1 Q The fact of the matter is you
2 refused to take those tests because you knew it would
3 reveal more that you had been drinking and driving and
4 you were impaired by that; right?
5 A That's not correct.
6 MR. PETERSON: No further
7 questions.
8 THE COURT: Redirect.
9 MR. BEALE: No, Your Honor.
10 THE COURT: You may stand down.
11 MR. BEALE: That will be our
12 evidence.
13 ----------
14 WITNESS STOOD ASIDE
15 THE COURT: Okay. Argument.
16 MR. PETERSON: It's your
17 motion.
18 MR. BEALE: Judge, with respect
19 to articulable suspicion, I won't make any
20 argument. With respect to probable cause to
21 arrest, that's where I'm going to focus my

1 argument. On the articulable suspicion,
2 Mr. Jones stated he stopped his vehicle. I'm
3 not going to dwell on that. On the probable
4 cause to arrest, Your Honor, I'll say this.
5 It's probably a more
6 common occurrence than any of us would like
7 to think, but it happens in our office, it
8 happens in our life, two people start talking
9 at each other rather than to each other. In
10 Mr. Jones's mind, the only concern he had was
11 his daughter and that's all he's worrying
12 about.
13 In Deputy Nelson's mind,
14 he's got a situation where he has a suspect
15 that's loose in the neighborhood and that's
16 his primary focus. Mr. Jones appears and I
17 think he indicated that he immediately
18 removed him as a suspect in his own mind, but
19 thought that there might be a possibility
20 that he might be trying to help the suspect
21 to leave the area, something of that nature.

1 Then, he focuses his
2 conversation on the smell of alcohol and
3 proceeds in that light. Mr. Jones perceives
4 all along that he felt threatened and I would
5 suggest to Your Honor that that would be a
6 reasonable thing for him to have felt while
7 he was there because of Deputy's Nelson's
8 conversations. I think that his did admit
9 that, you know, he thought he might be an
10 escape avenue for another individual.
11 He focuses and keeps at
12 him. He says I'm not going to do something,
13 but kept at him and at him. I understand the
14 field sobriety tests are voluntary and there
15 was no point in time where Deputy Nelson
16 said, "Mr. Jones, I would like for you to get
17 out and do these." His direction was to
18 direct Mr. Jones to get out and do the field
19 sobriety tests. Not that they were an option
20 and that he was going to do them.
21 Judge, I don't think that

1 is in accord with what they are supposed to
2 be, that is, voluntary. That's my first
3 point. The second point is we don't have the
4 results of these possible field sobriety
5 tests for Your Honor to have any decision
6 making power as to whether or not that would
7 rise to the level of probable cause.
8 What we have is that the
9 officer indicated that he smelled the odor of
10 alcohol and the explanation for Mr. Jones for
11 the vehicle was that there had been incense
12 in the vehicle and when he got into Deputy
13 Nelson's cruiser he was still saying I'm
14 smelling alcohol.
15 He said, I think, what
16 you're smelling is the cough drops I was
17 taking. The characterization that I
18 anticipate, and these are different
19 explanations, but they really are not
20 inconsistent. They are two-fold explanations
21 of what he maybe smelling. He had indicated

1 that Mr. Jones's eyes were red and they were
2 glassy. Your Honor, I don't know if you see
3 his eyes are red right now.
4 Redness of the eyes is not
5 an indication of being under the influence of
6 alcohol. It could be an indication of
7 various things of which might be there was
8 alcohol on board and on that individual, but
9 essentially not the only explanation.
10 Officer Nelson indicated that initially
11 Mr. Jones's conversation appeared to be
12 slurred and then said there was stuttering.
13 Your Honor got to hear his
14 conversation. It was a little quiet, but got
15 to hear Mr. Jones that night on a frequent
16 basis and I'd asked Your Honor that I asked
17 Deputy Nelson was it captured accurately and
18 he said it captured accurately his speech. I
19 would suggest to Your Honor there was
20 absolutely no slurring of Mr. Jones's speech
21 throughout any of the conversations when he

1 was talking to Deputy Nelson.
2 What we have in terms of
3 probable cause for arrest from the officer's
4 standpoint was the odor of alcohol and
5 redness of eyes and glassy. The officer
6 indicated that there was some slurring and
7 stuttering. I think that the evidence that
8 came out in the videotape is contradictory of
9 the slurring.
10 The timer on the tape was
11 inaccurate, but I don't think there was any
12 indication that the time sequence was
13 inaccurate. In other words, the first time
14 Mr. Jones comes into the picture, I believe
15 we're looking at about 9:43, 21:43 on the
16 screen and Deputy Nelson indicated that it
17 was actually about 11:40 at night and it is
18 probably two hours off or two hours and three
19 minutes off.
20 It doesn't matter, but
21 from that point forward, there is only a

1 brief time that the Deputy gets out of the
2 vehicle and there's no mic before Mr. Jones
3 gets into the vehicle with him. I would
4 suggest it wasn't sufficient time, even if it
5 was ten or fifteen minutes, I don't think it
6 was that long maybe three or five minutes,
7 for his voice to go from stuttering and
8 slurred to all of a sudden plain spoken.
9 Mr. Jones indicated that
10 he felt intimidated. He felt he would like
11 to approach the black officer. Maybe it
12 doesn't go to probably cause, but it's just
13 he had a feeling of intimidation about
14 himself. He did indicate that he felt very
15 nervous when he was talking with Deputy
16 Nelson which might explain his not wanting to
17 do certain things more so than anything else.
18 He indicated under oath
19 that he had not had any alcohol whatsoever to
20 drink that evening. He has explained why
21 there was the presence of one sealed alcohol

1 Steel Reserve and it may sound a little nutty
2 and I would submit it does sound a little
3 nutty carrying around that can of Steel
4 Reserve for good luck for the Steelers, but
5 you can't take him in a vacuum. That's who
6 he is. That's what he is.
7 He also explained unopened
8 wine coolers in his vehicle. When he got
9 this call, they stopped at a grocery store
10 before he came down here and apparently the
11 wine coolers had been left in the vehicle by
12 Margarit. I would submit that there's not
13 enough here to go to probable cause to arrest
14 Mr. Jones.
15 I might seem a little bit
16 suspicious, but I don't think it rises to the
17 leve of probable cause to arrest for DUI and
18 if there was no probable cause to arrest for
19 DUI, then the refusal charge would have to go
20 by the wayside because there would have to be
21 a valid arrest for the DUI to bring forward

1 the charge of the unreasonable refusal.
2 Thank you.
3 THE COURT: Thank you.
4 Mr. Peterson.
5 MR. PETERSON: Yes, sir. In
6 response to counsel, I think there were
7 several times throughout that he identified
8 different facts and tried to go into
9 different things as to why he would approach
10 this officer and explain certain things or
11 the explanation for the alcohol in there and
12 I would just point out that obviously he is
13 not being tried today.
14 The only focus today of
15 inquiry, I would suggest, is what the officer
16 observed. The officer observed alcohol in
17 two different types of containers at some
18 point. I would suggest there was no question
19 that the defendant was drinking. There was
20 no question he was driving. All this was
21 observed by the officer. He testified he saw

1 red glassy eyes. The defendant appeared
2 disoriented.
3 Talking about his speech,
4 I don't know how you want to characterize
5 this, but it's always a difficult question
6 that arises. The officer said he slurred and
7 stuttered and I asked him how do you describe
8 that and he said stuttering is stuttering. I
9 think the tape is the best evidence of it.
10 I would suggest that there
11 is no question but that his speech or speech
12 pattern was impaired however you want to
13 characterize it. Clearly, he was
14 disoriented. He clearly says to the officer
15 both on the mic and off the mic, "I flagged
16 you down. I flagged you down." That clearly
17 did not happen. The officer walks as he
18 waives his hand up to stop him. Clearly the
19 officer flagged him down.
20 I think clearly he was
21 disoriented. I would also suggest this. He

1 was argumentative. I'm not suggesting by
2 that that Mr. Jones raised his voice,
3 screamed at the officer, but if you just look
4 at the tenor of the conversation, he is
5 someone trying, I would suggest, talk
6 themself out of getting arrested, but he's
7 argumentative in talking to the officer.
8 "I'm not going to take those. I'm nervous."
9 He keeps arguing with the
10 officer. The officer is asking him to do
11 some different tests and do different things.
12 It's fair to characterize as Mr. Jones did.
13 He was trying to talk him into taking the
14 test so he could get a better reading so at
15 the end of the day he makes a judgment call
16 and I would suggest an appropriate judgment
17 call on the information that's before him at
18 that time.
19 There is no question that
20 he is trying to talk Mr. Jones into giving
21 him more information to either confirm or

1 dispel his belief that he is intoxicated.
2 Counsel brings up the point that they're
3 voluntary. I will point to the court that as
4 the court knows, and again he's not being
5 tried today, but the charge is refusal to
6 submit to the breath test and not refusal to
7 take the field sobriety test.
8 They are voluntary, but
9 under Farmer v. Commonwealth, I would suggest
10 the fact that the officer can consider making
11 a probable cause determination. Why is this
12 person under the circumstances refusing to
13 perform these field sobriety tests. He knows
14 at this point that this defendant has prior
15 DUIs. The defendant has admitted that is
16 part of the equation as well.
17 He is refusing to take any
18 field sobriety test. Again, he has an odor
19 of alcohol that is characterized as strong.
20 He has red glassy eyes. He is disoriented.
21 He is argumentative. He is refusing to take

1 the field sobriety test. In addition, he
2 lied about different things. That is
3 something that clearly the court can take
4 into consideration.
5 I would point the court's
6 attention to 260 Virginia 459, a Supreme
7 Court Case. It is referred in an unpublished
8 DWI probable cause case, Commonwealth v.
9 Elliott, unpublished 2003 case. In that
10 case, the defendant denies consuming any
11 alcohol. "If the fact finder believes the
12 defendant is lying, it may be inferred as
13 lying to conceal his guilty."
14 Again, I would suggest
15 he's denying he consumed alcohol as well as
16 refusing to take the field sobriety test.
17 Those are factors the officer can
18 appropriately consider in determining
19 consciousness of guilt. Why is he denying
20 this when I made some observations? Why is
21 he refusing to take these tests.

1 I would ask, and I would
2 point out to the court, that throughout all
3 this, defendant has not cited a single case.
4 Again, the only issue we are dealing with now
5 is he concedes the stop of reasonable
6 suspicion, the stop issue is probable cause,
7 but he doesn't cite a single case that
8 supports his motion. I would ask the court
9 to refer to some of the cases I have given
10 the court as guidance.
11 There is a Virginia case,
12 I think around 757, that the court held that
13 the officer had probable cause to believe
14 that the defendant was drunk in public. He
15 arrested him for being intoxicated when the
16 officer observed the defendant slumped in the
17 car thumbing for his driver's license even
18 when there was no odor of alcohol.
19 Again, I would suggest
20 that this is a much stronger case. In this
21 other case, the court found the driver of the

1 car was staggering and was belligerent and
2 consistent with a person under the influence
3 of alcohol despite the fact there was no
4 evidence of alcohol consumption or smell.
5 In the other case, you
6 will read there are different facts and other
7 indicia, some of which are present here, and
8 I would suggest this case, given all the
9 total circumstances apparent to this officer,
10 I would suggest his substantial experience in
11 DUI investigations is more significant and
12 more compelling than the ones where the court
13 has sustained probable cause and I would ask
14 the court deny the motion to suppress the
15 arrest.
16 MR. BEALE: Nothing further,
17 Your Honor.
18 THE COURT: Thank you,
19 gentlemen. You said it correctly that the
20 court is to look all the circumstances.
21 Although I understand there is no argument as

1 to the issue of suspicion, in affect there
2 was. You have addressed, each of you, your
3 respective circumstances that existed in this
4 encounter between the officer and the
5 defendant.
6 What do we have? We have
7 an officer responding to the same more recent
8 claim of a felony breaking and entering. The
9 officer, who is experienced, says that he was
10 concerned that the suspect might be on foot,
11 but also that he could be in a vehicle to
12 avoid detection, so they set up a perimeter.
13 He see this defendant
14 drive passed him slowly twice. This
15 officer's suspicion is heightened because of
16 the driving and because of the possibility,
17 based on his experience that sometimes a
18 suspect will bail on foot, but then get in a
19 car. We go through the issue of the
20 gentleman driving the car meets the
21 description of a black male, though the

1 officer says his hair as it appears today is
2 like it was then, but then he wasn't focusing
3 on him on being a suspect but as being
4 possibly someone transporting the suspect.
5 The encounter then begins
6 and the officer flags down the vehicle. He
7 has seen this man driving. When he
8 encounters him, he smells alcohol.
9 Containers of alcohol are visible in the
10 vehicle. He speaks to this defendant. He is
11 able to observe his demeanor. He is able to
12 observe and report on the defendant's
13 inconsistency.
14 He himself initiated the
15 exchange with the officer as well as the
16 defendant's uncertainty where he was, what
17 County he is in, and at the same time, the
18 defendant is telling the officer he looking
19 for his daughter. With all of this evidence
20 and with all those findings, this court finds
21 this officer, first of all, did have

1 reasonable articulable suspicion to stop this
2 defendant and from that encounter all the
3 facts from that encounter and the facts that
4 I heard, likewise had probable cause to
5 arrest him for driving under the influence on
6 the night of September 29 into September 30,
7 2006. The motion to suppress is denied.
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10 HEARING CONCLUDED AT 12:40 p.m.
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