IN THE

Supreme Court of Virginia

RECORD NO. 090727

RONALD LEE JONES,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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SUBJECT INDEX

Subject Index i

Table of Citations ii

Opening Brief for Appeal 1

Nature of the Case and Material Proceedings Below 2

Statement of Facts 3

Question Presented 17

Assignment of Error 17

Principles of Law, Argument and Authority 17

Conclusion 35

Certificate 36

TABLE OF CITATIONS

UNITED STATES CONSTITUTION

Fourth Amendment 4, 20

Fifth Amendment 4, 34

Fourteenth Amendment 4, 20, 34

VIRGINIA CONSTITUTION

Article One, Section 10 4

Article One, Section 11 4

CALIFORNIA CONSTITUTION

Article One, Section 13 34

OREGON CONSTITUTION

Article One, Section 12 32

CODE OF VIRGINIA

Virginia Code §18.2-266 2

Virginia Code §18.2-260.10 ..... 31, 32

Virginia Code §18.2-268.2 ..... 1, 2, 12, 31

Virginia Code §18.2-268.3 32

Virginia Code §19.2-60 4

EXHIBITS

Exhibit One 9, 10

Exhibit Two 9, 10, 12

Exhibit Three 12

Exhibit Four 10

FEDERAL CASES

Scott v. Harris, 550 U.S. ___051631 (2007) 24

Francis v. Franklin,

471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) 24

Griffin v. California, 381 U.S. 957, 85 S. Ct. 1797 (1965) 34

VIRGINIA CASES

Addington v. Commonwealth, 161 Va. 975, 170 S.E. 565 (1933) 26

Baker v. Taylor, 229 Va. 66, 69, 326 S.E.2d 669, 671 (1985) 29

Barker v. Commonwealth, 198 Va. 500, 95 S.E.2d 135 (1956) 26

Basham v. Terry, Admx, 199 Va. 817, 821, 102 S.E.2d 285, 288 (1958) .. 28

Bogstad v. Hope, 199 Va. 453, 100 S.E.2d 745 (1957) 28

Burks v. Webb, Admx, 199 Va. 296, 305, 99 S.E.2d 629, 636 (1957) 28

Davis v. Sykes, 202 Va. 952, 955, 121 S.E.2d 513, 515 (1961) 28

Farmer v. Commonwealth,

12 Va. App. 337, 404 S.E.2d 371 (1991). 29, 30, 34, 36

Farmer v. Commonwealth, 10 Va. App. 175, 390 S.E.2d 775 (1990).. 29, 30

Grinnelle v. Commonwealth, 157 Va. 915, 161 S.E. 888 (1932) 26

Harris v. Commonwealth,

266 Va. 28, 32, 581 S.E.2d 206, 209 (2003) 20, 24

Hill v. Lee, 209 Va. 569, 166 S.E.2d 274 (1969) 28

Jetton v. Commonwealth, 2 Va. App. 557, 347 S.E.2d 141 (1986)..... 29

Laughlin v. Rose, Admx, 200 Va. 127, 134, 104 S.E.2d 782, 287 (1958).. 28

Legions v. Commonwealth, 181 Va. 89, 23 S.E.2d 764 (1943) 26

Oliphant v. Snyder, 206 Va. 932, 147 S.E.2d 122 (1966)..... 28

Vance v. Commonwealth, 155 Va. 1028, 154 S.E. 512 (1930) 26

Wallace v. Commonwealth,

32 Va. App. 497, 505, 528 S.E.2d 739, 742 (2000)..... 28

Willis and Bell v. Commonwealth, 218 Va. 560, 238 S.E.2d 811 (1977).... 26

Yap v. Commonwealth, 49 Va. App. 622, 643 S.E.2d 523 (2007)..... 24

MISCELLANEOUS STATE CASES

Longshore v. Maryland, 399 Md. 486, 294 A.2d 1129 (2007)..... 30

State v. Fish, 321 OR, 48, 56, 893 P.2d 1023, 1028 (OR 1995)..... 30, 32

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

RONALD LEE JONES,

Appellant,

V. Supreme Court Record No. 090727

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF

Your Appellant, Ronald Lee Jones, respectfully represents that he is aggrieved by a certain judgment of guilt and sentence imposed by the Honorable J. Martin Bass, Judge for the Circuit Court for the County of Stafford, on February 27, 2007, and a certain misdemeanor jury trial for Unreasonably Refusing to Submit to a Blood or Breath Alcohol Test, Subsequent Offense pursuant to Virginia Code §18.2-268.2 and a finding of Guilty of same charge, therein lately pending in which Ronald Lee Jones, Appellant, herein was a defendant and the Appellee, Commonwealth of Virginia, the Plaintiff, which was affirmed by the Virginia Court of Appeals on May 6, 2008; and made final by a denial of a Rehearing En Banc on June 12, 2008.

NATURE OF CASE AND MATERIAL PROCEEDING BELOW

On February 5, 2007, Counsel for the accused along with the accused, Ronald Lee Jones, appeared before the Stafford County Circuit Court to present evidence and oral argument in support of a Motion to Suppress the charges of Driving While Under the Influence of Alcohol in violation of Virginia Code §18.2-266 and Unreasonably Refusing to Submit to a Blood or Breath Alcohol Test in violation of Virginia Code §18.2-268.2. It was also alleged that the accused violated Virginia Code §18.2-266 twice in the previous ten years elevating the charge of DUI to a felony and the charge of Unreasonable Refusal to a criminal Class 1 Misdemeanor. Judge Bass rejected the defense arguments on both charges.

Counsel and the Accused appeared before a jury on February 27, 2007 to answer for the charge of Unreasonable Refusal as a Third Offense. The accused was found guilty of that charge and was sentenced to pay a fine of $2,500, incur a three year suspension of his driver's license, and to serve 30 days in jail.

The accompanying charge of Driving Under the Influence of Alcohol was tried on a later date. The defendant, Jones, was found not guilty of Driving Under the Influence. That charge is not the subject of this appeal.

A Motion to Stay Execution of Sentence was timely filed and granted by the Circuit Court of the County of Stafford pending resolution from the Appellate Courts of the Commonwealth of Virginia.

A Petition for Appeal to the Court of Appeals was timely filed with the Court of Appeals of Virginia. The petition was granted in part, and denied in part. Briefs were submitted by Appellant and Appellee and oral arguments were presented on February 20, 2008 before a three judge panel of the Court. The Court delivered a written opinion finding no error on May 6, 2008. Appellant petitioned for a Rehearing *En Banc* on May 19, 2008, which petition was denied by way of written order on June 12, 2008. Counsel failed to properly file the Notice of Appeal with the Court of Appeals of Virginia and was subsequently granted a Delayed Appeal on March 13, 2009.

STATEMENT OF FACTS

The parties appeared before the Stafford County Circuit Court on February 5, 2007, on a pre-trial Motion to Suppress all the evidence obtained in the case. The basis of the motion focused on the lack of reasonable suspicion to stop the defendant and no probable cause to

arrest the defendant pursuant to Virginia Code §19.2-60, the Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment of the United States Constitution, as well as Article I, Section 10 of the Constitution of Virginia. The defense argued that there did not exist probable cause to arrest pursuant to the Due Process Clause to the Fifth and Fourteenth Amendment of the United States Constitution and Article I, Section 11 of the Constitution of Virginia. At the hearing, the Court ruled that a valid stop had occurred (A: 133-136); and that there existed probable cause to arrest. (A: 130-136)

In the pre-trial motion, the Commonwealth called one witness, former Deputy Sheriff Nelson, who testified about the circumstances surrounding the stop and arrest. Nelson stated that he stopped the vehicle by flagging it down for various reasons including the fact that he had set up a light perimeter in a neighborhood because of a recent break-in that had occurred. (A: 45) He noticed the Defendant driving through the perimeter very slowly on two occasions and noticed that he was a black male. (A: 45-46) Nelson indicated that there was a look out for a black male with an Afro as a suspect in the breaking and entering and he opined that the Defendant could have been there to pick up the suspect. Nelson testified that he was

therefore suspicious of the Defendant. (A: 64) He further indicated that he could not see into the back windows of the vehicle because of the tint; although, he noted that the tint was legal. (A: 59)

Based upon the testimony that Jones's eyes were red and glassy (A: 71), Nelson smelled the odor of alcohol (A: 71), and the manner in which Jones was speaking, Nelson believed that he had probable cause to arrest Jones. (A: 78) Nelson also indicated that Jones was a little irrational and that he both stuttered (A: 78) and slurred (A: 86) his speech.

Nelson indicated that he thought Jones did not want to cooperate with him (A: 69) and that he offered him every opportunity to show that he was not drinking (A: 68). He found alcoholic beverage containers in the vehicle. These containers were all sealed and full. (A: 72). Nelson stated that Jones offered two different explanations for what Nelson perceived to be an odor of alcohol: the scent of cough drops and incense. (A: 73)

Nelson also indicated that he felt Jones was confused because he did not know what county he was in even though he was coming to pick up his daughter. Jones actually asked Nelson if "this is Prince William?" and Nelson responded that it was Stafford County. (A: 74). Nelson thought it was odd that Jones did not know in what county his daughter lived. (A: 76).

Nelson became clearly frustrated with Jones because he would not do what Nelson commanded. Nelson went to so far as to opine that "the worst thing an officer can do is arrest someone and take them down for a pbt (i.e. preliminary breath test) [sic - pvt] and blow a flat zero. This is a horrible thing for an officer to do. You just arrested an innocent man that might be honest with you." (A: 81-82) Nelson further stated that Jones was irrational because he wanted to stay on the sidewalk and refused to get in the street as ordered. (A: 79)

The defense called Ronald Lee Jones in reference to the Motion to Suppress. Jones testified that he was nervous and his mind was consumed with where his daughter was located. These statements were substantiated by Nelson earlier. (A: 83, 90). Jones testified that he had consumed no alcohol during the 24 hour time period prior to his arrest on either September 29 or 30, 2006 (A: 99, 101-102).

Jones explained the odor that Nelson indicated was alcohol to be incense while Jones was within his vehicle. He later explained the odor on his breath as being cough drops that he had been using on a repeated basis to lubricate his throat. Jones detailed his explanation to explain the source of the odor that Nelson attributed to alcohol changed once he had

been removed from the vehicle and it was not evidence that he was confused.

As indicated above the Court denied the Motion to Suppress (A: 99-100) having found that there was an articulable suspicion to stop as well as probable cause to arrest. (A: 130-136) Accordingly, the case was scheduled for trial before a jury on February 27, 2007.

The Commonwealth's Attorney filed a Motion in Limine which was heard on the morning of trial prior to the trial itself and the Court ruled in favor of the Commonwealth in its Motion in Limine over the Defendant's objections and trial commenced. (A: 179) The defense also filed a Motion to Dismiss (R:94-7) the charge in this case on the basis that the Defendant was not given the opportunity to give a blood test, rather than a breath test, and was not given the opportunity to consult with an attorney prior to deciding whether to take either test. (A: 179). The Motion to Dismiss was also overruled by the Court.

The Commonwealth called one witness before the jury in its case in chief, Deputy Sheriff Peter Nelson. Nelson testified that he and a number of officers responded to the Park Ridge Subdivision of Stafford County on the evening of September 29, 2006, because of an investigation of an

alleged burglary. He noticed the defendant drive past him in a Sport Utility Vehicle coming in and out of where he was in a perimeter watch. (A: 286) Nelson said that he thought Jones might be there to pick up the burglar who was on foot. Nelson became suspicious so he flagged Jones down (A: 286). Nelson indicated that he flagged down the defendant by putting his hand up as he was approaching the vehicle (A: 287). Jones disputed this and said that he had come to a stop on his own volition as he was trying to ask the officer a question. (A: 209)

Nelson indicated that he smelled an odor of alcohol after stopping Jones (A: 288). He asked Jones if he had been drinking and asked him out of the car to do field sobriety tests. He stated Jones did not know where he was, i.e. what county he was in (A: 289). Nelson stated that Jones did not want to get in the street while speaking with him, but rather he wanted to get up on the curb for some reason. (A: 289). Jones denied that he had been drinking (A: 289). Nelson indicated there was a strong odor of alcohol coming from Jones (A: 289). Jones kept asking Nelson "Why you doing that to me? Why you doing this to me?" on a repeated basis. (A: 290) Nelson later directed Jones to do field sobriety tests and Jones responded

to said directive with the question, "Why you doing this to me? I don't understand what you're doing. I don't know why you're doing this." (A: 292)

The Commonwealth offered as Exhibit One[1] a videotape recording from Deputy Nelson's Cruiser as having fairly and accurately recorded what took place. (A: 294-295) The defense objected to the admissibility of the audio portion of videotape based upon the fact that it recorded only a portion of the conversation between the defendant and the arresting police officer. The Court overruled the objection. (A: 295-296). The videotape has a timer on it which was fast forwarded to 21:39:40 for viewing by the jury. (A: 299) The jury then viewed the videotape from that beginning point at 21:39:40 until the video tape showed the time of 23:06 (A: 307). The jury watched most of this portion of the videotape (Exhibit One); however, it was fast forwarded during a portion of the videotape where there was no audio recording after the defendant was in the police car because it provided no additional information. (A: 306) As noted in issue number one below, Counsel is requesting this Honorable Court view the video (Exhibit One) from 21:39:40 to the point of arrest to independently determine whether or not probable cause was established for the arrest in this case.

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[1] There is only one video tape which was introduced into evidence. It was introduced on three separate occasions, marked as Exhibit two in the Motion to Suppress hearing. (A: 70)

Nelson testified that he was in the perimeter of the Park Ridge Subdivision along with other officers and that he had made physical contact with Jones at what was marked on the video as 21:48:36. (A: 301) Nelson offered two explanations of why the microphone recording may have gone off in the course of his handling the arrest of Jones: (1) that he is not required to have the microphone on while talking with other officers, or (2) he could have gotten too far away from the car for the microphone to pick up his conversation. (A: 305) Nelson testified that it would take him a total of five minutes to do three field sobriety tests and read the implied [sic - applied] consent law. (A: 303) He did not specify which three field sobriety tests he would have given to Jones. The Court admitted the videotape as Commonwealth's Exhibit One preserving the previously made objections by Counsel and no additional objections were stated. (A: 307)

Additionally, the Commonwealth offered as Exhibits Two and Three, two prior convictions of Driving Under the Influence of Alcohol, to which there was no objection. (A: 308-309) Additionally, Exhibit Four was introduced without objection at A: 315 after it had been read to the jury in the previous five pages. (A: 310-314) Nelson retrieved two wine coolers and a 12 ounce beer from Jones's vehicle (A: 317). Nelson testified Jones

said "I [Nelson] did not know what I [Nelson] was doing. He [Jones] was there to help me [Nelson] and I was trying to hurt him [Jones]. He would do whatever he could to help me as long as it was within his rights. (A: 318)

On cross examination, Nelson admitted that he directed Jones to take the field sobriety tests without advising him that they were voluntary and that he had the right to decline them. (A: 322) He read him the information about the breath test to take at the station while the radio was making a great deal of noise and the discussion is unintelligible at 22:10 on the video. (A: 320-322). Nelson admitted that Jones told him while inside Jones's SUV that Nelson was mistaken in characterizing what he smelled as alcohol and indicated that what he smelled must have been incense. (A: 323) When Nelson continued to confront him about smelling alcohol after getting out of the vehicle, Jones further explained that Nelson must have smelled the cough drops that he was taking (A: 323). Nelson further admitted he told Jones that he had 150 cases the previous year, and that he did not lose a single one (A: 324-325).

At the conclusion of the Commonwealth's case, the defense made a Motion to Strike the case against the defendant laying out two specific points. First, there had been no proof of the time of the arrest of Jones in

the trial. One element of the offense requires, pursuant to Virginia Code §18.2-268.2, that the accused be arrested for suspicion of DUI within three hours of the alleged driving behavior in order for the Implied Consent laws to be enforceable. Second, the two previous DUI convictions that were admitted as Commonwealth Exhibits Two and Three are not valid predicate offenses for a third offense of Unreasonable Refusal to take a breath or blood test inasmuch as the elements are not the same. The Court overruled the Motion to Strike (A: 336) and the defense presented evidence from the Defendant, Ronald Lee Jones.

Jones testified that his daughter, Danielle, called him between 9:00 p.m. and 9:30 p.m. on September 29, 2006. Jones then turned around from going to the movies with this fiancé, Marguerite, to return home. On the way home they stopped at the grocery store for Marguerite to purchase items. The stop at the grocery store lasted about 15 minutes. (A: 338-339) Jones then left Marguerite at the condo and proceeded to Stafford County. Jones testified that he was concerned about his daughter's phone call to him earlier that evening and that he was completely focused on it during the course of the evening during his encounter with Nelson. As he was approaching her home he saw five or six police cruisers with lights and

sirens pass by him. When he entered her neighborhood there were police everywhere. (A: 340) When he arrived at his daughter's house he first noticed the house was unlocked and in an unusual state of disarray. He also found a note that stated "Daddy, come in. I'll be right back call me when you get here. 540-383-0184, Danielle." (A: 343) Jones attempted to call his daughter, but his cell phone battery had lost its power, and he could not locate her home telephone. (A: 96)

Jones then left his daughter's home, and came to a complete stop near a cruiser in the parking lot hoping that the police officer would come over to talk with him. (A: 344) He then went down the next street to another parking lot and made a U-Turn and came back out. When he first stopped for officer Nelson, he asked the officer what was going on and Nelson cut him off and asked Jones what he was doing down there. (A: 346) Jones advised Nelson that his daughter, granddaughter, and son-in-law live down there and began telling him about his daughter's phone call when he was cut off by Nelson asking him if his son-in-law had an Afro. (A: 348) Jones told Nelson that his son-in-law is a Sergeant in the United States Marine Corps, which prohibits afros, and was immediately confronted about drinking by Nelson. (A: 348) Jones testified that he

explained to the officer that he had not drank any alcohol, and Nelson must have been smelling either incense or an air freshener in his vehicle. Jones later explained that Nelson must have been smelling the mentholyptus cough drops to explain the smell Nelson was inquiring about. He further described the air freshener from his car as sweet smelling, a cinnamon and apple air freshener. (A: 351)

Jones denied that he had anything to drink that night. (A: 351-352) Jones wanted to explain how he was feeling that evening and the pressure that was being placed on him by Nelson; however, the Court would not allow Jones to respond to the question asked about it. (A: 353-354) Jones explained that the two bottles of wine coolers and the can of Steele Reserve beer found in his car were sealed. He had been carrying the Steele Reserve can since 2000 as a souvenir (referencing the Steel Curtain of the Pittsburg Steelers); and he did not know the wine coolers were in his car that night. (A: 354)

Jones did not feel he was going to gain anything with Officer Nelson after he had been told the number of arrests and convictions from last year. Moreover, he did not get a chance to talk to his daughter or to inquire as to her whereabouts. On cross examination, Jones explained that he did not

know that the wine coolers were in the vehicle and they had to have fallen out of the bag of groceries Marguerite had purchased at the store earlier in the evening. (A: 363) The prosecutor and arresting officer relied on the fact that Jones asked if he was in Prince William County as an indicator that he did not know where he was. This exchange takes place on the video at 22:13:50 and is the only indication whatsoever that Jones "does not know where he is." Counsel once again requests this Honorable Court to review the video tape which is Commonwealth's Exhibit One for its content and the interpretation of that content as being misapplied by the arresting officer. The officer's characterization that Jones simply did not know where he was as if he was lost in a fog or in some other incapacity is a misinterpretation of the evidence. The only indication of confusion was when Jones asked, at the time of his arrest, whether he was in Prince William County.

During cross-examination, Jones indicated he felt something was amiss with his daughter because the house was closed but unlocked; his daughter never leaves the door unlocked. (A: 370) He further advised that his cell phone was not working by the time he got down to her home and that he could not find her house telephone. (A: 373) Jones said he did not have the nerve to go over and ask the officers who appeared to be

extremely busy with another matter when he was riding through the neighborhood. He advised that he did not know if it was appropriate for him to get out of his car and approach an officer about what was going on. That is why he was hoping the officer would approach him if he traveled in a slow manner around the police officers. (A: 375-376) Jones also testified he was never offered a blood test in this transaction. (A: 388)

At the conclusion of the whole case, counsel for the defendant renewed the Motion to Strike the evidence. (A: 395) During this argument counsel noted that evidence came in about the time of the arrest for the first time in the rebuttal case at A: 391-393. It was pointed out that this was not the case in the conclusion of the Commonwealth's Case in Chief and it was renewed on that basis. Furthermore, the defense also argued again that the two previous DUI's were not an appropriate predicate for a third offense refusal case. (A: 395) The court overruled the Motion once again at the conclusion of argument. (A: 396)

The parties met and resolved all the jury instructions with the exception of one that was offered by the defense and denied by the Court. The instruction set out a theory of defense in the case that the defendant

was not allowed to consult with an attorney when facing a criminal charge of a refusal for the jury to consider. (R:143, A: 398-402)

QUESTION PRESENTED

I. DID THE COURT ERR FINDING PROBABLE CAUSE TO ARREST THE DEFENDANT WHEN AN ESSENTIAL ELEMENT FOR PROBABLE CAUSE WAS PREDICATED ON THE APPELLANT'S REFUSAL TO SUBMIT TO ANY FIELD SOBRIETY TESTS? (R:62-3, A: 41-136)

ASSIGNMENT OF ERROR

I. THAT THE COURT ERRED FINDING PROBABLE CAUSE TO ARREST THE DEFENDANT WHEN AN ESSENTIAL ELEMENT FOR PROBABLE CAUSE WAS PREDICATED ON THE APPELLANT'S REFUSAL TO SUBMIT TO ANY FIELD SOBRIETY TESTS. (R:62-3, A: 41-136)

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

I. DID THE COURT ERR FINDING PROBABLE CAUSE TO ARREST THE DEFENDANT WHEN AN ESSENTIAL ELEMENT FOR PROBABLE CAUSE WAS PREDICATED ON THE APPELLANT'S

REFUSAL TO SUBMIT TO ANY FIELD SOBRIETY TESTS? (R:62-3, A: 41-136)

A hearing was held on February 5, 2007, challenging Articulable Suspicion to stop and Probable Cause for arrest for the DUI and Unreasonable Refusal to take a Blood or Breath Test. Evidence was taken in the form of live testimony from Deputy Nelson about the night of September 29, and early morning hours of September 30, 2006, as well as offering a videotape of the actual event. Nelson testified that there had been a burglary in the area and the Stafford County Sheriff's Department had responded by setting up a border with several police vehicles. Ronald Jones was not involved in the burglary. Jones drove by Nelson on two different occasions and Nelson stepped out to flag him down on the second time (A: 45). Jones testified that he stopped to try to speak with Nelson and denied seeing Nelson's hand telling him to stop. Jones insisted instead that he had stopped to assist Nelson rather than being flagged down by him. (A: 109) Jones indicated that he was trying to find out information about his daughter and he stopped of his own accord to talk with a member of the Sheriff's Department. He had received a telephone call earlier that evening from his daughter and was concerned about her

safety. Jones saw several Sheriff's cars pass him on the interstate as he was making his way to his daughter's home only to find that there was a large police presence when he arrived in her neighborhood; this further concerned him. When he arrived at his daughter's apartment, the door was unlocked. (A: 96) Additionally, he discovered the house was in disarray because of granddaughter. (A: 95-96) Inside he found a note from his daughter, with her cell phone number, telling him to call her when he arrived. Jones was unable to make the call because his cell phone was no longer working and he was unable to locate the land line telephone in the house. (A: 96)

What occurred that night were two persons meeting with competing agendas. The Commonwealth characterizes Jones' behavior as being indicative of intoxication; whereas, the defense attempted to present a theory that Jones was concerned with his daughter's safety, which explained his slightly evasive behavior. The defense, however, was limited in its ability to present evidence in the hearing concerning probable cause to arrest as well as the trial of this case concerning Jones's complete mental state concerning his daughter or to offer that as an explanation as to why he did not want to take the field sobriety tests. (A: 94, A: 345-346)

The appellant requests this court sit in judgment of the evidence presented in the hearing to determine probable cause as an independent fact finder in this case inasmuch as the video tape which was introduced as Commonwealth's Exhibit One contains approximately 80% of the circumstances that were presented at the probable cause hearing. This Court should apply a *de novo* standard of review when determining whether someone has been seized in violation of the Fourth Amendment of the United States Constitution as applied through the Fourteenth Amendment. *Harris v. Commonwelath,* 266 Va. 28, 32, 581 S.E. 2d 206, 209 (2003) This Court cannot judge the credibility of the witnesses as they testified in the hearing; however, this Court can look at and listen to the tape to see whether Nelson's opinion or characterization testimony has credibility versus the actual event. Nelson described Jones's speech as being slurred (A: 86) or stuttering (A: 78), comments that Jones did not know where he was (A: 76), and that Jones smelled of alcohol (A: 76). The audio portion of the videotape is clear at times and Nelson concedes that it is an accurate recording of that audio portion. (A: 87)

Counsel invites this Honorable Court to review Commonwealth's Exhibit One, to listen to Jones's speech pattern and determine that there is

no stuttering or slurring of words throughout any of his conversation. Counsel also invites this Honorable Court to listen to the exchange that took place between Nelson and Jones that Nelson characterized as indicative of the fact that Jones did not know his whereabouts at 22:13:50. Specifically, Jones asked, whether or not he was in Prince William County. Nelson responded that he was in Stafford County. Jones is not an individual who was confused or did not know his whereabouts as a product of alcohol consumption as the Commonwealth would have this Court believe, rather he was a frightened, terrified father who was desperately attempting to ensure his daughter was safe. There are a number of reasons that an innocent man or woman would refuse to perform field sobriety tests (hereinafter FSTs): (1) they are voluntary, therefore, not required; (2) there is no implied consent law requiring them to determine whether probable cause exists to arrest if one is suspected of driving under the influence; (3) the FSTs are not explained to the accused prior to him or her being demanded to perform them; (4) the tasks required the accused are unnatural acts unless one is a gymnast; (5) the interpreter of one's performance on the FSTs will be done by a biased individual; (6) the suspect feels intimidated; (7) the police officer is disrespectful; (8) the

physical location where the FSTs are being requested to be performed (here in the street where the police officer is ordering Jones versus on the sidewalk where Jones feels safe); (9) the accused feels bias from the police officer based upon his race; (10) the suspect believes the reputation in the community of the Stafford County Sherriff's Department to be racially prejudiced; (11) the accused is unaware that the FSTs are being videotaped (although they were, the officer did not explain this to Jones, nor is there any evidence that Jones knew this); (12) the arresting officer brags about a 100% conviction rate on his arrests for DUI (A: 315); (13) the FSTs are not performed in a controlled environment; (14) the suspect is not allowed to call someone to act as an independent observer; (15) the arresting officer appears biased; (16) the arresting officer is not neutral; (17) the strobe effect of the police lights cause an accused to have a migraine headache; (18) the suspect is not allowed to consult with an attorney prior to making this decision; (19) the accused is ill (Jones's throat was bothering him); (20) the accused has a disease; (21) the accused has a disability; (22) the suspect is tired; (23) the suspect is diabetic; (24) the suspect has an inner ear infection; (25) the suspect has a chronic inner ear problem; (26) the suspect is deaf; the suspect has something else on his

mind, and is incapable of focusing on any other issue until that primary matter is resolved in his mind as the result of (27) Attention Deficit Disorder; (28) Bipolar Disorder; (29) autism; (30) a panic attack; (31) fear of his daughter's safety; the ground or surface is (32) unlevel; (33) defective; (34) sloped; (35) cracked; (36) contaminated by the elements such as ice or rain; (37) the suspect is affronted by the suggestion of being under the influence when they have had nothing to drink; (38) the suspect feels persecuted; (39) no independent party has explained the suspect their rights such as a neutral magistrate or other judicial officer; (40) there is nothing contained in the Manual published by the Department of Motor Vehicles about their rights and obligations if so confronted (link); (41) their does not exist a law in Virginia requiring the videotaping of all FSTs (See S.C. Law); or (42) the accused was previously advised by an attorney to refuse FSTs. This list is not meant to be exhaustive or infinite, but contains numerous reasons why Jones did not want to perform FSTs. None of which concern a guilty knowledge of himself as this inference creates. The reasoning of the trial Court is clear from the exchange with counsel as follows, to-wit:

> Mr. Beale: ...I want to explain why he felt uncomfortable with this officer as opposed to some different officer. I think it would relevant to the

> court's consideration whether his actions were being obstructive or whether or not he just didn't feel comfortable.
> The Court: At this point, we're looking at whether this officer had reasonable suspicion for probable cause I will sustain the objection. (A: 103-104)

There is to be no exploration into the reasoning of the suspect, yet it is appropriate that an inference of guilty knowledge will be applied. Inferences or presumptions are always suspect, and to enforce such an inference here where there are so many reasons that Jones would not perform the FSTs amounts to shifting the burdon or persuasion of proof. This is not appropriate. See *Francis v. Franklin* 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), *Yap v. Commonwealth,* 49 Va. App. 622, 643 S.E.2d 523 (2007).

The United States Supreme Court recently took the time to independently appraise the videotape of a police chase in *Scott v. Harris,* 550 U.S. 372, 127 S. Ct. 1769, 167, L.E.2d 686 *(2007).* It is clearly the standard of review in the challenge to probable cause for arrest for this court to conduct a *de novo* standard of review. *Harris v. Commonwealth*, 266 Va. 28, 32, 581 S.E.2d 206, 209 (2003).

Nelson testified in a conclusory manner in the hearing regarding his assessment of Jones. Nelson's conclusions are readily contradicted by the

audio portion of the video of the night's events that was offered into evidence. The focus on the videotape is not precise enough for this Court to independently evaluate the presence of redness or glassiness in the eyes and is not technologically capable of preserving whether or not there was an odor of alcohol; however, the audio portion does capture the fact that there is no slurred or stuttering speech by Jones. Furthermore, the tape captures the fact that the Defendant is not confused, as if in a state of disorientation as characterized by the Commonwealth, when he merely asked if he was in Prince William County. Although people who dwell within a particular county may feel that it is unusual for an individual not to know what county they are in, it is quite common for a visitor to not know what county they are in. This lack of geographical knowledge is not indicative of intoxication, it is merely indicative of the fact that Jones does not reside within the borders of Stafford County. Jones took Exit 143 Garrisonville/ Aquia Harbor off of Interstate 95, which does not indicate that it is Stafford like Exit 140, the Stafford exit. Many people that reside outside of Stafford County may not be aware that they have entered they county when they exit at the same location as Jones.

Additionally, the arresting officer said it was unusual for Jones not to stand in the street as ordered by him. Jones insisted that he remain on the sidewalk. A reasonable interpretation of this fact might be that most people do not stand in the street, intended for motor vehicle traffic, especially when a number of police vehicles were on the scene. Furthermore, if he were required to submit to Field Sobriety Tests, Jones might feel endangered to do so in a travel lane of a highway.

There are numerous precedents for an appellant court to judge the credibility of a witness by reading cold transcripts. The Court has ruled that the testimony of a Prosecutrix to be inherently incredible and dismissed the case. See *Willis and Bell v. Commonwealth 218 Va. 560, 238 S.E. 2d 811 (1977); Barker v. Commonwealth 198 Va. 500 95 S.E. 2d 135 (1956), Vance v. Commonwealth 155 Va. 1028, 154 S.E. 512 (1930); Grinnelle v. Commonwealth, 157 Va 915, 161 S.E. 888 (1932); Addington v. Commonwealth, 161 Va. 975, 170 S.E. 565 (1933); Legions v. Commonwealth, 181 Va. 89, 23 S.E. 2d 764 (1943).* Counsel does not advocate that this Court set up as high a hurdle for the Defense in a case such as this that the uncorroborated testimony of a witness must be found to be inherently incredible in order to be successful in a challenge at this

level. Since the technology is now catching up with the courtroom and video and audio tapes are a day to day experience for all persons to view and evaluate, it is Counsel's contention that is an appropriate thing in a case such as this for the Court to review and independently judge the credibility of the witness when the interaction between the witness and the accused has been memorialized in this fashion.

Now that the age of technology is catching up with the judicial system, an appellate court has an opportunity to independently review the actual events rather than reading a cold transcript of the description of the actual events. Counsel can point to a recent event in the history of our nation that speaks loudly on this same issue where an often convicted felon's beating was captured on videotape for the nation to see. The police officers involved in this event denied beating Rodney King, but the video of the actual event captured the truth.

Counsel does not suggest to the Court that this is a step that must be taken and that the Court has any obligation to investigate the actual circumstances leading up to the arrest of individuals throughout the Commonwealth of Virginia nor to take on the work responsibility of competent or incompetent Counsel in any respect. Counsel does not

suggest that the trial judge in this case did not observe the video tape. The accuracy of the visual recording is not in question. (A: 87) Unfortunately, Judge Bass did not delineate the basis of the ruling on the issue of probable cause to arrest as he did on the issue of reasonable articulable suspicion to stop in this case. (A: 133-136) There is no evidence of performance on field sobriety tests or other indicators of intoxication. Many cases have held that the mere odor of alcohol presents no question of intoxication for the determination by a jury. See *Hill v. Lee,* 209 Va. 569, 166 S.E. 2d 274 (1969)*; Burks v. Webb, Admx,* 199 Va. 296, 305, 99 S.E. 2d 629, 636 (1957*); Basham v. Terry, Admx* 199 Va. 817, 821, 102 S.E. 2d 285, 288 (1958); *Laughlin v. Rose, Admx* 200 Va. 127, 134, 104 S.E. 2d 782, 287 (1958); *Davis v. Sykes*, 202 Va. 952, 955, 121 S.E. 2d 513, 515 (1961); *Wallace v. Commonwealth,* 32 Va. App. 497, 505, 528 S.E.2d 739, 742 (2000). Conversely, the Supreme Court has ruled that an odor on a person's breath coupled with other circumstances indicating alcohol has effected an individual's speech, muscular movement, general appearance, or behavior would put the issue of intoxication in front of a jury. See *Bogstad v. Hope, 199 Va. 453, 100 S.E. 2d 745 (1957); Oliphant v. Snyder, 206 Va. 932, 147 S.E. 2d 122 (1966).*

This rule has been reiterated in the criminal context in such cases as *Jetton v. Commonwealth, 2 Va. App. 557, 347 S.E. 2d 141 (1986)* citing therein *Baker v. Taylor 229 Va. 66, 69, 326 S.E. 2d 669, 671 (1985).* It is the defense's position that the other factors are absent in this case if this Court views Commonwealth's Exhibit One and disregards or discounts the conclusory statements by the arresting officer in this case.

At the Petition for Rehearing En Banc, the defendant urged the Court of Appeals to overrule one of its earlier decisions of: *Farmer v. Commonwealth,* 12 Va. App. 337, 404 S.E. 2d 371 (1991), overruling a panel decision of *Farmer v. Commonwealth,* 10 Va. App. 175, 390 S.E. 2d 775 (1990). Jones urges this Court to overrule that decision as ill advised. Indeed the Court of Appeals decision at page 7 of its opinion comments on a testimonial interpretation of Jones refusal to perform the Field Sobriety Tests, which is the very reason no such inference should be created:

> While Jones' refusal to perform any field sobriety tests effectively deprived the deputy of direct evidence of the effect alcohol may have had on Jones' ability to drive, it did provide circumstantial evidence of another factor bearing on the issue – Jones' awareness that the tests would reveal his intoxication, or in other words, his consciousness of guilt.

The Court, in its opinion, goes further to discuss other indicators of consciousness of guilt, such as fleeing an arrest. This analysis is

diametrically opposed to the reasoning of the original majority opinion written by Chief Judge Koontz (10 Va. App. 175, 404 S.E.2d 775 (1990)) in the initial panel decision, which is reiterated in the dissenting opinion to the *En Banc* opinion. As Chief Judge Koontz opined, the physical findings from conducting a field sobriety test are not testimonial in nature; however, the reasoning behind taking or not taking the test and any inferences to be drawn therefrom would comment on a person's decision making power causing the individual to be a witness against himself and therefore testimonial. *Farmer,* En Banc Id. In accord are *State v. Fish,* 321 OR, 48, 56, 893 P.2d 1023, 1028 (OR 1995), and *Longshore v. Maryland,* 399 Md. 486, 294 A.2d 1129 (2007) (Refusal of consent to search is not evidence of consciousness of guilt.) Additionally, any tasks that are requested to be performed of a verbal nature, such as speaking, counting, or engaging in conversation, surrounding the testing also would be testimonial events performed by an accused. Counsel further argues that field sobriety tests conclusively are testimonial in nature as verbal tests are spoken words and therefore certainly testimony, and nonverbal tests are a form of nonverbal testimony. An individual with an impairment preventing them from speaking only has nonverbal means to communicate (such as American

Sign Language) and accordingly, said communication would be their only means of testimony.

It is still commonly understood that all field sobriety tests are voluntary in nature inasmuch as there is no statutory scheme for the Implied Consent law requiring an individual to take field sobriety tests. Virginia Code §18.2-268.2 sets out the conditions under which an individual must take the Implied Consent test. The Virginia legislature has not operated as other legislatures have done in the United States. The legislature has specifically prohibited any inference being taken from the refusal to take a blood or breath test pursuant to the Virginia Implied Consent law, except in rebuttal or pursuant to a finding of guilt for refusing to take a blood or breath test.[2] The Virginia legislature has legislated that such an inference is inadmissible even for a statutorily ordered function on evidential breath testing. Clearly, the legislature does not intend to have an individual's refusal to take field sobriety tests subject to comment in any

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[2] Virginia Code §18.2-268.10(B)
The failure of an accused to permit a blood or breath sample to be taken to determine that alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal or pursuant to subsection C; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal or pursuant to subsection C.

capacity as there is no statutory mandate to take field sobriety tests. Additionally, the fact that one has refused to take a blood or breath test at the station (which is a post arrest situation) is only admissible into evidence after a conviction beyond a reasonable doubt.[3] In neither instance is it permissible to comment on the guilty conscience of an accused.

The Commonwealth's entitlement to an inference of consciousness of guilt clearly goes against this statutory scheme set out by the Virginia legislature.[4] It also ignores the voluntary nature of the tests themselves. Additionally, in the facts of this case, there exists a second reason why that inference would be impermissible. The defendant waived his challenge to the reasonable articulable suspicion to stop in this case, he stopped of his

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[3] Va. Code §18.2-268.10 (C)
Evidence of a finding against the defendant under §18.2-268.3 for his unreasonable refusal to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood shall be admissible into evidence, upon the motion of the commonwealth or the defendant, for the sole purpose of explaining the absence at trial of a chemical test of such sample. When admitted pursuant to this subsection such evidence shall not be considered evidence of the accused's guilt.

[4] Oregon had a statutory scheme making field sobriety tests mandatory allowing the refusal to be used against the accused. *State v. Fish*, *Id.* found it in violation of the Oregon Constitution Article I, § 12 as "evidence of an individuals refusal therefore communicates his or her state of mind. Facts giving rise to inferences no less than direct statements, communicating an individual's state of mind is evidence that is subject to the right against compelled self-incrimination. Accordingly, Oregon found it was testimonial in nature.

own accord. Clearly, there is no indication of guilt on the part of the Defendant as theorized by the Court of Appeals, and therefore, to create any such inference would be impermissible.

The Court of Appeals noted, however, that the deputy also relied on Jones' physical appearance, his argumentative demeanor, and his persistent refusal to perform any field sobriety tests. The videotape in the case is not of sufficient quality for the Court to get a close up view of the quality of accused's eyes to independently evaluate whether they were red or glassy. This amount of physical appearance in addition to the deputy's claim of an odor of alcohol is not sufficient to effectuate an arrest. Additionally, the Court cited in its opinion that the deputy also relied on Jones' argumentative demeanor. The Court had an opportunity to review the videotape, which showed no argumentative demeanor on the part of Jones – only Jones's statements that the officer was trying to hurt or harm him on a consistent basis. It appears that the primary basis of the opinion is Jones' failure to perform the field sobriety tests and it is this standard that Jones takes exception to in his appeal.

To create such an inference where there is no statutory basis such as the implied consent law is inappropriate as the Court of Appeals has done

in *Farmer*. The United States Supreme Court dealt with a similar issue in *Griffin v. California*, 381 U.S. 957, 85 S. Ct. 1797 (1965), wherein it ruled on a specific portion of the California Constitution which stated in part that:

> in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. (Article I, §13, as cited in *Griffin)*

The Court held that the Fifth Amendment when applied to the states through the Fourteenth Amendment prohibits the creation of such an inference in the form of a jury charge. Likewise for this Court to uphold such an inference in the form of an interpretation also comments on the silence of an accused. The mere denial of performing or not of a voluntary act should create no inference for any court. If the act is performed testimony should be received as to the manner in which it was performed. If the acts are not performed, then no comment or inference should be drawn.

CONCLUSION

For the reasons stated above, the Defendant prays that this Honorable Court will reverse the conviction against him and dismiss the charge with prejudice.

Respectfully Submitted,

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CERTIFICATE

I hereby certify the following, to-wit:

1. That there has been compliance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia,
2. That I have filed 15 copies of the above brief with the Virginia Supreme Court on this 1st day of September, 2009,
3. Have submitted an electronic copy of the brief and appendix via CD in PDF format,
4. Have mailed three copies to Susan Harris, Assistant Attorney General assigned to this case,
5. That Virginia Code §17.1-410 does not apply as a Final Judgment. The disposition in the case includes a term of incarceration this case has a substantial precedential value involving probable cause to arrest as well as a request to overrule a case from the Virginia Court of Appeals in *Farmer v. Commonwealth*, 12 Va. App. 337, 404 S.E.2d 371 (1991) as well as the Court of Appeals decision in this case.

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J. Burkhardt Beale