

D . B E N J A M I N S E S S I O N S
SESSIONS & FLEISCHMAN, LLC
ATTORNEYS AT LAW
3155 ROSWELL ROAD, SUITE 220 • ATLANTA, GEORGIA 30305
TELEPHONE: (470) 225-7710
FACSIMILE: (678) 348-7165

SENT VIA E-MAIL TO randy.rich@gwinnettcountry.com and
REGULAR U.S. MAIL

June 4, 2012

The Honorable Randy Rich
Judge, Gwinnett County State Court
75 Langley Drive
Lawrenceville, Georgia 30046

Re: State of Georgia v. _____
 Case No. _____

Dear Judge Rich:

Thank you for allowing me to submit a letter brief regarding the motions hearing in the above-referenced case which was held on May 22, 2012. I apologize for the delay in getting this completed. I failed to complete it prior to vacation last week.

Prior to the hearing, the issues for consideration by the Court were limited to probable cause to arrest the Defendant for DUI, the admissibility of several post-arrest statements made by the Defendant, and the admissibility of an alco-sensor tube found in the Defendant's vehicle. I will address the issues in that order.

Lack of Probable Cause to Arrest

The evidence before the Court in the consideration of whether there was probable cause to arrest the Defendant for DUI consists of the following:

1. Speeding and Improper Lane Change. The Defendant acknowledged that he was speeding and that he improperly drove across the gore into the far right lane to pass vehicles in the proper lanes of travel. The Defendant acknowledged that he purposefully drove in this manner. He also explained to the officer that he was having difficulty with the clutch in his vehicle.
2. Actual Stopping of the Vehicle. The Defendant reacted properly to the blue lights. He slowed his vehicle appropriately and signaled his exit

from the roadway. The Defendant drove his car completely out of the lane of travel and provided the officer with a safe space to approach his vehicle.

3. License Production. The officer indicated that he did not have a distinct recollection of how the Defendant produced his license, but the officer testified that if the Defendant had difficulty he would have noted it.
4. Odor of Alcohol. The officer detected a strong odor of alcohol. The officer also acknowledged that an odor of alcohol merely indicates consumption of alcohol, and does not provide a basis for determining the Defendant's blood-alcohol concentration or whether his ability to drive was impaired by alcohol.
5. The officer said that the Defendant had bloodshot and watery eyes. The officer also acknowledged that bloodshot and watery eyes merely indicate possible consumption of alcohol, and (beyond other possible causes of these conditions) do not provide a basis for determining the Defendant's blood-alcohol concentration or whether his ability to drive was impaired by alcohol.
6. The officer said that the Defendant had slurred speech. The video of this stop has been stipulated into evidence by the State and the Defendant, and the video simply does not support the officer's statement that the Defendant's speech was slurred.
7. Exit From the Vehicle. As shown on the video, the Defendant did not have any difficulty exiting his vehicle.
8. Standing and Balancing. The Defendant did not have any difficulty standing and balancing while speaking with the officer. The Defendant also did not have any difficulty leaning back into his car to retrieve his shirt.
9. "Refusal" to Submit to Field Sobriety Tests. The arresting officer testified that the Defendant refused to submit to field sobriety testing. The video shows that the Defendant never refused to submit to field sobriety testing. The video shows that the following interaction occurred with regard to whether the Defendant would submit to field sobriety tests:¹
 - At 16:16:40, in response to the officer's request that he submit to field sobriety tests, Mr. _____ stated, "My principle tells me no. The principle of the matter tells me no."
 - At 16:16:53, Mr. _____ asked, "What will you do if I say no?"
 - At 16:17:05, Officer Bauman stated, "I am not going to tell you what is going to happen or what's not going to happen because I don't want you to say I am coercing you, you know what I mean?"
 - At 16:17:40, Officer Bauman stated, "Turn around and put your hands behind your back." At that time, Mr. _____ stated, "I'm thinking. I'm thinking." Officer Bauman acknowledged that Mr.

¹ Please excuse any errors in my transcription of the video. I have tried to accurately track the audio.

_____ was still indecisive: "You don't have to think about it anymore."

- At 16:38:10, Mr. _____ stated, "You know I really would be happy, more than happy to take a roadside test at this point."
 - At 16:39:30, Mr. _____ stated again, "You know, before my car gets towed and everything. But I know that is out of the question. But I'll do it. There he goes."
10. The officer conceded that field sobriety tests provided the basis for determining a level of impairment, if any.

State v. Ellison, 271 Ga. App. 898, 611 S.E.2d 129 (2005), is instructive in making the determination as to whether probable cause existed to arrest the Defendant in this case. In Ellison, the trial court granted the motion to suppress for lack of probable cause when presented with the following facts:

- (1)the defendant was stopped at a roadblock;
- (2)the officer observed a "strong" odor of alcohol;
- (3)the defendant's eyes were red, bloodshot, and watery;
- (4)after initially denying drinking, the defendant later acknowledged having a drink earlier; and
- (5)the defendant refused field sobriety testing and stated that he had been arrested for DUI before and did not believe that he could perform the field sobriety tests.

The trial court in Ellison stated that the odor of alcohol and red, bloodshot, and watery eyes did not provide evidence that alcohol affected the defendant's ability to drive. 271 Ga. App. at 899-900. The trial court observed that there was no evidence that alcohol affected the defendant's balance, speech, or other motor skills. Although the defendant in Ellison gave what could be viewed as an implicit admission that he was refusing field sobriety tests because he did not believe that he could satisfactorily perform the tests based on his prior DUI, the trial court held that without evidence that the defendant ability to walk and balance was affected by alcohol, it was not reasonable to infer from the defendant's refusal of field sobriety tests that they would have shown impairment. Id. at 900.

If we set aside the positive facts which show a lack of impairment, the facts which the officer offered in support of probable cause to arrest the defendant are (1) the Defendant's driving, (2) the odor of alcohol, (3) bloodshot and watery eyes, (4) "slurred" speech, and (5) "refusal" of field sobriety testing.

The Defendant's driving, while a violation of the law and possibly reckless, appears by all accounts to have been intentional and, from the Defendant's own statements, a recurring pattern of driving. There is no

indication that the presence of alcohol caused the driving manifestations in this case.

By the officer's own admission, the odor of alcohol and bloodshot and watery eyes do not provide any meaningful contribution to the determination of whether the Defendant was incapable of driving safely as a result of alcohol. These factors are indicative of consumption of alcohol. However, "[m]ere presence of alcohol is not the issue." Ricks v. State, 255 Ga. App. 188, 190, 564 S.E.2d 793 (2002); State v. Ellison, 271 Ga. App. 898, 902, 611 S.E.2d 129 (2005).

The officer's statement that the Defendant's speech was "slurred" is simply not supported by the video. The Defendant's speech was clear, and the Defendant was considerate in his questions and responses prior to arrest. The Defendant's manner of speech simply did not indicate that he manner of speech or cognitive ability was impaired by alcohol.

The officer's testimony that the Defendant "refused" field sobriety testing is contradicted by the video. The video shows that the Defendant was simply considering whether he should submit to the testing when the officer placed the Defendant under arrest. As in Ellison, there is no evidence in this case that the Defendant's fine motor skills, ability to walk, or ability to balance were affected by alcohol. Accordingly, there is a lack of evidence to support an inference that field sobriety testing would have shown impairment.

The evidence provides a reasonable basis to conclude that alcohol was present in the Defendant at the time of his arrest. However, there is a lack of evidence to support a conclusion that the Defendant's ability to drive was impaired as a result of the alcohol.

Probable cause to arrest for driving under the influence exists where the officer, at the time of the arrest, had knowledge or reasonably trustworthy information sufficient to authorize a prudent to believe that the defendant 'was driving under the influence of alcohol to the extent that it was less safe for him to be driving.' 'The test of probable cause requires merely a probability -- less than a certainty but more than a mere suspicion or possibility.'

Ellison, 271 Ga. App. at 900 (citations omitted). There is simply a lack of credible evidence to support the officer's conclusion that the Defendant's ability to drive safely was impaired as a result of alcohol. "Credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept

or reject any portion of the testimony.” Tate v. State, 264 Ga. 53, 56, 440 S.E.2d 646 (1994).

Post-Arrest Questioning of the Defendant

The following exchanges took place after the Defendant had been informed by the officer that he was being placed under arrest. The Defendant was not given a Miranda warning prior to any of these questions. The Defendant was in custody at the time that each of the following questions were asked of him:

- (1) At approximately 16:18:35, Officer Baumann stated, “What I’m about to read to you is called the Georgia Implied Consent Notice.” Then, he asked, “Have you ever been through anything like this before?” The Defendant responded, “Yes...”
- (2) At approximately 16:19:40, Officer Baumann asked, “Will you submit to a state-administered test of your breath?” The Defendant responded, “No, sir.” Then, the officer asked, “Any reason why not?”
- (3) At approximately 16:26:27, Officer Baumann asked, “Have you been stopped recently while you were drinking because you had an alcosensor tube in your front seat?” The Defendant responded, “Okay, I am going to stop trying to be all legal and say that I have no idea what that’s about. Honestly.”

The admission of the Defendant’s responses to these questions violates the Defendant’s rights against self-incrimination under the Fifth Amendment of the U.S. Constitution, Article I, Section I, Paragraph XVI of the Georgia Constitution, O.C.G.A. § 24-9-27, O.C.G.A. § 24-9-20.

Further, these statements should be inadmissible as they impermissibly introduce evidence of the Defendant’s character. “If evidence places an accused’s character in issue, it is inadmissible unless it is relevant to some other issue in the case.” Parker v. State, 486 S.E.2d 687 (1997).

Admissibility of the Alco-Sensor Tube Not Associated With Case

After the Defendant was placed under arrest, the arresting officer was securing and inventorying the Defendant’s vehicle. In connection with these actions, the officer found an alco-sensor tube. The Defendant requests that the Court exclude introduction of this evidence and testimony regarding this evidence from the trial of this case because it has no relevance and it impermissibly places the Defendant’s character in issue.

Respectfully Submitted, this 4th day of June, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

cc: Ms. _____ Y. Little-Hill, Assistant Solicitor, Gwinnett
County (via e-mail to _____ .little-hill@gwinnettcounty.com
and regular U.S. Mail)

Clerk, Gwinnett County State Court