



## Supreme Court of Georgia

Jane Hansen, Public Information Officer  
244 Washington Street, Suite 572  
Atlanta, Georgia 30334  
404-651-9385  
hansenj@gasupreme.us



## SUMMARIES OF OPINIONS

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### **GADDY ET AL. V. GEORGIA DEPARTMENT OF REVENUE ET AL. (S17A0177)** **GEORGIA DEPARTMENT OF REVENUE ET AL. V. GADDY ET AL. (S17X0178)**

Under an opinion by the Supreme Court of Georgia, the program that provides tax exemptions to those who contribute to scholarships for students to use at private schools, including religious schools, will remain in place.

With today's decision, the high court has unanimously upheld a **Fulton County** court ruling that says taxpayers who challenged the program as unconstitutional had no standing, or right, to bring their constitutional challenge.

"Plaintiffs' complaint fails to demonstrate that plaintiffs are injured by the program by virtue of their status as taxpayers," **Justice Robert Benham** writes for the Court. "Consequently, plaintiffs' taxpayer status fails to demonstrate a special injury to their rights so as to create standing to challenge the program."

This high-profile case stems from a dispute between a group of taxpayers and the State over the Qualified Education Tax Credit Program (House Bill 1133, which has been amended three times, most recently in 2013). Under the K-12 tax credit scholarship program, which is managed by the state Department of Revenue, individuals may donate up to \$1,000, couples up to \$2,500, and corporations thousands more to "student scholarship organizations," which are private charitable 501 (c) (3) organizations. These student scholarship organizations in turn must allocate at least 90 percent of the funds to award scholarships of up to \$8,983 per student to use at qualifying private schools. The organizations are required to distribute the scholarships to students who meet certain eligibility requirements, and the parent of each recipient must endorse the award to the private school of the parents' choice for deposit into the school's account. In

return for their donations, the contributors receive dollar-for-dollar tax exemptions on their income taxes. The annual amount of tax credits available under the program is \$58 million.

Four Georgia taxpayers, including Raymond Gaddy, sued the Department of Revenue and Revenue Commissioner Lynnette Riley, arguing the program is unconstitutional because it redirects public tax funds to private religious schools. In their lawsuit, the taxpayers sought “injunctive” relief to stop the illegal use of tax funds for private schools, a “declaratory” judgment by the court declaring the program is unconstitutional, and a “writ of mandamus” to compel Riley as a public official to do her duty and revoke the status of any school scholarship organization that solicited contributions by claiming it would award a scholarship for a specific student. The trial court ruled mostly in favor of the Department and of parents who support the program and were permitted to intervene in the lawsuit. The trial court ruled that the taxpayers lacked standing to challenge the constitutionality of the statute and that its claims for injunctive and declaratory relief were barred by the doctrine of sovereign immunity, the legal doctrine that protects the government or its departments from being sued without the State’s consent. But the court did rule the mandamus claim could go forward. The taxpayers then appealed the bulk of the ruling to the Georgia Supreme Court, while the State appealed the mandamus ruling.

In today’s opinion, the high court has upheld the trial court’s ruling regarding the taxpayers’ constitutional claims and reversed its ruling that would have allowed their mandamus claim to go forward.

“In general, to establish standing to challenge the constitutionality of a statute, a plaintiff must show actual harm in that his or her rights have been injured,” the opinion says. “Here, plaintiffs claim they have standing to challenge the constitutionality of the statutes in question because they can show injury by virtue of their status as taxpayers. They also claim standing is conferred by Georgia Code § 9-6-24. Neither assertion survives scrutiny.”

Each of the taxpayers’ allegations challenging House Bill 1133 hinges on certain assumptions, “the first one being that the grant of tax credits for student scholarships amounts to a diversion of public revenue that leaves the plaintiffs shouldering a greater portion of Georgia’s tax burden. Plaintiffs also assume that the tax credits amount to an unconstitutional expenditure of public funds because these funds actually represent tax revenue, or because the revenue department bears the costs of administratively processing these credits. But these premises are false.”

Suggesting that a tax credit from state income tax liability decreases the total revenue pool and increases the tax burden on the remaining taxpayers is “purely speculative,” the opinion says. “Further, a tax credit that funds a program that encourages attendance at private schools might, in fact, create a tax savings by relieving public schools of the burden of educating the students who chose to attend private schools.”

“We also reject the assertion that plaintiffs have standing because these tax credits actually amount to unconstitutional expenditures of tax revenues or public funds,” the opinion says. “The statutes that govern the program demonstrate that only private funds, and not public revenue, are used.”

House Bill 1133 lays out a scheme by which (1) donations of private funds by private individuals or entities, (2) made to non-governmental organizations to be used for scholarships to private schools, whether secular or religious, (3) may be claimed as tax credits by individual and corporate taxpayers. “The program does not involve the distribution of public funds out of the

State treasury because none of the money involved in the program ever becomes the property of the State of Georgia.”

“Because each of the constitutional provisions relied upon by plaintiffs involve the expenditure of public funds, and the statutes that establish the program demonstrate that no public funds are used in the program, plaintiffs lack standing as taxpayers to assert these claims. Plaintiffs’ complaint fails to show that they, or any taxpayers for that matter, are harmed by this program.”

These conclusions are supported by decisions from federal courts and other state courts that have considered the issue of taxpayer standing to challenge the constitutionality of similar scholarship programs, the opinion says.

Because the injunctive relief the taxpayers seek, to prevent the State from approving tax credits under the program, is based on their constitutional claims, “which we have concluded they have no standing to pursue,” the taxpayers consequently have no standing to pursue the injunctive relief, either, the opinion says.

In the cross appeal, the Department of Revenue appeals the trial court’s order denying its motion to dismiss the taxpayers’ claim for mandamus relief. In this claim, the taxpayers asked the trial court to require the Commissioner to enforce the statute that prohibits student scholarship organizations from representing that a taxpayer could make a contribution for a particular student. The trial court concluded that the taxpayers here had a case because they stated a claim upon which relief could be granted. In today’s opinion, however, “We disagree and reverse.” Here, the taxpayers “have failed to allege any clear legal right to mandamus relief,” the opinion says.

**Attorneys for Appellants (Gaddy):** William Whitner, Andrea Pearson, S. Tameka Phillips  
**Attorneys for Appellees (State):** Samuel Olens, Attorney General Samuel Olens, W. Wright Banks, Jr., Dep. A.G., Alex Sponseller, Sr. Asst. A.G., Mitchell Watkins, Asst. A.G.

### **MITCHELL V. THE STATE (S17A0459)**

The State will need to take additional steps to get results of a commonly used field sobriety test admitted as evidence under an opinion today by the Georgia Supreme Court.

In its decision, written by **Justice Michael Boggs**, the high court has ruled in the case of a man charged with driving under the influence (DUI) that before the results of the “Romberg” test may be admitted at trial, the judge must conduct a specific analysis to determine whether the evidence is scientifically valid.

Under the facts of the case, on Oct. 5, 2014, Quanton Kiere Mitchell was driving on Highway 54 when he was stopped by Deputy J. Bradley of the **Fayette County** Sheriff’s Office for alleged failure to stay in his lane. Bradley approached, and while speaking with Mitchell, smelled alcohol and asked Mitchell if he would submit to sobriety tests. Mitchell said no and refused to get out of the car. When Officer J. Hartley of the Fayetteville Police Department arrived at the scene, Hartley and Bradley approached Mitchell’s vehicle together. Bradley again asked Mitchell to get out of his car and Mitchell refused. Hartley intervened and told Mitchell, “We got two ways we can do this. You can either get out of the car on your own, or we can get you out of the car.” Mitchell got out, stumbling and leaning against the car door for support. Hartley asked him again to submit to field sobriety tests and again Mitchell said he did not want to. On Bradley’s dashcam video, Hartley is seen talking to Mitchell and can be heard saying, “it

would behoove you to cooperate because if you don't..." Hartley didn't finish the sentence because Mitchell cut him off saying he knew certain politicians and was aware of his Fifth Amendment rights, according to briefs filed in the case. Hartley can be heard telling Mitchell that all that mattered was whether he was a safe driver. Mitchell argued he was, and Hartley responded that Mitchell had bloodshot, watery eyes and the odor of alcohol surrounding him. Hartley then asked Mitchell if he would blow into a portable breath test. Mitchell refused. After pausing however, Mitchell apparently changed his mind, telling Hartley he would agree to the field sobriety testing because, "I like you."

Among the tests Mitchell was given that day was a horizontal gaze nystagmus test (HGN), the walk-and-turn test, the one-leg-stand test, and the Romberg test. During the Romberg test, Mitchell was told to tilt his head backward, close his eyes and estimate the passage of 30 seconds. Hartley testified that the purpose of that test is "to gauge a person's internal clock, to figure out if their internal clock is correct or accurate, given that certain drugs, alcohol being one of them, could impair your ability to interpret the passage of time or perceive it." During the test, Mitchell wrongly estimated the time, his eyes did not remain closed, he swayed back and forth, and his speech remained mildly slurred.

After performing the tests, Hartley walked away from Mitchell, leaving him unrestrained, while he shared the test results with Bradley. A little more than 18 minutes into the video, Bradley placed Mitchell under arrest, and he was subsequently charged with "driving under the influence (less safe)" and "failure to maintain lane."

Prior to going to trial, Mitchell's attorney filed a number of motions, including one asking the court to suppress the results of the field sobriety tests, another to exclude that he had initially refused to submit to the tests, a third to exclude the Romberg test evidence, and a fourth to declare as unconstitutional a statute that says expert opinion in criminal proceedings of any question of science "shall always be admissible." The trial court denied all of Mitchell's pretrial motions, and he appealed to the Georgia Supreme Court.

In today's ruling, the high court has upheld all the trial court's rulings on the motions except one: It has reversed the court's refusal to exclude the Romberg test evidence, agreeing that under the Georgia Supreme Court's 1982 ruling in *Harper v. State*, "the trial court failed to require the proper foundation for the Romberg field sobriety test."

The *Harper* decision guides trial courts, the opinion says, in determining whether a scientific principle or technique is competent evidence in a criminal trial and "has reached a scientific stage of verifiable certainty." Under *Harper*, the "trial court may make this determination from evidence presented to it at trial by the parties; in this regard, expert testimony may be of value. Or the trial court may base its determination on exhibits, treatises or the rationale of cases in other jurisdictions. The significant point is that the trial court makes this determination based on the evidence available to him rather than by simply calculating the consensus in the scientific community."

The initial question is whether the Romberg test falls into the category of a simple physical dexterity exercise observable by the average layperson, such as the walk-and-turn test or the one-leg-stand test, or a scientific test which must meet standards of validity and reliability, such as the horizontal gaze nystagmus (HGN) test.

At Mitchell's trial, Hartley acknowledged that he was not aware of any validation studies for the Romberg test, "not like there are for the other three tests, no, sir." He also acknowledged

that the range of plus or minus five seconds from the 30-second time requirement as an indication of impairment had not been established. No scientific or medical expert testified at trial.

“We conclude that, on the basis of the evidence presented at the hearing in this case, admissibility of the Romberg test is subject to the *Harper* standard,” today’s opinion says. “The significance of eyelid tremors or an individual’s ‘internal clock,’ how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer. The trial court therefore erred in failing to conduct a *Harper* analysis, whether through the evaluation of expert testimony or through the examination of exhibits, treatises, or the law of other jurisdictions.”

Today’s opinion addresses each of Mitchell’s remaining arguments, rejecting them all, including his assertion that the trial court erred by failing to exclude evidence that he had initially refused to submit to the field sobriety tests because such tests ought to require a search warrant.

“The United States Supreme Court has concluded that, on the one hand, ‘searches’ include such actions as taking blood, breath, or urine samples. But the high court has also held that observation of actions performed by an individual is *not* a search, even if performed at the demand of the State,” the opinion says. “And while field sobriety tests may involve specific, unusual maneuvers that are not normally performed in public *or* private, most are simply intended to reveal, more quickly and in a reproducible fashion, matters that also would be revealed by more time-consuming, but clearly permissible, passive observation.”

“Although it is a close question, we conclude that a basic field sobriety test is not a search implicating Fourth Amendment protections” and requiring a search warrant, the opinion says.

**Attorney for Appellant (Mitchell):** D. Benjamin Sessions

**Attorneys for Appellee (State):** Jamie Inagawa, Solicitor General, Joseph Myers, Jr., Chief Asst. Sol. Gen., Audrey Cruzan, Asst. Sol. Gen.

### **JONES V. THE STATE (S16G0890)**

The Supreme Court of Georgia has upheld a man’s conviction for driving under the influence (DUI). But with today’s opinion, the high court finds that the Georgia Court of Appeals did not use the proper analysis in determining whether the **Cherokee County** court, where the man was tried, was correct in allowing in evidence of the man’s prior DUI conviction. Furthermore, the high court finds that the trial court was wrong to admit it.

“At the core of the dispute is the method by which the lower courts are to determine the admissibility of extrinsic act evidence, in this case the prior DUI,” under the state’s new Evidence Code, **Justice Robert Benham** writes for a unanimous Court. This is the second time this case has come to the Supreme Court.

According to the facts of the case, the night of Jan. 21, 2011, a Cherokee County deputy sheriff pulled over Michael Jones for speeding. The officer smelled alcohol and noticed that Jones’ eyes were red and watery. He asked Jones if he’d been drinking and initially Jones said he had not. But after failing several field sobriety tests, Jones said he’d had two beers earlier that evening. The officer arrested Jones based on his performance on the tests and his observations of Jones. Jones agreed to submit to state-administered breath tests which measured 0.147 and 0.139. Under Georgia law, a blood alcohol level of 0.08 or higher signifies intoxication and Jones was

charged with “DUI-per se” and “DUI-less safe.” DUI-per se required proof that he was driving with an alcohol level of 0.08 or higher; DUI-less safe required proof that he was driving while under the influence of alcohol knowing that made it less safe for him to drive. Jones was also charged with speeding.

In January 2013, Georgia’s new comprehensive “Evidence Code” went into effect. Anticipating that Jones’s trial would not begin until after the new Code took effect, the State filed notice that it intended to introduce evidence of Jones’ conviction six years earlier of “DUI less safe,” to which Jones had pleaded guilty. Under Georgia Code § 24-4-404 (b), the State said its purpose for offering evidence of the prior conviction was to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The State later narrowed the purpose, stating the prior conviction evidence was relevant to show Jones’ knowledge and intent to drive, knowing that he was less safe.

The trial court granted the State’s motion and allowed in the prior conviction evidence. The court also performed the balancing test required by Georgia Code § 24-4-403 (b) under the new Evidence Code, which states the evidence may be excluded if its “probative value” – or its value in proving or disproving something – is substantially outweighed by its danger of unfairly “prejudicing” – or unfairly damaging – Jones’s case. The court ruled that the “other acts evidence” (which used to be called “similar transaction evidence”) was admissible because its probative value was not outweighed by its prejudicial effect. Following a jury trial, Jones was convicted of both DUI counts. For sentencing purposes, his DUI-less safe conviction was merged into his DUI-per se conviction and he was only sentenced for the latter.

However, the Court of Appeals reversed the conviction, finding that the prior conviction evidence should not have been admitted at trial because it was not relevant to, or probative of, the commission of his most recent DUI. The State then appealed to the Georgia Supreme Court, and this Court reversed the Court of Appeals’ decision and sent the case back to the appellate court with instructions to review the admissibility of the State’s “other acts evidence” under § 24-4-403. The Court of Appeals subsequently ruled that the trial court did not abuse its discretion by allowing in the prior conviction evidence. Jones then appealed to the state Supreme Court, which agreed to review the case a second time to determine whether the Court of Appeals used the proper analysis in determining that the trial court had not abused its discretion in applying the balancing test of § 24-4-403.

In today’s opinion, the high court concludes that the Court of Appeals “did not fully consider whether the trial court properly conducted the balancing test” that is required by § 24-4-403. Furthermore, the trial court erred in admitting Jones’s prior conviction “because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.”

“Instead of going to the issue of intent, the State’s use of the prior DUI had the effect of emphasizing appellant’s [i.e. Jones’s] dishonesty, creating the potential that the jury would render a decision predicated on that negative impression in addition to the stigma already associated with a prior criminal conviction,” the opinion explains.

However, the error was harmless, i.e. does not require a reversal of his conviction, because the evidence of Jones’s guilt in the more recent DUI-per se charge was “overwhelming,” today’s opinion says. “As to that charge, there was no dispute appellant was driving his vehicle; appellant admitted he had consumed alcohol that evening; and the breath tests showed appellant’s blood alcohol content was substantially in excess of 0.08 grams.”

Therefore, it is highly probable that Jones's prior DUI-less safe conviction did not contribute to the jury's verdict of guilty he received for the more recent DUI-per se conviction. Because the error was harmless, the Supreme Court has upheld the Court of Appeals' decision.

**Attorney for Appellant (Jones):** Jeffrey Filipovits

**Attorneys for Appellee (State):** Jessica Moss, Solicitor General, Carlton Todd Hayes, Chief Asst. Sol. Gen.

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**IN OTHER CASES,** the Supreme Court of Georgia has upheld the **murder** conviction and life prison sentence given to:

\* Windy Scott (Richmond)

**SCOTT V. THE STATE (S17A0524)**