IN THE COURT OF APPEALS FOR THE STATE OF GEORGIA

GEORGIA COURT OF APPEALS DOCKET NO.: A22A0489

THE STATE OF GEORGIA,

APPELLANT,

VS.

MARTY DUSTIN WHITMAN,

APPELLEE.

BRIEF OF APPELLANT

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STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. MARTY DUSTIN WHITMAN, Appellee.	: : : : : : :	DOCKET NUMBER: A22A0489

BRIEF OF APPELLANT

Comes now, THE STATE OF GEORGIA, and submits its BRIEF OF APPELLANT showing that the trial court's order suppressing the refusal to perform Standardized Field Sobriety Tests (SFSTs) should be reversed because it improperly extended State v. Bradberry, 357 Ga. App. 60 (2020) to include the refusal of pre-arrest field sobriety tests, directly contradicting Keenan v. State, 263 Ga. 569 (1993).

PART ONE

APPELLANT'S STATEMENT OF FACTS

Procedural History

Appellee, MARTY DUSTIN WHITMAN, has been accused on Accusation Number 430948 of Driving Under the Influence (Less Safe) (Alcohol), Failure to Maintain Lane, and Driving While License Suspended. (R. 8). On December 30, 2020, Appellee, through his counsel, attempted to file several motions with the trial court. (R. 11-27). These motions were not docketed until January 6, 2021, due to holiday closures. A hearing was scheduled for February 24, 2021, to address these

motions. On January 15, 2020, the trial court directed Appellee to file supplements to his motions particularizing the issues being challenged. Appellee failed to follow the order of the court and did not file a particularized motion. Instead, Appellee filed supplemental briefs on February 23rd, 2021, and February 24th, 2021. These briefs were titled "Brief in Support of Defendant's Motion to Exclude Evidence of Refusal to Submit to Field Sobriety Tests" and "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." (R. 28-39). These briefs raised new issues, and the trial court proceeded with the hearing on those issues on February 24, 2021. Due to the short notice given by Appellee of the actual issues to be challenged, the trial court gave the State two weeks to prepare and submit a brief supporting its position on the newly raised issues. The State filed its responsive brief on March 10, 2021. (R. 40-49).

On March 17, 2021, the trial court entered its order granting Appellee's motions in part and denying them in part. (R. 52-57). The trial court denied all of Appellee's motions except the "Motion to Exclude Evidence of Refusal to Submit to Field Sobriety Tests." (R. 56 & 57). On April 15, 2021, the State timely filed its Notice of Appeal in the State Court of Bibb County. (R. 1). On April 16, 2021, Appellee filed a Motion to Dismiss Appeal and a Demand for Speedy Trial. (R. 60-64). The State filed its response to the Motion to Dismiss on May 7, 2021. (R. 65-

68). On July 8, 2021, the trial court issued its order denying the Motion to Dismiss. (R. 69). On October 20, 2021, this case was docketed by this Court.

Factual History

On or about September 2, 2020, Georgia State Patrol Trooper Joshua Staff was patrolling the area of Wesleyan Drive in Bibb County, Georgia. (R. 77). Around 2:20 a.m., Trooper Staff observed Appellee, who was operating a red pickup truck, crossing the white fog line with the passenger side tires of his vehicle. (R. 77). It was at that time that Trooper Staff activated his blue lights and initiated a traffic stop. Appellee did not immediately stop. (R. 78). Instead of immediately stopping, Appellee made a left turn onto Bowman Road and continued to Chadwick Trail (roughly a quarter of a mile) before finally bringing the vehicle to a stop. (R. 78). Upon making contact with Appellee, Trooper Staff asked him to produce his driver's license. Appellee advised that he did not have one because his license was suspended. (R. 78). Trooper Staff then collected Appellee's personal identifying information to confirm Appellee's identity. During this interaction, Trooper Staff observed that Defendant's speech seemed to be somewhat slurred, that he had blood shot and watery eyes, and the odor of an alcoholic beverage coming from his person. Id.

As the interaction continued, Trooper Staff asked Appellee if he had been drinking. (R. 78). Appellee responded that he was coming from Billy's Clubhouse,

which is a bar, but denied consuming any alcohol. Id. Trooper Staff then returned to his patrol vehicle to run Appellee's information through the Georgia Crime Information Center database (GCIC). (R. 51 video at 2:58).[1] After speaking with Appellee for a brief time, Trooper Staff determined, based on his training and experience, that there was reason to believe that Appellee was an impaired driver and asked him step out of his vehicle. (R. 79).

Once Appellee was out of the vehicle, Trooper Staff continued to smell the odor of an alcoholic beverage coming from his person. (R. 79). Trooper Staff then began medically qualifying Appellee to determine if he was a candidate for performing Standardized Field Sobriety Testing (SFSTs). (R. 81). After medically clearing Appellee, Trooper Staff placed him in position for the Horizontal Gaze Nystagmus (HGN) test and began the test. (R. 81). Trooper Staff completed the two passes for equal tracking and equal pupil size, as well as the two passes for lack of smooth pursuit. Id. Following the passes for lack of smooth pursuit, Appellee asked if the tests were required. Trooper Staff responded that they were voluntary. (R. 81-82). Appellee then indicated that he did not want to continue. Id. Trooper Staffed noted that, prior to terminating the test, he had observed two clues of impairment, one in each eye for lack of smooth pursuit. (R. 82).

[1] The video of this encounter is found in the record. It is scanned as page 51. The video is 47 minutes and 7 seconds long. However, only the relevant portion was played at the hearing. The video was stopped at roughly the 14:42 time stamp. The video has not been altered and shows the entire interaction as it that occurred that night.

Due to Appellee's statement that he did not want to continue, Trooper Staff did not request any further SFSTs because it was his understanding that Appellee did not want to do the remaining tests. (R. 95). Trooper Staff then retrieved his Portable Breath Test (PBT) machine and requested a breath sample. Appellee agreed and provided a sufficient breath sample for the machine. (R. 83). The PBT returned a positive result for the presence of alcohol. Id. Based on his training and experience, the less safe driving act and his observations of Appellee, Trooper Staff determined Appellee was a less safe driver due to the effects of alcohol. (R. 83-84). He then placed Appellee under arrest for Driving Under the Influence of Alcohol. After placing Defendant in handcuffs, Trooper Staff read the Georgia Implied Consent Notice. (R. 100-102). Defendant refused the requested test of his blood. Id.

PART TWO

ENUMERATION OF ERROR

The trial court erred in granting Appellee's Motion to Exclude Evidence of Refusal to Submit to Field Sobriety Tests.

STATEMENT OF JURISDICTION

This Court, rather than the Supreme Court of Georgia, has jurisdiction over this appeal because it is a review of an interlocutory order in a misdemeanor criminal case that does not involve an issue where exclusive jurisdiction lies in the

Supreme Court of Georgia. See Ga. CONST. Art. 6, § 6, ¶ II; O.C.G.A. § 15-3-3.1. The question involves the application of a constitutional provision rather than the construction or constitutionality of any law or provision. Id. A Notice of Appeal was timely filed on April 15, 2021

STANDARD OF REVIEW

On review of a ruling on a motion to suppress, appellate courts review the trial court's factual findings for clear error and its legal conclusions de novo. Kennebrew v. State, 304 Ga. 406, 409 (2018); State v. Williams, 337 Ga. App. 791, 792 (2016). While an appellate court typically is bound by the trial court's findings of fact unless they are clearly erroneous, they must construe the evidentiary record in the light most favorable to the judgement of the trial court, and consideration of the disputed facts is limited to those expressly found by the trial court. Id. See also Hughes v. State, 296 Ga. 744, 746 (2015). However, where the material facts are not in dispute and can be definitively ascertained exclusively by uncontradicted, credible evidence, the court may review the facts de novo. Id. at 746, n. 5; see also Vanssant v. State, 264 Ga. 319, 320 (1994) and Lyons v. State, 244 Ga. App. 658, 659 (2000).

SUMMARY OF ARGUMENTS

For the following reasons, the State submits that the trial court erred when it granted Appellee's motion to suppress based upon an unsupported application of

State v. Bradberry, 357 Ga. App. 60 (2020). First, Standardized Field Sobriety Tests are not analogous with providing a breath sample for a portable breath test. Therefore, any extension of Bradberry beyond its application to Portable Breath Test refusals is unfounded. Furthermore, Standardized Field Sobriety Tests do not violate the right against compelled self-incrimination provided in the United States and Georgia Constitutions as well as O.C.G.A. § 24-5-506. The State also shows that any potential invasion into the protected interests of individuals caused by field sobriety exercises is minimal and is supported by overwhelming state interests in protecting the safety of the public. Therefore, the proper analysis for whether a refusal should be admitted is a rule 403 balancing test to determine if the probative value of the refusal is substantially outweighed by any prejudice posed to the defendant. O.C.G.A. § 24-4-403. This test should be done on a case-by-case basis performed by the trial court.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

1. The trial court's improper application of State v. Bradberry to exclude the refusal of Standardized Field Sobriety Tests is unsupported by any relevant case law and contradicts binding precedent found in Keenan v. State.

Appellee argued that his refusal to submit to Standardized Field Sobriety Tests (SFSTs) should be suppressed because the use of such a refusal violates his

rights under the Fifth Amendment to the United States Constitution and his right against compelled self-incrimination under the Georgia Constitution. Appellee based this assertion on the holdings in State v. Bradberry, 357 Ga. App. 60 (2020). Appellee asserted that, because Bradberry extended the holdings of Olevik v. State, 302 Ga. 288 (2017) and Elliott v. State, 305 Ga. 179 (2019) to the refusal to submit to a portable breath test (PBT), this should also extend to a refusal of field sobriety tests.

The trial court agreed and issued an order applying Bradberry to field sobriety tests with little to no analysis. The trial court simply stated that "Like a breath test, whether post-arrest or 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." (R. 56). Based on this finding, the court excluded the refusal. This ruling is not supported by any relevant caselaw and is directly contradictory to binding precedent holding that field sobriety tests do not implicate or violate the right against self-incrimination under the federal or Georgia constitutions. Keenan v. State, 263 Ga. 569 (1993).

The holding in Bradberry is based solely on the extension of Olevik and Elliott to the Portable Breath Test, based on their analysis of the nature of providing a breath sample only. It contains no independent analysis as to the basis for extending the holdings regarding a post-arrest breath test compared to a pre-

arrest screening tool. Rather, it merely regurgitates parts of the analysis of Olevik and Elliott and then blanketly applies the holdings to PBT refusals. Bradberry acknowledges that the two tests are not the same; but nevertheless, extended the holdings to refusals of a PBT based only on the fact that the action required for the test, expelling deep lung air, is the same for both machines. There is no analysis regarding the other differences between pre-arrest and post-arrest requests by a law enforcement officer. Bradberry also does not contain any mention or analysis regarding its applicability to SFSTs or any other type of pre-arrest investigatory tool. In fact, the only mention of its applicability in other contexts is a citation to Dunbar v. State, 309 Ga. 252 (2020). In Dunbar the Supreme Court clarified that the holding in Elliott did not extend to the refusal to consent to *any* search, but rather was limited to breath tests only. Dunbar at 257. (emphasis in original).

The current case is easily distinguishable from Bradberry, Olevik, and Elliott in that it does not involve a refusal to provide a breath sample of any kind. In fact, in the present case, Appellee agreed to provide a voluntary breath sample for the PBT. Instead, this case involves Appellee's refusal to complete field sobriety exercises, which the State contends, are not equivalent to a breath sample (whether for a PBT or for a post-arrest Intoxilyzer test). A breath test, like a blood test or urine test, involves the collection of a sample of a naturally excreted substance from the subject. The difference between the breath sample and the blood or urine

samples is that the breath sample cannot be gathered without the subject's cooperation because of the way the machines collect the sample, using deep lung air. A blood or urine sample can be collected without the assistance or participation of the subject; therefore, they do not violate the right against self-incrimination. Thus, blood and urine samples can be collected pursuant to a warrant, but a breath sample cannot. This is because the collection of a breath sample requires the subject to perform an act which produces testable evidence that may incriminate him. If a subject was compelled by a warrant, or otherwise, to provide such evidence, it would be a violation of the right against self-incrimination under the Georgia Constitution. Olevik v. State, 302 Ga. 228, 243-44 (2017). Therefore, an individual has a right under the Georgia Constitution to refuse the breath test and such a refusal could not be used against him.

In a case decided just four months before Olevik, however, the Supreme Court of Georgia distinguished actions which obtain tangible evidence from those that merely obtain information of personal or physical characteristics of the individual. Mitchell v. State, 301 Ga. 563, 569-70 (2017). That analysis was in the context of Fourth Amendment concerns regarding field sobriety tests as a search, but the analysis of the differences is still relevant here. In Mitchell, the Supreme Court held that, while field sobriety exercises may involve specific and unusual maneuvers not normally performed in any other context, they are simply intended

to more quickly reveal physical characteristics of the subject that could be passively observed over a longer period of time. Id. at 571. During the performance of SFSTs, officers are trained to look for specific characteristics or behaviors such as unsteady gait, lack of balance or coordination, impaired speech, lack of memory, or inability to divide their attention. Id. These characteristics are things that a normal individual could observe during a longer casual interaction. Id. They do not require any specific police training to observe, and most adults have, at some point, realized that an individual was intoxicated after interacting with them for a period of time based on observable behaviors the individual exhibited. Unlike a breath sample, most of the information gleaned from a subject's participation in field sobriety exercises could still be obtained without the individual performing an affirmative act if the officer extended the detention long enough to observe them. The officer is simply asking an individual to perform standardized maneuvers during the investigatory portion of a citizen encounter that provide reproducible results to minimize the length of a detention, enabling them to observe things that anyone could observe after spending time with an impaired individual.

The exception to this would be the Horizontal Gaze Nystagmus test. The presence of HGN in an individual cannot be passively observed without the subject's participation. However, the observations made by the officers during this

portion of the SFST battery are limited to notations of physical characteristics of the subject. During that exercise, officers are trained to observe whether the subject's pupils are of equal size and track a stimulus equally; whether the subject's eyes move smoothly while following a stimulus; whether the involuntary jerking of the eyes is distinctly present and sustained when looking at a stimulus that is held in a position where the eyes are at the outer edge of the eye opening for a minimum of 4 seconds; and whether the point when the involuntary jerking begins to be observable is prior to the eyes reaching a position where they are looking at a stimulus that is held at a 45 degree angle from their face. Additionally, during this exercise, officers also note whether they observe other physical characteristics of the eye such as dilated pupils, the pupils' reactivity to light, redness, watery eyes, eyelid tremors, difficulty keeping the eyes open, etc. These things could typically be passively observed during a casual interaction with the individual. There is no testimonial or physical evidence obtained during this exercise, only observations of physical characteristics.

Thus, the comparison of field sobriety exercises to breath tests is not a comparison of like activities. Therefore, extending a holding that has repeatedly and explicitly been limited to breath testing to include refusals of field sobriety exercises would not be supported by any existing caselaw. See State v. Johnson, 354 Ga. App. 447 (2020) and Hinton v. State, 355 Ga. App. 263 (2020).

Olevik, Elliott, and Bradberry all cite several cases illustrating when the right against self-incrimination is not violated. Many of those cases hold that the right is not violated where a defendant is merely compelled to be present so that certain evidence can be procured from him. Olevik, 302 Ga. at 242. This includes collecting articles such as boots[2], shoes[3], blood-stained clothes[4], DNA samples from convicted felons[5], photographing the defendant's body[6], taking impressions of the defendant's teeth[7], taking blood from an unconscious defendant[8], or requiring a defendant to undergo surgery to recover a bullet from his body[9]. Id. Furthermore, it is not a violation even when the defendant was required to perform certain acts, such as stripping to the waist, so that his tattoos could be photographed. Id. citing Ingram v. State, 253 Ga. 622, 634 (1984). Many of the other examples cited in these cases are distinguishable from Appellee's case because the evidence that the defendants in those cases were forced to produce could have been collected lawfully via a search warrant. That is not the case with field sobriety tests because a warrant would make the act compelled.

[2] Franklin v. State, 69 Ga. 36, 43-44 (1882).
[3] Batton v. State, 260 Ga. 127, 130 (1990).
[4] Drake v. State, 75 Ga. 413, 414-415 (1885).
[5] Quarterman v. State, 282 Ga. 383, 386 (2007).
[6] Ingram v. State, 253 Ga. 622, 634 (1984).
[7] State v. Thornton, 253 Ga. 524, 525 (1984).
[8] Strong v. State, 231 Ga. 514, 519 (1973).
[9] Creamer v. State, 229 Ga. 511, 517-518 (1972).

Additionally, the holding in Bradberry is in direct conflict with the holdings in Keenan v. State, 263 Ga. 569 (1993). Keenan held that pre-arrest field sobriety tests do not violate an individual's right not to incriminate himself under the Fifth Amendment, the Georgia Constitution, or O.C.G.A. § 24-9-20[10], and the defendant's refusal to undergo such tests was admissible. Id. at 571. Turnquest v. State, 305 Ga. 758, 771 (2019), 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. The court distinguished Keenan from the case it was examining because Keenan dealt with the refusal of a breath test more so than the failure to give Miranda type warnings. Id. at 772. Therefore, Turnquest 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 in Turnquest was that no Miranda, or other similar warnings, are required to inform a defendant of his right to refuse, whether the request was made before or after arrest. Id. at 775. This holding implies that the right against self-incrimination is not triggered by field sobriety tests.

[10] The language of former O.C.G.A. § 24-9-20 is now found under O.C.G.A. § 24-5-506. The wording is nearly identical in both instances.

2. Pre-Arrest Standardized Field Sobriety Tests do not violate the right against compelled self-incrimination protected by the Fifth Amendment to the United States Constitution, Paragraph XVI of the Georgia Constitution, or in O.C.G.A. § 24-5-506.

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. Bradberry, 357 Ga. App. at 66. However, Bradberry does not analyze whether there is a difference in the compelled nature of a pre-arrest investigative tool and a post-arrest test. The Fifth Amendment, the Georgia Constitution and O.C.G.A. § 24-5-506 all include compulsion toward the accused as an element triggering the protections 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; "No person shall be compelled to give testimony tending in any manner to be self-incriminating." GA CONST Art. 1, § 1, ¶ XVI (16); and "No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself." O.C.G.A. § 24-5-506(a). (emphasis added). Therefore, whether the subject was compelled to do the incriminating act 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. Montgomery v. State, 174 Ga. App. 95, 95-96 (1985), held that Georgia law is more protective of the right against self-incrimination than its federal counterpart because the Georgia constitution and O.C.G.A. § 24-9-20 extend the protection to evidence that is testimonial or real. However, in Montgomery, the Supreme Court held that the defendant was not in custody in regard to the establishment of constitutional protections. Id. Nor was he compelled to perform the tests because there was no evidence of threat of criminal sanctions for failing to perform them. Id. Montgomery also recognized that the defendant was not physically forced to perform the tests. Id. 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"). (emphasis added). Montgomery and Bramlett make it clear that the protections against self-incrimination under Georgia law include more than mere statements. However, they also make clear that this protection is limited to instances when those statements or acts are compelled, involuntary, or procured against one's will.

Additionally, decades of both Federal and State precedent show that post-arrest interrogations 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) (holding that there is no violation of the right against self-incrimination under the Fifth Amendment, the Georgia Constitution or then O.C.G.A. § 24-9-20, where the defendant was not in custody at the time field sobriety tests were requested); Keenan v. State, 263 Ga. 569 (1993) (reiterating the holding of Lankford and further holding that then O.C.G.A. § 24-9-20 does not apply to field sobriety tests requested before arrest because the individual is not a person charged in a criminal proceeding). Instead, the analysis required is a case-by-case weighing of the totality of the circumstances surrounding the request for an individual's participation, statement, or consent. Indeed, it is important to remember that, should a defendant complete field sobriety exercises without demonstrating enough indica of impairment, then law enforcement officers will allow them to leave the encounter without arrest or further detention. Post-arrest, this is impossible.

Appellee's underlying motion (R. 31), and the Court in Bradberry, cite Aldrich v. State, 220 Ga. 132 (1964) in support of the proposition 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 scales to be weighed for purposes of determining compliance with weight restrictions. The holding was that the statute making it a crime for an accused to refuse to do an action violated the right against self-incrimination. Id. (emphasis added). Aldrich reached an obvious conclusion that the act on the side of the road was clearly compelled because failure to comply would result in criminal prosecution for the refusal itself. The holding does not include any reference to the use of his refusal as evidence.

The present case is distinguishable from Aldrich because there is no threat of prosecution for Appellee's refusal to do the SFSTs. Instead, the State is seeking to use the refusal as one part of the evidence in a prosecution for DUI. Additionally, a subsequent case held that the then-applicable version of the statute questioned in Aldrich, which no longer made refusal a crime, did not violate the right against self-incrimination. Dennis v. State, 226 Ga. 341, 342 (1970). Dennis found that the operator was not compelled to drive the vehicle onto the scales because there was no penalty for refusing. Id. Instead, Dennis held that a refusal was merely a breach

of a condition of the driver's right to operate a vehicle and therefore did not violate the right against self-incrimination. Id.

To date, there has been no case that holds that a refusal to submit to SFSTs is inadmissible. Nor has any case held that SFSTs violate the right against compelled self-incrimination. Furthermore, the holdings in Olevik and Elliott have been limited in their application to breath tests only. Elliott v. State, 305 Ga. 179, 224 (2019). Subsequent decisions have also declined to extend the holdings to apply to blood tests. State v. Johnson, 354 Ga. App. 447 (2020); see also Hinton v. State, 355 Ga. App. 263 (2020). Therefore, caselaw pertaining to SFSTs and other evidence that pre-dates these decisions has not been overruled and is still binding precedent.

3. The interests of public safety outweigh an accused's interest in suppressing his refusal of the field sobriety testing, which is the least invasive means of obtaining the evidence necessary to prevent and prove impaired driving.

Even the most sacred protections of the Federal and State Constitutions are not absolute. When there exists a necessary and compelling interest of the State, particularly in protecting the general populace, a minimal intrusion into an individual citizen's rights can be justified in the interest of the public good. The more protected the right is, the higher the burden on the state to show that its interest is compelling enough to overwhelm the individual rights of citizens.

Perhaps the most common example of when a closely guarded right can be overcome is the right to be free from search and seizure absent a warrant or an applicable exception. This has long been considered one of the most fundamental rights of United States citizens. However, it has frequently been the subject of judicial holdings that find the state's interest outweighs the interests of individuals. This includes holdings in cases like Terry v. Ohio, 392 U.S. 1 (1968), which allows for brief detentions of individuals in order for law enforcement to investigate possible crimes.

Whenever a constitutional protection is invaded, a balancing of interests must be performed. There are always limitations as to how deeply the state can penetrate an individual's rights. If this were not the case, then the constitutional protections our country was founded on would be meaningless. Thus, the State must minimize its intrusion into protected interests of individuals, no matter how compelling its interest may be.

Impaired driving poses a significant risk to the health and safety of the general public. The impact of impaired driving isn't limited to the individual accused of this crime, especially when the impaired driving results in a collision. When the collision involves an innocent third party, the results are often catastrophic. The after-effects of a DUI crash often have a ripple effect that impacts the entire circle of people who love or rely on those involved. Even when

the only person injured is the impaired driver, the injuries he or she sustains have the potential to significantly affect his or her family and friends as well. Therefore, the State has a "paramount interest" in the protection of the safety of its public roads and highways. Birchfield v. North Dakota, ___ U.S. ___; 136 S. Ct. 2160, 2178 (2016) citing Mackey v. Montrym, 443 U.S. 1, 17-18 (1979).

Both Birchfield and Mackey consider the dangers of impaired driving and the number of fatalities and injuries that impaired drivers are responsible for each year. Mackey in particular acknowledges that the state has a compelling interest not just in prosecuting the driver who has already gotten behind the wheel while impaired, but also in deterring individuals from doing so before it occurs. Mackey 443 U.S. at 18.

To prove the facts necessary for a conviction for impaired driving, the state is required to show that the individual is impaired to the extent that they are less safe to drive, or that the concentration of alcohol in the driver's blood, breath, urine, or other bodily substance, is greater than 0.08. To show that a driver is less safe, the law enforcement officer must collect, and the prosecutor must present, sufficient evidence to prove beyond a reasonable doubt that the driver was in fact impaired. This is shown through the observations the officer made about the individual prior to their arrest. In fact, the vast majority of evidence (and in some cases, the only evidence) collected in DUI cases is obtained prior to the subject's

arrest. This information is gathered by simple observations of physical characteristics and behaviors that are common among impaired individuals. This information can be provided by the officer, and in some cases, where there are other individuals at the scene, through the testimony of eyewitnesses. When it is the officer alone, the process of collecting this information is aided by the use of pre-arrest field sobriety exercises.

Field sobriety exercises have evolved from tests like touching one's finger to their nose and reciting the alphabet, to a standardized set of evaluations that are commonly used nationwide. These standardized evaluations have been the subject of extensive scientific research and have been shown to be reliable because they are able to provide reproducible results when they are administered appropriately. The testing procedures, and the training officers receive in their administration are overseen by the National Highway Traffic Safety Administration (NHTSA). The officers are not arbitrarily asking subjects to perform unusual maneuvers. NHTSA provides guidelines that officers must substantially adhere to for the tests to produce the most reliable results. When an officer fails to adhere to the guidelines, the validity of the results frequently is rebuttable by the defense.

The battery of standardized field sobriety tests includes the Horizontal Gaze Nystagmus test, the Walk and Turn test, and the One Leg Stand test. The HGN test requires that the subject follow a stimulus with their eyes and their eyes only, so

that officers can observe features present in their eyes. The Walk and Turn test involves having the subject follow a set of specific instructions in order to walk a straight line. Finally, the One Leg Stand test requires the individual to balance on the leg of their choosing for 30 seconds. The last two tests are designed to show the individual's ability to balance, follow instructions, and to divide their attention between several tasks. This is closely related to the ability to drive a car because the actions required to safely operate a vehicle also require the individual to divide their attention between multiple tasks simultaneously.

Completion of the entire battery of tests typically takes only a few minutes on the side of the road and the subject's participation in them is voluntary. The tests are designed to be non-invasive of a driver's privacy, and they are easily performed by most adults. There is no physical contact made by the officer with the subject during the test administration unless it becomes necessary for the safety of the officer or the subject. Therefore, there is little to no risk of the officer forcing the individual to perform poorly on the tests due to his interference. If the subject refuses the tests, the officer must make an arrest decision based on the physical observations he can make by interacting with the individual. These characteristics are easily observed by the officer but are not as easy to see on a video of the interaction that would be played at trial. This is because there is no video equipment that can capture, with accuracy, all of the information the officer

can personally observe through using his senses (e.g., sight, sound, and smell). The sobriety exercises on the other hand, provide a means for a fact finder to also observe most of the physical characteristics of the subject for themselves (of course with the obvious exception of smells, which cannot be captured in a reproducible way) in order to determine whether the person is impaired to the point of being less safe to drive.

Field sobriety tests are the most minimally invasive means a law enforcement officer can use to gather the necessary evidence when investigating a potential DUI. Additionally, many subjects are released without arrest after completing field sobriety exercises because they are determined not to be impaired. The alternative ways of determining or proving impairment involve chemical tests of the subject's blood, breath or urine. As previously discussed, the State cannot compel a subject to provide a breath sample that could be chemically tested. So, if the individual refuses to provide a breath sample, the other way the State can reliably procure the necessary evidence is through a blood or urine test. Blood and urine tests can be compelled when the officer can show probable cause to believe the individual is impaired and secures a search warrant for a blood or urine sample. The most reliable of these options is a blood test, so it is the preferred method, whether collected by consent or by warrant.

Collecting a blood sample pursuant to a warrant involves a forcible blood draw, which is a more extreme invasion of the person's body than asking them to perform simple roadside tests. In a case where the defendant has refused all of the field sobriety tests, the portable breath test, and the requested State test, the refusal itself is one of the only pieces of evidence that can be used to show impairment. The refusal alone is not enough to support a conviction by itself. So, the State would be offering the refusal only as one piece of the circumstantial evidence that shows the person is impaired. Even with the refusal, proving the case beyond a reasonable doubt on such minimal evidence is far from guaranteed. But when faced with the proposition that even that is excluded, the State will have little choice but to resort to seeking a warrant for the far more invasive blood draw.

No one wants the default in DUI refusal cases to be a forcible blood draw. Such a significant invasion should be reserved for extreme situations. However, a holding that refusals of any type must be excluded in every case would tie the hands of the State and the result will be an even greater invasion of the individual's privacy not less.

4. The proper inquiry for the admissibility of a subject's refusal to submit to Standardized Field Sobriety Tests is a balancing test under O.C.G.A. § 24-4-403 to determine if the probative value of the refusal is substantially outweighed by any prejudicial effects.

In cases where no constitutional violation is found, and no other provision of Georgia or federal law requires exclusion, the admissibility of evidence at trial is determined by the State evidence code. State v. Orr, 305 Ga. 729, 736-37 (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). Therefore, if this Court finds that field sobriety tests, and the refusal to submit to them, do not implicate or violate the right against self-incrimination, the appropriate test for admissibility is found in the only provision of the evidence code of Georgia that addresses excluding evidence on the basis of the prejudice it may cause. Orr, 305 Ga. at 736-37, citing O.C.G.A. § 24-4-403. Rule 403 grants the trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury, or by considerations related to delay, waste of time or needless presentation of cumulative evidence. Rule 403 requires a case-specific balancing test rather than a bright-line rule of exclusion or admissibility, which Orr held was not within the purview of the judiciary. Id. at 736. Orr went on to reiterate prior holdings that exclusion under rule 403 is "an extraordinary remedy" that should be used sparingly to exclude only the type of evidence that is so lacking in probative force, that the only purpose for it being introduced is for the prejudice it creates. Id. at 737-38. Orr also acknowledged the decision in Elliott as being an example of

where a constitutional protection bars admissibility in *post*-arrest contexts. 305 Ga. at 733, n. 2. (emphasis in original).

The issue of refusals to perform field sobriety tests is not a new question. Multiple cases have held that a refusal to perform field sobriety tests 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 Crusselle v. State, 303 Ga. App. 879 (2010) (holding that a jury charge based on the holding in Massa was not erroneous but specified that the inference drawn from a refusal is permissive not mandatory); Hoffman v. State, 275 Ga. App. 356 (2005) (concluding that refusal to submit to field sobriety tests, along with other evidence, was sufficient to support a conviction); Jones v. State, 273 Ga. App. 192 (2005) (stating that "methods of proof [to show impairment] may include evidence of … refusal to take field sobriety tests.") (Citations omitted); and Smith v. State, 345 Ga. App. 43 (2018) (post Olevik reaffirmation of Massa).

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). In Wessels, the court recognized that the procedures involved in a typical DUI investigation are well known to the public. As such, a jury might infer from the absence of any mention of a test, that the defendant

complied with the test, and it did not show impairment. Id. at 247. Therefore, the Wessels court found that a defendant's refusal was both relevant and admissible. Id. Although, the analysis in Wessels specifically involved a refusal to submit to a blood-test rather than field sobriety tests, the reasoning is still applicable because the same inference could also be made in the absence of any mention of field sobriety exercises. A jury might also infer that the officer's credibility is questionable due to his failure to request any type of test that would help determine a subject's level of intoxication and/or impairment.

Here, the State seeks to offer the partially completed Horizontal Gaze Nystagmus test and the two clues observed during this evaluation prior to Appellee discontinuing the testing as one component of the evidence of Appellee's impairment. Trooper Staff testified that the two clues he observed prior to discontinuing the test played a role in the totality of the circumstances that led him to find Appellee was under the influence of alcohol to the extent that it was less safe for him to drive. (R. 82). The trial court also acknowledged those two clues as a part of its consideration of whether probable cause for arrest existed. (R. 54).

Appellee has not argued that the portion of the testing that was completed prior to Appellee discontinuing the test was not completed in substantial compliance with the officer's training. Therefore, by excluding any mention of Appellee's election not to continue with the test, the trial court also excluded

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. Lacking any explanation for why there were no tests requested, the jury would likely hold this against the State, weighing in favor of admissibility.

The State is not seeking to offer Appellee's refusal to submit to SFSTs as the only evidence of impairment. That would be insufficient. see Brinson v. State, 232 Ga. App. 706 (1998). Rather, the State seeks to present Appellee's refusal as one part of the totality-of-the-circumstances that show Appellee was a less safe driver due to the effects of alcohol. This proposition is supported by the holdings of Hoffman v. State, 275 Ga. App. 356 (2005) and Massa v. State, 287 Ga. App. 494 (2007). Therefore, while offering the accused's refusal of the field sobriety tests would clearly present some degree of prejudice, the probative value of the evidence sought to be admitted is not substantially outweighed by any prejudice.

CONCLUSION

The application of Bradberry v. State to a refusal of pre-arrest field sobriety tests is unsupported by any existing caselaw and directly conflicts with controlling precedent. Furthermore, the request for, performance of, or refusal to perform field sobriety tests does not violate any protection provided by the Fifth Amendment,

the Georgia Constitution, or O.C.G.A. § 24-5-506. The need to employ the minimally invasive procedures involved in the battery of standardized field sobriety tests is also supported by the State's "paramount interest" in protecting the safety of the public by ensuring the safety of its roadways. Therefore, any bright-line exclusionary rule enacted by the court would be inappropriate. Instead, the admissibility of evidence of a defendant's refusal should be made on a case-by-case basis rooted in the balancing test found in O.C.G.A. § 24-4-403.

WHEREFORE, Appellant asks this court to reverse the decision of the trial court to exclude Appellee's refusal of the field sobriety tests.

Respectfully submitted this the 19th day of November 2021.

This submission does not exceed the word count limit imposed by Rule 24.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. MARTY DUSTIN WHITMAN, Appellee.	: : : : : : :	DOCKET NUMBER: A22A0489

CERTIFICATE OF SERVICE

Comes now, Kristen L. Murphy, and hereby certify that I have served a copy of State's Brief of Appellant by placing a true and correct copy of the same by email and in the United States mail with adequate postage thereon addressed to:

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This the 19th day of November, 2021.

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