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May 8, 2015

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Docket Number: A15A1783 **Style**: Frances Farmer v. The State

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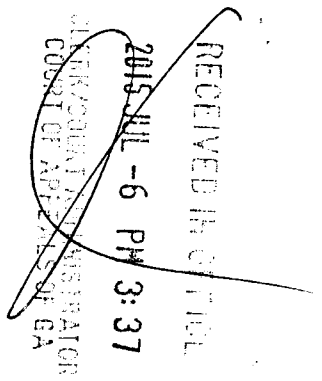

IN THE COURT OF APPEALS
STATE OF GEORGIA

FRANCES FARMER,
APPELLANT,

VS.

CASE NO.:A15A1783

STATE OF GEORGIA,
APPELLEE.

BRIEF OF APPELLANT

Submitted By:

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BRIEF OF APPELLANT

PART ONE

PROCEDURAL HISTORY - STATEMENT OF THE CASE

Appellant Frances Farmer was charged on March 27, 2014 in the State Court of Rockdale County in Accusation 2014-SR-1588 with the following misdemeanor offenses allegedly committed during an automobile accident that took place on January 4, 2014: (1) Driving Under The Influence of Alcohol ("DUI Less Safe") pursuant to O.C.G.A. Section 40-6-391; (2) Driving Under The Influence of Alcohol ("DUI Per Se") pursuant to O.C.G.A. Section 40-6-391; (3) Reckless Driving pursuant to O.C.G.A. Section 40-6-390; (4) Obstruction of a Law Enforcement Officer pursuant to O.C.G.A. Section 16-10-24; and (5) Failure to Maintain Lane pursuant to O.C.G.A. Section 40-6-48. Subsequent to issuance of this Accusation, Assistant District Attorney Damion Overstreet, Esq., entered a nolle pros on Count Three (Reckless Driving) and Count Four (Obstruction of a Law Enforcement Officer).

On September 15, 2014, Counsel for Ms. Farmer filed a Motion to Suppress. In the motion, Appellant motioned to suppress the State's test of Appellant's breath on the ground that Appellant was twice denied her requests for an independent test - first of an independent test of her urine, and second of an independent test of her breath. Appellant also motioned to suppress her statements and actions, including results of the Horizontal Gaze Nystagmus ("HGN") test on the ground that the statements, actions and results were obtained by coercion, that is, during a custodial interrogation in the absence of Miranda warnings and without a voluntary waiver of constitutional rights. Miranda v. Arizona, 384 U.S. 436 (1966). A hearing on the Motion to

Suppress was held on November 4, 2014 before the Honorable Nancy N. Bills. On January 5, 2015, the trial court denied Ms. Farmer's motion to suppress.

On February 10, 2015, the parties attended a stipulated bench trial before the Honorable Nancy N. Bills. At the trial, Judge Bills found Ms. Farmer guilty of both counts of DUI and Failure to Maintain Lanes (February 5, 2015 Transcript - 52). Ms. Farmer was also sentenced at the February 10, 2015 trial on the charges for which she had been adjudicated guilty.

Ms. Farmer appeals the trial court's January 5, 2015 order denying her Motion to Suppress.

STATEMENT OF THE FACTS

Ms. Farmer was, at that time of her arrest on January 4th, 2014, a Rockdale County Sheriff Deputy. (November 4, 2014 Motions Hearing Transcript, hereinafter "Transcript" or "T", at page 34). Ms. Farmer's assignment with the Rockdale County Sheriff's Office at that time was road patrol. (T-34). Ms. Farmer has received training on the enforcement of Georgia law, and her duties on road patrol include making traffic stops and arrests, including those for DUI. (T-34). Ms. Farmer's training on Georgia law enforcement gave her prior professional knowledge of her right to an independent chemical test in the event of an arrest for DUI. (T-34-35).

On January 4, 2014, Ms. Farmer was placed under arrest for driving under the influence, in violation of O.C.G.A. § 40-6-39, by Trooper John Taylor (hereinafter "Trooper"). (T-14). This trooper is well trained on valid DUI investigation techniques, as he is a POST certified law

enforcement officer; has received Drugs and Impaired Driving training; has participated in the DRE program; has participated in the Drug Recognition Program and serves as an instructor for that program; has instructed for various courses such as ARIDE; and is certified in field sobriety. (T-5-6). In the trooper's own testimony, he admits that he is aware that road patrol officers such as Ms. Farmer are authorized to make DUI arrests and have specific knowledge about implied consent laws and the right to independent testing. (T-22). The trooper also admitted that law enforcement officers possess the knowledge that only the state can designate the type of test to be administered by the state. (T-24).

The trooper was dispatched to Zingara Road on the night of Ms. Farmer's accident. (T-7). The trooper's car was equipped with an in-car video that also included audio recording, and the video and audio components were in working order on the night of the incident in question. (T-7). The officer testified that he was aware the camera was working properly and purposefully chose not to place Ms. Farmer on camera. (February 10, 2015 Trial Transcript, hereinafter "T2", at page 35). After making some initial inquiries with accident personnel on the scene, the trooper approached Ms. Farmer, who was located in the back of a patrol car. (T-11). The trooper knew Ms. Farmer due to her employment as a Rockdale County Sheriff's Deputy. (T-21). He had seen her previously on the job and knew that she was a road patrol officer (T-21). Additionally, when the trooper arrived on the scene, he was advised by personnel already present that a Rockdale police officer was involved. (T-21). When the trooper approached Ms. Farmer, he testified that he recognized her. (T-21). The trooper knew Ms. Farmer was a police officer and that she was aware of all of her rights under Implied Consent. (T-22).

Ms. Farmer testified that she is fully familiar with her right to independent testing because she worked road patrol for the Rockdale County Sheriff, was POST certified, has made DUI arrests, and has given implied consent warnings. (T-34-35).

After noticing what he claimed to be a strong odor of alcohol on Ms. Farmer's breath, the trooper administered a horizontal gaze nystagmus ("HGN") field sobriety test on Ms. Farmer. (T-12). He then administered a portable Alco-Sensor test on Ms. Farmer. (T-12). The trooper claimed that it was at this point that he placed Ms. Farmer under arrest, based on the results of the Alco-Sensor test. (T-14). The trooper proceeded to read Ms. Farmer the Georgia Implied Consent language from the card he keeps in his pocket and told Ms. Farmer that Georgia law required her to take the state-administered breath test. The trooper further stated that he was designating the breath test. (T-14). Ms. Farmer then asked to take an independent urine test. (T-14; T-38; and T-47). This request is audible on the in-car police video at approximately time 1920. Rather than accommodate Ms. Farmer's request for an independent urine test, the trooper detrimentally ignored Ms. Farmer's request and restated that he was requesting a breath test. (T-15). Ms. Farmer consented to the state administered test. (T-15).

Ms. Farmer's knew about her right to an independent test because she was a Rockdale Deputy, with prior professional knowledge, who had received training for DUI investigation and handled DUI arrests during her career. (T-34). With prior professional knowledge, Ms. Farmer knew that she has the right to designate any test that she wants, and she knew that she was not allowed to designate the state's test. (T-24).

Ms. Farmer testified that she wanted an independent urine test to be performed by

medically trained personnel, like a nurse of her choosing. (T-35) Ms. Farmer testified that she did not view a breath test administered by law enforcement to be as reliable as a urine test administered by medically trained personnel, such as a nurse of her own choosing. (T-35).

After the trooper confounded Ms. Farmer's request for a urine test by redundantly designating the state's test, Ms. Farmer requested to do an independent breath test (T-35). Ms. Farmer's exact words are clear, "if I'm going to do breath, I might as well do breath." (T-35). Ms. Farmer testified, "I wanted a secondary test." (T-35). Ms. Farmer clarified her desire for the state-administered breath test and an independent test of her own choosing when she testified that she specifically intended to have two tests. (T-35-36).

Neither an independent urine test nor an independent breath test was ever conducted for Ms. Farmer. (T-26). Within a few hours of Ms. Farmer's arrest, her employment with the Rockdale County Sheriff's office was terminated. (T-41). Ms. Farmer at no time waived her right to independent testing of any kind.

PRESERVATION OF ERRORS

I. IMPROPER REFUSAL TO SUPPRESS EVIDENCE OF A STATE ADMINISTERED CHEMICAL TEST

This error is preserved for review by a motion to suppress the state administered breath test at which evidence was heard beginning on page 1 of the November 4, 2014 Motion to Suppress Hearing Transcript and argued at page 48 of the Motion to Suppress Hearing Transcript by Appellant's attorney.

PART TWO

ENUMERATION OF ERRORS

I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE EVIDENCE OF A STATE ADMINISTERED CHEMICAL TEST OF APPELLANT'S BREATH.

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia rather than the Supreme Court of Georgia has jurisdiction of this case because this is an appeal from the final judgment of a State Court in a non-capital felony case, and does not come within any of the areas designated to be heard before the Supreme Court under Article VI, Section VI, Paragraph III, Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Court under the provisions of Article VI, Section V, Paragraph III, Georgia Constitution of 1983.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

I.

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE EVIDENCE OF A STATE ADMINISTERED CHEMICAL TEST OF APPELLANT'S BREATH.

Standard of Review: The standard of appellate review on a motion to suppress when the facts are undisputed is de novo, and the appellate court independently reviews the evidence to

determine whether the trial court erred in its application of the law to the undisputed facts. Johnson v. State, 313 Ga. App. 137, 137 (2011).

Where a person submits to a state administered chemical test of their blood, urine, breath, or other bodily substance, the "person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer." O.C.G.A. § 40-6-392(a)(3).

"An accused's right to have an additional, independent chemical test is administered by some statement that could be reasonably be construed in light of the circumstances to be an expression of a desire for an additional independent test." State v. Gillaspy, 270 Ga.App. 111, 114 (2004) (See also Anderton v. State, 283 Ga.App. 493,494, (2007)). "And none specifies to the accused any requirements for requesting that test – linguistically, temporally, or otherwise." McGinn v. State, 268 Ga.App. 450, 452 (2004). There shall be no burden placed on the accused to say specific or particular words. Ladow v. State, 256 Ga.App. 726, 728-729 (2002). "In adhering to this principle, courts are guided by the circumstances surrounding an alleged request, not simply the semantics of the alleged request." Anderton v. State, 283 Ga.App. 493, 493, (2007). Ruling on the issue on the basis of the words used in the statement, alone, without consideration of the circumstances in which the words were uttered is error as a matter of law. State v. Gillaspy, 270 Ga.App. 111, 114 (2004).

Further, "[l]aw enforcement officers have a corresponding duty not to refuse or fail to allow an accused to exercise that right." McGinn v. State, 268 Ga.App. 450, 451 (2004). "If an

individual requests an independent test but is unable to obtain it, the results of the State-administered test cannot be used by the State as evidence against him unless the failure to obtain the test is justified." Id. A trial court must determine whether the failure or inability to obtain the additional test is justified, and in making that determination, the court determines whether, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused who seeks an independent test. Id.

An officer is "on notice" that the accused is requesting an independent test if circumstances are such that the accused 1) presumably knew of her right to an additional test and the officer 2) presumably knew what type of test the accused wanted. Id. A person presumably knows of their right to an additional test if they have prior knowledge of the right to an independent test or if they state that they know their rights prior to hearing the Implied Consent Warnings. Ladow v. State, 256 Ga.App. 726, 728-729 (2002).

"Implied consent warnings are informational, and if an accused already possesses that information and has requested an independent test, the giving of the warnings themselves cannot become the stumbling block to fulfilling the otherwise unambiguous request." Id. "Implied consent warnings ask an accused to submit to a State-administered test; they do not ask the accused whether he wants an additional, independent chemical test." Id.

Ms. Farmer was entitled to an independent test because she submitted to a state administered chemical test of her breath at the direction of a law enforcement officer. O.C.G.A. § 40-6-392(a)(3). (T-15). Further, the trooper had a duty to safeguard Ms. Farmer's right to an independent test because he was on notice that she requested an independent urine test, and later,

an independent breath test. McGinn v. State, 268 Ga.App. 450, 451 (2004). The officer was "on notice" because Ms. Farmer 1) presumably knew of her right to an additional test (T-34-35) and 2) stated what type of test she wanted. (T-15). Id.

Testimony at the Motion to Suppress Hearing made it clear that the trooper knew Ms. Farmer was a Rockdale County Sheriff's Officer and that she had knowledge of all Georgia law. (T-22). Ms. Farmer also confirmed this in her own testimony, and stated that she was familiar with implied consent law and the accused's right to independent testing, and that she herself had made numerous DUI arrests in the past. (T-34-35).

As to the trooper, it is inconceivable that, with him having this knowledge of Ms. Farmer, he would not have been "on notice" that the accused knew of her right to an additional, independent test given her prior professional knowledge and training on Georgia Law. The officer was informed that Ms. Farmer was a deputy sheriff at the scene of the accident. (T-21). In fact, it is the exact reason why the Georgia State Patrol was required to perform the investigation. (T-20). Moreover, the officer knew Ms. Farmer because they had previous contact in their patrol duties. (T-21). The officer even referred to Ms. Farmer by her nickname, Frankie, although the name on her driver's license is Francis Farmer. (T-21). The officer knew that Ms. Farmer was presumably knowledgeable about Georgia law and her right to an independent test. (T-22).

The officer was also on notice of the type of test that Ms. Farmer wanted because she plainly asked, "Can I take a urine test?" (T-15). The officer read implied consent. (T-14). The warning stated **a)** that the officer can request a test and **b)** that Ms. Farmer can request an independent

test. The officer **a)** requested a breath test, and Ms. Farmer **b)** requested a urine test. As the case law notes, there is no more specific or particularized way to express what one wants than saying plainly, "Can I have a urine test." Ms. Farmer clearly wanted a urine test.

Nonetheless, the officer created stumbling blocks to avoid fulfilling his duty to allow an independent test by asking follow up questions after receiving Ms. Farmer's request for a urine test. (T-15-16).

No effort whatsoever was made by the officer to contact any facility to provide any type of independent test. (T-26). This refusal or failure by law enforcement to accommodate was not justified because numerous hospitals were open. Ms. Farmer was unable to obtain an independent test because the officer made no effort to accommodate her request.

The officer's follow up questions about her request for a urine test were used as stumbling blocks to fulfilling the otherwise unambiguous request. "Implied consent warnings ask an accused to submit to a State-administered test; they do not ask the accused whether he wants an additional, independent chemical test." The officer read the warnings and designated breath for the state administered test. When Ms. Farmer said "urine test" that was her designation for an independent urine test. (T-14). The officer restated that he was going to designate breath, and asked, "When you asked for a urine test, what was that about?" (T-15-16). This question was purposefully evasive of accommodating Ms. Farmer's request for an independent urine test. Mrs. Farmer asked, "Am I going to jail?" After the officer responded, "Yes," and Ms. Farmer believed that an arrest would put her employment in jeopardy, Ms. Farmer stated, "If I am going to do breath, then I might as well do breath." (T-35). This statement, however, was a statement

that if the officer was going to designate a breath test, then Ms. Farmer might as well take a breath test for her independent test as well. (T-35).

The officer negated Ms. Farmer's request for a urine test by asking a follow up question that placed an undue burden on Ms. Farmer and illegally created stumbling blocks that required her to utter specific language to the officer in order to receive an additional test. Ladow v. State, 256 Ga.App. 726, 728-729 (2002). (T-28). The officer's requirement that Ms. Farmer answer to his satisfaction his question "What was that about?" in order to receive an independent urine test, though requested in plain language by Ms. Farmer, unreasonably placed linguistic and temporal requirements on Ms. Farmer in violation of applicable case law. McGinn v. State, 268 Ga.App. 450, 452 (2004). When Ms. Farmer, as a person with prior professional knowledge, asked the trooper, who was aware of her prior professional knowledge (T-22), "Can I have a urine test? (T-15), Ms. Farmer made an expression, in light of the circumstances, that reasonably could be construed to be a desire for an additional, independent test. Anderton v. State, 283 Ga.App. 493,494, (2007). In this case, the circumstances of Ms. Farmer's prior professional knowledge, the familiarity the officer had with Ms. Farmer, and Ms. Farmer's state of mind following the accident are some of the circumstances that surrounded Ms. Farmer's request which should have been considered by the trial court. Id. The trial court erred as a matter of law by ruling on the issue on the basis of the words used in Ms. Farmer's statement, alone, without consideration of the circumstances in which the words were uttered. State v. Gillaspy, 270 Ga.App. 111, 114 (2004).

Words alone cannot be the basis for the Court's decision. The court must consider the circumstances. Anderton v. State, 283 Ga.App. 493, 493, (2007). The Georgia Court of Appeals held that an independent test was requested if circumstances are such that 1) the accused had prior knowledge of her right to an independent test and 2) the accused expressed what type of test she wanted. McGinn v. State, 268 Ga.App. 450, 451 (2004). Both of these circumstances are present in the instant case, and must be considered by the Court to be evidence that Ms. Farmer was asking for her own test. Ms. Farmer was a Rockdale County Sheriff deputy and the evidence of record establishes that she had knowledge of the implied consent law and her right to an independent test. In fact, she had personally handled DUI investigations and read the accompanying implied consent warnings on many occasions in her job as a road patrol office. These facts satisfy prong (1) referenced above. Further, Ms. Farmer plainly asked for a urine test, and later, an independent breath test, which satisfies prong (2) referenced above.

The trooper's testimony in Ms. Farmer's case was designed to lead the Court to believe that Ms. Farmer was not requesting an independent test, but rather, attempting to change the type of test designated by the trooper. This is exactly the same argument made by the State in the Anderton case. However, it is crucial to distinguish Anderton from the instant case, as the Anderton Court held that the accused was trying to change the designation of the State administered test *because Anderton's own testimony confirmed that he was not seeking an additional, independent test*. Anderton's argument that he supposedly wanted an independent test was negated by his own testimony, but that fact does NOT exist in this case. Our case is unlike Anderton because Ms. Farmer's testimony is that she was asking for an additional,

independent test. (T-14). As a trained and experienced officer, Ms. Farmer was aware that only the trooper can designate the type of test administered on behalf of the State, and that she could not unilaterally change that designation, but rather, she would have the right to an independent and separate test, the type of which *would* be of her choosing.

It is also significant to distinguish that, in Gillaspy, the trial court found that an independent test was requested based on the words used by the defendant, but the Court of Appeals reversed because the trial court considered only the words and not the circumstances. The circumstances in Gillaspy were that the state first designated a breath test, and then changed the state-designated test to blood to accommodate the defendant's request for a change in the state-designated testing method. The court in Gillaspy also considered the fact that Gillaspy did not testify in his motion hearing. In our case, Ms. Farmer was not requesting an accommodation (i.e., a change of the type of State-designated test), and there was thus no accommodation made at all. Further, Ms. Farmer *did* give testimony in her case, and it supported the fact that she was requesting independent urine testing during her interaction with the trooper.

The trooper in Ms. Farmer's case, by his own testimony, administered the breath test that he had designated previously, and did not arrange for a urine test (either as a differentiation of his original test designation or pursuant to Ms. Farmer's independent test request) at any time. (T-26). Like Gillaspy, the words used in Ms. Farmer's case were a request for an independent test, but, unlike Gillaspy, the request was not negated by Ms. Farmer asking for an accommodation, or by the trooper suggesting or providing one. Also, unlike Gillaspy, Ms.

Farmer testified that she knew her right to an independent test and was requesting an additional, independent test. (T-14; T-38; and T-47).

Despite Ms. Farmer's independent test request(s), the officer unreasonably failed to make any effort to fulfill same. The officer made no attempt to contact any facilities to determine whether an independent urine test could be administered, even though numerous hospitals would have been open and staffed with personnel capable of performing a urine test, or any other independent test requested by Ms. Farmer. Just like in *McGinn*, the officer's failure to investigate means of obtaining the independent test frustrated Ms. Farmer's right to obtain same. Even worse, after Ms. Farmer's request for a urine test was confounded, she requested a reasonable independent testing alternative, stating, "If I'm going to do breath, then I might as well do breath." (T-35). Ms. Farmer's words indicate she is requesting two tests, the State-designated breath test and an independent breath test. Nevertheless, the officer again failed unreasonably to follow up with this request or accommodate Ms. Farmer's request for an independent test, as he did not perform or arrange for administration of the independent breath test requested.

In summary, Ms. Farmer made a clear request for an independent test by asking, "Can I have urine." (T-14,T-38; and T-47). She was entitled to an independent test because she submitted to the State's test of her breath. O.C.G.A. § 40-6-392(a)(3). The officer had a duty to insure Ms. Farmer was allowed an independent test because he was on notice that she wanted a urine test, obviously a different test than the breath test that he designated. McGinn v. State, 268 Ga.App. 450, 451 (2004). Despite the officer's claims to the contrary, Ms. Farmer never asked the officer to change the type of State-designated testing, and there is no evidence in the record

that changing the test was discusses, or in any other way indicated that she wanted him to do so. All of the circumstances point to the fact that Ms. Farmer wanted an independent test, and that she first requested an independent urine test in plain English, and, because the office required her to use his magic words, she was denied. Then, Ms. Farmer asked for an independent breath test, again in plain English. The officer muddied the water, confounded Ms. Farmer, and created impermissible stumbling blocks to receiving an independent test by making redundant statements and asking Ms. Farmer follow-up questions which would require Ms. Farmer to use specific language in order to be granted her right to an independent test. (T-15) In analysis of the instant appeal, this Court must rely on the holding in *McGinn,* which states that it is impermissible to create stumbling blocks once the officer is on notice of a request for an independent test. The officer's actions in this case are thus plainly in contradiction of the *McGinn* ruling, as well as all other applicable case law cited herein. It is most significant to note that the officer had familiarity with Ms. Farmer and her prior professional knowledge, yet he still, unreasonably claimed he had no clue what Ms. Farmer was talking about when she made her simple requests, twice. (T-15-16). Because there was no effort made to perform either of the independent tests requested by Ms. Farmer, rather, the officer was unnecessarily contrarian in his efforts, purposefully denying Ms. Farmer's right to independent testing, because he did not want to perform the test, just like the trooper did not want to place her in front of the video camera, even though they were running and fully functional. (T2-35). The result of the state administered test of Ms. Farmer's breath must be suppressed as a matter of law.

CONCLUSION

For the reasons listed above, Appellant respectfully asks this Court to reverse the trial Court's denial of Appellant's Motion to Suppress and remand this case to the State Court of Rockdale County with directions to reconsider Appellant's conviction based upon a granting of the Motion to Suppress the State Administered Chemical Test.

Respectfully submitted,

/s/ Gordon Clark Hall
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IN THE COURT OF APPEALS
STATE OF GEORGIA

FRANCES FARMER,
APPELLANT,

VS. CASE NO.:A15A1783

STATE OF GEORGIA,
APPELLEE.

CERTIFICATE OF SERVICE

This is to certify that I have personally served the Office of the District Attorney with a copy of the attached *Brief of Appellant* via U.S.P.S. mail to Richard Reed, Rockdale County District Attorney, 922 Court Street, Room 201, Conyers, Georgia 30012.

Dated this 3rd day of July 2015.

/s/ Gordon Clark Hall
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Attorney for Appellant
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