DUI UPDATE FROM THE DEFENSE SIDE

POST-*WILLIAMS* CONSENT AND COERCION

***WILLIAMS* REMINDER:** In considering Williams's motion to suppress, the state court failed to address whether Williams gave actual consent to the procuring and testing of his blood, which would require the determination of the voluntariness of the consent under the totality of the circumstances. *Williams v. State*, 296 Ga. 817 (March 27, 2015).

The case was remanded to the trial court, where the evidence was suppressed as Williams was confused and perhaps lacked the mental capacity to consent; the trial court's order suppressing the evidence was upheld in *State v. Williams*, 337 Ga. App. 791 (July 7, 2016).

***McKibben v. State*, 340 Ga. App. 89 (January 23, 2017)**

". . . an affirmative response to the question posed by the implied-consent language "may be sufficient for a trial court to find actual consent, absent reason to believe the response was involuntary." To put it plainly, in determining the demarcation line between actual consent and coercion, context is crucial. Thus, in order to ascertain whether a suspect freely and voluntarily consented to the test, the trial court must consider the totality of the circumstances surrounding his consent, including (but not limited to) whether there was any threat or coercion by the officer; whether the suspect was unable to give valid consent due to (for example) his youth or lack of education; and whether a reasonable person would have felt free to decline the officer's request.

In this case, as in *Kendrick*[1], the evidence simply does not show that "the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent." Nor does McKibben argue that youth, lack of education, or low intelligence somehow negated the voluntariness of his consent. Rather, McKibben argues that he did not freely and voluntarily consent to the blood test because (1) the language of the implied-consent notice made him feel as though he had no choice but to acquiesce, and (2) he was not informed that his blood-test result could be used against him in a criminal prosecution."

DENIAL OF MOTION TO SUPPRESS AFFIRMED.

***State v. Brogan*, 340 Ga. App. 232 (February 15, 2017)**

FACTS: . . . the hearing evidence showed that in the early afternoon on May 13, 2015, a law enforcement officer was dispatched to investigate a car stopped in the middle of a busy intersection. Ambulance personnel were on the scene when he arrived; they had found the car in gear and Brogan asleep behind the wheel.

The officer roused Brogan and spoke with her, and he observed that her face looked lethargic and "droopy" and her speech was slow and slurred. When Brogan stepped out of the car at the officer's request, she was so unsteady that the officer believed Brogan could not safely perform field sobriety tests. Once out of the car, Brogan held out her arms in a stiff, unnatural posture; she told the officer she was doing this so that he could take her blood pressure, even though the ambulance personnel had taken her blood pressure moments before. In the video recording of the encounter, [***6] Brogan

1 Kendrick v. State, 335 Ga. App. 766 (2016)

appears confused and lacking control over her physical movements, and she gives tentative and sometimes nonresponsive or incomprehensible answers to the officer's questions.

The officer did not smell any alcohol on Brogan or in her car, and he told Brogan that he did not suspect she was impaired by alcohol. He asked Brogan if she had taken any drugs, and she responded that she had taken allergy medication. The officer told Brogan that he was worried about her and suggested she get medical attention. When Brogan replied that she wanted to go home, the officer told her that she could not drive herself home. At that point, Brogan turned away from the officer who, believing that Brogan was heading back to her car, handcuffed her and placed her in his patrol vehicle. He did not tell her that she was under arrest or explain why he had detained her.

Once Brogan was in the patrol vehicle, the officer read her Georgia's informed consent notice. He then asked her if she consented to a blood test. The officer testified that Brogan bobbed her head, but he conceded that he "really c[ould]n't speak to how she articulated yes," and no answer can be heard on the video recording. The officer then drove [***7] Brogan to a hospital, where her blood was drawn for testing. The results of the blood test were not entered into evidence; however, at the hearing the prosecutor and defense counsel agreed that the test showed she had an extremely high blood alcohol level.

This evidence does not demand that we reverse the trial court's ruling sustaining Brogan's motion to suppress. [Cit. omitted]. It is not clear from the evidence that Brogan gave any affirmative response to the implied consent notice, but even if she did respond affirmatively to it, our Supreme Court in Williams, 296 Ga. at 821-822, "rejected [a] per se rule automatically equating an affirmative response to the implied consent notice with actual consent to a search within the meaning of the Fourth Amendment.

MOTION TO SUPPRESS GRANTED BY TRIAL COURT - AFFIRMED

***State v. Nicholson*, 342 Ga. App. 118 (June 27, 2017)**

"Here, the undisputed facts show that Nicholson was neither injured nor threatened with harm during his interaction with the trooper. Nicholson appeared to be acting and responding rationally and did not appear to be confused or extremely intoxicated. Throughout their encounter, the trooper maintained a friendly demeanor and tone of voice and allowed Nicholson to ask questions. At one point, Nicholson asked if he could perform the walk and turn test on more even ground, and the trooper readily agreed, moving his patrol vehicle so that the camera would be facing the area of the parking lot that Nicholson chose. Nor does Nicholson argue that youth, lack of education, or low intelligence somehow negated the voluntariness of his consent. See *McKibben*, 340 Ga. App. at 93.

Nicholson, however, argues that "this Court cannot overlook the wording of the implied consent notice itself and the effect this created on [Nicholson]." According to Nicholson, because the implied consent notice uses the word "submit" versus "consent," a defendant's submission to a search (via a state-administered blood test) under Georgia's implied consent statute is not the same as a defendant "actually consenting" to a search under the Fourth Amendment, an assertion that the trial court adopted in its order granting the motion to suppress. However, this Court has previously considered and rejected this argument. See *Kendrick v. State*, 335 Ga. App. 766, 769-71 (2016) (implied consent notice is not coercive in failing to inform suspect of right to refuse); *State v. Oyeniyi*, 335 Ga. App. 575, 578 (2016) (implied consent notice is not misleading or an overstatement of penalties authorized by law)."

MOTION TO SUPPRESS GRANTED BY TRIAL COURT - REVERSED

***State v. Jacobs*, 342 Ga. App. 476 (August 2, 2017)**

"Turning to the circumstances of this case, the evidence shows that, after the officer suspected that Jacobs was too intoxicated to drive safely, he simply read the implied-consent notice set forth in OCGA § 40-5-67.1 (b) (2) verbatim, but instead of designating which test he was requesting, he asked Jacobs whether he would choose which test to take. But there was no evidence that the officer used fear, intimidation, threat of physical punishment, or a lengthy detention to obtain Jacobs's consent to the breath test. There was also no evidence, and the trial court did not find, that the officer used physical force or the threat of such force to coerce Jacobs into agreeing to the breath test. In fact, the officer testified that he did no such thing, and other than reading the implied-consent notice, he and Jacobs had no further discussions regarding his consent to the breath test. Moreover, there was no evidence that Jacobs's age, intelligence, or level of education hindered his ability to understand the implied-consent notice. To the contrary, evidence showed that Jacobs exercised his right to refuse to take any field-sobriety tests, which indicates that he was not so intoxicated that he could not make an informed decision regarding consent. Lastly, the officer, who was the sole person to observe Jacobs at the time, testified that when Jacobs consented to the breath test, he "seemed to understand … what [the officer] was asking of him[.]"

. . .

Notwithstanding that the implied-consent notice repeatedly indicated that Jacobs had the right to refuse testing and suffer the consequences, the trial court ignored all of the other relevant factors in determining whether consent was voluntary and improperly relied on a single relevant factor: its finding that the way in which the implied-consent notice was read would lead a "reasonable person" to believe that he or she did not have the right to refuse testing. But even accepting the court's finding in that respect, we must consider all of the circumstances surrounding Jacobs's agreement to submit to the breath test because no single factor controls."

MOTION TO SUPPRESS GRANTED BY TRIAL COURT - REVERSED

***Diaz v. State*, 344 Ga. App. 291 (January 23, 2018)**

"Trooper Hand testified that, not only did he read the applicable implied consent notice to the Appellant before the blood test was performed, he also obtained the Appellant's written consent to the test. The trial court conducted a hearing on the Appellant's motion to suppress the blood test results and denied the motion. The court found that Trooper Hand had read the implied consent notice to the Appellant; that, while the officer had probable cause to obtain the blood sample, the Appellant was not under arrest or in custody at the time of the test; that there was no evidence that the Appellant was in distress, pain, or shock or that he had any "physical issues" that affected his ability to consent to the blood test; and that the Appellant voluntarily gave written consent to the blood test. In making these findings, the court specifically found that the testimony of Trooper Hand and the registered nurse was credible, consistent, and uncontroverted.

. . .

[E]ven if Trooper Hand had, in fact, failed to read the implied consent notice, the Appellant's voluntary written consent to the blood test eliminated the need for the officer to read the notice.

. . .
Moreover, the nurse who obtained the Appellant's blood sample testified about the medications the Appellant received in the emergency room and their effects on a patient's system. The medical records showed that, at 11:17 p.m., he received Zofran for nausea and Fentanyl for pain, and that, at 11:35 p.m., he received a combination of succinylcholine ("SUX") and Propofol, which sedates and temporarily paralyzes the patient. According to the nurse, the SUX/Propofol combination was typically used to relax a patient's muscles in order to reposition a dislocated joint, and, based upon the amount given to the Appellant, the drugs' effects would last for only five to seven minutes. The nurse also testified that the hospital only gave enough Fentanyl to the Appellant to take "the edge off" the pain, and opined that most people would be "totally lucid" a few minutes after receiving the drugs in the amounts given to the Appellant. It is undisputed that Trooper Hand obtained the Appellant's written consent to the blood test at 12:38 a.m., over an hour after the hospital gave the Appellant the medications at issue."

DENIAL OF MOTION TO SUPPRESS AFFIRMED.

BONUS: "In a related claim of error, the Appellant argues that the court erred in admitting his blood test results because Trooper Hand did not read him his *Miranda* rights prior to administering the test. However, it is undisputed that the Appellant was not in police custody or under arrest at the time of the blood test, so he was not entitled to the protections provided by *Miranda*. Further, there is no duty for an officer to inform a suspect of his or her constitutional right against unreasonable searches before obtaining a blood sample. Thus, there was no error."

OTHER TOPICS

***Spencer v. State*, 302 Ga. 133 (October 2, 2017) – HGN = BAC?**

"We granted this petition for certiorari to consider whether the Court of Appeals erred in holding that the trial court properly admitted a police officer's testimony correlating the results of a horizontal gaze nystagmus ("HGN") test with a numeric blood alcohol content or "BAC." Because this testimony was admitted without a sufficient foundation having been laid under *Harper v. State*, 249 Ga. 519 (1982), we reverse the judgment of conviction and sentence with respect to the DUI.

. . .

In *Bravo v. State*, 304 Ga. App. 243 (696 SE2d 79) (2010), our Court of Appeals addressed this distinction, noting that its earlier decision in Webb v. State, 277 Ga. App. 355 (626 SE2d 545) (2006), had correctly framed the question:

[W]e do not wish to imply that a trial court must always admit numerical evidence of a defendant's blood alcohol content adduced by an HGN test. The HGN test is a procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. It may be an open question, however, whether the HGN test has reached a state of verifiable certainty in the scientific community as a basis for determining the numerical level of a driver's blood alcohol level.

(Citation and punctuation omitted; emphasis in original.) *Bravo*, supra, 304 Ga. App. at 247 (1). After noting that numerous jurisdictions have concluded that HGN tests are "not admissible to quantify a

specific BAC," id. at 247 n.13, the Court of Appeals concluded that the trial court erred in admitting a police officer's testimony that he "estimated that Bravo's BAC was 0.25 grams based on a mathematical calculation," id. at 245, because the evidence "[fell] short of establishing that the method at issue has reached a scientific stage of verifiable certainty." Id. at 249 (1).

We conclude that the evidence presented by the State in this case was insufficient to establish the scientific validity or reliability of any correlation between a particular number of clues on an HGN test and a numeric blood alcohol content, whether a specific percentage or "equal to or greater than" a specific percentage. The trial court therefore abused its discretion in admitting this evidence. In light of the repeated questioning regarding the offending evidence, as well as testimony that Spencer was not stopped for unsafe or erratic driving, that the officer acknowledged on cross-examination that she did not exhibit many of the usual signs of intoxication, that Spencer had had recent surgery, and that Spencer presented evidence that she was not less safe to drive, we cannot say that this error was harmless, and we therefore reverse Spencer's conviction for DUI (less safe)."

***State v. Council,* 343 Ga. App. 583 (October 30, 2017) – COMPELLED BREATH TESTING (AND A SIDE NOTE ON THE APPROPRIATE STANDARD OF REVIEW)**

"In its order on the Appellee's motion in limine to suppress, the trial court found that the Appellee "was compelled to [perform the breath test], and to do that act two times, to produce evidence against herself in violation of her Georgia Constitutional right against self-incrimination."

In the present case, the Appellee asked the DUI officer numerous questions about the different field sobriety tests and the breath test throughout the interaction. From the record, including the video recordings of the interaction between the Appellee and the DUI officer, the officer patiently and calmly answered her questions. Further, the Appellee appeared to understand and respond to questions. The DUI officer testified that he did not make any promises in exchange for the Appellee's agreement to submit to a breath test. And, although the DUI officer did not allow the Appellee to make any phone calls until they were finished with the breath tests, there is no evidence that the Appellee was forced to take the breath tests against her will in order to make the phone calls, as the trial court appears to imply. In other words, the Appellee was not going to be allowed to make the calls until she either took the breath tests or refused to do so. Thus, refusing to allow her to make the calls did not constitute coercion.

Therefore, under the totality of circumstances presented in this case,we find that the State did not coerce or compel the Appellee to undergo the breath tests. Thus, her agreement to the breath tests did not violate her right against self-incrimination.

Based on our holding, the Appellee was not compelled to undergo the breath tests. Therefore, we do not reach the State's remaining argument."

GEORGIA SUPREME COURT GRANTED CERT. ON THIS CASE, BUT THAT WAS VACATED AND REMANDED FOR FURTHER HEARING AT THE COURT OF APPEALS IN LIGHT OF STANDARD OF REVIEW ISSUE RAISED IN *CAFFEE* (SEE BELOW) IN *COUNCIL V. STATE*, 2018 GA. LEXIS 388 (MAY 21, 2018)

***Adams v. State*, 344 Ga. App. 159 (December 27, 2017) – ALS AGREEMENT INTRODUCED AT TRIAL**

"In related enumerations of error, Adams contends that the trial court erred in permitting the State to introduce evidence of the ALS Stipulation because it was irrelevant, unfairly prejudicial, and could not be introduced as an admission against him in his criminal trial. Adams further contends on the same grounds that the trial court should have granted a mistrial in response to the trooper's testimony about the ALS Stipulation.

Notably, however, Adams neither moved for a mistrial nor objected to the introduction of the ALS Stipulation on the grounds that it was irrelevant, unfairly prejudicial, and should not be treated as an admission. "To preserve an objection upon a specific ground for appeal, the objection on that specific ground must be made at trial, or else it is waived." Sneed v. State, 337 Ga. App. 782, 785 (1) (b) (2016). . .

Nor has Adams demonstrated that the admission of testimony and documentary evidence of the ALS Stipulation constituted plain error."

***State v. Stroud*, 344 Ga. App. 885 (March 2, 2018) – IMPLIED CONSENT ERROR!**

"The notice provision that a Georgia driver's license "will be suspended" upon refusal of testing establishes a mandatory suspension for such refusal. See Satterfield v. State, 252 Ga. App. 525, 527 (1) (2001) ("[T]he implied consent statute does provide for the automatic suspension of a resident driver's license upon refusing the request to take the [s]tate's chemical test."). In the instant case, the arresting officer's statement to Stroud that his license "may be suspended," instead of "will be suspended," altered the substance of the implied consent notice by changing the mandatory suspension into a mere permissive possibility. . .The officer's misleading notice, which incorrectly informed Stroud that his license suspension upon refusal was not mandatory, impaired Stroud's ability to make an informed decision about whether to submit to testing."

***Smith v. State*, 345 Ga. App. 43 (March 7, 2018) – ALS AGREEMENT ADMITTED (PLUS MISTRIAL ON VENUE WHERE DEFENDANT CAN BE RETRIED!)**

"Smith first argues that the trial court erred in considering evidence that, during the ALS proceedings, he agreed with the arresting deputy to plead guilty to the criminal DUI charge in exchange for dismissal of the deputy's sworn report supporting administrative suspension of his driver's license. The agreement, which was reflected in a consent "Motion to Dismiss Sworn Report" signed by Smith's attorney and the deputy, stated:

This dismissal of the Sworn Report is based upon [Smith's] agreement to enter a guilty plea to the underlying charge of violating OCGA § 40-6-391 . … [Smith] further agrees that if [he] fails to enter the plea as agreed, [Smith] waives [his] right to further contest the suspension under OCGA § 40-5-67.1, and agrees to the entry of an order vacating the Consent Order and an order suspending or disqualifying [his] driver's license, permit or privilege to operate a motor vehicle or commercial motor vehicle in this state.

. . .

Smith does not dispute that he authorized his attorney to enter the agreement, and he raises no claim of

fraud or mistake. The agreement is relevant to the underlying issue at trial — whether Smith drove under the influence of alcohol to the extent he was less safe. See [Flading v. State, 327 Ga. App. 346, at 351 (2) (2014)]; OCGA § 24-4-401 ("[T]he term 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). And nothing indicates that potential prejudice caused by the agreement outweighs its probative value. Accordingly, the trial court properly considered this evidence at the bench trial. See *Flading*, supra; see also *Adams v. State*, 344 Ga. App. 159 (2017) (following *Flading* in case involving ALS stipulation that did not include language regarding future admissibility of agreement).

Because the State failed to prove venue, we must reverse Smith's conviction for driving under the influence of alcohol. The State, however, "may retry him without violating the Double Jeopardy Clause if there was otherwise sufficient evidence at trial to support" his conviction. [Mock v. State, 306 Ga. App. 93, at 97 (2010)]. The evidence proffered here, including Smith's physical manifestations during the traffic stop, his refusal to participate in field sobriety tests and the state-administered breath test, and the agreement reached during the ALS proceeding, authorized the trial court to conclude that Smith drove under the influence of alcohol in violation of OCGA § 40-6-391 (a) (1). See *Massa v. State*, 287 Ga. App. 494, 495 (1) (2007) ("A defendant's refusal to submit to field sobriety tests is admissible as circumstantial evidence of intoxication and together with other evidence would support an inference that he was an impaired driver."); *Alewine v. State*, 273 Ga. App. 629, 630 (1) (2005) (defendant's erratic driving and physical manifestations supported DUI conviction); *Stephens v. State*, 271 Ga. App. 634, 635 (2005) ("[T]he refusal to submit to a blood alcohol test created an inference that the test would reveal the presence of a prohibited substance and bears directly on the issue of the sufficiency of the evidence.") (citation and punctuation omitted). Retrial, therefore, is permitted. See *Mock*, supra.

***Caffee v. State*, 303 Ga. 557 (May 7, 2018) – ANY REASON TO FIND A SEARCH VALID**

". . .the record shows that on November 1, 2015, Deputy Mark Patterson pulled over Caffee's truck for having an expired tag. During the stop, Deputy Patterson smelled the odor of raw marijuana coming from Caffee's truck. Deputy Patterson testified that, based upon his training and experience, he was familiar with the smell of raw marijuana.

After Caffee exited the truck, Deputy Patterson asked Caffee if he had marijuana in the truck. Caffee said no. Deputy Patterson decided to search Caffee's truck for drugs but waited for another officer to arrive. While waiting, Deputy Patterson conducted a pat-down search of Caffee, but found no weapons or contraband. When back-up arrived, Deputy Patterson searched the entire truck and found only two small empty bottles that smelled of marijuana. According to Deputy Patterson, the odor of raw marijuana dissipated from the truck during the search while the doors were open. When Deputy Patterson approached Caffee to ask about the two containers found in the truck, Patterson again smelled the odor of raw marijuana. Deputy Patterson searched Caffee's outer clothing and found in Caffee's shirt pocket a small plastic bag containing less than an ounce of marijuana. Caffee did not consent to any of the searches. Caffee was arrested and charged with possession of marijuana and driving with an expired tag.

Following a hearing on Caffee's motion to suppress at which Deputy Patterson testified as the sole witness and a video of the stop was introduced, the court rejected the State's argument that Patterson's search of Caffee's shirt pocket was a lawful pat-down search under *Terry v. Ohio*, 392 U. S. 1 (1968). The trial court nevertheless concluded that Patterson had probable cause to search Caffee's shirt pocket under the totality of the circumstances.

The Court of Appeals granted Caffee's application for interlocutory appeal and affirmed the trial court's ruling that the search of Caffee's clothing was valid. *Caffee*, 341 Ga. App. at 360. The Court of Appeals concluded that the police officer had probable cause to believe that marijuana would be found on Caffee's person because the officer had training and experience in detecting the odor of raw marijuana and physical manifestations of recent marijuana use, observed that Caffee had indications of recent marijuana use (e.g., bloodshot and glassy eyes and "white and risen" taste buds), smelled raw marijuana when he approached Caffee's truck, noticed that the odor dissipated during the search of the truck while the doors were open and Caffee was outside the vehicle, did not find marijuana in the truck, and smelled marijuana "pretty strongly" upon approaching Caffee after the vehicle search. *Id*. at 362-363 (1).

. . .

We have repeatedly said that HN4 on an appeal from the grant or denial of a motion to suppress, appellate courts must "focus on the facts found by the trial court in its order, as the trial court sits as the trier of fact."

. . .
Standard of Review (*referenced in remand on Council*)
But here, the Court of Appeals supplemented the trial court's findings with additional findings of its own that relied on testimony that inherently presented questions of credibility and were not "indisputably discernible" from the video of the stop.

. . .

The Court of Appeals found that Deputy Patterson had training and experience in detecting the physical manifestations of recent marijuana use, and that he observed indications that Caffee recently used marijuana. Although Deputy Patterson testified about his experience detecting recent marijuana use and that Caffee's bloodshot, glassy eyes and "white and risen" taste buds on his tongue reflected such use, the trial court made no findings as to these points.

. . .

Here, the Court of Appeals considered only whether there was probable cause to search. But Caffee squarely raised the issue of the warrant requirement, arguing that Deputy Patterson was not authorized to search his shirt pocket without a warrant. In failing to consider whether Deputy Patterson's warrantless search of Caffee's shirt pocket fell within an exception to the warrant requirement, the Court of Appeals held that probable cause by itself was sufficient to authorize a warrantless search. See *Caffee*, 341 Ga. App. at 362 (1). This was wrong; no amount of probable cause can justify a warrantless search absent an exception to the warrant requirement. See *Coolidge v. New Hampshire*, 403 U. S. 443, 468 (1971), overruled in part on other grounds by *Horton v. California*, 496 U. S. 128 (1990).

. . .

Although the Court of Appeals' reasoning was incorrect, its ultimate judgment was correct. There was probable cause here — the probable cause to arrest Caffee for committing the crime of possession of marijuana. As a result, the warrantless search fell within the recognized search-incident-to-arrest exception to the warrant requirement, even though the search preceded the arrest." *[See Sibron v. New*

York, 392 U. S. 40, 67 (1968) and *Rawlings v. Kentucky*, 448 U. S. 98, 111 (1980). - ed.]

Oh v. State, 345 Ga. App. 729 (May 14, 2018) – _TERRY_ STOP DOES NOT INVOKE CUSTODIAL RIGHTS, PROBABLE CAUSE FOUND, NO COERCION

"In this case, the evidence presented at the suppression hearing, including video and audio recorded from a police car patrol camera, showed that in the early morning hours of December 31, 2015, Oh was driving his vehicle when he was stopped by a police officer who had noticed that a brake light was malfunctioning. The officer followed Oh's vehicle for a short distance and then initiated his blue lights, which prompted Oh to pull his vehicle into a nearby parking lot. The officer had not observed any evidence of impairment at that point, and other than the failing brake light had not observed any other traffic violations.

The officer approached the driver's side of the vehicle and began speaking with Oh. During that conversation, the officer told Oh that he smelled burned marijuana coming from the vehicle. Oh replied that he had smoked marijuana in the vehicle a few days before. The officer asked Oh to exit his vehicle and had him stand behind the car until a backup officer arrived. At that point, the officer planned to search the car based on the marijuana he had smelled. In response to a question from the officer, Oh denied that he had consumed alcohol that evening.

Later, while Oh was standing outside the vehicle, the officer smelled alcohol on Oh's breath. Oh again denied that he had been drinking but then admitted to the officer that he had consumed one beer about an hour earlier in the evening with a meal. At that time, the officer also observed that Oh's eyes were red and watery.

The officer commenced a DUI investigation of Oh. The officer explained each of the evaluations he was going to ask Oh to participate in and asked if Oh had any physical or medical conditions that would prevent him from participating. Oh indicated that he was able to participate and did not mention any physical concerns.

The officer had Oh perform a battery of standardized field sobriety tests, beginning with a horizontal gaze nystagmus (HGN) test. The officer observed six out of six clues on the HGN test, consistent with conditions of impairment. The officer then instructed Oh to take a test in which he was instructed to take nine steps with his arms to his side and then turn around (the "walk and turn"). The officer demonstrated the actions he was asking Oh to perform before instructing Oh to proceed. The officer noted that Oh took ten steps instead of nine, failed to keep his balance during the instructional phase of the test, made an improper turn, and had to use his arms to maintain his balance. The officer testified that observing two or more of these clues during a walk and turn indicates impairment. The officer then asked Oh to stand on one leg, which he demonstrated for Oh. Oh performed this test without signaling any clues of impairment.

Based on the preliminary sobriety tests, the officer told Oh that he believed he was impaired due to alcohol consumption and offered him a portable breath test (PBT). The officer then accused Oh of lying about the amount of alcohol he had consumed that evening, asking him whether he had in fact consumed more alcohol than he initially claimed. Oh initially denied that he had lied to the officer or consumed more alcohol than he claimed, but he later admitted that he had consumed four beers earlier in the evening. After some discussion, Oh blew into the PBT, which generated, according to the officer, a "really high number." The officer testified that he did not believe the test was accurate because "[i]t was an absurd number, like alcohol-poisoning kind of number." Based on his belief that the initial test

was not consistent with his observations of Oh, the officer asked Oh to blow into the device a second time, which yielded a positive test for alcohol. The officer later testified that Oh's behavior and responses to the field sobriety tests were more consistent with consumption of four beers than a single beer.

Based on these observations, the officer placed Oh under arrest. The officer then read the Georgia implied consent notice for subjects age 21 and over to Oh and asked whether he consented to a breath test. Oh asked several questions about the warning and asked the officer to read it again, which prompted the officer to again read the consent warning to Oh and ask if he would submit to a breath test. The officer also accused Oh of stalling. Several minutes later, after asking additional questions, Oh provided his consent for the breath test. Oh submitted to the breath test at police headquarters, the results of which were consistent with the evidence of impairment the officer had observed during the traffic stop. Oh did not request an additional test. The officer described his encounter with Oh as "pleasant" and noted that he had not had to raise his voice with Oh during the stop. The officer also testified that he never told Oh that he had to take the breath test. His testimony was consistent with the conversation recorded by the dashboard camera.

HOLDING:

1. Oh was not in custody, and not entitled to be read his *Miranda* rights.
2. Probable cause existed to arrest Oh based on "Oh's red and watery eyes and the smell of alcohol on his breath, and two of the initial tests administered by the officer yielded evidence of impairment, as did Oh's second blow into the PBT."
3. " . . . , in light of the totality of the factors considered above, we agree with the trial court that Oh's consent to the breath test following the implied consent warning was voluntarily given. See *State v. Council*, 343 Ga. App. 583, 586 (2017)"

OLEVIK AND CONSTITUTIONAL CHALLENGES TO IMPLIED CONSENT

Hynes v. State, 341 Ga. App. 500 (May 31, 2017) – BEFORE OLEVIK

"The case law interpreting implied consent laws demonstrates that the judiciary overwhelmingly sanctions the use of civil penalties and evidentiary consequences against DUI suspects who refuse to comply."

"The admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend the right against self-incrimination." (from *South Dakota v. Neville* 459 US 554).

BONUS ISSUE - Right to an Independent Test
"Bearing in mind the principles of implied consent and statutory construction, we now consider the question of whether a DUI suspect has the right to an independent test when that suspect refuses testing under the implied consent law but is then tested pursuant to a search warrant.

. . .

In sum, because Hynes refused to submit to the chemical testing requested by the arresting officer pursuant to OCGA § 40-5-55, he was not entitled to an independent test, and the trial court properly denied his motion to suppress the results of the blood test performed pursuant to a search warrant.*"*

***Olevik v. State*, 302 Ga. 228 (October 16, 2017)**

FACTS: "After observing that Olevik failed to maintain his lane while driving and had an inoperable brake light, police initiated a traffic stop. During the stop, police observed that Olevik's eyes were bloodshot and watery, his speech was slow, and he smelled strongly of alcohol. Olevik admitted to the police that he had consumed four or five beers prior to driving. He agreed to undergo field sobriety tests and exhibited six out of six clues on the horizontal gaze nystagmus test. The walk-and-turn and one-leg-stand tests were not conducted because Olevik had certain physical limitations. After Olevik also tested positive for alcohol on a portable alco-sensor machine, police arrested Olevik and read him the statutorily mandated, age-appropriate implied consent notice. Olevik agreed to submit to a state-administered breath test, the results of which revealed that he had a BAC of 0.113.

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

4th Amendment/GA Const. Para XII

"Here, Olevik's claim that the language of the implied consent notice rendered his consent invalid is not cognizable on Fourth Amendment and Paragraph XIII grounds. The Supreme Court of the United States concluded in *Birchfield* that the Fourth Amendment permits warrantless breath tests as searches incident to a DUI arrest. *Birchfield*, 136 S. Ct. at 2184-2185 (V) (C) (3)[2]. Because the search incident to arrest exception to the warrant requirement applies to breath tests in that context, there is no need to obtain consent for a breath test to support a warrantless search for Fourth Amendment purposes after a valid arrest. Consequently, even assuming that the implied consent notice was coercive, securing a breath test after arrest based on reading the implied consent notice would not violate the Fourth Amendment, because the warrantless breath test is permitted as a search incident to arrest."

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

5th Am/ Ga Const. Para XVI

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

Inherently Coercive

"Because evaluating whether self-incrimination was compelled depends on the totality of the circumstances, Olevik cannot establish that the implied consent notice is materially misleading and substantively inaccurate in every application such that the notice invariably compels submission to the

2 *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)

requested breath test."

***Fazio v. State*, 302 Ga. 295 (October 16, 2017) – SAME DAY AS OLEVIK**

"On appeal, Fazio makes several arguments as to why his motion to suppress should have been granted. All are without merit.*"*

4th Am/Para XIII rejected
"But in another case decided today, Olevik v. State, we hold that the implied consent statute is not unconstitutional under the Fourth Amendment or Paragraph XIII because, even if the statute were coercive, police may obtain a breath test without a warrant as a search incident to arrest. See also *Birchfield v. North Dakota* (holding that a breath test (but not a blood test) can be conducted categorically, without a warrant, as a search incident to arrest)." *Citations omitted*.

Statute is not coercive on its face
"Second, Fazio argues that the implied consent statute is unconstitutionally misleading and coercive on its face, in violation of due process. He asserts that the statute does not fully and accurately inform a suspect of his rights or the consequences of his refusal to consent to a breath test. But we consider and reject just such an argument in Olevik . . ."

5th Am/ Para XVI – RAISE THE ISSUE!
"Finally, Fazio contends that the taking of a breath test violates his constitutional right against compelled self-incrimination because, he argues, a breath test requires the active participation of the suspect — blowing hard into a tube. But, as Fazio concedes, he did not raise this constitutional argument below, and so we cannot review it on appeal." *Citations omitted*.

MacMaster v. State, 344 Ga. App. 222 (January 10, 2018)

"MacMaster argues that the trial court erred in denying her motion in limine to exclude the results of her State-administered breath test because the warrantless test violated her right to be free of unreasonable searches and seizures under the United States and Georgia Constitutions. According to MacMaster, the trial court erred in finding that she freely and voluntarily consented to the warrantless breath test. We disagree.

. . .

Article I, Section I, Paragraph XIII of the Georgia Constitution allows a warrantless breath test to be administered as a search incident to arrest. See *Olevik* [Cit. Omitted]. Consequently, the warrantless test of MacMaster's breath was authorized by the search-incident-to-arrest exception to the warrant requirement under both the United States and Georgia Constitutions, irrespective of whether MacMaster's consent was freely and voluntarily obtained for the breath test.

. . .

MacMaster argues that the trial court erred in denying her motion in limine to exclude her statements consenting to the State-administered breath test and of the results of that test because the admission of that evidence at trial violated her constitutional right against self-incrimination under the United States and Georgia Constitutions. We are unpersuaded.

. . .

A defendant's verbal consent to take a breath test and the results obtained from such a test are not evidence of a testimonial or communicative nature and thus do not implicate the right against self-incrimination under the Fifth Amendment. See [*Scanlon v. State*, 237 Ga. App. 362, 363-364 (1), (2) (1999)]

. . .

MacMaster also contends that the trial court should have excluded her verbal response consenting to the State-administered breath test because her consent was obtained after she was in police custody but before she had been advised of her rights under *Miranda v. Arizona*, 384 U. S. 436. As discussed supra in Division 1 (b), a defendant's Fifth Amendment right against self-incrimination is not implicated by a State-administered breath test. See *Scanlon*, 237 Ga. App. at 363-364 (1), (2). "Thus, the absence of Miranda warnings does not require suppression of [MacMaster's] consent to the breath test under federal law." *Id*. at 364 (1). Additionally, we have held in a whole court decision that "an arrestee is not, under Georgia constitutional or statutory law, entitled to Miranda warnings before deciding whether to submit to the State's request for an additional test of breath, blood, or urine." (Emphasis omitted.) *State v. Coe*, 243 Ga. App. 232, 234 (2) (2000), overruled in part on other grounds by *Olevik*, 302 Ga. at 246 (2) (c) (iv), n. 11. See *Taylor v. State*, 337 Ga. App. 486, 494 (4) (a) (iii) (2016).

Although MacMaster, with the permission of this Court, filed a supplemental brief to address the Supreme Court's recent Olevik decision, she did not address in her brief whether or to what extent that decision might affect our ruling in Coe regarding the application of Miranda warnings under the Georgia Constitution.

. . .

MacMaster further argues that the trial court erred in denying her motion in limine to exclude her refusal to take the alco-sensor test. According to MacMaster, an alco-sensor test is a warrantless search of a suspect's breath, and she should be able to invoke her Fourth Amendment right to refuse to consent to such a search without having her refusal used against her at trial.

As previously noted, the administration of a breath test is a search under the Fourth Amendment. *Birchfield*, 136 SCt at 2173 (IV); *Kendrick*, 335 Ga. App. at 768. In *Mackey v. State*, 234 Ga. App. 554, 556 (1998), we held that "an individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial." However, *Mackey* involved a defendant's refusal to consent to the warrantless search of a vehicle, and we pointed out that "[a] defendant's refusal to consent to a warrantless search of his vehicle or other property is quite a different issue" from "a defendant's refusal to submit to a blood or urine test for determining alcohol or drug content." *Id.* at 555-556. As we have emphasized, "[t]he case law interpreting implied consent laws demonstrates that the judiciary overwhelmingly sanctions the use of civil penalties and evidentiary consequences against DUI suspects who refuse to comply." *Hynes v. State*, 341 Ga. App. 500, 508 (2017). See *Birchfield*, 136 SCt at 2185 (VI); *Olevik*, 302 Ga. at 247 (3) (a). Hence, we have held that the refusal to take a State-administered chemical test under Georgia's implied consent law is admissible at trial. See *Szopinski v. State*, 342 Ga. App. 647, 650 (1) (2017); *Brooks v. State*, 187 Ga. App. 194, 195 (1) (1988). We discern no reason why the same rule in favor of admission should not apply in the context of a defendant's refusal to take an alco-sensor preliminary breath test, which we have previously held is admissible as circumstantial evidence tending to show that the defendant was impaired. See *Korponai v. State*, 314

Ga. App. 710, 712 (3) (a) (2012); *Crusselle v. State*, 303 Ga. App. 879, 881 (1) (694 SE2d 707) (2010).

Moreover, MacMaster cannot demonstrate harm resulting from the alleged erroneous admission. Even error of constitutional magnitude can be held harmless, if "the State can prove beyond a reasonable doubt that the error did not contribute to the verdict," such as when the evidence is cumulative of other properly admitted evidence or the evidence of the defendant's guilt is overwhelming. (Citation and punctuation omitted.) *Stovall v. State*, 287 Ga. 415, 418 (3) (2010).

. . .

Accordingly, even if we were to assume for the sake of argument that the admission of MacMaster's refusal to take an alco-sensor test was constitutional error, it was harmless error that did not contribute to MacMaster's convictions of DUI per se and failure to maintain lane. See [*Jones v. State*, 301 Ga. 544, 551 (3) (802 SE2d 234) (2017)] . While it is a closer question whether admission of the refusal would have been harmful with respect to the jury's guilty verdict for DUI less safe, that issue is moot in light of the trial court's merger of that offense into MacMaster's DUI per se conviction for purposes of sentencing. See *Jones* v. State, 301 Ga. at 551 (3) (2017)."

***Cherry v. State*, 345 Ga. App. 409 (February 21, 2018)**

4th Am/ Para XII rejected
Because a breath test was permitted as a search incident to Cherry's DUI arrest, Cherry's refusal to take the state-administered breath test was not the exercise of the constitutional right against unreasonable searches and seizures. See *Olevik v. State*. Thus, the trial court did not err in admitting evidence that Cherry refused to take the breath test required under Georgia's Implied Consent law.

***State v. Herrera-Bustamante*, 2018 Ga. LEXIS 551 (August 20, 2018) - LAST WEEK!**

Under the so-called "pipeline" rule, Georgia appellate courts will apply a new rule of criminal procedure to all cases then on direct review or not yet final.

5th Am./ Ga Const. Para XVI – USE IT OR LOSE IT!!
Even assuming that Olevik announced such a new rule (*prohibiting introducing evidence of refusal as violative of Defendant's 5th Amendment rights – ed.*), however, as we also explained in Taylor, we will apply a new procedural rule only if the issue to which it pertains was properly preserved for appellate review.

Plain Error
"When a defendant does not object to evidence at trial, under Georgia's new Evidence Code, the rulings related to that evidence are subject to review on appeal for plain error affecting substantial rights. This plain-error review is limited to the trial court's evidentiary rulings, that is, rulings which admit or exclude evidence, O.C.G.A. § 24-41-103(a) . . .

To show plain error, a defendant must point to an error that was not affirmatively waived, the error must have been clear and not open to reasonable dispute, the error must have affected his substantial rights, and the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings. A reviewing court need not analyze all of the elements of this test when the defendant has failed to establish one of them.

. . .

"'[A]n error is plain if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point . . . .'" *Simmons v. State*, 299 Ga. 370. The "current law" considered is the law at the time of appellate review rather than at trial, see *Lyman v. State*, 301 Ga. 312, 317-318 (800 SE2d 333) (2017), but "[a]n error is not plain under 'current law' 'if a defendant's theory requires the extension of precedent.'" *United States v. Trejo*, 610 F3d 308, 319 (5th Cir. 2010) (citations omitted)."

. . .

The problem for Herrera-Bustamante is that endorsement of his argument would require us to extend Olevik. Olevik held that a breathalyzer test involves an act that cannot be compelled under the Georgia Constitution, so the defendant has the right to refuse to take the test; Olevik did not decide anything about how such a refusal can or should be treated as evidence at trial. (Olevik *consented to the test – ed.*)

OLEVIK CASES CURRENTLY BEFORE THE SUPREME COURT NOW

***Licata v. State*, No. S18C0563, 2018 Ga. LEXIS 419 (Cert. granted June 4, 2018)**

"The Supreme Court today granted the writ of certiorari in this case. All the Justices concur.

. . .

This Court is particularly concerned with the following issue or issues:

1. Are *Miranda*-type warnings required before a suspect in police custody is asked to perform acts protected by the state constitutional rights against compelled self-incrimination? See Ga. Const. of 1983, Art. I, Sec. I, Par. XVI; *Olevik v. State*, 302 Ga. 228 (806 SE2d 505) (2017); *Price v. State*, 269 Ga. 222 (498 SE2d 262) (1998).

2. If so, is the standard *Miranda* warning sufficient to advise a suspect of his right not to be compelled to act in a way that incriminates himself?

3. After *Olevik*, is an individual entitled to the advice of counsel when he is asked to submit to a breath test? See *Rackoff v. State*, 281 Ga. 306, 308-309 (637 SE2d 706) (2006)."

***State v. Licata*, 343 Ga. App. 874, 806 S.E.2d 292 (2017)**

"[*Price v. State*, 269 Ga. 222 (1998)] stands for the proposition that, under Georgia law as well as federal law, a Miranda warning to a suspect in custody is sufficient to render evidence of field sobriety tests admissible. See also *State v. Dixon*, 267 Ga. App. 320, 320-321 (2004) ("Under Georgia's protections against the [s]tate compelling an arrestee to give evidence against himself, the result of a field sobriety test performed when a suspect was 'in custody' will be admissible only if the request to perform the field sobriety test was preceded by Miranda warnings.") (footnote omitted); *State v. O'Donnell*, 225 Ga. App. 502, 504 (2) (1997) (whole court 9) ("field sobriety tests given to a person under arrest, without giving him or her a Miranda warning first, are inadmissible under" former OCGA § 24-9-20 (a), a statute that encompassed the Georgia constitutional right against performing self-

incriminating acts and which is now codified at OCGA § 24-5-506 (a)). For these reasons, the trial court erred by granting Licata's motion to suppress the results of his field sobriety tests.

We acknowledge that there is at least arguably tension between our Supreme Court's opinion in *Price* and Art. I, Sec. I, Par. XVI of the Georgia Constitution of 1983, as it has been construed in cases like [*Creamer v. State*, 229 Ga. 511, 516 (3) (1972)], supra. But whether any such tension is to be resolved by narrowing the holdings of Price and similar cases is up to our Supreme Court.

. . .

The trial court found that Licata requested an attorney pursuant to the Miranda warning and so his refusal to submit to the state-administered breath test should be suppressed. We disagree because the arresting officer was legally correct and explicitly clear that Licata did not have the right to consult an attorney before deciding whether to submit to the breath test.

. . .

[I]n this case, the arresting officer's explanation informed Licata that he was not entitled to consult an attorney when deciding whether to submit to the breath test. Therefore, Licata's refusal to submit to the state-requested breath test could not have been based on a belief that he was entitled to an attorney prior to taking the test. The trial court erred in excluding evidence of Licata's refusal on this basis.

***Elliott v. State*, 2017 Ga. LEXIS 1001 (Cert. granted December 11, 2017)**

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur.

. . .

This Court is particularly concerned with the following issue or issues:

Given that Article I, Section I, Paragraph XVI of the Georgia Constitution preserves the right to refuse to submit to chemical breath tests, see *Olevik v. State* [Cit. omitted], may the State nevertheless introduce into evidence the fact that a defendant declined to submit to a chemical breath test? See *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974); *Loewenherz v. Merchants and Mechanics Bank of Columbus*, 144 Ga. 556 (87 SE 778) (1916); *Harrison v. Powers*, 76 Ga. 218 (1886).

***Garvin v. State*, S18I0610 (Application for Interlocutory Appeal granted January 11, 2018)**

"Upon consideration of the application for interlocutory appeal filed in the above-styled case, the application is hereby granted. All the Justices concur. The Court is particularly concerned with the following:

Given that Article I, Section I, Paragraph XVI of the Georgia Constitution preserves the right to refuse to submit to chemical breath tests, see *Olevik v. State* [Cit. omitted], may the State nevertheless introduce into evidence the fact that a defendant declined to submit to a chemical breath test? See *Elliott v. State*, S17G0716 (cert. granted Dec. 11, 2017); *Simpson v. Simpson*, 233 Ga. 17 (1974); *Loewenherz v. Merchants and Mechanics Bank of Columbus*, 144 Ga. 556 (1916); *Harrison v. Powers*, 76 Ga. 218 (1886)."

***Bunde v. The State,* S18I1432 (Interlocutory Appeal granted August 2, 2018)**

The application for interlocutory appeal in this case is granted. All the Justices concur.

The Court is particularly concerned with the following:

1. Are *Miranda*-type warnings required before a suspect in police custody is asked to perform acts protected by the state constitutional rights against compelled self-incrimination?
2. If so, is the standard *Miranda* warning sufficient to advise a suspect of his right not to be compelled to act in a way that incriminates himself?
3. After *Olevik v. State*, 302 Ga. 228 (2017), is an individual entitled to the advice of counsel when he is asked to submit to a breath test?
4. Given that Article I, Section I, Paragraph XVI of the Georgia Constitution preserves the right to refuse to submit to chemical breath tests, see *Olevik*, may the State nevertheless introduce into evidence the fact that a defendant declined to submit to a chemical breath test as provided by OCGA § 40-6-392 (d)?
5. If not, does the contrary language contained in Georgia's implied consent notice, see OCGA § 40-5-67.1, violate the due process guarantees of the United States and Georgia Constitutions?

. . .

This case involves issues that are the same as or similar to those raised in other pending appeals. See, e.g., *Elliott v. State* (Case No. S17G0716); *Garvin v. State* (Case No. S18A1112); *Licata v. State* (Case N
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