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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

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(*REPORTER’S NOTE: Exhibits were retained by the Court.*)

1 **PROCEEDINGS**

2 (Court Convened on February 24, 2021.)

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

5 MR. SESSIONS: Yes, sir.

6 THE COURT: And it's Accusation 430948?

7 MR. SESSIONS: Yes, sir.

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

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

20 And, Judge, for the purpose of the hearing, I will
21 stipulate that the proper implied consent notice was
22 read to Mr. Whitman. It was read timely. Any other
23 foundational issues as to the appropriateness of
24 implied consent, I'm not, I'm waiving those for the
25 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.

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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.

Patricia C. Ussery
Patricia C. Ussery, CCR REPORTER 1238
