IN THE SUPREME COURT
OF THE STATE OF GEORGIA

Case No. S21G0370

OMAR AWAD,

Appellant,

v.,

STATE OF GEORGIA,

Appellee.

BRIEF OF APPELLANT

COUNSEL FOR APPELLANT:

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APPELLANT'S BRIEF

PART 1

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Prior to jurors being sworn, the Appellant moved in limine to exclude evidence of the Appellant's refusal to submit to a post-arrest urine test that was requested pursuant to the Georgia implied consent notice. (MT – 2). The State stipulated that the motion was properly made as a motion in limine. (MT – 21). Based upon stipulated facts, the trial court granted the Appellant's motion to exclude evidence of the Appellant's refusal to submit to a post-arrest urine test. (MT – 40).

The relevant facts are straightforward: (1) the Appellant was arrested for DUI, (2) the Appellant was read the appropriate Georgia Implied Consent Notice, (3) the arresting officer requested a urine sample from the Appellant, and (4) the Appellant refused to consent to the requested urine test. (MT – 7-8, 35). At the motion hearing, the State argued to the trial court that:

> Well, and if I may, Your Honor, we don't get to that point because an officer treats him – when the officer asks for implied consent, he's not waiting four hours for him to give it. The defendant is either going to say yes or no, I'm going to provide a urine same. If he says no, then it's treated as a refusal, which is where we're at in this particular case.

(MT – 7).

No warrant for the Appellant's urine specimen was obtained by the State, and the Appellant's urine sample was not sought by use of a catheter. (MT – 5).

The Appellant argued that his refusal to submit to a urine test should be excluded from evidence because the production of a urine sample is an act protected by the self-incrimination clause of the Georgia Constitution and, therefore, cannot be introduced against him. The trial court granted the Appellant's motion in limine to exclude evidence of the Appellant's refusal to submit to a post-arrest urine test. (MT – 40). In its oral findings of fact, the trial court found that the self-incrimination clause of the Georgia Constitution protected the Appellant's refusal to submit to a urine test because "[y]ou could hold a cup in front of him and you can't make him urinate. He is not going to naturally urinate. You have to wait and he has to voluntarily release the sphincter …. He must voluntarily release the sphincter in order to produce a urine sample which could be self-incriminating. That's all I can say." (MT – 43). The trial court entered a written order adopting its oral findings of fact and ruling made on the record. (MT – 75).

PART 2

JURISDICTIONAL STATEMENT

On May 3, 2021, this Honorable Court entered an order granting the Appellant's petition for a writ of certiorari from the ruling of the Court of Appeals in Case No. A20A1490.

ENUMERATION OF ERROR

The Court of Appeals erred in reversing the order of the trial court excluding the Appellant's refusal to submit to a urine test. The trial court found that the urine test requested in this case would have required the Appellant to perform the act of relaxing the sphincter muscles of his bladder, and, therefore, properly held that the requested act was protected by the Georgia Constitution's self-incrimination clause.

PART 3

STANDARD OF REVIEW

"[W]here the facts relevant to a suppression motion are undisputed, the proper standard of review on appeal is de novo, not clearly erroneous." *State v. Underwood*, 283 Ga. 498, 500, 661 S.E.2d 529, 531 (2008).

ARGUMENT AND CITATION OF AUTHORITY

The trial court found that the urine test requested in this case would have required the Appellant to perform the act of relaxing the sphincter

muscles of his bladder, and, therefore, properly held that the requested act was protected by the Georgia Constitution's self-incrimination clause. The State acknowledged that the urine test in this case required the Appellant to voluntarily provide a sample at the request of the law enforcement office. At the motion hearing, the State argued to the trial court that:

> Well, and if I may, Your Honor, we don't get to that point because an officer treats him – when the officer asks for implied consent, he's not waiting four hours for him to give it. The defendant is either going to say yes or no, I'm going to provide a urine same. If he says no, then it's treated as a refusal, which is where we're at in this particular case.

(MT – 7).

In determining whether the self-incrimination provision of the Georgia Constitution is implicated, our courts have consistently examined whether evidence is obtained as a result of a compelled affirmative act. *Elliott v. State*, 305 Ga. 179, 206, 824 S.E.2d 265, 284–85 (2019). Those instances in which a defendant must perform a physical action in order to allow the government to obtain evidence have continuously been held to implicate the Georgia Constitution's right against self-incrimination:

- a breath test is an act incriminating in nature and, therefore, Paragraph XVI prohibits the State from compelling such a test. *Elliott v. State*, 305 Ga. 179, 189, 824 S.E.2d 265, 273

(2019), citing *Olevik v. State*, 302 Ga. at 235-246 (2) (c), 806 S.E.2d 505;

- requiring a defendant to place his foot in footprints located near a crime scene violated the right against self-incrimination. *Day*, 63 Ga. at 668-669 (2).
- requiring a defendant to stand up during trial so that his amputated leg could be observed violated the right against self-incrimination. *Blackwell*, 67 Ga. at 78-79 (1).
- requiring a defendant to drive his truck onto scales violated the right against self-incrimination. *Aldrich*, 220 Ga. at 135, 137 S.E.2d 463.
- requiring a defendant to produce a handwriting exemplar violates the self-incrimination provision. *Brown*, 262 Ga. at 836 (10), 426 S.E.2d 559 (1993).

The mere removal of evidence from a defendant is not protected by the right against self-incrimination. *Elliott*, 305 Ga. at 206. "[T]he right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him." *Olevik v. State*, 302 Ga. 228, 242, 806 S.E.2d 505, 517 (2017), citing *Batton v. State*, 260 Ga. 127, 130 (3), 391 S.E.2d 914

(1990). Those cases in which evidence is obtained from a defendant's person but do not require an action by the defendant have been consistently held not to implicate the right against self-incrimination:

- removing clothing from a defendant does not violate the right against self-incrimination. See, e.g., id. (taking shoes from defendant); *Drake v. State*, 75 Ga. 413, 414-415 (2) (1885) (taking blood-stained clothes from defendant); *Franklin v. State*, 69 Ga. 36, 43-44 (3) (1882) (pulling boots off a defendant).
- when evidence is taken from a defendant's body or photographs of the defendant are taken the right against self-incrimination is not implicated. See, e.g., *Quarterman v. State*, 282 Ga. 383, 386 (4), 651 S.E.2d 32 (2007) (statutory requirement that convicted felon provide DNA sample did not violate his right against compelled self-incrimination because it does not force the convicted felon to remove incriminating DNA evidence from his body himself but only to submit to having the evidence removed); *Ingram v. State*, 253 Ga. 622, 634 (7), 323 S.E.2d 801 (1984) (right was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body); *State v. Thornton*, 253 Ga. 524, 525 (2), 322 S.E.2d 711 (1984) (taking impression of defendant's

teeth did not compel defendant to perform an act); *Strong*, 231 Ga. at 519, 202 S.E.2d 428 (withdrawal of blood from unconscious defendant did not violate right); *Creamer v. State*, 229 Ga. 511, 517-518 (3), 192 S.E.2d 350 (1972) (right not violated where defendant required to undergo surgery to remove a bullet from his body because the defendant was not forced to remove the bullet himself).

The trial court found that the procedure by which a urine sample was requested in this case required the Appellant to perform the overt act of relaxing his sphincter muscles to produce a urine sample. Based on the facts submitted by the State, the trial court found that "[y]ou could hold a cup in front of [the Appellant] and you can't make him urinate. He is not going to naturally urinate. You have to wait and he has to voluntarily release the sphincter …. He must voluntarily release the sphincter in order to produce a urine sample which could be self-incriminating." (MT – 43). It was also undisputed that the urine sample was not to be drawn by a catheter from the Appellant, and it was requested that the Appellant produce the sample through the excretion of urine.

This Honorable Court's decision in *Green v. State,* 260 Ga. 625 (1990), should be reconsidered in light of *Olevik* and *Elliott*.

The Court of Appeals relied upon *Green v. State*, 260 Ga. 625, 626, 398 S.E.2d 360, 362 (1990), for the proposition that a defendant's performance of the act of producing a urine sample is not protected by the self-incrimination clause of the Georgia Constitution. In *Green*, this Court held that the self-incrimination clause was not applicable to a urine test because urine is a substance naturally excreted by the human body. 260 Ga. at 627 (2), 398 S.E.2d 360. If the self-incrimination clause does not apply to a substance naturally excreted from the body, *Olevik* and *Elliott* were decidedly incorrectly.

However, it is *Green* – not *Olevik* and *Elliott* – that is inconsistent with this Court's interpretation of the self-incrimination clause of the Georgia Constition. *Green* contains virtually no analysis of the law applying Georgia's self-incrimination clause. The Court in *Green* did not consider whether law enforcement merely collected the urine specimen or whether the defendant was required to produce the sample at the request of law enforcement. In *Green*, there was no consideration of how the defendant's urine sample was obtained. If the Court in *Green* had considered that the suspect "was required to provide a urine sample to law enforcement

officers upon request", *Green* likely would have been decided differently under the analysis in *Olevik*.

In *Olevik*, this Honorable Court observed that "for the State to be able to test an individual's breath for alcohol content, it is *required* that the defendant *cooperate* by *performing an act*." And, "[c]ompelling a defendant to perform an act that is incriminating in nature is precisely what Paragraph XVI prohibits. 302 Ga. 228, 244, 806 S.E.2d 505, 518–19 (2017), citing *Calhoun*, 144 Ga. at 681, 87 S.E. at 893 (the right against compelled self-incrimination protects one from "doing an act against his will which is incriminating in its nature").

Given that the defendant in *Green* was required to perform the act of providing a urine sample, the self-incrimination clause of the Georgia Constitution should have been applicable to the urine test there. Likewise, in this case, because the urine test required the Appellant to cooperate and perform an act, the trial court properly determined that the self-incrimination clause was applicable and the Appellant's refusal to provide the urine sample was inadmissible at trial under *Elliott.*

CONCLUSION

For the foregoing reasons, the Appellant respectfully asks that this Honorable Court reverses the ruling of the Court of Appeals in Case No. A20A1490.

RESPECTFULLY SUBMITTED, this 24th day May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing Brief of Appellant to the Whitfield County District Attorney's Office by depositing same in U.S. mail with sufficient first class postage affixed thereon to ensure delivery to:

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RESPECTFULLY SUBMITTED, this 24th day May, 2021.

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