IN THE

Supreme Court of Virginia

RECORD NO. 090727

RONALD LEE JONES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF AMICUS CURIAE
THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Ronald Lee Jones,
Appellant,

v. Record No. 090727

Commonwealth of Virginia,
Appellee.

BRIEF OF *AMICUS CURIAE* VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Pursuant to Rule 5:30, Rules of the Supreme Court of Virginia, the Virginia Association of Criminal Defense Lawyers (hereinafter, "VACDL") respectfully files this brief *amicus curiae* in support of Appellant's position.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Appellant, Ronald Lee Jones (hereinafter, "Jones"), was charged in Stafford County Circuit Court with unreasonable refusal to take a breath test and with driving under the influence. The charges were tried separately, with the refusal charge being tried first. On February 27, 2007, Jones was convicted of unreasonable refusal and sentenced to serve 30 days in jail, to pay a fine of $2,500.00 and to suffer a 3-year license suspension. On May 3, 2007, he was acquitted of the charge of driving under

the influence.

Prior to trial of the refusal charge, Jones filed a Motion to Suppress, alleging that the officer lacked probable cause to arrest him for driving under the influence, thus implicating the implied consent statute. At the hearing on that motion, the trial court specifically found that probable cause for the arrest existed because, among other things, Appellant had refused to perform field sobriety tests. The Court of Appeals of Virginia upheld Jones' conviction for unreasonable refusal, agreeing with the trial court that Jones' refusal to perform field sobriety tests was admissible as circumstantial evidence of his consciousness of guilt. It is from that ruling of the Court of Appeals that this appeal was timely taken.

QUESTION PRESENTED

Did the Court of Appeals err in upholding the trial court's finding probable cause to arrest the Appellant when an essential element for probable cause was predicated on the Appellant's refusal to submit to any field sobriety tests?

ASSIGNMENT OF ERROR

The Court of Appeals erred in upholding the trial court's finding probable cause to arrest the Appellant when an essential element for probable cause was predicated on the Appellant's refusal to submit to any field sobriety tests.

STATEMENT OF FACTS

On September 26, 2006, while investigating a reported home invasion burglary, a Stafford County Deputy Sheriff stopped Jones' vehicle because he thought it could have been involved in the burglary. The deputy detected a "strong odor of alcohol" coming from Jones and noticed that Jones' eyes were "a little glassy, a little red." Jones disputed with the deputy whether he smelled alcohol or something else. The deputy asked Jones to perform some field sobriety tests, which Jones refused to do.

The deputy arrested Jones for driving under the influence and read him the implied consent law. Jones refused to submit to a breath test as required by Virginia Code §18.2-268.2.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

In denying Jones' appeal, the Court of Appeals relied on its decision in *Farmer v. Commonwealth*, 12 Va. App. 337, 404 S.E.2d 371 (1991) (*en banc*), in which it held that evidence of a driver's refusal to cooperate with an officer's investigation by not agreeing to perform field sobriety tests was admissible as evidence against him in his trial for driving under the influence. The Court of Appeals, in *Farmer*, cited this Court's opinion in *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954) for the proposition that neither the Fifth Amendment to the United States Constitution nor the Constitution of Virginia was violated by the admission into evidence of the

testimony of a trooper recounting a statement made by the Defendant in response to the officer's questions while he was in custody.

At the outset, it should be noted that this Court's 1954 *Gardner* decision was no longer good law when *Farmer* was decided in 1991 because of the intervening United States Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which found that custodial interrogations were inherently coercive, *i.e.*, implied compulsion, absent an express warning of the right to refuse to answer. The *Farmer* Court did not address that defect in *Gardner* because it was not presented to the Court.[1]

Furthermore, *Farmer* relied in part on *Schmerber v. California*, 384 U.S. 757 (1966) for the proposition that the privilege against self-incrimination protects an accused "only from being compelled to testify against himself **or otherwise provide the State with evidence of a testimonial or communicative nature.**" 384 U.S. at 761 (Emphasis added.) Clearly, declining an officer's request to perform field sobriety tests is evidence of a communicative nature. Were it not so, nothing could be deduced from the refusal to perform such tests. The whole point of *Farmer* is that, by refusing to perform field sobriety tests, the driver is communicating something to the officer, namely that he declines to perform these voluntary tests. Indeed, in Chief Judge

[1] The *Farmer* Court's reliance on *South Dakota v. Neville*, 459 U.S. 553 (1983), is of no moment in this case because that decision dealt with an implied consent statute and a South Dakota rule of evidence for its own courts. Additionally, Mr. Neville was also warned that refusing the test was not a "safe harbor," free of adverse consequences. *Id.* at 566. That is not this case.

Koontz' dissent in *Farmer*, he cites *Doe v. United States*, 487 U.S. 201, 210 n.9 (1988) for the proposition that "the expression of the contents of an individual's mind is testimonial communication." 12 Va. App. at 346, 404 S.E.2d at 376.

It should be remembered that the activities that were held permissible in *Schmerber, supra,* were matters that dealt with the identity of the accused, such as fingerprinting, photographing, standing, walking or speaking. The question was whether these characteristics were sufficient to allow the witness to identify the accused. Such is not the case with field sobriety tests because those tests are not intended to help identify the accused. Rather, they are intended to provide evidence against the accused by giving the officer probable cause to suspect him of a crime.

Jones' counsel has asked this Court to overrule *Farmer* as being ill-advised. It would be appropriate for this Court to do so even though it refused on August 8, 1991 to grant Farmer's petition for appeal (Record No. 910794). This case presents a valid reason for this Court to revisit the effect of the *Farmer* decision and overrule it.

It should be noted that, in *Hammond v. Commonwealth*, 17 Va. App. 565, 439 S.E.2d. 877 (1994) (*en banc*), the Court of Appeals limited the application of its decision in *Farmer*, saying that:

> Farmer held only that evidence of the accused's refusal to take the test or his actions in voluntarily performing the non-required field sobriety test may be relevant to prove the accused's guilt or innocence.

Hammond involved a situation in which, after being arrested for driving under the influence and being informed of his obligations under the implied consent law, Hammond elected to take a breath test. For reasons not evident in the opinion, the breath test operator determined that Hammond should take a blood, rather than breath, test. Hammond refused to take the blood test and again volunteered to take a breath test. He was charged with unreasonable refusal (of which he was ultimately acquitted) and with DUI, of which he was convicted.

On appeal of his DUI conviction, Hammond argued that proof of his willingness to take the breath test should have been admitted as evidence of his consciousness of innocence. However, the Court of Appeals disagreed, and affirmed his conviction.

The *Hammond* opinion distinguished *Farmer* because "[u]nlike the field sobriety test considered in *Farmer*, a blood or breath test is not a voluntary test." So, the Court of Appeals, in *Hammond*, concluded that:

> Upon being arrested for DUI, one is required either to take the blood or breath test or suffer additional consequences. Code §18.2-268.2 Thus, the agreement to take the blood or breath test, as opposed to suffering the consequences of taking neither, does not carry with it the same indicia of belief in one's innocence as does the willingness to take a voluntary field sobriety test. For this reason, we hold that *Farmer* does not control our decision. The request to take the breath test under these circumstances proves nothing about appellant's guilt or innocence. 17 Va. App. at 568, 439 S.E.2d at 879.

So, reading *Farmer* and *Hammond* together, it appears that the Court of Appeals

believes that an accused's consciousness of guilt is an element to consider in determining guilt or innocence. If the accused refuses to take a voluntary test, his belief in his guilt is admissible. However, if he willingly agrees to take a mandatory test, his belief in his innocence is not admissible. With all due respect, this leads to an absurd conclusion.

Here, in side-by-side comparison is what the Court of Appeals has said:

Farmer	**Hammond**
We see no reason to distinguish between a refusal to submit to a blood test and the act of refusing to submit to a field sobriety test for purposes of what constitutes testimony or compulsion.	[T]he agreement to take the blood or breath test, as opposed to suffering the consequences of taking neither, does not carry with it the same indicia of belief in one's innocence as does the willingness to take a voluntary field sobriety test.

The question, then, appears to be whether a driver's refusal to perform field sobriety tests can reasonably be construed to mean anything. In its opinion below in Jones' case, the Court of Appeals compared refusal to perform field sobriety tests to flight, saying that the latter is admissible because it is evidence of knowledge of guilt. Similarly, the Court of Appeals reasoned, refusal to take field sobriety tests is also admissible because it, too, is evidence of guilt. This is a non-sequitur.

Unlike flight, refusal to take field sobriety tests is not avoidance of apprehension by the suspect. Refusal to take the field sobriety tests could mean a number of things,

including that the suspect recognizes that he has a choice of whether to take the field sobriety tests or exercise his right not to do so. The Court cannot infer a bad motive simply from the fact of refusal, i.e. the exercise of a right.

This would be a different case if Jones had said "I won't take the tests because I know I'm too drunk." In that case, the Court would have a statement against interest by him expressing his view of his own intoxication. That is not this case.

In fact, the acceptance of the Court of Appeals' position in this case would make field sobriety tests *de facto* mandatory since the refusal to perform such tests could be used as evidence against a driver. This is tantamount to judicial legislating.

Since the General Assembly will not allow the refusal to take a mandatory breath or blood test to be used as evidence of guilt according to 18.2-268.10.C of the Code, allowing refusal to take a voluntary field test to be used as evidence against a citizen is not consistent with the intent of the people speaking through the General Assembly.

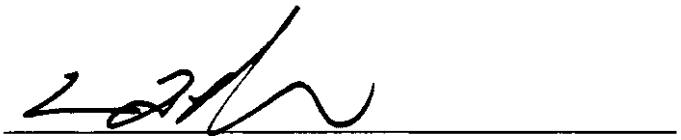
If evidence can be viewed in a light favorable to the accused or against him, the presumption of innocence – and precedent of this Court – requires that it be construed in favor of the accused. The decision below runs contrary to the presumption of innocence.

CONCLUSION

WHEREFORE, the Virginia Association of Criminal Defense Lawyers respectfully requests that the decision of the Court of Appeals be reversed.

Respectfully submitted,

VIRGINIA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS



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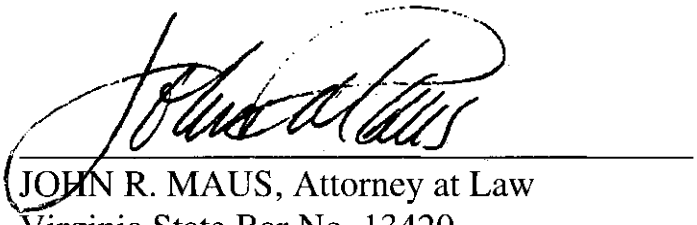

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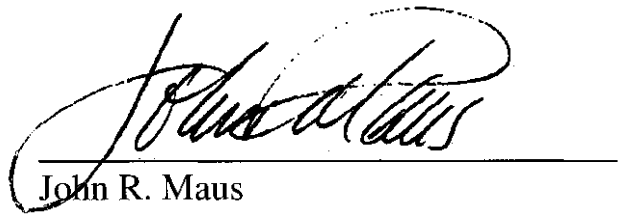
Certificate

I certify that Rule 5:26(d) has been complied with on this 1st day of September, 2009.



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