IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
Appellee	)	
	)	**Supreme Court Case No. _____________**
vs.	)	**Appeal Case No. M2002-01461-CCA-R3-CD**
	)	**Davidson County Criminal**
HAROLD R. GREGORY,	)	
Appellant	)	

ON RULE 11, T.R.A.P.
APPLICATION FOR PERMISSION TO APPEAL
FROM THE COURT OF CRIMINAL APPEALS

BRIEF OF APPELLANT

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INTRODUCTION

This is a brief on the merits in support of a Rule 11, T.R.A.P., Application for Permission to Appeal by Harold Gregory from the Court of Criminal Appeals, affirming his conviction for driving under the influence an intoxicant, second offense, with a sentence of eleven months and twenty-nine days, suspending all but forty-five days with the balance on probation supervision. Mr. Gregory challenges the legality of the search, the sufficiency of the evidence, and certain evidentiary matters.

The Court of Criminal Appeals affirmed the conviction on July 29, 2003. No petition to rehear was filed by either party.

The primary issue in the case is the failure of the trial court to permit the testimony of Mr. Gregory's long-time attorney Bill Bruce. Mr. Bruce would have given testimony as to the telephone conversation he had with Mr. Gregory shortly after his arrest and would have been in an excellent position to characterize Mr. Gregory's behavior as that of a person who was <u>not</u> intoxicated. The judge found that because Mr. Bruce was in practice with Mr. Gregory's trial lawyer that this somehow disqualified Mr. Bruce from testifying. The failure to permit the testimony of a critical witness compromised Mr. Gregory's constitutional rights to compulsory process and the right to present a defense. This constitutional issue should justify a new trial in this matter along with the other errors.

STATEMENT OF THE ISSUES

1. **SINCE MR. GREGORY'S ARREST WAS UNLAWFUL, WHETHER ALL OF THE EVIDENCE SECURED AS A RESULT OF THE ARREST SHOULD HAVE BEEN SUPPRESSED.**

2. **WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THERE WAS NO PROOF THAT MR. GREGORY WAS DRIVING WHILE INTOXICATED.**

3. **WHETHER THE FACTS ARE INADEQUATE TO ESTABLISH THAT MR. GREGORY "REFUSED" TO TAKE A BREATH TEST AND THUS EVIDENCE OF HIS "REFUSAL" WAS UNLAWFUL.**

4. **WHETHER MR. GREGORY'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND THE RIGHT TO PRESENT A DEFENSE UNDER THE TENNESSEE AND UNITED STATES CONSTITUTION WERE COMPROMISED BY THE TRIAL COURT'S FAILURE TO PERMIT THE TESTIMONY OF MR. BILL BRUCE WHO WAS GOING TO TESTIFY THAT MR. GREGORY TELEPHONED HIM SHORTLY AFTER MR. GREGORY'S ARREST AND THAT MR. GREGORY DID NOT SOUND AS IF HE WERE INTOXICATED.**

DESIGNATION OF THE RECORD

The record consists of one volume of pleadings and orders which will be referred to in this brief as the technical record and abbreviated by the letters TR. There is one volume of testimony concerning the suppression hearing, two volumes of trial testimony and a single volume of testimony at the hearing on the motion for a new trial. There is one exhibit which is reproduced in this brief. There is one supplemental technical record.

DESIGNATION OF THE PARTIES

The appellant will hereinafter be referred to by his name Harold Gregory or, occasionally, as the defendant. The appellee will be referred to a the State or the State of Tennessee.

STATEMENT OF THE CASE

Mr. Gregory was arrested on September 20, 2000 for allegedly driving under the influence. He was indicted by the Davidson County Grand Jury on June 13, 2001 for a second offense DUI and violation of the implied consent law. (TR 3-6).

A motion to suppress was filed on September 20, 2001. (TR 9-11). The trial court heard testimony on the motion on September 27, 2001. These proceedings appear in volume two.

The matter came on to be heard for trial on January 7, 2002, whereupon the defendant waived a jury. (TR 14). The court conducted a bench trial at the conclusion of which the court found Mr. Gregory guilty of driving under the influence. The parties stipulated that Mr. Gregory had a prior conviction for driving under the influence and the court imposed a sentence on January 24, 2002 of eleven months and twenty-nine days, all to be suspended except for forty-five days and certain mandatory alcohol treatment programs. The court also suspended Mr. Gregory's driving privileges for two years. The court also assessed a fine of $600.00. (TR 15).

A motion for new trial was filed on January 24, 2002. (Supplemental Technical Record). An amended motion for new trial was filed on May 24, 2002. (TR 16-19). The judge denied the amended motion for a new trial on June 6, 2002. (TR 21). A notice of appeal was filed on June 6, 2002. (TR 22). The Court of Criminal Appeals affirmed the conviction on July 29, 2003.

STATEMENT OF FACTS AT SUPPRESSION HEARING

Corporal Daniel Okert

Corporal Okert testified that he worked for the Goodlettsville Police Department for over thirteen years. (Vol II, p. 3). On September 20, 2000, he arrested Mr. Harold Gregory at approximately 9:15 in the evening. The officer said he was responding to a complaint of a "possible intoxicated or erratic driver." He was given a physical description of the vehicle. (Vol. II, pp. 3-4).

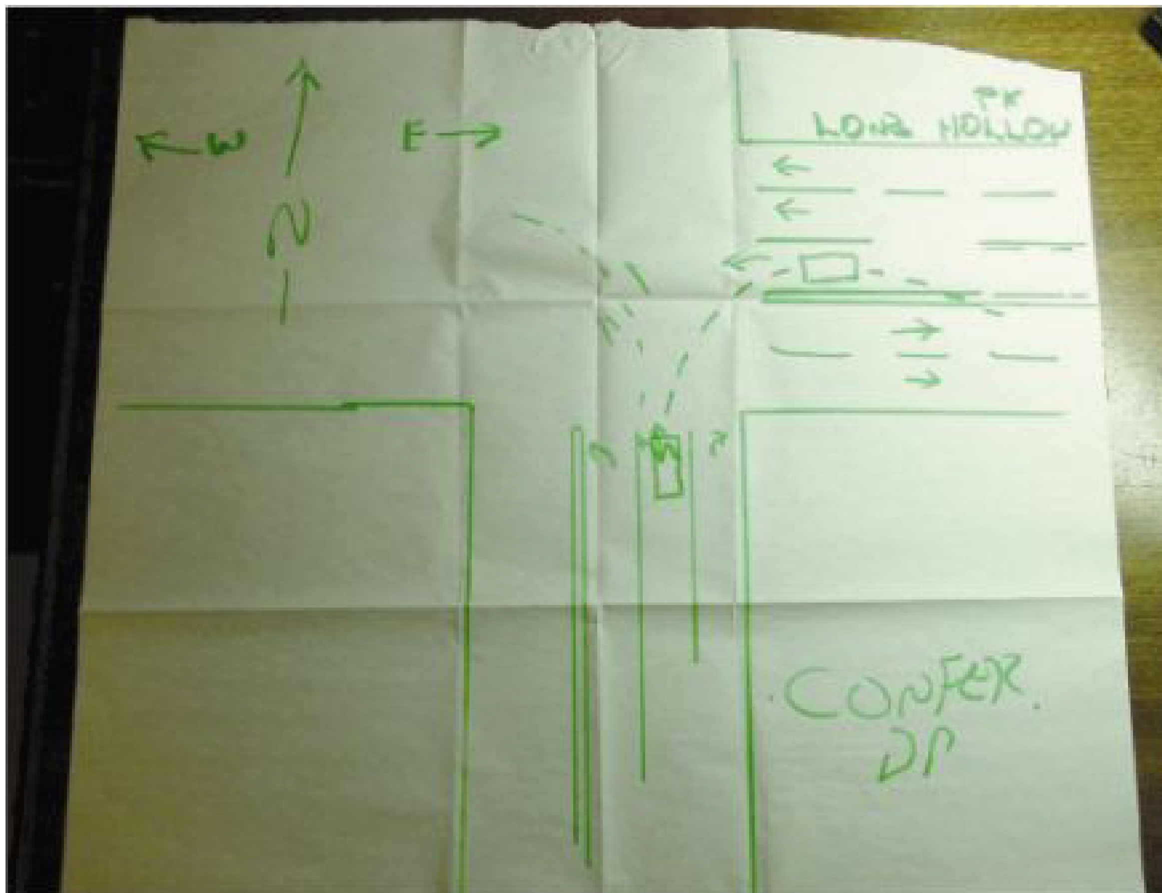
Corporal Okert subsequently located a red Chevy pick-up truck sitting at a traffic light. The officer said he made a U-turn because he had turned into Conference drive and pulled back in behind the suspect vehicle. At this location there is a left lane for a left turn. There is a center lane for through traffic or a left turn and then there is a right lane for right hand lanes putting you "going out bound on Long Hollow Pike." The vehicle was stopped in the center lane or the lane to go left or straight through.

Once the traffic light turned to green the suspect vehicle made a right turn out of the center lane and made a wide right turn which "proceeded to put him going in an easterly direction on Long Hollow Pike."

The officer said that this particular intersection is basically five lanes. As the suspect vehicle made his turn into Long Hollow Pike "he crossed completely over into the lane of traffic and proceeded in an eastbound direction before coming back over into the eastbound lanes of traffic." (Vol. II, pp. 4-5).

That particular area it is not designated for left turns because there is a “double yellow line, so he had to cross the double yellow line to be over into that lane of traffic.” The officer then stopped the suspect vehicle at the intersection of Long Hollow Pike and Ellen Drive.

(Vol. II, p. 5).



Digital Copy of Exhibit 1

Upon making contact with Mr. Gregory the officer noted that there was an odor of an alcoholic beverage coming from inside the vehicle. Mr. Gregory produced his driver license and was asked to step from the vehicle. (Vol. II, p. 6). As he was getting out of the vehicle the vehicle apparently was equipped with automatic locks and Mr. Gregory "kept hitting the lock button locking the door on himself and couldn't get out of the vehicle. I eventually had to reach into the vehicle and unlock the door and then grab the handle and open the door for him." (Vol. II, p. 7).

Mr. Gregory was "unsteady on his feet as he exited the vehicle." The officer said he noticed the odor of alcohol proceeding from inside the vehicle and "came out into the night air and was around him during the field interview portion of the contact." (Vol. II, p.8)

Mr. Gregory said that "he had had a couple of drinks in the Goodlettsville area." Mr. Gregory also said that he was on some type of medication and indicated there was no physical impairments that would hamper his ability while he was talking. (Vol. II, p.8)

Corporal Okert testified that he has attended DUI enforcement classes concerning field training for DUI cases. (Vol. II, p. 8). The officer testified that Mr. Gregory understood the field sobriety tests and proceeded to perform them. He missed the heel to toe test. He had to raise his arms to maintain his balance. Mr. Gregory was given a one-legged stand test. He was asked to count while performing the test. Mr. Gregory told the officer that he could not perform that test. (Vol. II, pp. 8-10).

After completing all of the field sobriety tests Mr. Gregory was placed under arrest for DUI and was transported to the police department for a breath test. The officer testified that:

> The implied consent law was explained to him. He requested to talk with an attorney before he took the breath test and I informed him that according to the Tennessee Supreme Court, the attorney privilege did not enter into that portion of his arrest at that point in time then he said, I am not doing anything. So I took that as a refusal and he was then transported to the Metro booking room and taken before a Night Court Commissioner and warrants against him were sought for DUI and implied consent violations. (Vol. II, p. 12).

On cross-examination Corporal Okert said that he did not pay a lot of attention to the initial traffic report and that it was just a dispatch that came over his radio. (Vol. II, p. 13). He made a U-turn and pulled right in behind Mr. Gregory. At that point he observed nothing wrong with Mr. Gregory's behavior. (Vol. II, p. 15).

The officer said that he did not know exactly what was wrong but he "got a suspicion" that there might be something wrong with Mr. Gregory's vehicle. The officer agreed that Mr. Gregory did not go any significant distance over into the other lane. He just made a turn. (Vol. II, p. 16).

The officer was asked on cross-examination "do you know, but for going over into this lane, is it your understanding that turning from the middle lane here on Conference Drive into the north side of the eastbound lane of Long Hollow Pike, that would be an illegal turn?" To which the officer responded:

> Well I think under the driver law it would be an illegal turn. I don't know that I would stop somebody initially for something like that. It would just be an indicator to me that there was something wrong.

The officer said that the "tip" was not enough to stop Mr. Gregory but the "second indicator was that he made a wide right turn into the wrong lane. The next indicator was he ended up in that opposing lane of traffic." The officer admitted that when Mr. Gregory was pulled over he did not have any bad driving and did not hit anything. (Vol. II, pp. 17-19).

The officer admitted that his vehicle did not have a video camera in it and there was no video taping of the arrest. The officer said that he could not tell how much Mr. Gregory had been drinking. The officer said he did not make any notes and none were available. (Vol. II, p. 21).When they drove over to the Goodlettsville police station it was a distance of approximately a mile and a half. Mr. Gregory did not have any trouble getting out of the vehicle and walking over to the police station. (Vol. II, pp. 30-31). Mr. Gregory was under arrest at that point. Unquestionably he had asked to speak to a lawyer before doing anything else. He was told that he could not speak to a lawyer or talk to a lawyer before he did any of the tests. (Vol. II, p. 31). The officer said he took this as refusal. (Vol. II, p. 32).

At the conclusion of this testimony the judge denied the motion to suppress:

> The officer's attention was brought to the defendant's vehicle based upon information of the radio. That would have clearly been inadequate for him to stop the defendant. But his observations thereafter were more than sufficient and he articulated them specifically, to justify the stop. The field sobriety tasks were administered properly. So, any motion to suppress them would be denied, other than the horizontal gaze and the nystagmus [test] are suppressed. (Vol. II, p. 35).

STATEMENT OF THE FACTS AT BENCH TRIAL

State's Proof

Corporal Daniel Okert

Corporal Daniel Okert has been with the Goodlettsville Police Department for over thirteen years and prior to that worked for the City of Gallatin for eleven years. (Vol. III, pp. 23 - 24).

On September 20, 2000, Corporal Okert was working the 6:00 p.m. to 6:00 a.m. shift. (Vol. III, p. 27). Corporal Okert first observed the defendant, Harold Gregory, when he responded to a complaint from a citizen on Conference Drive who was approaching the area of Long Hollow Pike. The caller was on a cell phone with the dispatcher and this information was being relayed to Corporal Okert by radio communication. (Vol. III, p. 28). The caller was complaining about the person's inability to drive his vehicle in a safe manner. (Vol. III, p. 54).

Corporal Okert turned on Conference Drive off of Long Hollow Pike and saw a red pickup truck, with dealer plates, sitting at the traffic light. Corporal Okert made a U-turn and pulled right in behind the truck which was sitting at the traffic light in the center lane. Corporal Okert described Conference Drive as a three-lane highway where the far left lane is the left turn lane; the center lane is a left turn lane and a straight through lane of traffic; and a right lane for right turns onto Long Hollow Pike. (Vol. III, pp. 28-29).

Corporal Okert stated that when the light changed to green, the vehicle in question proceeded forward and then made a right turn onto Long Hollow Pike from the center lane of traffic. Corporal Okert followed the vehicle as it proceeded to make its turn onto Long Hollow Pike. (Vol. III, p. 30). Corporal Okert also stated that there was no traffic to Mr. Gregory's right so he did not interfere with anyone when he made his right turn. (Vol. p. 62). He also stated that Mr. Gregory, after making his right turn, maneuvered back into the lane within about 100 feet. Corporal Okert even stated that it was a safe maneuver, that Mr. Gregory did not endanger anybody, and he did not cause any problems. (Vol. III, p. 65).

Corporal Okert described Long Hollow Pike as a four-lane divided highway, with a two-way left turn lane down the center. At the intersection the two-way left turn lane becomes a single left turn lane for the traffic that is coming into Goodlettsville and turning left onto Conference Drive. Corporal Okert also stated there is a double yellow line prohibiting anyone from crossing over into the center lane of traffic. (Vol. III, p. 30).

Corporal Okert stated that as the vehicle made its turn, it proceeded off into the center lane of traffic. After traveling a short distance in the center lane, the truck veered back over into the eastbound lane of traffic onto Long Hollow Pike, the center lane of traffic, and proceeded outbound. (Vol. III, pp. 30 - 31). Corporal Okert stated that there was no traffic in the left turn lane. (Vol. III, p. 62).

After observing Mr. Gregory's driving habits, Corporal Okert felt he needed to go ahead and stop the vehicle without following it any further. Corporal Okert then activated his blue lights to stop the vehicle. (Vol. III, p. 31).

Corporal Okert stated that the vehicle continued eastbound on Long Hollow Pike out of Davidson County into Sumner County for approximately a half mile to three-quarters of a mile before stopping. Corporal Okert stated that he had his lights on but he did not have his siren on. (Vol. III, pp. 31 - 32).

As Corporal Okert approached the vehicle Mr. Gregory had rolled down his window and Corporal Okert then noticed an odor of alcoholic beverage coming from inside the vehicle. At this time Corporal Okert asked Mr. Gregory for his driver's license. Mr. Gregory then asked Corporal Okert why he was being stopped. Corporal Okert stated that Mr. Gregory was able to get his license but, there was a little bit of a problem but not a great deal. In fact, on the 132 form Corporal Okert filled out, he did not mark the box where it says "fumbled excessively getting license." This did not cause Corporal Okert any great problems. (Vol. III, p. 69).

Corporal Okert stated that Mr. Gregory's speech was somewhat slurred. He then asked Mr. Gregory if he had been drinking and Mr. Gregory indicated that he had and that he was headed home. These were the initial things that Corporal Okert observed while Mr. Gregory was seated in his vehicle. (Vol. III, pp. 32 - 33). Corporal Okert stated that there were not any alcohol containers in the vehicle. (Vol. III, p. 70).

Corporal Okert then asked Mr. Gregory to step out of his vehicle. Corporal Okert stated that he had to reach in, unlock and open the door for Mr. Gregory. Corporal Okert stated that every time Mr. Gregory would try to unlock the door, he would hit the lock button

again. (Vol. III, pp. 33). Corporal Okert stated that he could not remember what type of locking mechanism the truck had or how it unlocked. (Vol. III, p. 72).

Corporal Okert stated that at the intersection of Long Hollow Pike and Ellen Drive, where Mr. Gregory had pulled over, there is no shoulder. It is just a paved four-lane road with a turn lane in the center. There is no shoulder anywhere in the area. Corporal Okert stated that Mr. Gregory had pulled over on the street itself, next to the curve. He also stated that there is a vacant lot on the southwest corner and across the street on the north side it is all residential. Corporal Okert also stated that at the other side on the southeastern corner of the intersection there is a dentist's office with a parking lot. (Vol. III, pp. 34-35). Corporal Okert also stated that Mr. Gregory pulled over in a safe and lawful manner. (Vol. III, p. 66).

Corporal Okert stated that is was approximately 9:15 in the evening and it was dark out. He also stated there were no other cars in the dentist office parking lot. (Vol. III, pp. 35-36).

Corporal Okert stated that he unlocked the door for Mr. Gregory and had him step down from the vehicle. He stated that Mr. Gregory had to use his truck for support. He also noticed that as Mr. Gregory exited the vehicle there was an odor of alcoholic beverage that proceeded outside around him. (Vol. III, p. 36). However, Corporal Okert did state that based on odor alone, that is not an indicator of a person's impairment. (Vol. III, p. 70). He also stated that Mr. Gregory did get out of his vehicle okay; he didn't have to assist him and he didn't fall down or anything like that. (Vol. III, p. 75).

Corporal Okert then asked Mr. Gregory to perform the walk and turn sobriety task and the one leg stand. Corporal Okert stated that Mr. Gregory was not able to complete them. Corporal Okert stated that he had made notes on the Influence Report of how Mr. Gregory performed on the test and the statement that he had made to him. (Vol. III, pp. 36-37). Corporal Okert also stated that he filled out the MPD-132 report at the police department (Vol. III, p. 49). He also stated that he did not make any field notes on paper at the scene. However, he did make notes on the palm of his hand such as which leg Mr. Gregory stood on. (Vol. III, p. 50). Corporal Okert did state that he did not have any trouble understanding Mr. Gregory. (Vol. III, p. 71).

In reference to the one leg stand task, Corporal Okert stated that the statement made to him by Mr. Gregory was "I can't do that." Corporal Okert stated they had a brief discussion about it and Corporal Okert showed him what he wanted him to do and then Mr. Gregory agreed to try that. Mr. Gregory's foot went down at 1,002, 1,003, and 1,004 and then Mr. Gregory just stopped trying to do the test. (Vol. III, p. 38 and 87).

Corporal Okert stated that during the time he was giving the field sobriety tasks he asked Mr. Gregory if there was anything wrong with him. Mr. Gregory indicated that there was nothing physically wrong with him. Corporal Okert stated that he normally goes through bad back, bad knees, or anything to that effect. (Vol. III, p. 38).

Corporal Okert then asked Mr. Gregory if he was on any medications. Mr. Gregory stated that he was on medication but would not tell Corporal Okert what type of medication he was taking. (Vol., III p. 39).

Corporal Okert stated that Mr. Gregory did the walk and turn task before he did the one leg stand task. The purpose for the walk and turn task is to determine an individual's ability to do two different things. One of them is listen to your instructions while you have the person stand in a position and maintain their balance; so you are asking them to do two different things at one time. That is one portion of the test. Then they are given instructions on what you are requiring them to do and Corporal Okert demonstrates that to them. Corporal Okert stated that he is looking for how they perform these tests as far as losing their balance and their inability to perform a simple task. (Vol. III, pp. 39-40).

At this point, Corporal Okert had Mr. Gregory stand beside his vehicle. There was not a white line in the road to use, so he used Mr. Gregory's vehicle as a parallel line for him to walk beside the vehicle. (Vol. III, p. 40). Mr. Gregory stood at the rear of his truck facing the front of Corporal Okert's vehicle. Corporal Okert asked Mr. Gregory to place his left foot in front of his right foot and stand there and listen to him. At that point, while Corporal Okert demonstrated how he wanted Mr. Gregory's foot in front of him, Mr. Gregory attempted his best to get his foot there, but was unable to do so. (Vol. III, pp. 40-41).

Corporal Okert then stated that while he was trying to explain to Mr. Gregory what he wanted him to do, as far as taking nine heel-to-toe steps forward, Mr. Gregory started walking before Corporal Okert had finished explaining everything to him. Corporal Okert then stopped his demonstration and got Mr. Gregory back in the position that he wanted him in and told him to just stand there and listen and not start until he was sure of what was going on. (Vol. III, p. 41).

Corporal Okert then stated once he was satisfied that Mr. Gregory understood what he wanted him to do and once Mr. Gregory indicated he understood, Corporal Okert then let him start the test. Corporal Okert noticed that Mr. Gregory had to raise his hands up and hold onto the side of the pickup truck to maintain his balance. (Vol. III, p. 42). However, Corporal Okert did not mark Box 11 on his form 132 where it states "leaned or braced self against vehicle while walking or standing." (Vol. III, p. 83). Corporal Okert did, however, make a note at "Block 15" that "done beside his pickup track - - truck and had to hold on to it." (Vol. III, p. 83).

Corporal Okert stated that Mr. Gregory missed his heel-to-toe and stepped off the line. He also stated that Mr. Gregory did take the nine steps forward, as instructed, but when he was asked to take three small pivot steps that would turn him completely around facing back towards the patrol car, he just spun around and lost his balance. Once Mr. Gregory regained his balance he started back towards the patrol car, again missing his heel-to-toe, raising his arms and using the truck for support. Corporal Okert did say that it was not on every step but a big portion of the test. (Vol. III, pp. 42-43).

Corporal Okert stated that in his opinion, based upon his contact with Mr. Gregory, his ability to operate his vehicle was impaired. (Vol. III, p. 43). Corporal Okert did state that he has never met Mr. Gregory before that night and agreed that all of his observations would have been based on not having a knowledge of how Mr. Gregory normally walked, talked and other things he did. (Vol. III, p. 71).

Corporal Okert stated that the other officer out at the scene with him was Corporal Jimmie Driver. Corporal Driver observed Mr. Gregory perform the field sobriety tasks. (Vol. III, p. 44). Corporal Driver showed up just as Corporal Okert was making the stop and was right behind him. (Vol. III, p. 68).

Corporal Okert then placed Mr. Gregory into the patrol car. Corporal Okert stated that Mr. Gregory did not have any problem getting in the patrol car. (Vol. III, p. 91).

Once Mr. Gregory was placed in the patrol car, Mr. Kevin Wheeler arrived and asked Corporal Okert if he could take custody of Mr. Gregory's vehicle. Corporal Okert allowed him to take the vehicle at that time. Corporal Okert, after placing Mr. Gregory under arrest, took him to the Goodlettsville Police Department. (Vol. III, p. 44).

While at the police department Corporal Okert asked Mr. Gregory to perform a breath test and he read him the Implied Consent Warnings. Corporal Okert stated that Mr. Gregory did not have any trouble exiting the vehicle and walking into the police department. (Vol. III, p. 45 and 93). Corporal Okert then gave Mr. Gregory the Implied Consent Warnings form and asked him to mark the "I will submit to the test" or "I refuse to submit to the test" block and then sign off on it. Corporal Okert stated that Mr. Gregory refused to sign the form. (Vol. III, pp. 46-47). Mr. Gregory stated that he understood what he was telling him and before he took a test he wanted to talk to an attorney. (Vol. III, p. 47 and 94).

Corporal Okert stated that he has no idea what happened to the person who called dispatch about Mr. Gregory's driving. Corporal Okert never reviewed the dispatch logs to find out who that person was. Corporal Okert stated that he does not know what the caller

based their complaints on or what driving behavior they may have observed. (Vol. III, p. 66-67). Corporal Okert also has no way of verifying or knowing what the caller's veracity is or anything else. (Vol. III, p. 68).

Corporal Okert testified that when he received the dispatch and saw Mr. Gregory's truck sitting at the red light that he had <u>not</u> formed an opinion at that time nor did he have reasonable grounds to believe that Mr. Gregory was driving under the influence. Corporal Okert still had <u>not</u> formed an opinion nor did he have reasonable grounds to believe that Mr. Gregory was driving under the influence when he saw Mr. Gregory turn onto Long Hollow Pike and get back over into the eastbound lane of Long Hollow Pike. Corporal Okert still had not formed an opinion as to Mr. Gregory' s state when Mr. Gregory pulled over and he walked up to his truck. However, Corporal Okert stated that there was reasonable suspicion that there was something wrong with the driver of the vehicle, be it physically impaired through alcohol or through medication or some kind of physical impairment itself. (Vol. III, p. 94).

Corporal Okert stated that when he took the totality of the entire situation into account, he formed an opinion of Mr. Gregory's ability to operate his vehicle. (Vol. III, p. 91). Corporal Okert stated that the entire procedure, from start to transport, lasted maybe fifteen to twenty minutes. (Vol. III, p. 93).

Corporal Jim Driver

Corporal Driver has been with the Goodlettsville Police Department for nine years. (Vol. III, p. 98).

On September 20, 2000, Corporal Driver was working the 11 to 11 or 2 to 2 shift. (Vol. III, p. 100). He was assisting Corporal Okert in a traffic stop involving Mr. Harold Gregory. (Vol. III, p. 100). Corporal Driver stated that he was on routine patrol when he got the call to respond to a stop. He stated that whenever there is a DUI stop that another officer will go to the scene for back-up in case the individual is not cooperative. (Vol. III, p. 105). Corporal Driver also stated that the call he received was of a possible intoxicated subject driving down Conference Drive headed toward Long Hollow Pike. Supposedly a citizen was calling on a cell phone and the subject was driving erratically. (Vol. III, p. 106). Corporal Driver did not know who made the complaint and he did not make any effort to find out who it was. (Vol. III, p. 106).

Corporal Driver stated that he got behind Corporal Okert eastbound on Long Hollow Pike right around Captain D's which is about a half mile to three-quarters of a mile from where the stop was made. (Vol. III, pp. 107-109). He stated that the stop occurred at Long Hollow Pike right at Ellen Drive. He also stated that there was a doctor's office at the corner and at the time of the stop he did not see anybody come in or out of the parking lot of the doctor's office. (Vol. III, p. 101).

Corporal Driver stated that he did not observe any erratic driving while he was behind Corporal Okert. (Vol. III, p. 109). Corporal Driver did observe the "pull-over" and agreed with Corporal Okert that it was safe and lawful. (Vol. III, p. 110).

Corporal Driver stated that he personally never spoke with Mr. Gregory. He observed him as he was getting out of the vehicle with Corporal Okert and going through his tasks and being placed in the patrol car. (Vol. III, p. 102).

Corporal Driver stated that Corporal Okert walked up to the driver's side of the vehicle and he walked around to the passengers side to observe in the vehicle to make sure there were no weapons or any problems. Corporal Driver stated that there were no problems and no open containers in the vehicle. (Vol. III, p. 110).

Corporal Driver stated that Mr. Gregory had an unusually hard time getting out of his vehicle and was unable to get the door open. He also stated that Mr. Gregory was fumbling around trying to get out of the car and when he finally got out he was very unsteady on his feet. (Vol. III, p. 103).

Corporal Driver stated that he observed Mr. Gregory perform the field sobriety tasks and in his opinion he believes Mr. Gregory was intoxicated. (Vol. III, p. 103).

Corporal Driver stated that the only person he remembers stopping and talking to was the gentleman that pulled up and said he knew Mr. Gregory and asked if he could pull his vehicle over in the parking lot so we would not have to call a wrecker for it. (Vol. III, p. 112)

Corporal Driver stated that the closest he got to Mr. Gregory was when he walked up to the passenger side of the truck. (Vol. III, p. 113). He also stated that the window was up and he was not close enough to observe any odor of alcoholic beverage.

Defense Proof

Harold Gregory

Mr. Harold Gregory has been the owner of Nashville Used Cars for twenty-two years which is located at 3260 Gallatin Road in East Nashville. Mr. Gregory is a resident of Sumner County. (Vol III, p. 121).

Mr. Gregory stated that he remembers the night of the incident on September 20, 2000. (Vol. III, p. 121). Mr. Gregory testified that he closed his business that day around 7:30 p.m. He was with another gentleman named David Love who, at that time, worked for him part-time. (Vol. III, p. 122). When they closed the business that evening, Mr. Love went to the store and bought a six-pack of Bud Light and returned to the store. (Vol. III, p. 122). Mr. Gregory stated that they sat there for about an hour and fifteen minutes. Mr. Gregory had two beers, Mr. Love had two and then Mr. Love took the remaining two home with him. Mr. Gregory stated that he also drank half of a miniature of Old Charter. Mr. Gregory and Mr. Love left the store at approximately 8:45 p.m. (Vol. III, p. 123).

Mr. Gregory testified that the route he took home was on Gallatin Road about a half a mile, he then turned left on to Home Road and went over to Neeley's Bend Road and turned left. He then went to Ellington Parkway and turned right and circled up on Briley

Parkway. He then went to Interstate 65, got off at I-65 North and went to the Vietnam Veterans Boulevard to Conference Drive. He got off there and turned left on Conference Drive and went to Long Hollow Pike. Mr. Gregory stated that the distance he traveled was maybe twenty miles total. (Vol. III, p. 123).

Mr. Gregory testified that he did not notice anybody following him or blinking their lights at him. He also stated that he did not think he was driving funny. (Vol. III, p. 124).

Mr. Gregory testified that when he got to Conference Drive and Long Hollow Pike he was turning right and when he turned right he had his signal lights on. He got in the center lane to turn into Kentucky Fried Chicken to get a bite to eat. When he got in the center lane, right around the Sumner County line, he noticed the blue lights. (Vol. III, p. 125). Mr. Gregory actually did not know the police officer was after him; because he went on through Caldwell, which is a green light, to Ellen Drive, and Mr. Gregory then pulled over on Ellen Drive and Long Hollow Pike. (Vol. III, pp. 125-126).

Mr. Gregory testified that the officer came up to the door and Mr. Gregory still had his truck in drive. The officer wanted to see his driver's license. Mr. Gregory started to get out his license then the officer asked him to step out of the truck. Mr. Gregory hit the lock to get out but because his truck was still in drive the truck automatically locked back. Mr. Gregory then put it in park and the officer reached in and unlocked the door. Mr. Gregory testified that it was only two or three times that he tried to unlock the door. (Vol. III, p. 126).

Mr. Gregory testified that the officer asked him to get out of the truck, which he did, and he did not have any problems getting out of the truck. (Vol. III, p. 126).

Mr. Gregory then testified that the officer called him to the back of the truck. Mr. Gregory again stated that he had no trouble getting to the back of the truck. However, Mr. Gregory did state that he holds on to things when he walks because he has a herniated disc and a bulging disc and it is pretty hard to walk sometimes when you have things like that wrong with you. (Vol. III, p. 127).

Mr. Gregory testified that the officer wanted him to walk-the-line and stand on one foot. Mr. Gregory advised the officer that he could not do it. (Vol. III, p. 127). Mr. Gregory started to do the test but then he stopped. (Vol. III, p. 128). Mr. Gregory stated that he did not tell the officer why he could not do the field tests or give him any reason for not being able to do them. (Vol. III, p. 128).

Mr. Gregory testified that he could not have done the field tests because he can hardly stand on his left leg due to the herniated and bulging disc. Mr. Gregory testified that when he walks it is sometimes difficult if he does not have anything to hold on to. (Vol. III, p. 128). Mr. Gregory testified that he has been treated for a bulging disc and back problems for about two-and-a-half years. Mr. Gregory goes to a chiropractor and to therapy. He was told that if he did not do something he would lose the feeling in his left leg. (Vol. III, p. 129). Mr. Gregory stated that he told Corporal Okert that he had medical problems but did not tell him what. (Vol. III, p. 129).

At this point Mr. Gregory testified that he walked to the patrol car and did not have any problems with that. (Vol. III, pp. 129-130).

Mr. Gregory testified that Kevin Weaver showed up at the scene shortly after he was stopped. Ms. Lisa Harper, who used to date Mr. Gregory's son, also stopped in the parking lot at the doctor's office. Ms. Harper arrived about four or five minutes after Mr. Gregory was stopped. (Vol. III, p. 130). Mr. Gregory testified that Ms. Harper stayed in her car and called Mr. Gregory's wife and son. (Vol. III, p. 131).

Mr. Gregory testified that Mr. Weaver came up to him while he was sitting in the patrol car and Mr. Gregory told him it was okay for Mr. Weaver to park his vehicle and keep his keys. (Vol. III, p. 133).

Mr. Gregory testified that he weighs two hundred and twenty pounds. (Vol. III, p. 133). He also stated that he has been under the influence before. (Vol. III, p. 134).

Mr. Gregory testified that the night of the incident he was not under the influence. He also stated that he had no problems driving, getting out of the police car or walking into the police station. (Vol. III, p. 134).

Mr. Gregory testified that he remembers the officer asking him about the form and reading the form to him and that he understood what he was telling him. Mr. Gregory also asked to call a lawyer which he did. (Vol. III, p. 134). He also stated that he dialed the number himself and did not have any trouble dialing the number. (Vol. III, p. 135).

Mr. Gregory testified that the officer explained to him that he was going to handcuff him in front because it was more comfortable riding downtown to Nashville. However, when they got downtown he would have to cuff him in the back and Mr. Gregory told the officer that would be fine. (Vol. III, p. 135).

Mr. Gregory also testified that the officer asked him if he wanted to take the breath test. Mr. Gregory responded that he did not. (Vol. III, p. 135). Mr. Gregory said the reason for not taking the breath test was because after what he had just gone through he "just didn't do it." (Vol. III, p. 136).

Mr. Gregory testified that he had been arrested before for DUI on March 10, 1996. (Vol. III, p. 136). Mr. Gregory stated that he took a blood test and subsequently pled guilty to DUI. (Vol. III, p. 138).

Mr. Gregory testified that the reason he made the turn from the middle lane onto Long Hollow Pike was because he has seen other people make that turn all the time and there are no arrows to show that the right-hand turn is supposed to come from the right-hand lane. (Vol. III, p. 139).

Mr. Gregory stated again that he told the officer that he was on medication although he did not say what it was. Mr. Gregory did state that some of the medication was for pain. (Vo. III, pp. 144-145). Mr. Gregory stated that on the night of the stop that he had not taken any of the pain medication although he had taken Glucophage and Avalide which is for diabetes. (Vol. III, p. 147).

Kevin Weaver

Mr. Kevin Weaver is employed by ABC Auto Auction in dealer sales. He resides in Hendersonville, Tennessee. Mr. Weaver has known Mr. Gregory for probably ten years through the car business. (Vol. IV, p. 154).

Mr. Weaver testified that on the night of September 20, 2000, he was on his way home. Just before turning into his subdivision in Long Hollow Woods off of Long Hollow Pike, he saw flashing lights. Mr. Weaver stated that he saw Mr. Gregory by a patrol car with a police officer. He then pulled over to see if he could assist. (Vol. IV, pp. 155-156).

Mr. Weaver testified that he got out of his vehicle and was met by the Goodlettsville police officer. Mr. Weaver explained to the police officer that he was a friend of Mr. Gregory's and he was willing to take him home or whatever needed to be done. The police officer explained to Mr. Weaver that someone had phoned in saying Mr. Gregory was swerving on the road and so they pulled him over. (Vol. IV, p. 156).

Mr. Weaver did not observe Mr. Gregory attempt to do any of the field sobriety tasks. However, he did have contact with Mr. Gregory when they put him in the patrol car and Mr. Gregory asked Mr. Weaver if he would take his car home for him. (Vol. IV, pp. 156-157).

Mr. Weaver testified that he had a chance to observe Mr. Gregory's demeanor and he stated that Mr. Gregory seemed clear and just the way he has always known him. He stated that Mr. Gregory did not appear to be under the influence. Mr. Weaver testified that he did not have any problems understanding what Mr. Gregory was saying to him. (Vol. IV, pp. 157-158).

Mr. Weaver stated that he remembers this night clearly because his auction is on Thursday night and it is the only night he comes home late. (Vol. IV, p. 158). Mr. Weaver also stated that he spoke with Mr. Gregory last week about testifying and as to what he had seen. (Vol. IV, p. 158).

Mr. Weaver testified that he has occasion to work with Mr. Gregory and have contact with him but he does not socialize with him. Mr. Weaver would not know how Mr. Gregory might be affected by alcohol. Mr. Weaver also testified that he was not with Mr. Gregory the night or the day of September 20, 2000 to know how much he had to drink that day. (Vol. IV, p. 160-161).

Mr. Weaver testified that he has been to several parties and noticed people who were under the influence. He stated that a person under the influence would have loud behavior, slurred speech and lack of balance. (Vol. IV, p. 162). The night Mr. Weaver saw Mr. Gregory he did not observe any of these signs. (Vol. IV, p. 163).

Lisa Marie Brown

Ms. Lisa Marie Brown testified that she has dated Mr. Gregory's son for about two years. Ms. Brown lives in Goodlettsville, Tennessee. (Vol. IV, p. 165).

On the night of September 20, 2000, Ms. Brown testified that she left her mother's house and was on her way to K-Mart on Long Hollow Pike. Ms. Brown stated that she had pulled out of Loretta and saw Mr. Gregory getting out of his vehicle and a police officer. She assumed he had been pulled over so she pulled in. (Vol. IV, p. 165-166).

Ms. Brown testified that there is a doctor's office on the corner so she went down the road on the right-hand side and turned in to Saint Thomas Health Center, pulled around and came back and pulled into the parking lot of the dentist's office and sat there. She stated that she was going to get out and ask if everything was okay but she just sat there and watched

for a few minutes. She was about fifteen feet away from Mr. Gregory and the police officer. (Vol. IV, p. 166). When Ms. Brown pulled in the parking lot she had her lights on and then turned them off leaving the parking lights on. (Vol. IV, p. 175).

Ms. Brown testified that she did get out of the car and stood there for a second and then got back in the car. She stated she was in the parking lot for about twenty to twenty-five minutes. (Vol. IV, p. 167).

Ms. Brown testified that she observed Mr. Gregory while he was toward the back of his truck and from what she saw Mr. Gregory did not appear to have any problems standing there. Ms. Brown testified that Mr. Gregory did not have any problems with his balance. (Vol. IV, pp. 167-168).

Ms. Brown subsequently left the parking lot of the dentist's office and went to call Mr. Gregory's wife. (Vol. IV, p. 168). After Ms. Brown spoke with Mr. Gregory's wife she went right back to the dentist's office parking lot. At this point Mr. Gregory's truck had been moved into the dentist's parking lot and Mr. Gregory was in the police car. Ms. Brown then left and went home. (Vol. IV, p. 169).

Ms. Brown has known Mr. Gregory for about three or four years now and has had the chance to observe his normal behavior. Ms. Brown testified that from what she saw on September 20, 2000 that she had no reason to believe that anything was wrong with Mr. Gregory in terms of him being under the influence. (Vol. IV, p. 170).

Ms. Brown testified that she has not talked to Mr. Gregory since his son and her were not together or dating. Mr. Gregory's attorney, Mr. Fox, contacted her regarding testifying. (Vol. IV, p. 176).

Ms. Brown testified that when she initially saw Mr. Gregory there was one officer on the scene and by the time she turned around to get into the dentist's office parking lot another officer had arrived. (Vol. IV, p. 177).

Ms. Brown testified that she did not have any direct contact with Mr. Gregory that night and does not know for a fact whether Mr. Gregory had consumed alcohol or not. (Vol. IV, p. 178).

Ms. Brown testified that she has seen people drunk or under the influence of alcohol and said some signs of being under the influence are stumbling around and not keeping balance. Ms. Brown testified that based on what she saw Mr. Gregory did not appear to be under the influence of alcohol. (Vol. IV, p. 180).

James F. Neal

Mr. James Neal, a Nashville attorney, has known Mr. Gregory for at least fifteen years and is familiar with Mr. Gregory's reputation in the community. Mr. Neal states that Mr. Gregory's reputation in the community is great. (Vol. IV, p. 182).

Mr. Neal states that Mr. Gregory does not have a reputation in regards to consuming alcohol or drinking and driving. (Vol. IV, p. 185).

Mr. Neal testified that Mr. Gregory's reputation in the community for truth and veracity is very good. (Vol. IV, p. 187).

Robert Widenhofer

Mr. Robert Widenhofer has know Mr. Gregory for about seven years. Mr. Widenhofer states that Mr. Gregory is a very generous guy who has given a lot of time and money to Vanderbilt and is also very critical as a coach. Mr. Widenhofer does not believe Mr. Gregory has ever missed a practice or football game in the seven years that he has known him. Mr. Widenhofer also testified that he has never known Mr. Gregory to lie; he has a reputation for telling the truth. (Vol. IV, p. 190).

Mr. Widenhofer testified that he has had social contact with Mr. Gregory on several occasions. Mr. Widenhofer stated that he does not have any information regarding Mr. Gregory's reputation for drinking and driving. It surprised Mr. Widenhofer to learn that Mr. Gregory had a prior conviction for drinking and driving in Sumner County because he has never known Mr. Gregory to drink too much and he has always been careful about that, as far as he knew. (Vol. IV, p. 192).

Attorney, Bill Bruce

(*Defense Offer of Proof*)

The Judge did not allow Mr. Bruce to testify because he was in practice with Mr. Gregory's attorney Mr. Fox, but an offer of proof was made. Mr. Bill Bruce testified that he was an attorney licensed to practice law in the State of Tennessee. (Vol. V, p. 8). He has

known Mr. Gregory for over 20 years. He has been his attorney and he is also a "good friend." He talks to him five or six times a week. He has had an opportunity to talk to Mr. Gregory on numerous occasions over the telephone.

On the date of Mr. Gregory's arrest Mrs. Gregory called Mr. Bruce at home advising him that Harold Gregory had been arrested him and is in jail.

Subsequently Mr. Bruce got a telephone call from Mr. Gregory and spoke to him for several minutes. At the time Mr. Gregory was at the Goodlettsville police station. (Vol. V, pp. 8-9). The reception was clear and Mr. Bruce could hear perfectly. Mr. Gregory related that he had been arrested for driving under the influence and was upset about it. During the conversation Mr. Gregory "sounded like he always does." Mr. Bruce did not notice that his speech was slurred in any manner and he did not appear to be under the influence of alcohol and he sounded normal." (Vol. V, p. 10).

Mr. Bruce testified that there was no slurring of words and Mr. Gregory seemed to understand the questions that were asked of him. He did not exhibit any confusion about what was going on. (Vol. V, p. 11).

Mr. Bruce testified that he has spoken with people on the telephone who he believed to have been intoxicated. He did not think Mr. Gregory sounded like he was intoxicated.

Mr. Bruce testified that Mr. Gregory:

> Sounded like he always does. I could not tell he was under the influence of alcohol. His speech was not slurred. Of course I am in my house and he is at the police station. He sounded like he always does. (Vol. V, p. 12).

Mr. Bruce testified that he is associated in practice with Mr. Mike Fox. There are eleven attorneys in their offices and they share overhead. They do not share income but they share expenses.

Mr. Gregory called Mr. Bruce about representation and Mr. Gregory was referred to Mr. Fox. (Vol. V, p. 13).

State's Rebuttal Testimony

Corporal Daniel Okert

Corporal Okert testified that he did not see Ms. Brown, or any car, pull into the parking lot of the dentist's office on September 20, 2000 while stopping Mr. Gregory. Corporal Okert stated that the parking lot was situated at an angle and where he and Corporal Driver were they had a visual on the parking lot itself and the intersection the entire time. Corporal Okert stated that the parking lot was dark and had a car pulled up in that lot with its headlights on and had someone exited the vehicle and stood there and watched and observed them for a period of time that one of them would have gone over and made contact with that person. (Vol. IV, pp. 195-196).

Corporal Okert testified that Ms. Brown would have had some problems getting into the parking lot because they had the intersection blocked. Ms. Brown would have had to squeeze her vehicle in behind one of the marked patrol cars and then gone up in to the parking lot. (Vol. IV, p. 197).

Corporal Okert testified that he pulled over Mr. Gregory at 9:15 p.m. and was there for about fifteen to twenty minutes. The stop occurred about five minutes away from the Goodlettsville Police Department. (Vol. IV, p. 198).

Corporal Okert testified that his report indicates the stop took place on a Wednesday night. (Vol. IV, p. 199).

ARGUMENT

1. SINCE MR. GREGORY'S ARREST WAS UNLAWFUL, ALL OF THE EVIDENCE SECURED AS A RESULT OF THE ARREST SHOULD HAVE BEEN SUPPRESSED.

Mr. Gregory asserts that the "stop" of his vehicle as well as his subsequent arrest constituted a violation of his rights under Article I, Sections 7 and 9 of the Tennessee Constitution and the Fourth and Fourteenth Amendments to the United States Constitution because the stop and arrest were based on an absence of probable cause or insufficient facts. As such the statement's made by Mr. Gregory, his refusal to take the breath test, and the officer's "observations" were unlawlly obtained. Mr. Gregory filed a motion to suppress prior to trial and the Court conducted a hearing on this issue which is contained in the second volume of testimony. This has been summarized at length in the statement of facts.

The facts relate that the police officer stopped Mr. Gregory because there was an anonymous report of a "possible intoxicated or erratic driver." (Vol. II, pp. 3-4). The officer admitted that when he pulled in behind Mr. Gregory he observed nothing wrong with Mr. Gregory's behavior. (Vol. II, p. 15). The officer said that he did not know exactly what was "wrong" but he "got a suspicion" that there might be something wrong with Mr. Gregory's vehicle. The officer agreed that Mr. Gregory did not go any significant distance over into any other lane when he was making a turn. Essentially, Mr. Gregory just made a "turn." (Vol. II, p. 16). Under all of these facts and circumstances the defense vigorously asserts that the stop was unlawful and thus the subsequent arrest and evidence was also unlawful.

It is true that the officer was not required to have probable cause to arrest Mr. Gregory prior to the initial stop. All that is required for an initial investigatory stop is that the officer have reasonable suspicion based on specific and articulable facts that an offense is being or is about to be committed. See *State v. Yeargan*, 958 S.W.2d 626 (Tenn.1997); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn.1992). There is no question that the stop in this case was a "seizure" within the meaning of both the Federal and State Constitutions. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968).

The moment the officer turned on his emergency equipment and stopped Mr. Gregory, he initiated an investigatory stop and thus seized Mr. Gregory within the meaning of the Federal and State Constitutions. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980); *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn.1993). This stop did not comply with the constitutional prohibitions against unreasonable seizures. The Fourth Amendment to the United States Constitution provides, in relevant part: "[t]he right of the people to be secure ... against unreasonable searches and seizures, shall not be violated." Similarly, Article I, Section 7 of the Tennessee Constitution provides: "that the people shall be secure ... from unreasonable searches and seizures." The intent, purpose, and scope of the two prohibitions against unreasonable searches and seizures is the same. *State v. Simpson*, 968 S.W.2d 776, 779-80 (Tenn.1998).

Under both Constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression, unless the state

demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn.1997).

The investigative stop is one such exception to the warrant requirement. *Terry*, 392 U.S. at 20. Although an investigative stop is less intrusive than an arrest, the Fourth Amendment is still implicated because an investigative stop is a seizure of the person. *Id.* Seizures of the person that are not arrests are judged by their reasonableness rather than by a showing of probable cause. *Id.* The reasonableness of the intrusion is "judged by weighing the gravity of the public concern, the degree to which the seizure advances that concern, and the severity of the intrusion into individual privacy." *Pulley*, 863 S.W.2d at 30 (quoting *Brown v. Texas*, 443 U.S. 47, 50, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979). Having conducted that balancing test, the United States Supreme Court found that even a brief detention of an automobile is a violation of the Fourth Amendment, unless there is at least articulable and reasonable suspicion that an occupant is engaged in or is about to be engaged in criminal activity. *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). Thus, an investigative stop of an automobile may be based on reasonable suspicion rather than probable cause. *Id.*; *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn.1992).

Reasonable suspicion must be based on specific and articulable facts indicating that a criminal offense has been or is about to be committed. *Terry*, 392 U.S. at 21; *State v.*

Seaton, 914 S.W.2d 129, 131 (Tenn. Crim. App.1995). In evaluating whether reasonable suspicion is based on specific and articulable facts, we must consider the totality of the circumstances, including the personal observations of the police officer, information obtained from other officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins*, 827 S.W.2d at 294 (citing *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)); *State v. Wilhoit*, 962 S.W.2d 482, 486-87 (Tenn. Crim. App.1997). The specific and articulable facts must be judged objectively rather than relying on the subjective beliefs of the officer making the stop. *State v. Norword*, 938 S.W.2d 23, 25 (Tenn. Crim. App.1996) (citing *Cortez*, 449 U.S. at 417-18). A court must consider the rational inferences and deductions that a trained police officer may draw from the circumstances. *Watkins*, 827 S.W.2d at 294 (citing *Terry*, 392 U.S. at 21).

Although the officer articulated facts which made him suspicious of the defendant, those facts were not sufficient to reasonably justify his suspicion. The officer relied on radio traffic that some unknown person reported a "suspicious" car. (Vol. II , pp. 3-4). This is NOT enough to justify the "stop."

When a stop is based upon the tip of an informant, the factors set forth in *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn.1989), are useful in evaluating the sufficiency of the tip. *Pulley*, 863 S.W.2d at 31. In *Jacumin*, our Supreme Court adopted the two-prong test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Jacumin*, 778 S.W.2d at 436. In *Aguilar*, the United States Supreme Court concluded that there must be a "basis of

knowledge" when an officer relies on an informant's tip. The "veracity" prong of the *Aguilar-Spinelli* test requires a showing that the informant is credible or the information is reliable. The *Jacumin* court held that: while independent police corroboration could make up deficiencies in either prong, each prong represents an independently important consideration that "must be separately considered and satisfied in some way." 778 S.W.2d at 436 (quoting *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548, 557 (1985)); see *Pulley*, 863 S.W.2d at 31. An investigatory stop based upon reasonable suspicion requires " 'a lower quantum of proof than probable cause.' " *Pulley*, 863 S.W.2d at 31.

"Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Id.* at 32 (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990)). The question of reasonable suspicion is answered by considering the totality of the circumstances, including looking at the gravity of the public concern at stake, the degree the police intrusion advances that concern, and the severity of the intrusion. See *Pulley*, 863 S.W.2d at 30; *Watkins*, 827 S.W.2d at 294.

It is clear here that there was no credible information that Mr. Gregory was engaged in or about to engage in any illegal activity. When analyzing whether an officer had reasonable suspicion for an investigatory stop, our supreme court has distinguished between information provided by a known citizen informant and that obtained from a criminal or professional informant. *State v. Cauley*, 863 S.W.2d 411, 417 (Tenn.1993); *State v. Melson*,

638 S.W.2d 342, 354 (Tenn.1982). Information supplied by a criminal informant must be analyzed under the *Jacumin* test, while the known citizen informant is presumed to be reliable. *Cauley*, 863 S.W.2d at 417. Citizen informants, whether they be victims or witnesses, have necessarily gained their information through first-hand experience. *Melson*, 638 S.W.2d at 354-56 (citations omitted). The criminal informant provides information in exchange for some consideration--whether it be monetary or the granting of some exemption or privilege--while the citizen informant acts in the interest of society or personal safety. *State v. Smith*, 867 S.W.2d 343, 347 (Tenn. Crim. App.1993) (citing *State v. Paszek*, 50 Wis.2d 619, 184 N.W.2d 836, 842-43 (1971)).

In this case the officer based his stop of the defendant upon information given to the police dispatcher by an UNKNOWN citizen informant. An officer may make an investigatory stop based upon a police dispatch as long as the individual or agency placing the dispatch has the requisite reasonable suspicion supported by specific and articulable facts that indicate criminal conduct. *State v. Moore*, 775 S.W.2d 372, 378 (Tenn. Crim. App.1989); see *Whiteley v. Warden*, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971). The presence of reasonable suspicion may be assessed by looking to the testimony of the individual placing the dispatch or the testimony of the individuals who witnessed the information that is eventually passed on to the investigating officer. *Moore*, 775 S.W.2d at 378.

Mr. Gregory asserts that when the citizen is anonymous or unknown, concern over the information's reliability resurfaces due to the potential danger of false reports. See *Pulley*, 863 S.W.2d at 31. The name of the citizen alone is not sufficient to qualify the informant as

a known citizen informant, thereby raising the presumption of reliability. *Smith*, 867 S.W.2d at 348 (holding that an affidavit giving the informant's name but otherwise failing to indicate who he was or how he got the information did not give probable cause for the issuance of a search warrant). For reliability to be presumed, information about the citizen's status or his or her relationship to the events or persons involved must be present. See *Melson*, 638 S.W.2d at 354-56 (presuming reliability when the affidavit listed the sources of the information, their relationship to the victim, and their status as witnesses to certain events).

In the instant case, the citizen informant did not have a name. The credibility of an anonymous informant cannot be verified intrinsically, see *State v. Kelly*, 948 S.W.2d 757, 761 (Tenn. Crim. App.1996). The officer's ability to corroborate the details provided by the anonymous informant helps establish the reliability of the tip. *Kelly*, 948 S.W.2d at 761. The officer does not have to corroborate every detail of the anonymous informant's tip, but he or she must corroborate more than a few minor aspects, especially if they are not criminal in nature. *Id.* (citing *State v. Moon*, 841 S.W.2d 336, 341 (Tenn. Crim. App.1992).

In summary, Mr. Gregory respectfully submits that the stop was unlawful because it was based on an unknown, citizen informant. There were insufficient facts and circumstances beyond that initial tip which justified the stop of Mr. Gregory's car. Accordingly, the trial judge should have suppressed all of the evidence from the stop which, of course, would have meant that the State would have had no evidence upon which to convict Mr. Gregory.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THERE WAS NO PROOF THAT MR. GREGORY WAS DRIVING WHILE INTOXICATED.

Mr. Gregory vigorously believes that the evidence was insufficient to support the verdict of guilt beyond a reasonable doubt. This was a Bench Trial. In going over all of the facts and circumstances the trial judge said:

> Finally, I believe the defendant when he says in his opinion, he was not under the influence. I believe the officers when they say in their opinion, both of their opinions, that he was under the influence. And I don't find an inconsistency there; because when you consider all of this other evidence, its – its well known that a person who is under the influence is the last person who is a credible witness for the purpose – for the purpose of giving an opinion as to whether they are or are not adversely affected by drugs or alcohol. So I very much believe Mr. Gregory. I believe he is telling the truth from his perspective.
>
> But when you consider all of this other evidence and the inference to be drawn from the breath test, I am convinced, though it is barely over the threshold of beyond a reasonable doubt, but it is beyond a reasonable doubt, that the defendant was operating a motor vehicle in Davidson County while under the influence of an intoxicant on September 20 of the year 2000.

(Vol. IV, pp. 228-229).

With all due respect, the evidence certainly was not beyond a reasonable doubt once one believes that Mr. Gregory was telling the truth. In other words, the credibility of the witnesses is up to the trier of fact which, in this case, was the judge.

Mr. Gregory asserts that the evidence in this record is insufficient to support his convictions for driving under the influence of an intoxicant. Mr. Gregory maintains that the evidence of intoxication is absent from this record.

Rule 13(e), Tennessee Rules of Appellate Procedure, provides that "findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." When evaluating the sufficiency of evidence, we must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (citation omitted); *State v. Keogh*, 18 S.W .3d 175, 180-81 (Tenn. 2000); *State v. Patterson*, 966 S.W.2d 435, 444, (Tenn. Crim. App.1997). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App.1996). Although the evidence of the defendant's guilt is circumstantial in nature, circumstantial evidence alone may be sufficient to support a conviction. *State v. Patterson*, 966 S.W.2d at 444; *State v. Gregory*, 862 S.W.2d 574, 577 (Tenn. Crim. App.1993).

A verdict of guilt accredits the State's witnesses and resolves all conflicts in favor of the State. *State v. Patterson*, 966 S.W.2d at 444; *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn.1994). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *Id.*; *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn.1978). Moreover a guilty verdict removes the presumption of innocence which the defendant enjoyed at trial and raises a presumption of guilt on appeal. *State v. Buggs*, 995 S.W.2d 102, 105-6 (Tenn.1999).

A criminal offense may be established exclusively by circumstantial evidence. *State v. Transou*, 928 S.W.2d 949, 955 (Tenn. Crim. App.1996); *State v. Hailey*, 658 S.W.2d 547,

552 (Tenn .Crim. App.1983), perm. app. denied, (Tenn.1983). However, before a defendant may be convicted of a criminal offense based exclusively upon circumstantial evidence, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant...." *State v. Transou*, 928 S.W.2d at 955, citing *State v. Crawford*, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971).

It is true that this Court has previously found evidence of DUI sufficient even though it consisted entirely of the arresting officer's testimony. In *State v. Vasser*, 870 S.W.2d 543, 544 (Tenn. Crim. App.1993), the evidence was sufficient to support a DUI conviction when the trial court relied only upon the arresting officer's testimony that the defendant was driving under the influence. In *Vasser*, the defendant did not complete the field sobriety tests and refused to take a breath test. In *State v. Corder*, 854 S.W.2d 653 (Tenn. Crim. App.1992), the defendant was found asleep in his car and no field sobriety tests were administered. *Id.* at 654. This Court affirmed the DUI conviction because the trial court accredited the testimony of the arresting officer over the other witnesses. *Id.* Driving under the influence may be shown by circumstantial evidence. *State v. Lawrence*, 849 S.W.2d 761, 763 (Tenn.1993); *Corder*, 854 S.W.2d at 654.

The proof in the present case was clearly NOT sufficient to allow a rational fact finder to conclude beyond a reasonable doubt, based upon both direct and circumstantial evidence, that Mr. Gregory was driving under the influence. This is so because there was more than just one defense witness testifying that Mr. Gregory was not intoxicated. Kevin Weaver testified that on the night in question he saw Mr. Gregory standing by a patrol car with a police officer. (Vol. IV, pp. 155-156). Mr. Weaver testified that he had a chance to

observe Mr. Gregory's demeanor and he stated that Mr. Gregory seemed clear and just the way he has always known him. He said that Mr. Gregory did not appear to be under the influence and that Mr. Gregory did not have any problems understanding what Mr. Weaver was saying to him. (Vol. IV, pp. 157-158).

Lisa Marie Brown testified that she also saw Mr. Gregory getting out of his vehicle and that he was standing near a police officer. She assumed that he had been pulled over so she pulled in behind him. (Vol. IV, pp. 165-166). Ms. Brown testified that she observed Mr. Gregory while he was toward the back of his truck and from what she saw Mr. Gregory did not appear to have any problems standing. He did not appear to have any problems with his balance either. (Vol. IV, pp. 167-168). Ms. Brown testified that she had no reason to believe that anything was wrong with Mr. Gregory in terms of him being under the influence. (Vol. IV, p. 170).

In contrast, the officers were "all over the map" as to their description of Mr. Gregory's behavior. One officer said that the odor alone was not an indicator of a person's impairment. The officer said that Mr. Gregory got out of his vehicle in a normal manner and that the officer did not have to assist him and that Mr. Gregory did not fall down. (Vol. III, p. 75).

When Mr. Gregory was pulled over by the police, he did so in a safe and lawful manner. (Vol. III, p. 66). The only thing the officer could say was that Mr. Gregory was "impaired." (Vol. III, p. 43). Of course it is important to know that the officer made no notes on paper at the scene although he did make notes "on the palm of his hand" about

which leg Mr. Gregory stood on. (Vol. III, p. 50). Nor was there any video tape of any of this.

Another officer who was at the scene stated that the window was up on the vehicle and he was “not close enough” to observe any odor of alcoholic beverage. (Vol. III, p. 113). This is the total of the government’s case against Mr. Gregory.

In summary, then, this Court must find that the evidence was insufficient to support the finding of guilt and that this conviction should be reversed and dismissed.

3. THE FACTS ARE INADEQUATE TO ESTABLISH THAT MR. GREGORY “REFUSED” TO TAKE A BREATH TEST AND THUS EVIDENCE OF HIS “REFUSAL” WAS UNLAWFUL.

Mr. Gregory asserts that it was improper for the government to introduce testimony that Mr. Gregory “refused” the breath test. On this issue the officer testified at the Suppression Hearing, (Vol. II, pp. 11-12), that:

> [Mr. Gregory] was placed under arrest for DUI and was made aware of the charge that was pending against him. He was subsequently transported to our police department for a breath test. The implied consent law was explained to him. He requested to talk with an attorney before he took the breath test and I informed him that according to the Tennessee Supreme Court, the attorney privilege (sic) did not enter into that portion of his arrest at that point in time. And he said, I am not doing anything. So, I took that as a refusal and he was transported to the Metro booking room and taken before a night court commissioner and warrants against him were sought for DUI and implied consent violation.

Under the law it is the express refusal of the driver of the vehicle, and not the voluntariness of the individual motorist’s submission to the test, as required by the Fourth Amendment, which governs the admissibility of test results. It is also true that neither the

results of breath tests nor a refusal to submit to the tests are protected by the Fifth Amendment. The Tennessee Supreme Court has held that a person arrested without a warrant on reasonable suspicion of DUI does not have the right to consult with an attorney prior to deciding whether to submit to a blood alcohol test. *State v. Frasier*, 914 S.W.2d 467, 471 (Tenn. 1996). The Supreme Court reasoned that "the state's interest in having an accurate measurement of a defendant's blood alcohol level" and the practical considerations regarding the possible difficulty of contacting an attorney within a reasonable time outweigh a defendant's due process rights in such a situation. Moreover, the giving of a breath sample is not testimonial in nature and that Fifth Amendment right against self-incrimination is not implicated. An officer's mere request that a suspect consent to a blood alcohol test is not governed by the *Miranda* rule. *State v. Snapp*, 696 S.W.2d 370, 371 (Tenn. Crim. App. 1985).

The problem here, of course, is that the issue of the ability to consult with an attorney (or not) is being confused with the issue of whether Mr. Gregory actually "refused" the breath test. Again, the officer testified that he took Mr. Gregory's request for an attorney as a refusal to take the breath test. (Vol. II, pp. 11-12). So there is no doubt about the matter consider the following questions and answers during the Suppression Hearing:

Q. He wasn't free to go anywhere except with you to wherever you were going to take him?

A. That's correct, sir.

Q. He asked to speak to a lawyer before doing anything else?

A. Yes sir.

Q. And then you explained to him that your understanding was you don't get a lawyer yet. You do my tests then you talk to a lawyer?

A. That's correct.

Q. Did you allow him to call a lawyer then or do you recall?

A. After we took this as a refusal?

Q. Yes.

A. My common practice with people is after I get this portion of it done I still got quite a bit of paper work. I gave them the opportunity to go ahead and make as many phone calls as they want. I don't recall whether he took my offer up on that or not. There is a phone right down by us. And normally, everyone will make phone calls and I don't discourage it. I like to let people let their people know where they're at and what's going on with them. But I don't recall whether he used the phone that night or not.

(Vol. II, pp. 31-32).

During the trial the officer was shown a form as to whether Mr. Gregory refused to submit to the test or agreed to take the test. The officer agreed that <u>he did not mark anything</u> on the form. (Vol. III, pp. 46-47).

The only thing the officer said was that Mr. Gregory told him that "before he took a test, he wanted to talk to an attorney." (Vol. III, p. 47). This, of course, is not the same thing as a out and out refusal. This Court should find that the request for an attorney before taking a breath test does not constitute a refusal to take the breath test itself. This is confusing apples and oranges. It is only where there is an express refusal to take the breath test which is not conditioned upon any extraneous fact should the law then allow an express refusal to be permitted into evidence.

This issue is <u>not</u> harmless. Even though there was a Bench Trial the judge considered the failure to take the breath test a significant point in determining that Mr. Gregory was guilty: ". . . combine all of that with the fact that the defendant refused the breath test and the inference that may be drawn from a refusal to take a breath test. . .." (Vol. IV, p. 228).

The judge was in error in permitting this "refusal" to come into evidence for the simple fact that the defendant did not actually refuse to take a breath test but simply inquired if he could call his attorney before taking the breath test which is not a refusal at all. Accordingly, this conviction should be reversed.

4. MR. GREGORY'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND THE RIGHT TO PRESENT A DEFENSE UNDER THE TENNESSEE AND UNITED STATES CONSTITUTION WERE COMPROMISED BY THE TRIAL COURT'S FAILURE TO PERMIT THE TESTIMONY OF MR. BILL BRUCE WHO WAS GOING TO TESTIFY THAT MR. GREGORY TELEPHONED HIM SHORTLY AFTER MR. GREGORY'S ARREST AND THAT MR. GREGORY DID NOT SOUND AS IF HE WERE INTOXICATED.

A defendant has a constitutional right to present witnesses to establish a defense. *Hale v. State*, 453 S.W.2d 424 (Tenn. Crim. App. 1969) (defendant denied right to present proof regarding duress). See also, *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986) (the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense).

Occasionally the State will erect some procedural barrier wherein a witness might not be able to give testimony on behalf of a defendant. Usually this procedural barrier falls as against the defendant's constitutional right to present a defense. See e.g. *State v. Brown*, 29

S.W.3d 427 (Tenn. 2000) where the court held that the testimony that a child admitted to two friends that she had had sexual intercourse with an adolescent male during the same time that the defendant allegedly committed the rape was relevant to the issue of whether the defendant was responsible for the victim's injury. The exclusion of this testimony was erroneous because it violated the defendant's right to present a defense and the testimony was admissible even though it violated the rule against hearsay.

In the instant case the defense sought to introduce the testimony of Mr. Bill Bruce who was Mr. Gregory's long-time attorney with whom Mr. Gregory spoke shortly after his arrest. The trial lawyer proposed to call Mr. Bruce to testify as to how Mr. Gregory "sounded on the phone." (Vol. III, p. 13). The prosecutor and the trial judge had a problem with Mr. Bruce testifying because he practiced law with Mr. Fox who was Mr. Gregory's trial lawyer. The judge said that this was not an issue of the Rules of Evidence but rather dealt with the Code of Professional Responsibility. (Vol. III, p. 14). (See also Vol. III, p. 19). The judge finally ruled that he was required not to permit Mr. Bruce to testify because Mr. Bruce was in the same firm as Mr. Fox. (Vol. III, p. 21). [1] It appears, then, that the trial judge refused to allow Mr. Bruce to testify on behalf of his former client because of an alleged violation of the Rules of Professional Responsibility.

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[1] The Court will note that at Volume III, page 21, that the word "not" has been struck and the date "6/6/02" is written on the original transcript. This is because of the error of the court reporter in including that word. The judge himself made that alteration on the transcript during the hearing of the motion for new trial and corrected the transcript accordingly. (See Vol. V, p. 5): "THE COURT: I have just done that, put my initials and I will even add the date, June 6th."

While it is generally true that the lawyer may not testify for his client this is a rule of professional responsibility which impacts the lawyer and does not prevent the client from calling the lawyer as a witness if necessary. There are, of course, exceptions which occasionally permit lawyers to testify on behalf of their clients in exceptional circumstances. See *Bowman v. State*, 598 S.W.2d 809 (Tenn. Crim. App. 1980) (if the need to testify arises during a trial, the court may allow the attorney to testify and remain in the case); *Winrow v. State*, 649 S.W. 2d 18 (Tenn. Crim. App. 1983) (in some cases a miscarriage of justice could take place if an attorney were totally prohibited from serving as a witness for his client).

So that the substance of Mr. Bruce's testimony was in the record the trial court permitted an offer of proof during the hearing on the motion for new trial. (See Vol. V, pp. 8-16). A summary of Mr. Bruce's testimony is contained in the statement of facts in this brief. Essentially, Mr. Bruce testified that Mr. Gregory called him on the telephone and they had a conversation right after Mr. Gregory was arrested. Mr. Bruce said that Mr. Gregory did not sound intoxicated and he sounded normal and he sounded like he always did.

This Court should return to the trial judge's findings at the conclusion of the trial:

> So that leaves us with the defendant and two police officers and [the fact that the defendant did not take] the breath test. The other witnesses, as I've already said, are credible; but I don't see their testimony being - - carrying a great deal of weight as to the ultimate issue, the ultimate issue, was the defendant under the influence of an intoxicant or not.

(Vol. IV, pp. 224-225). It is true that the judge did make some comments about the <u>proposed</u> testimony of Mr. Bruce:

> Now, the thing I was going to add a minute ago and I decided to wait till this point is that even if Mr. Bruce were to testify that he talked to the defendant and over that telephone conversation, he - - the defendant sounded

> okay to him and his speech was not slurred and he did not sound like he was under the influence, I would believe Mr. Bruce, because I know Mr. Bruce to be a very honorable person, but also believe that the weight to which that evidence should be given would be very modest, because it was a short conversation, as I understand it from the discussion we had earlier on whether it was admissible or not, and it's a phone conversation; and I would be of the belief that if someone was to say that somebody else was under the influence because of a telephone conversation, I think that would be pretty weak evidence as well.
>
> So I'd just like to opine for Mr. Gregory's benefit that the - - case was not won or lost based upon that one point. I don't want you to think that but for that, it would have been different. I - - I have great respect for Mr. Bruce; and if he said he didn't think you were under the influence, I would believe very much that is indeed his opinion; but I would think that it would have little - - little - - carry little weight.

(Vol. IV, pp. 229-231).

With all due respect it is difficult to understand how the judge could make such a "finding of fact" when he did not actually hear from Mr. Bruce at all. The trial lawyer just gave a "summary" of what Mr. Bruce was going to say and the trial judge did not have the benefit of this testimony.

We must also remember that the trial judge had already ruled against Mr. Gregory on the key question of whether Mr. Bruce could testify or not. Then, after the fact, the judge attempts to "justify" that ruling by holding that Mr. Bruce's testimony would not have made any difference after all not withstanding the fact that the judge never heard from Mr. Bruce. This is, with all due respect, totally inconsistent. The point is that Mr. Bruce had every right to testify on behalf of Mr. Gregory and the trial judge should have heard this testimony. We will never know if it would have actually made a difference or not.

The error in this mater is not harmless. Mr. Gregory testified on his own behalf. He did have two witnesses who testified for him but neither witness was in a close position to actually hear Mr. Gregory speak in any detail. All they could say was that Mr. Gregory looked normal from the way he was standing. On the other hand, Mr. Bruce actually had a conversation with Mr. Gregory and was in the best position to judge his demeanor. This is in direct conflict to the officer's testimony that Mr. Gregory was confused and did not sound normal. Thus, Mr. Bruce was not some "remote" or "cumulative" witness. He was, in fact, the only real witness that Mr. Gregory had in the entire trial who gave the very best testimony about Mr. Gregory's demeanor and speech immediately after his arrest.

After-the-fact assessments of harmlessness or not by the trier of fact is irrelevant. This Court must first determine whether the exclusion of the testimony of the witness was harmless or not. Before embarking on that inquiry this Court must first note that the error here is of constitutional dimension in that Mr. Gregory was denied the compulsory process guaranteed him by the Constitution and the constitutional right to present a defense. Thus, the error here is constitutional in nature. Harmless error analysis requires an examination of the type of error involved because of the different burden of proof requirements. In *State v. Harris*, 989 S.W.2d 307, 314-315 (Tenn. 1999) the court held that once a constitutional error is found, the burden shifts to the state to prove harmlessness. A constitutional error will result in reversal unless the reviewing court is convinced beyond a reasonable doubt that the error did not affect the trial outcome.

Thus, the burden is on the State to show that the constitutional error here was not harmless beyond a reasonable doubt. Even a normal "evidentiary error" will only be deemed

harmless in direct proportion to the degree of the margin by which the proof exceeds the standard to convict. *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979). In a "close case" the error will not be harmless. *State v. Francis*, 669 S.W.2d 85 (Tenn. 1984).

We return again to statements of the trial court in finding Mr. Gregory guilty:

> But when you consider all of this other evidence and the inference to be drawn from the breath test, I'm convinced, though it is barely over the threshold of beyond a reasonable doubt, but it is beyond a reasonable doubt, that the defendant was operating a motor vehicle in Davidson County while under the influence of an intoxicant on September the 20th of the year 2000.

(Vol. IV, p. 229).

In essence, the trial judge was finding that this defendant was "barely guilty" of DUI. There is no further "room" for harmless error here particularly where the error is of constitutional dimension. Accordingly, this Court should squarely hold that it was error not to permit Mr. Bill Bruce to testify as to his conversation with Mr. Gregory immediately after Mr. Gregory's arrest. This Court should find that the error was of constitutional nature thus casting the burden on the government to prove harmlessness beyond a reasonable doubt. Finally, this Court should hold that the error was not harmless given the closeness of the evidence as articulated by the trial judge himself who was the finder of fact. Thus this conviction should be reversed and a new trial granted.

CONCLUSION

This Court should find that the evidence is insufficient to justify a conviction and the finding of DUI should be reversed and dismissed. Alternatively, for the trial errors committed, this Court should grant a new trial.

Respectfully submitted,

HOLLINS, WAGSTER & YARBROUGH, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via hand delivery to David Findley, Assistant Attorney General, 425 5th Avenue North, P.O. Box 20207, Nashville, TN 37202-0207 on this the _____ day of September, 2003.

____

David L. Raybin