



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, March 5, 2018**

### 10:00 A.M. Session

#### **MCCOY V. THE STATE (S17G1530)**

A woman is appealing her conviction in **Henry County** of Driving Under the Influence, arguing that the State failed to prove the arresting officer had the "training and experience" to single her out for field sobriety tests.

**FACTS:** On July 18, 2015, Sgt. Jason Black of the Henry County Police Department authorized a roadblock at Exit Ramp 228 of I-75 southbound. The department's Policy and Directives Manual states that, "the screening officer's training and experience will be sufficient to qualify him/her to make an initial determination as to which motorists should be given field tests for intoxication." Black submitted a "Henry County Police Department Roadblock and Safety Checkpoint Record" for this particular roadblock. He approved the personnel who would participate, and the document he submitted stated, "The following screening officers were present, all of which possess the sufficient training and experience to qualify them to make an initial determination as to which motorist should be given Field Sobriety Tests for intoxication." All of the officers who participated in the roadblock, including Officer Gerald Mitchell, were certified by Peace Officers Standards and Training (POST) to be law enforcement officers in Georgia and had been through the police academy. According to Black's testimony, officers go

through a certification during their police academy that prepares them to determine what drivers need to be given field sobriety evaluations.

**Latisha Shana McCoy** was a motorist going through the roadblock when Mitchell, the screening officer who checked her license as part of the roadblock, pulled her aside for field sobriety evaluations based on his observations. Following an investigation by Mitchell and another officer, McCoy was arrested and charged with Driving Under the Influence of marijuana. Prior to trial, McCoy's attorney filed a motion to suppress the evidence seized during the stop, arguing that the roadblock was unconstitutional. In December 2015, the trial court denied her motion. In a bench trial (before a judge with no jury), McCoy was convicted of DUI in June 2016. She then appealed to the Georgia Court of Appeals, Georgia's intermediate appellate court. In the appeal, McCoy argued that the State failed to meet its burden of showing one of the factors necessary to establish that the roadblock was constitutional – that the officer conducting the screening had sufficient training and expertise to qualify him to make an initial determination as to which motorists should be given field tests for intoxication. The Court of Appeals upheld the trial court's ruling and the denial of McCoy's motion to suppress. It stated that "it is commonly known and cannot reasonably be questioned that any police officer, to obtain certification in Georgia, has received training in law enforcement activities that concern impaired drivers." The appellate court concluded that given this fact, as well as the long-standing rule that any person may testify as to whether another person appeared intoxicated, the trial court did not err in denying McCoy's motion to suppress based on finding that the POST-certified officer had the required training and experience. McCoy then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in its application of the Georgia Supreme Court's 1998 decision in *LaFontaine v. State* in determining whether the roadblock was reasonable under the Fourth Amendment of the Constitution.

**ARGUMENTS:** McCoy's attorney argues that yes, the Court of Appeals erred. At the hearing in the trial court, the State presented no testimony as to the name of the screening officer, the reason for the screening officer extending the stop of McCoy beyond the checking of her license, or any interaction that took place between McCoy and the screening officer. The State presented testimony only of Sgt. Black, who had no personal interaction with McCoy. As to the training of the officers involved, Black could only testify that all of the officers were POST-certified. "Upon these facts, the roadblock in question was unconstitutionally established as it failed to meet all of the constitutional requirements for establishing roadblocks, specifically that the screening officer's training and experience was sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication, as established in the case of *LaFontaine v. State*," McCoy's attorney argues in briefs. There was no testimony as to when the screening officer received his training and whether it was before or after POST initiated such training on DUI-drug detention. Furthermore, "*LaFontaine* requires that the screening officer have 'both' training and experience," the attorney argues. "Though all officers who are POST-certified may receive training in DUI detection and in recognizing impaired drivers, this does not equate to experience in these areas as training does not equal experience," the attorney argues. "Though this Court has never provided a definition of what training and experience would be sufficient to satisfy the requirement of *LaFontaine*, the Court can look to other sources for guidance," such as the dictionary which defines experience as "direct observation of, or participation in, events as a basis of knowledge." "Simply put, a screening

officer must not only be POST certified, but also have conducted at least one traffic stop involving a DUI for alcohol and one DUI for drugs,” McCoy’s attorney contends.

The State, represented by the Solicitor General of the State Court of Henry County, argues that the Court of Appeals made the right decision as the record contains sufficient evidence that the screening officer had the training and experience to determine which motorists should be tested for intoxication. “This Court has determined that a roadblock is constitutional where it meets the factors articulated in *LaFontaine v. State*, and although they are minimum constitutional prerequisites, those factors are ‘not absolute criteria that a roadblock must meet in order to be considered legitimate,’” the State argues in briefs. The fifth factor under *LaFontaine*, which is at issue here, is that “the ‘screening’ officer’s training and experience are sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.” Here, the screening officer at the roadblock suspected, after speaking with McCoy, that she was impaired from smoking marijuana. He then called over another officer who was part of a specialized DUI unit to take over the investigation. At the hearing, McCoy’s attorney did not cross-examine Sgt. Black’s testimony that the officers involved in the roadblock “were POST-certified and had training in DUI detection.” POST certification is sufficient to satisfy the fifth requirement of *LaFontaine* as it encompasses a standard of training, as well as the ability to testify about an opinion of a motorist’s sobriety, the State argues. The POST course involves eight hours of training dedicated solely to Impaired Drivers investigation, and another four hours dedicated solely to Controlled Substances Investigation. “The trial court had enough uncontroverted evidence before it to support a finding that the fifth requirement of *LaFontaine* was met, and that the screening officer present at this roadblock had sufficient training and experience to enable him to make an initial determination as to the sobriety of motorists,” the State contends.

**Attorney for Appellant (McCoy):** Joe Harris, Jr.

**Attorneys for Appellee (State):** John “Trea” Pipkin, III, Solicitor General, Caitlin McGillicuddy, Asst. Sol. Gen.

### **MAXIM CABARET ET AL. V. CITY OF SILVER SPRINGS (S18A0496)**

A strip club in Sandy Springs, GA is appealing a **Fulton County** court ruling that upholds as constitutional city ordinances banning the sale of alcohol in adult establishments.

**FACTS:** Since 1992, Theo Lambros has owned and operated a strip club serving alcohol beverages on Roswell Road. Originally, the club was known as The Coronet Club. Then for several years, it operated under the name of **Maxim Cabaret**. Today, it again goes by the name of The Coronet Club, although when litigation in this case began, it was still using the name of Maxim. In March 2003, Maxim applied for, and was granted, a Fulton County license for on-premises consumption of alcoholic beverages. Prior to Sandy Springs becoming a new city, the club operated in unincorporated Fulton County. When the City of Sandy Springs incorporated Dec. 1, 2005, Maxim came under the jurisdiction of the new City of Sandy Springs. Following its incorporation, Sandy Springs adopted its own adult establishments licensing ordinance, which included a ban on alcohol in adult establishments. These ordinances are included in the Alcohol, Licensing, and Zoning chapters of Sandy Springs’ Code of Ordinances. During public hearings in December 2005, the City Council received extensive information about the negative secondary effects of sexually oriented businesses, including higher crime, commercial depression

of property values, acceleration of community blight in surrounding neighborhoods, and increase in expenditures for law enforcement to preserve law and order.

In January 2005, Maxim sued the City of Sandy Springs in Fulton County State Court. Later that year, two other strip clubs in the northern part of Fulton County – Mardi Gras and Flashers – sued the City in federal court. The City meanwhile periodically amended its regulations. In 2009, after receiving additional information about the secondary effects of sex businesses, the City claims it overhauled its licensing, zoning, and alcohol regulations related to adult establishments. In 2012, the City amended certain provisions of the ordinances that Maxim subsequently challenged in its consolidated complaint in 2015 – its eighth amended complaint. Throughout the 13 years of litigation, Maxim has been allowed to operate as an adult establishment with nude dancers and on-premises alcoholic beverages sales.

In June 2016, the superior court issued “summary judgment” in favor of the City, ruling against Maxim on all its challenges. (A court issues “summary judgment” when it determines a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) The trial court ruled that the ordinances were designed to target adverse secondary effects and that Maxim had not cast doubt on the City’s secondary effects evidence or rationale. The trial court also found that the regulations were narrowly tailored to serve the City’s governmental interests and met constitutional standards. Maxim now appeals to the state Supreme Court.

**ARGUMENTS:** Attorneys for Maxim argue that the trial court erred in ruling that the City had *repealed* rather than *amended* ordinances affecting adult businesses and that therefore, Maxim’s challenges of those ordinances were moot. Maxim had argued that “amendments to unconstitutional ordinances cannot cure unconstitutionality.” The lawyers argued that the original ordinances were constitutionally deficient and, because Georgia law holds that an amendment to an unconstitutional law is void, Sandy Springs’ much-amended ordinances are unconstitutional. “The trial court failed to rule on this argument, but instead incorrectly referred to the City’s original ordinances and early amendments as ‘repealed,’” the attorneys argue in briefs. The trial court also erred in ruling that the original adult regulations and multiple amendments to its adult business licensing, zoning and alcohol regulations were not unconstitutional. The trial court made no effort to determine the constitutionality of the City’s original ordinances, which it was required to do, the attorneys contend. And they argue that the ordinances regulating adult entertainment establishments must be evaluated under “strict scrutiny” due to “the content of the expression they offer. “Maxim is subject to the ordinances’ restrictions only because of the sexually oriented content of the expression they present,” the attorneys argue. “These ordinances must, therefore, be evaluated in accordance with First Amendment precedent.” “The text and context of the ordinances make clear that it is the content of the ‘entertainment’ offered at a venue that triggers their provisions.” Even if the City’s adult ordinances are subject to strict scrutiny, they are unconstitutional. “The City must not only show that it relied on evidence ‘reasonably believed to be relevant’ to its interest in ameliorating adverse secondary effects and that evidence fairly supported that rationale, but it must also demonstrate that its ordinances leave ‘the quantity and accessibility of speech substantially intact.’” “Customers are drawn into Maxim for the purpose of watching nude dancers with the opportunity to enjoy a drink. Without a doubt, the City’s ordinances sound a death knell for Maxim’s operation. The City’s ordinances, therefore, do not ‘leave the quantity and accessibility

of speech intact,” Maxim’s attorneys contend. Finally, the trial court erred in holding that Maxim and Theo Lambros lack standing to challenge the City’s alcohol code.

Attorneys for the City of Sandy Springs argue that Maxim has not shown it suffered any injury from the old adult codes, and the trial court correctly rejected Maxim’s challenges as moot. “There are many problems with Maxim’s argument, but the first – and fatal – one is that the former codes were never held unconstitutional, and Maxim suffered no injury that would save its challenges from mootness,” the attorneys argue in briefs. “On the contrary, Maxim admits that it has continued to operate an adult entertainment establishment, with alcohol, in violation of the City’s regulations for more than a decade.” To establish standing, a plaintiff must demonstrate “an injury in fact.” But when an ordinance provision is challenged on constitutional grounds, the repeal of that provision renders the challenge moot. “Maxim does not have any injury from the former codes, so it lacks standing to challenge them,” the City’s attorneys argue. Also Maxim has waived its right to make some of the challenges it is arguing now because it failed to raise them when the case was still in the trial court. The rest of its challenges “are meritless,” the attorneys contend. Finally, the City’s adult establishment codes easily pass “intermediate scrutiny” and do not require a “strict scrutiny” analysis. Maxim does not mention, let alone refute, the trial court’s thorough analysis showing that the City’s ordinances easily satisfy the three-part intermediate scrutiny test the Georgia Supreme Court established in its 1982 decision, *Paramount Pictures Corp. v. Busbee*. As a result, Maxim has waived any argument on the issue. Also, as the Georgia Supreme Court ruled in its recent 2017 decision in *Oasis Goodtime Emporium I, Inc. v. City of Doraville* involving another strip club, “dispensing the unprotected conduct of alcohol consumption from live nude conduct presents no intrinsic limitation on speech at all,” the City’s attorneys argue. As that opinion stated, “Serving alcohol is not itself protected expression, and [the alcohol ban] leaves Oasis’s employees free to express themselves as they wish through dance or otherwise.” Finally, the trial court was correct in finding that Maxim lacks standing to challenge the provisions in the City’s alcohol code, the attorneys contend.

**Attorneys for Appellant (Maxim):** Cory Begner, Alan Begner

**Attorneys for Appellee (Sandy Springs):** Scott Berghold, Bryan Dykes, Harvey Gray

### **CLAYTON COUNTY BOARD OF TAX ASSESSORS V. ALDEASA ATLANTA JOINT VENTURE (S18A0430)**

The **Clayton County** Board of Tax Assessors is appealing a court ruling that a concessionaire who leases space at the Atlanta airport is not required to pay property taxes.

**FACTS:** The City of Atlanta owns the real property that comprises Hartsfield-Jackson Atlanta International Airport. Portions of the airport – including the portions at issue in this case – are located in Clayton County outside city limits. The City of Atlanta grants concessionaires the right to use portions of the airport to operate businesses that serve the airport’s patrons. In 2007, the City entered into a lease with **Aldeasa Atlanta Joint Venture**, allowing Aldeasa to operate two duty-free retail stores on Concourses E and T of the airport. The term of the Concessions Agreement was five years. Aldeasa reported to the County, and paid the County ad valorem taxes due on its *personal* property, including such things as inventory and computers.

The County issued real property tax assessments to Aldeasa for the 2011 and 2012 tax years for Aldeasa’s alleged real property interest granted under the Concessions Agreement. The

County referred to the two parcels of property where the shops were located as “Possessory Interest Parcels.” Aldeasa appealed the assessments to the Clayton County Board of Equalization. Because Georgia law requires taxpayers to pay 85 percent of taxes alleged to be due pending the outcome of an appeal, Aldeasa paid \$399,384 in taxes while it appealed. After the Board of Equalization ruled in the County’s favor, Aldeasa appealed to the Clayton County Superior Court. Following a hearing, the court ruled in Aldeasa’s favor, finding that Aldeasa’s interest constituted a “usufruct.” Usufructs are generally short-term leases that confer mere use rights and are distinguished from “estate-for years leases,” which grant an interest in land. The trial court found that there were “severe restrictions imposed through the Concessions Agreement” on Aldeasa, including the City’s right to terminate the lease at will, to relocate Aldeasa at will, and to require Aldeasa to invest in improvements belonging to the City. The court rejected the two grounds for taxation argued by the County, determining that Georgia Code § 6-3-21 “was never intended to impose property tax on usufructs located at the airport.” Furthermore, the court found, if it were interpreted to do that, the statute “would have to be declared unconstitutional” as it “would violate the Georgia Constitution’s requirement of uniformity of taxation” by “only taxing usufructs at the airport,” but not elsewhere. And the trial court found that Aldeasa did not hold some type of taxable franchise, as the County had argued, under Georgia Code § 48-5-421. The County now appeals to the state Supreme Court.

**ARGUMENTS:** The County’s attorneys argue that the trial court erred in finding that Aldeasa has a nontaxable “usufruct” interest at the airport and not “an estate for years.” Georgia Code § 48-5-421 states that, “All real property including...leaseholds...and all personal property shall be liable to taxation and shall be taxed, except as otherwise provided by law.” “A leasehold, which essentially is an estate for years, is classified for tax purposes as a real property interest,” the attorneys argue in briefs. As a general rule, “there is a rebuttable presumption that a lease for five years or more is a taxable estate for years,” the attorneys contend, quoting a 1993 decision by the Georgia Court of Appeals in *Huntingdon II, Ltd. V. Chatham County Board of Tax Assessors*. The Concessions Agreement here “has more characteristics of an estate for years than a nontaxable usufruct.” The trial court also erred in ruling that Georgia Code § 6-3-21 does not authorize the County to tax Aldeasa’s “possessory interest,” the attorneys contend. “A taxable possessory interest is created when a private party is granted the exclusive use for private benefit of real property owned by a non-taxable entity.” “The Georgia legislature intended to make clear that private parties that have any interest on city-owned land are subject to ad valorem tax,” the County’s attorneys argue. Georgia Code § 6-3-21 clearly authorizes the imposition of a tax on Aldeasa’s possessory interest located at the airport, and such a construction of the statute “would not violate the Georgia Constitution’s requirement of uniformity of taxation, as the trial court erroneously held.” Among other arguments, the County contends the trial court also erred in finding that Aldeasa’s use of a franchise is not subject to tax, and by not finding that Aldeasa has taxable leasehold improvements.

Aldeasa’s attorneys argue that the trial court properly held that Aldeasa’s limited contractual right to space at the airport is not subject to real property tax. “Georgia courts have held for nearly a century that usufructs – limited licenses to use the real property of another – are not estates in real property and are thus not subject to property tax,” the attorneys argue in briefs. “The limited rights the City grants to concessionaires at the airport, like Aldeasa, are nontaxable usufructs. Prior case law of this [Georgia Supreme] Court has specifically held as much.”

Although a lease agreement of five years or more is presumed to create an “estate for years,” the presumption can be rebutted. “If the owner imposes restrictions on the tenant’s use of the premises that ‘are so pervasive as to be fundamentally inconsistent with the concept of an estate for years,’ the lease creates a nontaxable usufruct regardless of its length,” the attorneys argue. Here, Aldeasa’s “severely restricted” right to use airport property is a nontaxable usufruct, not a taxable estate for years. The trial court also properly ruled that § 6-3-21 does not impose tax on Aldeasa’s nontaxable usufruct interest and that to hold otherwise would be unconstitutional. The history of the statute shows it was not intended to tax usufructs. As Sen. Butch Miller explained during a Senate floor debate over a 2014 amendment to § 6-3-21, “This bill [corrects] a misapplication of an ad valorem tax due to a misinterpretation of the Georgia Tax Code by the officials of Clayton County, and it has direct implications for the concessionaires of the City of Atlanta, specifically at the airport. . . . The concessionaires have a usufruct. . . and a usufruct in the Georgia Code is not taxable.” The trial court also properly held that the County’s attempt to tax only usufructs located at the airport violates the Constitution’s tax uniformity requirements. Finally, the trial court properly held that Aldeasa’s nontaxable usufruct interest is not taxable as a franchise under Georgia Code § 48-5-421 and that Aldeasa has no leasehold improvements that are taxable as real property, Aldeasa’s attorneys argue.

**Attorneys for Appellant (County):** Jack Hancock, A. Ali Sabzevari

**Attorneys for Appellee (Aldeasa):** W. Scott Wright, Madison Barnett

## **2:00 P.M. Session**

### **REIS ET AL. V. OOIDA RISK RETENTION GROUP, INC. (S18A0505)**

A man and woman who were injured in a collision with a tractor-trailer are appealing a **Newton County** court ruling that the company providing liability insurance to the truck’s owner is not a party to the case and subject to being sued.

**FACTS:** In February 2015, **Candice Reis** and Melvin Williams, who were riding in Reis’s Nissan car, were involved in a collision with a Freightliner tractor-trailer on a road encircling a mall where the speed limit was 15 mph. The collision caused deployment of the Nissan’s airbags, damage to both vehicles and possible injuries. James Powell and his company, Zion Train Express, Inc., owned the truck, which was insured by **OOIDA (Owner-Operated Independent Drivers) Risk Retention Group**. (A risk retention group is a liability insurance company that is owned by its members who are engaged in similar businesses and are exposed to the same types of liability. Risk retention groups were created by the federal Liability Risk Retention Act, a federal law created in 1986.) OOIDA is a liability risk retention group chartered in Vermont with principal business offices in Grain Valley, MO. As a result, in Georgia, it is a foreign, or “non-domiciliary,” risk retention group. Through its adjuster, Commercial Truck Claims Management, the OOIDA Risk Retention Group denied liability on the part of Zion Train or its owner in the collision involving Reis. In September 2015, Reis and Williams sued the truck driver, Andre Robinson, the motor carrier, Zion Train Express, Inc., and its insurance carrier, OOIDA, under the Georgia Direct Action statute (Georgia Code § 40-1-112). In August 2016, OOIDA filed a motion for “summary judgment,” arguing that the federal Liability Risk Retention Act exempted it from liability under Georgia’s Direct Action statute. (A court grants

summary judgment after determining that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) OOIDA argued that as a foreign risk retention group, it is not subject to regulation in Georgia, except as specifically set forth under the federal law. While OOIDA remains financially responsible for any judgment against Robinson and Powell based on the terms of its policy, it is not a proper party to this case. The Newton County court granted OOIDA summary judgment, determining that a direct action against a foreign risk retention group such as OOIDA is both preempted by federal law and not contemplated by the Georgia Direct Action statute. Reis and Williams now appeal to the Georgia Supreme Court.

**ARGUMENTS:** The attorney for Reis and Williams argues the trial court erred in ruling that the Georgia Direct Action statute “regulates” the operations of OOIDA as a risk retention group. The trial court correctly decided that the Georgia statute contained no provision for risk retention groups. “However, the lack of mention of risk retention groups in the statute is not germane to the central issue of Appellants’ [i.e. Reis’s and Williams’] contention of the Direct Action Statute’s import, which is that the law in Georgia...was not intended as a ‘regulation’ of either traditional insurance groups or risk retention groups, as that term is used,” the attorney argues in briefs. Also, the Georgia Direct Action statute is not preempted by the general preemption language of the federal Liability Risk Retention Act, the attorney contends. Finally, the trial court’s error in concluding that OOIDA was not subject to being sued under the Georgia Direct Action statute has been established by federal and state law, the attorney contends.

Attorneys for OOIDA argue that the purpose of the Georgia Direct Action statute is “to protect the public against injuries caused by the motor carrier’s negligence.” Because the statute affects the business operations of risk retention groups such as OOIDA in the furtherance of the General Assembly’s public policy goals, it constitutes “regulation,” the attorneys argue. And because the federal Liability Risk Retention Act bars all regulation by non-chartering states, and the list of regulatory powers retained by non-chartering states does not include authorizing direct actions against foreign risk retention groups, the Georgia Direct Action statute is preempted as to foreign risk retention groups, including OOIDA. The federal law “specifically sets forth the categories of regulation which are permitted by non-chartering states, and none of those categories authorizes a direct action against a foreign risk retention group,” the attorneys argue in briefs. The Liability Risk Retention Act “contains **sweeping preemption language** that sharply limits the authority of states to regulate, directly or indirectly, the operation of risk retention groups chartered in another state.” Any regulation of a foreign risk retention group, such as OOIDA is in Georgia, beyond the regulatory powers specified in the federal code is preempted by federal law in a non-chartering state. The trial court correctly ruled that the federal Act preempts the Georgia Direct Action statute based upon Congressional intent and proper statutory construction, the attorneys argue. The trial court “joined the majority position nationwide by holding that direct actions are preempted by the Liability Risk Retention Act.” The Georgia Direct Action statute affects OOIDA’s business operations, thereby constituting “regulation” as that term has been defined by the U.S. Supreme Court. Finally, OOIDA’s dismissal as a party to this case will not change the outcome of this lawsuit or affect the ability of Reis and Williams to secure a full recovery, should a jury award them damages, OOIDA’s attorneys argue. “OOIDA retains financial responsibility pursuant to the terms of its policy for the claims of Appellants.”

**Attorney for Appellants (Reis):** Daniel Jason

**Attorneys for Appellee (OIDA):** Scott McMickle, Zach Matthews

**PALMER V. THE STATE (S18A0426)**

A young man who witnesses say egged on a 14-year-old to shoot an art student while the student and his girlfriend were surveying graffiti in an Atlanta neighborhood is appealing his murder conviction and three consecutive life prison sentences for the art student's death.

**ACTS:** The day after Christmas in 2013, 21-year-old Xavier Arnold and his girlfriend, Xenia Aims – both art students – decided to drive to Kirkwood in **DeKalb County** to photograph the graffiti on many of the Atlanta neighborhood's abandoned industrial buildings. On the way, they picked up their friend, Ibrahim Sanusi, arriving in Kirkwood around 4:45 p.m. As the three exited Aims' rental car, Aims saw two males down the street but did not think much of it. As the friends walked down a bike path, Aims noticed that the two men seemed to be following them and were getting closer. With a fence on one side and MARTA tracks on the other, the group had nowhere to go but straight ahead. At one point, they stepped aside to let the two men pass, which they did before disappearing into the woods. The three friends turned around and started walking back to the car when one of the two men, who was actually a boy, ran up to them and started yelling, "What's up? Why are you acting so hard?" The other, who was later identified as 20-year-old **Qutravius Palmer**, ran up with the boy, later identified as Palmer's 14-year-old cousin Zion Wainwright, but remained behind him. According to later testimony, Arnold tried to diffuse the situation, told them they were leaving, and told Palmer and Wainwright to "chill." Wainwright then pulled out a handgun while Palmer grabbed Arnold under his arms and threw him to the ground. Wainwright pointed the gun at Aims and Sanusi, demanding that Sanusi empty his pockets. Sanusi complied, but the boy shot him in the leg anyway, then pointed the gun at Arnold. Sanusi said he then heard the older man, Palmer, tell the boy to "shoot him." As Arnold started to stand up, Wainwright shot him in the back of the head.

Neighbors heard the gunshots and called 911 around 5:40 p.m. One of the neighbors, an off-duty firefighter, tried to help Arnold but Arnold later died from his head injury shortly after arriving at Grady hospital. Aims later testified that Palmer and Wainwright seemed to be acting as a "unit," with the older of the two seemingly in charge and letting the younger one show him what he could do. Following a joint trial in May 2015, Palmer was found guilty of a number of crimes, including two counts of felony murder, two counts of armed robbery and three counts of aggravated assault. He was sentenced to three consecutive life sentences. Wainwright was also convicted. Palmer now appeals to the state Supreme Court.

**ARGUMENTS:** Palmer's attorney argues the trial court made several errors, including by going forward with Palmer's trial "when doubts existed regarding his competency to stand trial." "Palmer's verbal outbursts and illogical statements to the court during trial demonstrated his irrational behavior," his attorney argues in briefs. And "where a defendant's demeanor and statements during trial call into question a defendant's competency, it is reversible error to do no more than simply ask the defendant if he understands the proceedings and is competent." The court also erred in denying Palmer's motion to sever his trial from Wainwright's trial "in light of the antagonistic defenses and the overwhelming evidence against his co-defendant." "Unlike Palmer, Wainwright was described as the aggressive one, verbally assaulting the three victims on the bike path and boasting about shooting after he did it," Palmer's attorney argues. "Also, there

was evidence that Wainwright was a member of a violent gang, where no such evidence existed against Palmer.” Finally, Palmer’s trial attorney rendered “ineffective assistance of counsel” to Palmer in a number of ways in violation of Palmer’s constitutional rights.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that the trial court did not err in failing to order, on its own, a new competency evaluation during the trial. Nearly a year before his trial, Palmer’s attorney filed a plea of mental incompetency to stand trial and a motion for a psychiatric evaluation. The trial court granted his motion, and a state psychologist evaluated Palmer in September 2014. Based on that evaluation, the trial court found Palmer competent to stand trial. Although Palmer’s attorney now argues that based on Palmer’s outburst during his trial, the trial judge should have ordered a new competency evaluation, the State argues that Palmer “has not shown that his behavior during trial rose to the level of creating a bona fide doubt regarding his competency that would necessitate trial court action.” The trial court also properly denied Palmer’s motion to sever his trial from his co-defendant’s because no legal reason justified the severance. Finally, Palmer’s trial attorney was effective, the State contends, and Palmer has failed to satisfy the burden of proving otherwise.

**Attorney for Appellant (Palmer):** Rachel Kaufman

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Arthur Walton, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Brock, Asst. A.G.

### **WATERS V. THE STATE (S18A0423)**

A woman is appealing her conviction in **Cobb County** for Driving under the Influence, challenging as unconstitutional the Georgia statute that allows for a blood test without a warrant.

**FACTS:** On May 11, 2013, just before 2:00 a.m., a Cobb County police officer stopped a silver BMW driven by **Lindsay Waters** for failure to maintain lane and improperly blowing her horn. When the officer approached the vehicle, he smelled an “overwhelming” odor of freshly sprayed perfume and a strong odor of alcoholic beverage. Waters denied having had anything to drink, but the officer noted that her eyes were glassy and her speech “extremely slurred,” and that “she was unsteady on her feet and very methodical in taking her steps.” She told the officer that she was taking three different prescriptions. He asked Waters if she would provide a breath sample in the Alco-Sensor and she declined. A backup officer arrived, and he asked Waters to perform several field sobriety tests, including the Horizontal Gaze Nystagmus (HGN) test. Her results were initially unremarkable, but then she began to move her eyes in a way that led the sergeant to believe she was trying to anticipate his movements, and he was unable to complete the test. Waters declined to do the walk-and-turn test, saying that her balance was not good. She also declined to do the one-leg stand. The officer later testified, over the objection of Waters’ attorney, that he gave her the Romberg test and she failed. The officer determined that Waters was not safe to drive, arrested her and read her the “implied consent warning.” Georgia Code § 40-5-67.1 requires an officer to read the following warning to DUI suspects following their arrest: “Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver’s license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial.”

Waters agreed to take a blood test and she was transferred in handcuffs to Kennestone Hospital where she signed a consent for treatment form. Prior to the test, Waters asked medical staff a number of questions, leading the officer to believe she was trying to avoid taking the blood test. The officer re-read her the implied consent warning, then “I told her, hey, that I needed a yes or no answer for the examination – or for the state test or I would have to take her not answering as a no.” The officer did not read Waters her *Miranda* rights. The blood test was finally taken, and Waters’ test registered a blood alcohol level of 0.09. An alcohol concentration of 0.08 grams or more is the legal definition of intoxication in Georgia. The officer later denied using abusive language or threatening Waters, but after hearing the videotape, admitted using an obscenity and calling her a “liar.” Waters’ mother testified to her emotional problems and described her behavior as normal and not due to alcohol.

Waters was charged with “DUI per se,” “DUI less safe,” failure to maintain lane and improper use of horn. Prior to trial, Waters’ attorney filed a motion to suppress the results of the blood test but the judge denied the motion. At a bench trial (before the judge with no jury), Waters was found guilty of all but the charge involving the improper use of horn. Waters now appeals to the state Supreme Court.

**ARGUMENTS:** Waters’ attorney argues that the trial court erred in ruling that the Georgia implied consent statute is not unconstitutional. The U.S. Supreme Court’s 2016 opinion in *Birchfield v. North Dakota* “provides very clear guidance that the Fourth Amendment allows warrantless breath tests, but as a general rule does not allow warrantless blood draws, incident to a lawful drunk-driving test,” the attorney argues. (The Fourth Amendment prohibits unreasonable searches and seizures.) The high court further found that the police failed to provide a justification for obtaining the more intrusive blood test without a warrant. The Georgia implied consent warning falsely informed Waters that she must submit to the warrantless blood test, contrary to the ruling in *Birchfield*, Waters’ attorney argues. The State cannot enforce submission to a blood test by threatening to suspend one’s license or use a person’s refusal to submit to the test as evidence against the person. The threat of a warrantless blood test as required by Georgia Code § 40-5-67.1 is unconstitutional in all its applications, Waters’ attorney contends. Furthermore, the Georgia Supreme Court in its 2017 decision in *Olevik v. State* and its 2015 decision in *Williams v. State* acknowledged that state-administered tests have constitutional implications but noted that many issues, such as the allegedly misleading nature of the Georgia implied consent scheme, have not been considered. The trial court also erred in finding that Waters gave voluntary consent to the blood test. Waters did not voluntarily consent because the information presented to her by the implied consent warning and the officer himself was inherently deceptive and indeed coerced. “It defies common sense, absent extraordinary circumstances, to conclude that a person voluntarily consented to a test when the person has been arrested, charged with a DUI, told that the law required submission to the test, told the refusal to test would be used against the person at trial, told that her property right in a driver’s license will be suspended for refusal, told that the officer dictates the type of test that must be conducted, and told she is in custody and going to jail,” the attorney argues in briefs. Finally, the trial court erred in holding that Waters voluntarily “acted” to provide evidence by submitting to the blood test, signing consent forms, and cooperating with the blood draw, Waters’ attorney argues. In its 1998 decision in *Price v. State*, the Georgia Supreme Court ruled that once a person is in custody, *Miranda* warnings must be given before any statement or act is admissible. Here, Waters was

compelled to provide evidence against herself in violation of the *Miranda* right against self-incrimination. Without any advisement of her *Miranda* rights, any evidence obtained should be inadmissible at trial.

The State, represented by the Cobb County Solicitor-General's office, argues that Georgia's implied consent law is not unconstitutional under the Fourth or Fifth Amendments to the U.S. Constitution or under the Georgia Constitution. "This Court [i.e. Georgia Supreme Court] conducted a thorough analysis of this exact issue in *Olevik* and determined implied consent is not coercive," the State argues in briefs. "Further, there is no evidence that the implied consent notice itself was coercive in this case." Immediately after Waters was arrested, the officer read her the implied consent notice and she agreed to take a blood test. "The State complied with the implied consent statute when the officer read the implied consent notice on the side of the road immediately following formal arrest," the State argues. The trial court also correctly determined that Waters voluntarily consented to the blood test as required by the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures. "A consent to search will be valid if the State proves by a totality of the circumstances that consent was freely and voluntarily given and officers did not use fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent." Among other arguments, the State also argues that Georgia's implied consent law is not unconstitutional under the Fifth Amendment to the Constitution, which prohibits forcing a person "to be a witness against himself." In conclusion, "The trial court was correct in holding a warrantless taking of blood via consent is not coerced under the United States Constitution or the Georgia Constitution," the State contends.

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