STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-000745

The State, Respondent,

vs.

Maria Todd Martin, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. The circuit court correctly determined the magistrate erred in suppressing clearly voluntary statements as well as Appellant's refusal to take field sobriety tests.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The circuit court properly considered the State's appeal of the magistrate's suppression of Appellant's clearly voluntary statements as well as the suppression of her refusal to take field sobriety tests because the ruling significantly impaired the State's ability to prosecute the case.

Appellant contends the trial court erred in considering the State's appeal of the magistrate court's suppression of statements made by Appellant and her refusal to participate in field sobriety tests offered by Trooper Sinclair. She asserts the appeal was not proper under State v. Samuel, 411 S.C. 602, 769 S.E.2d 662 (2015) and State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985), because the ruling did not significantly impact the State's ability to prosecute the case. The circuit court correctly determined it could consider the State's appeal because the ruling suppressing clearly voluntary statements, as well as Appellant's refusal to take field sobriety tests, significantly impacted the State's ability to prosecute the case.

Pursuant to section 14-3-330 of the South Carolina Code:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action . . . .

S.C. Code Ann. § 14-3-330(2) (1976). The South Carolina Supreme Court "has interpreted the appealability statute, S.C. Code Ann. § 14-3-330 (1976), to allow the immediate appeal of pre-trial orders which would significantly impair the prosecution of a criminal case." State v. Sterling, 377 S.C. 475, 478, 661 S.E.2d 99, 100–01 (2008). Specifically, the South Carolina Supreme Court has found: "A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code

Ann. § 14–3–330(2)(a) (1976)." State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). "Allowing the interlocutory appeal serves the State's interest in enforcing its criminal laws because the suppression order, even if erroneous, could result in an acquittal from which the State could not appeal. An interlocutory appeal allows the appellate court to correct any erroneous order of suppression." William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S.C. L. Rev. 411 (1993).

In the instant case, the magistrate suppressed Appellant's refusal to take the field sobriety tests offered by Trooper Sinclair. Even more significant, the magistrate suppressed Appellant's statements made in refusing the field sobriety tests, which included what amounted to a confession of her intoxication. In declining to perform the field sobriety test, Appellant stated: "No. If I was straight, I couldn't pass it." (Roadside Video; Order of Judge Martin, p.2; R. 55). The suppression of these items, most notably Appellant's confession, significantly impacted the State's ability to prosecute the case.

Appellant contends this case is similar to the South Carolina Supreme Court's recent case in Samuel, where the Supreme Court found the State was not entitled to appeal the suppression of one statement made by the appellant. In that case, however, the State had multiple other statements which were not suppressed in which the identical or more significant evidence could be presented. As the Supreme Court found in ruling the suppression did not substantially impair the State's ability to prosecute the case: "Petitioner's statements made subsequent to Statement 1 were admitted by the trial court. Because those statements supplied essentially the same information and confession as Statement 1, the suppression of Statement 1 did not significantly impair the prosecution's ability to try Petitioner's case." Samuel, 411 S.C. at 605, 769 S.E.2d at 663. The same is not true in this case. The one and only statement by Appellant which was a

confession was suppressed. The State did not have comparable evidence to admit and certainly did not have the cumulative evidence of other statements as found in Samuel.

Instead, this case is more comparable to other cases appealed by the State which were allowed to proceed. For example, in State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 (1991)[1], the magistrate suppressed the defendant's refusal to take the breathalyzer test. Id. at 321, 408 S.E.2d at 235. The State appealed to both the circuit court and Supreme Court. The Supreme Court considered the appeal and ultimately reversed, thereby finding it had appellate jurisdiction to consider the appeal because the suppression significantly impaired the State's ability to prosecute the case. Id. at 323, 408 S.E.2d at 237; see also, State v. Landon, 370 S.C. 103, 634 S.E.2d 660 (2006) (State's appeal of the suppression of breath test results allowed to proceed and considered by Supreme Court). The suppression of a defendant's refusal to take the breath test or the breath test results was sufficient to significantly impair the State's ability to prosecute. The same holding should apply to the refusal to submit to field sobriety tests, especially when one of the refusals indicated: "If I was straight, I couldn't pass it."

In State v. Henry, this Court specifically considered the issue of the State's ability to appeal under State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985). State v. Henry, 313 S.C. 106, 107, 432 S.E.2d 489, 490 (Ct. App. 1993). In Henry, the defendant was charged with sexual crimes against one of his step-daughters and the State sought to admit testimony by two other step-daughters to establish a common scheme or plan. The circuit court suppressed the Lyle evidence by the other step-daughters and the State appealed. This Court found the suppression of the Lyle evidence significantly impaired the ability of the State to prosecute the case against the defendant. In the case, this Court explained: "Henry argues that the State can

[1] This case occurred prior to any reference by section 56-5-2950 of the use of a defendant's refusal at trial. See S.C. Code Ann. § 56-5-2950(B) (1991). Therefore, the significance of this case is not created by the statute's reference to the right to admit the refusal at trial.

obtain a conviction without the subject testimony and, therefore, the exclusion of such evidence does not significantly impair the prosecution of the case. We disagree and hold that the suppression of the subject testimony would significantly impair the State's case." Id. at 108, 432 S.E.2d at 490.

Similarly, in the case *sub judice*, Appellant contends the State has other evidence it can put before the jury so it should be required to proceed to trial and not be allowed to appeal. If the standard required the State to not be able to prosecute its case in total or was such that the suppressed evidence would have to require the State to not be able to survive directed verdict then the standard would not be as announced in McKnight. The Supreme Court recognized the value and fairness in allowing the State to challenge suppression, even when it did not completely end its ability to prosecute a case. If the suppression of Lyle testimony is sufficient to significantly impact the State's ability to prosecute a case, then the suppression of the one and only confession by the defendant, as well as the fact that she chose to refuse the field sobriety tests, certainly significantly impacts the State's ability to prosecute this case. Additionally, as stated before, this case is significantly different from Samuel because in Samuel there were multiple confessions and only one suppressed. Here the one statement which could be construed as a confession, as well as other very significant non-cumulative evidence, was suppressed, which should allow the State to appeal the magistrate's determination.

Appellant contends the fact the State attempted to prosecute the case the first time the magistrate suppressed the evidence and the trial ended in a hung jury and mistrial indicates it can be prosecuted. The fact the State could conceivably bring the charges and have evidence sufficient to survive a directed verdict motion should not bar a State's appeal. The fact the State presented all of its remaining evidence, including the evidence from the Trooper's testimony,

and trial ended in a hung jury, demonstrates the significant impairment placed on the State by the magistrate's suppression of Appellant's confession.

Accordingly, under the standard of McKnight, the suppression of this evidence significantly impaired the State's ability to prosecute the case and the circuit court properly concluded the appeal should be allowed to proceed.

II. The circuit court correctly determined the magistrate erred in suppressing clearly voluntary statements as well as Appellant's refusal to take field sobriety tests.

Appellant maintains the trial court erred reversing the magistrate's decision to suppress Appellant's refusal to take the field sobriety tests offered by Trooper Sinclair. She asserts construction of the various DUI related statutes indicate the refusal should not be admissible at trial. Further, she contends she has a right to remain silent and not to provide evidence against herself by having her refusal and possible confession presented to the jury. The statutes do not prohibit the admission of a refusal to take the field sobriety tests, nor do they in any way establish what evidence is or is not admissible. Additionally, Appellant voluntarily made the statements to Trooper Sinclair, especially her commentary that she could not pass the field sobriety tests if she "was straight." Finally, she is not being compelled to offer testimony against herself through her voluntary statements and answers to routine questions regarding taking a field sobriety test.

First, the South Carolina statutes related to DUI do not prohibit the admission of Appellant's refusal to take the field sobriety tests, nor does a proper statutory construction of the various statutes at issue. "It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired . . . ." S.C. Code Ann. § 56-5-2930 (Supp. 2012). Pursuant to section 56-5-2953:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> > (i) not begin later than the activation of the officer's blue lights;

> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.
>
> (b) A refusal to take a field sobriety test does not constitute disobeying a police command.
>
> (3) The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.

S.C. Code Ann. § 56-5-2953 (A)(1) and (3) (Supp. 2012). While field sobriety tests can be refused for a suspected DUI, if a death is caused by the motor vehicle, the legislature has made field sobriety tests mandatory.[2] See S.C. Code Ann. § 56-5-2948 (Supp. 2012).

Further, Appellant referenced section 56-5-2950(B), a portion of the implied consent statute, to demonstrate that the legislature knows how to make a refusal to take a test admissible because it made the refusal to take a breath test or other test admissible. However, a proper reading of the statute in question demonstrates it does not make the refusal to take a test admissible, but instead acknowledges evidence of the refusal is **already** admissible at trial and requires law enforcement to provide notice of that fact prior to administering the test. See S.C. Code Ann. § 56-5-2950(B) (Supp. 2012) ("No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) the person does not have to take the test or give the samples, but that the person's privilege to drive

[2] It is interesting to note that the legislature has attached no penalty to the refusal to take the field sobriety tests in section 56-5-2948. One of Appellant's arguments is that the refusal to submit to field sobriety tests is not admissible for a stop for DUI because there is no penalty attached to their refusal. The same would equally apply to a refusal to take field sobriety tests requested at a felony DUI incident site, which Appellant seems to argue would be admissible. (App. Br. 6, 10).

must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court . . . ."). The statute clearly does not make the refusal admissible; it merely requires notice of its admissibility. The State agrees no statute requires notice of the admissibility of a refusal prior to administering field sobriety tests. However, just as in the case of a refusal to perform the breath test, no statute exists making the refusal admissible and no statute exists indicating the refusal is not admissible.

The legislature has made it clear that the video and everything on it are admissible unless the evidence is prohibited by constitution, statute, or rule. See S.C. Code Ann. § 56-5-2953(A)(3). Appellant's argument that a portion of the video should be treated differently under the statute from the rest of the video based on an improper statutory construction is without merit. Further, no constitutional, statutory, or rule of evidence prevents the admission of the refusal to submit to field sobriety tests.

Appellant contends the refusal to submit to the field sobriety tests should be suppressed because it is testimonial and because it places the defendant in a difficult position. The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The South Carolina Constitution contains identical language. See S.C. Const. art. I, § 12. Admitting evidence that a defendant refused to take a field sobriety test violates her right against self-incrimination only if (1) the refusal evidence is testimonial and (2) the evidence is impermissibly compelled by the State. The refusal is not testimonial in nature nor is it being compelled by State action.

Refusal is not Testimonial

The refusal to take a field sobriety test is not of a testimonial or communicative nature. 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**." Schmerber v. California, 384 U.S. 757, 761 (1966) (emphasis added). "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. 201, 210 (1988). In Holt v. United States, 218 U.S. 245 (1910), the USSC stated:

> [T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent.

Id. at 252-253. The Court further explained in Schmerber:

> [C]ourts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged ... is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Schmerber, 384 U.S. at 764.

Field Sobriety tests, like the examples provided by the USSC in Schmerber are not testimonial in nature. Instead, they are physical tests designed to convey "real or physical

evidence" and not thoughts, communications, or the subjective beliefs of the defendant.[3] As the Supreme Court of South Dakota explained:

> Dexterity tests are real physical evidence and are not protected by the constitutional privilege against self-incrimination. These tests are based on the loss of coordination, balance and dexterity that results from intoxication, they do not force the subject to betray his subjective knowledge of the crime through communication or testimony. These tests merely compel the suspect to demonstrate his physical characteristics and condition at that time as a source of real or physical evidence to which observers may testify.

State v. Roadifer, 346 N.W.2d 438, 440 (S.D. 1984). "Field sobriety tests are not testimonial in nature because the suspect does not intend to convey a statement as to his or her state of sobriety by performing the test. Furthermore, field sobriety tests involve no requirement that the suspect make admissions or respond to police inquiries regarding prior alcohol use." State v. Babbitt, 525 N.W.2d 102, 106 (Wis. Ct. App. 1994). As the Supreme Court of Colorado explained: "we note that the courts in a large number of states have considered the issue before us and nearly all have held that the roadside sobriety test does not compel a confession from its subject." People v. Ramirez, 199 Colo. 367, 374, 609 P.2d 616, 620 (1980) *disapproved of on other grounds by* People v. Archuleta, 719 P.2d 1091 (Colo. 1986). The Ramirez court cited to nearly twenty other states that have concluded field sobriety tests are not testimonial in nature. Id. at 620, n.8; but see, State v. Fish, 893 P.2d 1023, 1029-1030 (Or. 1995) (finding under Oregon's constitution limited types of field sobriety tests and the refusal to perform those tests can be considered testimonial).[4]

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[3] Appellant contends the determination of whether field sobriety tests are testimonial is a question for another day. However, for this Court to properly analyze the question of whether the refusal is testimonial a decision must be made on the status of the tests themselves. Appellant's conclusory statement that the refusal is clearly testimonial notwithstanding any determination by this Court related to the testimonial nature of the tests is without merit.

[4] The State can find no cases in the country ruling a defendant's performance on the HGN, walk and turn, or one leg stand tests—the three most commonly used tests in South Carolina—is testimonial in nature. The State also notes that the majority of cases have distinguished Fish and come to a different conclusion regarding the testimonial nature of even the field sobriety tests at issue in that case.

The refusal to submit to a field sobriety test offers no more of a communication or testimony than does the submission to, and performance on, the field sobriety test. "[T]he physical dexterity tests are not 'evidence of a testimonial or communicative nature within the privilege against self-incrimination' and are not within the scope of the Miranda[5] decision and the Fifth Amendment. Therefore, the admission of evidence of defendant's refusal to submit to such tests does not violate his constitutional right against self-incrimination." State v. Flannery, 230 S.E.2d 603, 607 (N.C. App. 1976).

Appellant takes the stance that the refusal to submit to field sobriety tests is testimonial, without citing to any authority, based on the inferences a jury would be allowed to draw and a prosecutor would be allowed to argue to the jury. This specific argument was rejected by the Supreme Court of Washington in a very well-reasoned opinion and should be rejected by this Court. See City of Seattle v. Stalsbroten, 978 P.2d 1059 (Wash. 1999). The Washington Court of Appeals in Stalbroten found the refusal to submit to a field sobriety test was testimonial even though it acknowledged the performing of the test itself was non-testimonial. The court of appeals reasoned "a suspect's refusal to perform an FST communicates to the officer the suspect's implied belief that he or she thinks he or she will fail the test. Given the fact that the refusal communicates a suspect's 'perception of intoxication,' the court concluded that the refusal to submit to FSTs is testimonial and therefore constitutionally protected." Id. at 1063. In reversing the decision, the Supreme Court of Washington explained:

> We disagree with this distinction. A suspect's refusal to perform an FST is no more testimonial than the suspect's actual performance of an FST. State v. Hoenscheid, 374 N.W.2d 128 (S.D.1985). Just because refusal evidence has probative value does not mean that such evidence is testimonial. See Welch v. District Court of Vt., 461 F.Supp. 592, 595 (D.Vt.1978) (discussing refusal evidence in the context of Breathalyzer tests) aff'd, 594 F.2d 903

[5] Miranda v. Arizona, 384 U.S. 436 (1966)

> (2d Cir.1979). A refusal to submit to sobriety tests is not a statement communicating testimonial evidence; rather, the refusal "is best described as conduct indicating a consciousness of guilt." Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969) (discussing refusal evidence in the context of blood alcohol tests). The act of refusal "merely exposes [the defendant] to the drawing of inferences, just as does any other act." State v. Wright, 116 N.M. 832, 835, 867 P.2d 1214, 1216 (Ct. App. 1993) (quoting McKay v. Davis, 99 N.M. 29, 31, 653 P.2d 860, 861 (1982)).
>
> The argument that a refusal to take an FST communicates the suspect's belief that the test will produce evidence of his or her guilt **confuses reasonable inferences with communications**. See Welch, 461 F.Supp. at 595. "Perhaps one might infer from the refusal that it is an effort to conceal intoxication, but evidence of the refusal and of the words of refusal, standing alone, does not constitute testimonial evidence of any thought, reason or excuse for the refusal." Id. (footnote omitted). Because a defendant's refusal to perform an FST is not testimonial evidence, Fifth Amendment protections do not apply.

Stalsbroten, 978 P.2d at 1063 (emphasis added). In finding proper the admission at trial of evidence regarding a defendant's refusal to cooperate in giving a voice sample, a non-testimonial act, Chief Justice Traynor explained:

> Although conduct indicating consciousness of guilt is often described as an 'admission by conduct," such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. **By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.**

People v. Ellis, 421 P.2d 393, 397–98 (Cal. 1966) (emphasis added). The refusal to submit to field sobriety test is non-testimonial in nature, and, even if the prosecutor can argue and the jury can infer guilt from the refusal, then it does not make the refusal any less non-testimonial. Because the refusals were non-testimonial, thus failing the first requirement for application of the Fifth Amendment, Appellant cannot show a violation of her privilege against self-incrimination.

Lack of Compulsion

Even if this Court joins the overwhelming minority of states and holds the refusal to submit to field sobriety tests is testimonial, the evidence was not compelled by the State, and therefore, would not violate the privilege against self-incrimination. Significantly, the USSC addressed the issue of admitting a defendant's refusal to submit to a blood alcohol test and whether it constituted a violation of his Fifth Amendment privilege against self-incrimination. In South Dakota v. Neville, 459 U.S. 553 (1983), the USSC specifically considered whether the admission of the defendant's statement: "I'm too drunk, I won't pass the test" when refusing to submit to a blood test **after he was arrested** was admissible at trial. Id. at 562. The USSC noted: "[T]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." Id. (quoting Fisher v. United States, 425 U.S. 391, 397 (1976)). The USSC found: "Here, the state did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." Id. In explaining the choice, the USSC explained several types of "choices" that would still invoke protection by the Fifth Amendment.[6] The Court explained in the case of refusing the blood alcohol test, however, "the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." Id. at 563. The USSC ultimately explicated:

> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has

[6] The Court spoke of the "cruel trilemma" created by the choice of submitting to self accusation, or testifying falsely (risking perjury) or declining to testify (risking contempt); a choice between self-incrimination and an otherwise painful, dangerous, or severe, or so violative of religious beliefs option that a person would inevitably choose confession; or the situation of custodial interrogation where the compulsion is inherent and the Court has prescribed the Miranda warnings to rectify the compulsion. See Neville, 459 U.S. at 563.

> lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

Id. at 564.[7]

South Carolina has also long recognized the refusal to submit to a blood alcohol test is admissible at trial. In State v. Smith, the South Carolina Supreme Court considered "the question of whether error was committed in permitting testimony of the appellant's refusal to submit to a chemical test for the purpose of determining the amount of alcohol in his blood" and also "the question whether it was error for counsel for the respondent to comment to the jury upon the appellant's refusal to submit to the chemical test of his blood." State v. Smith, 230 S.C. 164, 169, 94 S.E.2d 886, 888 (1956). The Court concluded: "appellant's constitutional rights were not violated by admitting testimony of his failure to submit to a chemical test designed to measure the alcoholic content of his blood. Since the testimony was admissible, it was proper for the attorney for the respondent to comment to the jury upon the appellant's refusal to submit to the chemical test of his blood." Id. at 173, 94 S.E.2d at 890.

The admission of a defendant's refusal to submit to a breath test was later upheld in State v. Miller, 257 S.C. 213, 185 S.E.2d 359 (1971). The Court in Miller further found that the prosecutor's argument to the jury "only a drunk man would have refused to submit to the breathalyzer test and had the defendant been sober he would not have so refused" was proper argument and, while "other inferences could reasonably be drawn from appellant's refusal to take the test, . . . the appellant was free to urge [these] upon the jury." Id. at 216, 185 S.E.2d at 360.

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[7] The USSC, in rebutting an argument based on Doyle v. Ohio, 426 U.S. 610 (1976), also held that a defendant need not be warned of the consequences of his refusal prior to the statement in order for it to be admissible at trial. To the extent Appellant's brief can be read to rely on Doyle, this issue has also been decided by the USSC against Appellant's argument.

The refusal to take the blood test in Neville and Smith occurred after arrest. The refusal to submit to field sobriety tests in the instant case came before Appellant was in custody. In Berkemer v. McCarty, 468 U.S.420 (1984), the United States Supreme Court (USSC) concluded the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. at 440. The USSC reiterated its ruling in Berkemer in the case of Pennsylvania v. Bruder, 488 U.S. 9 (1988). In Bruder, an officer stopped Bruder's vehicle, and after smelling alcohol on Bruder, administered field sobriety tests, including asking Bruder to recite the alphabet. The officer also inquired about alcohol. Bruder answered he had been drinking and was returning home. At trial, Bruder's conduct and statements during the field sobriety tests were admitted. Id. at 9-10. The Court found Bruder was not in custody for purposes of Miranda, held Miranda warnings were not required, and concluded the statements and conduct were properly admitted. Id. at 11. See also, State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989) (the South Carolina Supreme Court held that a roadside field sobriety test did not constitute detainment sufficient to rise to the level of custodial interrogation). As a result, it is clear that Appellant was not entitled to the reading of Miranda warnings, and the circumstances under which her refusal was made was not "custody" for purposes of determining the requirements of Fifth Amendment protection. If a person's refusal to take a test after arrest is not compelled testimony, then a similar refusal to take the test when the person is not subject to custody should certainly not be compelled testimony.

The analysis in the instant case should be the same as the analysis regarding the refusal to submit to a blood or breath test for alcohol level. Appellant was not in custody, thereby mandating the giving of Miranda warnings or the finding that her responses were "compelled" by reason of the custodial interrogation and its inherent pressures. Additionally, Appellant was not

compelled to give her responses because she was offered the choice of submitting to the field sobriety tests or refusing. While it may have been a difficult choice, especially if she was intoxicated and knew she would likely fail the field sobriety test, it was not the "cruel trilemma" of submitting to self-accusation, or testifying falsely (risking perjury) or declining to testify (risking contempt). See Neville, 459 U.S. at 563. "In the context of refusal evidence, simply put, a hard choice is not state compulsion." State v. Ferm, 7 P.3d 193, 205 (Haw. Ct. App. 2000). As a result, the Fifth Amendment privilege against compelled self-incrimination was not violated because the responses by Appellant were not compelled by Trooper Sinclair.

Appellant argues the subjective nature of the field sobriety tests should differentiate a refusal to perform the tests from a refusal to perform a breath or blood test. The differences may provide a great argument for the jury on why Appellant's refusal should not allow an inference of guilt, but it does not change the analysis of whether the admission of the evidence violates the Fifth Amendment. As has been found by other state courts:

> 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. In either case, the incriminating inference is drawn not from the testimonial act of the accused but from the physical act of the suspect. Asking a suspect to submit to a field sobriety test does not place the suspect in the "cruel trilemma" of self-accusation, perjury or contempt.

Farmer v. Com., 404 S.E.2d 371, 373 (Va. App. 1991).

In addition, Appellant claims a difference exists in the type of refusal being admitted because the statutory framework contemplates the use of a refusal of a breath or blood test, while it is silent as to the use of a refusal to submit to field sobriety tests at trial. The Court of Appeals of New York addressed this issue head on and had a very well analyzed response:

> Defendant attempts to distinguish [a case allowing for admissibility of the refusal to submit to chemical testing] on the ground that a statute specifically authorizes the admissibility of evidence of a refusal to submit to a chemical analysis test, while no such statute authorizes the admissibility of refusal evidence in the context of field sobriety tests (see, Vehicle and Traffic Law § 1194[2][f]). That distinction is constitutionally insignificant, as the admissibility of evidence in the face of the Self–Incrimination Clause does not turn on the presence or absence of such a statute. **Even if a statute expressly authorized the use of evidence of a defendant's refusal to submit to field sobriety tests, that statute would not be enforceable if the State or Federal Constitutions mandated a contrary result. Likewise, if evidence is constitutionally permissible, the absence of authorization in a statute does not make it impermissible.**

People v. Berg, 708 N.E.2d 979, 982–83 (N.Y. 1999) (emphasis added). Additionally, in expressing its disapproval with the Oregon Court of Appeals decision in State v. Green, 684 P.2d 575 (Or. App. 1984), the Court of Appeals of Arizona explained:

> If the offer to take a blood-alcohol test is "no less legitimate" when the state by statute gives the suspect the power to refuse [referencing Neville], the offer to take field sobriety tests is certainly not less legitimate because the state has not enacted a similar legislative choice. The issue is not whether the defendant has a statutory power to refuse, but whether he has a constitutional right to refuse. We thus find the Oregon court's distinction in State v. Green between a refusal under an implied consent statute and a refusal to take a constitutionally-permissible field sobriety test to be meaningless. Since the officer's request in this case was lawful and [the defendant's] refusal was not constitutionally protected, the refusal was not coerced and admission of evidence of that refusal does not violate [the defendant's] privilege against self-incrimination.

State v. Superior Court of State of Ariz., 742 P.2d 286, 289 (Ariz. Ct. App. 1987).

This Court should join the majority of other states which have considered the issue and find the admission of evidence regarding a defendant's refusal to submit to field sobriety tests does not violate the privilege against self-incrimination. As the Washington Court stated:

> Our conclusion is further bolstered by the fact that the majority of courts that have considered this issue have concluded that the admission of evidence that a defendant refused to perform [a field sobriety test] does not violate the defendant's right against self-incrimination. State v. Taylor, 648 So.2d 701 (Fla.1995); State v. Washington, 498 So.2d 136 (La.Ct.App.1986); [State v.]Wright, 116 N.M. 832, 867 P.2d 1214 (1993); Commonwealth v. McConnell, 404 Pa.Super. 439, 591 A.2d 288 (1991); State v. Hoenscheid, 374 N.W.2d 128 (S.D.1984); Dawkins v. State, 822 S.W.2d 668 (Tex.Ct.App.1991); Farmer v. Commonwealth, 12 Va.App. 337, 404 S.E.2d 371 (1991); State v. Mallick, 210 Wis.2d 427, 565 N.W.2d 245 (Ct.App.1997).

Stalsbroten, 978 P.2d at 1065. Other courts have joined the list since that time, and this Court should be the next. In line with the reasoning of Neville, this Court should find no compulsion was used by Trooper Sinclair to obtain the refusal and because the statements, even if testimonial in nature, were not compelled, there can be no violation of Appellant's Fifth Amendment right against self-incrimination.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 8, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-000745

The State, Respondent,

vs.

Maria Todd Martin, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 21(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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