IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA :
:
v. : CASE NO.: SU-13-CR-0495-H
:
WILLIAM WILSON HEATON, JR. :
:
Defendant. :

DEFENDANT'S MOTION TO SUPPRESS, MOTION IN LIMINE AND MOTION PURSUANT TO O.C.G.A § 24-9-67.1 (DAUBERT) TO EXCLUDE ANY TESTIMONY CONCERNING DEFENDANT'S ALLEGED BLOOD ALCOHOL CONTENT

COMES NOW William Wilson Heaton, Jr. ("Defendant") and moves this Court to suppress and exclude certain evidence obtained by the State, showing the Court as follows:

1.

Defendant moves the Court to suppress from use against Defendant: 1) any evidence obtained from the vehicle, described as a red Mazda B2300 pickup truck, tag number PGU3440, VIN 4F4CR12A3VTM06723 ("Truck"); 2) any evidence obtained from the cellular phone described as a grey/black Samsung, model number SGH-A107, serial number RQAB505320Z, with an attached SIM card serial number 89014104211751493969 and belonging to Danny Elder ("Elder's Phone"); and 3) any evidence obtained from the State's interviews with William Wilson Heaton, Sr. and Tara Heaton, for and upon the following reasons and grounds:

a) The State's seizures of the Truck and Elder's Phone were not supported by probable cause. Said seizures were warrantless and unlawful, and the use of any evidence obtained as the result of the illegal seizures violates Defendant's rights under the Fourth Amendment to the Constitution of the United States, and Article I, Section I, Paragraph XIII of the Constitution of the State of Georgia of 1982. See Brief in Support of Defendant's Motion, at I.A and B.

b) The State obtained Mr. and Mrs. Heaton's consent to an interview under the improper threat of prosecution. The interviews by Mr. and Mrs. Heaton were unlawfully coerced and given under improper threat of prosecution, and the use of any evidence obtained as the result of said coerced interviews violates Defendant's rights under the Fifth Amendment to the Constitution of the United States. See Id., at I.C.

2.

Defendant moves the Court to exclude from use against Defendant: 1) any evidence of Defendant's general drinking habits or evidence of prior law enforcement incidents involving Defendant; 2) any "observations" evidence by the State's witnesses as to the accident and/or Defendant's conduct after the accident which are not based on personal knowledge; 3) any Facebook posts, cellular phone text messages, or other statements retrieved from electronic devices; 4) any containers retrieved from the Truck or fingerprints lifted from said containers; 5) any evidence suggesting Defendant's "flight" or "evasion" of investigators as proof of Defendant's "guilt"; and 6) any evidence of the victim's medical records or medical condition as a result of the accident, for and upon the following reasons and grounds:

a) Such evidence is inadmissible and improper because it is irrelevant, speculative, constitutes hearsay, and is more prejudicial to Defendant than probative of any facts alleged by the State. See Id., at II.

3.

Defendant moves the Court to exclude from use against Defendant any evidence containing statements or conclusions by the State's investigators as to Defendant's alleged blood alcohol content at or around the time of the incident, for and upon the following reasons and grounds:

B. The Anticipated Evidence.

Based upon the discovery materials received by Defendant from the State, Defendant anticipates the state will seek to introduce, *inter alia*, the following illegally obtained and inadmissible evidence:

a) Evidence obtained from the initial warrantless search and seizure of the Truck, including hair samples and swabbings;

b) Evidence obtained from warrantless seizure and subsequent search of a cellular telephone belonging to Danny Elder;

c) Statements from interviews of Defendant's Parents, which were procured by the threat of prosecution;

d) Statements referencing Defendant's general drinking habits or observations related to Defendant's appeared reaction to alcohol consumption, including, but not limited to statements by the following individuals: Jennifer Anthony, Len King, Nicholas Lanier, Kelsey McCormick, Sierra Page, Jacob Walsh, and Taylor Whitley.

e) Evidence of Defendant's prior arrests or other criminal history;

f) Evidence of Defendant's involvement in an automobile accident in December, 2012;

g) Speculative observations respecting the victim's position in the road, the type of vehicle that struck the victim, and the occupants in the Truck by alleged "eyewitnesses" to the accident, including, but not limited to statements by the following individuals: Kyle Edwards, Daniel Saucedo, David Saucedo, and Jorge Vargas.

h) Speculative witness observations of Defendant's conduct surrounding the accident, including, but not limited to statements by the following individuals: Jennifer Anthony, Misty Bales, Josh Gilreath, Dale Roseman, and Morgan Turnbull.

i) Speculative conclusions regarding the tire marks observed at the scene of the accident;

j) Speculative conclusions and hearsay statements retrieved from electronic sources, including but not limited to: Defendant's Facebook posts and/or text messages, Holly Heaton's Facebook posts and/or text messages, messages from Jenny

Youngblood's cellular phone, and all other posts, messages, or other statements retrieved from electronic sources.

k) Physical evidence retrieved from the Truck pursuant to the State's eventually obtained search warrant;

l) Evidence suggesting Defendant's "flight" or "evasion" of investigators;

m) The victim's medical records or evidence of the victim's medical condition as a result of the accident; and

n) An estimate by ACCPD officer Brenan Baird that Defendant's alleged BAC was 0.29.

However, because such evidence is inadmissible against Defendant, this Court should suppress or exclude it from being used against Defendant in this case.

ARGUMENT AND CITATION OF AUTHORITY

I. THIS COURT SHOULD SUPPRESS ANY STATE'S EVIDENCE WHICH WAS ILLEGALLY OBTAINED.

A. The State Cannot Use Any Evidence Obtained as a Result of the Warrantless Search and Seizure of the Truck.

The Fourth Amendment protects Defendant against "unreasonable searches and seizures." U.S. Const. Amend. IV. "Even with probable cause, absent exigent circumstances or proper consent, warrantless searches and seizures...by officers in the pursuit of their traditional law enforcement duties are presumptively unreasonable." Corey v. State, 320 Ga. App. 350, 353 (2013) (citing to e.g. Kentucky v. King, 131 S.Ct. 1849 (2011)). It is undisputed that the State's investigators "processed" (searched) and towed (seized) the Truck within one hour of the accident. At the time hair samples and swabbings were taken from the Truck, the ACCPD were in the initial stages of their investigation. Defendant was nowhere near the Truck, and officers had yet to even confirmed that the Truck was indeed the vehicle involved in the accident.

1. *The Fact that the State's Officers Did not Enter the Vehicle Does Not Excuse the Failure to Obtain a Warrant for "Processing" and Towing the Truck.*

Despite these facts, the State relies on its assertion that its officers did not enter the Truck at this time, but remained lawfully around the exterior of the Truck. However, "while the characterization of an observation as a non-search plain view situation settles the lawfulness of the observation itself, it does not determine whether a [search or] seizure of the observed object would likewise be lawful." Gates v. State, 229 Ga. App. 766, 768 (1997). In Gates, officers observed the defendant's marijuana plants from the lawful vantage point of a neighbor's yard and sought to justify their subsequent entry into defendant's property and seizure of the contraband based on their initial lawful position. The court rejected this argument, noting that "a warrant is required to enter a private residence and seize evidence...unless...consent or exigent circumstances excuse the officer from taking the time to obtain a warrant." Id.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the United States Supreme Court analyzed a plain-view situation in the context of the state's illegal warrantless search and seizure of an automobile. There, the court held:

> [P]lain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that ***no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'*** Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, ***this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.***

Id. at 468 (emphasis added). In other words, absent exigent circumstances, even plain-view situations where officers remain around the exterior of an automobile will not justify proceeding with a warrantless search and seizure. Likewise, here, the fact that officers were initially in a

lawful position when locating the Truck does not excuse their failure to obtain a warrant to collect the hair and swabbings, or to ultimately seize the Truck by having it towed.

2. *No Exigent Circumstances Justified "Processing" and Towing the Truck Without a Warrant.*

Defendant anticipates that the State will argue exigent circumstances justified "processing" the Truck and towing it. Exigent circumstances may be found in the following circumstances: 1) "where police reasonably perceive an emergency involving a threat to life or property," 2) "where an officer is in hot pursuit of a fleeing felon," 3) "where an officer reasonably fears the imminent destruction of evidence," or 4) "where an officer reasonably perceives that a suspect within the dwelling poses a risk of danger to the police or others." James v. State, 294 Ga. App. 656, 658 (2008) (quoting Love v. State, 290 Ga. App. 486, 488 (2008)). Here, the Truck was parked in an apartment complex between 3:00 and 4:00 a.m. and the ACCPD admits no individuals were around the vehicle. No facts suggested an imminent threat to life or property or a risk of danger to police and others such that the officers needed to collect hair and swabbings or tow the truck immediately. Likewise, since at that time, officers had not located Defendant, there was no hot pursuit.

Regarding the potential destruction of evidence exigent circumstance, Defendant anticipates the State will argue the well-recognized "automobile exception" to the warrant requirement. The Georgia Supreme Court explained the automobile exception as follows:

> The "automobile exception" to the search warrant requirement is premised upon two characteristics of automobiles. One characteristic is their "ready mobility." If the police have probable cause, they may search a vehicle without a warrant because the opportunity to search is fleeting since a car is readily movable. If the police had to take the time to secure a warrant, the evidence or contraband would probably vanish. The second characteristic upon which the automobile exception is based is the diminished expectation of privacy in a car. Automobiles are subject to pervasive governmental regulation and control, especially with regard to safety and licensing, and the public is fully aware that it is accorded less privacy in its

> automobiles because of this compelling governmental need for regulation. However, the "automobile exception" cases do not hold that a search warrant is never needed to search a car. There is an automobile exception to the search warrant requirement, not an exemption.

State v. LeJeune, 276 Ga. 179.182-183 (2003) (internal citations omitted). Here, there was absolutely nothing to indicate to ACCPD officers that evidence on or within the Truck would vanish in the time it took to obtain a warrant. As previously noted, the Truck was parked and immobile and the driver of the Truck was nowhere to be found. The two justifications for the automobile exception come into play only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes." California v. Carney, 471 U.S. 386, 392-393 (1985). Since the Truck was found stationary in a residential apartment parking lot, no justifications for the "automobile exception" existed for the ACCPD to search or seize the Truck pursuant to the automobile exception. See, e.g. Coolidge, 403 U.S. at 458-464 (despite the existence of probable cause, the warrantless seizure of a suspect's car from his driveway and its later search at the police station held to be unconstitutional because "automobile exception" to the warrant requirement not met); LeJeune, 276 Ga. at 183 ("We conclude that ***the automobile exception does not apply where, as here, the suspect's car was legally parked in his residential parking space, the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it, and the police seized the automobile without a warrant, placed it on a wrecker and hauled it away to be searched at a later date.***") (emphasis added).

Even assuming it was reasonable for officers to believe evidence in or around the Truck would be destroyed, which it was not, nothing prevented the ACCPD from posting an officer at the Truck to prevent any tampering or destruction while the warrant was obtained. In fact, such protective measures are commonplace in law enforcement investigations and encouraged to

ensure proper warrant requirements are met. See Reed v. State, 126 Ga. App. 323 (1972) (officer waited several hours to obtain warrant for search of automobile, despite that suspected contraband was in plain-view behind front seat); Minor v. State, 298 Ga. App. 391 (2009) (deputies waited outside dwelling for search warrant and ordered suspects to exit house and wait on front porch to prevent destruction of evidence). Instead, the State's investigators impatiently collected evidence from the Truck's exterior and then towed the Truck, all within an hour of the accident and well before the Truck was confirmed as the vehicle involved in the accident or a suspect was located.

The illegality of the State's premature search and seizure of the Truck is further confirmed by its own investigator Robert Schulte, who errantly told Defendant's parents several hours after the Truck had been processed and towed that the Truck would be towed and that the investigation was being started. Indeed, Mr. Heaton's interviewer assured Mr. Heaton that at the time officer Schulte spoke to Defendant's parents the morning after the accident, officer Schulte was clear there were no warrants at the time. These admissions by the State's investigators as to the investigation's progress confirms that the State's initial processing and towing of the Truck was warrantless and illegal. Accordingly, all evidence obtained as a result of this unlawful search and seizure is inadmissible against Defendant.[1]

B. The State Cannot Use Any Evidence Obtained as a Result of the Warrantless Seizure of Daniel Elder's Cellular Phone.

One of the interviews conducted by the State in this case was of Daniel "Danny" Elder. Mr. Elder voluntarily spoke to investigating officers initially on February 19, 2013. However, when the interviewing officer accused Mr. Elder of lying, Mr. Elder immediately and

[1] Defendant recognizes that after the Truck was impounded on February 16, 2013, a warrant to search the truck was eventually obtained on February 18, 2013. Notwithstanding, all evidence obtained pursuant even to that search warrant should be excluded as speculative, irrelevant, and prejudicial to Defendant. See Sec. D, *infra*.

unequivocally invoked his right not to speak any more without the presence of an attorney. Nevertheless, the interviewing officer seized Mr. Elder's cellular telephone, without warrant or consent based on the officer's assumptions regarding Mr. Elder's statements.

As previously noted, absent exigent circumstances or consent, warrantless searches and seizures are presumptively unreasonable and therefore illegal. See Sec. I, *supra*. No facts existed during Mr. Elder's interview which created an exigent circumstance for the interviewing officer to take Mr. Elder's cellular phone. As with the officers who searched and seized the Truck, nothing prevented Mr. Elder's interviewer from seeking a warrant based upon his suspicions to search the content in Mr. Elder's phone. In fact, the State's officers admit they obtained warrants to search several cellular phones belonging to Defendant's other friends. However, the State has failed to justify why it chose not to observe similar warrant protocol for Mr. Elder's phone.[2] Accordingly, because the seizure was unlawful, any evidence obtained therefrom cannot be used against Defendant.

C. The State Should Not be Permitted to Use Any Evidence Obtained as a Result of the Improperly Coerced Interviews of William Wilson Heaton, Sr. and Tara Heaton.

From the outset of the State's investigation, Defendant and Defendant's Parents exercised their Fourth Amendment rights not to have any voluntary contact with investigators. Indeed, this was unequivocally conveyed to the State the morning after the accident, on February 16, 2013, when Defendant's counsel telephoned ACCPD and stated that Defendant and Defendant's Parents would not have any further contact with investigators. Nevertheless, during the time period between the day of the accident and March 6, 2013, the State's investigators threatened

[2] As with the Truck, Defendant recognizes that a warrant to search Mr. Elder's cellular phone was eventually obtained on February 20, 2013. Pretermitting that the initial seizure was illegal, as noted in Sec. C, *infra*, any statements obtained from Mr. Elder's phone constitute speculative and hearsay statements which are not admissible against Defendant.

Defendant's Parents with prosecution for "obstruction" based upon their choice not to voluntarily cooperate with the investigation. As a result of this improper threat of prosecution, Defendant's Parents felt compelled to give statements to the ACCPD and were interviewed on March 6, 2013.

Defendant concedes that the Georgia Supreme Court has acknowledged the general principle that there is a "distinction between using coerced statements of nondefendant witnesses as opposed to those of a defendant." Wilcox v. State, 250 Ga. 745, 754 (1983). Apart from this acknowledgement of the Second Circuit's reasoning, however, Georgia courts have yet to squarely address a criminal defendant's due process concerns in the context of coerced witness statements. The court in Wilcox did note that "under the proper facts...public policy reasons might forbid the use of such statements in certain situations." Id. at 754, n. 1. There is a split of authority on this issue across jurisdictions. However, because Defendant's Parent's statements were only made as a result of an improper threat of prosecution, this Court should not permit the use of such statements against Defendant because such use would violate Defendant's Constitutional right to a fair trial.

In U.S. v. Merkt, 764 F.2d 266, 274 (5th Cir. 1985), the court held that "[a] defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics." See also Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997) ("[A] person may challenge the government's use against him or her of a coerced confession given by another person."). This is because although the defendants' rights are not affected by the police obtaining the subject witness' statements, "subsequent use of those statements could potentially implicate defendants' due process rights" to a fair trial. United States v. Gonzalez, 164 F.3d 1285, 1289 (10th Cir. 1999); see also Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir.1994) ("Confessions wrung

out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause."). Here, there is no question that the coerced statements by Defendant's Parents will affect Defendant's fair trial since the interviews yielded Defendant's confidential statements to his parents. The fairness of the State's prosecution of its case against Defendant is completely undermined by the improper tactics the State utilized to obtain its evidence. Put simply, "methods offensive when used against an accused do not magically become any less so when exerted against a witness." Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997) (quoting LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir.1974)). Accordingly, because Defendant's Parent's statements were only given under threat of prosecution, such statements were coerced and if used against Defendant, will undermine his Fifth Amendment right to a fair trial.

II. THIS COURT SHOULD EXCLUDE ANY STATE'S EVIDENCE WHICH IS IRRELEVANT, SPECULATIVE, HEARSAY, AND PREJUDICIAL TO DEFENDANT.

"Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded." O.C.G.A. §24-2-1. Evidence is relevant if it "logically tends to prove or to disprove any material fact which is at issue in the case." Owens v. State, 248 Ga. 629, 630 (1981). Whether testimony is relevant is for the trial court to decide. Kilpatrick v. Foster, 185 Ga. App. 453, 457 (1987). In this case, the issues for determination are whether Defendant committed the acts alleged in the State's indictment, specifically, whether Defendant drove his vehicle while under the influence of alcohol, whether Defendant failed to maintain his lane, and whether Defendant struck the victim with his vehicle and then knowingly fled the scene of the accident. Testimony that does not relate to these issues or includes mere speculation is immaterial and irrelevant, and must be excluded.

A. Any Evidence of Defendant's General Drinking Habits or Evidence of Prior Law Enforcement Incidents Involving Defendant Constitutes Irrelevant and Inadmissible Character Evidence.

Defendant anticipates that the State will seek to introduce: 1) evidence of Defendant's general drinking habits; and 2) evidence of Defendant's prior arrests; and 3) evidence that Defendant was involved in an unrelated automobile accident in December, 2012. These facts are completely irrelevant to the charges in this case and admitting them would be improper evidence aimed at suggesting Defendant's overall "bad" character.

O.C.G.A. § 24-4-402 generally provides that "[e]vidence which is not relevant shall not be admissible." O.C.G.A. § 24-4-404 specifically provides that "[e]vidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion" and that "[e]vidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith." Simply put, what is forbidden regarding admission of bad-character evidence "is the state's introduction in the first instance of evidence whose sole probative value is that it tends to show a defendant's bad character." Arnold v. State, 305 Ga. App. 45, 52 (2010).

Here, Defendant's general drinking habits, prior actions related to alcohol, prior arrests, and involvement in a previous automobile accident are completely irrelevant to the instant charges because such facts do not make it "more or less probable" that Defendant did or did not commit the acts alleged in the indictment. O.C.G.A. § 24-4-401. Consequently, introducing any such facts does nothing more than attempt to show Defendant's general "bad" character. The State cannot introduce prior bad acts as evidence to support the current charges. See, e.g., Anderson v. State, 195 Ga.App. 673 (1990) (noting that "[s]uch evidence is an attempt to prove...culpability in this instance by proving general bad character or by showing guilty acts in

other unrelated circumstances."). Therefore, any evidence pertaining to Defendant's general drinking habits, prior actions related to alcohol, prior arrests, and involvement in a previous automobile accident charges must be excluded as irrelevant character evidence.

B. Any Observations by the State's Witnesses as to the Incident and Defendant's Conduct after the Incident Which Are Not Based on Personal Knowledge are Inadmissible.

To the extent that the State seeks to introduce the testimony of any individuals who allegedly witnessed the accident and the Defendant after the alleged incident occurred, Defendant anticipates that such testimony will include completely speculative statements. To the extent the State seeks to introduce any speculative witness statements through the testimony of investigating officers, the statements will also be inadmissible hearsay. O.C.G.A. § 24-7-701 provides, in pertinent part: "if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are...[r]ationally based on the perception of the witness." Thus, "[a] verdict cannot stand which is dependent upon testimony based on guess, speculation and conjecture." City of Atlanta v. Hightower, 177 Ga. App. 140, 143 (1985). Hearsay, which is defined by O.C.G.A. § 24-8-801 as an out of court statement "offered in evidence to prove the truth of the matter asserted" is also inadmissible against Defendant. See O.C.G.A. § 24-8-802.

1. The "Witnesses" to the Accident Cannot Speculate as to the Specifics of the Accident or Defendant's Involvement.

In this case, no individual witnessed the accident at the time of impact. Similarly, no witness can confirm the identity of the driver or the type of vehicle that struck the victim. Nevertheless, the State's "witnesses" to the accident speculated as to the specifics of the impact and Defendant's involvement. For instance, the male who was walking with the victim around the time of the accident stated that they were not walking in the road when the wreck happened

yet admits he turned and walked away from the victim to urinate and at the time of impact, and only heard a loud noise and turned around to find the female laying on the ground. Similarly, witnesses allegedly driving by have claimed they knew the truck had struck the pedestrian but admit they did not actually observe the collision. Additionally, witness drivers have concluded they are 90 percent sure the driver was the only occupant of the truck.

In Smith v. State, 237 Ga. App. 582, 585 (1999), the state asked a witness whether the defendant had threatened to cut the tires on the victim's vehicle, to which she answered unresponsively, that she did not "know who cut his tires" but "maybe his wife cut them or somebody." The court held that "[b]ecause the witness lacked knowledge of the identity of the tire slasher, her unresponsive comment was inadmissible speculation." By their own admission, the "witnesses" to the collision here have no personal knowledge of where the victim was in relation to the road at the time of impact or what type of vehicle actually struck the victim because they did not actually observe the accident. Therefore, statements that the victim was not in the road or that the truck struck the victim constitute mere speculation on the part of these witnesses and are inadmissible. Likewise, any statements by witness drivers that they are a certain percent sure the driver was the only occupant of the truck are similarly speculative since, once again, they are not based on personal knowledge but on an admittedly uncertain observation.

2. *The Witnesses Who Allegedly Observed Defendant Around the Time of the Accident Cannot Speculate as to Defendant's Identity, Direction of Travel, or Demeanor.*

The State's witnesses claim they observed an individual walking down Lexington Road shortly after the time of the accident who the witnesses thought to be Defendant. Defendant was also allegedly observed walking to his Truck when leaving downtown. No witness ever

confirmed the identity of the individual was walking down Lexington road. Likewise, the State has no evidence that Defendant ever got to his Truck after leaving downtown. Other individuals observed Defendant as allegedly looking "guilty", "down", "not himself", or "as if he had done something wrong" after the alleged incident. As noted above, the Georgia Court of Appeals in Smith prohibited uncertain observations as to the identity or conduct of Defendant as inadmissible speculation. Similarly, any testimony which speculates as to Defendant's demeanor and mindset is also inadmissible since such conclusions are mere assumptions and conjecture. See Smith, *supra*; cf. Usher v. State, 258 Ga. App. 459, 462 (2002) (confirming that an officer's testimony that a defendant was "running in a certain direction...was not relevant to his guilt" of the charge of armed robbery). Accordingly, this Court should limit any testimony strictly to the witness's personal knowledge and exclude any conclusions which speculate on the identity of an unknown individual, Defendant's destination of travel, or which assume how or what Defendant was feeling.

3. Accident Investigators Cannot Speculate as to the Tire Marks Observed at the Scene.

As with any speculation regarding witness observations, this Court should also exclude any speculation by investigating officers as to the "tire tracks" which were observed at the scene of the accident. Upon examining the tire tracks, ACCPD officers offered non-forensic opinions respecting the nature of the accident--e.g., direction of travel, the vehicle's movement. Such conclusions are not based upon any forensic data or personal knowledge but instead, solely upon the assumptions of an officer. Witnesses, including the State's investigators, may only testify as to their personal knowledge. Simply put, the officers can testify to what they observed, but they cannot offer conclusions based on their observations. Since no officer observed the accident, any

conclusions as to the vehicle's direction of travel or movement are speculative and inadmissible against Defendant. See generally, Sec. II.B, *supra*.

C. All Witness Statements Obtained from Electronic Sources Constitute Inadmissible Hearsay and Speculation.

Defendant anticipates the State will introduce evidence obtained from Facebook activity and text messages from various individuals around the time of the accident. However, any statements retrieved from these electronic sources constitute inadmissible hearsay. As previously noted, hearsay constitutes any out of court statement offered to prove the truth of the matter asserted. II.B, *supra*. Any witness statements made via Facebook or text messages are undoubtedly out of court since the declarant cannot be verified and at best, only a telephone number can be identified. See, e.g., Hollie v. State, 298 Ga. App. 1 (2009) (recognizing that text messages may constitute inadmissible hearsay). Indeed, because this Court cannot be certain of who posted a statement to Facebook or who sent a text message, there can be "absolutely no showing of reliability with respect to the statement of the anonymous declarant." Al Amin v. State, 278 Ga. 74, 89 (2004). As such, this Court should not permit the State to introduce any hearsay statements from Facebook, text messages, or any other electronic source.

Defendant also anticipates the State will introduce evidence that both Defendant's Facebook page and his cellular telephone were "wiped clean" or that electronic information was "deleted." Such conclusions are completely speculative, as the State has no evidence whatsoever of such actions by anyone, let alone Defendant. Since the charges against Defendant cannot be proven by speculation or conjecture, any reference by the State to the deletion of electronic information by any witness is inadmissible. See generally, Sec. II.B.

D. The Evidence Obtained from Inside the Truck is Inadmissible Against Defendant as Irrelevant and Speculative.

As noted in Sec. I.A, *supra*, any evidence obtained from the illegally seized Truck cannot be used against Defendant. However, even if the State relies upon its late warrant, all of the evidence obtained from inside the truck as a result of the late warrant is irrelevant and speculative. Investigators retrieved various containers (arguably, undisposed trash) from inside the Truck and lifted Defendant's fingerprints from these containers. Defendant anticipates the State will use this evidence to support its allegation that Defendant was drinking and/or drunk while driving the Truck. However, this inference is, like much of the State's evidence, speculative. The containers and fingerprints establish that Defendant held the containers at some point. To use this evidence to show Defendant was drinking in the Truck, however, calls for speculation, which is not admissible. See generally, Sec. II.B.

E. Evidence Suggesting Defendant's "Flight" or "Evasion" of Investigators as Proof of Defendant's "Guilt" is Inadmissible and Prejudicial to Defendant.

As a result of the State's interviews with Defendant's parents, William Wilson Heaton, Sr. and Tara Heaton, Defendant anticipates that the State will seek to use Mr. and Mrs. Heaton's statements as to Defendant's actions immediately after the accident—e.g., Defendant immediately parked his truck and went into the woods, Defendant did not answer telephone calls from law enforcement personnel trying to locate him—against him as evidence of "flight," to suggest a "consciousness of guilt." As previously noted, because Mr. and Mrs. Heaton only gave interviews under improper threat of prosecution, any evidence obtained by the State as a result of the interviews should be suppressed. Furthermore, Defendant's actions in the hours following the incident are not relevant to the issues in this case—i.e., whether Defendant was involved in the incident. See generally, Sec. II. *supra*. However, even assuming this Court finds the interview

evidence admissible and relevant. using Defendant's failure to come forward to investigators will unfairly prejudice Defendant.

1. Admitting Any Facts as Evidence of Defendant's "Flight" is Substantially More Prejudicial than Probative.

Defendant's actions constituted nothing more than a failure to come forward and acknowledge the initial investigation. In Mallory v. State, 261 Ga. 625, 630 (1991) (emphasis added), the Georgia Supreme Court unequivocally held that for evidentiary purposes, a state's "comment upon a defendant's silence or failure to come forward ***is far more prejudicial than probative***...such a comment will not be allowed." The Georgia Supreme Court reinforced its Mallory ruling in Reynolds v. State, 285 Ga. 70, 71 (2009), noting that the "in the situation of a criminal defendant, this failure to speak or act ***will most often be judged as evidence of the admission of criminal responsibility***. Thus, ***the element of prejudice is indisputable***." (emphasis added). Moreover, the holding in Mallory is a clear and "bright-line evidentiary rule" that is not limited to certain factual scenarios. Reynolds, at 71. Thus, the State may not comment on Defendant's failure to come forward "even where the [D]efendant has not received Miranda warnings and where he takes the stand in his own defense." Mallory, at 630. Georgia law is therefore clear that any suggestion that Defendant avoided or failed to respond to investigating officers cannot be used against him or even commented on by the State because it would be highly prejudicial.

2. The State Cannot Use Defendant's Assertion of His Fourth Amendment Rights as Evidence of His Guilt.

During the early-morning hours following the incident, Defendant was not fleeing, but choosing to exercise his Fourth Amendment rights not to voluntarily have any contact with investigating officers. Indeed, Defendant's attorney confirmed Defendant's exercise of his right to

remain silent and not have any voluntary contact with the State's agents as soon as possible in morning following the accident. To suggest Defendant was "fleeing" or "evading" is irrelevant to the charges against Defendant. It is a well-established principle that when law enforcement officers initiate an interaction with a citizen for purposes of basic inquiry, the encounter falls "within the realm of a first-tier encounter." State v. Jones, 303 Ga. App. 337, 339 (2010). A first-tier encounter is completely voluntary and absent any suspicion of criminal wrongdoing, the citizen may choose not to interact with the law enforcement officer. Indeed, "a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. ***Even running from police during a first-tier encounter is wholly permissible.***" Id. (emphasis added).

In this case, Defendant chose not to engage in a first-tier encounter with investigating officers when they initiated their investigation by searching for Defendant and calling Defendant's cellular phone. At this stage of the investigation, Defendant had no obligation to have any contact with law enforcement officers and he chose to exercise his Fourth Amendment rights and avoid police altogether at that time. These actions cannot be characterized as "flight" since Defendant was free to leave as he pleased. As Chief Justice Clarke noted in Renner v. State, 260 Ga. 515, 520 (1990), "Black's Law Dictionary defines flight thusly: "***[t]he evading of the course of justice by voluntarily withdrawing one's self in order to avoid arrest or detention, or the institution of criminal proceedings***, regardless of whether one leaves jurisdiction" (emphasis added). The current definition is similar: "[t]he act or an instance of fleeing, ***esp. to evade arrest or prosecution*** <the judge denied bail because the defendant is a flight risk>. – ***[a]lso termed flight from prosecution; flee from justice.***" BLACK'S LAW DICTIONARY 714 (9th ed. 2009) (emphasis added). Accordingly, evidence of Defendant's actions which fails to

demonstrate Defendant was evading arrest or prosecution falls short of "flight." The State did not obtain a warrant for Defendant's arrest until March 6, 2013 so his actions immediately following the accident cannot come close to establishing "flight." Since Defendant was free to avoid the first-tier encounter with investigating officers, he cannot be said to have been fleeing from justice by running into the woods or avoiding all contact with investigating law enforcement; to allow such tenuous circumstantial evidence will undoubtedly prejudice Defendant. See Baker v. State, 254 Ga. App. 19, 20 (2002) ("[I]f the proffered evidence is too tenuous to prove desired matter and is possibly more prejudicial than probative, trial court does not abuse its discretion in excluding evidence.).

To characterize Defendant's pre-arrest actions as "flight" in order to justify admission of such facts as circumstantial evidence is to use Defendant's voluntary avoidance of a first-tier encounter as affirmative evidence of his guilt. This is an impermissible use of a defendant's assertion of his constitutional rights. See Sec. II.E.1. *supra*; cf. Howard v. State, 237 Ga. 471, 473 (1976) (applying similar principles to hold that "use of petitioner's silence as evidence of guilt would be unconstitutional"); Lampley v. State, 284 Ga. 37 (2008) (reaffirming longstanding constitutional prohibition on state commenting on accused's pre-arrest silence or failure to come forward). Defendant's assertion of his Fourth Amendment rights cannot be used against him in this manner. Accordingly, any proposed evidence of Defendant's "flight" should be excluded as irrelevant to the charges pursuant to O.C.G.A. § 24-4-402.

F. Any Evidence of the Victim's Medical Records or Medical Condition as a Result of the Accident is Overly Prejudicial to Defendant.

As a general rule, evidence which does not tend to make it more or less probable that Defendant committed the acts alleged in the State's indictment is irrelevant and inadmissible. See Sec. II, *supra*. Even though the victim's medical records and medical condition developed after

the alleged criminal acts were committed and would ordinarily be irrelevant to the triable issues here. Defendant concedes that Georgia courts have allowed evidence of a victim's subsequent medical condition if such medical evidence is necessary to assist the fact finder in establishing any elements or factors related to Defendant's charges. See, e.g., Smith v. State, 253 Ga. 536, 536 (1984) (gruesome photographs of victim necessary to show defendant's "abandoned or malignant heart" when committing the murder); Stoe v. State, 187 Ga. App. 171, 172 (1988) (treating physician's testimony on nature of victim's injuries relevant to establish element of "use of an offensive weapon" in armed robbery case). However, even assuming the victim's medical records or medical condition are relevant to establishing the elements of the charges against Defendant, Defendant is willing to stipulate to the nature of the victim's injuries for purposes of the State's burden of proof on the charges that require such evidence. As such, there is no need to introduce any evidence of the victim's medical condition, including her medical records, if stipulated, since such evidence would no longer serve the purpose of proving the charges. Instead, such evidence would merely inflame the jury and be overly prejudicial against Defendant. See Holcomb v. State, 130 Ga. App. 154, 155 (1973) (noting that despite the relevancy of photographs depicting the victim's injuries, "[w]here, as here, the cause of death is not in dispute, and the defendant admits to having fired the fatal bullet, a trial judge would often be well advised to sustain an objection to their admissibility on the ground that they add nothing of probative value to the record.").

Additionally, while there is no question that this Court may award restitution to the victim in this case and use the victim's medical records as a basis for determining the proper amount of restitution, such issues are for the Court. See O.C.G.A. §§ 17-14-3; 17-14-10; see also, e.g., Elsasser v. State, 313 Ga. App. 661 (2011). Accordingly, the jury should not be

permitted to review any evidence respecting the victim's medical records or medical condition as a result of the accident, as such evidence would undoubtedly prejudice Defendant.

III. THIS COURT SHOULD EXCLUDE ANY CONCLUSIONS BY THE STATE AS TO DEFENDANT'S ALLEGED BLOOD ALCOHOL CONTENT AS SPECULATIVE AND IMPROPER LAY TESTIMONY.

A. The State's Witnesses Cannot Speculate as to Defendant's Alleged Blood Alcohol Content.

As previously noted, speculative evidence is improper and cannot support a verdict. See Sec. II.C, *supra*. In this case, the State did not obtain any breath or blood test of Defendant which could have established a numerical value for Defendant's alleged blood alcohol content ("BAC"). Nevertheless, in one of the State's investigative reports, Officer Brenan Wyatt Baird ("Baird"), speculates that based on the alcohol Defendant purportedly consumed prior to the incident, Defendant's BAC was approximately 0.29. Officer Baird admits he calculated this value based on his observations of video evidence which allegedly depicts Defendant ordering drinks at a bar; officer Baird did not state how he confirmed Defendant's identity as that of the individual observed in the video. See Id. Using these videos and factors such as Defendant's "weight", period of consumption, and the equivalent amount of "ounces" Defendant allegedly consumed, officer Baird came to his 0.29 BAC figure. Id. However, officer Baird admits that his calculation is speculative, calling it only a "BAC estimate." As such, officer Baird's BAC estimate is plainly speculative and not admissible against Defendant.

B. Testimony Respecting Blood Alcohol Content is Appropriate for Expert Witnesses and the State's Investigators Should Not Be Permitted to Testify as Experts.

Even if this Court finds officer Baird's estimate is not speculative evidence, a BAC numerical conclusion is proper when presented through scientific test results or, at minimum, an expert witness, which SPO Baird is not. See, e.g., Turner v. State, 241 Ga. App. 431, 438 (1999)

(recognizing that testimony concerning the effect of defendant's BAC on his ability to drive a motor vehicle was properly presented through an expert). To the extent the State seeks to qualify officer Baird as an expert in order to admit evidence of officer Baird's BAC estimate, such proposed testimony is inadmissible pursuant to the Daubert standard.

1. Standard For Admitting Expert Testimony.

O.C.G.A. § 24-7-707 generally notes that expert testimony is admissible in criminal cases. O.C.G.A. § 24-7-702(b) then sets forth the requirements for expert testimony:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact."

O.C.G.A. § 24-7-702(f) further specifies that Georgia courts "may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases." "The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence." Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1261 (11th Cir. 2004).

The determination of whether "a witness is qualified to render an opinion as an expert is a legal determination for the trial court." Moran v. Kia Motors America, 276 Ga. App. 96, 97 (2005). The Georgia Supreme Court has clearly articulated the trial court's important role:

> "In determining the admissibility of expert testimony, the trial court acts as a gatekeeper, assessing both the witness' qualifications to testify in a particular area of expertise and the

> relevancy and reliability of the proffered testimony. Kumho Tire Co., supra, 526 U.S. at 141, 119 S.Ct. 1167. See McDowell v. Brown, 392 F.3d 1283, 1298(IV) (11th Cir. 2004) (Daubert "impressed a gatekeeping role upon judges, and directed them to 'ensure that any and all scientific testimony or evidence is not only relevant, but reliable.'"); Cotten v. Phillips, 280 Ga.App. 280, 286, 633 S.E.2d 655 (2006) (recognizing trial court's role as gatekeeper of expert testimony)."

HNTB Georgia, Inc. v. Hamilton-King, 287 Ga. 641, 642 (2010), reconsideration denied (July 26, 2010). This Court must exercise its role as gatekeeper in this case and exclude SPO Baird from testifying as to Defendant's alleged BAC.

2. *Officer Baird's BAC Estimate is Not Based On Reliable Scientific Principles and Methods.*

"Reliability [of a method] is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training. [cits.]" HNTB Georgia, Inc., at 642-43.

Officer Baird's report notes that his opinion as to Defendant's alleged BAC is based on his teaching or assistance in "teaching of the Standardized Field Sobriety classes," part of which classes include "an active 'wet lab' in which persons are given specific known amounts of alcohol over specific known time periods to reach a specific BAC...based on their sex and weight." Importantly, officer Baird admits in his report that the participating "wet lab" subjects "are ***tested for exact results once the lab is over to confirm the formula's accuracy***." In Bravo v. State, 304 Ga. App. 243 (2010), the court considered the question of whether a police officer's "method of estimating a specific numeric BAC" based on a standardized field sobriety test such as the horizontal gaze nystagmus ("HGN") evaluation, "can be verified with such certainty that it is competent evidence in a court of law." Id. at 247. There, the state sought to introduce the

"arresting officer's testimony regarding his estimate of [the defendant's] blood alcohol concentration" based on the officer's field sobriety training and specifically, an HGN test. Id. at 243. The court evaluated the officer's significant credentials and experience, evaluated case studies and statistics, and still firmly held that the officer's field sobriety analysis had not "the requisite scientific stage of verifiable certainty" and therefore was "not admissible to quantify a specific BAC." Id. at 247, n. 13, 248. Moreover, the court in Bravo held the trial court's admission of such evidence was "not harmless" error. Id. at 250.

Officer Baird's BAC estimate here is based generally on his experience with field sobriety classes, and specifically, his "wet lab" testing. Importantly, the "wet lab" methods described involve actual testing of the subject, similar to the officer using the HGN test on the defendant in Bravo. However, no testing was ever conducted by the State on Defendant here. Instead, SPO Baird relies upon an approximate amount of alcohol the Defendant allegedly consumed in bar videos which allegedly depict the Defendant. Although officer Baird identified some standardized field sobriety techniques for estimating BAC, he did not state whether his BAC estimate of Defendant was capable of testing. Indeed, given the absence of any evidence from Defendant's body, it is impossible to test officer Baird's BAC estimate. Officer Baird did not state whether his specific BAC estimate had ever been subjected to peer review or as to rates of error. Likewise, while officer Baird referenced certain standardized law enforcement classes, he did not state whether the scientific or medical community has ever accepted the BAC estimate he used for Defendant. Simply put, officer Baird's estimate was nothing more than an educated guess based on law enforcement field sobriety training, and not calculated from recognized and accepted scientific principles.

3. *Officer Baird's Conclusions are Based On Bare Assertions and Personal Speculation.*

As noted above, officer Baird's BAC estimate is admittedly speculative. See III.A, *supra*. The Georgia General Assembly, like the Supreme Court of the United States, has recognized that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Daubert, *supra*, at 595. In the absence of evidence that an expert's opinion is grounded in generally accepted standards and subject to validation or testing by objective means, or to peer review, what is proffered as expert opinion is nothing more than "***subjective belief or unsupported speculation***." Id. at 590 (emphasis added). As noted in General Electric Company v. Joiner, 522 U.S. 136, 147, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Judge Hugh Lawson succinctly explained the logic of the ipse dixit limitation this way: "If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." Goforth v. Paris, CIVA 5:02CV94 HL, 2007 WL 988733 (M.D. Ga. Mar. 30, 2007) (citing U.S. v. Frazier, 387 F.3d 1244, 1262 (11th Cir. 2004)).

As set forth above, nothing in officer Baird's report indicates his methods were reliable in the scientific community or that his calculation was tested. Indeed, Defendant's identity as the alleged drinker in the video is itself, speculative. As such, this Court cannot permit such unsubstantiated, speculative testimony as to Defendant's alleged BAC guised as expert opinions.

WHEREFORE, Defendant moves the Court to suppress the evidence illegally obtained and exclude the improper evidence as set forth above, and to direct the Prosecutor and the State's

witnesses to not use, mention or otherwise refer to such evidence at the trial or other proceeding in this case.

Respectfully submitted this 22nd day of October, 2013.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing:

DEFENDANT'S MOTION TO SUPPRESS, MOTION IN LIMINE, AND MOTION PURSUANT TO O.C.G.A.§ 24-9-67.1 (DAUBERT) TO EXCLUDE ANY TESTIMONY CONCERNING DEFENDANT'S ALLEGED BLOOD ALCOHOL CONTENT AND BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS, MOTION IN LIMINE, AND MOTION PURSUANT TO O.C.G.A.§ 24-9-67.1 (DAUBERT) TO EXCLUDE ANY TESTIMONY CONCERNING DEFENDANT'S ALLEGED BLOOD ALCOHOL CONTENT

by hand delivering a copy of same to:

Athens-Clarke District Attorney's Office
Athens-Clarke County Courthouse
325 East Washington St., Suite 500
Athens 30601

This 22nd day of October 2013.

KEVIN E. EPPS

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