IN THE SUPREME COURT OF FLORIDA

KENDRA SUE MACIAS, Petitioner, vs STATE OF FLORIDA, Respondent.	)	CASE NO. 68,440

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the County Court of the Seventeenth Judicial Cricuit, in and for Broward County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

On May 14, 1982, Petitioner was charged by information with driving while under the influence of alcoholic beverages and unlawful blood alchohol level (Appendix, Exhibit I).

Petitioner was found guilty as charged by the jury on April 28, 1983 (Appendix, Exhibit III, page 1-2).

On May 8, 1985, Petitioner's conviction was reversed by the Circuit Court in and for Broward County, Florida.

Respondent then filed a petition for writ of common law certiorari on June 7, 1985. The Fourth District Court of Appeal granted certiorari and quashed the order of the Circuit Court on January 22, 1986.

Petitioner, on January 29, 1986, filed a petition for rehearing and motion to certify conflict. On February 12, 1986, the Fourth District Court of Appeal denied the petition for rehearing and motion to certify conflict. Mandate was issued on February 28, 1986.

Petitioner filed a notice to invoke discretionary jurisdiction on March 5, 1986. This Honorable Court accepted jurisdiction June 24, 1986.

STATEMENT OF THE FACTS

Petitioner, Kendra Sue Macias, was charged by information filed May 14, 1982, with driving while under the influence of alcoholic beverages and unlawful blood alcohol, contrary to §313.193, Fla.. Stat. (Appendix, Exhibit 1).

Petitioner's case came on for trial on April 27, 1983 (Appendix, Exhibit II, pages 1 to 119) and April 28, 1983 (Appendix, Exhibit II, pages 120-211).

At trial, Officer Howard Fox, of the Davie Police Department (Appendix, Exhibit II, page 3), testified that at approximately 4:30 in the morning on April 30, 1982, he observed Petitioner driving in an erratic manner, swaying from lane to lane (Appendix, Exhibit II, pages 4 and 5). He testified that he pulled Petitioner over at which time he smelled the odor of an alcoholic beverage upon her person (Appendix, Exhibit II, page 7). Officer Fox testified that Petitioner was very wobbly, had slurred speech, bloodshot eyes, and alternated between laughing and crying (Appendix, Exhibit II, page 12). Officer Fox testified that in his opinion, Petitioner was impaired to the degree that her normal faculties were impaired (Appendix, Exhibit II, page 66).

Officer Fox testified that he gave Petitioner the roadside sobriety test by administering the heel to toe test, the balance test, and the finger to nose test (Appendix, Exhibit II, pages 16 and 17). He testified that Petitioner failed these tests as she was unable to

perform them (Appendix, Exhibit II, pages 21 and 22). The trial court then compelled Petitioner to perform the roadside sobriety tests in court (Appendix, Exhibit II, pages 26 to 29), pursuant to the prosecutor's request and citation of Lusk v. State, 367 So.2d 1088,(Fla. 3d DCA 1979)(Appendix, Exhibit II, page 19). The trial court stated that it understood the demonstration was in no way a reconstruction of what Petitioner's faculties were on the date in issue (Appendix, Exhibit II, page 20) and would not allow the arresting officer to comment on the manner in which Petitioner performed the test (Appendix, Exhibit II, page 27).

Karen Perez, a police aide with the town of Davie (Appendix, Exhibit II, page 96), testified that she obtained a sample of Petitioner's breath when Petitioner blew into a breathalyzer machine (Appendix, Exhibit II, page 130). She testified that Petitioner's blood alcohol reading was .19 percent (Appendix, exhibit II, page 132).

The jury found Petitioner guilty as charged (Appendix, Exhibit II, pages 206 and 207; Appendix, Exhibit III) and she was so adjudicated by the trial court (Appendix, Exhibit II, page 208).

On appeal, the circuit court issued its opinion reversing Petitioner's convictions and remanding for a new trial on the ground that Petitioner, by being compelled to perform the roadside sobriety tests in court, was unconstitutionally compelled to be a witness against herself (Appendix, Exhibit IV).

SUMMARY OF ARGUMENT

Respondent maintains that the trial court was correct in compelling Petitioner to perform roadside sobriety tests and state her name in court, in the presence of the jury. The performance of these tests was not testimony or communication which is privileged under the Fifth Amendment.

Petitioner was compelled to state her name in the presence of the jury to ascertain the physical characteristics of her voice, not the content of what she said. Thus, according to Untied States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and the other cases cited herein, Petitioner's privilege against self incrimination was not violated by stating her name.

Likewise, being compelled to perform roadside sobriety tests in order to show the jury that Petitioner's normal faculties are, was not violative of the privilege. Petitioner was merely compelled to become a source of real or physical evidence. As stated in Schmarbar v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d (1966) and the other cases cited herein, this situation is not one which invokes Petitioner's privilege against self incrimination, as it was neither testimonial nor communicative.

Respondent would also suggest that if this Honorable Court found the trial court to have erred in admitting the evidence in issue, that it has been deemed to be harmless error. State v. Marshall, 476 So.2d 159 (Fla. 1985).

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT IN COMPELLING PETITIONER TO PERFORM CERTAIN ROADSIDE SOBRIETY TESTS AND STATE HER NAME IN THE PRESENCE OF THE JURY WHEN SUCH TESTS WERE NEITHER COMMUNICATIVE NOR TESTIMONIAL?

ARGUMENT

THE TRIAL COURT WAS CORRECT IN COMPELLING PETITIONER TO PERFORM CERTAIN ROADSIDE SOBRIETY TESTS AND STATE HER NAME IN THE PRESENCE OF THE JURY WHEN SUCH TESTS WERE NEITHER COMMUNICATIVE NOR TESTIMONIAL.

Petitioner contends that the trial court erred in compelling her to perform certain roadside sobriety tests, and a voice test, in open court. The roadside sobriety tests were the same as those administered by the police officer on the night Petitioner was arrested. According to Petitioner, the compelling of these tests before a jury was a violation of her privilege against self-incrimination. Respondent maintains that the trial court was correct in allowing these tests to be performed in open court as they were neither testimonial nor communicative as contemplated by the Fifth Amendment of the United States Constitution.

The leading case in which the United States Supreme Court determined what is testimonial or communicative, and therefore privileged under the Fifth Amendment, is Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d (1966). It was this case that the court held a blood test taken from the defendant through compulsion, and used as evidence against him, was not privileged under the Fifth Amendment. The court, quoting from Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed.1021 stated:

> The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion

> to extort communications from him, not an exclusion of his body as evidence.

The State was using Petitioner's "body as evidence" when it compelled her to state her name and perform certain roadside sobriety tests at the direction of the arresting police officer, who was testifying at the time.

In its discussion of the policies underlying the need for the privilege, the court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 715 (1966) said as follows:

> All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government-state or federal - must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load, ..., to respect the 'inviolability of the human personality, our accusatory system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by cruel, simple expedient of compelling it from his own mouth.

In Schmerber, the court, referring to the above-quoted passage from Miranda said:

> The privilage has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through 'the cruel, simple expedient of compelling it from his own mouth ...'

There is no doubt a person brought before a court would feel compelled to submit to the direction of a judge as was the Petitioner in the instant case. Respondent would suggest that after reading the prior quote from Schmerber and that from Holt, in light of the facts in this case, the Petitioner was not compelled in a Fifth Amendment sense which deserves the protection of the privilege against self-incrimination.

As the court in Schmerber concluded, it is the compelling of communications or testimony for which the privilege was meant to protect, not a "compulsion which makes the accused the source of real or physical evidence." Schmerber, supra. Some examples of where the privilege does not protect are: fingerprinting, photographing, measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, or to make a particular gesture. Id. supra.

Petitioner was asked by the judge, after a request by the state attorney to state her full name in the presence of the jury (Appendix, Exhibit II, page 13). The purpose for this was for the arresting police officer to make a comparison of Petitioner's present voice, with the way he recalled it the night of the arrest. Petitioner was not asked to state her guilt. She was only to state her name which, according to the facts, is not a communication (Appendix, Exhibit II, page 13). It was only done for comparison purposes, not for the content of what Petitioner said. (R 13).

In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) the defendant was compelled to say the words allegedly used by the robber within hearing distance of the witnesses. The court held that these statements were not testimonial or communicative. Rather, it was used to identify the physical characteristics of the defendant's voice. Wade, 388 U.S. at 222.

Similarly in United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) the court held that the giving of a voice example for identification purposes was not within the protection of the privilege against self-incrimination. This Honorable Court held that compelling an accused to speak the words spoken by the extortionist would not have violated his rights. Therefore, in refusing to speak, the defendant was not exercising his privilege not to incriminate himself. Clark v. State, 379 So.2d 97 (Fla. 1979). See also Lusk v. State, 367 So.2d 1088 (Fla. 3d DCA 1979) and Lacey v. State, 239 So.2d 628 (Fla. 2d DCA 1970). The Fourth District Court, in the instant case stated that "... there is no question that the words Respondent was compelled to utter in court were used only to ascertain the physical properties of her voice and not for the content of what she said (only her name). State v. Macias, 481 So.2d 979, 982 (Fla. 4th DCA 1986). Certainly, compelling Petitioner to perform roadside sobriety tests in court, in order to determine Petitioner's normal faculties, is no different than the voice cases above.

Petitioner alleges that by being compelled to perform the various tests, she in effect was aiding the State in proving part of their case against her. The reason being, that the State had to prove beyond a reasonable doubt that Petitioner's normal faculties were impaired by alcohol. By performing the tests, Petitioner was showing the jury what her normal faculties were, which in effect lessened the State's burden of proof. The problem with this argument is that the State does not have to prove that Petitioner has normal faculties, but only that her normal faculties were impaired by alcohol. There is a burden in Florida that each accused is "presumed to have the normal faculties of mankind in general until such time as the defendant presents evidence that his normal condition is so different as to mislead strangers." City of Orlando v. Ford, 220 So.2d 661, 663 (Fla. 4th DCA 1969). If the defendant presents such evidence, then the burden of persuasion as to the defendant's normal faculties is on the State. Ford, supra; Parkins v. State, 238 So.2d 817 (Fla. 1970). There was no attempt on the part of Petitioner to rebut this presumption.

The Fourth District Court of Appeal expressed disagreement with the decisions of the Third District Court of Appeal in Machin v. State, 213 So.2d 499 (Fla. 3d DCA 1968) and Wells v. State, 468 So.2d 1087 (Fla. 3d DCA 1985). In Machin the defendant wanted to demonstrate his running gait to the jury by running across the courtroom. The

court ruled this way because they felt under the specific circumstances set forth in that case, that such would have been a form of testimony presented by the defendant to the jury. Machin, 213 So.2d at 501. Wells is similar in that the defendant wanted to display the tattoos on his arms to the jury. The court, citing Machin, affirmed the trial court's decision to allow this display if defendant would subject himself to cross-examination. The Fourth District Court of Appeal in Macias felt that both tattoos and running gait are physical characteristics which are non-communicative and do not become testimonial merely because they tend to prove or negate defendant's guilt. Macias, 468 So.2d at 982. Respondent contends, and the Fourth agrees, that Machin and Wells are incorrect as to their viewing these displays before the jury as testimony.

In addition, Machin and Wells are distinguishable from the instant case. In both cases it was the defendant who requested to make the displays before the jury. The defendant was not compelled to testify, and so the Fifth Amendment privilege against self-incrimination did not apply.

Here, the State via the Court, compelled the Petitioner to state her name and perform the sobriety tests. Because Petitioner was compelled, the question then becomes whether what she did was communicative or testimonial. If it is not, as Respondent contends, then the privilege is inapplicable. And in State v. Edwards, 463 So.2d 551 (Fla. 5th DCA 1985)

the Fifth District Court of Appeal held that:

> A blood test is not testimonial evidence or a communication protected by the Fourth or Fifth Amendment .... Likewise, the field sobriety test is not a communication protected by the statute. [1]

Id. at 554. Petitioner contends that the sobriety tests in State v. Edwards were not privileged because they were not compelled by the statute. This is not the case. The reason the tests are not considered to be within the privilege is because they are not testimonial or communicative. Therefore, as the Fourth District Court of Appeal put it, "If the performance of these tests at the scene is not a communication, the same is ipso facto true of performance of the identical tests in court." Macias, 468 So.2d at 982. The South Dakota Supreme Court held that dexterity tests are physical evidence and not protected by the privilege against self-incrimination. State v. Roadifer, 346 N.W.2d 438 (1984). See also, State v. Hoenscheid, 38 Crim.Law. Rptr. 2033 (September 6, 1985).

In Thomas v. State, 439 So.2d 246 (Fla. 5th DCA 1983) the defendant moved the court to allow him to display his upper body to the jury without being subjected to cross-examination. The trial court denied the motion and the Fifth District Court of Appeal affirmed.

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[1] §316.066(4) Fla. Stat. (Supp. 1982).

In affirming, the court said the physical display that the defendant was suggesting would not be testimonial. See also United States ex rel. Mitchell v. Pinto, 438 F.2d 814 (1971). But that does not in turn mean it is automatically admissible without some qualifying predicate to determine its relevance.

First, there is no problem with relevance as to the demonstration by Petitioner in the instant case. The judge determined that it was relevant to show what Petitioner's normal faculties are (Appendix, Exhibit II, page 20). Second, counsel for Petitioner did not object to relevance at trial. This Honorable Court, in Castor v. State, 365 So.2d 701 (Fla. 1978), held that "to meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review." Id. at 703. Respondent would suggest that Petitioner did not preserve the issue of relevance for appeal. Therefore, according to Thomas, Petitioner being compelled to perform the tests did not violate her Fifth Amendment privilege against self-incrimination where the display was neither testimonial nor communicative.

If this Honorable Court was to find that the tests, as performed by Petitioner, were testimonial or communicative, it would be receding from established precedent. Petitioner alleges that because the evidence at issue would

aid the State in proving its case, it should be inadmissible. If this was the state of the law today then blood samples, fingerprinting, speaking for identification, and appearances at lineups would no longer be admissible simply because they are using the accused to aid the State in proving their case. The possible prejudice to the accused anytime evidence is introduced against him, is that it may influence or sway the jury to find him guilty.

Petitioner also submits, even if this Honorable Court determines that the trial court erred in admitting the evidence at issue, that the Fourth District Court of Appeal's decision should be affirmed by applying the harmless error doctrine. In State v. Marshall, 476 So.2d 150 (Fla. 1985) this Court has applied the harmless error rule to cases in which there have been comments on an accused's failure to testify. Respondent suggests that the situation in the instant case is analogous to these cases involving improper comment on the accused's failure to testify.

The State has the burden to prove beyond a reasonable doubt that the error complained of was harmless. It is clear from the record that there was overwhelming evidence of the Petitioner's guilt. The Petitioner was stopped by Officer Fox of the Davie Police Department. The officer observed Petitioenr driving in an erratic manner, swaying from lane to lane (Appendix, Exhibit II, page 5).

Once Petitioner stopped her vehicle, the officer approached her and smelled the odor of an alcoholic beverage

(Appendix, Exhibit II, page 7). Petitioner appeared to the officer to be wobbly, she had slurred speech, bloodshot eyes, and would cry then laugh (Appendix, Exhibit II, page 12).

At the state attorney's request and over objection, the court directed Petitioner to state her name in order to show her voice characteristics (Appendix, Exhibit II, page 13). The officer testified that her voice had a "distinct quality today" and was slurred when he stopped her (Appendix, Exhibit II, page 14-15). Petitioner's eyes were bloodshot (Appendix, Exhibit II, page 15). The officer administered certain roadside sobriety tests (Appendix, Exhibit II, page 18). First he adminstered the balance test, then the finger to nose test, and the heel to toe test (Appendix, Exhibit II, page 18). The officer concluded the Petitioner failed all three tests (Appendix, Exhibit II, page 21-22). Petitioner did the same tests a second time with her shoes off (Appendix, Exhibit II, page 22). She failed all three tests again.

At the State's request, the court compelled Petitioner to perform the roadside sobriety tests in court (Appendix, Exhibit II, page 19). The court stated that this being done only to show what Petitioner's normal faculties are, and not a reconstruction of what occurred then on the date in issue (Appendix, Exhibit II, page 20). The officer was not permitted to comment on the manner in which Petitioner

performed the tests (Appendix, Exhibit II, page 27).

Karen Perez, a police aide with the Davie Police Department, testified that she obtained a sample of Petitioner's breath when Petitioner blew into a breathalyzer machine (Appendix, Exhibit II, page 130). Officer Perez testified that Petitioner's blood alcohol content was .19 percent. Officer Perez also testified that she concluded that Petitioner was under the influence of alcohol to the extent that her normal faculties were impaired (Appendix, Exhibit II, page 133).

Clearly, from the record in this case, the State has met its burden of proof with respect to applying the harmless error rule. See Marshall, supra and State v. DiGuilio, 11 F.L.W. 339 (Fla. 1986). Therefore, the Fourth District Court of Appeal was correct in quashing the Circuit Court's order.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished, by United States Mail, to FRED HADDAD, ESQUIRE, Sandstrom & Haddad, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 4th day of August, 1986.

Of Counsel