

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File Number: _____

STATE OF NORTH CAROLINA,)
)
v.)
)
DEFENDANT NAME,)
Defendant)

**MOTION TO SUPPRESS RESULTS
OF CHEMICAL ANALYSIS
AND TO DISMISS**

NOW COMES The Defendant, by and through counsel and moves the Court pursuant to N.C.G.S. §§ 15A-954 and 15A-972 et. al. (2010) to dismiss all charges in the above-referenced matter that resulted from a substantial and flagrant violation of her statutory and constitutional rights under N.C.G.S § 20-16.2 (2010); Amendment VI, U.S. Constitution; and Art. I, § 23, N.C. Constitution. In support of this motion, the Defendant shows unto the court the following:

I. FACTS

1. That the Defendant was arrested on suspicion of Driving While Impaired (DWI) on (DATE) at approximately (TIME) by Officer Smith of the (AGENCY) Police Department. The Defendant was subsequently transported to the City County Bureau of Investigation (CCBI) in order to perform further testing.

2. That the Defendant was advised of her rights under N.C.G.S. § 20-16.2, including her right to have a witness present to view the testing procedures, at approximately 12:16 a.m. on November 14, 2008.

3. That the Defendant indicated to Officer Smith that she wished to have a witness present. The Defendant called Mr. John Doe at 12:24 a.m. and requested that he come to CCBI to witness the testing procedures.

4. That while on his way to CCBI, Mr. Doe spoke with Officer Smith on the Defendant's cell phone and asked for directions.

5. That Mr. Does arrived at CCBI at approximately 12:45 a.m., called the Defendant's cell phone to make sure he was at the correct location, and spoke with the officer at the front desk. The officer at the front desk called Officer Smith in the testing room and informed him of Mr. Doe's presence. Mr. Doe was told that, according to Officer Smith, he was too late to act as a witness.

6. That the Defendant did not give her first breath sample until 12:57 a.m., approximately twelve (12) minutes after Mr. Doe had arrived. Mr. Doe was in the lobby at the time that the Defendant's breath test was administered and was not permitted to witness the procedures.

7. That the Defendant submitted to field sobriety tests at CCBI including the Walk and Turn and the One Leg Stand. Mr. Doe was not permitted to witness any of these tests.

8. That, after submitting to the tests at CCBI, the Defendant was unable to contact Mr. Doe until approximately 2:18 a.m.

II. DENIAL OF ACCESS TO A WITNESS TO A BREATH TEST IS A FLAGRANT VIOLATION OF DEFENDANT'S CONSTITUTIONAL AND STATUTORY RIGHTS AND REQUIRES DISMISSAL UNDER *FERGUSON*

9. That, pursuant to N.C.G.S. § 20-16.2(a)(6), administration of a breathalyzer test need only be delayed for thirty (30) minutes to allow a witness time to arrive. However, the test is not required to be administered within the 30 minutes and may be delayed further by the officer. *Pappas v. North Carolina Dep't of Motor Vehicles*, 42 N.C. App 497 (1979).

10. That N.C.G.S. § 20-16.2(a)(6) permits a person charged with DWI to select a witness "to view the *testing procedures remaining after the witness arrives.*" (emphasis added).

11. That the testing procedures remaining after Mr. Doe arrived include the administration of the entire breath test.

12. That, at a minimum, the denial of the right to select a witness to view the testing procedures requires that the results of the breath test be suppressed. *See, State v. Hatley*, N.C. App. LEXIS 1013 (2008), *State v. Shadding*, 17 N.C. App. 279 (1973), and *State v. Myers*, 118 N.C. App. 452 (1995) (granting defendant's motion to suppress breath test results based on violation of statutory right). *Compare, State v. Ferguson*, 90 N.C. App. 513 (1988).¹

13. That a trial court must dismiss the charges if it determines that “[t]he defendant’s constitutional rights have been flagrantly violated and there is such irreparable damage to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” N.C.G.S. § 15A-954(4) (2010).

14. That N.C. Const. Art. I Sec. 23 guarantees that “[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . .”

15. That the North Carolina Court of Appeals in *Ferguson* held that, “[t]he denial of access to a witness in this case -- when the State’s sole evidence of the offense is the personal observations of the authorities -- would constitute a flagrant violation of defendant’s constitutional right under N.C. Const. Art. I Sec. 23 as a matter of law and would require that the charges be dismissed.” *Ferguson* at 519.

¹ The defendants in *Hatley*, *Myers*, and *Shadding* moved to suppress based only on a violation of the statutory right and did not “contend that this is a constitutional right.” *Shadding*, *Supra*. Under *Ferguson*, the violation of the Constitutional right was addressed and dismissal of the charges was found to be the appropriate remedy based on that violation.

16. That the evidence supporting this conclusion in *Ferguson* was: (1) that the Defendant's wife may have arrived in time to witness the procedures under the statute; (2) that his wife was implicitly denied access to the Defendant upon arrival at the jail; and (3) that the Defendant was denied the opportunity to take the breath test in the presence of his chosen witness and obtain evidence for his defense. *Id.*

17. That in the present case, as in *Ferguson*, (1) Mr. Doe arrived before the breath test was administered, (2) Mr. Doe was denied access to the Defendant when he was told he was too late, and (3) the Defendant was denied the opportunity to have Mr. Doe observe the testing procedures as well as her condition and was thereby deprived of the opportunity to obtain evidence for her defense.

18. That the Defendant's statutory rights under N.C.G.S. § 20-16.2 were violated by the denial of access to a witness to view the testing procedures remaining upon the witnesses arrival. Therefore, the results of the breath test should be suppressed under *Hatley*, *Myers*, and *Shadding*. *Supra*.

19. That, additionally, the Defendant's Constitutional right to confront her accusers and witnesses with other testimony under N.C. Const. Art. I Sec. 23 was flagrantly violated when Officer Smith denied Mr. Doe access to the Defendant to view the testing procedures. Under *Ferguson*, this flagrant violation requires that the charges against the Defendant be dismissed. *Supra*.

**III. THE DENIAL OF ACCESS TO A POTENTIAL WITNESS DURING A
CRITICAL STAGE OF EVIDENCE GATHERING REQUIRES THAT THE
CHARGES BE DISMISSED UNDER HILL & KNOLL**

20. That in *State v. Hill*, 277 N.C. 547 (1971), the North Carolina Supreme Court held that denying a person charged with DWI the right to communicate with counsel and friends deprives him of the fundamental right to confront the State's witnesses with other testimony and amounts to irreparable prejudice per se.

21. That the North Carolina Supreme Court stated that when “intoxication is an essential element, time is of the essence. Intoxication does not last.” *Id.* Therefore, a defendant is “entitled to communicate with [witnesses] *immediately*[.]”*Id.*

22. That the *Hill* Court further recognized that “[p]ermission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner’s call are not permitted to see for themselves whether he is intoxicated.” *Id.* at 553.

23. That in *State v. Knoll*, 322 N.C. 535 (1988), the North Carolina Supreme Court addressed a situation in which the defendant was denied the right to a witness after the breath test had been performed. Since the results of the breath test in *Knoll* were admissible and sufficient in themselves to support a conviction, the Court required a showing of prejudice by the defendant.

(A) Prejudice Against the Defendant Should be Presumed

24. That the Court of Appeals has found that, where the results of a breath test would be inadmissible due to a violation of N.C.G.S. § 20-16.2(a), independent observations would be even more critical. Therefore, in such a case, the defendant’s inability to collect independent evidence would be akin to the factual scenario of *Hill*, where the Court adopted a per se prejudice rule. *State v. Gilbert*, 85 N.C. App. 594 (1987).

25. That the violation of the Defendant’s rights in the instant case affected the admissibility of the breath test results and therefore would properly be analyzed under *Hill*.² Therefore, prejudice against the Defendant should be presumed.

(B) The Defendant was Irreparably Prejudice by the Denial of Access to a Witness

26. That, even if the prejudice per se rule is not applied, the Defendant can make a showing of irreparable prejudice.

² The breath test should be suppressed for the reasons laid out in Section II. Therefore, observations that could have been made by Mr. Doe are even more critical under *Gilbert*.

27. That irreparable prejudice is established if the Defendant shows that “lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as a result of the statutory deprivations of which he complains.” *Knoll*, Supra. (citations omitted).

28. That, in requiring a showing of prejudice, the *Knoll* Court stated that a finding of irreparable prejudice was supported by the fact that the violations “came during the crucial period in which [the defendant] could have gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition . . .” *Id.*

29. That Mr. Doe waited at CCBI for approximately one hour and thirty three minutes from the time of his arrival until he was given access to the Defendant. During this time, Officer Smith administered field sobriety tests on the Defendant which Mr. Doe was not permitted to witness.

30. As in *Knoll*, the denial of access to Mr. Doe in the present case came during a crucial period in which the Defendant could have gathered evidence concerning the accuracy of the testing procedures, performance on the remaining field sobriety tests, and observations of her appearance and demeanor.

31. That the Defendant was irreparably prejudiced by her inability to collect evidence for her defense due to a substantial violation of her rights under N.C.G.S. § 20-16.2(a); Amendment VI, U.S. Constitution; and Art. I, § 23, N.C. Constitution.

32. That the substantial and flagrant violation of these rights requires that the charges against the Defendant be dismissed under *Hill* and *Knoll*.

WHEREFORE, the Defendant respectfully prays the Court the following relief:

1. That the results of the breath test be suppressed;
2. That all charges against the Defendant in the above-captioned matter be dismissed with prejudice;
3. For such further relief as the Court deems just and proper.

This the _____ day of _____, 2010.

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