Chief Judge
State Court of Bibb County

AUG 18, 2021 02:32 PM

IN THE STATE COURT OF BIBB COUNTY, GEORGIA


Patricia M. Graves, Clerk of State Court
Bibb County Georgia

STATE OF GEORGIA,	:	ACCUSATION NO. 20-SCCR-430948
	:	
	:	COUNT 1: DUI (LESS SAFE)
	:	(ALCOHOL)
VS.	:	
	:	COUNT 2: FAILURE TO MAINTAIN
	:	LANE
MARTY DUSTIN WHITMAN,	:	
	:	COUNT 3: DRIVING WHILE
Defendant	:	LICENSE SUSPENDED
	:	

HEARING HELD ON FEBRUARY 24, 2021

DEFENDANT'S DEMURRERS and MOTIONS TO SUPPRESS, TO
EXCLUDE EVIDENCE and TO DECLARE STATUTES UNCONSTITUTIONAL

ATTORNEY FOR STATE:
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TRANSCRIPT PREPARED BY:

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EXHIBITS

	<u>Admitted</u>
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(*REPORTER’S NOTE: Exhibits were retained by the Court.*)

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(Court Convened on February 24, 2021.)

THE COURT: Okay, we are here in the case, in my understanding in the case of State v. Marty Whitman.

MR. SESSIONS: Yes, sir.

THE COURT: And it's Accusation 430948?

MR. SESSIONS: Yes, sir.

THE COURT: All right. We're here on a motion hearing, and, Mr. Sessions, if you could identify for us the topics that we need to address in this particular motion.

MR. SESSIONS: Yes, Your Honor. Judge, I know I filed a motion packet, the standard packet, but all we're addressing for the purposes of the hearing, Your Honor, is probable cause to arrest, refusal of the field sobriety tests. And, Your Honor, there's a recent case, *Bradberry vs. State*, that I submitted a brief on this, that I believe controls on that issue, and then the refusal of the blood test.

And, Judge, for the purpose of the hearing, I will stipulate that the proper implied consent notice was read to Mr. Whitman. It was read timely. Any other foundational issues as to the appropriateness of implied consent, I'm not, I'm waiving those for the purposes of the hearing, Your Honor. I just want to

1 preserve the issue that we've argued before the Court
2 previously with regard to the admissibility of the
3 refusal of a blood test. I understand what the Court's
4 position is on it, but just want to preserve it for the
5 record, Your Honor.

6 THE COURT: Okay.

7 MR. SESSIONS: Thank you.

8 THE COURT: So, we've got probable cause and --

9 MR. SESSIONS: Yes, sir.

10 THE COURT: -- anything specific that you're
11 challenging in relation to the probable cause?

12 MR. SESSIONS: Just probable cause to arrest, Your
13 Honor.

14 THE COURT: Okay. Ms. Murphy?

15 MS. MURPHY: Your Honor, I'm a little confused by
16 what was filed in the way of motions versus the briefs
17 that were submitted. The two briefs in support are in
18 support of motions that were not filed.

19 THE COURT: Okay.

20 MS. MURPHY: The, I think you said you filed the
21 normal packet, but I think you may have filed the wrong
22 packet because the packet that you sent actually is all
23 about the chemical tests, on suppressing the chemical
24 tests, as opposed to field sobrieties and refusal of
25 the chemical tests. So, until receiving these briefs,

1 the State was not aware of any argument to do with
2 these things and the State, as you know, has a right to
3 be informed of that with time to prepare an argument.

4 THE COURT: Okay. Well, let's, on the two things
5 that - the latest brief related, I think, to the
6 refusal of the field sobriety and the refusal of the
7 blood test, and I don't think, I agree that you need a
8 chance to respond to that. I don't think that's going
9 to change anything on the evidence part of it.

10 MS. MURPHY: No. No.

11 THE COURT: Okay. So, let's go ahead and take the
12 evidence today --

13 MS. MURPHY: Okay.

14 THE COURT: -- and then I'll give you an
15 opportunity to --

16 MS. MURPHY: Okay.

17 THE COURT: -- file a response --

18 MS. MURPHY: Okay.

19 THE COURT: -- if you want to on those.

20 MS. MURPHY: And I have some arguments prepared.

21 THE COURT: Okay.

22 MS. MURPHY: I'm not sure whether I'll need more
23 than that.

24 THE COURT: Okay. All right. Well, we'll go
25 forward with the evidence relating to the stop and the

1 arrest, and the State, you can proceed to call your
2 first witness.

3 MS. MURPHY: The State calls Trooper Staff.
4 (Whereupon the witness took the stand.)

5 THE WITNESS: Good morning, Judge.

6 THE COURT: Good morning. If you'll pull that
7 microphone around to you.

8 THE WITNESS: Yes, sir.
9 (Whereupon the witness was sworn by Ms. Murphy.)

10 **JONATHAN STAFF**

11 **WITNESS HAVING BEEN FIRST DULY**

12 **SWORN TESTIFIED ON**

13 **DIRECT EXAMINATION**

14 BY MS. MURPHY:

15 Q Would you please state your name for the record.

16 A Trooper First Class Jonathan Staff.

17 Q Okay. And what agency do you work for?

18 A The Georgia Department of Public Safety;
19 specifically, the Georgia State Patrol.

20 Q Okay. And how long have you been with them?

21 A Coming up on three years.

22 Q Okay. Do you - are you P.O.S.T. Certified?

23 A Yes, ma'am.

24 MR. SESSIONS: I'll stipulate to the
25 qualifications and training of the Officer if you'll

1 accept it.

2 MS. MURPHY: Yes, I will.

3 THE COURT: Okay.

4 MS. MURPHY: Then we'll move on to the stop.

5 Q MS. MURPHY: Were you on duty at, on September the
6 2nd of 2020?

7 A Yes, ma'am.

8 Q And on that date, did you have an opportunity to
9 have contact with the Defendant?

10 A Yes, ma'am.

11 Q And did you, do you recognize the Defendant in the
12 courtroom today?

13 A Yes, ma'am.

14 Q Can you identify who that is?

15 A Yes, ma'am. Mr. Whitman, sitting right there.

16 Q Could you give some identifying factor for the
17 record?

18 A He's sitting right there. He's wearing a blue
19 shirt and --

20 Q Very good.

21 A -- a blue mask.

22 MS. MURPHY: Let the record reflect he has
23 identified the Defendant.

24 THE COURT: It does.

25 Q MS. MURPHY: So, did you arrest the Defendant on

1 that date?

2 A Yes, ma'am.

3 Q All right. What was your job assignment that day?

4 A I was assigned to the Nighthawks of Middle Georgia
5 H.E.A.T. Team.

6 Q Okay. And what were you doing at the time that
7 you encountered Mr. Whitman?

8 A I was driving on Wesleyan Drive near Brookfield
9 Drive.

10 Q Okay. And about what time was it?

11 A Two twenty-six in the morning.

12 Q Okay. And did you observe the Defendant's
13 vehicle?

14 A Yes, ma'am.

15 Q Do you recall what type of vehicle it was?

16 A It was a red pickup truck.

17 Q Okay. And did this happen in Bibb County?

18 A Yes, ma'am.

19 Q All right. What drew your attention to Mr.
20 Whitman's vehicle?

21 A The vehicle failed to maintain its lane by its
22 passenger tires crossing over the white fog line.

23 Q Okay. And when you noted that, what did you do in
24 response?

25 A I caught up to the vehicle at Wesleyan Drive and

1 Bowman Road where I activated my emergency equipment and
2 signaled for him to stop.

3 Q Okay. And did he stop?

4 A He turned left onto - he did not. He, not
5 immediately. He turned left onto Bowman Road and continued
6 to drive until finally coming to a stop at Chadwick Trail.

7 Q All right. After you - were you able to make
8 contact with him?

9 A Yes, ma'am.

10 Q Okay. When you first approached the window, can
11 you describe Mr. Whitman?

12 A He was sitting in his vehicle. I told him the
13 reason for the stop, and after speaking with him briefly I
14 asked him for his driver's license. He said he didn't have
15 one because it was suspended and I detected the strong odor
16 of an alcoholic beverage coming from the passenger
17 compartment of the vehicle and his eyes were bloodshot and
18 watery, his speech sounded slurred. I asked him how much he
19 had to drink. He told me he didn't have anything to drink.
20 He said he had just got done playing pool at Billy's
21 Clubhouse.

22 Q For the record, what is Billy's Clubhouse?

23 A It's a bar --

24 Q Okay.

25 A -- on Forest Hill Road.

1 Q All right. Did he mention - he said his driver's
2 license was suspended. Did he mention the reason for that?

3 A He did not, but when I went back to my patrol
4 vehicle to check him through the NCIC on our computers, and
5 GCIC, he was found to be suspended for a previous DUI.

6 Q Did you ask him to step out of the car?

7 A Yes, ma'am.

8 Q And when you asked him to step out, did you notice
9 anything specific about him at that point?

10 A He told me he knew he was going to go to jail
11 because of his suspended driver's license, and I told him I
12 never mentioned anything like that and I just, we walked to
13 the front of my vehicle.

14 Q Did you notice whether he had any problems with
15 balance or anything?

16 A I don't - I don't recall.

17 Q Okay. Were you able to isolate whether or not the
18 odor you observed from the passenger compartment was coming
19 from his person?

20 A Yes, ma'am. When I got him out of the vehicle and
21 in front of mine, I continued to smell a strong odor of
22 alcoholic beverage coming from his person.

23 Q Okay. And was your car equipped with a camera on
24 September the 2nd?

25 A Yes, ma'am.

1 Q Okay. Are you familiar with the recorder and how
2 it operates?

3 MR. SESSIONS: I'll stipulate to the foundation
4 for the video as well, Your Honor, if --

5 THE COURT: Okay.

6 MR. SESSIONS: -- the State will accept it.

7 MS. MURPHY: Okay.

8 THE COURT: Any objection to admitting the video
9 and playing the video?

10 MS. MURPHY: No, sir.

11 MR. SESSIONS: No, sir.

12 THE COURT: All right. That's State's Exhibit?

13 MS. MURPHY: One.

14 THE COURT: One is admitted without objection.

15 MS. MURPHY: Can we (inaudible).

16 (Whereupon the video was played for the Court.)

17 THE COURT: Anything else you want me to hear on
18 the video?

19 MR. SESSIONS: No, sir.

20 THE COURT: Okay.

21 Q MS. MURPHY: So, we'll start with what that left
22 off with. After allowing Mr. Whitman to speak with Mr.
23 Sessions, was it your opinion that he had refused implied
24 consent?

25 A Yes, ma'am.

1 Q We'll go back in time a little bit and talk about
2 the field sobriety just for a second. Have you been trained
3 in the administration of standardized field sobriety?

4 A Yes, ma'am.

5 Q And how long ago was that?

6 A I want to say I got certified, or I got trained in
7 standardized field sobriety in 2014 or '13, I want to say
8 then. That's when I first went through standardized field
9 sobriety testing.

10 Q You've had some updates since then?

11 A Yes, ma'am.

12 Q Do you recall when your most recent update was?

13 A I just actually recertified my drug recognition
14 expert training. It expires at the end of this month and
15 will be recertified at the end of this month.

16 Q Okay. All right. So, did you perform any
17 standardized field sobriety tests in this case?

18 A I attempted to do the Horizontal Gaze Nystagmus
19 test.

20 Q And what happened when you attempted to do that?

21 A After I checked for equal tracking and equal pupil
22 size and any resting Nystagmus to qualify them, I began to
23 check for lack of smooth pursuit, and after I checked for
24 that he stopped me and asked if it was voluntary, or if he
25 had to do this, and I said it was completely voluntary.

1 Q Okay. And up to the point that you were stopped,
2 had you substantially conformed with your training?

3 A Yes, ma'am.

4 Q Did you observe any clues prior to stopping the
5 test?

6 A I observed the lack of smooth pursuit in both
7 eyes. That would indicate two clues.

8 Q And what would be the significance of two clues?

9 A That there's some kind of substance that is
10 causing horizontal gaze nystagmus to start on the subject.

11 Q What kind of substances would cause that?

12 A Depressants, such as alcohol, inhalants and
13 dissociative anesthetics.

14 Q Okay. And in your determination of probable
15 cause, did you rely at all on the two clues you observed
16 before he stopped the test?

17 A Can you repeat it; I'm sorry.

18 Q Did you rely at all on those two clues in
19 determining whether you had probable cause for arrest?

20 A No, ma'am. It was the totality of the
21 circumstances.

22 Q Was that part of the totality of the
23 circumstances?

24 A Yes, ma'am; that's correct.

25 Q Okay. Did you do an Alco-Sensor test?

1 A Yes, ma'am.

2 Q What kind of Alco-Sensor do you have?

3 A The FST Alco-Sensor. It's on the approved list
4 from the GBI.

5 Q Okay. And have you been trained in how to use it?

6 A Yes, ma'am.

7 Q Have you used it before?

8 A Several times.

9 Q And what instructions did you give him?

10 A I asked him to blow into it, and he did.

11 Q Okay. And did it test positive or negative for
12 alcohol at the time?

13 A Positive.

14 Q Did that factor into your arrest?

15 A Yes, ma'am.

16 Q Okay. Have you in your personal experience in
17 your occupation as a law enforcement officer had the
18 opportunity to observe persons in various stages of
19 intoxication?

20 A Yes, ma'am.

21 Q Are the manifestations that you observed the night
22 you arrested Mr. Whitman consistent with someone who has
23 been drinking alcohol excessively?

24 A Yes, ma'am.

25 Q Based on your previous experience and your formal

1 training and what you observed from the Defendant on that
2 night, including odors, physical features, everything, do
3 you have an opinion as to whether the Defendant was under
4 the influence of alcohol to the extent that he was a less
5 safe driver?

6 A Yes, ma'am. I believe he was.

7 Q Okay. So, your opinion is that he was?

8 A Yes, ma'am.

9 Q Okay. Real quickly, are you familiar with the
10 booking process?

11 A Yes, ma'am.

12 Q Well, first of all, did you arrest him?

13 A Yes, ma'am.

14 Q Okay. And where did you proceed with him after
15 you arrested him?

16 A I called for his, his girlfriend to take control
17 of the truck, and when I released it to her, I transported
18 him to the Bibb County Sheriff's Office Jail.

19 Q Okay. And are you familiar with the booking
20 process at the Bibb County Jail?

21 A Yes, ma'am.

22 Q Are you aware of whether taking photographs is a
23 routine part of the booking process?

24 A It is.

25 Q And are booking photos taken within a short period

1 of time after arrest?

2 A Yes, ma'am.

3 Q Are you the one that takes those photos?

4 A No, ma'am.

5 Q Are you present when they're taken?

6 A Not usually.

7 Q All right. Have you had the opportunity to view
8 booking photos to the extent you could identify one by
9 sight?

10 A Yes, ma'am.

11 Q All right. I'm showing you on the screen what's
12 been marked as State's Exhibit 2. Does this appear to be a
13 booking photo?

14 A Yes, ma'am.

15 Q All right. Do you recognize the person in the
16 photo?

17 A Yes, ma'am.

18 Q Do you recognize - well, who is it?

19 A It's Mr. Whitman.

20 Q All right. And do you recognize the clothing that
21 he has on in the photo as being the same clothing he was
22 wearing during the stop?

23 A Yes, ma'am, it is.

24 Q And does it appear to be a fair and accurate
25 representation of Mr. Whitman's physical appearance on

1 September the 2nd of 2020?

2 A Yes, ma'am.

3 MS. MURPHY: The State would move to tender
4 Exhibit 2.

5 THE COURT: Any objection?

6 MR. SESSIONS: For the purpose of the hearing,
7 Your Honor, no.

8 THE COURT: It's admitted without objection for
9 the hearing.

10 Q MS. MURPHY: All right. Is there anything
11 significant that you noticed about this photograph?

12 A He's got bloodshot watery eyes in this photograph
13 and it looks like his face is a little flushed as well.

14 Q Would those be indicators of alcohol consumption?

15 A Yes, ma'am.

16 Q Okay. Were those things that you observed at the
17 scene?

18 A Yes, ma'am.

19 Q All right. And did those play into your arrest?

20 A Yes, ma'am.

21 Q All right. So, you mentioned the totality of the
22 circumstances. What factors made up the totality of the
23 circumstances for you in this case?

24 A His driving by crossing over the white fog line
25 with his passenger tire, his slurred speech, his bloodshot

1 watery eyes, the strong odor of an alcoholic beverage, what
2 I began to see on the Horizontal Gaze Nystagmus test, even
3 though I could not complete it; and, also the FST Alco-
4 Sensor, its results as well.

5 Q Anything else about his manner of driving?

6 A Oh, and he, well, something else I noticed was
7 when I stopped him he didn't stop right away when there was
8 a shoulder he could have pulled on, and we actually passed a
9 road on the left. I think it's Wesleyan Bowman Road is the
10 name of the road. He could have turned left into there.
11 There was no traffic on that road to hinder him turning. He
12 just stopped in the intersection.

13 Q And on that basis you determined he was a less
14 safe driver?

15 A Yes, ma'am.

16 MS. MURPHY: Nothing further.

17 THE COURT: Cross examination?

18 MR. SESSIONS: Thank you, Your Honor. Your Honor,
19 is it okay if I stand here or do you want --

20 THE COURT: That's fine.

21 MR. SESSIONS: -- to stand...

22 **CROSS EXAMINATION**

23 **BY MR. SESSIONS:**

24 Q Trooper Staff --

25 MR. SESSIONS: I'll tell you what, I'm going to

1 move over there.

2 THE WITNESS: That's okay.

3 MR. SESSIONS: Because I've got you all jacked up.

4 THE WITNESS: It's all right.

5 MR. SESSIONS: I've got you leaning over that way.

6 Q MR. SESSIONS: I'm going to kind of work
7 backwards, okay?

8 A Yes, sir.

9 Q The FST Alco-Sensor, the preliminary breath test
10 that you had him do, right before - you saw on the video
11 right before you administered it, he reaches into his lip --

12 A Uh-huh (affirmatively).

13 Q -- and he throws something out. That probably was
14 a dip, right?

15 A I'm sure. I didn't notice it.

16 Q Okay. But on the video itself, did you see it?

17 A No, sir. I wasn't looking at it. The only reason
18 I wasn't is because it distracts me and I've always done
19 that, but we can play it again, that's fine.

20 Q Is there --

21 A But it was probably --

22 Q It's right before, it's where he ends up at the
23 front bumper of the patrol car.

24 MR. SESSIONS: I didn't notice the time at first.

25 MS. MURPHY: This particular program doesn't --

1 (Whereupon a portion of the video was played.)

2 A THE WITNESS: This should be it. I see it now,
3 yes.

4 MR. SESSIONS: I'm going to pause this right here.

5 Q MR. SESSIONS: That portion right there, he
6 reaches into his lip and it's probably a dip. We don't know
7 with certainty what was in there?

8 A That's correct. I don't know what it is, sir.

9 Q All right. And prior to the administration of a
10 preliminary breath test are you supposed to make sure that
11 the person hasn't had any other substance in their mouth
12 like that?

13 A Any liquid, that's correct.

14 Q Yes, sir. Are there dips that contain alcohol in
15 them?

16 A I'm not sure. I don't dip, sir.

17 Q Okay. Does that conform with your training,
18 having a person with a substance like dip in their mouth
19 prior to the administration of a preliminary breath test?

20 A I don't recall that as being part of my training.
21 The part of the training would be to observe them without
22 anything in their mouth for 20 minutes or so, 10 to 20
23 minutes.

24 Q Okay.

25 A But I didn't, again, I didn't observe that when I

1 was talking to him in front of the vehicle or anything like
2 that.

3 Q Yes, sir. And to be fair to you, whenever he,
4 whenever he reaches in there to get the dip, you're going
5 back to your car to retrieve the preliminary breath test at
6 that point in time, right?

7 A Yes, sir.

8 Q All right. So, he reaches in to grab the dip, or
9 whatever substance was in his mouth. He reaches in there to
10 get it. That's whenever your back is turned to him, right?

11 A It's not turned to him. I'm more, if the push
12 bumper is here, I'm, this is my passenger door and that's
13 where I keep my Alco-Sensor at.

14 Q Yes, sir. You didn't see him reach in his lip to
15 get it, right?

16 A No, sir.

17 Q If you had, you would have waited a period of time
18 before you administered the preliminary breath test; right?

19 A Yes, sir.

20 Q Okay. Your training requires you to wait a period
21 of time before you administer the preliminary breath test,
22 right?

23 A Yes, sir.

24 Q If you know that a substance is in a person's
25 mouth?

1 A Yes, sir.

2 Q All right. And you didn't know a substance was in
3 his mouth but there was something in his mouth, right?

4 A Well, there was according to this video but I
5 didn't know at the time.

6 Q Yes, sir. All right. You have no idea whether or
7 not there is a substance that could cause the presence of
8 alcohol to be positive on a preliminary breath test from a
9 dip, right?

10 A That's correct. I'm not familiar with that.

11 Q Well, one of the concerns that we have whenever a
12 person has got a substance like dip in their mouth is that
13 if they did drink whenever they had a dip in their mouth
14 then the dip could trap the alcohol, is that right?

15 A I'm not sure, sir.

16 Q And then can we kind of go back from there to the
17 HGN test. In your training you are taught that there, if
18 you can correlate a certain number of clues to a person's
19 blood alcohol concentration; is that right?

20 A Yes, sir.

21 Q Based on two clues on the Horizontal Gaze
22 Nystagmus test, what would you estimate a person's blood
23 alcohol concentration would be?

24 A At least a .02.

25 Q I'm sorry?

1 A At least a .02. That's how I was originally
2 trained.

3 Q What's the highest that you can go based on two
4 clues on the Horizontal Gaze Nystagmus test?

5 A Repeat that, sir.

6 Q Yes, sir. What is the highest estimation of a
7 person's blood alcohol concentration based on two clues on
8 the Horizontal Gaze Nystagmus test?

9 A I don't know if there is one, sir. I don't - it
10 doesn't give a range.

11 Q Okay. So, if you have four clues, what would you
12 estimate a person's blood alcohol concentration to be?

13 A Impaired.

14 Q What blood alcohol level?

15 A An .08 or above.

16 Q And how high - you don't know how high two clues
17 would put you at; what's the highest --

18 A At least an .02. It would be between there. It
19 would be between those two numbers. I can't discuss actual
20 range because he wouldn't let me finish doing it.

21 Q Yes, sir. And when we're performing the
22 Horizontal Gaze Nystagmus test, does it require a suspect to
23 actually do anything?

24 A Stand straight up, feet together, arms down by
25 your side and to focus on the stimulus and to follow it

1 without, with just their eyes and not moving their head.

2 Q If a suspect were to sit there and just look
3 straight, not do any acts whatsoever for you, can you
4 perform the test on them?

5 A I would ask them if they could - what I usually do
6 with folks like that is I ask them if they can just move
7 their eyes from side to side, and if they can I attempt and
8 I attempt and I attempt and I give them full, I'm not sure
9 of the word, but I give them every opportunity to comply
10 with me.

11 Q Yes, sir. But if a suspect will not voluntarily
12 move their eyes from side to side for you, that is if they
13 won't perform the act of moving their eyes from side to
14 side, controlling their own body, can you do the test on
15 them?

16 A I usually just discontinue the test because most
17 people, if they're driving a vehicle, they can move their
18 eyes from side to side.

19 Q Right. But if they just don't want to do it, you
20 can't do the test on them; is that right?

21 A That's correct. Yeah. If they say they don't
22 want to do it, they don't have to do it.

23 Q Right. So, you can't make, you can't observe the
24 clues on the Horizontal Gaze Nystagmus test unless the
25 person is willing to perform that act for you of following

1 the stimulus; is that right?

2 A That's correct.

3 Q And just so we're clear, Mr. Whitman unequivocally
4 said that he didn't want to do it; is that right?

5 A That's correct. After I completed the lack of
6 smooth pursuit passes he said he, he asked if he had to do
7 it and I said, no, sir, it's voluntary.

8 Q Now, I'm sorry, I hate hopping all over the place.
9 Did you ever ask Mr. Whitman if he had anything in his mouth
10 prior to the administration of the preliminary breath test?

11 A No, sir. I never do.

12 Q And after you did the two clues on the Horizontal
13 Gaze Nystagmus test, that's a, that's a test that you're
14 looking for involuntary jerking of the eyes; right?

15 A Yes, sir, as they move from side to side.

16 Q And I've heard some people say that they can feel
17 the involuntary jerking.

18 A Yeah, they can't.

19 Q But it's an involuntary thing that people don't
20 know is present in their eyes, right?

21 A That's correct.

22 Q Okay. So if a suspect is doing that test, they
23 don't have any clue if their eyes are twitching as they're
24 moving horizontally; is that correct?

25 A Yes, sir. As they're jerking; yes, sir.

1 Q But there's two other field sobriety tests - the
2 Walk and Turn and One Leg Stand - that are a part of the
3 standardized field sobriety battery for alcohol cases; is
4 that correct?

5 A That's correct.

6 Q Did you ever ask Mr. Whitman to do those tests?

7 A No, sir, I did not because I understood him saying
8 he didn't want to do it anymore as he didn't want to do any
9 of the testing.

10 Q Did you ever actually ask him if he wanted to do
11 those tests?

12 A No, sir.

13 Q Okay. But you did proceed to do another test
14 after that, though, right?

15 A Well, I proceeded to get the FST Alco-Sensor out.
16 That's normally what I do. After I complete field sobriety
17 I always get the Alco-Sensor out. It's just something I've
18 always done. I'm systematic.

19 Q Yes, sir. It's just a habit and routine for you?

20 A Yes, sir, that's correct.

21 Q So, he unequivocally stops the Horizontal Gaze
22 Nystagmus test, correct?

23 A Yes, sir.

24 Q And it was your understanding that he did, that he
25 was therefore not going to submit to the Walk and Turn and

1 One Leg Stand tests, correct?

2 A Yes, sir, that's correct.

3 Q But then you did actually have him do another
4 test, the preliminary breath test; correct?

5 A Yes, sir.

6 Q Did you ever inform him that that test was
7 voluntary?

8 A No, sir. I don't have to.

9 Q Kind of moving backwards from there, whenever Mr.
10 Whitman, after you stopped the vehicle, did he have any
11 trouble rolling down his window for you that you observed?

12 A Not that I noted.

13 Q Was that something that you were looking for?

14 A I wasn't specifically looking to see if he had
15 trouble with his window.

16 Q Anything unusual about that? I know that you said
17 that he passed a road on the left. The road that he stopped
18 on, was this the first road on the right that he came to?

19 A Yes, sir.

20 Q And you said that there was a delay and that he
21 could have stopped on a shoulder or he could have pulled
22 over to the left?

23 A Yes, sir.

24 Q Was there any other driveway or anything like that
25 that he could have pulled into on the right?

1 A He could have, yes, sir. I mean I believe we
2 passed a couple houses on the right.

3 Q The first road was the road where he stopped at on
4 the right?

5 A Yes, sir.

6 Q Anything unusual about his manner of stopping the
7 truck?

8 A Just that he didn't yield right away and that he,
9 the way he stopped ended up having us block that roadway
10 from any drivers trying to exit the neighborhood or come
11 into the neighborhood.

12 Q Yes, sir. Did anybody actually get blocked?

13 A Not that I recall.

14 Q Did you ever see the truck. as it was actually in
15 motion driving down the road, did you ever see it cross over
16 the yellow line?

17 A No, sir.

18 Q And the line that we're talking out is the one to
19 the right of the truck, right?

20 A Yes, sir, the white fog line.

21 Q How many times did you see it cross over the white
22 fog line?

23 A Once.

24 Q Did you see any other moving violations?

25 A No, sir, not that I observed.

1 Q Anything unusual about the way that he actually
2 stopped? Did he slam on the brakes, anything of that
3 nature?

4 A No, sir.

5 Q You saw him signal the left turn right before he
6 stopped, correct?

7 A Well, he turned left, signaled to turn left onto
8 Bowman Road and that's when I activated my emergency
9 equipment.

10 A Yes, sir.

11 Q After you approached the truck, he rolls down his
12 window fine; right?

13 A (No verbal response.)

14 Q Then he starts having a discussion with you about
15 why it is he doesn't have a license on his person, correct?

16 A That's correct.

17 Q He explains that to you and then you actually ask
18 him to exit from the truck, right?

19 A Yes, sir, after I went back to my patrol vehicle
20 and checked him through NCIC.

21 Q Yes, sir. The information that he gave you was
22 correct?

23 A Yes, sir.

24 Q So, he gives you that information, you come back
25 up, reapproach him and ask him to exit from the truck. Did

1 you observe anything that was unusual about his demeanor in
2 exiting from the truck?

3 A No, sir.

4 Q Did he have any trouble standing?

5 A Not that I noted.

6 Q Did he stagger or hold onto the truck or anything
7 of that nature?

8 A No, sir.

9 Q And those are all things that you are trained to
10 observe or look for, correct?

11 A Yes, sir.

12 Q And you would have noticed those things if they
13 were present, correct?

14 A Yes, sir.

15 Q After he exited from the truck, he had to walk to
16 the rear of the truck to return to the patrol car; is that
17 right?

18 A That's correct.

19 Q Did he have, was there an unusual gait or distance
20 between his steps that you observed?

21 A Not that I observed.

22 Q Is that the kind of thing you were trained to
23 observe or look for as well?

24 A Yes, sir.

25 Q You would have noticed them if they were present,

1 right?

2 A That's correct.

3 Q Did he stumble?

4 A Not that I noted.

5 Q Did he stagger?

6 A No, sir.

7 Q Did he sway?

8 A No, sir.

9 Q Did he hold onto the truck for balance?

10 A No, sir.

11 Q Anything else that you were trained to observe
12 that would have clued you into, hey, this is possibly an
13 impaired person in his manner of walking back to the patrol
14 car?

15 A No, sir.

16 Q Was there anything in your mind that suggested to
17 you that he was possibly impaired by any substance besides
18 alcohol?

19 A No, sir.

20 Q And why is it that we didn't just do a breath test
21 in the beginning?

22 A What, oh, you're talking about with the implied
23 consent?

24 Q Yes, sir.

25 A Because I was asking for a blood test, and it's my

1 choice of which test I want to do.

2 Q All right. I realize, obviously I understand what
3 the law is with regard to the choice of tests that are
4 there, but if ultimately we were trying to get to the truth
5 of the matter, which is whether or not the person is
6 intoxicated, why was it that we didn't just say, hey, all
7 right you're scared of needles, just do a breath test for
8 me?

9 A Because I wanted to do a blood test.

10 Q Okay. And you've done breath tests before, right?

11 A It's been about four years.

12 Q You're certified to do them, right?

13 A Yes, sir.

14 Q All right. You've got a good valid certification
15 from the State to perform that test, right?

16 A Yes, sir.

17 Q That's a test that the GBI set up as well, right?

18 A Yes, sir.

19 Q You just didn't want to do that?

20 A Yes, sir, that's correct. He could have done a
21 breath test on it after a blood test.

22 Q Right. But obviously he told you, hey, I've got a
23 real fear of needles, and I'll do a breath test and a urine
24 test for you; right?

25 A Yes, sir.

1 Q He told you he was scared of a blood draw?

2 A I believe he said he was scared of needles.

3 Q Just a couple of other things; I'm sorry. With
4 regard to his eyes in the photo that you saw up there,
5 obviously it's an indicator, or a possible indicator of
6 consumption of alcohol; correct?

7 A With his eyes you said?

8 Q Yes, sir.

9 A Yes, sir.

10 Q And there's numerous environmental conditions that
11 could cause a person to have bloodshot and watery eyes,
12 right?

13 A That's correct.

14 Q And Billy's Clubhouse is a pool hall as well,
15 correct?

16 A I'm not sure.

17 Q All right.

18 A I've never been inside.

19 Q Yes, sir. Do you know whether or not you're
20 allowed to smoke inside Billy's Clubhouse?

21 A I have no idea.

22 Q And, obviously, people, and a lot of times in bar
23 settings there is exposure to smoke and that sort of thing;
24 right?

25 A I assume so, sir.

1 Q Yes, sir. Can smoke cause a person to have
2 bloodshot watery eyes?

3 A Yes, sir.

4 Q Can you determine a person's level of intoxication
5 based on bloodshot watery eyes?

6 A No, sir.

7 Q Can you determine their blood alcohol
8 concentration?

9 A No, sir.

10 Q Can you determine their ability to drive safely?

11 A No, sir.

12 Q With regards to the odor of alcohol, can you
13 determine a person's level of intoxication based on the
14 strength of the odor of alcohol?

15 A No, sir.

16 Q All right. Can you determine how much a person
17 had to drink?

18 A No, sir.

19 Q Can you determine a person's blood alcohol
20 concentration?

21 A No, sir.

22 Q Can you determine a person's ability to drive
23 safely?

24 A No, sir.

25 MR. SESSIONS: Thank you, sir.

1 THE WITNESS: Yes, sir.

2 THE COURT: Any redirect?

3 MS. MURPHY: Just quickly. I'll stay right here.

4 **REDIRECT EXAMINATION**

5 **BY MS. MURPHY:**

6 Q Are standardized field sobriety tests required for
7 the Defendant to do?

8 A No, sir. No, ma'am.

9 Q Did you tell Mr. Whitman that they were not
10 required?

11 A After he asked; yes, ma'am.

12 Q Did you force him to do the portion of the test
13 that he did?

14 A No, ma'am.

15 Q Did you threaten him to make him do the test?

16 A No, ma'am.

17 Q Did you promise him anything to induce him to do
18 the test?

19 A No, ma'am.

20 Q All right. Mr. Sessions spent a good bit of time
21 asking you about things you didn't observe and about how
22 several factors alone wouldn't indicate impairment. One
23 factor is not enough. What is the consideration to be
24 enough to determine less safe?

25 A It's the totality of the circumstances.

1 Q And it's your opinion that the totality of the
2 circumstances showed he was less safe to drive?

3 A That's correct.

4 MS. MURPHY: Nothing further.

5 THE COURT: Anything further, Mr. Sessions?

6 MR. SESSIONS: No, sir. Thank you.

7 THE COURT: Okay. Anything further from the
8 Trooper?

9 MS. MURPHY: No.

10 MR. SESSIONS: No, sir.

11 THE COURT: All right. You're free to go if you
12 like. Thank you. Any further evidence from the State?

13 MS. MURPHY: No, Your Honor.

14 THE COURT: Any evidence from the Defense?

15 MR. SESSIONS: No, Your Honor. Just argument.

16 THE COURT: Okay. I'll hear argument.

17 **CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT**

18 MR. SESSIONS: Judge, with regard to probable
19 cause to arrest, as the Court's well aware there's a
20 standard that has to be applied there, and I'll submit
21 on the evidence that's been produced at the hearing
22 unfortunately the standard is not very favorable to me
23 so I tend to recognize where that goes, so. Our
24 Supreme Court spoke to it last year or so and the
25 standard has certainly taken away some of the deference

1 that was given to trial judges in making that
2 determination. So, I'll submit on it.

3 With regard to the second issue that I raised,
4 Judge, and the refusal to submit to field sobriety
5 tests, there's a recent case, *Bradberry - State vs.*
6 *Bradberry*. I'm sorry, I was thinking it was a
7 defendant's appeal. But the Court of Appeals number is
8 A20A1460, and I've cited it in the brief, Your Honor.

9 THE COURT: Yes. It's 357 Ga. App. 60 is the
10 cite.

11 MR. SESSIONS: You've got the more updated
12 citation. It was decided in October of last year, Your
13 Honor. It dealt with refusal to submit to, a pre-
14 arrest refusal to submit to an Alco-Sensor, a
15 preliminary breath test, that we talked about for a
16 while here.

17 In that case, the defendant submitted to, refused
18 to submit to a preliminary breath test. There was no
19 inquiry as to whether or not you were coerced to submit
20 to it or any of that, anything in terms of the
21 voluntariness. The analysis was did the defendant
22 refuse to submit to an act, did that act, was it
23 protected by the self-incrimination provision of the
24 Georgia Constitution. The answer to that was, yes, and
25 therefore that evidence is not admissible in trial

1 against the defendant under *Bradberry*.

2 THE COURT: Well, in that one the defendant did
3 say he was scared the results would be bad for him or
4 something like that.

5 MR. SESSIONS: And, Judge, he did say that, and
6 I'm not sure whether or not that statement in and of
7 itself might be admissible at trial against the
8 defendant if they were to do it.

9 You don't have to give a reason for it. If you
10 invoke the right not to, not to perform an act, if you
11 refuse to submit to the act, that cannot be introduced
12 in to you. They follow the same analysis that we do
13 under the other self-incrimination cases. For example,
14 *Elliott*.

15 In *Elliott*, you don't have to have a defendant.
16 It's post-arrest in *Elliott*, but you don't have to have
17 a defendant who says I don't want to submit to that
18 because that won't be favorable to me. If a defendant
19 says I refuse to submit to that or they just remain
20 silent and don't do the act, then it's protected by the
21 self-incrimination provision if what you're asking the
22 defendant to do is protected by the self-incrimination
23 clause.

24 It's a good question as to whether or not field
25 sobriety tests are, in fact, covered by the self-

1 incrimination clause; it is. It's one that I don't
2 think we have a settled answer to, but I know that we
3 have multiple cases that involve acts that are much
4 less, would seemingly much less implicate the self-
5 incrimination provision in field sobriety tests.

6 For example, asking a defendant to place their
7 foot into a footprint on the scene involves the self-
8 incrimination provision. Asking a defendant to drive
9 their truck onto a scales involves the self-
10 incrimination provision and is protected by that. You
11 can't force a defendant to do that, and if a defendant
12 were to say, no, you can't use that refusal against him
13 under our settled rulings here in the state of Georgia.

14 We know that the evidence that the officer was
15 asking Mr. Whitman to produce for him requires the
16 defendant to perform an act. It's an act of following
17 a stimulus with your eyes. Trooper Staff told us
18 honestly if a defendant doesn't voluntarily do that
19 thing for him; that is, if a defendant were to just sit
20 there and look at him straight on, or not look at him
21 straight on, or do anything besides follow that
22 stimulus, he can't get a result on that test, and it's
23 as simple as that. It requires a defendant to perform
24 a physical act of moving his eyes from side to side.

25 Whenever a defendant says, I don't want to do

1 that, he is invoking his right not to incriminate
2 himself by performing acts under the Georgia
3 Constitution. That refusal cannot be used against the
4 defendant. That's what our law is, clearly, under
5 *Bradberry*.

6 I think it was a really good question before
7 *Bradberry* as to whether or not you could use a
8 defendant's pre-arrest refusal to submit to a test.
9 That question really had not been answered. We had
10 *Mallory*, which I thought kind of was contradictory to
11 *Bradberry*, but the Court of Appeals said after *Elliott*,
12 if you apply the rule of *Elliott*, looking at our
13 previous cases that have decided the self-incrimination
14 provisions; and, Judge, I went through and listed out
15 multiple different situations in which we have
16 previously interpreted the self-incrimination clause.
17 They looked at *Bradberry* - they looked at *Elliott* and
18 said the breath test clearly invokes an act that's
19 required under the self-incrimination provision. We
20 have multiple other cases that have been decided that
21 were pre-arrest. For example, driving a truck up on a
22 scales was pre-arrest. That obviously involves self-
23 incrimination. We've interpreted it to apply to pre-
24 arrest as well. This is pre-arrest, it's an act;
25 therefore, a defendant's refusal to submit to it should

1 not be used, or cannot be used against a defendant at
2 trial. That is, that's the refusal to submit to field
3 sobrieties, and I believe that evidence should be
4 excluded on that basis, Your Honor.

5 Our third issue that we raised was refusal to
6 submit to a blood test. This is the opposite of our
7 situation with regard to refusal to submit to field
8 sobriety tests. We know that the blood test implicates
9 the Fourth Amendment right. The Fourth Amendment right
10 is a somewhat unsettled question right now. We have
11 multiple cases in Georgia that say that you should
12 interpret a defendant's refusal to submit to a search
13 in the same way that you interpret a defendant's
14 refusal to submit to acts under the self-incrimination
15 clause.

16 *Miley, Mackey, Gardner, Kwiatkowski*, all those
17 cases in the more traditional criminal case context all
18 say that a search should not be admissible or cannot be
19 introduced, or a defendant's refusal to submit to a
20 search cannot be introduced against him at trial.
21 Those are all cases that outside the DUI context that's
22 the way that we interpret a defendant's refusal to
23 submit to a search.

24 I know that the Court's ruled on this previously,
25 and I know that there are cases right now that are

1 pending, that have been decided by the Court of Appeals
2 that are adverse to me. That issue is pending before
3 the Georgia Supreme Court so I wanted to raise it and
4 obviously preserve that issue as well, Your Honor.

5 THE COURT: Okay.

6 MR. SESSIONS: Thank you, sir.

7 THE COURT: Ms. Murphy?

8 **CLOSING ARGUMENT ON BEHALF OF THE STATE**

9 MS. MURPHY: All right. So, Mr. Sessions relies
10 very heavily on *Bradberry*, and I'll discuss *Bradberry*
11 in a minute, but I want to first turn the focus on the
12 key, the key here, and that is the right against self-
13 incrimination.

14 Both the Fifth Amendment of the United States
15 Constitution and the Georgia Constitution use the word
16 compelled, so the right is against compelled self-
17 incrimination. That would indicate that the Fifth
18 Amendment and the Georgia Constitution's provision
19 against self-incrimination is not triggered unless the
20 person is compelled to produce evidence or to say
21 something that would incriminate themselves. The
22 protection is not against incriminating yourself at
23 all, it's about being forced to incriminate yourself.

24 There is previous case law that holds just that,
25 and to the best of my knowledge those cases have not

1 been overruled. *Ferega v. State*, 286 Ga. App. 808, in
2 2007 found that the element of coercion necessary to
3 trigger Fifth Amendment protection was clearly absent
4 in a case where a defendant was specifically told that
5 the tests were voluntary and he refused to take them.
6 That's exactly what happened here.

7 Accordingly, the trial court was entitled to rely
8 upon this evidence in conjunction with other evidence
9 at trial in determining whether the defendant was
10 guilty of DUI. *Bramblett v. State* also holds that DUI
11 suspect had not been compelled to perform field
12 sobriety tests in violation of his right against self-
13 incrimination where he was not threatened with criminal
14 sanctions for his failure to perform tests. He was
15 neither physically forced to do the tests nor was there
16 a show of force tantamount to the actual use of force,
17 and he did not refuse to perform the tests.

18 THE COURT: But, then, are - I want you to keep
19 going, but are all these so far, all of these are
20 before *Olevik*? These are all before we got the --

21 MS. MURPHY: Yes. Some of them are. One of them
22 that I will cite is contemporary with *Olevik*.

23 THE COURT: Okay.

24 MS. MURPHY: And then some of the ones I will cite
25 later are after *Olevik*.

1 THE COURT: Okay.

2 MS. MURPHY: *Bramblett* was in 2010 for reference.

3 THE COURT: All right. And what was the cite on
4 that?

5 MS. MURPHY: Huh?

6 THE COURT: What was the cite on *Bramblett*?

7 MS. MURPHY: 302 Ga. App. 527.

8 THE COURT: Thank you.

9 MS. MURPHY: That case also held the
10 Constitutional guarantee protects one from being
11 compelled to furnish evidence against himself either in
12 the form of oral confessions or incriminating
13 admissions of an involuntary character or of doing an
14 act against his will which is incriminating in nature.
15 Again, compelled and involuntary. Standardized field
16 sobriety tests are not involuntary. They are very much
17 voluntary and the Defendant was informed of that.

18 Miranda warnings are not required to be given
19 prior to a request for field sobriety tests where the
20 defendant is not in custody. That's also a pretty good
21 indication that the right against compelled self-
22 incrimination is not implicated when standardized field
23 sobriety tests are sought prior to arrest. *Langford v.*
24 *State* and *Keenan v. State* are on point for that. Those
25 are also both prior to *Olevik*.

1 There is also previous case law that says refusal
2 is admissible as circumstantial evidence of
3 intoxication. And, again, these cases have not been
4 overruled in any way. *Massa v. State*, 287 Ga. App. 494
5 in 2007 found that a defendant's refusal to submit to
6 field sobriety tests is admissible as circumstantial
7 evidence of intoxication and together with other
8 evidence would support an inference that he was an
9 impaired driver. *Hoffman v. State*, *Jones v. State*,
10 *Smith v. State* and *Crucilla v. State* (phonetically)
11 also speak to that. I'll give you a list of all the
12 cites. *Turnquest v. State* is also, that's the
13 contemporary to *Olevik* and *Elliott*. It overruled an
14 old case, *Price v. State*, holding that Miranda warnings
15 are not needed even after arrest for standardized field
16 sobriety tests.

17 There is also a case that stands to reason that
18 prohibition against compelled acts does not extend to
19 acts which merely allow the collection or observation
20 of physical characteristics, such as involuntary
21 jerking of the eyes. In that case, in *Ingram v. State*,
22 the right against self-incrimination was not violated
23 where the defendant was required to strip from the
24 waist up to allow photographing of his tattoos.
25 Therefore, requiring a defendant to perform a series of

1 small simple tasks during which the officer observes or
2 does not observe physical manifestations to the level
3 of alcohol impairment the State would argue would be
4 permissible.

5 Now I'll turn to *Bradberry*. First of all, this
6 case is distinct from *Bradberry* in that *Bradberry*
7 specifically deals with PBT tests, not standardized
8 field sobriety tests and there's nothing in that
9 holding that extends its ruling beyond the refusal to
10 the PBT tests. Therefore, current case law regarding
11 the use of refusals for standardized field sobriety
12 tests has not been overruled.

13 The State would also argue that *Bradberry* is
14 flawed in its analysis in that it fails to consider and
15 address the key element in determining whether the
16 right against self-incrimination has been triggered,
17 the compelled nature of the act. Instead, it focuses
18 simply on the language of *Olevik* and *Elliott* to the
19 extent that they discuss the Georgia Constitution's
20 extension of the right against self-incrimination to
21 acts that would incriminate; specifically, production
22 of deep lung air.

23 *Bradberry* fails to address the difference between
24 pre-arrest and post-arrest requests for a defendant to
25 do an act. The Court ruled to the extent that *Elliott*

1 and *Olevik* - they ruled to extent *Olevik* and *Elliott*
2 because, quote, *Bradberry* would have been required to
3 perform the affirmative act of blowing into the Alco-
4 Sensor device for a sustained period of time. They
5 held that since he had a right to refuse to provide
6 incriminating evidence by performing an affirmative
7 act, the admission to his refusal, of his refusal, have
8 violated his rights, but this analysis ignores
9 completely whether or not the act is compelled.

10 THE COURT: How would an Intoxylizer be compelled?

11 MS. MURPHY: I, an Intoxylizer would be compelled
12 in the sense that he would be required to produce deep
13 lung air in order to gather the information.

14 THE COURT: Unless he decided not to.

15 MS. MURPHY: Correct.

16 THE COURT: I mean so it's voluntary in if they do
17 it, they're doing it voluntarily?

18 MS. MURPHY: Uh-huh (affirmatively). Unlike, I
19 guess the difference between that and a blood test is
20 that a blood test, you can get that information by use
21 of a warrant whether the defendant wants to provide it
22 or not.

23 THE COURT: Right. But I'm struggling with how is
24 that different than a field sobriety test or a PBT
25 test? I mean --

1 MS. MURPHY: Because the Intoxylizer test is self,
2 is a post-arrest test. That's something --

3 THE COURT: But it's still not compelled at that
4 point.

5 MS. MURPHY: *Olevik* and *Elliott* has found that it
6 is compelled and they have determined that, and they
7 have limited the ruling to that particular test.

8 One of the cases that *Bradberry* addresses and that
9 Mr. Sessions actually mentioned is *Aldridge v. State*
10 from 1964 and that is involving a pre-arrest roadside
11 compelled act, but in that case it was, it's driving
12 the truck onto the scales. You can't be forced to
13 drive a truck onto the scales for purposes of weighing
14 to determine if you're over the limit. But, the focus
15 of that case, if you actually read that case, is that
16 the actual statute itself made the refusal to drive
17 onto the scales a crime, so the entire evidence the
18 State had was the refusal to do the act. That's
19 different here. It's part of the totality of the
20 circumstances rather than the only piece of evidence
21 the State has to offer.

22 That statute also has since been changed to remove
23 the punishment of criminal charges for refusing to
24 drive onto the scales but it still allows for the
25 suspension of a CDL for refusing, and as far as I know,

1 I believe refusing to drive onto that scale at this
2 point would be able to be used as a part of the
3 evidence to show that the defendant was not complying
4 with the requirements of their CDL.

5 There are also other stipulations which refusal to
6 comply with law enforcement orders are punishable by
7 criminal prosecution. Obstruction and fleeing and
8 alluding are things that we deal with every day. Even
9 the act of forced compliance alone is not per se
10 compelled self-incrimination. Here's there's no force
11 whatsoever; they're totally voluntary and the Defendant
12 was advised of this.

13 *Bradberry* also acknowledges that it does not
14 extend to refusal, to all refusals of consent. It's
15 like *Dunbar v. State* in which the withdrawal of consent
16 for the search of a home was not within the protection
17 of the right against self-incrimination under Georgia's
18 Constitution.

19 If you do find that suppression, or that it is a
20 compelled act, the State also would offer an
21 alternative theory and that is that the use of the
22 refusal in a criminal trial for purposes other than
23 inferring guilt has been permitted in limited
24 circumstances. *State v. Orr*, 305 Ga. 729, in 2019
25 lists a variety of ways in which a defendant's pre-

1 arrest silence or failure to come forward might be
2 permissible but recognizes that it requires a case by
3 case analysis rather than a bright line rule which
4 overrules *Mallory v. State*, which I believe Mr.
5 Sessions referred to.

6 Case law in other Circuits also has dealt with
7 where it has been admitted whether its admission was
8 harmless, and the focus there tends to be on whether or
9 not the inference was brought in, or the reference was
10 brought in by the defendant, or by the prosecution,
11 whether the prosecution focused on or highlighted the
12 reference, whether the comment did not strike at the
13 jugular of the defendant's defense and where there was
14 no further mention of the silence and there was strong
15 evidence of the defendant's guilt. The State is not
16 arguing to infer guilt on the refusal alone nor is the
17 State attempting to use the Defendant's for, the
18 Defendant's statement, or refusal, for purposes of
19 impeachment. The State, instead, offers the evidence
20 as a part of the circumstantial evidence in determining
21 whether the totality of the circumstances shows the
22 Defendant was a less safe driver.

23 And, finally, the Defendant's refusal to submit to
24 standardized field sobriety tests in this case is
25 highly relevant. It's very difficult to extract the

1 Defendant's refusal to the tests in this case and still
2 have a complete picture of the investigation.

3 Exclusion of any mention of the Defendant's refusal
4 could lead to an inference by the jury that the officer
5 did not do a thorough investigation and that he might,
6 and that might be held against the State's case.

7 Additionally, Trooper Staff testified that he
8 relied in part on the two clues he observed prior to
9 the Defendant stopping the test, so excluding any
10 mention of the refusal would by force exclude other
11 relevant and legally obtained evidence. I would refer
12 to *Wessels v. State* as well that found that the absence
13 of tests without any explanation of why it is absent
14 could lead to a negative inference by the jury against
15 the State.

16 And, then, on to the refusal of, the exclusion of
17 the refusal of the blood test, I think Mr. Sessions
18 wrongly characterizes the law on this as unsettled. I
19 think it's very much settled. The *State v. Johnson* and
20 *Hinson v. State* are 2020 cases that both very clearly
21 hold that the refusal to consent to a blood test does
22 not implicate the right against self-incrimination and
23 that *Olevik* and *Elliott* are not extended to anything
24 beyond blood, I mean beyond breath. Sorry.

25 Other Georgia case law also allows for jury

1 instructions regarding inferences from refusals of
2 blood tests: *Bravo v. State*, 249 Ga. App. 433. And the
3 case law is also clear to state that the refusal alone
4 is not sufficient to prove the elements of the crime.
5 That's in *Brinson v. State*. But here, as stated
6 earlier, the State would introduce other evidence that
7 would in combination tend to show that the Defendant
8 was less safe to drive.

9 THE COURT: Okay. And do you want time to file a
10 written submission?

11 MS. MURPHY: Yeah. It may just be a list of
12 cases, but just a week or so so I can get the case list
13 together for you.

14 THE COURT: Two weeks, is that enough?

15 MS. MURPHY: Uh-huh (affirmatively).

16 THE COURT: Okay, Mr. Whitman, I'm going to take
17 this under advisement and make a decision. I'm going
18 to give the State a couple of weeks to respond because
19 what Mr. Sessions filed I think it was one thing
20 yesterday and one thing today.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: So I'll give them a chance to respond
23 to that. And then I'll get a decision out to you.

24 MR. SESSIONS: Thank you, sir.

25 THE DEFENDANT: Thank you, sir.

CERTIFICATE OF REPORTER

GEORGIA, BIBB COUNTY:

I, Patricia C. Ussery, Certified Court Reporter, State of Georgia, Certificate No. B-1238, certify that acting in such capacity I have transcribed the aforecaptioned matter from audio supplied to me by the Court, and the foregoing pages constitute a true, correct and complete transcript of the proceedings in the matter therein stated, prepared to the best of my skill and ability from that audio.

I FURTHER CERTIFY that I am not counsel for, nor related to, any of the parties; nor am I interested in the event or outcome thereof.

WITNESS my hand and official seal, this 18th day of August, 2021.

