IMPORTANT CASELAWS

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2003-KM-02179-COA

HENRY ADAMS **APPELLANT**

v.

CITY OF BOONEVILLE, MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	6/27/2003
TRIAL JUDGE:	HON. SHARION R. AYCOCK
COURT FROM WHICH APPEALED:	PRENTISS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KENNETH E. FLOYD, II
ATTORNEY FOR APPELLEE:	WILLIAM W. SMITH
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
TRIAL COURT DISPOSITION:	VERDICT OF GUILTY OF DRIVING UNDER THE INFLUENCE, FIRST OFFENSE, ORDERED TO PAY A FINE OF $518.50, PLUS STATE ASSESSMENTS IN THE AMOUNT OF $208.50, AND ORDERED TO ATTEND THE MISSISSIPPI ALCOHOL SAFETY EDUCATION CLASSES
DISPOSITION:	AFFIRMED - 3/22/2005
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BRIDGES, P.J., IRVING AND MYERS, JJ.

MYERS, J., FOR THE COURT:

¶1. On January 1, 2003, Henry Adams was charged with driving under the influence ("DUI"), first offense. On May 8, 2003, Adams was convicted of DUI, first offense, in the municipal court of Booneville. Adams appealed that conviction to the Circuit Court of Prentiss County. On June 26, 2003, the circuit court conducted a de novo trial, and on June 27, 2003, the circuit court also found Adams guilty of DUI, first offense.

¶2. Aggrieved by his conviction, Adams now appeals, raising the following single issue:

DID THE CIRCUIT COURT ERR IN RULING THAT THERE WAS REASONABLE SUSPICION FOR THE STOP OF ADAMS'S VEHICLE?

FACTS

¶3. Officer Brad Taylor, and Reserve Officer Jeremy Pace were on patrol in Booneville on New Year's Eve and the early hours of New Year's Day. At around 2:30 a.m., Officer Taylor noticed that a vehicle, traveling northward on Hwy 145, was riding in the middle of the two northbound lanes. This particular road is a four lane road. Thus, the vehicle was riding in the middle of two lanes that were headed in the same direction, and there was no danger to any oncoming, south bound vehicles. According to Officer Taylor, there was nothing else about the vehicle or the way it was being driven to excite his suspicions other than the fact that he observed it driving down the middle of two lanes of traffic. Reserve Officer Pace, however, did testify that he saw the vehicle swerve in the road. Officer Taylor turned his patrol car around and proceeded to make a traffic stop in order to issue a citation for careless driving. By the time Officer Taylor turned his car around and made it into the northbound lane, the vehicle was in the left lane, preparing to make a left turn into a gas station.

¶4. At the gas station, when the stop was made, Adams, the driver of the vehicle, got out of his car and approached Officer Taylor. As Adams neared, Officer Taylor noticed the scent of alcoholic beverage about the person of Adams. In addition, Officer Taylor testified that Adams's speech was slurred and that Adams had some difficulty keeping his balance. Based upon these circumstances, Officer Taylor suspected that Adams was intoxicated. Officer Taylor then proceeded to administer three field sobriety tests, none of which Adams passed. Due to his faulty performance on the field sobriety tests, Adams was taken to the justice center and given an Intoxilyzer test. Adams's alcohol level registered as .172, well in excess of the legal limit of .08. Based upon the results of the intoxilyzer test, Adams was charged with DUI, first offense.

LEGAL ANALYSIS

DID THE CIRCUIT COURT ERR IN RULING THAT THERE WAS REASONABLE SUSPICION FOR THE STOP OF ADAMS'S VEHICLE?

¶5. Adams argues that the stop was illegal, because there was no objective reason for the officer to stop the vehicle, and he maintains that he did nothing more than make the legal maneuver of changing lanes. Adams argues further that, objectively, there were no facts that should have given rise to a reasonable suspicion that a traffic violation or other crime had been or was being committed.

¶6. The City argues that, based upon what he observed, Officer Taylor had a reasonable belief that the traffic violation of careless driving had occurred and, therefore, there was probable cause for the stop of Adams's vehicle.

STANDARD OF REVIEW

¶7. For assignments of error challenging a trial court's judgment on reasonable suspicion and probable cause we employ de novo review. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (¶11) (Miss. 1999). In addition, we "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* Thus, while we review the lower court's legal conclusions on probable cause and reasonable suspicion de novo, we must accept the fact findings that led the lower court to that legal conclusion unless there is clear error in those fact findings. *Id.*

DISCUSSION

¶8. The case of *Floyd v. City of Crystal Springs*, cited above, very clearly states the law in Mississippi on the question of probable cause for traffic stops. The *Floyd* court declared:

> The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest. This Court has recognized that "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest," that is, on less information than is constitutionally required for probable cause to arrest. *Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975). *See also McCray v. State*, 486 So. 2d 1247, 1249 (Miss. 1986). Such an investigative stop of a suspect may be made so long as an officer has "a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a felony. . . ." *McCray*, 486 So. 2d at 1249 (quoting *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 680, 83 L.Ed.2d 604, 612 (1985)), or as long as the officers have "some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." *McCray*, 486 So. 2d at 1249-50 (quoting *Cortez*, 449 U.S. at 417, 101 S.Ct. at 695).
>
> The United States Supreme Court approved this investigatory procedure in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In determining whether there exists the requisite "reasonable suspicion, grounded in specific and articulable facts," the court must consider whether, taking into account the totality of the circumstances, the detaining officers had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417- 18, 101 S.Ct. at 694-95 (citing *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979)).

Floyd, 749 So. 2d at114-15 (¶¶16-17). In a somewhat condensed fashion, we have also stated this standard as follows:

> [T]he test for probable cause in Mississippi is the totality of the circumstances . . . . It arises when the facts and circumstances with an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.'

Harrison v. State, 800 So. 2d 1134, 1138 (¶18) (Miss. 2001) (quoting *Conway v. State*, 397 So. 2d 1095, 1098 (Miss. 1980)).

¶9. Having reviewed above the general law on probable cause for traffic stops, as stated in *Floyd* and *Harrison*, we now turn to the particulars of the present case. The statute under which Adams was stopped reads in relevant part:

> Any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving. Careless driving shall be considered a lesser offense than reckless driving.

Miss. Code Ann. § 63-3-1213 (Rev.2004). Adams's driving in the middle of the two northbound lanes constituted, in Officer Taylor's opinion, a violation of this statute.

¶10. We have previously addressed challenges to stops based on Mississippi Code Annotated §63-3-1213. In one recent case we held that "[c]arelessness is a matter of reasonable interpretation, based on a wide range of factors." *Henderson v. State,* 878 So. 2d 246, 247 (¶8) (Miss. Ct. App. 2004). In the *Henderson* case we also noted, "As a general rule, 'the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'" *Henderson*, 878 So.2d at 247 (¶7) (quoting *Whren v. U.S.,* 517 U.S. 806, 810 (1996)). Applying these two principles to the particular facts of that case, the *Henderson* court held:

> The officer witnessed the vehicle that Henderson was driving approach the curb twice. This indicates that Henderson was driving without due regard for the width and use of the street. The officer's observations were enough for him to determine that careless driving had taken place.
>
> Further, this Court has determined that failure to have regard for the width and use of the street by swerving off the side of the road or crossing the marker lines constitutes probable cause for a traffic stop.

Henderson, 878 So.2d at 247 (¶¶7-8). Thus, in the *Henderson* case, the fact that the officer observed the vehicle approached the curb twice was held to provide probable cause for a traffic stop for careless driving. The stop ultimately revealed that Henderson had a blood alcohol content above the legal limit and later led to Henderson's conviction for possession of cocaine.

¶11. Approaching a definition of the kind of driving that will violate the careless driving statute, our supreme court has observed, "T]he [careless driving] statute echoes the familiar tort law standard, requiring

that drivers on Mississippi roads exercise the same standard of care as a prudent person would in the same circumstances." *Leuer v. City of Flowood*, 744 So.2d 266, 270 (¶14) (Miss. 1999). This principle from the *Leuer* case sheds some light on the kind of driving that may justifiably prompt an officer to make a stop under Miss. Code Ann. § 63-3-1213.

¶12. The *Leuer* case is also helpful because of its factual similarity to the case *sub judice*. In *Leuer* the court found:

> Officer Harper had a reasonable suspicion that Leuer was driving "under the influence" when he observed Leuer run off the road onto the shoulder, make a left turn and then go out into the middle of the roadway at 2:30 a.m. Once Leuer pulled over, Harper observed that Leuer smelled strongly of alcohol and had glassy eyes and difficulty speaking. Harper opined that Leuer was "under the influence" of intoxicating liquor. Leuer admitted having alcoholic drinks earlier in the evening, but predictably denied having anything else since 10:30 p.m.

Leuer, 744 So.2d at 269 (¶12). As the quote above demonstrates, the facts of the *Leuer* case are very similar to the facts in the case *sub judice*. In *Leuer*, an officer observed some driving irregularities, or driving that did not appear to conform with driving of prudent and, presumably, sober persons in the same circumstances (going off the road onto the shoulder and traveling in the middle of the roadway), very late at night (or very early in the morning, depending upon how one measures the hour). *Id.* Also, after the stop the driver of the vehicle exhibited signs of intoxication and admitted to having drunk alcoholic beverages earlier in the evening. *Id.* These facts were held to constitute a legal stop for careless driving, and the subsequent charge and conviction of driving under the influence was upheld. *Id.* at 270 (¶16).

¶13. Here, in the case *sub judice*, Officer Taylor observed, very late at night (at 2:30 a.m.) one of the specific driving irregularities mentioned in the *Leuer* case: driving in the middle of the road. In addition, after the stop, Adams exhibited signs of intoxication and admitted to having drunk alcoholic beverages

earlier in the evening. Thus, the holding and the analysis found in the *Leuer* case support affirming the judgment of the circuit court in the case *sub judice*.

¶14. As something of a sub-argument, Adams contends that since he was acquitted of the careless driving charge in municipal court, this proves that there was no probable cause or reasonable suspicion to stop him. In making this argument, however, Adams misunderstands our law on this subject. Our supreme court has held that probable cause may be present even if the officer turns out to have based his conclusions on a mistake of law. The case of *Harrison v. State*, 800 So. 2d 1134 (Miss. 2001), sets forth this principle.

¶15. In *Harrison*, the court declared that a good faith, reasonable belief that a traffic law has been violated may give an officer probable cause to stop a vehicle, even though, in hindsight, a mistake of law was made and the defendant is acquitted of the traffic violation. *Id.* at 1138-39 (¶¶19-21). The issue is not whether the defendant is ultimately found guilty of the traffic violation; rather, the issue is whether or not the officer reasonably, and objectively believed that a traffic violation had occurred. *Id.* at 1139 (¶20). Put another way, the issue is not what the officer discovers later, but rather what the officer reasonably believed at the time of the stop. *Id.* Thus, based upon the holding in *Harrison*, in the case *sub judice* the State correctly argues that Adams's acquittal on the careless driving charge does not, by itself, settle the issue of probable cause for the stop. Adams's argument in this regard, therefore, lacks merit.

¶16. We do, however, agree with Adams's contention that a traffic stop must have an objective basis, and we also accept the logical corollary to that contention, namely that a traffic stop must be based upon more than a pure, subjective conclusion or "hunch" of the officer's. The case of *U.S. v. Escalante* makes this plain in its discussion of the test under *Whren v. U.S.*:

> [U]nder *Whren v. United States*, a traffic stop, even if pretextual, does not violate the Fourth Amendment if the officer making the stop has "probable cause to believe that a traffic violation has occurred." This is an objective test based on the facts known to the officer at the time of the stop, not on the motivations of the officer in making the stop. On the other hand, if it is clear that what the police observed did not constitute a violation of the cited traffic law, there is no "objective basis" for the stop, and the stop is illegal.

U.S. v. Escalante, 239 F.3d 678, 680-81 (5th Cir. 2001). Thus, *Escalante* makes it clear that there must be an objective basis for the stop.

¶17. Yet, accepting this principle from the *Escalante* case, we cannot say that in the case *sub judice* it is clear that what Officer Taylor observed did not or could not constitute a violation of the cited traffic law. Nor can we say that there was no objective basis for the stop of Adams's vehicle. Based upon our review of the record, we do not find the present case to be one in which the officer acted without any objective reason or on the basis of a purely subjective feeling or "hunch." On the contrary, viewing the totality of the circumstances, we find that Officer Taylor did have an objective, reasonable suspicion that Adams had committed the traffic violation of careless driving, even though Adams was ultimately acquitted of the careless driving charge.

¶18. We do not disagree with the trial judge's observation that this case is a "close call;" nevertheless, we conclude that there was probable cause for the stop of Adams's vehicle. In support of this conclusion, we note some of the circumstances surrounding the stop: the time of night was very late (or very early depending upon how one chooses to measure the hour); the particular night, New Year's Eve, is one on which persons are widely known to celebrate and often consume alcohol; in Officer Taylor's observation, the vehicle was traveling without due regard for the width and use of the highway by traveling in the middle of two lanes of traffic; and the reserve officer accompanying Officer Taylor saw the vehicle swerve. All of these circumstances serve to bolster the conclusion that Adams appeared to Officer Taylor, at that

particular time, to be driving without due regard for the width and use of the highway, or, in other words, in violation of the careless driving statute.

¶19. Adams also argues that the trial judge improperly relied upon factors that were not testified to by the officer as prompting his decision to make the stop, such as the time of night. But we note again that the probable cause inquiry looks to the totality of the circumstances. *Harrison*, 800 So. 2d at 1138 (¶18). Thus, it was not error for the judge to consider all of the relevant factors present in order to gain a clearer picture of the totality of the circumstances confronting the officer at the time. Adams's argument in this regard lacks merit.

¶20. Based upon the foregoing discussion, we cannot say that the officer's decision to stop Adams's vehicle was unreasonable or lacked an objective basis in the law or facts. Therefore, we find that the circuit court did not err in ruling that the stop of Adam's vehicle was legal. The judgment of the circuit court, therefore, is affirmed.

¶21. THE JUDGMENT OF THE CIRCUIT COURT OF PRENTISS COUNTY OF CONVICTION OF DRIVING UNDER THE INFLUENCE, FIRST OFFENSE, AND FINE OF $518.50 AND STATE ASSESSMENTS OF $208.50 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., BRIDGES AND LEE, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR

950 So.2d 220
(Cite as: 950 So.2d 220)

H

Court of Appeals of Mississippi.
George L. **BATES** a/k/a George **Bates**, Appellant
v.
STATE of Mississippi, Appellee.
No. 2005-KA-01769-COA.

Oct. 17, 2006.
Rehearing Denied Feb. 27, 2007.

Background: Defendant was convicted in the Circuit Court, Tate County, Andrew C. Baker, J., of causing disfigurement and permanent disability to another while operating vehicle under influence of intoxicating liquor. Defendant appealed.

Holding: The Court of Appeals, Irving, J., held that evidence was sufficient to support conviction.

Affirmed.

West Headnotes

[1] Automobiles 48A 355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Evidence was sufficient to show that defendant was intoxicated at time of accident, as required to support conviction for causing disfigurement and permanent disability to another while operating vehicle under influence of intoxicating liquor; defendant had just left gathering of friends where he and another had consumed "about a case or two" of beer, State presented several witnesses who testified that everyone in attendance at gathering was drinking beer, including defendant, and friend followed defendant after leaving gathering in case defendant needed help. West's A.M.C. § 63-11-30(1).

[2] Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
A motion for a judgment notwithstanding the verdict tests the sufficiency, not the weight, of the evidence.

[3] Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
A motion for a judgment notwithstanding the verdict asks the court to hold, as a matter of law, that the verdict may not stand and that the defendant must be finally discharged.

[4] Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
Where a defendant has moved for judgment notwithstanding the verdict, the trial court must consider all of the evidence, not just the evidence which supports the State's case, in the light most favorable to the State.

[5] Criminal Law 110 911

110 Criminal Law
110XXI Motions for New Trial
110k911 k. Discretion of Court as to New Trial. Most Cited Cases
The decision to grant a new trial is discretionary with the trial court.

[6] Criminal Law 110 741(1)

110 Criminal Law

110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) k. In General. Most Cited Cases
Matters regarding the weight of evidence are to be resolved by the jury.

***221**David L. Walker, attorney for appellant.

Office of the Attorney General by Deirdre McCrory, attorney for appellee.

Before KING, C.J., SOUTHWICK and IRVING, JJ.

IRVING, J., for the Court.

¶ 1. George L. Bates was convicted in the Circuit Court of Tate County of one count of causing disfigurement and permanent disability to another while operating a vehicle under the influence of intoxicating liquor, and one count of failing to remain at the scene of an accident involving disfigurement and permanent disability of another. Bates was sentenced to concurrent terms of imprisonment of six and five years, respectively, and was ordered to pay restitution to the victim.

¶ 2. On appeal, Bates raises the following issues which we quote verbatim:

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

¶ 3. We find no error; therefore, we affirm Bates's conviction and sentence.

FACTS

¶ 4. On Friday, August 27, 2004, Terry and Alice Hammersmith were riding their motorcycles single file on Hammond Hill Road, a two-lane road in Tate County. As the couple was heading south on Hammond Hill Road, Terry observed oncoming headlights over the hill. Terry moved toward the right-hand side of the road and looked in his rear-view mirror to make sure that his wife had pulled over behind him, as was their custom when they faced oncoming traffic on a two-lane road.

¶ 5. Terry got over as far as he could, but was forced off the road by a white Ford pickup, driven by Bates, which was traveling toward them in the southbound lane. Unable to control his motorcycle, Terry fell. As he was falling, he heard the impact of the truck with his wife's motorcycle***222** and her screams as she was thrown from her motorcycle into a ditch. As a result of the collision, Alice lost a foot. Johnny Wilson was following Bates in his vehicle and witnessed the accident. He stopped briefly to ascertain whether Bates' truck had struck Alice.

¶ 6. At the time of the accident, Bates had just left a gathering of friends where he and the other men had consumed “about a case or two” of beer. Bates left the scene of the accident without identifying himself or rendering any assistance to either Alice or Terry. While Terry was attempting to attend to his wife, Wilson also left the scene.

¶ 7. Terry provided officers with a description of the truck; however, the police did not receive any leads for several months. The following January, after learning that a reward had been offered, John Mabrey went to the sheriff's department with information concerning the accident. Based on the information from Mabrey, officers went to Bates's home, interviewed him, and inspected his white Ford pickup truck. The officers observed damage on the side of Bates' truck, extending from the front of the truck down the side quarter panel to where the quarter panel and door meet. The damage included an indentation in the side of the truck which matched the ball from the handle grips of Alice's motorcycle. Bates provided no explanation for the damage to his vehicle and, at trial, testified that he had never been involved in any accident.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Denial of Motion for Judgment Notwithstanding the Verdict

[1][2][3][4] ¶ 8. In this issue, Bates argues that the verdict of the jury is against the overwhelming

weight of the evidence. Although he alludes to the weight of the evidence, we interpret that to mean sufficiency of the evidence, as a motion for a JNOV tests the sufficiency, not the weight, of the evidence. *May v. State*, 460 So.2d 778, 780 (Miss.1984). A motion for a JNOV "asks the court to hold, as a matter of law, that the verdict may not stand and that the defendant must be finally discharged." *Id.* at 780-81. "Where a defendant has moved for [a] JNOV, the trial court must consider all of the evidence-not just the evidence which supports the State's case-in the light most favorable to the State." *Id.* at 781. In *May*, the Mississippi Supreme Court held that the State "must be given the benefit of all inferences that may reasonably be drawn from the evidence." *Id.* (citing *Glass v. State*, 278 So.2d 384, 386 (Miss.1973)). When viewed in this light, if "reasonable men could not have found beyond a reasonable doubt that [the] defendant was guilty," we must reverse. *McFee v. State*, 511 So.2d 130, 133 (Miss.1987). While at the same time, if the record indicates that there was sufficient evidence of such quality and weight that a reasonable and fair-minded jury could arrive at different conclusions, the verdict of guilty is "beyond our authority to disturb." *Id.* at 134.

¶ 9. **Bates** argues that there was no intoxilyzer or sobriety test performed to determine whether he was intoxicated at the time of the accident. It is **Bates's** contention that the **State** was required to present evidence that he was "stumbling down drunk" to support its position that he was driving while under the influence of intoxicating liquor.

¶ 10. The record reflects that the trial court initially agreed with Bates, but upon further argument by the State, the court was convinced that the proof was sufficient to present the matter to the jury. Mississippi Code Annotated section 63-11-30(1) ***223** (Rev.1996), subsections (a) and (b) provide that "it is unlawful for any person to drive or otherwise operate a vehicle within this **state** who is under the influence of intoxicating liquor [or who] is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle." Nothing in these subsections requires the **State** to prove that **Bates** had a certain blood alcohol content. The **State** need only prove that **Bates** was either operating his vehicle while under the influence of intoxicating liquor or operating his vehicle while under the influence of any other substance which impaired his ability to operate a motor vehicle. **Bates's** argument concerning the lack of an intoxilyzer or sobriety test would only be relevant had he been indicted under Mississippi Code Annotated section 63-11-30(1) (Rev.1996), subsection (c) which provides:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter.

¶ 11. The **State** presented several witnesses, all of whom testified that everyone in attendance at the gathering was drinking beer, including **Bates**. The **State** also presented evidence that Johnny Wilson was following **Bates** home in case **Bates** needed help. Further, there was proof that **Bates** was over the centerline on the crest of the hill when the collision occurred. Thus, the **State** presented sufficient evidence from which the jury could reasonably conclude that **Bates** was under the influence of intoxicating liquor to the degree that his motor skills necessary to properly operate a vehicle were impaired.

¶ 12. **Bates** left the scene of the accident before police arrived; thus, there was no opportunity to conduct a field sobriety test. Further, the only evidence offered by **Bates** to prove that he was not intoxicated at the time of the accident was his testimony that when he drinks he leaves his truck with Wilson and Wilson's wife. **Bates** explained that he does this because he is the caretaker of his elderly mother and he wants to ensure that, if anything were to happen, the Wilsons could take care of his mother. **Bates** fails to point to any evidence indicating that he was not drinking on the night of the accident. In the final analysis, there is simply no evidence to support a finding that reasonable men could not have found beyond a reasonable doubt that **Bates** operated his vehicle while under the influence of intoxicating liquor. We find no basis for concluding that **Bates's**

motion for judgment notwithstanding the verdict was improperly denied.

2. Denial of Motion for a New Trial

[5][6] ¶ 13. In this issue, **Bates** contends that the weight of the evidence presented does not support the trial court's denial of his motion for a new trial. The decision to grant a new trial is discretionary with the trial court. *McClain v. **State***, 625 So.2d 774, 781 (Miss.1993). It is well established that matters regarding the weight of evidence are to be resolved by the jury. *Neal v. **State***, 451 So.2d 743, 758 (Miss.1984). The standard of review in determining whether a jury verdict is against the overwhelming weight of evidence***224** is well settled. "[An appellate court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998) (citing *Herring v. State*, 691 So.2d 948 (Miss.1997)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will [an appellate court] disturb it on appeal." *Id.* Bates has to present enough evidence to meet this burden. For the reasons stated above, we cannot say that the evidence was such that allowing a conviction to stand on this evidence would result in an unconscionable injustice. Thus, finding no error, we affirm.

¶ 14. **THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY OF CONVICTION OF COUNT I-FELONY D.U.I. CAUSING SERIOUS BODILY INJURY AND SENTENCE OF SIX YEARS, AND CONVICTION OF COUNT II-FAILURE TO STOP AT THE SCENE OF AN ACCIDENT AND SENTENCE OF FIVE YEARS, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH SAID SENTENCES RUNNING CONCURRENTLY, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO TATE COUNTY.**

KING, C.J., LEE AND MYERS, P.JJ., SOUTHWICK, CHANDLER, GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR.
Miss.App.,2006.
Bates v. State
950 So.2d 220

END OF DOCUMENT

After the statement by the court, appellant did not cross-examine in an effort to show that the right of review of his sentence induced Howard to plead guilty and testify for the state, but appellant now complains that he was curtailed in his effort to show the effects this right of review may have had on Howard's willingness to testify.

On review of the entire record, we are not convinced that appellant was restricted in his cross-examination. The jury was made aware of Howard's status as an accomplice and the right of the court to review his sentence. Furthermore, as stated earlier, the jury was instructed to receive Howard's testimony with care and caution.

Finding no reversible error, we affirm.

AFFIRMED.

PATTERSON, C.J., WALKER, P.J., and BROOM, ROY NOBLE LEE, BOWLING, HAWKINS, DAN M. LEE and PRATHER, JJ., concur.

Laverne Y. BOOTH, et al.

v.

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.

No. 53722.

Supreme Court of Mississippi.

Sept. 22, 1982.

Rehearing Denied Nov. 10, 1982.

Appeal from Circuit Court, Hinds County; Dan M. Lee, Judge.

Banks & Nichols, Fred L. Banks, Jr., Coolidge C. Anderson, Jr., Jackson, for appellant.

Brunini, Grantham, Grower & Hewes, Richard W. Dortch, Jackson, for appellee.

Before SUGG, P.J., and BROOM and HAWKINS, JJ.

AFFIRMED.

William Earl BAYSE

v.

STATE of Mississippi.

No. 53748.

Supreme Court of Mississippi.

Sept. 29, 1982.

Rehearing Denied Nov. 10, 1982.

Defendant was convicted in the Circuit Court, Marion County, R.I. Prichard, III, J., of manslaughter by culpable negligence, and he appealed. The Supreme Court, Prather, J., held that: (1) defendant's confession was heard prior to his warrantless arrest and therefore, whether arrest was lawful or unlawful, evidence of the confession was properly admitted in manslaughter prosecution; (2) since police officer observed injured bodies at scene of vehicular accident moments after it occurred, and since driver was not present, officer had sufficient facts to constitute the corpus delicti of "leaving the scene of an accident" and therefore warrantless arrest of defendant at his home was lawful; and (3) statements defendant's wife made to police officer outside of defendant's presence, which were repeated by officer before the jury, were inadmissible both on grounds of spousal privilege as well as on hearsay grounds and admission of such evidence constituted error.

Reversed and remanded.

1. Arrest ⇐68

An "arrest" is not consummated until there has been a taking of possession of a person by manual caption, or submission on demand; although a manual touching is unnecessary unless there is resistance to an arrest, there must be restraint of a person to establish an arrest.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐517(7)

Defendant's confession was heard prior to his warrantless arrest and therefore, whether arrest was lawful or unlawful, evidence of the confession was properly admitted in manslaughter prosecution.

3. Arrest ⇐63.4(13)

Since police officer observed injured bodies at scene of vehicular accident moments after it occurred, and since driver was not present, officer had sufficient facts to constitute the corpus delicti of "leaving the scene of an accident" and therefore warrantless arrest of defendant at his home was lawful. Code 1972, § 99–3–7.

4. Arrest ⇐63.3

Where an officer obtains sufficient facts to establish corpus delicti of a crime, and he additionally obtains a confession, the "presence" requirement of applicable statute has been met and officer may arrest the individual for a misdemeanor crime. Code 1972, § 99–3–7.

5. Criminal Law ⇐419(1)
Witnesses ⇐52(7)

Statements defendant's wife made to police officer outside defendant's presence, which were repeated by officer before the jury, were inadmissible both on grounds of lawful privilege as well as on hearsay grounds and admission of such evidence constituted error. Code 1972, § 13–1–5.

6. Criminal Law ⇐488

Doctor's personal supervision of the procedures in the analysis of defendant's blood rendered him qualified to testify as to results of defendant's blood alcohol test despite fact that he did not actually perform the test.

7. Criminal Law ⇐753.2(5, 8)

In passing upon a motion for a directed verdict, all evidence introduced by state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, motion for a directed verdict must be overruled.

8. Automobiles ⇐356

Jury question was presented as to whether a defendant's driving while heavily intoxicated and his failure to aid bicyclists with whom he collided indicated a wanton disregard of life; thus, trial court properly refused to direct a verdict of not guilty on charge of manslaughter by culpable negligence.

Travis Buckley, Dan C. Taylor, Ellisville, for appellant.

Bill Allain, Atty. Gen. by Carolyn B. Mills, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before SUGG, P.J., and ROY NOBLE LEE and PRATHER, JJ.

PRATHER, Justice, for the Court:

William Earl Bayse was convicted for the crime of manslaughter by culpable negligence in the Circuit Court of Marion County. As a result, he was sentenced to a fifteen-year term at the Mississippi Department of Corrections. The incident which led to Bayse's conviction occurred when an automobile driven by the appellant collided with two teenagers riding on a bicycle. One of the teenagers was fatally injured upon impact.

The appellant assigns as error:

(1) That the lower court committed error in admitting evidence gained as a result of an alleged unlawful arrest; and

(2) That the lower court committed error in admitting prejudicial hearsay statements made by defendant's wife; and

(3) That the lower court committed error in admitting the testimony of Dr. Arthur Hume, Director of the Mississippi Crime Laboratory, since his testimony was allegedly not based on personal observation; and

(4) That the lower court committed error in granting and refusing various instructions, including a request for a directed verdict.

STATEMENT OF THE FACTS

On October 13, 1980, at approximately 7:00 p.m., Mason Ford and Benard Smith, two ninth grade children who lived near Columbia, Mississippi, were riding one bicycle, with Mason peddling and Benard riding on the handlebars. They were traveling south on the east side of Highway 13, facing oncoming traffic. Two of their friends were off of the west side of Highway 13, on separate bicycles. Three cars were also traveling south on Highway 13 on the occasion in question, and the third car, driven by the defendant, William Earl Bayse, pulled out into the east lane to attempt to pass the second car. In doing so, Bayse hit Ford and Smith on their bicycle. The testimony conflicted as to whether the bicycle was on or off the paved portion of the highway when struck from the rear. Bayse pulled back into the west lane of traffic without passing the second automobile and traveled approximately 1,320 feet down the highway before stopping to remove the bicycle from the front portion of his car. Without returning to the scene of the accident, Bayse drove home and parked his car in the woods.

The deputy sheriff who investigated the accident obtained car identification information which led him to Bayse's residence, where he first talked to Bayse's wife. Mrs. Bayse told the officer of her husband's recent arrival at home in a drunken condition and of his telling her that he hit something with his car. She also observed that the car windshield had been broken. The deputy sheriff told Mrs. Bayse that he needed to talk with her husband, and she responded by calling her husband to the door. The deputy testified that the defendant "came out ready to go," for "he knew the reason I was there." Further, the officer stated that Bayse's speech was slurred, the smell of alcohol strong, and his walk sluggish. In the officer's opinion Bayse was intoxicated. The officer then asked the defendant, without coercion, during this investigatory period, where his car was and if he had hit somebody. The defendant, upon stating that he had hit somebody, was then placed under arrest by the officer for leaving the scene of an accident, and his Miranda rights were read to him. No further interrogation was conducted by this officer, but, the officer did ask the defendant if he would consent to a breath alcohol test, which the defendant refused. However, the defendant did consent to a blood test which indicated that the defendant was heavily intoxicated at the time of the collision. After the death of Mason Ford, the defendant was charged with manslaughter by culpable negligence.

I.

The first error assigned involves the admission into evidence of the defendant's confession to the deputy sheriff and of the results of the blood alcohol test. Bayse contended that this evidence was the result of an unlawful arrest since he was arrested without warrant for a misdemeanor. Admittedly, if the arrest is unlawful, then the evidence gained as a result must be suppressed. *Canning v. State,* 226 So.2d 747 (Miss.1969); *Smith v. State,* 228 Miss. 476, 87 So.2d 917 (1956); *Lewis v. State,* 198 Miss. 767, 23 So.2d 401 (1945). Further, section 99–3–7 of the Mississippi Code Annotated (1972) limits the circumstances under which a law enforcement officer may arrest a defendant on a misdemeanor charge without warrant, and the statute provides that such an arrest is legal only when the officer knows that a warrant is in fact outstanding for the defendant, or when the misdemeanor is committed in the officer's presence. *See Butler v. State,* 212 So.2d 573 (Miss.1968) (officer cannot arrest individual for misdemeanor not committed in presence except with warrant); *Shedd v. State,* 203 Miss. 544, 33 So.2d 816 (1948) (arrest without warrant must be justified on ground provided by statute).

[1, 2] With regard to the confession, it is the Court's opinion that the confession occurred prior to the arrest. "An arrest is not consummated until there has been a taking of possession of a person by manual caption, or submission on demand; and although a manual touching is unnecessary

unless there is resistance to an arrest, there must be restraint of a person to establish an arrest." *Fondren v. State,* 253 Miss. 241, 175 So.2d 628 (1965). In the instant case, Officer McCain testified that he did not place Bayse under arrest until he had heard the confession. The defendant offered no evidence to the contrary. Indeed, Officer McCain testified that he had no intention of arresting Bayse at the time he arrived at Bayse's residence. Under these circumstances, it is apparent that the confession occurred prior to the arrest, whether termed lawful or unlawful, and evidence of the confession was properly admitted.

[3, 4] We also conclude that the arrest was lawful and that testimony concerning the blood test results was properly admitted. This conclusion is reached because Officer McCain personally observed the injured bodies at the scene of the accident, he gained information from various witnesses that Bayse's car was involved in the incident, and he heard the confession of the defendant that he was involved in the collision. In *Myers v. State,* 158 Miss. 554, 130 So. 741 (1930) our Court determined that:

> One of the safest tests . . . of when a misdemeanor is committed in the presence of an officer, is whether the officer as a witness could at the time of the arrest of his own knowledge testify to sufficient facts as having happened in his presence to make out a case for conviction, if his evidence were undisputed; and, of course, *an admission made to him or in his hearing is sufficient to supply knowledge of those facts competent to be covered by an admission.* But no admission or confession can wholly supply the corpus delicti; that is to say, there must presently exist, independently of the confession, the essential facts which constitute the corpus delicti. (Emphasis added). [158 Miss. at 556, 130 So. at 741].

Thus, where an officer obtains sufficient facts to establish the corpus delicti of a crime, and he additionally obtains a confession, the "presence" requirement of section 99-3-7 has been met and the officer may arrest the individual for a misdemeanor crime.[1] This same rationale was recently employed by our Court in *Gregg v. State,* 374 So.2d 1301 (Miss.1979), wherein we stated:

> In the present case there can be no question but that the arrest of the defendant Gregg was a lawful arrest. This is true because when Officer Edmonds first observed Gregg, he was "propped up" against a vehicle on the side of the road; spoke with a thick tongue and had trouble standing; smelled of alcohol; and in Edmonds' opinion was intoxicated. It was under those circumstances that Gregg told Edmonds that he was driving the vehicle which Edmonds observed in the ditch. Upon such facts, the arrest of Gregg was legal. [374 So.2d at 1303].

Since Officer McCain observed the injured bodies at the scene of a vehicular accident moments after it had occurred, and since the driver was not present, McCain had sufficient facts to constitute the corpus delicti of "leaving the scene of an accident." We therefore find no error in this assignment.

II.

[5] On the trial of this cause Officer McCain was permitted, over objection, to repeat all of the statements made by the defendant's wife to him and outside the defendant's presence. Objection was made to this testimony on the ground that it was hearsay testimony and that it violated the confidential communication privilege between husband and wife. Section 13-1-5 of the Mississippi Code Annotated (Supp. 1981) is the applicable statute in this matter insofar as the privilege assertion is concerned and its pertinent parts provide:

1. The Court also notes that pursuant to section 99-3-7 an officer may arrest an individual when a felony has been committed, and the officer has reasonable ground to believe that the individual arrested committed the felony. Under the facts of this case, the deputy sheriff had sufficient grounds to arrest Bayse for the felony crime of aggravated assault under section 97-3-7 of the Mississippi Code Annotated (Supp.1981).

. . . Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or non-support of children under the age of sixteen years, or abandonment of children. But in all other instances *where either of them is a party litigant the other shall not be competent as a witness and shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without the consent of both.* (Emphasis added).

This statute has been construed as prohibiting the prosecution from calling the defendant's wife to testify against her husband. *Wallace v. State,* 254 Miss. 944, 183 So.2d 525 (1966); *Outlaw v. State,* 208 Miss. 13, 43 So.2d 661 (1949). Further, this prohibition extends to introduction of out-of-court statements made by the spouse. *Ford v. State,* 218 So.2d 731 (Miss.1969); *Caldwell v. State,* 194 So.2d 878 (Miss.1967). *See also* McCormick's Handbook of the Law of Evidence 168 (2d ed. 1972) (just as spouse cannot betray confidence by testifying in court, he or she may not destroy the privilege by out-of-court statements either). Clearly, in the case sub judice, the statements of the wife to the officer and repeated by him before the jury were inadmissible both on the ground of this privilege as well as on hearsay. The admission of this evidence constituted error.

III.

[6] The defendant's contention that Dr. Hume should not have been permitted to testify as to the results of the blood alcohol test since he did not actually perform the test himself is without merit. His personal supervision of the procedures in the analysis of this blood as shown by this record is more than sufficient to have received the testimony. The court finds no error in this contention.

IV.

There were other errors assigned relating to the instructions of the court. The Court finds that some of these instructions could have been worded with more clarity and succinctness for the jury, but we find no substantial error in their use. Since, however, this case will have to be reversed and remanded for a new trial on the basis of the prejudicial error heretofore discussed in Part II above, the Court suggests the use of a clearer instruction in the retrial of the case.

[7, 8] The appellant also contended that he should have been granted a directed verdict of not guilty. In passing upon a motion for a directed verdict, all evidence introduced by the state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for a directed verdict must be overruled. *Wilks v. State,* 408 So.2d 68 (Miss.1981); *Taylor v. State,* 398 So.2d 1341 (Miss.1981). In the instant case, for purposes of analyzing the appellant's request for a directed verdict, the witnesses' testimony that the boys were riding three feet away from the road must be accepted as true. Further, Bayse's driving while heavily intoxicated and his failure to aid the victims arguably indicated a wanton disregard of life. Under these circumstances, a directed verdict of not guilty would not be proper.

In conclusion, because of the admission of prejudicial hearsay statements made by the defendant's wife over objection of the defendant, this Court finds that the cause must be reversed and remanded for a new trial.

REVERSED AND REMANDED.

PATTERSON, C.J., SUGG and WALKER, P.JJ., and ROY NOBLE LEE, HAWKINS, BOWLING and DAN M. LEE, JJ., concur.

BROOM, J., takes no part.

958 So.2d 254
(Cite as: 958 So.2d 254)

Court of Appeals of Mississippi.
Zavien T. BEAL, Appellant
v.
STATE of Mississippi, Appellee.
No. 2006-KM-00345-COA.

May 29, 2007.

Background: Defendant was convicted in the Justice Court, Jefferson County, of driving under influence (DUI) first offense. He appealed. The Circuit Court, Jefferson County, Lamar Pickard, J., also found defendant guilty of DUI first offense. Defendant appealed.

Holding: The Court of Appeals, Irving, J., held that the evidence was sufficient to support the conviction.

Affirmed.

West Headnotes

[1] Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Evidence was sufficient to support conviction for driving under influence (DUI) first offense, even though law enforcement officer who stopped defendant issued a citation and allowed him to drive from scene after receiving a call requesting assistance at an accident; officer observed marijuana on defendant's clothing and noted that defendant's eyes were bloodshot, and officer testified that defendant appeared to be very nervous and that defendant stated that he had smoked marijuana a short time before the stop.

[2] Automobiles 48A ⚿349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most Cited Cases
It is improper for a law enforcement officer to allow a motorist to continue to drive when the officer has determined that the motorist has been driving under the influence.

***255** Aafram Yaphet Sellers, attorney for appellant.

Office of the Attorney General by W. Glenn Watts, attorney for appellee.

Before KING, C.J., IRVING and ROBERTS, JJ.

IRVING, J., for the Court.

¶ 1. Zavien Beal was convicted by the Jefferson County Justice Court of speeding and D.U.I. first offense (other substance) and was sentenced to pay a fine and serve a term of forty-eight hours in jail, with the forty-eight hours suspended upon payment of the fine. Aggrieved, **Beal** appealed his conviction for D.U.I. first offense to the Jefferson County Circuit Court, which reviewed the case *de novo* and also found **Beal** guilty of D.U.I. first offense.[FN1] Thereafter, **Beal** appealed to this Court, asserting that insufficient evidence exists to convict him of D.U.I. Finding no error, we affirm.

FN1. **Beal** has never appealed his conviction for speeding.

FACTS

¶ 2. **Beal** was a student at Alcorn State University in 2005. On November 3, 2005, **Beal** left school and went to Natchez, Mississippi, some twenty-five miles or so away. After spending some time in Natchez, **Beal** left to return to Alcorn State when he was stopped by Officer Kenny Tarleton of the Mississippi Highway Safety Patrol. Officer Tarleton stopped **Beal** because **Beal** was traveling at eighty-seven miles per hour in a fifty-five-miles-per-hour zone. Officer Tarleton testified that as he approached the

vehicle, he smelled a strong odor of burnt marijuana coming from it. Upon reaching the vehicle, Officer Tarleton testified that he observed a green leafy substance that appeared to be marijuana on **Beal's** clothing.

¶ 3. Officer Tarleton stated that he then asked **Beal** why there was marijuana on his clothing. According to Officer Tarleton, **Beal** stated that he had smoked marijuana when he left Alcorn State and had smoked again before departing from Natchez. Officer Tarleton observed that **Beal's** eyes "were bloodshot, red and very ***256** glazy." Officer Tarleton also testified that **Beal** appeared to be very nervous throughout the encounter. Officer Tarleton admitted that he did not perform any field sobriety tests on **Beal**, nor did he take a sample of blood or urine for testing. Officer Tarleton stated that he did not do these things because **Beal** freely admitted that he had smoked marijuana before leaving Natchez, which was a relatively short distance away.

¶ 4. By contrast, **Beal** testified that there was no marijuana on his shirt. Rather, he claimed that there was a printed pattern on the shirt that might have been confusing. **Beal** admitted that he had smoked marijuana much earlier in the day, but denied that he had told Officer Tarleton that he had smoked marijuana immediately prior to leaving Natchez for school.

¶ 5. What is undisputed is that, during **Beal's** stop, Officer Tarleton received a call requesting his assistance at an accident scene. Because Officer Tarleton was apparently the only officer on duty at the time, he issued a citation to **Beal** and left the scene to respond to the accident. At the circuit court appeal hearing, Officer Tarleton testified that he did not "allow" **Beal** to leave the scene, although he placed **Beal's** keys on the trunk of the car and left the scene. Officer Tarleton testified that the stop was done approximately one hundred yards from the Alcorn State Campus, and further testified that he mentioned this fact to **Beal** at the scene. After Officer Tarleton left, **Beal** drove his car to school.

ANALYSIS AND DISCUSSION OF THE ISSUE

¶ 6. When reviewing the sufficiency of the evidence supporting a conviction, we look at "whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' " *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When reviewing the decision of a trial judge sitting without a jury, we give the judge "the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." *Johns v. State*, 926 So.2d 188, 202(¶ 70) (Miss.2006) (quoting *Chantey Music Pub., Inc. v. Malaco, Inc.*, 915 So.2d 1052, 1055(¶ 10) (Miss.2005)).

[1] ¶ 7. We find that the evidence is sufficient to sustain **Beal's** conviction. At the scene, Officer Tarleton observed marijuana on **Beal's** clothing, noted that **Beal's** eyes were blood-shot, and remarked that **Beal** appeared to be particularly nervous. Furthermore, Officer Tarleton testified that **Beal** stated that he had smoked marijuana a short time before the stop. Clearly, this evidence is sufficient to sustain **Beal's** conviction. Although **Beal** testified and gave a different account of events than Officer Tarleton, the court, as the finder of fact, was entitled to believe whatever testimony it found most credible. *Curry v. State*, 939 So.2d 785, 792(¶ 23) (Miss.2006). The evidence is such that a reasonable fact-finder could have found Beal guilty of first-offense D.U.I., and the court's findings are supported by the evidence.

[2] ¶ 8. That Officer Tarleton allowed Beal to drive from the scene after Tarleton ***257** had charged Beal with first-offense D.U.I. does not vitiate the fact that sufficient evidence was presented at trial to undergird Beal's conviction for D.U.I. However, we take this opportunity to remind our law enforcement officers that, as announced by the Mississippi Supreme Court, it is improper for an officer to allow a motorist to continue to drive when the officer has determined that the motorist has been driving under the influence:

> Operating a motor vehicle on a public highway

> while under the influence of intoxicants, although classified as a misdemeanor, differs in essential particulars from the usual "traffic violation." Apart from the mortal danger to which it exposes others, the offender may not be given a "ticket," and sent on his way. *He must be detained and may not be allowed to drive away in his automobile.* By force of circumstances possession must be taken by the officers of the automobile itself for the time being.

Hogan v. State, 235 So.2d 704, 705 (Miss.1970), (emphasis added).

¶ 9. As previously stated, regardless of Officer Tarleton's handling of the situation, the evidence is sufficient to sustain Beal's conviction. Nothing about the officer's allowing Beal to drive away from the scene affects whether Beal was actually under the influence when he was stopped initially.

¶ 10. **THE JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON COUNTY OF CONVICTION OF FIRST OFFENSE D.U.I. AND SENTENCE OF FORTY-EIGHT HOURS OF JAIL TIME, SUSPENDED UPON PAYMENT OF A $511.50 FINE, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE AND MYERS, P.JJ., CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.
Miss.App.,2007.
Beal v. State
958 So.2d 254

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764 So. 2d 508, *; 2000 Miss. App. LEXIS 368, **

CHARLES CLARK A/K/A CHARLES ALBERT CLARK, APPELLANT v. CITY OF ABERDEEN, APPELLEE

NO. 1999-KM-00891-COA

COURT OF APPEALS OF MISSISSIPPI

764 So. 2d 508; 2000 Miss. App. LEXIS 368

August 8, 2000, Decided

PRIOR HISTORY:
[1]** DATE OF JUDGMENT: 03/31/1999. COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT. TRIAL JUDGE: HON. THOMAS J. GARDNER, III. TRIAL COURT DISPOSITION: APPELLANT CONVICTED OF 1ST OFFENSE DUI AND FINED $ 500 AND SENTENCED TO 48-HOURS IN JAIL WITH THE JAIL TIME SUSPENDED.

DISPOSITION:
AFFIRMED.

LexisNexis(TM) HEADNOTES - Core Concepts

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN1] The standard of review that an appellate court must apply when reviewing findings of fact made by a trial judge sitting without a jury, is that such findings may not be disturbed or set aside on appeal unless manifestly wrong. These findings may not be upset on appeal provided there is in the trial record substantial supporting evidence. It matters not that on the same proof an appellate court might have found otherwise.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN2] A trial judge, sitting as the trier of fact, is solely authorized to determine witness credibility.

COUNSEL:
ATTORNEY FOR APPELLANT: MOSE LEE SUDDUTH, JR.

ATTORNEY FOR APPELLEE: ROBERT H. FAULKS. CITY ATTORNEY: ROBERT H. FAULKS.

JUDGES:
MOORE, J., McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, IRVING, LEE, PAYNE, AND THOMAS, JJ., CONCUR. MYERS, J., NOT PARTICIPATING.

OPINIONBY:
MOORE

OPINION:

[*508] NATURE OF THE CASE: CRIMINAL - MISDEMEANOR

BEFORE McMILLIN, C.J., LEE, AND MOORE, JJ.

MOORE, J., FOR THE COURT:

P1. Appellant Charles A. Clark was arrested and charged with driving while under the influence by Officer Randy Perkins of the City of Aberdeen Police Department on August 16, 1997. Clark was convicted in the Municipal Court of Aberdeen, Mississippi for this charge, and subsequently filed his notice of appeal to the Circuit Court of Monroe County, Mississippi. During the bench trial, Clark moved to dismiss the charge against him based on the grounds that the affidavit was defective. The circuit **[**2]** court denied the motion, and on March 31, 1999, found Clark guilty of the crime charged. The circuit court sentenced Clark to forty-eight hours in the Monroe County jail, suspended, and imposed a fine of $ 500. On appeal, Clark presents the following issue for our review:

[*509] I. THE LOWER COURT COMMITTED REVERSIBLE ERROR FOR FAILING TO GRANT APPELLANT'S MOTION TO DISMISS THE CHARGE AGAINST HIM DUE TO THE CITY'S FAILURE TO CHARGE APPELLANT BY PROPER AFFIDAVIT AS REQUIRED BY LAW.

Finding this assignment of error to be without merit, this Court affirms.

STATEMENT OF THE FACTS

P2. On August 16, 1997, at approximately 1:24 a.m., the Aberdeen Police Department was notified of an automobile accident. Officer Perkins responded to the call, finding Clark at the scene. Clark told Officer Perkins that "his brakes had failed" and that "he had run through the stop sign and struck Ms. Carothers in the side." Perkins noticed that Clark was having trouble standing, and that he was confused and was stuttering his words. He also noted that Clark smelled strongly of alcohol and had bloodshot and watery eyes. Clark told Officer Perkins he had been drinking. Officer Perkins testified **[**3]** that he then

transported Clark from the scene of the accident to the Monroe County Sheriff's Office to run an intoxilyzer test. The test results revealed Clark's blood alcohol level to be .200, a level that exceeds the legal limit. At this point, Officer Perkins prepared the Uniform Arrest Ticket.

P3. On direct examination, Officer Perkins testified as to the normal procedure for preparing an arrest ticket. He stated that there are four copies in the arrest ticket package, with the violator's copy on the bottom. He testified that he normally pulls the violator's copy out at the time the violator is locked up at the jail, prior to going in front of the court clerk to sign the affidavit portion of the ticket. Officer Perkins also stated that at that time all the information on the ticket, with the exception of his signature, is filled out. He testified that usually the other three copies are then taken over to the court clerk, where the officer signs and swears to the ticket. The clerk then signs her name and title.

P4. On cross-examination, after testifying again that normal procedure is for an officer to sign and swear to a ticket in front of the clerk *after* giving the **[**4]** bilateral copy to the violator, Officer Perkins was asked why his signature was on the violator's copy if that copy was supposed to have been torn off prior to the officer signing it. Officer Perkins responded by stating that in this instance, he must have had the violator's copy sent over to Clark after all the remaining copies were sworn to. Officer Perkins was then asked on cross-examination that if this was the case, why was the clerk's signature not on the violator's copy. The attorney conducting the cross-examination asserted that Officer Perkins simply signed the ticket package, but did not swear to it in front of the clerk. Officer Perkins testified that he did in fact swear to the ticket and that if the clerk's signature was not on the violator's copy, it must not have gone all the way through the other three carbon copies so as to show up on the violator's copy.

P5. Upon Clark's motion to dismiss on the basis of a defective affidavit, the court denied the motion finding that the affidavit was properly sworn to. At the conclusion of the trial, the court found Clark guilty of driving while under the influence.

LAW AND ANALYSIS

I. DID THE LOWER COURT COMMIT **[**5]** REVERSIBLE ERROR FOR FAILING TO GRANT APPELLANT'S MOTION TO DISMISS DUE TO THE ALLEGATION THAT THE CITY FAILED TO CHARGE APPELLANT BY PROPER AFFIDAVIT AS REQUIRED BY LAW?

P6. Appellant Clark argues that the affidavit in question was not properly sworn to, therefore making the affidavit defective. Clark claims that due to the alleged defective affidavit, the circuit court had no **[*510]** jurisdiction; therefore, the circuit court committed reversible error in failing to grant his motion to dismiss. We do not agree with Clark's contentions and hereby affirm.

P7. After all the testimony concerning the affidavit was presented, Clark made his motion to dismiss. The circuit judge based his decision to deny the motion ultimately on his findings of fact. After a review of the documents and Officer Perkins's testimony, the circuit court judge determined that "the affidavit in this case was in fact sworn to on the 16th day of August, 1997." Clark refutes this finding of fact.

P8. The officer's copy of the ticket contained Officer Perkins's signature as well as the signature of the clerk, Lottie Galdney, on the affidavit portion. However, Clark's carbon copy of the ticket, the violator's **[**6]** copy, only contained Officer Perkins's signature, which was identical to the signature on the officer's carbon copy, but lacked the clerk's signature. In making his argument, Clark makes note of these facts and from these facts alone, asserts that Officer Perkins could not have followed the "normal procedure" as to signing and swearing to such tickets in front of the clerk. Clark states that the only explanation for the discrepancy in the two copies of the ticket is that Officer Perkins did not actually swear to the ticket; therefore, the affidavit was improper. After reviewing all the facts, the circuit court did not agree with this argument, and this Court affirms that finding.

P9. On appeal, this Court has a particular [HN1] standard of review that it must apply when reviewing findings of fact made by a trial judge sitting without a jury. These such findings "may not be disturbed or set aside on appeal unless manifestly wrong." *Dungan v. Dick Moore, Inc., 463 So. 2d 1094, 1100 (Miss. 1985).* In further explanation of this standard, these findings may not be upset here on appeal "provided there is in the trial record substantial supporting evidence. It matters not **[**7]** that on the same proof we as trial judges might have found otherwise." *Id*. At present, there were documents revealing facts about this case, as well as Officer Perkins's testimony concerning the affidavit. "[HN2] A trial judge, sitting as the trier of fact, is solely authorized to determine witness credibility." *Merchants Acceptance, Inc. v. Jamison, 752 So. 2d 422, 426* (P15) (Miss. 1999).

P10. The officer's copy of the ticket that was presented to the trial judge displayed the signature of the clerk, Lottie Gladney, signifying the affidavit. Officer Perkins also testified that he swore to the ticket in front of Lottie Gladney. The ticket displaying the clerk's signature is substantial evidence that this ticket was in fact sworn to. In addition, the trial judge has the authority to determine the credibility of witnesses and in this case, chose to find credibility in Officer Perkins's testimony. That is within the trial judge's discretion. The trial judge's finding of fact that

the affidavit was sworn to on August 16, 1997, is supported by this evidence. The finding was not manifestly wrong.

P11. Therefore, the lower court's finding that the affidavit was in **[**8]** fact properly sworn to is affirmed. The lower court did not commit reversible error in denying the motion to dismiss. The conviction of driving while under the influence is thereby affirmed.

P12. **THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY OF CONVICTION OF DRIVING WHILE UNDER THE INFLUENCE AND SENTENCE OF FORTY-EIGHT HOURS IN THE MONROE COUNTY JAIL, SUSPENDED, AND A FINE OF $ 500, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, [*511] IRVING, LEE, PAYNE, AND THOMAS, JJ., CONCUR. MYERS, J., NOT PARTICIPATING.

912 So.2d 1091
(Cite as: 912 So.2d 1091)

C

Court of Appeals of Mississippi.
Daniel Clyde DOVE, Appellant
v.
STATE of Mississippi, Appellee.
No. 2004-KA-00226-COA.

Oct. 18, 2005.

Background: Defendant was convicted in a jury trial in the Circuit Court, Harrison County, Jerry O. Terry, Sr., J., of felony driving under the influence (DUI). Defendant appealed.

Holdings: The Court of Appeals, Chandler, J., held that:
(1) probable cause existed for arrest warrant authorizing blood alcohol test without defendant's consent;
(2) evidence of two prior DUI offenses was required to be admitted in order to meet State's burden of proof and obtain conviction for felony DUI; and
(3) admission of two prior DUI offenses did not prejudice defendant in felony DUI prosecution.

Affirmed.

West Headnotes

[1] Automobiles 48A 419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
Probable cause existed for issuing warrant authorizing blood alcohol test without defendant's consent; officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol, he noted that defendant actually admitted to having drunk four beers that morning, and defendant was unable to recite alphabet. U.S.C.A. Const.Amend. 4.

[2] Criminal Law 110 216

110 Criminal Law
110XII Pretrial Proceedings
110k215 Preliminary Warrant or Other Process
110k216 k. Nature and Necessity. Most Cited Cases

Criminal Law 110 217

110 Criminal Law
110XII Pretrial Proceedings
110k215 Preliminary Warrant or Other Process
110k217 k. Issuance. Most Cited Cases
A police officer desiring an arrest warrant must obtain a judicial determination that probable cause exists; the issuing judge's determination of the existence of probable cause is determined by the totality of the circumstances. U.S.C.A. Const.Amend. 4.

[3] Criminal Law 110 1158.2

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.2 k. Search and Arrest. Most Cited Cases
(Formerly 110k1158(2))
On review of a judge's issuance of an arrest warrant, appellate court determines whether the facts and circumstances before the judge provided a substantial basis for concluding that probable cause existed. U.S.C.A. Const.Amend. 4.

[4] Automobiles 48A 359.6

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.6 k. Repeat Offenders. Most Cited Cases
(Formerly 48Ak359)
Evidence of two prior driving under the influence (DUI) offenses was required to be admitted in order to meet State's burden of proof and obtain conviction for felony DUI. West's A.M.C. § 63-11-30.

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[5] **Automobiles 48A ⚿359.6**

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.6 k. Repeat Offenders. Most Cited Cases
(Formerly 48Ak359)
Admission of two prior driving under the influence (DUI) offenses did not prejudice defendant in felony DUI prosecution; jury was given cautionary instruction mandating that defendant's prior DUI convictions were not to be considered as evidence against him. West's A.M.C. § 63-11-30; Rules of Evid., Rule 403.

***1092** Robert Charles Stewart, attorney for appellant.

Office of the Attorney General by Jean Smith Vaughan, attorney for appellee.

Before BRIDGES, P.J., MYERS and CHANDLER, JJ.

CHANDLER, J., for the Court.

¶ 1. Daniel **Dove** was convicted by a jury in the Harrison County Circuit Court for felony DUI. **Dove** appeals, raising the following issues:

I. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING **DOVE'S** MOTION TO SUPPRESS THE EVIDENCE

II. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING **DOVE'S** MOTION *IN LIMINE* TO PREVENT EVIDENCE OF **DOVE'S** PRIOR CONVICTIONS

¶ 2. Finding no error, we affirm.

FACTS

¶ 3. On November 26, 2000, at approximately 11:00 a.m., Larry Isaiah and Larry Hartfield were involved in a car accident with Daniel **Dove** at the parking lot of the Studio Apartments in Gulfport. Officer James Vaughan responded to the accident. He instructed **Dove** to turn his car off, but instead he drove another three feet. **Dove** complied with the request after Officer Vaughan repeated the command.

¶ 4. Officer Vaughan noticed that **Dove** had a beer in his hand and was trying to hide it. He also noticed that **Dove's** "words were slurry, his eyes were bloodshot, and he really didn't know where he was." He also noticed that **Dove's** car smelled of alcohol.

¶ 5. Officer Vaughan decided to obtain the assistance of Officer Jerry Birmingham, who has received training in detecting drunk driving. Officer Birmingham approached **Dove** and observed him stagger and stumble. He then asked **Dove** to recite the alphabet, but **Dove** failed after reaching the letter G. At 11:37 a.m., Officer Birmingham was of the opinion that **Dove** was under the influence of alcohol and arrested him. **Dove** refused to submit to an intoxilyzer test, so Officer Birmingham obtained a warrant from a municipal court judge to draw **Dove's** blood. The test was administered at 1:24 p.m. and showed a blood alcohol concentration of .39 percent. At the time of the arrest, the legal limit for driving under the influence was .10 percent. Miss.Code Ann. § 63-11-30(1)(c) (Rev.2000).

¶ 6. While Dove was in custody, the police learned that Dove had been found guilty of a DUI on January 13, 1997, and pleaded guilty to a second DUI on March 11, 1999. Dove was arrested and later indicted for felony driving under the influence of alcohol. Miss.Code Ann. § 63-11-30(1)(a)(2)(c) (Rev.2004). The case went to trial, and the jury returned a guilty verdict.

I. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING **DOVE'S** MOTION TO SUPPRESS THE EVIDENCE

[1] ¶ 7. On the day of **Dove's** trial, his attorney made a motion to suppress evidence of **Dove's** blood alcohol results, claiming that the warrant authorizing the blood alcohol test was invalid. The court denied the motion. **Dove** contends that ***1093** the municipal court violated his Fourth and Fourteenth Amendment rights when it issued a warrant authorizing a blood alcohol test without **Dove's** consent.

¶ 8. In *Schmerber v. California*, 384 U.S. 757, 758-59, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), Schmerber was being treated at a hospital for injuries he suffered

in an automobile accident. A police officer directed a physician to take a blood sample from Schmerber's body. The blood sample showed that Schmerber was intoxicated at the time of the accident. Schmerber was indicted for driving under the influence of alcohol, and the blood sample was introduced at trial. Schmerber claimed that the blood test was given without his consent, was the product of an unlawful search and seizure, and violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution. The United States Supreme Court disagreed and held that taking blood alcohol samples from a defendant who had been lawfully arrested did not violate a person's constitutional rights. In reaching this conclusion, the Court recognized the urgency of administering alcohol tests quickly, noting that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770, 86 S.Ct. 1826.

[2][3] ¶ 9. A police officer desiring an arrest warrant must obtain a judicial determination that probable cause exists. *Conerly v. State*, 760 So.2d 737, 740(¶ 7) (Miss.2000). The issuing judge's determination of the existence of probable cause is determined by the totality of the circumstances. *Haddox v. State*, 636 So.2d 1229, 1235 (Miss.1994). On review of a judge's issuance of an arrest warrant, this Court determines whether the facts and circumstances before the judge provided a " 'substantial basis ... for conclud[ing] that probable cause existed.' " *Byrom v. State*, 863 So.2d 836, 860 (¶ 65) (Miss.2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). In the present case, Officer Birmingham observed **Dove's** slurred speech and staggered walk, and he noted that **Dove's** breath smelled of alcohol. He also noted that **Dove** actually admitted to having drunk four beers that morning and was unable to recite the alphabet. The municipal court judge was within his discretion in issuing a warrant.

II. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING **DOVE'S** MOTION IN LIMINE TO PREVENT EVIDENCE OF **DOVE'S** PRIOR CONVICTIONS

[4] ¶ 10. On the day of trial, **Dove's** attorney made a motion *in limine* to suppress evidence of **Dove's** prior DUI convictions. The court heard the motion and denied it. **Dove** asserts that the **State** presented evidence of four prior DUI convictions, over **Dove's** attorney's objection. This assertion is factually incorrect. In reality, the **State** presented into evidence four documents representing two prior DUI offenses.

[5] ¶ 11. **Dove** also contends that **Dove's** prior DUI convictions unfairly prejudiced the jury and claims that the prejudicial effect outweighed the probative value. M.R.E. 403. However, the Mississippi Supreme Court has specifically addressed this very issue. In *Weaver v. State*, 713 So.2d 860 (Miss.1997), the defendant was convicted of a felony third offense DUI. Weaver claimed that the felony DUI trials should have been bifurcated due to the prejudicial nature of the underlying misdemeanor convictions. *Id.* at 865(¶ 29). The Mississippi Supreme Court rejected this claim and noted that the evidence of the defendant's prior DUI ***1094** convictions was necessary to meet the State's burden of proof and obtain conviction for a felony DUI. *Id.* at 865(¶ 31). Likewise, in the present case, it was necessary for the State to produce evidence of Dove's prior DUI convictions in order to secure a felony DUI conviction, because the prior arrests were elements of the crime with which he was charged. Moreover, in the case *sub judice*, the circuit court took steps to minimize the potentially prejudicial effects of **Dove's** prior convictions. The jury was given a cautionary instruction mandating that **Dove's** prior DUI convictions were not to be considered as evidence against **Dove**. This issue is without merit.

¶ 12. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF FELONY DRIVING UNDER THE INFLUENCE AND SENTENCE OF FIVE YEARS, SENTENCE TO RUN CONSECUTIVELY WITH SENTENCE APPELLANT IS CURRENTLY SERVING, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS ARE ASSESSED TO HARRISON COUNTY.

KING, C.J., BRIDGES AND LEE, P.JJ., IRVING, MYERS, GRIFFIS, AND BARNES, JJ., CONCUR. ISHEE, J., NOT PARTICIPATING.
Miss.App.,2005.
Dove v. State
912 So.2d 1091

CHESTER EDWARDS A/K/A TAILGUNNER EDWARDS A/K/A TONY EDWARDS A/K/A CHESTER R L EDWARDS A/K/A CHESTER R V EDWARDS A/K/A LESLIE EDWARDS A/K/A VAUGHN CHESTER EDWARDS, APPELLANT v. STATE OF MISSISSIPPI, APPELLEE

NO. 1999-KA-01121-COA

COURT OF APPEALS OF MISSISSIPPI

795 So. 2d 554; 2001 Miss. App. LEXIS 241

June 19, 2001, Decided

PRIOR HISTORY:
[1]** DATE OF TRIAL COURT JUDGMENT: 06/23/1999. COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT. TRIAL JUDGE: HON. ROBERT WALTER BAILEY. TRIAL COURT DISPOSITION: POSSESSION OF METHAMPHETAMINE WITH INTENT TO DISTRIBUTE WHILE IN POSSESSION OF FIREARM: SENTENCED TO SERVE 15 YEARS IN THE CUSTODY OF THE MDOC, 9 YEARS SUSPENDED AND 5 YEARS SUPERVISED PROBATION.

This Opinion Substituted on Denial of Rehearing for Withdrawn Opinion of February 20, 2001, Previously Reported at: *2001 Miss. App. LEXIS 72*.

DISPOSITION:
AFFIRMED.

LexisNexis(TM) HEADNOTES - Core Concepts

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches
[HN1] Requiring vehicles to stop at a weigh station is a seizure for purposes of the Fourth Amendment. Nonetheless, probable cause or even reasonable suspicion is not required in this situation.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches
[HN2] Mandatory stops at highway roadblocks are approved for certain purposes. Weigh station stops of truckers are distinguishable from the random stopping of all motorists in order to check their driver's licenses and automobile registrations. The prohibition of random stops of motorists does not cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches
[HN3] There are three requirements under Camara to validate a particular law enforcement practice involving a stop and limited detention: (1) existence of a strong public interest in maximizing success in combating the problem at hand; (2) an inability to achieve adequate result by relying on probable cause determinations; and (3) the relatively limited invasion of the citizen's privacy involved in the procedure in question. Applying these Camara standards, it would seem clear that the required stops at weigh stations for the purpose of weighing are reasonable under the Fourth Amendment.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN4] Some "suspicionless searches" are permitted when the reasons serve special needs, beyond the normal need for law enforcement.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches
[HN5] Increased inspections of randomly selected truckers are permissible.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
[HN6] Under the "plain feel" corollary to the "plain view" doctrine, when a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
[HN7] Since the "plain feel" exception for the discovery of contraband during a pat-down for weapons is the tactile equivalent of the "plain view" doctrine, it requires probable cause. Only reasonable suspicion is needed when a pat-down feels a possible weapon.

Governments > State & Territorial Governments > Police Power
[HN8] Mississippi Department of Transportation officers at inspection and weight stations are authorized to arrest

drivers who are found in violation of laws with reference to the fitness of a driver, among other laws. *Miss. Code Ann. § § 27-5-71* through 27-5-75 (Rev. 1999).

Governments > State & Territorial Governments > Police Power
[HN9] Filed sobriety tests may create probable cause to arrest for driving under the influence. There is no statutory prohibition on Mississippi Department of Transportation officers' performing such tests and there are no other grounds on which to prohibit it.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
[HN10] There is no Fourth Amendment hindrance to a law enforcement officer's reasonable steps to look through a high vehicular window. This is akin to the enhanced view that police may properly gain by using binoculars or artificial lighting.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View
[HN11] Evidence found in plain view by officers who have a legal right to be in the position to view, if the object's incriminating character is immediately apparent, can be seized without a warrant.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Inventory Searches
[HN12] An inventory search conducted pursuant to established procedures and policies does not offend the Fourth Amendment.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Inventory Searches
[HN13] Closed containers may be opened as part of an inventory search only if departmental regulations authorize it. Standardized criteria, or established routine, must regulate the opening of containers found during inventory searches, based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale
[HN14] A presumption can arise from the quantity alone of an intent to sell drugs and not just use them personally.

Governments > State & Territorial Governments > Police Power
[HN15] *Miss. Code Ann. § 27-5-75* (Rev. 1999) permits Mississippi Department of Transportation (MDOT) officers to enforce the provisions of all laws mentioned in *Miss. Code Ann. § 27-5-71* (Rev. 1999), and in the performance of their duties such employees shall have the right to bear arms, and shall have the authority to make arrests. MDOT enforcement officers have long had the authority to search for contraband during an inspection, authority that appears in *Miss. Code Ann. § § 63-5-1* & 63-5-49 (3) (Rev. 1996). That authority is mentioned in *Miss. Code Ann. § 27-5-71* (Rev. 1999) in two ways: MDOT officers may enforce laws relating to the size and weight of vehicles and laws with reference to the inspection of any vehicle, driver or operator, or cargo transported on state highways. *Miss. Code Ann. § 27-5-71* (Rev. 1999).

COUNSEL:
ATTORNEY FOR APPELLANT: JOHN M. COLETTE.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY JEAN SMITH VAUGHAN. DISTRICT ATTORNEY: BILBO MITCHELL.

JUDGES:
SOUTHWICK, P.J., McMILLIN, C.J., KING, P.J., PAYNE, BRIDGES, THOMAS, LEE, IRVING, MYERS AND CHANDLER, JJ., CONCUR.

OPINIONBY:
SOUTHWICK

OPINION:

[*556]

NATURE OF THE CASE - CRIMINAL FELONY

MODIFIED OPINION ON MOTION FOR REHEARING n1

n1 The motion for rehearing is denied and this opinion is substituted for the initial opinion of the Court.

[2]**

EN BANC

SOUTHWICK, P.J., FOR THE COURT:

P1. Chester Edwards was convicted of possession of methamphetamine with the intent to distribute while in possession of a firearm. On appeal, he asserts that the trial court erred in admitting evidence found on him and in his vehicle. Finding no reversible error, we affirm.

FACTS

P2. While driving a tractor-trailer rig, Edwards made a mandatory stop at a state-operated weigh station east of Meridian on the interstate highway. His truck was found to be in compliance with the applicable weight limit. As Edwards drove the truck off of the scales, he was told to park and walk into the office. Two Mississippi Department

of Transportation (MDOT) officers testified that on a random basis they had decided to do an additional "walk-around" inspection of the vehicle. Both officers testified that once Edwards was inside the station office, he appeared to be under the influence of narcotics. They surmised this from his agitation, his trembling hands and the fact that he repeatedly licked his lips, indicating a dry mouth. One of the officers testified that the fact that Edwards was wearing sunglasses on an overcast, possibly rainy morning **[**3]** added to his suspicion.

P3. Before walking out with Edwards to inspect his truck, the officers asked him if he was carrying any weapons. Edwards stated that he was not. One of the officers noticed a bulge in Edwards's right-hand pants pocket. After brushing the bulge with his hand, that officer was of the opinion that it was a weapon. Edwards admitted that it was his pocket knife and that he had forgotten it. Edwards removed it from his pocket. The other officer then asked Edwards to empty all of his pockets. Edwards refused. At that time, a pat down for weapons was conducted. The officer performing the pat down felt a small round object that he thought was methamphetamine. After another officer **[*557]** arrived to conduct a second pat down on Edwards, the object was removed from Edwards's pocket. It was a plastic bag containing what appeared to be methamphetamine.

P4. At this time Edwards was arrested. The officers then sought Edwards's consent to search his truck. He refused to sign a consent form, but the officers testified that he gave them oral consent. Edwards informed them that he had a gun in the truck. In the process of stepping up on the running board to enter the truck, **[**4]** the officer retrieving the gun saw a marijuana joint in a cup on the console between the seats. Later, the officers along with a Bureau of Narcotics agent who had arrived, searched the truck. More drugs and drug paraphernalia were found. The substance found on Edwards and in some parts of the truck was methamphetamine. In addition, a field sobriety test was conducted on Edwards. The test indicated that Edwards was under the influence.

P5. Edwards was indicted for possession of the drugs with intent to distribute. A suppression hearing was held. The trial judge in a written order concluded that the search of Edwards's person violated the Fourth Amendment. The court also found, though, that even if Edwards had not been searched, the walk around inspection of the truck still would have discovered the marijuana in a cup in "plain view" when an officer looked into the cab. He then would have been arrested for that offense as well as for being under the influence of drugs. This arrest would have led to the search of Edwards as an incident of arrest. Therefore the drugs inevitably would have been discovered.

DISCUSSION

P6. Edwards argues that the random stop of his truck and **[**5]** the resulting searches violated the Fourth Amendment. We find the following facts to be critical to the outcome:

1) Edwards complied with his obligation to stop his commercial truck at this stationary weigh station established at one of the interstate highway entrances to Mississippi.

2) A weigh station officer randomly ordered a walk-around inspection of the truck. The specific acts that are involved with this inspection were to step onto the running board, to open the cab door in order to see the vehicle identification number and compare it to the "cab card," to check the safety of the tires, and to make certain of the condition of mud flaps and of load-restraining straps on flatbed trailers. There was also testimony that the procedure included going into the cab to seek weapons that were within an arm's reach of the driver's seat.

3) The trial court discussed various events within the weigh station office prior to the inspection, including a pat-down of Edwards for weapons, the discovery of methamphetamine, Edwards's failure of a field sobriety test, and his possible consenting to a search of the vehicle. The judge found that any problems with those events were cured by the discovery **[**6]** of a marijuana cigarette in the vehicle, which was in plain view to an officer conducting the inspection of the vehicle.

P7. We now analyze each of these elements.

1. Right to require stop at weigh station

P8. [HN1] Requiring vehicles to stop at this weigh station is a seizure for purposes of the Fourth Amendment. Nonetheless, probable cause or even reasonable suspicion is not required in this situation. There are only "limited circumstances" in which suspicion is unnecessary. A fairly comprehensive **[*558]** list of those situations appears in a recent opinion of the United States Supreme Court. *City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 451-53, 148 L. Ed. 2d 333 (2000).*

P9. Relevant here is that [HN2] mandatory stops at highway roadblocks have been approved for certain purposes. *121 S. Ct. at 453.* In an earlier opinion, the United States Supreme Court referred to weigh station stops of truckers as being distinguishable from the random stopping of all motorists in order to check their driver's licenses and automobile registrations. *Delaware v. Prouse, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).* The Court's prohibiting **[**7]** of random stops of motorists did not "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory

inspection than are others." *Id. at 663 n. 26. Accord, Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 454, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990).*

P10. Three years before *Prouse*, the Supreme Court had found highway law enforcement officer's rights to stop, question and inspect to be more extensive at fixed checkpoints than for roving patrol stops as were involved in *Prouse*:

> [The] objective intrusion--the stop itself, the questioning, and the visual inspection--also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less in the case of a checkpoint stop.
>
> *United States v. Martinez-Fuerte, 428 U.S. 543, 558, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976).*

P11. In *Prouse*, the Court analyzed the issue of the Fourth Amendment reasonableness **[**8]** of stops to check for a license or registration "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Prouse, 440 U.S. at 654.* This balancing requirement originated in *Camara v. Municipal Court, 387 U.S. 523, 539, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967);* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.8(a) (3d ed.1996).

P12. [HN3] There are three requirements under *Camara* to validate a particular law enforcement practice involving a stop and limited detention: (1) existence of a strong public interest in maximizing success in combating the problem at hand; (2) an inability to achieve adequate result by relying on probable cause determinations; and (3) the "relatively limited invasion of the *** citizen's privacy" involved in the procedure in question. *Camara, 387 U.S. at 537.* "Applying the previously discussed *Camara* standards, it would seem clear that the required stops at these stations for the purpose of weighing are reasonable under the Fourth Amendment." 4 LAFAVE, SEARCH AND SEIZURE § 10.8(c).

P13. In *Edmond*, the Supreme Court referred **[**9]** to *Camara* as a case supporting administrative inspections. *Edmond, 121 S. Ct. at 452.* Similar factors have been applied to temporary law enforcement stops of individuals. *Brown v. Texas, 443 U.S. 47, 50-51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979)* (seizures involve "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty").

P14. Requiring truckers to stop at this weigh station was valid.

[*559] *2. Random inspection*

P15. Once the seizure occurred, the evidence supported that the officers randomly selected Edwards's truck for an additional, "walk-around" inspection. There was at least a suggestion in *Prouse* that weigh station stops followed by additional inspections could be justified. As mentioned above, the Court did not intend to "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." *Prouse, 440 U.S. at 663 n. 26.*

P16. We repeat **[**10]** the relevant facts in our case. The officers randomly chose Edwards for an additional obligation. It was to pull his truck to the side for a walk-around inspection. After Edwards did so, he walked into the inspection station. There he was questioned by two officers, Matthew Lott and Tex Jones. Lott told Edwards that he wanted to see his bill of lading, truck registration and his driver's license. Edwards returned to the truck to get it, acting angry and agitated according to Lott. After Lott reviewed the paperwork, he found it to be in order. Edwards was then informed that the officers would begin a walk-around inspection of the vehicle. That is when the vehicle identification number would be compared to the "cab card," the safety of the tires checked, and the existence and condition of mud flaps and load-restraining straps on flatbed trailers would be determined.

P17. For the substantive answer to whether random selection for these inspections is proper, we return to the *Camara* factors that are referenced in *Prouse*. *Prouse, 440 U.S. at 654.*

P18. First, there is a strong public interest in assuring that the large commercial vehicles are meeting minimal **[**11]** safety standards such as the condition of their tires, mud flaps, straps holding down loads, and other matters being inspected as described by the testimony at trial. Examining the driver's license and registration is something that *Prouse* itself authorizes when it occurs at a fixed site and to all vehicles of a specific category, as opposed to random stops by roving patrols of vehicles chosen at the officers' discretion. The Supreme Court did not question that at roadside truck weigh-stations and inspection checkpoints, "some vehicles may be subject to further detention for safety and regulatory inspection than are others." *Prouse, 440 U.S. at 663 n. 26.*

P19. Secondly, we find that if weigh station officials through their quick glance as a truck was being weighed must acquire probable cause to believe that there are defects in basic safety items such as tires, mud flaps, and other features, this would prevent acceptable results from being obtained. Delaying the vehicle and allowing a closer look is necessary. Moreover, if randomness is prohibited the

manpower needs would be greatly increased, which might well lead to no inspections occurring except for probable **[**12]** cause arising from the quick glance.

P20. Thirdly, we must decide whether requiring the driver to delay for the additional time necessary for a walk-around inspection is a "relatively limited invasion" of privacy. This is not a full vehicle search, with cargo being shifted or even removed, with the cab being closely examined, or any meaningful intrusion other than the inconvenience of the driver's having to wait somewhat longer at the weigh station. With one exception, what the officer saw were the same things any bystander would have seen whenever the vehicle was in a stationary position being refueled at a truck stop or paused at a rest stop. **[*560]** The exception was the officer's stepping up on a running board and opening the door to see the vehicle inspection number. Considering the safety concerns that apply if a commercial truck is not what its driver purports it to be, suggesting theft or some other illegal conduct, we find this a relatively limited and necessary invasion.

P21. *Prouse* identified a State's "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that **[**13]** licensing, registration, and vehicle inspection requirements are being observed." *Delaware v. Prouse, 440 U.S. at 658.* Delaware's specific measure of stopping all kinds of motorists randomly was found not sufficiently to further those aims. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. .... *Camara v. Municipal Court, 387 U.S. at 532-533.*" *Prouse, 440 U.S. at 661. Prouse* then distinguished weigh station stops of commercial trucks and found that its holding was irrelevant to that analysis. *Id. at 663 n. 26.*

P22. For the very reasons that random stops were not justified in *Prouse*, we find them to be fully justified here once all commercial trucks have been required to undertake the initial stop to be weighed. We find that the health and safety concerns regarding large commercial vehicles are immense, individualized suspicions would not be effective, and the additional intrusion of the walk-around inspection is limited. *See Camara, 387 U.S. at 537.* **[**14]**

P23. This was the analysis that upheld Kansas's random stopping of commercial trucks on the highway for safety inspections. *United States v. Burch, 153 F.3d 1140, 1141 (10th Cir. 1998)* (state trooper randomly stopping commercial trucks for inspection). Random safety inspections of commercial motor vehicles have long been a recognized tool for highway safety:

> We begin by accepting as substantial the Government's interests in promoting highway safety and protecting employees from retaliatory discharge. Roadway does not question the legislative determination that noncompliance with applicable state and federal safety regulations in the transportation industry is sufficiently widespread to warrant enactment of specific protective legislation encouraging employees to report violations. "Random inspections by Federal and State law enforcement officials in various parts of the country [had] uniformly found widespread violation of safety regulations," and [the relevant federal statute] was designed to assist in combating the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong.Rec. 32509, 32510 (1982) (remarks **[**15]** of Sen. Danforth and summary of proposed statute).
>
> *Brock v. Roadway Exp., Inc., 481 U.S. 252, 262, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987)* (bracketed inserts in original).

P24. Even beyond commercial truck inspections, there have been situations in which random searches have been authorized when the reasons are not simply law enforcement. Of course, we are concerned with a seizure and not a full search, a distinction which under the balancing tests being applied in *Camara* and other case law is significant. As a useful analogy are the precedents that address "special need" searches. As the Supreme Court majority in *Edmond* stated, [HN4] some "suspicionless searches" are permitted when the reasons **[*561]** serve "special needs, beyond the normal need for law enforcement." *Edmond, 121 S. Ct. at 451,* quoting *Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995)* (random drug testing of student-athletes permissible) .

P25. Among those special needs are several situations for random drug and alcohol testing for employees in safety-sensitive positions. *Edmond, 121 S. Ct. at 451-52,* **[**16]** citing *Treasury Employees v. Von Raab, 489 U.S. 656, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989)*("the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety. ... [The importance of safety] was recognized by Congress when it enacted the Hours of Service Act in 1907, and also when it authorized the Secretary to "test ... railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary" under a 1970 railroad statute).

P26. The critical considerations are under *Camara* or the similar factors in *Brown v. Texas*. Under those factors, we find that [HN5] increased inspections of randomly selected truckers are permissible.

P27. Relevant by analogy is case law for random administrative inspections of closely regulated businesses. *See., e.g., New York v. Burger, 482 U.S. 691, 702-704, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987).* Its primary application is to stationary business premises. *Burger* provides **[**17]** for notice to business premises owners "that inspections will be made on a regular basis and by limiting the inspection to regular business hours and to vehicles and parts subject to record-keeping requirements." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, § 13.03 (a) (1993) at 276. We find that the *Burger* test is satisfied here. Instead of the inspectors' choosing when to inspect, the trucker chooses by the schedule that he keeps. The inspection occurs at a stationary weigh site, can only occur when the trucker decides to use the adjacent highway, and is limited in scope to what can be seen from outside the vehicle. That a trucker is not always inspected is equivalent to the business that is not going to be inspected every day that it is open for business.

P28. For the variety of reasons, starting with the *Camara* factors, then looking explicitly at the direction from the footnote in *Prouse*, and finally considering as analogies the special needs and the warrantless administrative inspection case law, we find no defect in the random selection of certain vehicles for a walk-around inspection once they have already been stopped for weighing.

[18]** *3. Events in weigh station and inevitable discovery*

A. Pat-down for weapons

P29. The officer's pat-down of Edwards before the two officers went with him out to his tractor- trailer rig is when the first contraband was discovered. According to the trial judge's written findings, the officer's search of Edwards "was unreasonable as it does not fall within any recognized exception to the exclusionary rule found in the Fourth Amendment. *Minnesota v. Dickerson, 508 U.S. 366, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993).*" The relevance of *Dickerson* is not explained, but the transcript reveals that the case was discussed at the suppression hearing. In *Dickerson*, the Supreme Court recognized a [HN6] "plain feel" corollary to the "plain view" doctrine. When "a police officer lawfully pats down a suspect's outer clothing **[*562]** and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified ...." *Id. at 375-376.* However, the Supreme Court affirmed **[**19]** the lower court's decision that the specific officer conducting a pat-down on Dickerson did not obtain a plain enough feel to have probable cause to believe that the substance in his pocket was contraband. *Id. at 379.*

P30. We interpret the quoted statement in the trial court's opinion, which immediately precedes the reference to *Dickerson*, to imply a finding of fact that the two officers who testified did not have probable cause to believe just from touch that the object in Edwards's pocket was methamphetamine. The officers may have been quite confident as to the identity of the substance, but the court rejected that they had a sufficient factual basis. [HN7] Since the *Dickerson* "plain feel" exception for the discovery of contraband during a pat-down for weapons is the tactile equivalent of the "plain view" doctrine, it requires probable cause. *Id. at 375;* WHITEBREAD & SLOBOGIN, CRIMINAL PROCEDURE, § 10.03 (1993) at 212-213. Only reasonable suspicion is needed when a pat-down feels a possible weapon. *Dickerson, 508 U.S. at 373.*

P31. Though only implied, this finding of fact was for the trial court to make. Therefore the "plain feel" **[**20]** exception factually cannot be used to justify what occurred to Edwards thereafter.

B. Field sobriety test

P32. After finding the removal of the suspected drugs from Edwards's pocket to be invalid, the trial court also explained that a field test was conducted on the substance. It was found to be methamphetamine. After that result, Edwards was given and failed a field sobriety test. The court made no specific finding as to whether Edwards would have been given a field sobriety test absent the discovery and identification of the drugs. Nonetheless, there was significant testimony from the officers that Edwards's physical appearance and mannerisms alone created the basis to give the field sobriety test. Since the trial court found that the suspicions that Edwards was under the influence would have justified his arrest, we find it implied that the officers' suspicions were untainted by what the judge had just found was an improper discovery of drugs in Edwards's pocket.

P33. The trial judge said that it was "clear to the Court that the Defendant was going to be arrested initially for Driving Under the Influence." Edwards argues that Department of Transportation officers **[**21]** may not conduct the test that then confirmed his impairment. The officers testified that they were not permitted to conduct an intoxilyzer test or take a blood or urine sample. The statute cited by Edwards that does not list MDOT officers applies to "a chemical test or tests of his breath, blood or urine ...." *Miss. Code Ann. § 63-11-5 (1)* (Rev. 2000).

P34. This is not the test administered on Edwards. What he received is called a "field sobriety test." The test basically measures coordination by requiring a suspect to attempt performing such tasks as walking a straight line or standing on one leg. The officer who gave the test stated that he had

been trained in its administration. [HN8] Department of Transportation officers at inspection and weight stations are authorized to arrest drivers who are found in violation of "laws with **[*563]** reference to the fitness of a driver," among other laws. *Miss. Code Ann. § § 27-5-71* through 27-5-75 (Rev. 1999). Thus these officers had the right to arrest Edwards for being impaired, which requires that they have a probable cause basis on which to do so. The field sobriety test indicated that he was **[**22]** under the influence of some substance and therefore impaired as a driver. [HN9] Such tests may create probable cause to arrest for driving under the influence. *Young v. City of Brookhaven, 693 So. 2d 1355, 1361 (Miss. 1997).* There is no statutory prohibition on MDOT officers' performing the test and we find no other grounds on which to prohibit it.

C. Discovery of marijuana cigarette in cab of truck

P35. The trial also found that the improbable "plain feel" discovery of drugs in Edwards's pocket was cured by the discovery in "plain view" of a marijuana cigarette between the front seats of Edwards's truck. We have already found that the officers had the authority randomly to subject vehicles to a more intrusive inspection. Edwards had been selected for that inspection. By standing on the running board at the driver's door, the officer testified he saw into the truck and discerned that a marijuana cigarette was in a tin cup. The trial judge specifically accepted that testimony.

P36. [HN10] We find no Fourth Amendment hindrance to a law enforcement officer's reasonable steps to look through a high vehicular window. This is akin to the enhanced view that police may **[**23]** properly gain by using binoculars or artificial lighting. *Texas v. Brown, 460 U.S. 730, 740, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983)* ("use of a searchlight is comparable to the use of a marine glass or a field glass"). That is the same view an officer could gain if the Department of Transportation had a platform constructed adjacent to where trucks parked on which officers could stand; such a platform would not violate Fourth Amendment rights. By "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests," we find the enhanced view from the running board to be acceptably limited inspection technique. *Prouse, 440 U.S. at 654; cf. Kyllo v. United States, 150 L. Ed. 2d 94, 533 U.S. 27, 2001 U.S. LEXIS 4487, 121 S. Ct. 2038,* No. 99-8508 (June 11, 2001) (thermal imaging to measure heat emanating from home was a search).

P37. [HN11] Evidence found in plain view by officers who have a legal right to be in the position to view, if the object's incriminating character is immediately apparent, can be seized without a warrant. *Horton v. California, 496 U.S. 128, 136-137, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990).* An officer had **[**24]** the right to step on the running board. The officer testified that he saw and was able to identify the marijuana joint when he stepped onto the running board and looked through the window. The trial court accepted that testimony.

P38. Once the marijuana in the truck was discovered, Edwards would have been arrested for that offense. Then a search of his person and an inventory search of his vehicle would have followed. This means that even if the pat-down discovery and seizure of the drug from Edwards's pocket was invalid, that same evidence would have been admissible under the doctrine of "inevitable discovery." *Nix v. Williams, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984).* We find no defect in the evidence that supports the trial court's finding on inevitable discovery.

[*564]

P39. We review two remaining issues also raised by Edwards since they might impact the validity of the conviction.

4. Search of the truck

P40. A search of the truck revealed an additional ninety grams of methamphetamine. One officer found a 33-gram rock of methamphetamine inside a clear plastic bag in the outside compartment. Another sixty grams were inside a drink **[**25]** bottle covered in duct tape found inside the "headache rack" on the rear of the truck. On appeal, Edwards argues that the evidence from the truck is inadmissible as the search was illegal. Preliminarily, we note that there was testimony that Edwards gave his consent to the search, but Edwards at the suppression hearing denied that he consented. The judge never made a fact-finding, and we cannot on appeal resolve the factual dispute on consent.

P41. We find no legitimate dispute that once Edwards was arrested because of the marijuana, standard procedure was for the truck to be subjected to an inventory search before it was driven or towed to a secure location. A wrecker service was contacted, which sends a driver or tow truck. [HN12] An inventory search conducted pursuant to established procedures and policies does not offend the Fourth Amendment. *Robinson v. State, 418 So. 2d 749, 753 (Miss. 1982).* That policy here would have led to a search inside and outside the truck before it left the site.

P42. With one exception all the evidence found would have been uncovered by a search conducted by these rules. The problematic item of evidence was a plastic bottle sealed **[**26]** with duct tape. Though there was some testimony that an officer could see all the way through the bottle, most of the evidence was that the contents were not discernible until the container was opened. The United States Supreme Court has [HN13] permitted closed containers to be opened as part of an inventory search only if departmental regulations authorize it. "Our view that standardized criteria, or established routine, must regulate the opening of

containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells, 495 U.S. 1, 4, 109 L. Ed. 2d 1, 110 S. Ct. 1632 (1990)* (citations omitted).

P43. No copies of Department of Transportation rules were introduced below and only brief mention was made during testimony. In the Florida Supreme Court decision preceding the United States Supreme Court's opinion in *Florida v. Wells*, there was reference made to the state agency's submitting some rules with their *amicus curiae* brief. *State v. Wells, 539 So. 2d 464, 469 (Fla. 1989).* That court apparently was willing to consider **[**27]** evidence of state agency rules first introduced at the appellate level, though in that case no relevant rule existed. *Id.* The Mississippi Supreme Court has held that it will take judicial notice on appeal of a state agency's rules and regulations. *North Mississippi Savings & Loan Ass'n v. Collins, 317 So. 2d 913, 916 (Miss. 1975)* (Board of Savings & Loan Associations rules); *Board of Education of Prentiss County v. Wilburn, 223 So. 2d 665, 668 (Miss. 1969)* (Educational Finance Commission rules and regulations).

P44. An initial search into readily available public documents, however, has not uncovered potentially applicable MDOT directives on opening closed containers during inventory searches. An officer testified generally about inventory search policy but was never asked specifically about this issue. We therefore find that the evidence as to what was in the **[*565]** sealed bottle, which was 60 grams of methamphetamine, should not have been admitted under the inventory search exception. It is possible, but the trial judge made no findings regarding it, that discovering some of the other drugs during the inventory search created probable cause to **[**28]** open this container.

P45. Notwithstanding this defect, evidence of a substantial quantity of drugs was presented. There were thirty-three grams of methamphetamine in a clear plastic bag in an outside compartment and six grams on Edwards himself. There was testimony that normal personal consumption of methamphetamine averaged from 1/2 gram to two grams. [HN14] A presumption can arise from the quantity alone of an intent to sell drugs and not just use them personally. *Fox v. State, 756 So. 2d 753, 759 (Miss. 2000).* Even without the contraband found in the bottle, the officers recovered approximately thirty-nine grams of methamphetamine, at least twenty times the amount for personal use. In addition, there were scales found in the truck that were of the kind often used to weigh drugs. The evidence about the additional quantity was not a determining factor in the finding of intent to sell.

5. Authority to arrest

P46. On rehearing, Edwards questions the arrest authority of these MDOT officers. The issue of arrest authority was mentioned in the motion to suppress, but there the argument was that officers of the Public Service Commission had no general police **[**29]** authority. It appears that counsel initially believed that these were PSC officers, but in fact none of these officers were with that agency. No factual presentation was made and no ruling from the trial court obtained as to arrest authority. Arrest authority was not questioned on appeal until the motion for rehearing and has not been briefed by both parties. The related argument that was made concerned the authority of these MDOT officers to conduct field sobriety tests. We have already addressed that issue.

P47. A brief statement might be useful, though, to indicate that no plain error exists here. There were at least two bases on which to arrest Edwards before the inventory search was conducted. One was his being under the influence of drugs. We have discussed that issue previously in examining field sobriety tests. The other basis was the discovery of marijuana in plain view in the truck. Explicit authority to arrest for the drug offenses was granted to MDOT officers in one statute only after the events in this case. [HN15] *Miss. Code Ann. § 41-29-159* (Supp. 2000) (authority effective March 18, 1999). However, the same statute that gives officers at inspection **[**30]** stations the authority to arrest an impaired driver also permits the officers "to enforce the provisions of all laws mentioned in Section 27-5-71, and in the performance of their duties such employees shall have the right to bear arms, and shall have the authority to make arrests ...." *Miss. Code Ann. § 27-5-75* (Rev. 1999). n2 MDOT enforcement officers have long had the authority to search for contraband during an inspection, authority that appears in a statutory chapter entitled "Size, Weight and Load Regulations." *Miss. Code Ann. § § 63-5-1* & 63-5-49 (3) (Rev. 1996). That **[*566]** authority is "mentioned" in Section 27-5-71 in two ways: MDOT officers may enforce "laws relating to the size and weight of vehicles" and "laws with reference to the inspection of any vehicle, driver or operator, or cargo" transported on state highways. *Miss. Code Ann. § 27-5-71* (Rev. 1999).

> n2 The statute then states that these officers may "hold and impound any vehicle which is being operated in violation" of truck weight or privilege tax laws. *Miss. Code Ann. § 27-5-75* (Rev. 1999). We do not interpret the arrest authority to be limited to weight and tax laws, both as a matter of phrasing but also because of the statute's authorizing of enforcement of other laws.

[31]**

P48. An MDOT officer may make arrests under Section 27-5-75 when criminal violations under these statutes are

discovered during a proper inspection. Since we have found the walk-around inspection at this stationary weigh station site to be valid, the officers' discovery of drugs inside the truck properly could cause them to arrest Edwards.

P49. THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF METHAMPHETAMINE WITH THE INTENT TO DISTRIBUTE WHILE IN POSSESSION OF A FIREARM AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH NINE YEARS SUSPENDED AND FIVE YEARS OF SUPERVISED PROBATION AND FINE OF $ 5,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING, P.J., PAYNE, BRIDGES, THOMAS, LEE, IRVING, MYERS AND CHANDLER, JJ., CONCUR.

749 So. 2d 110, *; 1999 Miss. LEXIS 362, **

GRAHAM ALEXANDER FLOYD v. CITY OF CRYSTAL SPRINGS, MISSISSIPPI

NO. 1998-KM-01252-SCT

SUPREME COURT OF MISSISSIPPI

749 So. 2d 110; 1999 Miss. LEXIS 362

November 24, 1999, Decided

PRIOR HISTORY:
[1]** COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 7/28/1998. TRIAL JUDGE: HON. LAMAR PICKARD.

DISPOSITION:
CONVICTION OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND SENTENCED TO PAY A FINE OF $ 672.00 AFFIRMED.

LexisNexis(TM) HEADNOTES - Core Concepts

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN1] Determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. The appellate court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. Thus, the court is restricted to a de novo review of the trial judge's findings using the applicable "substantial evidence"/"clearly erroneous" standard.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN2] The standard of review regarding admission or exclusion of evidence is abuse of discretion. Where error involves the admission or exclusion of evidence, an appellate court will not reverse unless the error adversely affects a substantial right of a party.

Criminal Law & Procedure > Search & Seizure
[HN3] U. S. Const. amend. IV and Miss. Const. art. 3, § 23 contain almost identical language expressing a person's right to be secure from unreasonable searches and seizures. The prohibition against unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches
[HN4] By statute in Mississippi, a law enforcement officer may arrest, without a warrant, a suspect for a misdemeanor when the misdemeanor was committed in the officer's presence. *Miss. Code Ann. § 99-3-7(1)* (Supp. 1999). However, the statute permits an officer to arrest a suspect for a felony where the officer has reasonable ground to believe the person to be arrested committed a felony, even though not committed in the officer's presence.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Stop & Frisk
[HN5] Given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest, that is, on less information than is constitutionally required for probable cause to arrest. Such an investigative stop of a suspect may be made so long as an officer has a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a felony or as long as the officers have some objective manifestation that the person stopped is, or is about to be engaged in criminal activity.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Stop & Frisk
[HN6] In determining whether there exists the requisite reasonable suspicion, grounded in specific and articulable facts, a court must consider whether, taking into account the totality of the circumstances, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches
[HN7] As a general rule, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops
[HN8] An investigative stop may be made even where officials have no probable cause to make an arrest as long as they have a reasonable suspicion, grounded on specific and articulable facts, that a person they encounter was involved or is wanted in connection with a completed felony or some objective manifestation that the person stopped is, or is about to be engaged in criminal activity.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops
[HN9] To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an

officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops
[HN10] Reasonable cause for an investigatory stop may be based on an officer's personal observation or on an informant's tip if it bears indicia of reliability.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops
[HN11] Reasonable suspicion is dependent upon both the content of the information possessed by the detaining officer as well as its degree of reliability. Both factors - quantity and quality - are considered in the "totality of the circumstances."

Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants
[HN12] A citizen who confronts an officer in person to advise the officer that a designated individual present on the scene is committing a specific crime should be given serious attention and great weight by the officer. A person who is not connected with the police or who is not a paid informant is inherently trustworthy when he advises the police a crime is being committed.

Criminal Law & Procedure > Trials
[HN13] It is the duty of the objecting party to obtain a ruling by the trial court on objections, and that if the record includes no ruling by the trial court, the objections are waived for purposes of appeal.

COUNSEL:
ATTORNEY FOR APPELLANT: ROBERT LEWIS SPOTSWOOD.

ATTORNEY FOR APPELLEE: ROBERT W. LAWRENCE.

JUDGES:
SMITH, JUSTICE. PRATHER, C.J., PITTMAN, P.J., BANKS, MILLS, WALLER AND COBB, JJ., CONCUR. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SULLIVAN, P.J.

OPINIONBY:
SMITH

OPINION:

[*112] NATURE OF THE CASE: CRIMINAL - MISDEMEANOR

EN BANC.

SMITH, JUSTICE, FOR THE COURT:

P1. This case comes to this Court on appeal following the conviction in the Circuit Court of Copiah County, Mississippi, of Graham Floyd for first offense DUI.

P2. On April 24, 1997, Graham Floyd was operating his vintage red 1966 Ford Mustang convertible in an easterly direction along Highway 27 within the City of Crystal Springs, Mississippi, when he was stopped by members of the Crystal Springs Police Department and subsequently arrested for driving under the influence. Floyd was tried and convicted by the Municipal Court of Crystal Springs, Mississippi, **[**2]** for DUI, first offense, on May 15, 1997.

P3. Floyd then appealed the conviction to the Circuit Court of Copiah County, Mississippi. Circuit Judge Lamar Pickard conducted a de novo bench trial and found Floyd guilty of DUI, first offense, in violation of *Miss. Code Ann. § 63-11-30(1)(a)* (Supp. 1998). Floyd was sentenced to pay a fine of $ 500.00 plus State assessments in the amount of $ 172.00, and was taxed with all costs of the appeal to the circuit court. Floyd now appeals the conviction to this Court.

STATEMENT OF FACTS

P4. Officer Gerome Leflore of the Crystal Springs Police Department was off duty when a citizen approached him at a gas station on Mississippi Highway 27 on April 24, 1997, and reported to him that there was a person in an antique model, red Mustang convertible driving at a high rate of speed in a reckless manner headed into town on Highway 51. Because Officer Leflore was not on duty at the time, he called the Crystal Springs Police Department and relayed the information to the dispatcher. Officer Leflore testified that the citizen who reported the incident, David Rogers, had given Leflore information and complaints in the past.

P5. **[**3]** The police dispatcher radioed the information to Officer Chris Palmer, who proceeded to the intersection of Highway 51 and Highway 27 in Crystal Springs, where he intercepted a vehicle matching the description given by the dispatcher. When Officer Palmer began following the Mustang, there was a vehicle between Officer Palmer's patrol car and the Mustang, and Officer Palmer testified that he did not see the driver of the Mustang violate any traffic laws. As soon as Officer Palmer could safely pass the vehicle, he pulled the Mustang to the side of the road.

P6. Officer Palmer testified that he asked the driver, Graham Floyd, for his license. Officer Palmer stated that the top was down on the convertible, and he noticed a glass on the middle console of the vehicle and an opened bottle of a white substance labeled "vodka" on the passenger side.

P7. Officer Palmer testified that he asked Floyd to step from the vehicle, and that, when Floyd did so, he staggered,

and Officer Palmer had to step between Floyd and the highway to keep Floyd safely out of the highway. Officer Palmer stated that Floyd told him he had had a few drinks at the County Line beer joint and was drinking some **[**4]** on the way home. Officer Palmer also testified that Floyd's speech was "really slurred," and that Floyd muttered and talked loudly. Officer Palmer stated that Floyd tried to fix his pants leg and almost fell.

P8. Officer Palmer testified that Floyd had a knot on his head that was bleeding a little, apparently from a fight Floyd had been engaged in earlier that evening. Palmer stated that he asked Floyd several times whether Floyd wanted to see a doctor, but that Floyd refused medical assistance.

[*113] P9. Officer Palmer then thought it necessary to transport Floyd to the police department for the intoxilizer test, so he handcuffed Floyd and drove him to the police station. At the station, Officer Palmer told Floyd he had the right to refuse the test and explained the consequences of refusal. At that time, Floyd asked to use the telephone to call his attorney. Officer Palmer testified that, upon Floyd's request, he gave Floyd the nearest telephone available, which was only five feet from where the two were sitting. Officer Palmer did not leave the room while Floyd called his attorney. Floyd told his attorney on the phone that he had had a few drinks. Subsequent to the telephone **[**5]** conversation, Floyd refused to take the intoxilizer test.

P10. Floyd was tried and convicted by the Municipal Court of Crystal Springs, Mississippi, for DUI, first offense, on May 15, 1997. Floyd then appealed the conviction to the Circuit Court of Copiah County, Mississippi. Circuit Judge Lamar Pickard conducted a de novo bench trial and found Floyd guilty of DUI, first offense, in violation of *Miss. Code Ann. § 63-11-30(1)(a)* (Supp. 1998). At trial, Floyd's counsel objected to the introduction of the telephone conversation and moved to dismiss for lack of probable cause to stop Floyd's vehicle. Judge Pickard reserved ruling on the objection regarding the telephone conversation, and never issued a final ruling to that objection. Judge Pickard overruled the motion to dismiss, and stated that there was probable cause to stop the vehicle. From this ruling, Floyd appeals, raising the following issues:

I. WHETHER A POLICE OFFICER HAS THE LAWFUL AUTHORITY TO STOP A VEHICLE WHEN THE OFFICER DID NOT OBSERVE ANY MOTOR VIOLATIONS OR SUSPICIOUS DRIVING, YET RECEIVED SPECIFIC INFORMATION FROM A THIRD PARTY WARNING THAT THE DRIVER WAS OPERATING THE VEHICLE IN A RECKLESS MANNER. [6]**

II. WHETHER INCRIMINATING STATEMENTS MADE BY A SUSPECT DURING A TELEPHONE CONVERSATION WITH HIS ATTORNEY MAY BE USED AGAINST THE DEFENDANT WHEN THE CONVERSATION TOOK PLACE IN THE PRESENCE OF A POLICE OFFICER AND AFTER THE DEFENDANT HAD BEEN PLACED IN CUSTODY.

STANDARD OF REVIEW

P11. This Court must utilize a separate standard of review for each of the two issues raised by Floyd. First, [HN1] determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. ***Ornelas v. United States**, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996).* This Court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. ***Id.*** Thus, this Court is restricted to a de novo review of the trial judge's findings using the applicable "substantial evidence"/"clearly erroneous" standard. ***McNeal v. State**, 617 So. 2d 999, 1007 (Miss. 1993)* (citing ***Hansen v. State**, 592 So. 2d 114 (Miss.1991)).*

P12. Second, this Court has held that "the [HN2] standard **[**7]** of review regarding admission [or exclusion] of evidence is abuse of discretion." ***Thompson Mach. Commerce Corp. v. Wallace**, 687 So. 2d 149, 152 (Miss. 1997).* Where error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party." ***In re Estate of Mask**, 703 So. 2d 852, 859 (Miss. 1997); **Terrain Enters., Inc. v. Mockbee**, 654 So. 2d 1122, 1131 (Miss. 1995).*

[*114] DISCUSSION

I. WHETHER A POLICE OFFICER HAS THE LAWFUL AUTHORITY TO STOP A VEHICLE WHEN THE OFFICER DID NOT OBSERVE ANY MOTOR VIOLATIONS OR SUSPICIOUS DRIVING, YET RECEIVED SPECIFIC INFORMATION FROM A THIRD PARTY WARNING THAT THE DRIVER WAS OPERATING THE VEHICLE IN A RECKLESS MANNER.

P13. Floyd argues that the power of a law enforcement officer to perform an investigatory stop without a warrant is limited to those instances when a misdemeanor or felony is committed in the presence of the officer or when the officer reasonably believes that the suspect is involved in a felony. Thus, Floyd contends that because reckless driving is a misdemeanor and because **[**8]** Officer Palmer did not personally observe Floyd driving in a reckless manner, the stop performed by Officer Palmer was unlawful as a violation of the Fourth Amendment's prohibition against unreasonable search and seizure.

P14. [HN3] The Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution contain almost identical language expressing a person's right to be secure from unreasonable searches and seizures. The prohibition against unreasonable searches and seizures "applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle." ***United States v. Cortez**, 449 U.S. 411, 417, 101 S. Ct. 690, 694, 66 L. Ed. 2d 621 (1981). See also **Davis v. Mississippi**, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); **Terry v. Ohio**, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968).*

P15. [HN4] By statute in Mississippi, a law enforcement officer may arrest, without a warrant, a suspect for a misdemeanor when the misdemeanor was committed in the officer's presence. *Miss. Code Ann. § 99-3-7(1)* (Supp. 1999). However, the statute permits **[**9]** an officer to arrest a suspect for a felony where the officer has reasonable ground to believe the person to be arrested committed a felony, even though not committed in the officer's presence.

P16. The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest. This Court has recognized that [HN5] "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest," that is, on less information than is constitutionally required for probable cause to arrest. ***Singletary v. State**, 318 So. 2d 873, 876 (Miss. 1975). See also **McCray v. State**, 486 So. 2d 1247, 1249 (Miss. 1986).* Such an investigative stop of a suspect may be made so long as an officer has "a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a felony...." ***McCray**, 486 So. 2d at 1249* (quoting ***United States v. Hensley**, 469 U.S. 221, 229, 105 S. Ct. 675, 680, 83 L. Ed. 2d 604, 612 (1985)),* or as **[**10]** long as the officers have "some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." ***McCray**, 486 So. 2d at 1249-50* (quoting ***Cortez**, 449 U.S. at 417, 101 S. Ct. at 695).*

P17. The United States Supreme Court approved this investigatory procedure in ***Terry v. Ohio**, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968),* and ***[HN6] Adams v. Williams**, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).* In determining whether there exists the requisite "reasonable suspicion, grounded in specific and articulable facts," the court must consider whether, taking into account the totality of the circumstances, the detaining officers had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." ***Cortez**, 449 U.S. at 417-18, 101 S. Ct. at 694-95* (citing **[*115]** ***Brown v. Texas**, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979)).*

P18. As this Court noted in ***Singletary***, the United States Supreme Court has "unequivocably settled the question **[**11]** of the lawfulness of an investigative stop where there is no probable cause to arrest if the officer acts reasonably." ***Singletary**, 318 So. 2d at 877.*

The test is thus one of reasonableness, and neither this Court nor the United States Supreme Court has articulated a concrete rule to determine what circumstances justify an investigatory stop. ***Green v. State**, 348 So. 2d 428, 429 (Miss. 1977).* The question is approached on a case-by-case basis. ***Id.*** The United States Supreme Court has stated that, [HN7] as a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." ***Whren v. United States**, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996)* (citing ***Delaware v. Prouse**, 440 U.S. 648, 659, 99 S. Ct. 1391, 1399, 59 L. Ed. 2d 660 (1979); **Pennsylvania v. Mimms**, 434 U.S. 106, 109, 98 S. Ct. 330, 332, 54 L. Ed. 2d 331 (1977)).*

P19. Floyd argues that an investigative stop is lawful only where the officer has observed the suspect committing a misdemeanor or reasonably **[**12]** believes the person to have committed a felony. Floyd contends that because an officer could not lawfully arrest a suspect without a warrant where the misdemeanor was committed outside the officer's presence, the investigative stop of a misdemeanor suspect violates the Fourth Amendment where the misdemeanor occurred outside the officer's presence. The State distinguishes between the standard of reasonable suspicion required for an investigative stop and the misdemeanor / felony distinction made by *Miss. Code Ann. § 99-3-7* in determining probable cause to arrest.

P20. For this argument, Floyd cites to the following language found in ***Floyd v. State**, 500 So. 2d 989 (Miss. 1986):*

> An investigative stop may be made even where officials have no probable cause to make an arrest as long as they have "a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved or is wanted in connection with a completed felony ... or 'some objective manifestation that the person stopped is, or is about to be engaged in criminal activity.'"

Floyd**, 500 So. 2d at 992* (quoting ***McCray v. State**, 486 So. 2d at 1249-50).* **[**13]** The defendant in ***Floyd was suspected of drug trafficking. The highway patrol put out a bulletin on the defendant's vehicle. The defendant was subsequently spotted by a trooper and pulled over. The trooper first arrested the defendant, then smelled marijuana when he leaned inside the car. The trooper then opened the trunk and discovered bales of marijuana. On appeal, this Court stated that the trooper lacked both the reasonable

suspicion of criminal activity required to make the stop as well as the probable cause required to arrest the defendant. ***Floyd***, *500 So. 2d at 993 n.1.* The trooper lacked reasonable suspicion to make the stop because he was told only to be on the lookout for the defendant's vehicle and to advise headquarters if he stopped the vehicle. The trooper had no idea why the defendant was wanted. The trooper lacked probable cause to make the arrest because the arrest preceded the discovery of the marijuana, and the scant information given to the officer was not enough to amount to probable cause.

P21. The above quoted language which is urged by Floyd in this case was first utilized by this Court in ***McCray v. State***, *486 So. 2d 1247 (Miss. 1986).* **[**14]** Like ***Floyd***, ***McCray*** involved a suspected felony, not a traffic violation. In ***McCray***, officers observed certain characteristics of the often-used drug courier profile in determining that the defendant was likely involved in drug trafficking. Officers stopped the defendant in an airport terminal. A drug-detecting dog reacted positively to the suitcase belonging to the defendant. The defendant was asked to accompany the **[*116]** officers to the airport police office where the defendant consented to a search of his bags. This Court held that even if the initial stop of the defendant exceeded the scope of the investigative search and thus amounted to a seizure, the officers had probable cause to do so. ***McCray***, *486 So. 2d at 1250.*

P22. Floyd also cites to ***Haddox v. State***, *636 So. 2d 1229 (Miss. 1994),* another drug trafficking case which, again, cites ***Floyd*** for the requirement that to make an investigative stop, an officer needs only a reasonable suspicion that the suspect is involved in a felony. ***Haddox***, *636 So. 2d at 1233.* In ***Haddox***, a law enforcement **[**15]** officer received information from a confidential informant that the defendants, two sisters, were to be driving into Marion County with a large amount of marijuana. The officer pulled over the vehicle driven by the sisters, and, upon not seeing any contraband in plain view, informed the sisters that they would have to wait while a search warrant was obtained. On appeal, the sisters argued that the detention amounted to an arrest and that the officer did not have probable cause to detain them. The Court held that the detention, which lasted only five to ten minutes, did not amount to an arrest, but was within the purview of the investigative stop, and that, at the time of the stop, there was no reasonable belief that the stop would turn into a more permanent detainment, i.e. a full arrest. ***Id.*** *at 1237.* As in both ***Floyd*** and ***McCray***, this Court was not called upon in ***Haddox*** to make the felony/misdemeanor distinction, and the stop was unrelated to any traffic offense.

P23. Examining only the language of ***Floyd***, ***McCray*** and ***Haddox*** containing the statement that to make an investigative stop, an **[**16]** officer needs only a reasonable suspicion that the suspect is involved in a felony, it would seem, at first blush, that Floyd's argument that Officer Palmer could not lawfully stop him for a traffic violation which did not occur in Officer Palmer's presence is correct. Nevertheless, this argument is misplaced.

P24. First, the language argued by Floyd from ***Floyd***, ***McCray***, and ***Haddox*** allows an officer to make an investigative stop where the traffic violation did not occur in his presence. Again, that language reads:

> [HN8] An investigative stop may be made even where officials have no probable cause to make an arrest as long as they have 'a reasonable suspicion, grounded on specific and articulable facts, that a person they encounter was involved or is wanted in connection with a completed felony ... or some objective manifestation that the person stopped is, or is about to be engaged in criminal activity.'

Floyd, *500 So. 2d at 992* (quoting ***McCray***, *486 So. 2d at 1249-50)* (emphasis added). As Floyd points out, traffic violations are misdemeanors, and misdemeanors are, technically speaking, "criminal activity" **[**17]** in that misdemeanors, like felonies, are crimes. Therefore, the very language urged by Floyd allows an officer to stop a suspect so long has he has a reasonable suspicion of any "criminal activity."

P25. Second, Floyd takes the language relied upon out of context. The facts of neither ***Floyd***, ***McCray***, nor ***Haddox*** stand for the proposition for which Floyd cites those cases. The defendants in all three cases were suspected of felonies; thus, this Court was not faced with making a felony/misdemeanor distinction in any of cases cited by Floyd. The quoted language relied upon by Floyd is found either in cases like the three discussed above in which the investigative stop was made for purposes wholly unrelated to a traffic violation or in cases in which the suspect was stopped initially for a traffic violation, but where the suspect was detained for something unrelated to the traffic violation. *See, e.g.,* ***Chapman v. State***, *284 So. 2d 525 (Miss. 1973)* (defendant was stopped for speeding and was detained because she and her companions fit the description of the persons who had recently robbed a grocery **[*117]** store) **[**18]** . This Court has never applied the language relied upon by Floyd to simply a stop made for purposes of investigating a possible traffic violation.

P26. Third, applying the felony/misdemeanor distinction in traffic violation cases would require law enforcement officials to ignore communications of other officials warning of drivers who may be impaired, ill, reckless, or dangerous to the public unless the officer has probable cause to arrest. The State urges this Court to recognize the common sense rule enunciated by the Maryland Court of Special Appeals in ***State v. Alexander***, *124 Md. App. 258, 721 A.2d 275 (Md. Ct. Spec. App. 1998):*

"When police cross a threshold not in their criminal investigatory capacity, but as a part of their community caretaking function, it is clear that the standard for assessing the Fourth Amendment propriety of such conduct is whether they possessed a reasonable basis for doing what they did .... The question is whether there were reasonable grounds to believe that some kind of an emergency existed, that is, whether there was evidence which would lead a prudent and reasonable official to see the need to act .... **[**19]** "

Id. *at 284* (holding that marijuana discovered in plain view was admissible where police entered a residence without a warrant to investigate a potential breaking and entering and to determine whether there were any victims). The Fifth Circuit has recognized a similar rule, cited by this Court in ***Singletary v. State****, 318 So. 2d 873, 876 (Miss. 1975):* "The local policeman ... is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so." ***United States v. West****, 460 F.2d 374, 375-76 (5th Cir. 1972).*

P27. The United States Supreme Court has noted that determining the reasonableness of a detention less intrusive than a traditional arrest depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***Brown v. Texas****, 443 U.S. at 50, 99 S. Ct. at 2640* (quoting ***Pennsylvania v. Mimms****, 434 U.S. at 109, 98 S. Ct. at 332).* **[**20]** "Consideration of the constitutionality of seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." ***Brown v. Texas****, 443 U.S. at 50-51, 99 S. Ct. at 2640.* Returning to the case at bar, there was no reason to believe, at the time Officer Palmer stopped Floyd, that the short detention would turn into a more permanent detention, that is, an arrest for DUI. Officer Palmer merely investigated a complaint received from the dispatcher regarding a reckless driver. The public concern served by the seizure is evident - a reckless driver poses a mortal danger to others. There exists in such a situation an absolute necessity for immediate investigatory activity. The severity of interference with individual liberty was minimal - Floyd was required to pull over to the side of the road. Officer Palmer had a duty to investigate the detailed complaint given to the police department concerning a driver who may have been ill, impaired, reckless or dangerous to the public. To cling to a rule which would prevent a police officer **[**21]** from investigating a reported complaint of reckless driving would thwart a significant public interest in preventing the mortal danger presented by such driving.

P28. The felony/misdemeanor distinction cited in the cases urged by Floyd is not the correct test by which to evaluate whether an investigative stop is reasonable. The question is not whether a driver is suspected of a felony or misdemeanor, but whether a law enforcement officer acts reasonably in stopping a vehicle to investigate a complaint short of arrest. This **[*118]** Court stated in ***Singletary****, 318 So. 2d at 876:*

Police activity in preventing crime, detecting violations, making identifications, and in apprehending criminals may be divided into three types of action: ... (2) Investigative stop and temporary detention: [HN9] To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest ....

P29. Though Floyd argues otherwise, the circumstances under which Officer Palmer stopped Floyd were clearly reasonable, and Floyd **[**22]** clearly had "reasonable suspicion, grounded on specific and articulable facts" as required by this Court in ***Floyd****, 500 So. 2d at 992.* Floyd argues that the stop was unreasonable because Officer Palmer received a dispatch based on a complaint from a third party.

P30. [HN10] Reasonable cause for an investigatory stop may be based on an officer's personal observation or on an informant's tip if it bears indicia of reliability. ***[HN11] Adams v. Williams****, 407 U.S. at 147, 92 S. Ct. at 1924.* Reasonable suspicion is dependent upon both the content of the information possessed by the detaining officer as well as its degree of reliability. ***Alabama v. White****, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301 (1990).* Both factors - quantity and quality - are considered in the "totality of the circumstances." ***Id.*** Here, Officer Palmer received a very specific description of Floyd's vehicle, the precise location of the car, and information regarding exactly what was complained of, that is, reckless driving at a high rate of speed. The report came to Officer Palmer over his radio from the dispatcher. Officer Leflore testified **[**23]** that the complaint came from a named source who had given him information in the past. This was certainly enough to satisfy both the quantity and quality requirements.

P31. A case from the Texas Court of Appeals is precisely on point. In ***State v. Sailo****, 910 S.W.2d 184 (Tex. App. 1995),* while police officers were making a traffic stop, a private citizen drove up and informed police officers that he had seen a possible drunk driver approaching the scene. The informant described the suspect as driving a small, white Toyota pickup truck and stated that the vehicle was approaching the officers. The informant drove off before the officers could take down the informant's name. The officers stopped the vehicle described by the informant

even though neither had seen the vehicle commit any traffic violations. The driver was eventually arrested after failing field sobriety tests.

P32. The driver argued on appeal that the investigative stop was unlawful because the information provided by the unidentified informant was not an adequate ground for the officers to form a reasonable suspicion that criminal activity was occurring. The court noted that a tip by an **[**24]** unnamed informant of undisclosed reliability standing alone will rarely establish the requisite level of suspicion necessary to justify an investigative detention, and that "there must be some further indicia of reliability, some additional facts from which a police officer may reasonably conclude that the tip is reliable and a detention is justified." ***Id.*** *at 188* (*citing* ***White****, 496 U.S. at 329, 110 S. Ct. at 2415-16).* The ***Sailo*** court held, that the informant's complaint contained the requisite indicia of reliability, citing Justice (then Judge) Kennedy's statement in the Ninth Circuit Court of Appeals case, ***[HN12] United States v. Sierra-Hernandez****, 581 F.2d 760 (9th Cir. 1978):*

A citizen who confronts an officer in person to advise the officer that a designated individual present on the scene is committing a specific crime should be given serious attention and great weight by the officer. ... A person who is not connected with the police or who is not a paid informant is inherently trustworthy **[*119]** when he advises the police a crime is being committed.

Sailo*, 910 S.W.2d at 188* **[**25]** (*citing* ***Sierra-Hernandez****, 581 F.2d at 763).* The ***Sailo*** court also discussed ***Illinois v. Gates****, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983),* in which the Supreme Court stated that a detailed description of the wrongdoing, along with a statement that the event was observed firsthand, entitles an informant's tip greater weight than might otherwise be the case. ***Sailo*** at 189. The court in ***Sailo*** thus determined that, in the totality of the circumstances, the investigative stop of the defendant was justified. Cases with like facts and result are ***State v. Melanson****, 140 N.H. 199, 665 A.2d 338 (N.H. 1995)* (unknown caller's report that provided a specific description of a car whose driver was thought to be intoxicated, knowledge of its exact location at the time, and specific information of its movements, reasonably supported the conclusion, for the purpose of determining whether officer had reasonable suspicion to stop vehicle, that the basis of the caller's knowledge was his personal observation of vehicle), and ***Commonwealth v. Janiak****, 368 Pa. Super. 626, 534 A.2d 833 (Pa. Super. Ct. 1987)* **[**26]** (investigatory stop of a vehicle based on radio broadcast that intoxicated individual was driving vehicle in vicinity was proper; vehicle was the only vehicle on road that it was reported to be proceeding from).

P33. As in ***Sailo***, the information given by the informant to Officer Leflore was neither vague as to the type of criminal activity nor imprecise as to the kind of crime being committed. The informant also described the suspect's location with some particularity. Furthermore, the name of the informant in the case at hand was known by Officer Leflore, and Leflore had received complaints from the informant in the past. No evidence is present in the record which should have caused Officer Leflore to doubt the reliability or good faith of the informant. Officer Leflore immediately telephoned the dispatcher, and the same information was relayed to Officer Palmer. There was no link in the chain of communication which was or should have appeared to be unreliable to Officer Palmer. Officer Palmer confirmed that a vehicle was located where the informant had indicated and matching the description given. In light of the totality of the circumstances, the investigative **[**27]** stop was justified.

II. WHETHER INCRIMINATING STATEMENTS MADE BY A SUSPECT DURING A TELEPHONE CONVERSATION WITH HIS ATTORNEY MAY BE USED AGAINST THE DEFENDANT WHEN THE CONVERSATION TOOK PLACE IN THE PRESENCE OF A POLICE OFFICER AND AFTER THE DEFENDANT HAD BEEN PLACED IN CUSTODY.

P34. Floyd argues that his Fifth and Sixth Amendment rights to counsel were violated by Officer Palmer's remaining within hearing distance of Floyd's telephone conversation with his attorney and the subsequent use at trial of statements made during that conversation. Floyd's counsel objected to the use of the telephone conversation at trial, but on the grounds that the statements were confidential and thus protected by attorney-client privilege. To this objection, counsel for City of Crystal Springs replied that the communication was not confidential where Floyd was aware of the presence of Officer Palmer at the time the statements were made. The trial judge stated that he would take the objection under consideration and directed the witness, Officer Palmer, to answer the prosecution's questions regarding the telephone conversation. Officer Palmer testified that during the telephone conversation **[**28]** Floyd stated, "yes, I've had a few drinks" and that after Floyd hung up the telephone, he stated to Officer Palmer that he did not want to take the intoxilizer test. No ruling was ever made regarding the objection, and Floyd's counsel never raised the question **[*120]** again to the trial court. Floyd now raises the objection on appeal, apparently abandoning the confidentiality argument and arguing, instead, that the use of the statements at trial violated Floyd's right to counsel.

P35. Floyd's argument is procedurally barred. Floyd abandoned his objection when he failed to require the trial judge to issue a ruling on the objection. The State submits that this Court should apply its holding in ***Rushing v. State****, 711 So. 2d 450 (Miss. 1998),* to the issue at hand. In

that case, the defendant was convicted of uttering a forged prescription. The defendant had several prior convictions for forged prescriptions, and, prior to trial, the defense attorney filed a motion in limine seeking to exclude from evidence any mention of prior bad acts or convictions. The trial court never ruled on the motion, and the defendant attempted to raise her objection on appeal. This Court stated: **[**29]**

There is nothing in the record to indicate whether the motion was ruled on by the court. It is well-established that "it is the responsibility of the movant to obtain a ruling from the court on motions filed by him and failure to do so constitutes a waiver of same." ***Martin v. State***, *354 So. 2d 1114, 1119 (Miss. 1978)*(*citing* ***Grant v. Planters' Bank***, *5 Miss. 326 (1840))....* Thus, we do not hold the trial court in error for not ruling on the motion.

711 So. 2d at 456. See also ***Wright v. State***, *540 So. 2d 1, 4 (Miss. 1989).*

P36. This principle applies to obtaining rulings on objections as well as on motions. This Court has held that [HN13] it is the duty of the objecting party to obtain a ruling by the trial court on objections, and that if the record includes no ruling by the trial court, the objections are waived for purposes of appeal. ***Cole v. State***, *525 So. 2d 365, 369 (Miss. 1987)* (citing ***Hemmingway v. State***, *483 So. 2d 1335 (Miss.1986);* ***Cummings v. State***, *465 So. 2d 993 (Miss.1985)).*

P37. Furthermore, any error in admitting the statement **[**30]** from the telephone conversation is harmless. The proof of impairment offered by the State was so overwhelming that any such error was harmless. This Court has explained that an error is harmless when it is apparent on the face of the record that a fair-minded jury could not have arrived at a verdict other than that of guilty. ***Forrest v. State***, *335 So. 2d 900, 903 (Miss. 1976).*

P38. The evidence of Floyd's impairment is so overwhelming that a fair minded jury (or, here, a judge in a bench trial) could have arrived at no verdict other than to find Floyd guilty. Officer Palmer testified, and Floyd does not contradict, that at the time he stopped Floyd's vehicle, Floyd stated that he had been to the County Line beer joint where, by Floyd's own admission, he had been drinking. Floyd also told Officer Palmer that he had been drinking on the way home. There was an opened bottle of vodka, one-fourth of which was missing, on the passenger seat of Floyd's car and a glass on the console of the car. When Floyd exited the vehicle, he staggered, almost fell into the highway, could not stand properly, almost fell over when he tried to fix his pants leg, and spoke **[**31]** with slurred speech, alternating between mumbling and loud speech.

P39. Additionally, the only statement from the telephone conversation testified to by Officer Palmer was Floyd's statement, "Yes, I've had a few drinks." Floyd had already told Officer Palmer, when Officer Palmer pulled Floyd's car to the side of the road, that he had been to the County Line beer joint where he had been drinking and that he had been drinking on the way home. The statement from the telephone conversation was merely cumulative and is, therefore, harmless.

CONCLUSION

P40. This Court affirms the trial court's conviction of Graham Floyd for DUI, first offense. The issues raised by Graham on appeal are without merit.

[*121] P41. Floyd's argument that Officer Palmer could not lawfully stop his vehicle because Officer Palmer did not personally observe the reckless driving is without merit. Officer Palmer had a reasonable suspicion, grounded on specific and articulable facts that Floyd had been driving recklessly. Floyd's argument that his constitutional right to counsel was violated is procedurally barred. Further, any error in admitting Floyd's statements from the telephone **[**32]** conversation was harmless, given the abundance of evidence of Floyd's impairment presented to the trial court and given Floyd's prior statements to Officer Palmer regarding the fact that he had been drinking.

P42. Therefore, this Court affirms Graham's conviction and the judgment of the Copiah County Circuit Court.

P43. **CONVICTION OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND SENTENCED TO PAY A FINE OF $ 672.00 AFFIRMED.**

PRATHER, C.J., PITTMAN, P.J., BANKS, MILLS, WALLER AND COBB, JJ., CONCUR. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SULLIVAN, P.J.

DISSENTBY:
McRAE

DISSENT:

McRAE, JUSTICE, DISSENTING:

P44. The majority writes that the information provided by a third party that Floyd was speeding and driving recklessly was sufficient to justify a ***Terry*** investigative stop. ***Terry v. Ohio***, as the majority notes, allows police to make an investigatory stop if the officer has a reasonable suspicion that a person has committed or may be committing a crime. ***Terry v. Ohio***, *392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).* However, because it cannot be said that one who is

speeding and/or driving recklessly **[**33]** is likely to be engaging in any crime other than speeding and/or driving recklessly, n1 and one cannot investigate the crime of speeding and/or driving recklessly by stopping the alleged violator, allowing police to conduct an investigative stop under these circumstances stretches the concept of a ***Terry*** stop too far. Indeed, because the driver who commits no infractions while driving probably does not exist, n2 the majority's opinion gives police carte blanche to search almost every driver on the road. Moreover, the officer in this case, although he was able to maneuver his vehicle behind the car behind Floyd, never observed Floyd speed or drive recklessly. Thus, the obvious conclusion is that the informant's information which formed the basis for the alleged ***Terry*** stop was not reliable since no speeding or reckless driving occurred within the officer's presence. If the information forming the basis of the stop is not reliable, the information cannot support a warrantless search. ***Barton v. State,*** *328 So. 2d 353, 354 (Miss. 1976).*

n1 Speeding and or other traffic infractions alone do not generally provide a reasonable suspicion that the offender is guilty of driving while intoxicated. *See, e.g.* ***State v. Carver****, 577 N.W.2d 245 (Minn.Ct.App. 1998)* (speeding and parking vehicle diagonally were not sufficient indicia of intoxication to provide probable cause to arrest defendant for DUI and petty misdemeanor speeding did not provide sufficient probable cause to arrest defendant for DUI); ***State v. Rutherford****, 160 Ore. App. 343, 981 P.2d 386 (Or.Ct.App. 1999)* (state trooper did not have subjective probable cause to believe that defendant was driving under the influence of intoxicants before he administered field sobriety after stopping defendant for speeding and driving carelessly). **[**34]**

n2 Even a minimally competent police officer can follow a car long enough to observe some minor traffic infraction if he is looking for a pretext to stop the vehicle. While we certainly do not endorse this practice, we would be foolish not to recognize that it happens. ***People v. Uribe****, 12 Cal. App. 4th 1432, 16 Cal. Rptr. 2d 127, 129 (1993)* (unsafe lane change); ***King v. State****, 839 S.W.2d 709 (Mo.Ct.App. 1992).*

P45. The Fourth Amendment to the United States Constitution prohibits both unreasonable searches and seizures. Just as a search must be commensurate with the information which forms the basis for **[*122]** the search (e.g., the police cannot search for a stolen television in a pocketbook), n3 so, too, should a stop be commensurate with its objective. Indeed, this is exactly what the United States Supreme Court held in ***Terry*** -- an investigative detention is permissible only if (1) "the officer's action was justified at its inception," and (2) "**it was reasonably related in scope to the circumstances which justified the interference in the first place**." **[**35]** ***Terry****, 392 U.S. at 20, 88 S. Ct. 1868* (emphasis added). If speeding and/or reckless driving is an indication of no crime other than speeding and/or reckless driving, an investigative stop of a driver alleged to have been speeding and/or driving recklessly is pointless inasmuch as the stop terminates all evidence of the crime. If the officer has not observed the driver speeding and/or driving recklessly, stopping the driver is not going to aid his investigation.

n3 *See, e.g.,* ***Cupp v. Murphy****, 412 U.S. 291, 295, 93 S. Ct. 2000, 2003, 36 L. Ed. 2d 900 (1973);* ***Ferrell v. State****, 649 So. 2d 831, 833 (Miss. 1995)* (police could not examine contents of matchbox in a search for weapons incidental to arrest of driver).

P46. If the police had themselves observed Floyd violating traffic ordinances, they could have stopped him and seized him long enough to process a citation. The fact that he was observed violating traffic ordinances, however, does not **[**36]** *ipso facto,* give police probable cause to make an investigative stop. In other words, speeding and driving recklessly are not evidence that the driver is likely to be committing other crimes.

P47. What is lacking here is any reasonable suspicion that Floyd, seen speeding by another motorist, was likely to be engaging in any criminal activity **other than speeding and/or driving recklessly**. As a practical matter, stopping a driver to investigate whether he might have been speeding defies all common sense. Because stopping the driver actually pretermits all evidence that the driver might be speeding, it cannot be said that the stop and search are "reasonably related in scope to the circumstances [alleged speeding] which justified the interference in the first place." ***Terry****, 392 U.S. at 20, 88 S. Ct. at 1868.*

P48. In ***Knowles v. Iowa****, 525 U.S. 113, 119 S. Ct. 484, 488, 142 L. Ed. 2d 492 (1998),* the United States Supreme Court reversed a conviction for possession of drugs which had been found in a search incident to a traffic citation. There was no justification for a search of the car where once the speeder was stopped, "all **[**37]** the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." ***Knowles****, 119 S. Ct. at 488.*

P49. The majority argues that "applying the felony/misdemeanor distinction in traffic violation cases would require law enforcement officials to ignore communications of other officials warning of drivers who may be impaired, ill, reckless, or dangerous to the public unless the officer has probable cause to arrest." This is hardly the great concern the majority would have us

believe. If an officer is given a report of an impaired driver, he needs only to follow the driver a short distance to determine for himself whether the driver is impaired. Since the officer would have to apprehend the vehicle to stop the car anyway, it should demand no extra effort to require the officer to verify for himself that the suspected bad driver is a bad driver in reality.

P50. The majority's opinion in this case does more than just make bad law; it threatens the very freedoms upon which this nation was founded. The idea that police **[**38]** officers may stop citizens for no reason other than that they **might** have been speeding is specious. The majority, it seems, would have one give up all right to be free from government intrusion once **[*123]** he enters his automobile. I, for one, cannot agree, and, thus, I dissent.

SULLIVAN, P.J., JOINS THIS OPINION.

KENNETH W. GOFORTH v. CITY OF RIDGELAND, STATE OF MISSISSIPPI

No. 89-KA-00056

SUPREME COURT OF MISSISSIPPI

603 So. 2d 323; 1992 Miss. LEXIS 348

June 10, 1992, DECIDED

PRIOR HISTORY:
[1]** Appeal No. 1215 from Judgment dated SEPTEMBER 12, 1988, ALFRED G. NICOLS, JR. RULING JUDGE, Madison County Circuit Court

DISPOSITION:
Affirmed.

LexisNexis(TM) HEADNOTES - Core Concepts

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN1] Once an appeal is before the Supreme Court of Mississippi under *Miss. Code Ann. § 11-51-81* (1972), it is before the court for all purposes. The court's jurisdiction extends to "appeals," which are entire cases, and not merely isolated or discrete issues therein. On the other hand, it is a fair interpretation of the statute that, within the court's discretion, it may decline to consider non-constitutional issues and restrict its review to issues of general importance in the administration of justice, or to protect a party from substantial and irreparable injury.

Criminal Law & Procedure > Arrests > Warrantless Arrest
[HN2] The familiar provisions of *Miss. Code Ann. § 99-3-7* (1972) implement the constitutional guarantee: An officer or private person may arrest any person without warrant, for a breach of the peace threatened or attempted in his presence.

Criminal Law & Procedure > Arrests > Warrantless Arrest
[HN3] Miss. Unif. Crim. Rules Cir. Ct. Prac. 1.02 provides: An officer may arrest any person without a warrant for breach of the peace, including those threatened or attempted, committed in the presence of an officer.

Criminal Law & Procedure > Arrests > Warrantless Arrest
[HN4] Misdemeanors are breaches of the peace, and *Miss. Code Ann. § 99-3-7* (1972), Miss. Unif. Crim. Rules Cir. Ct. Prac. 1.02 empower officers to make arrests of persons who commit misdemeanors in their presence.

Criminal Law & Procedure > Arrests > Warrantless Arrest
[HN5] The better view of the law authorizes the arrest of a person for driving while intoxicated in certain circumstances even though the officer first discovers the offender after the vehicle has come to rest.

Criminal Law & Procedure > Arrests > Warrantless Arrest
[HN6] To be legal, the warrantless arrest does not have to have been on the charge ultimately brought.

Criminal Law & Procedure > Discovery & Inspection > Subpoenas
[HN7] Miss. Const. art. 3, § 26 provides that an accused of right may have compulsory process for obtaining witnesses in his favor, but this does not mean he may subpoena anybody or anything as he pleases. He must show the evidence sought would arguably be "in his favor." Before the Supreme Court of Mississippi may reverse, it must find that the accused at some point provided a proper predicate for admissibility. That the trial court may in its discretion have enforced a subpoena is no reason why the Supreme Court of Mississippi must reverse for its failure to do so.

Criminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN8] As the report of an intoxilyzer test is a powerful weapon in the hand of the prosecution, the accused is entitled to a fair and reasonable opportunity to confront and rebut it.

Evidence > Witnesses > Expert Testimony
[HN9] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Miss. R. Evid. 702.

Evidence > Witnesses > Expert Testimony
[HN10] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Miss. R. Evid. 703.

Evidence > Procedural Considerations > Rulings on Evidence
[HN11] The rules on expert testimony import discretion, and where the trial court applies the correct legal standards, the Supreme Court of Mississippi will not reverse absent an abuse of discretion. That the trial court may have admitted the testimony packs no punch, as discretion by definition suggests at least two courses the court may have pursued without reversal.

Evidence > Witnesses > Expert Testimony
[HN12] Miss. R. Evid. 702 prescribes no freefloating test of expertise. Before a witness' "knowledge" is such that it may assist the trier of fact to understand the evidence, it is only common sense that the witness must possess expertise on the particular issue.

COUNSEL:
FOR APPELLANT - Minor F. Buchanan, Jackson, MS.
FOR APPELLEE - Steven H. Smith, Jackson, MS; Richard B. Schwartz, SCHWARTZ & ASSOCIATES, Jackson, MS;

JUDGES:
LEE, ROBERTSON, PITTMAN, HAWKINS, LEE, PRATHER, SULLIVAN, BANKS, MCRAE

OPINIONBY:
FOR THE COURT; ROBERTSON

OPINION:

[*324] T**ROBERTSON, JUSTICE, FOR THE COURT:**

I.

This appeal arises from a conviction for driving under the influence of intoxicating liquors and presents important questions regarding our law's procedural response to the menace of drunk driving. Defendant attacks with vigor the use of an intoxilyzer to test his sobriety and provide evidence against him. We have considered defendant's points with care and find none requiring reversal.

II.

A.

On December 12, 1986, Kenneth W. Goforth, age twenty-nine, had been on a business trip to Senatobia, Mississippi. Goforth lives in Ridgeland and was employed as an insurance sales representative. Upon returning to the Jackson area, Goforth went to his home in Ridgeland for a time and then drove to the 1001 Restaurant and Lounge on County Line Road, where he planned to meet **[**2]** a business acquaintance. Goforth arrived at the lounge at 9:30 or 9:45 p.m., but his friend never appeared. While there, he says he consumed two brandies and left to go home about midnight.

Goforth says that he got into his 1975 280Z automobile and drove easterly down County Line Road to the intersection of Old Canton Road.

I was going to take a left onto (Old Canton Road) and I went way too wide **[*325]** and there's a drop-off, if you all have ever been on there, there's a drop-off about like this and the front wheels went into the mud and I gave it some gas hoping it would come back out, but the car would not come back over the thing, it hit the mud and slapped up against the wall.

He said he was traveling about 30 to 35 miles per hour, and the road was wet.

After his car came to a stop, Goforth got out and found he was stuck in the mud, "like that Yazoo clay stuff" -- very sticky. Two men came up and sought to extricate Goforth from his mess. A few minutes later, Officer William R. Grissett with the Ridgeland Police Department pulled up, and the civilian Samaritans took their leave. Grissett asked Goforth whether he had been drinking, and Goforth told him about the two **[**3]** drinks.

Officer Grissett has a different view. He was on patrol the night of December 12, 1986, when he came upon the motor vehicle accident on Old Canton Road. He noticed the car was sitting on top of one roadway sign, and two or three others had been knocked down. Grissett found Goforth unstable on his feet, with a strong smell of alcohol about him, that he was slurring his speech, and his eyes were dilated. In short, Grissett thought Goforth was drunk.

Sergeant James Stepp, also with the Ridgeland Police Department, appeared at the accident scene shortly after Grissett talked with Goforth. Officers Grissett and Stepp arrested Goforth -- the charge, driving under the influence of intoxicating liquors -- and proceeded to handcuff Goforth and take him into custody. Part of the reason for handcuffing Goforth was to make sure he did not take anything by mouth for twenty minutes before the intoxilyzer test was given.

Officer Kenneth David Craft, an RPD dispatcher, administered the intoxilyzer test to Goforth that night. The test was timed at 1:20 a.m., twenty minutes after Officer Grissett called in that he was enroute to the station with Goforth. Craft followed normal testing **[**4]** procedures, and found Goforth to have .25 blood alcohol level.

B.

On February 5, 1987, Goforth stood trial in the Municipal Court of the City of Ridgeland, Mississippi, on a charge of driving under the influence of intoxicating liquors, *Miss. Code Ann. § 63-11-30, et seq.*, and was found guilty. Goforth appealed to the County Court of Madison County, Mississippi, which, on June 10-11, 1987, afforded him a trial *de novo* which again resulted in a

judgment of guilt. Goforth then appealed to the Circuit Court of Madison County, where, on September 12, 1988, the County Court judgment was affirmed.

Invoking the procedures set forth in *Miss. Code Ann. § 11-51-81* (1972), Goforth represented to the Circuit Court that his case necessarily presented constitutional questions and that he should be allowed an appeal to the Supreme Court of Mississippi. On October 10, 1988, the Circuit Court entered an order certifying "that a constitutional question does in fact exist for determination by the Supreme Court of the State of Mississippi."

Goforth now presents his appeal to this Court.

III.

Our jurisdiction is a function of statute, and because this case originated in the Municipal **[**5]** Court of the City of Ridgeland, we may not hear it unless

> a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge. ...

Miss. Code Ann. § 11-51-81 (1972). Of late we have reiterated that we take seriously these jurisdictional restrictions. *See, e.g., Green v. City of Clinton, 588 So.2d 842 (Miss. 1991); Sumrall v. City of Jackson, 576 So.2d 1259 (Miss. 1991); Jones v. City of Meridian, 552 So.2d 820 (Miss. 1989); Barrett v. State, 491 So.2d 833 (Miss. 1986); Alt v. City of Biloxi, 397 So.2d 897 (Miss. 1981).*

[*326] Goforth's appeal presents questions whether his rights under Miss. Const. Art. 3, § 23 (1890), were offended when Officers Grissett and Stepp seized him and arrested him without a warrant and whether the trial court denied his right to compulsory process, Miss. Const. Art. 3, § 26 (1890), when it quashed his subpoena duces tecum for the intoxilyzer machine. The City of Ridgeland makes no challenge to our jurisdiction, nor to the certificate of the Circuit Court. We proceed.

[HN1] Once an appeal is before us **[**6]** under Section 11-51-81, it is here for all purposes. Our jurisdiction extends to "appeals," which are entire cases, and not merely isolated or discrete issues therein. On the other hand, we think it a fair interpretation of the statute that, within our discretion, we may decline to consider non-constitutional issues and restrict our review to issues of general importance in the administration of justice, or to protect a party from substantial and irreparable injury. *See Jones v. City of Meridian, 552 So.2d 820, 825 (Miss. 1989)* (considering and adjudging non-constitutional issues).

IV.

Goforth argues that the trial court erred when it received into evidence the result of the intoxilyzer test, reflecting .25 percent by weight of volume of alcohol in his blood. He grounds his point on the claim his arrest contravened his right to be secure from unreasonable seizure, citing Miss. Const. Art. 3, § 23 (1890). The test is said to have been the tainted fruit of the arrest.

Goforth's principal charge that his arrest was illegal, however, emanates from [HN2] the familiar provisions of *Miss. Code Ann. § 99-3-7* (1972), implementing the constitutional guarantee:

> An **[**7]** officer or private person may arrest any person without warrant, for ... a breach of the peace threatened or attempted in his presence.

He relies as well upon [HN3] Rule 1.02, Miss.Unif.Crim.R.Cir.Ct.Prac. (1982), which provides:

> An officer may arrest any person without a warrant ... for ... breach of the peace, including those threatened or attempted, committed in the presence of an officer.

It is well settled that [HN4] misdemeanors are breaches of the peace, and these rules empower officers to make arrests of persons who commit misdemeanors in their presence. Goforth's argument is that Officer Grissett did not observe him driving and, in consequence, had no authority to arrest him *sans* a warrant.

Williams v. State, 434 So.2d 1340, 1344 (Miss. 1983), speaks to the point. A deputy sheriff found the defendant under the wheel of a car at the scene of an accident and observed substantial indicia of drunk driving and placed the defendant under arrest. On appeal, we recognized that [HN5] the better view of the law

> authorizes the arrest of a person for driving while intoxicated in certain circumstances even though the officer first discovers the offender **[**8]** after the vehicle has come to rest.

Williams v. State, 434 So.2d at 1344; see also, Jones v. State, 461 So.2d 686, 695 (Miss. 1984), and *Gregg v. State, 374 So.2d 1301 (Miss. 1979).* Significantly, Goforth admitted to Officer Grissett he had been driving the automobile. *Williams, 434 So.2d at 1344.* Beyond this, Goforth was publicly intoxicated in the presence of Officers Grissett and Stepp and, as well, of the two men who had first stopped to help. *Miss. Code Ann. § 97-29-47* (1972); *Gregg, 374 So.2d at 1303.* [HN6] To be legal, the warrantless arrest does not have to have been on the charge ultimately brought. *Jones, 461 So.2d at 695; State for Use of Kelley v. Yearwood, 204 Miss. 181, 194, 37 So.2d 174, 176 (1948).*

On the record presented, Goforth's arrest and seizure were legal. No taint attaches to the subsequent intoxilyzer test.

V.

Substantial portions of the transcript of proceedings reflect Goforth's attack on the intoxilyzer machine employed by the City of Ridgeland law enforcement authorities. **[*327]** Goforth has struggled **[**9]** mightily throughout to prove that its report of a .25 blood alcohol level was, in a word, unreliable. As a part of his attack, Goforth sought to produce the intoxilyzer machine into court and to conduct a demonstration. The trial court denied this request, largely on grounds of untimeliness, but Goforth presses the point on appeal, arguing violation of his right under Miss. Const. Art. 3, § 26 (1890), to be confronted by the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

Seven days before trial, Goforth caused to be issued for Chief of Police Harold Acy a subpoena duces tecum requiring him to bring the intoxilyzer machine to court for Goforth's trial. The City moved to quash the subpoena. n1 The trial court granted the motion but ordered the City to allow Goforth the opportunity to run a test in the police station where the intoxilyzer machine was situated. Much of the dispute at trial centered on the dangers of damage to the machine if it were taken from the police station, the inconvenience to the City in that officers would not be able to use it while it was at court. The trial court also found Goforth had failed to show the test **[**10]** he proposed would substantially replicate the circumstances of the evening of December 12-13, 1986.

n1 In civil cases such subpoenas ordinarily must be served ten days before they are returnable. Rule 45(b)(3), Miss.R.Civ.P. Though cited below, the rule has no *per se* relevance in today's misdemeanor criminal prosecution. *See* Rule 4.11, Miss.Unif.Crim.R.Cir.Ct.Prac. (1979); and Rule 1.00, Miss.Unif.Crim.R.Co.Ct.Prac. (1985).

We approach this issue with care. [HN7] Section 26 of our Constitution provides that an accused of right may have compulsory process for obtaining witnesses in his favor, but this does not mean he may subpoena anybody or anything as he pleases. He must show the evidence sought would arguably be "in his favor." Before we may reverse, we must find that the accused at some point provided a proper predicate for admissibility. *Cf. Heidel v. State, 587 So.2d 835, 845-46 (Miss. 1991); West v. State, 553 So.2d 8, 20-21 (Miss. 1989).* That the trial court **[**11]** may in its discretion have enforced the subpoena is no reason why we must reverse for its failure to do so.

[HN8] As the report of an intoxilyzer test is a powerful weapon in the hand of the prosecution, the accused is entitled to a fair and reasonable opportunity to confront and rebut it. The record does not reflect Goforth was denied this opportunity. It is certainly clear that Goforth wanted the machine brought to the courthouse. On the other hand, he has provided us nothing in this record which shows that he and his expert witness would have been unable to do what they needed to do in order properly to defend the case by examining and testing the machine at the police station. He certainly made no showing he could reproduce the conditions of the night in question, nor offer relevant evidence that might have aided his cause. Moreover, the trial judge was hardly out of bounds in considering that moving the machine to the courthouse would be substantially disruptive and inconvenient to the City of Ridgeland law enforcement authorities.

On the present record, we find that the Circuit Court was within its discretionary authority n2 in the premises. We note that Goforth could have **[**12]** gone to the police station during the noon recess or overnight on June 10 and made his examination or test of the machine. He made no request for additional time or for a continuance.

n2 *See* Section VI, *infra*.

VI.

Finally, Goforth urges that the Court erred when it refused to allow his expert witness, Eric Rommerdale, to give his opinion regarding the impact of a four-tooth temporary partial bridge in Goforth's mouth upon the intoxilyzer test.

Rommerdale is Chief of Laboratory Technology at the University of Mississippi School of Dentistry, and qualified as an expert witness regarding the property of bridges and the manner of fit of temporary bridges in the mouth. He has national **[*328]** certification in complete dentures, removal of partial dentures, and in crowns and bridges. He was accepted as an expert witness in the tendered field, although he has no degree in biology, chemistry, or forensic science.

The context of Rommerdale's proffered testimony was that Goforth had a temporary partial bridge on his front **[**13]** four teeth at the time in question, and he sought to elicit an expert opinion from Rommerdale that residual brandy could have been in Goforth's mouth at the time of the intoxilyzer test and could have distorted the test results. Finally, the following exchange took place:

Q. Based on your knowledge, based on your teaching that you have received and based on your research in the field, and based on your work experience, Mr. Rommerdale, and I am going to give you a factual situation, a hypothetical

situation, do you have an opinion as to whether or not residual alcohol would be in the mouth within an hour after consumption if a man were wearing a temporary partial bridge in his mouth?

BY MR. SMITH:

Objection, Your Honor, he is not qualified to render that opinion.

BY MR. BUCHANAN:

Your Honor, he testified that he is familiar with the properties and veracity of all of materials, plus the fit and the fact that it traps fluid and liquids between the gums and the bridge.

BY THE COURT:

I'm going to sustain the objection to the question in the fashion in which it was asked.

MR. BUCHANAN CONTINUES DIRECT EXAMINATION:

Q. Let me give you a factual **[**14]** hypothetical situation. A man has a drink of brandy. Within one hour he is tested for having alcohol in his bloodstream. At the time he had that drink of brandy, he had a four-tooth temporary partial bridge on his front four teeth in his mouth at the time he had his drink of brandy and at the time he took the test. Based on your experience, on your training, taking that hypothetical situation as a fact, do you have an opinion to a reasonable scientific certainty as to whether or not it is probable that there was residual alcohol in that man's mouth when that test was taken?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

I'm going to sustain the objection.

...
BY THE COURT:

I am sustaining the objection of the prosecutor regarding the qualification of Mr. Rommerdale to render an expert opinion based upon the question asked of the witness.

Goforth then proceeded to make a proffer for the record, wherein Rommerdale testified that it was possible for the dental partial to capture alcohol. He further testified that it was reasonable for a drop of alcohol to have been trapped behind the denture.

This Court has promulgated rules of evidence **[**15]** for the governance of trials, and in today's context, these rules provide:

[HN9] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, Miss.R.Ev.; and

[HN10] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703, Miss.R.Ev.

We admonish that our trial courts take care that one who offers opinion testimony "really is an expert in the particular field at issue." *Hall v. Hilbun, 466 So.2d 856, 875* **[*329]** *(Miss. 1985).* Still, the rules hardly admit a regimen of mechanical application. [HN11] They import discretion, and we have repeatedly emphasized that, where the trial court applies the correct legal standards, we will not reverse **[**16]** absent an abuse of discretion. *See, e.g., Thornhill v. State, 561 So.2d 1025, 1032-33 (Miss. 1989); Wyeth Laboratories, Inc. v. Fortenberry, 530 So.2d 688, 690 (Miss. 1988); May v. State, 524 So.2d 957, 963 (Miss. 1988); Detroit Marine Engineering v. McRee, 510 So.2d 462, 467 (Miss. 1987); Hooten v. State, 492 So.2d 948, 950-51 (Miss. 1986)* (Hawkins, J., dissenting). That the trial court may have admitted the testimony packs no punch, as discretion by definition suggests at least two courses the court may have pursued without reversal. *Morrow v. Morrow, 591 So.2d 829, 832 (Miss. 1991); Jackson v. State, 551 So.2d 132, 139 (Miss. 1989); Burkett v. Burkett, 537 So.2d 443, 446 (Miss. 1989).*

[HN12] Rule 702 prescribes no freefloating test of expertise. Before a witness' "knowledge" is such that it may "assist the trier of fact to understand the evidence," it is only common sense that the witness must possess expertise on the particular issue. The question here is not whether Rommerdale was an expert in the making of dental appliances, **[**17]** but whether he had an specialized knowledge regarding the rather technical question of whether a partial bridge such as Goforth had in his mouth could affect the results of the intoxilyzer test. Moreover, before a qualified expert's opinion may be received, it must rise above mere speculation. *Fowler v. State, 566 So.2d*

1194 (Miss. 1990). What, and all, Rommerdale stated in Goforth's out-of-the-presence-of-a-jury proffer was that, hypothetically, the temporary bridge could have trapped residual alcohol. Rommerdale would merely answer that this was a "reasonable" hypothesis.

Under the circumstances, we consider that the trial court was within its discretionary authority when it sustained the objection. Expert testimony should be made of sterner stuff.

VII.

Goforth tenders no further issues that merit either discussion or reversal. *See Saucier v. State, 562 So.2d 1238, 1246-47 (Miss. 1990); Morea v. State, 329 So.2d 527 (Miss. 1976).*

CONVICTION OF DRIVING UNDER THE INFLUENCE AND SENTENCE OF TWENTY-FOUR HOURS IN CUSTODY OF THE MADISON COUNTY SHERIFF'S DEPARTMENT, AFFIRMED, WITH THE SUSPENSION OF SAID TWENTY-FOUR HOUR **[**18]** PERIOD OF INCARCERATION TO BE CONTINGENT UPON PROMPT PAYMENT OF THE FINE IMPOSED AND ALL COURT COSTS AND ASSESSMENTS AND SATISFACTORY COMPLETION OF THE MISSISSIPPI ALCOHOL SAFETY AND EDUCATION PROGRAM.

ROY NOBLE LEE, C.J., HAWKINS, P.J., DAN M. LEE, P.J., PRATHER, SULLIVAN, PITTMAN, AND BANKS, JJ., CONCUR. McRAE, J., DISSENTS WITH WRITTEN OPINION TO FOLLOW.

DISSENTBY:
MCRAE

DISSENT:

MCRAE, JUSTICE, DISSENTING: - June 17, 1992, Decided

That an individual may combine driving and drinking without causing serious bodily harm to another does not condone the practice. Drunk driving leads to often tragic consequences; it also carries with it serious ramifications for anyone so charged. Therefore, when an individual is charged with driving under the influence of an intoxicating liquor, whether as a misdemeanor or as a felony, he should be entitled to the same rights and protection as one charged with any other crime. Accordingly, I dissent from the majority opinion which affirms the conviction of Kenneth Goforth.

Although Goforth admitted to police that he was driving his automobile at the time he overshot a turn and became mired in mud, I disagree with the majority's contention that the alleged offense, driving while intoxicated, happened in the "presence" of an officer or private person so as satisfy the requirements of *Miss. Code Ann. § 99-3-7*, which authorizes arrests for a misdemeanor **[*330]** without a warrant. In *Williams v. State, 434 So. 2d 1340, 1344 (Miss. 1983)*, we stated that "the basis for the requirement that the offense be committed **[**19]** in the presence of the arrestor is to avoid mistake."

What did the arresting officer observe when he arrived at the scene of Goforth's mishap? Officer William R. Grissett testified that he saw two men attempting to extricate Goforth's sports car from the mud. He stated that Goforth was "unstable on his feet," that he smelled of alcohol, that his speech was slurred and that his pupils were dilated. Notably, he testified that he did not guestion the two Good Samaritans. Officer Ken Craft, who later administered the intoxilyzer test on Goforth testified that he noticed nothing unusual about his speech, walk or smell.

The majority relies on *Williams* to support its findings that there were sufficient indicia of drunk driving to find that Goforth had committed a misdemeanor in the presence of the arresting officers. However, the officers in *Williams* observed far more than slurred speech, the smell of alcohol, unsteady footing on muddy ground and an admission that the defendant had been driving the vehicle in question. One man was dead. Williams was sitting on the floor of his car, under the steering wheel. *Williams, 434 So. 2d at 1344.* Two eye witnesses, **[**20]** one of whom had been forced off the road earlier when William's car was cruising down the center of the highway, had observed the vehicle coming at them at a high rate of speed. *Id. at 1341-1342.* Clearly, the arresting officer in *Williams* was greeted at the scene of the accident with circumstances far more clearly indicative of drunk driving than in the case *sub judice.*

As I read the facts, there was insufficient evidence to show that Goforth committed the offense of driving under the influence of intoxicating liquor in the presence of the arresting officers, as required to make an arrest for a misdemeanor without a warrant. Accordingly, the results of the intoxilyzer test should not have been admitted.

Our drunk driving laws and testing procedures have done much to bring to justice countless drivers whose reckless abuse of alcohol has led to tragedy. However, the same safeguards provided by our constitution to those charged with other crimes should be applicable to those arrested for drunk driving, lest injustice result.

Court of Appeals of Mississippi.
Ronald Mark HOLLOMAN, Appellant,
v.
STATE of Mississippi, Appellee.
No. 2000-KA-00868-COA.

June 18, 2002.

Defendant was convicted in the Circuit Court, Coahoma County, Howard Q. Davis, Jr., J., of vehicular homicide. Defendant appealed. The Court of Appeals, McMillin, C.J., held that: (1) exigent circumstances existed that negated requirement for seeking a formal warrant to draw blood and urine samples from defendant; (2) trial court did not abuse its discretion in finding probable cause existed to draw blood and urine samples from defendant; and (3) evidence was sufficient to prove that defendant was under the influence of methamphetamine and cocaine at time of automobile accident.

Affirmed.

King, J., filed dissenting opinion in which Bridges and Chandler, JJ., joined.

West Headnotes

[1] Searches and Seizures 349 ⚿47.1

349 Searches and Seizures
349I In General
349k47 Plain View from Lawful Vantage Point
349k47.1 k. In General. Most Cited Cases
Warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate.

[2] Automobiles 48A ⚿419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; N for Arrest. Most Cited Cases
Exigent circumstances existed that negated r ment for seeking a formal warrant to draw blo urine samples from defendant following auto accident; where there were limited number of tigating officers working a major vehicle ac that involved serious injuries to two drivers and ity of one passenger, drug and alcohol content person's system can dissipate over period of an lays incurred in obtaining and serving the warrant

[3] Criminal Law 110 ⚿1148

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 k. Preliminary Proceeding: Most Cited Cases
Trial court's determination of probable cause is re viewed on appeal on an abuse of discretion standard.

[4] Automobiles 48A ⚿419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
Trial court did not abuse its discretion in finding probable cause existed to draw blood and urine samples from defendant, where investigating officers testified that a vehicle traveling as defendant's did after impact normally leaves an observable field of debris in its path and officers observed presence of empty beer bottles and materials that could properly be classified as drug paraphernalia in debris field.

[5] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most

Cited Cases
Substantial discretion is afforded to the trial courts in ruling on the admissibility of evidence, including the qualifications of experts.

[6] Criminal Law 110 475

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k475 k. Nature, Condition and Relation of Objects in General. Most Cited Cases
Mississippi Supreme Court has repeatedly sanctioned the use of qualified experts to offer opinion testimony in the field of reconstructing the events leading up to a vehicular accident.

[7] Criminal Law 110 475

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k475 k. Nature, Condition and Relation of Objects in General. Most Cited Cases

Criminal Law 110 478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases
Trial court did not abuse its discretion in accepting state's expert witness in the field of accident reconstruction and allowing him to testify concerning his determinations as to the course and speed of defendant's vehicle immediately preceding the accident, where defendant offered no concrete criticism as to exactly how expert fell short in his training and experience, which included rather extensive education in fields related to mathematics, physics, and numerous courses in various aspects of vehicular accident investigation, expert was certified as an accident reconstructionist by the Mississippi Highway Patrol, and defense counsel declined to voir dire expert as to his credentials as an expert in accident reconstruction.

[8] Criminal Law 110 474.2

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474.2 k. Intoxication. Most Cited Cases
Trial court did not abuse its discretion in excluding defendant's proffered medical expert on grounds that the testimony would not assist the trier of fact and could tend to confuse them, where defendant's expert was going to testify that there were insufficient facts regarding presence of drugs in defendant's system to make a medical determination that he was "under the influence" at time of accident, state did not offer scientific evidence as to quantity of drugs discovered in defendant's system or to provide expert opinion that levels discovered were sufficient to meet "under the influence" provisions, term in statute was not scientific term, and state's proof tending to indicate that defendant's abilities to function were affected was not of the scientific sort; rather, it consisted of observed evidence of his unusual behavior shortly before accident and fact that he was driving erratically and at dangerously high rate of speed just moments before impact.

[9] Criminal Law 110 1144.13(2.1)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(2.1) k. In General. Most Cited Cases
In reviewing an insufficiency of evidence claim on appeal, Court of Appeals must review all the evidence and consider it in the light most favorable to upholding the verdict of the jury.

[10] Criminal Law 110 1159.5

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.5 k. Particular Issues or Elements. Most Cited Cases
Only if Court of Appeals is satisfied that, as to one or more of the essential elements of the crime, the proof was so lacking that a reasonable juror fairly considering the evidence could only have found defendant not guilty may it intercede.

[11] Automobiles 48A ⚷355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Evidence was sufficient to prove that defendant was under the influence of methamphetamine and cocaine at time of automobile accident, where defendant's blood and urine samples taken after the accident revealed presence of cocaine and methamphetamines, defendant was observed by an acquaintance hours before accident behaving in an unusual manner, and moments before accident defendant was driving on wrong side of the road in an erratic manner at high rate of speed.
***53** Johnnie E. Walls, Jr., Greenville, attorney for appellant.

Office of the Attorney General by Scott Stuart, attorney for appellee.

EN BANC.

McMILLIN, C.J., for the court.

¶ 1. This is an appeal of a criminal conviction returned by a jury in the Circuit Court of Coahoma County. Ronald Hollomon was convicted of vehicular homicide for allegedly negligently causing an accident resulting in the death of another while he was under the influence of one or more controlled narcotic substances. The indictment charged that, at the time of the accident, Holloman was under the influence of methamphetamine and cocaine.

¶ 2. Though the indictment does not cite a particular statute, it seems evident that Holloman was charged under Section 63-11-30(5) of the Mississippi Code, which states that

> Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in ***54** a negligent manner causes the death of another ... shall, upon conviction, be guilty of a felony ....

Miss.Code Ann. § 63-11-30(5) (Supp.2001). Subsection (1), in turn, makes it "unlawful for any person to drive ... a vehicle within this **state** who ... is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law...." Miss.Code Ann. § 63-11-30(1)(d) (Supp.2001).

¶ 3. **Holloman's** appeal presents four issues which he contends warrant the reversal of his conviction. For reasons we will proceed to discuss, we find those issues to be without merit and we, therefore, affirm **Holloman's** conviction and resulting sentence.

I.

Facts

¶ 4. The facts of the case are drawn principally from witnesses for the prosecution. The driver of the other vehicle, Margaret Stone, testified that she suddenly observed **Holloman's** vehicle approaching her in her lane of travel and that, despite efforts to swerve out of his path, she was unable to avoid a violent collision that injured her, seriously injured **Holloman**, and caused the death of Stone's young friend, Megann Williams. Through the testimony of an accident reconstructionist, the **State** presented evidence tending to show that **Holloman** was traveling at a high rate of speed and that his vehicle, in the moments prior to impact, was weaving on and off the roadway. Additionally, the **State** presented testimony from a woman acquainted with **Holloman** who testified to having observed him at a convenience store less than two hours prior to the accident who recalled observing **Holloman** behaving in a manner she thought unusual and which she described as "hyper." Officers investigating the accident testified that

physical evidence at the scene indicated that **Holloman's** vehicle had rolled over successive times after impact, that the trunk lid had been sprung open, and that there was a collection of debris in the path followed by the vehicle that had the appearance of being scattered from the vehicle as it rolled off the roadway. The officers testified that the debris field contained empty beer cans, packages of syringes, and bottles containing unidentified liquids and residue.

¶ 5. Based on these discoveries, upon Holloman's arrival at the hospital after the accident, a blood sample was drawn and a urine sample taken and tested for the presence of alcohol and narcotic drugs. The tests revealed no alcohol, but the testing did reveal the presence of cocaine and methamphetamines in Holloman's system.

¶ 6. The defense called only two witnesses. One was Holloman's wife, who claimed that she saw Holloman shortly before the accident and that he was behaving in an entirely normal manner. The owner of a building where Holloman was doing some painting work testified to having seen him at approximately 6:30 p.m. and having observed him to be behaving normally at that time. The accident occurred shortly after 10:00 p.m. that evening.

¶ 7. Based on this evidence, the jury returned a verdict of guilty. **Holloman's** appeal raises the following issues:

(1) **Holloman** contends that the evidence was insufficient to establish his guilt.

(2) The evidence derived from scientific testing of **Holloman's** blood and urine samples should have been excluded because the samples were taken without a warrant and without **Holloman's** consent.

***55** (3) The trial court should have excluded the expert testimony of the **State's** accident reconstructionist upon **Holloman's** timely objection.

(4) The trial court improperly excluded the testimony of an expert witness for the defense whose testimony was critical to **Holloman's** defense.

¶ 8. We will consider the issues in a different order than presented in **Holloman's** brief, dealing first with the trial court's various rulings on the admissibility of evidence and reserving for last the consideration of whether the evidence was insufficient as a matter of law to uphold the jury's guilty verdict.

II.

Exclusion of Blood and Urine Sample Test Results

¶ 9. Holloman argues that the trial court erred in its ruling regarding his pre-trial motion to exclude any evidence relating to testing of blood and urine samples drawn from his person in the aftermath of the accident. Holloman appears to argue that the officers ordered the collection of the samples based solely on the authority contained in Section 63-11-8 of the Mississippi Code, which requires the collection of fluid samples from drivers in any accident that results in a fatality. This section was declared unconstitutional by the Mississippi Supreme Court in the decision of *McDuff v. State*, 763 So.2d 850, 857(¶ 19) (Miss.2000), which was decided after the accident but prior to the trial of this cause. In that case, the supreme court found that such an across-the-board requirement would violate the defendant's fourth amendment protections against unreasonable searches and seizures.

[1][2] ¶ 10. Our review of the transcript of this trial leaves us convinced that the admissibility of the test results was determined under principles announced in *McDuff* since the trial court considered counsel's argument on this point and specifically concluded that there was probable cause to obtain the fluid samples. A warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate that a warrant should properly issue. *Sanders v. State*, 678 So.2d 663, 667 (Miss.1996). The trial court in this case heard evidence from investigating officers that, in their experience, a vehicle traveling as Holloman's did after impact normally leaves an observable field of debris in its path. The officers further testified that they observed the presence of empty beer bottles and materials that could properly be classified as drug paraphernalia in the debris field that would have been produced from Holloman's vehicle. Based upon that testimony, the court specifically noted the existence of the recent decision in *McDuff* but held that these facts established probable cause to

have the samples drawn. This Court is satisfied that exigent circumstances existed that would negate the requirement for seeking a formal warrant to draw the fluid samples; these circumstances including the fact that there were a limited number of investigating officers working a major vehicle accident that involved serious injuries to the two drivers and a fatality to one passenger and the fact that drug and alcohol content in a person's system can dissipate over the period of any delays incurred in obtaining and serving the warrant.

[3][4] ¶ 11. The trial court's determination of probable cause is reviewed on appeal on an abuse of discretion standard. *Parker v. State*, 606 So.2d 1132, 1137-1138 (Miss.1992). By that standard, we see no basis to disturb the trial court's ruling that ***56** probable cause existed to draw fluid samples from Holloman, thereby rendering admissible the results of the scientific testing of these samples.

III.

Admissibility of the State's Accident Reconstructionist's Testimony

¶ 12. The trial court accepted the State's witness, Brady McMillen, as an expert in the field of accident reconstruction and permitted McMillen to testify concerning his determinations as to the course and speed of Holloman's vehicle in the period immediately preceding the accident. McMillen testified that he reached such conclusions based on his observations of the physical phenomena at the scene and his training and experience in the field of accident reconstruction.

¶ 13. In this appeal, Holloman urges that the court erred in permitting McMillen to testify as an expert in the field. In his argument on this point, Holloman briefly recites McMillen's credentials that were offered into evidence in order to establish him as an expert in the field, and appears to be contending that, on the face of the record, the State failed to establish McMillen as a qualified expert as to the matters he proposed to testify about. He offers no concrete criticism as to exactly how McMillen fell short in his training and experience, which included rather extensive education in fields related to mathematics, physics, and numerous courses in various aspects of vehicular accident investigation. McMillen further testified that, as a result of his training, he had been certified as an accident reconstructionist by the Mississippi Highway Patrol. When offered the opportunity to voir dire McMillen as to his credentials as an expert in accident reconstruction, defense counsel declined. The trial court thereupon accepted McMillen as an expert witness.

¶ 14. In this appeal, Holloman's only citation to authority is a reference to a federal case where the trial judge disallowed the expert testimony of an alleged accident reconstructionist in a civil trial. *Wilson v. Woods*, 163 F.3d 935 (5th Cir.1999). That case dealt strictly with the qualifications, or lack thereof, of the proposed expert in accident reconstruction. The Fifth Circuit, conceding the discretion given to the trial judge in controlling the admissibility of evidence, simply found that the court had not erred in disallowing the testimony of an inexperienced novice in the field. More particularly, the appellate court said:

> The district court's finding that Rosenhan lacked the requisite qualifications is supported in the record. Appellees' voir dire and the court's own questioning revealed significant deficiencies in Rosenhan's experience and professional training, leading ineluctably to the impression that his "expertise" in accident reconstruction was no greater than that of any other individual with a general scientific background.

Id. at 938.

[5][6] ¶ 15. Mississippi, like the federal courts, affords substantial discretion to the trial courts in ruling on the admissibility of evidence, including the qualifications of experts. *Hall v. State*, 611 So.2d 915, 918 (Miss.1992). While the federal district court judge, in a passage quoted by the Fifth Circuit in its opinion and re-quoted by Holloman in his brief, questioned the very existence of a field of expert knowledge identifiable as accident reconstruction, two things are clear. First, the Fifth Circuit did not decide the case on that basis, rather, that court merely agreed with the trial judge that Rosenhan lacked sufficient experience in the field to give him any specialized knowledge that would ***57** be helpful to the jury. Second, the Mississippi Supreme Court has repeatedly sanctioned the use of qualified experts to offer opinion testimony in the field of reconstructing the events leading up to a vehicular accident. *See, e.g., McCollum v. State,*

785 So.2d 279, 284 (¶ 17) (Miss.2001); *Wilson v. State*, 574 So.2d 1324, 1335 (Miss.1990).

[7] ¶ 16. The difference in the qualifications, training and experience of the proposed expert in *Wilson v. Woods* and Officer McMillen is substantial. We do not detect the sort of abuse of discretion that would require this Court to intercede in the trial court's decision to permit McMillen to testify as an expert.

IV.

The Defense Expert

¶ 17. Holloman proposed to call Dr. Shirley Sanders, who was prepared to testify that the known facts regarding the presence of drugs in Holloman's system were insufficient to make a medical determination that Holloman was "under the influence" of either of the narcotic substances set out in the indictment at the time of the accident. According to Holloman's brief, Sanders would have testified that

> the medical community had not yet developed any standard scientific methods of measuring and demonstrating the effects certain drugs such as methamphetamine and cocaine have on the human body. She would have testified that although no such standard scientific methods or procedures had been developed, since the state had not offered any testimony or proof on the amounts of methamphetamine or cocaine in the system of the appellant the proving of impairment or that appellant had been driving under the influence of the controlled substances at the time of the wreck was impossible.

¶ 18. The State's primary objection to Dr. Sanders's testimony was that Holloman had failed to reveal the thrust of her expert testimony in discovery. The trial court, however, correctly dealt with the issue under rules relating to discovery violations rather than summarily excluding the witness. The court permitted the defense to proffer Dr. Sanders's intended testimony and ultimately elected to exclude it on the basis that, in the court's view, it would not assist the trier of fact and could tend to confuse them. Dr. Sanders's proffered testimony was essentially along the lines set out in the above quote from Holloman's brief.

[8] ¶ 19. We do not find that the trial court abused the discretion afforded it in such matters in that ruling. The State, after all, did not purport to offer scientific evidence as to the quantity of drugs discovered in Holloman's system and to provide expert opinion that the levels discovered were sufficient to meet the "under the influence" provisions of the statute under which he was charged. The term in the statute is not a scientific term in all events, and the State's proof tending to indicate that Holloman's abilities to function were affected by the narcotic substances was not of the scientific sort. Rather, it consisted of the observed evidence of his unusual behavior shortly before the accident and the fact that he was driving erratically and at a dangerously high rate of speed just moments before impact.

¶ 20. Dr. Sanders's testimony, if presented to the jury, would have essentially stood for the proposition that it is, under the present state of medical research, impossible to scientifically determine whether a person who has ingested the narcotic substances at issue in this case is under ***58** their influence. Were that the case, and were that the sole method of proving such an allegation under the statute, then the conclusion is unavoidable that a conviction for causing an accident while under the influence of illegal narcotics would be impossible. While medical science may not be able to inform us as to exactly what level of particular narcotics must be ingested to safely lead to the conclusion that the user is under the influence of the drug, the similar issue of whether a person is under the influence of alcohol has for many years been routinely submitted to the jury based on evidence other than scientific testing. *Ricks v. State*, 611 So.2d 212, 218 (Miss.1992). Such determinations can properly be based upon observed behavior and the common understanding of jurors that persons under the influence of certain chemical substances, whether alcohol or narcotics, behave in ways that are different from the average person. We see no basis to draw a distinction between narcotic use and alcohol use and we decline to do so. Since the State did not attempt to prove the level of Holloman's impairment through expert testimony relating to the measured quantity of drugs found in his system, we tend to agree with the trial court that expert testimony that such an endeavor would, in all events, have been impossible under current medical science could only have served to confuse and mislead the jury as to the issues it was charged to resolve. We do not find error in this ruling.

V.

Sufficiency of the Evidence

[9][10] ¶ 21. Holloman claims that the evidence was insufficient as a matter of law to prove beyond a reasonable doubt that he was under the influence of cocaine and methamphetamine at the time of the accident. In reviewing such a claim on appeal, this Court must review all the evidence and consider it in the light most favorable to upholding the verdict of the jury. *Milano v. State*, 790 So.2d 179, 187(¶ 31) (Miss.2001). Only if we are satisfied that, as to one or more of the essential elements of the crime, the proof was so lacking that a reasonable juror fairly considering the evidence could only have found Holloman not guilty may we intercede. *Blocker v. State*, 809 So.2d 640, 644(¶ 16) (Miss.2002).

[11] ¶ 22. Holloman's argument on this point closely parallels the issue raised in regard to the excluded testimony of Dr. Sanders. He contends that all the State showed was the presence of a measurable level of methamphetamine and cocaine in his system together with the fact that he was involved in a vehicular accident. His contention is that evidence of the mere presence of such drugs does not prove that he was "under the influence" of those narcotic substances within the meaning of the statute. What that argument misses is the evidence presented to the jury that Holloman was observed by an acquaintance in the hours before the accident to be behaving in an unusual manner and evidence that in the moments before the accident he was driving on the wrong side of the road in an erratic manner at a high rate of speed.

¶ 23. On the related question of determining whether a person was under the influence of alcohol, the Mississippi Supreme Court has granted substantial leeway to the finders of fact in making such a determination and has placed the threshold for such a determination notably low, taking judicial notice that the presence of even small amounts of alcohol can cause an almost imperceptible impairment that, nevertheless, "may spell the difference between accident or no accident...." *Allen v. Blanks*, 384 So.2d 63, 67 (Miss.1980).

***59** ¶ 24. This Court can discover no reasoned basis to make a distinction between the discretion afforded the finders of fact in *Allen v. Blanks* and the discretion properly allowed the jurors in this case. We are satisfied that the uncontroverted evidence that Holloman had ingested illegal narcotics that were still present in measurable quantities in his body, together with evidence of remarkably unusual behavior and his demonstrably reckless operation of a motor vehicle were enough, when considered in conjunction, to support a reasonable inference by the jurors that Holloman was, in fact, under the influence of the narcotic substances at the time of the fatal accident.

¶ 25. **THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF VEHICULAR HOMICIDE AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THE LAST TEN YEARS SUSPENDED AND THE FIRST FIVE YEARS OF THE SUSPENDED SENTENCE TO BE SERVED ON POST RELEASE SUPERVISION AND THE LAST FIVE YEARS ON PROBATION AND THE ORDER TO PAY $4500 TO THE CRIME VICTIMS' RESTITUTION FUND IS AFFIRMED. SAID SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.**

SOUTHWICK, P.J., THOMAS, LEE, IRVING, MYERS, AND BRANTLEY, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES AND CHANDLER, JJ.

KING, P.J., dissenting:

¶ 26. I dissent and would reverse and remand this case.

¶ 27. Holloman maintains that the State failed to prove the elements of the offense charged pursuant to Miss.Code Ann. Section 63-11-30(5) (Rev.1996). [FN1] The indictment states:

> FN1. Miss.Code Ann. Section 63-11-30(5) (Rev.1996):(5) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death

> of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years.

On or about April 17, 1999, in the County and State aforesaid, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously drive or otherwise operate a motor vehicle on Highway 322 in Clarksdale, Mississippi, while under the influence of methamphetamine and cocaine, and did, in a negligent manner, cause the death of Megann [sic] Williams, a human being....
Holloman suggests that the State's charge as cited in the indictment is itself defective such that it could not be proven solely upon the facts and elements presented in the State's case. Holloman indicates through a discussion with the court that the indictment does not clearly show which subsection under which he is charged. The trial court acknowledges that Holloman is charged under Miss.Code Ann. Section 63-11-30(5) (Rev.1996), but attempts to determine what subsection (1) of the statute actually refers to:

THE COURT: The Court notes that subsection one of 63-11-30 is broken *60 down into (a), (b), (c), (d) and (e). (E) has to do with blood alcohol content of people with commercial driver's licenses; (a) has to do with driving under the influence of intoxicating liquor. Neither of those is involved in this case.

...

(B) says: "It's unlawful for a person to drive who is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle." (D) says: "Is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi controlled substance law."

I'm not sure what (b) refers to, because it would just be whether it's legal or illegal, and that section uses the word impair. Section (d) says: "Under the influence of any illegal drug."

It's this Court's understanding of that section is that all that needs to be proved is that an illegal drug has been used by the person and that the person has operated in a negligent manner. I think those are the two things this jury has to find. I don't think they have to find that the illegal substance actually impairs the person's ability, because it's illegal to have or use those substances by law. And, therefore, if a person has used them, he's under the influence of them, and he's violated the law.

Holloman contends that because the indictment charged him with being "under the influence" of the controlled substances methamphetamine and cocaine, the **State** was required to prove that these substances "influenced and/or impaired" his driving to such an extent that he caused the collision and subsequent death of Megan Williams "beyond a reasonable doubt." **Holloman** claims that the **State** failed to present evidence regarding any physical or mental condition which impaired his driving ability before the collision.

¶ 28. The sole testimony offered by the **State** of **Holloman's** mental impairment was that of Stacy Vanlandingham who testified that when she saw **Holloman** at the store a couple of hours prior to the accident he was "extremely hyper." Her testimony does not give any indication of the circumstances confronting **Holloman** when she described his behavior as being "hyper." By her own admission, Ms. Vanlandingham did not speak to **Holloman**, she did not attempt to determine what was going on which might have caused him to act in a manner which she described as hyper. She also testified that she had only seen **Holloman** "maybe two or three" times prior to the day of the accident.

¶ 29. Vandlandingham's testimony was contradicted by **Holloman's** wife who testified that as he left home shortly before the accident, he acted absolutely normally.

¶ 30. The accident reconstructionist provided evidence of **Holloman's** driving when he **stated** that **Holloman's** car appeared to have been "traveling at a minimum speed of 82 miles per hour."

¶ 31. Accordingly, the record shows that evidence

was presented of both **Holloman's** mental impairment and driving ability prior to the accident. The question before this Court is, how was this evidence to be evaluated at the directed verdict stage.

¶ 32. Because **Holloman** also challenges the trial court's denial of his motion for a directed verdict, we must consider the standard of review applicable to the trial judge's ruling at trial, which is:

> In considering a motion for directed verdict, this Court must consider whether the "evidence in opposition to the motion was of such quality and weight that reasonable and fair-minded jurors in the ***61** exercise of impartial judgment could differ as to the verdict." If so, the motion must be denied and the verdict will stand. If, however, the evidence is so overwhelmingly in favor of the appellant that reasonable persons could not have reached a different verdict, this Court must reverse.

McKinzie v. Coon, 656 So.2d 134, 137 (Miss.1995) (citations omitted).

¶ 33. When making his ruling on **Holloman's** motion for a directed verdict, the trial judge reasoned that through process of elimination, it appeared that **Holloman** was charged with Miss.Code Ann. Section 63-11-30(1)(d)(5) (Rev.1996). The **State** then took the position that it did not prove "impairment" nor was it required to do so. The **State** attempted to prove "under the influence" by showing the type of controlled substances in **Holloman's** blood and urine, and his behavior when observed prior to the accident. The trial judge agreed with the prosecutor and concluded that to prove "under the influence" all the **State** had to show basically was that **Holloman** had drugs in his system at the time of the accident and not that the drugs actually caused his negligent operation of the vehicle. Consequently, the **State** did not provide evidence of the amount of drugs in **Holloman's** system.

¶ 34. The indictment charged **Holloman** under Miss.Code Ann. Section 63-11-30(5) (Rev.1996), which provides that the **State** must prove that **Holloman** 1) negligently caused the death of Megan Williams, and that he caused Williams' death while 2) violating Miss.Code Ann. Section 63-11-30(1) (Rev.1996). Unfortunately, the indictment does not specify whether the **State** is proceeding under 1) Miss.Code Ann. Section 63-11-30(1)(b) (Rev.1996), which requires a showing that the defendant is under the influence of some substance, other than alcohol, "which has impaired such person's ability to operate a motor vehicle", 2) Miss.Code Ann. Section 63-11-30(1)(d) (Rev.1996) which requires a showing that the defendant "is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law", or 3) some other provision listed under this particular subsection.

¶ 35. Under Miss.Code Ann. Section 63-11-30(5) (Rev.1996), the State must present sufficient evidence to establish that Holloman operated his motor vehicle in violation of Miss.Code Ann. Section 63-11-30(1) (Rev.1996). Holloman argues that this requires a further showing that he was under the influence of "any other substance" pursuant to Miss.Code Ann. Section 63-11-30(1)(b) (Rev.1996); but the State would also have to prove that the substance has impaired Holloman's ability to operate a motor vehicle. The record reflects that Holloman thought that he was indicted under this subsection.

¶ 36. However, during the trial, after the State presented its case against Holloman, the State revealed that it was proceeding under Miss.Code Ann. Section 63-11-30(1)(d) (Rev.1996). This occurred when the State responded to Holloman's motion for a directed verdict or dismissal of the indictment. Under this particular section, the State is not required to prove "impairment." Though under the language of the statute, the State must prove "under the influence" in either of these sections.

¶ 37. The trial court indicated that "mere presence" of a controlled substance is sufficient. The State indicated that it must prove that Holloman was "under the influence." The trial court did not explicitly address the issue of dismissal of the indictment nor did it acknowledge the ambiguity that exists due to the manner in which the indictment was drafted in this ***62** case. However, a fair reading of the language contained in this indictment shows that Holloman could have been charged under either Miss.Code Ann Sections 63-11-30(1)(b) or (d)(5) (Rev.1996).

¶ 38. The distinction between the two provisions is that Miss.Code Ann. Section 63-11-30(1)(b) (Rev.1996) requires that the State prove that Holloman was "under the influence" of methamphetamine

and cocaine, and that these drugs "impaired" his ability to operate his vehicle. Whereas, Miss.Code Ann. Section 63-11-30(1)(d) (Rev.1996) does not require a showing of "impairment," but requires a showing that Holloman was "under the influence" of methamphetamine and cocaine.

¶ 39. Whether the vagueness in the language presented is sufficient to quash the indictment is a separate issue altogether. Holloman was placed on notice that he was charged with "vehicular homicide," therefore, he was not harmed by the ambiguity of the language. *Harbin v. State*, 478 So.2d 796, 799 (Miss.1985). Accordingly, a dismissal of the indictment is not warranted.

¶ 40. However, when we consider the issue of sufficiency of proof, we must look at the point that if the defense counsel and the State could identify different versions of what the State must prove, then the jury could have reasonably been confused on what proof was sufficient on which to convict Holloman. If the jury was led to believe that "mere presence of drugs alone" was sufficient, without a further showing that Holloman was both impaired and negligent, then this conviction should not stand. *Leuer v. City of Flowood*, 744 So.2d 266(¶ 14) (Miss.1999). Miss.Code Ann. Section 63-11-30(5) (Rev.1996) specifically provides that:

> Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years.

Miss.Code Ann. Section 63-11-30(5) (Rev.1996).

¶ 41. While no Mississippi cases have specifically addressed the issue of driving "under the influence" of substances other than alcohol with a concise definition, the *Leuer* case attempted to define "under the influence" in an alcohol related incident, where the BAC test was not available to bring the offense within the statutory quantitative definition. In *Leuer*, the court referenced *Government of Virgin Islands v. Steven*, 134 F.3d 526, 528 (3rd Cir.1998) as secondary legal authority, where the court stated:

> That courts have recognized for over half a century that driving "under the influence" is commonly understood to mean driving in a state of intoxication that lessens a person's normal ability for clarity and control.

Leuer v. City of Flowood, 744 So.2d 266 (¶ 14) (Miss.1999).

¶ 42. The Mississippi Supreme Court also pointed to certain specific behavior and actions noted in *Leuer* and determined that "common understanding and practice recognize that Leuer's behavior here is most consistent with being 'under the influence' of intoxicating liquors, and thus clearly supports his conviction for DUI." Here, the court listed the behavior such as an officer observing Leuer running off the road, making a left turn into the middle of the roadway at 2:30 a.m. and an officer ***63** smelling the odor of alcohol on Leuer's breath along with observing his glassy eyes as evidentiary support for the conviction. *Leuer*, 744 So.2d 266 at (¶ 12). This suggests that evidence must exist which shows that Holloman was "driving in a state of intoxication that lessens a person's normal ability for clarity and control." *Leuer*, 744 So.2d 266 at (¶ 11).

¶ 43. In the present case, the court should have required the State to prove, not only that the drugs methamphetamine and cocaine were in Holloman's system in trace amounts, but that these substances lessened Holloman's normal ability for clarity and control. *Id.* Accordingly, I, would reverse and remand this case to the Coahoma County Circuit Court for further proceedings.

BRIDGES AND CHANDLER, JJ., JOIN THIS SEPARATE WRITTEN OPINION.
Miss.App.,2002.
Holloman v. State
820 So.2d 52

END OF DOCUMENT

858 So.2d 139
(Cite as: 858 So.2d 139)

H

Supreme Court of Mississippi.
Patrick **JONES**
v.
STATE of Mississippi.
No. 2000-CT-00407-SCT.

Oct. 30, 2003.

Defendant was convicted following a jury trial in the Circuit Court, Bolivar County, Kenneth L. Thomas, J., of negligently causing the death of another while operating a vehicle under the influence of cocaine. Defendant appealed. On rehearing, the Court of Appeals, en banc, Irving, J., 881 So.2d 209, 2003 WL 21005836, affirmed. Certiorari was granted. The Supreme Court, Smith, P.J., held that: (1) physician-patient privilege did not apply to exclude results of hospital's urinalysis of defendant; (2) otherwise admissible will not be excluded because of failure to comply with statute governing chemical analysis of a person's breath, blood, or urine; and (3) hospital's chemical analysis of defendant's urine specimen was thus admissible.

Affirmed.

Graves, J., concurred in result only.

McRae, P.J., dissented.

West Headnotes

[1] Privileged Communications and Confidentiality 311H ⚷238

311H Privileged Communications and Confidentiality
311HIV Physician-Patient Privilege
311Hk230 Subject Matter
311Hk238 k. Blood, Tissue, and Urine Samples and Tests. Most Cited Cases
(Formerly 410k212)
Physician-patient privilege did not apply in criminal case to exclude results of hospital's urinalysis of driver in prosecution for vehicular homicide while under influence of cocaine; the driver could not rely on the privilege to exclude incriminating evidence. West's A.M.C. § 13-1-21(1); Rules of Evid., Rule 503.

[2] Privileged Communications and Confidentiality 311H ⚷220

311H Privileged Communications and Confidentiality
311HIV Physician-Patient Privilege
311Hk220 k. Offensive Use Doctrine. Most Cited Cases
(Formerly 410k208(1))
A defendant in a criminal case may not rely on physician-patient privilege to exclude incriminating evidence. West's A.M.C. § 13-1-21(1); Rules of Evid., Rule 503.

[3] Criminal Law 110 ⚷388.2

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.2 k. Particular Tests or Experiments. Most Cited Cases
Statute governing chemical analysis of a person's breath, blood, or urine is not a rule of evidence, and evidence otherwise admissible will not be excluded because of failure to comply with its requirements; the statute is not an exclusionary rule. West's A.M.C. § 63-11-19.

[4] Automobiles 48A ⚷422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In General. Most Cited Cases

Automobiles 48A ⚷423

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Founda-

tion or Predicate
48Ak423 k. Competency of Technician. Most Cited Cases
Hospital's chemical analysis of injured driver's urine specimen was admissible in prosecution for vehicular homicide while under influence of cocaine, even if medical technician did not follow methods approved by the State Crime Laboratory and the Commissioner of Public Safety and did not possess a permit issued by the State Crime Laboratory. West's A.M.C. § 63-11-19.

[5] Privileged Communications and Confidentiality 311H 238

311H Privileged Communications and Confidentiality
311HIV Physician-Patient Privilege
311Hk230 Subject Matter
311Hk238 k. Blood, Tissue, and Urine Samples and Tests. Most Cited Cases
(Formerly 410k212)
The physician-patient privilege may not be used to exclude incriminating drug analysis results discovered as a result of diagnostic treatment. West's A.M.C. § 13-1-21(1); Rules of Evid., Rule 503.

***140** Raymond L. Wong, Cleveland, attorney for appellant.

Office of the Attorney General by Dewitt T. Allred, III, attorney for appellee.

EN BANC.

ON WRIT OF CERTIORARI

SMITH, Presiding Justice, for the Court.

¶ 1. Patrick **Jones** was indicted on one count of vehicular homicide in Bolivar County Circuit Court. **Jones** was accused of causing an automobile accident while under the influence of cocaine which resulted in the death of Emma Powell. **Jones** was convicted and received a sentence of twenty years with five years suspended. **Jones** appealed, and the appeal was assigned to the Court of Appeals which affirmed. ***Jones*** *v.* ***State***, 881 So.2d 209, 2003 WL 21005836 (Miss.Ct.App.2003). This Court granted certiorari to consider the application of the physician-patient privilege in criminal cases and the possible evidentiary implication of standards for hospitals and medical personnel involved in drug testing of patients. 852 So.2d 577 (Miss.2003). After due consideration, we find no error in the judgment of the Court of Appeals and affirm.

FACTS

¶ 2. This statement of facts is taken from the opinion of the Court of Appeals:

> While driving his loaded tractor trailer rig along Highway 61 North, just south of Shaw, Jones collided with Emma Powell's automobile. More specifically, Jones struck Powell's vehicle from the rear as they were both proceeding north in the outside lane of Highway 61 North which, at the point of impact, is a four-lane highway. At the time of the collision, the weather was clear. There ***141** were no obstructions blocking the view of northbound motorists. There were no skid marks indicating that Jones had applied his brakes prior to impact. However, there were skid marks from Powell's vehicle, apparently caused by the weight of Jones truck resting on the rear of her car while, at the same time, pushing her car down the road. Powell and Jones were both injured and transported to the Bolivar Medical Center. Powell later died as a result of the injuries she received.
>
> Sergeant Bob McFadden with the Mississippi Highway Patrol's Traffic Enforcement Division investigated the accident. After Powell was pronounced dead, McFadden administered a breath test to **Jones**. This test was negative for alcohol, and McFadden did not request that a urine analysis be performed on **Jones**.
>
> Although McFadden did not request that a urine analysis be administered to **Jones**, one was administered by hospital personnel as a part of the diagnostic treatment administered to **Jones**. Clint Robinson, an emergency room registered nurse, retrieved the urine sample from **Jones**, and Betty Cooper, a medical technologist with Bolivar Medical Center, following hospital procedures, performed the analysis on **Jones's** urine. This analysis determined that **Jones** had cocaine in his system. The results of Cooper's cocaine analysis were confirmed, pursuant to standard hospital policy, by Memphis Pathology Laboratories (MPL). How-

> ever, no one from MPL testified. Over persistent objection from **Jones**, the trial court admitted the results of the urine analysis, performed by Cooper, and the confirmation report performed by MPL.

Jones v. State, 881 So.2d at ----, 2003 WL 21005836, at * 1 (footnote omitted).

¶ 3. **Jones** was convicted of vehicular homicide and was sentenced to twenty years, with five years suspended. **Jones** appealed his conviction and sentence, arguing that the circuit court had admitted the results of his urinalysis in violation of the physician-patient privilege and without meeting the statutory requirements for admission contained in Miss.Code Ann. § 63-11-19 (Supp.2003). The Court of Appeals rejected this argument, **stating**: (1) the results of **Jones's** urinalysis were not protected by the physician-patient privilege; (2) the requirements of § 63-11-19 did not per se exclude the evidence in question; (3) admission of the evidence should be based on a standard of reasonableness; and (4) while the admission of the report from Memphis Pathology Lab was improper based on hearsay and violation of the right of confrontation, but this error was harmless.

DISCUSSION

I. WHETHER THE PHYSICIAN-PATIENT PRIVILEGE WAS APPLICABLE.

[1] ¶ 4. Jones argues first that the Court of Appeals erred in finding that the results of his urinalysis were not protected from disclosure by the physician-patient privilege. The privilege may be found at Miss.Code Ann. § 13-1-21(1) (Rev.2002) and Mississippi Rule of Evidence 503. None of the exceptions found in Rule 503 are applicable here.

[2] ¶ 5. This Court has stated that the physician-patient privilege applies in criminal cases. *Hopkins v. State*, 799 So.2d 874 (Miss.2001); *State v. Baptist Mem'l Hosp.-Golden Triangle*, 726 So.2d 554 (Miss.1999); *Cotton v. State*, 675 So.2d 308 (Miss.1996); *Ashley v. State*, 423 So.2d 1311 (Miss.1982). However, these cases are distinguishable on their facts from ***142** Jones's situation. In *Ashley*, the privilege was waived when Ashley failed to timely object. In *Cotton*, the privilege in question was not Cotton's, but a witness's. In *Baptist Mem'l*, there was a statutory exception to the privilege, and in *Hopkins*, the defendant waived the privilege. In this case the evidence in question came under the physician-patient privilege, and there was no waiver and no statutory exception. The Court of Appeals noted that without the urinalysis results there was no evidence of cocaine in Jones's system. Citing *Baptist Mem'l*, the Court of Appeals found that "to ensure the proper administration of justice, the medical records regarding the analysis of Jones's urine specimen must be removed from the protection of the physician-patient privilege." *Jones*, 881 So.2d at ----, 2003 WL 21005836, at *4 (¶ 20). A defendant in a criminal case may not rely on this privilege to exclude incriminating evidence. This Court, citing cases from other jurisdictions, made this same point numerous times in *Baptist Mem'l*, 726 So.2d at 559, 560, stating that "[w]here there is an investigation into a serious and/or dangerous felony, public policy must override the rights of an individual," and that the physician-patient privilege would not be used as a "cloak for a crime." This issue is without merit.

II. WHETHER MISS. CODE ANN. § 63-11-19 IS AN EXCLUSIONARY RULE.

[3] ¶ 6. Miss.Code Ann. § 63-11-19 states in part:

> A chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis. The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory ... The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of same.

[4] ¶ 7. Jones argues that the chemical analysis of his

urine specimen was not performed according to methods approved by the State Crime Laboratory and the Commissioner of Public Safety, and that Betty Cooper did not possess a permit issued by the State Crime Laboratory. Jones seeks to have § 63-11-19 used as a rule of evidence, where noncompliance results in exclusion of the evidence.

¶ 8. The Court of Appeals noted *Johnston v. State*, 567 So.2d 237 (Miss.1990), where we reversed a conviction for DUI because there was no evidence in the record to establish that the intoxilyzer machine had been calibrated within the time period required by § 63-11-19. The Court of Appeals correctly distinguished *Johnston* because it dealt with accuracy of intoxilyzer machines, and also stated that

> we do not read *Johnston* to say that the result of a chemical analysis of a person's blood inadmissible if it is not done by a permittee of the State Crime Laboratory in accordance with methods approved by the State Crime Laboratory. ***143** For sure, such an analysis would not be deemed as valid as one performed by a permittee in accordance with methods approved by the State Crime Laboratory. In such cases, the procedures used in the analysis must pass a test of reasonableness.

Jones v. State, 881 So.2d at ----, 2003 WL 21005836, at *6 (¶ 25).

¶ 9. The Court of Appeals then cited *Cutchens v. State*, 310 So.2d 273 (Miss.1975), language from Miss.Code Ann. § 63-11-39(2), which was repealed in 1991, and *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), to find that admission of the evidence in question should be viewed under a reasonableness standard. Finding that the standard was met, the Court of Appeals affirmed the admission of the urinalysis results.

¶ 10. We conclude that § 63-11-19 is not a rule of evidence and evidence otherwise admissible will not be excluded because of failure to comply with its requirements. *Johnston v. State* is distinguishable as it dealt with an intoxilyzer, which must be tested at least quarterly by the State Crime Lab under § 63-11-19, and not hospital procedures and personnel, as in this case. This issue is without merit.

CONCLUSION

[5] ¶ 11. We find that the physician-patient privilege may not be used to exclude incriminating drug analysis results discovered as a result of diagnostic treatment. We find that Miss.Code Ann. § 63-11-19 is not a rule of evidence and will not exclude otherwise admissible evidence because of a failure to comply with the statute's requirements. Accordingly, we affirm the judgment of the Court of Appeals which affirmed the circuit court's judgment.

¶ 12. **AFFIRMED.**

PITTMAN, C.J., WALLER, COBB, EASLEY AND CARLSON, JJ., CONCUR. GRAVES, J., CONCURS IN RESULT ONLY. McRAE, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.
Miss.,2003.
Jones v. State
858 So.2d 139

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763 So. 2d 850, *; 2000 Miss. LEXIS 110, **

BEVERLY ANN McDUFF a/k/a BEVERLY HURST v. STATE OF MISSISSIPPI

NO. 1998-KA-01010-SCT

SUPREME COURT OF MISSISSIPPI

763 So. 2d 850; 2000 Miss. LEXIS 110

May 4, 2000, Decided

PRIOR HISTORY:
[1]** COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 05/08/1998. TRIAL JUDGE: HON. GEORGE B. READY.

DISPOSITION:
REVERSED AND REMANDED.

LexisNexis(TM) HEADNOTES - Core Concepts

Constitutional Law > Search & Seizure > Scope of Protection
[HN1] See U.S. Const. amend. IV.

Constitutional Law > Search & Seizure > Scope of Protection
[HN2] See Miss. Const. art 3, § 23.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN3] See *Miss. Code Ann. § 63-11-8 (1).*

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN4] Unlike other statutes under Mississippi's Implied Consent laws, this *Miss. Code Ann. § 63-11-8(1)* does not require an officer to have probable cause to believe that a driver may be intoxicated before said officer can require a chemical test.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN5] See *Miss. Code Ann. § 63-11-5*.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN6] *Miss. Code Ann. § 63-11-7*.

Constitutional Law > Search & Seizure > Probable Cause
Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN7] A search made without warrant and not incident to a lawful arrest is not illegal per se, but if the fruits of the search are to withstand the exclusionary rule, the search must have been predicated on probable cause. The degree of intrusion necessary in the taking of a blood sample is sufficient to require the presence of probable cause. The U.S. Const. amend. IV prohibition against unreasonable search and seizure applies when an intrusion into the body--such as a blood test--is undertaken without a warrant, absent an emergency situation.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN8] Where the state is justified in requiring a blood test to determine the alcoholic content in a suspect's blood, and such test has in fact been performed, although for diagnostic and not law enforcement purposes, the state is entitled to the benefit of the test results.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN9] Admission of evidence is within the discretion of the trial judge. That discretion must be exercised within the scope of the Mississippi Rules of Evidence and reversal will only be had when an abuse of discretion results in prejudice to the accused.

Constitutional Law > Procedural Due Process > Self-Incrimination Privilege
[HN10] The U.S. Supreme Court has held that a blood test was physical or real evidence rather than testimonial evidence and therefore was unprotected by the U.S. Const. amend. V privilege. This Court has likewise held that the State may force a defendant to provide blood, hair and saliva samples.

COUNSEL:
ATTORNEYS FOR APPELLANT: T. K. MOFFETT, GEORGE S. WHITTEN, JR.

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: DEWITT T. ALLRED, III.

DISTRICT ATTORNEY: ROBERT L. WILLIAMS.

JUDGES:
PRATHER, CHIEF JUSTICE. DIAZ, J., JOINS THIS OPINION.

OPINIONBY:
PRATHER

OPINION:

[*852]

NATURE OF THE CASE: CRIMINAL - FELONY

EN BANC.

PRATHER, CHIEF JUSTICE, FOR THE COURT:

INTRODUCTION

P1. The Court is asked to determine the constitutionality of *Miss. Code Ann. § 63-11-8* (1998), which provides that any driver involved in an automobile accident from which a fatality occurs shall have his blood drawn and tested for the presence of alcohol or drugs, regardless of whether probable cause exists to believe that the driver was under the influence of alcohol or drugs.

STATEMENT OF THE CASE

P2. On July 11, 1996, Beverly McDuff was traveling north on Highway 61 in DeSoto County when she lost control of her Toyota Camry, crossed the center line, and struck an on- coming southbound vehicle, a Pontiac 6000. As a result of this accident, **[**2]** the driver of the Pontiac was killed, and McDuff was injured.

P3. McDuff was treated on the scene by E.M.T. Michael Hancock (Hancock), who subsequently transported her to the Regional Medical Center in Memphis, TN (hospital). Prior to leaving the scene, Hancock was given a blood alcohol kit (BAC kit) by a law enforcement officer with orders that McDuff's blood be drawn at the hospital for the purpose of testing for alcohol and drugs. Hancock did not know the name of the officer who gave him the BAC kit or for which department he or she worked. The identity of this officer has never been ascertained.

P4. Just prior to McDuff being taken to the hospital, Sgt. William Williamson (Williamson) of the Mississippi Highway Patrol arrived at the scene. Although he did not see or talk with McDuff at the scene, he did speak with Richard Ramsey (Ramsey), a motorist who had been following McDuff for approximately 8 to 9 miles before the accident. After McDuff had left the scene, Ramsey informed Williamson that he observed McDuff driving in an erratic manner prior to the accident.

P5. At the hospital, McDuff was treated by nurse Harry Coder (Coder). Hancock gave Coder the BAC kit, **[**3]** and while Coder was "drawing [their] own lab on [McDuff]" he filled two (2) tubes from the kit and gave them back to Hancock. At this point, McDuff had not been placed under arrest. Coder testified that he never told McDuff that he was drawing blood pursuant to law enforcement orders, and he obviously never obtained her consent to do so.

P6. Upon completion of his preliminary investigation, Williamson left the scene of the accident and went to the hospital. At this point, he had yet to have any contact with McDuff. When Williamson arrived at the hospital, he met Hancock at the back door of the hospital, and Hancock gave him the BAC kit containing the two (2) tubes of McDuff's blood. After receiving McDuff's blood, Williamson went into the hospital and asked a nurse to draw **[*853]** McDuff's blood again so that he could personally witness the act. The nurse refused. Williamson testified that he asked for the second blood test for two (2) different reasons. One, he felt he had probable cause to believe that McDuff had been driving under the influence of alcohol or drugs, said belief being based on both Ramsey's statement that McDuff had been driving erratically prior to the accident, **[**4]** and also on the fact that his investigation revealed that McDuff's crossing the center line of the highway caused the accident. The trial court ruled that Williamson indeed had probable cause to request the second test. Additionally, he asked for the second test based on § 63-11-8, which mandates that blood be taken from any driver involved in a fatal accident, regardless of the existence of probable cause to believe that alcohol or drugs were involved. Williamson subsequently had the BAC kit that he received from Hancock transported to the state crime lab for testing. Crime Lab tests showed McDuff's blood samples to contain .23% ethyl alcohol, well over the legal limit. On November 25, 1996, she was indicted on charges of negligently causing death while driving under the influence of alcohol (D.U.I.). n1

n1 McDuff was indicted under *Miss. Code Ann. § 63-11-30 (4)*. This statute has since been amended, and former subsection (4), under which McDuff was prosecuted, is now subsection (5) of the current § 63-11-30.

[5]**

P7. At McDuff's trial, over her objection, the Crime Lab test results were introduced into evidence. After all the evidence was presented, she was convicted, and sentenced to a term of ten (10) years imprisonment, with five (5) years suspended. McDuff posted a $ 100,000 appeal bond, and now appeals her conviction, raising numerous assignments of error. This Court will only address two of the issues raised by McDuff, as the others are not dispositive on this case.

ISSUES

I. Under both the Fourth Amendment to the United States Constitution and Article 3, § 23 of the Mississippi

Constitution, *Miss. Code Ann. § 63-11-8* is null and void because it mandates search and seizure absent probable cause or consent.

P8. The central issue in this case is the admissibility of the blood test evidence. This evidence was collected at the direction of an unidentified law enforcement officer at the accident scene. McDuff asserts that the officer lacked probable cause to require her to be subjected to a warrantless blood test. The officer who ordered Hancock to have McDuff's blood drawn and tested was never identified, and he obviously never testified at trial. Therefore, **[**6]** the record is void of any probable cause justifying such an order. McDuff was not under arrest at the time her blood was drawn, nor did she give consent to have her blood drawn *for law enforcement purposes*, nor was a search warrant obtained. Therefore, when Coder drew two (2) tubes of blood from McDuff in response to the law enforcement request as relayed by Hancock, this evidence was acquired not incident to a lawful arrest and without probable cause or a warrant or her explicit consent. Williamson subsequently developed probable cause to believe that McDuff may have been intoxicated; however, this occurred after McDuff was en route to the hospital with orders to have her blood drawn. Armed with the probable cause he eventually developed, Williamson unsuccessfully attempted to have McDuff's blood drawn again in his presence at the hospital.

P9. "[HN1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. Const. Amend. IV. "[HN2] The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search..." Miss. Const. art 3, § 23 ([HN3] 1890). *Miss. Code* **[**7]** *Ann. § 63-11-8 (1)*, titled "Mandatory blood test for operators involved in **[*854]** fatal accidents" states, in relevant part, that "the operator of any motor vehicle involved in an accident that results in a death shall be tested for the purpose of determining the alcohol content or drug content of such operator's blood, breath or urine." [HN4] Unlike other statutes under Mississippi's Implied Consent laws, this statute does not require an officer to have probable cause to believe that a driver may be intoxicated before said officer can require a chemical test. [HN5] Under § 63-11-5, an officer may test a driver when "such officer has reasonable grounds and probable cause to believe that the person was driving...while under the influence ...". [HN6] Under § 63-11-7, when a driver is unconscious, dead, or otherwise incapable of refusing a test as the result of an accident, that driver will be subject to a blood test "if the arresting officer has reasonable grounds to believe the person to have been driving...while under the influence..."

P10. [HN7] "A search made without warrant and not incident to a lawful arrest is not illegal *per se*, but if the fruits of the search are to withstand the exclusionary **[**8]** rule, the search must have been predicated on probable cause." ***Hailes v. State**, 268 So. 2d 345, 346 (Miss. 1972).* "The degree of intrusion necessary in the taking of a blood sample is sufficient to require the presence of probable cause. The Fourth Amendment prohibition against unreasonable search and seizure applies when an intrusion into the body--such as a blood test--is undertaken without a warrant, absent an emergency situation." ***Cole v. State**, 493 So. 2d 1333, 1336 (Miss. 1986)* (quoting ***Schmerber v. California**, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36, 16 L. Ed. 2d 908, 919-20 (1966)).*

P11. In ***Skinner v. Railway Labor Executives' Ass'n**, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)*, the United States Supreme Court created a "special needs" exception to the probable cause requirement. The Court in ***Skinner*** considered a federal statute requiring railroad employees to submit to breath, blood and urine testing in certain situations, absent probable cause. The statute was found to be constitutional because it furthered the government's compelling interest in **[**9]** promoting rail safety, and because railway employees have a diminished expectation of privacy. ***Skinner**, 489 U.S. at 634, 109 S. Ct. at 1422, 103 L. Ed. 2d at 670.*

P12. Although the constitutionality of § 63-11-8 has never been considered by this Court, several other states have considered similar statutes. The Pennsylvania Supreme Court, in declining to apply the limited exception set forth in ***Skinner***, struck down a statute which provided:

> any person who drives...a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcohol content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving...a motor vehicle which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.

***Commonwealth v. Kohl**, 532 Pa. 152, 615 A.2d 308 (1992).* That court noted that the underlying purpose of the statute was to obtain evidence for use in criminal prosecutions, **[**10]** and stated "no matter how compelling, however, the Commonwealth's interest in securing evidence that a driver is operating a vehicle under the influence of alcohol or drugs does not evince a special need that would justify departure from the probable cause requirements of the Fourth Amendment." ***Kohl** 532 Pa. at 164, 615 A.2d at 314.* In similar fashion, the Illinois Supreme Court struck down a statute providing:

> Any person who drives or is in actual control of a motor vehicle upon the public highways of this State shall be deemed to have given consent to a breath test using a

portable device as approved by the Department of Public **[*855]** Health or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if there is probable cause to believe that such person was the driver at fault, in whole or in part, for a motor vehicle accident which resulted in the death or personal injury of any person.

***King v. Ryan**, 153 Ill. 2d 449, 607 N.E.2d 154, 180 Ill. Dec. 260 (1992).* That court held "it is clear that the State has a compelling interest in protecting **[**11]** its citizens from the hazards caused by intoxicated drivers...However, [the statute] is also intended to gather evidence for use in a criminal proceeding. Because [the statute] is designed to further this law enforcement purpose, we do not believe it falls within the special needs exception to the probable cause requirement." ***King**, 153 Ill. 2d at 461-462, 607 N.E.2d at 160, 180 Ill. Dec. at 266.*

P13. The State, in its brief, essentially admitted that § 63-11-8 is unconstitutional when it wrote "appellee respectfully asks this Court to hold clearly that evidence inadmissible under the probable-cause requirement of the Fourth Amendment and Section 23, Mississippi Constitution of 1890 is not made admissible by operation of § 63-11-8."

P14. The only court found to have upheld a statute which is somewhat similar to § 63-11-8 is the Maine Supreme Judicial Court, which, in the case of ***State v. Roche**, 681 A.2d 472 (Me. 1996)* upheld a statute providing in pertinent part:

> Each operator of a motor vehicle involved in a motor vehicle accident shall submit to and complete a chemical test to determine that person's blood-alcohol **[**12]** level or drug concentration by analysis of the person's blood, breath, or urine if there is probable cause to believe that a death has occurred or will occur as a result of the accident...the result of a test taken pursuant to this paragraph is admissible at trial if the court, after reviewing all the evidence regardless of whether the evidence was gathered prior to, during, or after the administration of the test, is satisfied that probable cause exists, independent of the test result, to believe that the operator was under the influence of intoxication of liquor or drugs or had an excessive blood alcohol level.

P15. We find the holdings of the Pennsylvania and Illinois Supreme Courts to be persuasive. The Maine Supreme Judicial Court's holding in ***Roche*** is not relevant to our case, as the statute at issue in that case contained a probable cause provision, and § 63-11-8 contains no such provision.

P16. Accordingly, we hold that *Miss. Code Ann. § 63-11-8* is unconstitutional, as it requires search and seizure absent probable cause. Although the State undoubtedly has a significant interest in preventing accidents involving alcohol and drugs on its roadways, **[**13]** this statute does nothing to further that interest. *Miss. Code Ann. § 63-11-8* is not applicable prior to the occurrence of a serious accident; therefore, it is prosecutorial, not preventive in nature. Furthermore, the tragic fact that a fatality arises out of a motor vehicle accident is in no way, standing alone, an indicator that alcohol or drugs were involved. It is not overwhelmingly burdensome for an officer to establish probable cause to believe that a driver may be under the influence of alcohol or drugs (i.e. the smell of alcohol on the driver's breath, erratic driving, alcohol containers or drug paraphanalia in plain sight in the vehicle, etc.). Therefore, it is not necessary to circumvent the constitutionally mandated probable cause requirement in order to aid law enforcement officials in achieving an already achievable burden.

P17. The State cites ***Ashley v. State**, 423 So. 2d 1311 (Miss. 1982)* for its contention that the introduction of McDuff's blood test results at trial was proper even if § 63-11-8 is unconstitutional. In that case, Ashley rear-ended a **[*856]** stopped car, causing the death of one of its passengers. The officer investigating the accident **[**14]** eventually developed probable cause to believe that Ashley was intoxicated. While the officer was still at the accident scene, and after Ashley had been transported to the hospital, the officer contacted the hospital with instructions to perform a blood-alcohol test on Ashley. When the officer finally arrived at the hospital, he was informed that a blood test had already been performed on Ashley. This test was ordered by Ashley's physician for diagnostic purposes, and when the test was ordered, this doctor had no knowledge of the law enforcement request that such a test be performed. The officer did not order another blood test because one had already been done, and he knew the results of said test. The trial court overruled Ashley's pretrial motion to suppress the results of the blood-alcohol test, which showed him to be intoxicated at the time of the accident. In reviewing the record, this Court found that based on the officer's investigation "there existed probable cause for arrest and also probable cause to search [Ashley] by requiring him to submit to the withdrawal of blood from his body to be tested." ***Ashley**, 423 So. 2d at 1313.* This Court upheld Ashley's **[**15]** conviction, holding that "[HN8] where the state is justified in requiring a blood test to determine the alcoholic content in a suspect's blood, and such test has in fact been performed, *although for diagnostic and not law enforcement purposes*, the state is entitled to the benefit of the test results. It would have been unduly repetitive to require the officer to have blood withdrawn from [Ashley] a second time for testing. This would have required [Ashely] to be subjected to another intrusion of his body. Any additional tests were unnecessary because one had already been performed, and the results were available." ***Ashley**, 423 So. 2d at 1314* (emphasis added).

P18. The case sub judice, however, is different from ***Ashley***. At the point when nurse Coder drew McDuff's blood in response to the law enforcement request, the State was not "justified in requiring a blood test to determine the alcoholic content in [McDuff's] blood." Under ***Ashley***, the probable cause that Williamson eventually developed entitled him to obtain the blood drawn by the hospital *for diagnostic purposes* (i.e. the blood which Coder drew "for [their] own lab **[**16]** on [McDuff]"). However, Williamson's probable cause did not entitle him to obtain the blood drawn specifically as a result of a law enforcement request (i.e. the two (2) tubes Hancock gave Coder). In other words, his probable cause could not retroactively cure the prior unlawful search and seizure which occurred when Coder drew the extra two (2) tubes of blood. *See* ***Isaacks v. State****, 350 So. 2d 1340, 1343 (Miss. 1977).*

P19. We hold that the drawing of the two (2) tubes of McDuff's blood, done specifically at the request of law enforcement, was improper because this was done without probable cause, a warrant or consent, and was not incident to a lawful arrest. This violated both the Fourth Amendment to the United States Constitution and Article 3, § 23 of the Mississippi Constitution. Consequently, the trial court abused its discretion in allowing the results of the blood test into evidence, and in doing so committed reversible error. "[HN9] Admission of evidence is within the discretion of the trial judge. That discretion must be exercised within the scope of the Mississippi Rules of Evidence and reversal will only be had when an abuse of discretion results **[**17]** in prejudice to the accused." ***Parker v. State****, 606 So. 2d 1132, 1137-38 (Miss. 1992).*

II. *Miss. Code Ann. § 63-11-8* is invalid because it compels a person to give evidence against himself to be used to criminally prosecute him, in violation of the Fifth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution.

P20. "In ***Schmerber*** (citations omitted), [HN10] the U.S. Supreme Court upheld a **[*857]** state-compelled blood test, finding that a blood test was 'physical or real' evidence rather than testimonial evidence and therefore was unprotected by the Fifth Amendment privilege." ***Ricks v. State****, 611 So. 2d 212, 215-16 (Miss. 1992).* This Court has likewise held that the State may force a defendant to provide blood, hair and saliva samples." ***Id.*** (quoting ***Williams v. State****, 434 So. 2d 1340, 1344-45 (Miss. 1983)),* ***Wesley v. State****, 521 So. 2d 1283, 1286 (Miss. 1988).* Therefore, this assignment of error must fail.

CONCLUSION

P21. Because McDuff's blood was drawn without probable cause, consent, a warrant or incident **[**18]** to a lawful arrest, the trial court committed reversible error in admitting into evidence the results of tests performed on that blood. Therefore, the test results were inadmissible, and this Court reverses McDuff's conviction for causing the death of another while driving under the influence and remands the case to the trial court for a new trial. Under ***Ashley***, the State may, upon retrial, use the blood drawn from McDuff by hospital personnel for diagnostic purposes, if this evidence is still available. However, it may not use the blood drawn specifically in response to the law enforcement request, which was made at the scene of the accident without a showing of probable cause. We also hold that *Miss. Code Ann. § 63-11-8* is unconstitutional, insofar as it mandates search and seizure absent probable cause. Without a probable cause provision, this statute can not pass constitutional muster, and we suggest that the Legislature review this statute in light of this decision.

P22. **REVERSED AND REMANDED.**

PITTMAN AND BANKS, P.JJ., SMITH, MILLS AND COBB JJ., CONCUR. McRAE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, J. WALLER, [19] J., NOT PARTICIPATING.**

McRAE, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

P23. I agree that *Miss. Code Ann. § 63-11-8* (1998) is unconstitutional because it does not have a probable cause provision and cannot pass constitutional muster. However, I would go further to hold that a Mississippi police officer may not request blood tests to be performed outside the state of Mississippi. Since the majority has refused to discuss this issue, I am compelled to do so myself.

P24. In addition, while the majority finds § 63-11-8 unconstitutional, it errs in holding that upon retrial the blood drawn from McDuff by hospital personnel in Tennessee for diagnostic purposes may be entered as evidence in Mississippi. Both the Tennessee and Mississippi (M.R.E. 503) medical privilege comes into play and only the patient can waive that privilege. See ***Cotton v. State****, 675 So. 2d 308, 312 (Miss. 1996);* ***Ashley v. State****, 423 So. 2d 1311, 1315 (Miss. 1982).* There is also no provision for the State to obtain the medical records outside this jurisdiction as the majority so advises the State to do. The majority's reliance on **[**20]** ***Ashley*** for this contention is unfounded. In ***Ashley***, the Court only allowed the blood tests taken by hospital personnel into evidence once the privilege was waived by the appellant calling his doctor to the stand. The Court in ***Ashley*** stated:

We hold that appellant waived the privilege when he called Dr. Wiggins to the stand as his own witness and the result of the test was elicited from the doctor on cross-examination without objection from the defendant.

In the present case, McDuff has in no way waived this privilege.

P25. Even if *Miss. Code Ann. § 63-11-8* were constitutional, it does not give law enforcement the authority to exercise this power out-of-state. Our subpoena power in a criminal proceeding does not go beyond our state boundaries.

P26. Under certain circumstances, police officers have the right to arrest offenders **[*858]** in jurisdictions other than their own so long as that other territory is **within the state** pursuant to *Miss. Code Ann. § 99-3-13* (1994). *See also* ***McLean v. Mississippi***, *96 F.2d 741 (5th Cir. 1938)* (the functions of the sheriff are confined to his own county except when pursuing **[**21]** a fleeing offender). Outside of the state's boundaries, Mississippi police officers have powers no greater than those possessed by any citizens. That is, officers may effect a person's arrest where a felony had been committed or where a breach of the peace is being threatened or attempted, n2 but a citizen may not require a person to submit to chemical testing. Therefore, outside the state of Mississippi, Mississippi police officers are without the authority to require a person to submit to blood alcohol testing or order one done. If he orders it done, can the officer arrest the person in Tennessee if he refuses?

> n2 *Miss. Code Ann. § 99-3-7(1)*(Supp. 1999); see also ***Nash v. State***, *207 So. 2d 104, 107 (Miss. 1968)* (sheriff who arrested accused outside of his jurisdiction on basis that car which struck decedent was owned by accused had probable cause to believe a felony had been committed, that accused was guilty party, and had right to make citizen's arrest).

P27. In this case, **[**22]** the officer could have asked McDuff to submit to a blood test, and McDuff could have either given or withheld her consent. But McDuff was never consulted as to whether she consented to have an analysis of her blood alcohol content performed. Therefore, the results should have been suppressed since the officer did not have the authority to require her to submit to blood alcohol testing outside of Mississippi.

P28. At common law, a police officer outside his jurisdiction does not act in his official capacity and has no official authority to arrest. ***Perry v. State***, *303 Ark. 100, 794 S.W.2d 141 (Ark. 1990);* ***People v. Vigil***, *729 P.2d 360, 365-66 (Colo. 1986);* ***State v. Hodgson***, *57 Del. 383, 200 A.2d 567 (Del. Super. Ct. 1964);* ***People v. LaFontaine***, *92 N.Y.2d 470, 705 N.E.2d 663, 682 N.Y.S.2d 671 (N.Y. 1998);* ***Commonwealth v. England***, *474 Pa. 1, 375 A.2d 1292 (Pa. 1977);* ***State v. Hart***, *149 Vt. 104, 539 A.2d 551 (Vt. 1987);* ***State v. Slawek***, *114 Wis. 2d 332, 338 N.W.2d 120 (Wis. Ct. App.1983);* 5 Am.Jur.2d *Arrest* § 50, at 742-43; **[**23]** 4 Wharton's Criminal Law and Procedure § 1614, at 277 (R. Anderson ed.1957). He has only the power to make a citizen's arrest. ***State v. O'Kelly***, *211 N.W.2d 589, 595 (Iowa 1973);* ***State v. Bickham***, *404 So. 2d 929, 932 (La. 1981);* Restatement (Second) Torts, § 121, cmt. a (1965). A police officer outside his territory, then, may exercise authority beyond that of a citizen only where there is explicit legislation allowing him to do so. As there is no such legislation in this state, the results of the blood alcohol test performed on McDuff without her consent should have been suppressed.

P29. For these reasons, I concur with the holding that *Miss. Code Ann. § 63-11-8* is unconstitutional. However, I dissent from the majority's failure to hold, or even discuss, that Mississippi law enforcement cannot require blood testing be done outside the state of Mississippi.

P30. The majority is also misguided in holding that the blood drawn by hospital personnel in Tennessee can be used in a second trial pursuant to ***Ashley***. The blood test results of the defendant in ***Ashley*** were not admitted into evidence through statute, **[**24]** but instead because the defendant called the doctor to the stand, thus waiving any medical privilege, including the results of his blood test. Since McDuff never waived this privilege, allowing his blood results entered into evidence at the second trial would clearly violate M.R.E. 503 which applies in criminal proceedings. ***Cotton,*** *675 So. 2d at 312,* see ***Ashley***, *423 So. 2d at 1314;* ***Keeton v. State***, *175 Miss. 631, 167 So. 68 (1936).*

P31. Accordingly, I concur in part and dissent in part.

DIAZ, J., JOINS THIS OPINION.

TAMI SAUCIER, APPELLANT v. CITY OF POPLARVILLE, APPELLEE

NO. 2002-KM-01873-COA

COURT OF APPEALS OF MISSISSIPPI

858 So. 2d 933; 2003 Miss. App. LEXIS 1025

November 4, 2003, Decided

PRIOR HISTORY: [1]** COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT. DATE OF TRIAL COURT JUDGMENT: 10/24/2002. TRIAL JUDGE: HON. JOHN T. KITCHENS. TRIAL COURT DISPOSITION: GUILTY OF DRIVING UNDER INFLUENCE. *Saucier v. City of Poplarville, 2003 Miss. App. LEXIS 1126 (Miss. Ct. App., Nov. 4, 2003)*

DISPOSITION: AFFIRMED.

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure > Arrests > Probable Cause
[HN1] As a general rule, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Reckless Driving
[HN2] See *Miss. Code Ann. § 63-3-1213* (Rev. 1996).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the InfluenceCriminal Law & Procedure > Arrests > Probable Cause
[HN3] Probable cause to administer a field sobriety test can be the basis of probable cause to arrest and administer a breath test.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the InfluenceCriminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Implied Consent
[HN4] See *Miss. Code Ann. § 63-11-30(1)(a)* (Rev. 1996).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
[HN5] A Horizontal Gaze Nystagmus test is conducted by asking the driver to cover one eye and focus the other on an object, usually a pen, held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision he watches the driver's eyeball to detect involuntary jerking. The officer then observes: (1) the inability of each eye to track movement smoothly; (2) pronounced nystagmus at maximum deviation; and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the InfluenceCriminal Law & Procedure > Evidence > Scientific Evidence > Sobriety Tests
[HN6] The absence of evidence from a successfully administered Intoxilizer test does not prevent proof of intoxication.

COUNSEL: ATTORNEY FOR APPELLANT: THOMAS M. MATTHEWS.

ATTORNEY FOR APPELLEE: NOVA A. CARROLL CITY ATTORNEY: NOVA A. CARROLL.

JUDGES: BEFORE SOUTHWICK, P. J. , MYERS AND CHANDLER, JJ.

OPINION BY: SOUTHWICK

OPINION: [*934] NATURE OF THE CASE: CRIMINAL - MISDEMEANOR

SOUTHWICK, P.J., FOR THE COURT:

P1. Tami Saucier was convicted of driving under the influence. She appeals arguing that there was no probable cause for the traffic stop nor for the administration of a breath test. She also argues that the evidence did not support that she was under the influence of alcohol. We find no error.

STATEMENT OF FACTS

P2. On the night of November 30, 2001, Saucier was driving on Highway 53 near Poplarville, Mississippi. While on patrol, a Pearl River County sheriff's deputy began to follow her. He observed Saucier increase and decrease her speed and "bump" the centerline. She was driving between fifteen and twenty miles per hour in a thirty-five mile per hour zone. He followed her for about **[**2]** eight miles. As they entered Poplarville, Saucier went into the center lane and jerked her vehicle back into the right lane. The officer contacted the Poplarville Police Department for assistance.

P3. A police officer responded and pulled his vehicle in between the sheriff deputy's vehicle and that of Saucier. He followed her for perhaps three hundred yards. He observed Saucier cross the yellow line into the turn lane and then back into her lane. She was also driving rather slowly. The police officer then stopped Saucier. As he approached Saucier's vehicle, he smelled alcohol coming from inside her vehicle. He then noticed that Saucier's eyes were bloodshot and glassy. He asked her to exit her vehicle. The sheriff's deputy was also present and he saw Saucier sway. Saucier stated that she had been drinking wine earlier at a casino on the Gulf Coast.

P4. Two field sobriety tests were conducted. Saucier did not successfully complete either, so she was asked to submit to an Intoxilizer exam for breath alcohol content. Saucier was transported to the Pearl River County Sheriff's Department for the test. She was unable to complete it. She was arrested and charged with careless driving **[**3]** and driving under the influence of intoxicating liquor. In the Poplarville Municipal Court, Saucier entered a *nolo contendre* plea. She then appealed her conviction to the Circuit Court of Pearl River County for a trial de novo. Both parties requested a trial without a jury. Saucier was found guilty of driving under the influence, first offense.

DISCUSSION

1. Probable cause for a traffic stop and for administering field sobriety test

P5. Saucier claims that there was no probable cause for the police officer to conduct a traffic stop. The United States Supreme Court has stated that, [HN1] as a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States, 517 U.S. 806, 810, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)*. To know whether there was evidence of the offense of careless driving, we examine the statute on that crime:

[HN2] Any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and **[*935]** highways and all other attendant circumstances is guilty of **[**4]** careless driving.

Miss. Code Ann. § 63-3-1213 (Rev. 1996).

P6. Repeatedly, the vehicle that Saucier was driving crossed over the center line. This is

careless driving under the statute. She was driving without due regard for the width and use of the street. This was observed by two law enforcement officers. The officer's observations were sufficient for him to conclude that the traffic violation of careless driving had occurred.

P7. Saucier relies on a precedent that states that a driver allowing his vehicle one time to drift slightly across a lane marker was not an offense under Texas law. *Hernandez v. State of Texas, 983 S.W.2d 867, 870 (Tex. Ct. App. 1998)*. The driver was on a five lane highway, and he did not cross over into the lane for oncoming traffic. The court discussed the legislative history of the relevant Texas statute, and found that there was a violation only when a driver "fails to stay within its lane and such movement is not safe or is not made safely." *Id. at 871*. The failure to prove the unsafe nature of the lane violation is what caused the court to find that no traffic offense had occurred. **[**5]**

P8. We note factual distinctions. First, there was not a one-time and brief drifting across the painted stripe separating lanes as in *Hernandez*, but a multiple intrusion across the dividing stripe on the highway. The frequency of the failure to maintain the proper lane suggests a greater degree of risk and carelessness. Secondly, Hernandez drifted across the stripe dividing his lane from others going the same direction; Saucier crossed over the centerline into the lane for traffic going the opposite direction. A witness specifically stated that Saucier was drifting into the lane used by oncoming traffic. We do not find *Hernandez* persuasive as to the resolution of this appeal.

P9. In a factually similar decision, this Court found that a driver who was seen several times permitting his vehicle to cross over into a turning lane (apparently a center lane usable by traffic in each direction) could be found guilty of careless driving. *Guerrero v. State, 746 So. 2d 940, 943 (Miss. Ct. App. 1999)*.

P10. There was probable cause to believe a traffic offense had been committed. Saucier was properly stopped for further police action.

P11. Saucier also **[**6]** argues that even though she might properly have been stopped, there was not sufficient basis to believe that she was intoxicated. Consequently, she argues that the results of the field sobriety test should be suppressed.

P12. [HN3] Probable cause to administer a field sobriety test can be the basis of probable cause to arrest and administer a breath test. *Young v. City of Brookhaven, 693 So. 2d 1355, 1361 (Miss. 1997)*. The record reflects that the officers smelled alcohol, that Saucier's eyes were glassy and bloodshot, that she swayed, and that she could not adequately perform two field sobriety tests. Saucier admitted to drinking at a casino that night. From this, the officer concluded that Saucier was intoxicated. It was not clearly erroneous for the circuit court to conclude there was probable cause to administer the Intoxilizer exam. Saucier was unable to complete this test.

2. Proof of intoxication

P13. Saucier asserts that there is no evidence indicating she was intoxicated. This is the statute that Saucier was found to have violated:

> [HN4] (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who
>
> **[*936]** (a) is under **[**7]** the influence of intoxicating liquor.

Miss. Code Ann. § 63-11-30(1)(a) (Rev. 1996).

P14. The circuit judge concluded Saucier was intoxicated based on the testimony of the police officer and the sheriff's deputy. This evidence demonstrated that Saucier was driving carelessly, smelled of alcohol, had glassy eyes, swayed, and could not complete two field sobriety tests.

P15. Saucier states that the evidence should be found to be inadequate because of a precedent that rejected the sufficiency of the Horizontal Gaze Nystagmus test as proof of intoxication. *Richbourg v. State, 744 So. 2d 352, 354 (Miss. Ct. App. 1999).* That specific test, involving the ability of a person suspected of being intoxicated to follow with his eyes the movement of the officer's hand or finger, is not what was used in this case.

[HN5] An HGN test is conducted by asking the driver to "cover one eye and focus the other on an object--usually a pen--held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision he watches the driver's eyeball to detect involuntary jerking. The officer then observes: **[**8]** "(1) the inability of each eye to track movement smoothly; (2) pronounced nystagmus at maximum deviation; and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point."

Young v. City of Brookhaven, 693 So. 2d 1355, 1359 (Miss. 1997).

P16. Saucier received a different test, commonly called a field sobriety test. Saucier was asked to put her feet together. She then was asked to close her eyes and tilt her head back, extending her arms. With her eyes still closed, Saucier was asked to touch the tip of her nose with the index finger, first of one hand and then of the other. She was then given what the officer called a "finger-count" test. It is unclear from the testimony whether other requests were made. The officer stated that she was unable to pass these tests of coordination. Such field sobriety tests have been distinguished from the HGN test. *Edwards v. State, 795 So. 2d 554, 562-63 (Miss. Ct. App. 2001).*

P17. Besides just these tests, the officers testified about slurred speech, smell of alcohol, and glazed eyes. [HN6] The absence of evidence from a successfully administered Intoxilizer test does not prevent **[**9]** proof of intoxication. The evidence available was sufficient for the circuit judge to conclude in fact that Saucier was intoxicated.

P18. **THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY OF CONVICTION OF DUI FIRST OFFENSE AND SENTENCE OF TWO DAYS IN THE PEARL RIVER COUNTY JAIL, SUSPENDED, AND FINE OF $ 500 IS AFFIRMED. ALL COSTS ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., KING, P.J., BRIDGES, THOMAS, LEE, IRVING, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR.

--- So.2d ----, 2008 WL 4914960 (Miss.App.)
(Cite as: 2008 WL 4914960 (Miss.App.))

Court of Appeals of Mississippi.
Krystal Marie TESTON, Appellant,
v.
STATE of Mississippi, Appellee.
No. 2007-KA-00353-COA.

Nov. 18, 2008.

Background: Defendant was convicted in the Harrison County Circuit Court, Stephen B. Simpson, J., on three counts of driving under the influence of hydrocodone and negligently causing death to another and one count of driving under the influence of hydrocodone and negligently causing serious injury to another. Defendant appealed.

Holdings: The Court of Appeals, King, C.J., held that:
(1) indictment and prosecution of defendant on four counts of driving under the influence of hydrocodone and negligently causing death or serious injury to another, and four counts of driving under the influence and negligently causing the death or serious injury to another, did not violate double jeopardy;
(2) blood test of defendant was admissible, though it was taken three hours after accident;
(3) trial court did not abuse its discretion by determining that State's impairment expert's methodology to determine the level of hydrocodone in defendant's system was reliable;
(4) issue of whether defendant was impaired at the time of the accident was for the jury;
(5) prosecutor did not improperly comment on defendant's exercise of her right not to testify; and
(6) sentence of defendant to four consecutive 15 year sentences, with 30 years suspended, was not grossly disproportionate in violation of the Eighth Amendment.

Affirmed.

West Headnotes

[1] Double Jeopardy 135H 5.1

135H Double Jeopardy
135HI In General
135Hk5 Prohibition of Multiple Proceedings or Punishments
135Hk5.1 k. In general. Most Cited Cases
Double jeopardy allows a defendant to be protected against multiple punishments for the same offense. U.S.C.A. Const.Amend. 5.

[2] Double Jeopardy 135H 135

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk132 Identity of Offenses; Same Offense
135Hk135 k. Proof of fact not required for other offense. Most Cited Cases
The same elements test is used to determine whether double jeopardy attaches, under which, if the offenses contain the same elements, they are the same offense and double jeopardy bars additional punishment and successive prosecution. U.S.C.A. Const.Amend. 5.

[3] Double Jeopardy 135H 142

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk142 k. Motor vehicle and traffic offenses. Most Cited Cases
Indictment and prosecution of defendant on four counts of driving under the influence of hydrocodone and negligently causing death or serious injury to another, and four counts of driving under the influence and negligently causing the death or serious injury to another, did not violate double jeopardy,

where the State expected defendant to attack credibility of her blood test indicating hydrocodone because she admitted to taking a second drug but test came back negative for that drug, State argued that the other counts were necessary to fall back on in the event the jury determined that the blood test was not reliable, and when allegations that defendant had taken other drugs were not proven trial court granted defendant a directed verdict on the counts not specifying hydrocodone. U.S.C.A. Const.Amend. 5; West's A.M.C. § 63-11-30(1)(b), (5).

[4] Criminal Law 110 661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and scope of proof. Most Cited Cases
The admissibility of evidence is left to the sound discretion of the trial court.

[5] Criminal Law 110 1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In general. Most Cited Cases
Court of Appeals will not disturb a trial court's ruling on the admissibility of evidence absent a finding that the trial court abused its discretion.

[6] Automobiles 48A 416

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak416 k. Time for test. Most Cited Cases
The provision to draw blood within two hours of an accident that results in death is not an unyielding mandate; rather, in light of the circumstances, the statute requires substantial compliance. West's A.M.C. § 63-11-8.

[7] Automobiles 48A 416

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak416 k. Time for test. Most Cited Cases
Blood test was admissible in trial that resulted in conviction of defendant on four counts of driving under the influence of hydrocodone and negligently causing death or serious injury to another, though test was drawn three hours after the accident in question, as statute on the drawing of blood after an accident causing death only required that the blood be drawn within two hours if possible, officer who arrived at scene of the accident and requested blood test was not initially aware of defendant's involvement in the accident, officer only saw the medications in defendant's vehicle after her arrest for driving with a suspended license an hour and a half after accident occurred, blood test was further delayed while officer waited for tow truck to arrive, officer did not deliberately delay the blood test, and there was no evidence that the delay prejudiced defendant. West's A.M.C. § 63-11-8(1).

[8] Criminal Law 110 469.2

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469.2 k. Discretion. Most Cited Cases
The admissibility of expert testimony lies within the sound discretion of the trial court.

[9] Criminal Law 110 1153.12(3)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(3) k. Admissibility. Most Cited Cases
Court of Appeals reviews a trial court's admittance of expert testimony under an abuse of discretion standard, and will not disturb the trial court's ruling unless it is clear that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.

[10] Criminal Law 110 469

Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469 k. In general. Most Cited Cases
he *Daubert* test for the admission of expert testiiony requires a two-prong inquiry: (1) the trial court nust determine whether the expert testimony is rele-ant, meaning that it must assist the trier of fact, and (2) the trial court must determine whether the proffered expert testimony is reliable. Rules of Evid., Rule 702.

[11] Criminal Law 110 ⚿485(2)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k485 Hypothetical Questions and Answers
110k485(2) k. On issue of mental condition or capacity. Most Cited Cases
Hypothetical question posed to State's expert regarding defendant's level of impairment, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another, was based on sufficient and accurate facts; though witness to accident did not testify that defendant's driving was "very erratic" witness did describe defendant's driving as "erratic," defense counsel during cross-examination asked whether someone under the influence of hydrocodone would be able to safely operate a vehicle, and trial court added to State's hypothetical fact that police officer did not notice any signs of impairment in his initial contact with defendant. Rules of Evid., Rule 702.

[12] Criminal Law 110 ⚿388.1

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.1 k. In general. Most Cited Cases
Factors to be considered when applying the *Daubert* test for the reliability of scientific testimony, which are not exhaustive, include whether the theory or technique can be and has been tested, whether it has been subjected to peer review and publication, whether, in respect to a particular technique, there is a high known or potential rate of error, whether there are standards controlling the technique's operation, and whether the theory or technique enjoys general acceptance within a relevant scientific community. Rules of Evid., Rule 702.

[13] Criminal Law 110 ⚿388.1

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.1 k. In general. Most Cited Cases
The applicability of the *Daubert* factors for the reliability of scientific testimony depends on the nature of the case, the area of expertise, and the subject of the testimony. Rules of Evid., Rule 702.

[14] Criminal Law 110 ⚿488

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k488 k. Experiments and results thereof. Most Cited Cases
Trial court did not abuse its discretion by determining that State's impairment expert's methodology to determine the level of hydrocodone in defendant's system prior to the administration of her blood test was sufficient to pass the *Daubert* test for reliability, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another; although there were no studies concerning the retrograde extrapolation of hydrocodone, a study was conducted to determine the mean peak level of hydrocodone in a person's system, expert testified regarding the half-life of hydrocodone, and expert, using several different peak levels, testified that based on defendant's impairment three hours after accident defendant was impaired at the time of the accident. Rules of Evid., Rule 702.

[15] Criminal Law 110 ⚿469.2

--- So.2d ----, 2008 WL 4914960 (Miss.App.)
(Cite as: 2008 WL 4914960 (Miss.App.))

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469.2 k. Discretion. Most Cited Cases
Trial courts have considerable leeway in determining the reliability of expert testimony. Rules of Evid., Rule 702.

[16] Criminal Law 110 ⚿486(2)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k486 Basis of Opinion
110k486(2) k. Necessity and sufficiency. Most Cited Cases
A trial court is not required to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert, as self-proclaimed accuracy by an expert is an insufficient measure of reliability. Rules of Evid., Rule 702.

[17] Criminal Law 110 ⚿388.1

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.1 k. In general. Most Cited Cases
The *Daubert* test for the reliability of scientific testimony does not require trial judges to become experts themselves. Rules of Evid., Rule 702.

[18] Criminal Law 110 ⚿977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment notwithstanding the verdict. Most Cited Cases
A motion for a judgment notwithstanding the verdict (JNOV) attacks the legal sufficiency of the evidence.

[19] Criminal Law 110 ⚿1144.13(2.1)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(2.1) k. In general. Most Cited Cases
When review the denial of a motion for judgment notwithstanding the verdict (JNOV), the Court of Appeals with respect to each element of the offense must consider all of the evidence, not just the evidence which supports the case for the prosecution, in the light most favorable to the verdict.

[20] Criminal Law 110 ⚿1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(4) k. Evidence accepted as true. Most Cited Cases
When reviewing a trial court's denial of motion for judgment notwithstanding the verdict (JNOV), the credible evidence which is consistent with the guilt must be accepted as true.

[21] Criminal Law 110 ⚿1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or deductions from evidence. Most Cited Cases
When reviewing a denial of a motion for judgment notwithstanding the verdict (JNOV), the prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence.

[22] Criminal Law 110 ⚿977(4)

110 Criminal Law

110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment notwithstanding the verdict. Most Cited Cases
Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury, for purposes of a motion for judgment notwithstanding the verdict (JNOV).

[23] Criminal Law 110 1134.70

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.70 k. In general. Most Cited Cases
The Court of Appeals may reverse a denial of a motion for judgment notwithstanding the verdict (JNOV) only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

[24] Criminal Law 110 935(1)

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) k. Weight and sufficiency of evidence in general. Most Cited Cases
A motion for a new trial attacks the weight of the evidence.

[25] Criminal Law 110 911

110 Criminal Law
110XXI Motions for New Trial
110k911 k. Discretion of court as to new trial. Most Cited Cases
It is within the trial court's sound discretion whether to grant or deny a motion for a new trial.

[26] Criminal Law 110 935(1)

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) k. Weight and sufficiency of evidence in general. Most Cited Cases
A trial court should grant a new trial when it finds that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.

[27] Criminal Law 110 1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(4) k. Evidence accepted as true. Most Cited Cases

Criminal Law 110 1156(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(1) k. In general. Most Cited Cases
On appeal of a denial of a motion for a new trial, the Court of Appeals must accept as true the evidence that supports the verdict, and the Court will not disturb the trial court's decision absent a finding that the trial court abused its discretion.

[28] Automobiles 48A 356(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak356 Questions for Jury
48Ak356(6) k. Driving while intoxicated. Most Cited Cases
Issue of whether defendant was impaired while driving her vehicle at the time of the accident was for the jury, in trial that in trial that resulted in conviction of defendant on four counts of driving under the influence of hydrocodone and negligently causing death or serious injury to another. West's A.M.C. § 63-11-30(1)(b), (5).

[29] Criminal Law 110 741(1)

110 Criminal Law

110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿742(1)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k742 Credibility of Witnesses
110k742(1) k. In general. Most Cited Cases
Matters regarding the weight and credibility to be accorded to the evidence are to be resolved by the jury.

[30] Criminal Law 110 ⚿396(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k396 Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party
110k396(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿413(1)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k413 Self-Serving Declarations
110k413(1) k. In general. Most Cited Cases
Defendant's recorded statement taken at police department following accident was self-serving hearsay and thus not admissible absent the cross-examination of defendant, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another; though defendant asserted that the State misled the jury by only offering the statement she made at the scene of the accident, at the scene of the accident defendant told officer that she took two hydrocodone pills on the day of the accident and that she took two other drugs after the accident, while at the police department defendant told an investigator that she had mostly consumed drugs only after the accident. Rules of Evid., Rule 106.

[31] Criminal Law 110 ⚿369.2(4)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(4) k. Assault, homicide, abortion and kidnapping. Most Cited Cases
Trial court did not abuse its discretion by reversing its prior order made on defendant's motion in limine and finding, after voir dire was conducted, that evidence of defendant's arrest at scene of accident for driving with a suspended driver's license was admissible to establish why a field sobriety test was not performed and to explain the sequence of events leading up to blood test that showed the presence of hydrocodone, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another; though, relying on in limine order, defense counsel did not question the venire regarding potential prejudice based on defendant's arrest, trial court instructed jurors that they could not consider evidence of defendant's arrest as an inference of guilt. Rules of Evid., Rules 401, 402.

[32] Criminal Law 110 ⚿867.2

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.2 k. Discretion of court. Most Cited Cases
It is within the trial court's sound discretion to grant or to deny a motion for a mistrial.

[33] Criminal Law 110 ⚿1155

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 k. Issues related to jury trial. Most Cited Cases
Court of Appeals reviews a trial court's denial of a motion for a mistrial under an abuse of discretion standard.

[34] Witnesses 410 ⚿300

410 Witnesses
410III Examination
410III(D) Privilege of Witness
410k299 Privilege of Accused in Criminal Prosecution
410k300 k. In general. Most Cited Cases
A defendant has a constitutional right not to take the stand in his or her own defense. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[35] Criminal Law 110 ⚿2132(1)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2132 Comments on Failure of Accused to Testify
110k2132(1) k. In general. Most Cited Cases
To protect a defendant's right to not take the stand in her own defense, attorneys are prohibited from making a comment on the defendant's failure to testify. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[36] Criminal Law 110 ⚿2132(1)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2132 Comments on Failure of Accused to Testify
110k2132(1) k. In general. Most Cited Cases
Each comment made by a prosecutor that allegedly refers to a defendant's failure to testify should be examined on a case-by-case basis and examined within the context in which it was made. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[37] Criminal Law 110 ⚿2132(1)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2132 Comments on Failure of Accused to Testify
110k2132(1) k. In general. Most Cited Cases
If the trial court finds that an improper comment was made regarding a defendant's exercise of the right not to testify, the defendant is entitled to a mistrial. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[38] Criminal Law 110 ⚿2132(2)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2132 Comments on Failure of Accused to Testify
110k2132(2) k. In particular prosecutions. Most Cited Cases
Comment by prosecutor in opening statement, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another, that defendant could not come up and say she was sorry about the dead kids, was not an improper comment on defendant's exercise of her right not to testify, as at that point in the trial there had been no testimony from any witnesses, it was not known if defendant would elect to take the stand, and prosecutor was commenting on defendant's lack of a defense. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[39] Criminal Law 110 ⚿2132(2)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2132 Comments on Failure of Accused to Testify
110k2132(2) k. In particular prosecutions. Most Cited Cases

Criminal Law 110 ⚿2174

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2164 Rebuttal Argument; Responsive Statements and Remarks
110k2174 k. Comments on evidence or witnesses. Most Cited Cases
Comment by prosecutor during closing argument, that defendant lied about her involvement in accident to police officer at the scene of the accident and could not come into the court with a straight face and say she lied for whatever kind sweet reason counsel might have the jury believe, was not an improper comment on defendant's exercise of her right not to testify, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another; there was a delay in taking blood sample of defendant and defense counsel claimed the delay was prejudicial, defense counsel argued that defendant had not misled officer about her involvement accident and thereby delayed the test because she did not know she had caused it, and prosecutor's comment was a response to defense counsel's argument. U.S.C.A. Const.Amend. 5; West's A.M.C. Const. Art. 3, § 26.

[40] Criminal Law 110 ⚿814(17)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(17) k. Circumstantial evidence. Most Cited Cases
Circumstantial-evidence instruction was not warranted, in prosecution for driving under the influence of hydrocodone and negligently causing death or serious injury to another, as there was direct evidence that defendant was the driver of the vehicle that caused the accident that killed three people and seriously injured a fourth; police officer testified that defendant introduced herself as driver of black car at the scene of the accident, and victim who survived the accident testified that she assumed defendant was the driver of the car that caused the accident because defendant approached victim immediately after it occurred in a hysterical manner and apologized for the accident.

[41] Criminal Law 110 ⚿784(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k784 Circumstantial Evidence
110k784(1) k. Necessity of instructions in general. Most Cited Cases
A circumstantial-evidence instruction is warranted where the State cannot produce an eyewitness to the crime or cannot get a confession from the alleged perpetrator.

[42] Criminal Law 110 ⚿814(17)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(17) k. Circumstantial evidence. Most Cited Cases
A trial court is not required to give a circumstantial-evidence instruction where the State presents direct evidence of the crime.

[43] Sentencing and Punishment 350H ⚿31

350H Sentencing and Punishment
350HI Punishment in General

350HI(B) Extent of Punishment in General
350Hk31 k. Discretion of court. Most Cited Cases
If a defendant is convicted of the crime charged, her sentence will be determined within the sound discretion of the trial court.

[44] Criminal Law 110 1134.75

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)8 Sentencing
110k1134.75 k. In general. Most Cited Cases
The Court of Appeals will not disturb a sentence imposed by the trial court when that sentence falls within the statutory guidelines.

[45] Sentencing and Punishment 350H 1482

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(E) Excessiveness and Proportionality of Sentence
350Hk1482 k. Proportionality. Most Cited Cases
Where a sentence is grossly disproportionate to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[46] Automobiles 48A 359.5

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.5 k. Cases involving death. Most Cited Cases

Sentencing and Punishment 350H 1500

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(E) Excessiveness and Proportionality of Sentence
350Hk1500 k. Motor vehicle offenses. Most Cited Cases

Sentencing and Punishment 350H 1508

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(E) Excessiveness and Proportionality of Sentence
350Hk1508 k. Cumulative or consecutive sentences. Most Cited Cases
Sentence of defendant, convicted on four counts of driving under the influence of hydrocodone and negligently causing death or serious injury to another, to 15 years on each count to be served consecutively, with 30 years suspended and five years of post-release supervision, was not grossly disproportionate to the crimes committed in violation of the Eighth Amendment, as the sentence was within statutory guidelines; statute authorized trial court to sentence defendant from five to 25 years on each count, and determination of whether sentences for multiple violations would run consecutively or concurrently was within trial court's discretion. U.S.C.A. Const.Amend. 8; West's A.M.C. § 63-11-30(5).
Tim C. Holleman, Gulfport, attorney for appellant.

Office of the Attorney General by John R. Henry, attorney for appellee.

Before KING, C.J., BARNES and ISHEE, JJ.

KING, C.J., for the Court.

*1 ¶ 1. Krystal Marie Teston was convicted in the Circuit Court of Harrison County of three counts of driving under the influence and negligently causing death to another and one count of driving under the influence and negligently causing serious injury to another. Teston was sentenced to serve consecutive terms of fifteen years on each count, for a total of sixty years, with thirty years suspended and five years of post-release supervision, in the custody of the Mississippi Department of Corrections (MDOC). On appeal, **Teston** raises nine issues, which are as follows:

I. Whether the trial court erred by allowing the **State** to proceed to trial on Counts V, VI, VII, and

VIII of the indictment.

II. Whether the trial court erred by denying **Teston's** motion to suppress her blood test results when **Teston's** blood was drawn more than two hours after the accident.

III. Whether the trial court erred by allowing the **State's** expert to testify and give his opinion regarding **Teston's** level of impairment at the time of the accident.

IV. Whether the trial court erred by denying **Teston's** motion for a JNOV or, in the alternative, for a new trial.

V. Whether the trial court erred by refusing to allow **Teston's** recorded statement into evidence and by prohibiting defense counsel from questioning Officer Wesley Brantley about the recorded statement.

VI. Whether the trial court erred by reversing its ruling on **Teston's** motion in limine and allowing the **State** to introduce evidence of **Teston's** arrest for driving with a suspended license.

VII. Whether the **State** made improper statements regarding **Teston's** failure to testify.

VIII. Whether the trial court erred by denying **Teston's** circumstantial-evidence instruction.

IX. Whether **Teston's** sentence was grossly disproportionate to the crime.

Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2. On September 10, 2004, five college students in an SUV were traveling east on Interstate 10 in Biloxi, Mississippi. The driver of a black Honda, who was later identified as Teston, was also traveling east on I-10. The driver of the black Honda swerved into the path of the SUV. When the black Honda veered in front of the SUV, the driver of the SUV lost control of the vehicle, which crashed into the concrete median and flipped over.

¶ 3. Three of the passengers-Lindsay Miller, Maksim Sisoev, and Beth Finch-were killed in the accident. Joshua Miller, the fourth passenger, was severely injured, and Nicole Thurman, the fifth passenger, received minor injuries.

¶ 4. Stacey Ross testified that on the night of the accident, she and her husband were traveling east on I-10 in the center lane. A Buick was traveling in the lane to Ross's left. Ross noticed that the black Honda came up rapidly behind the Buick, tailgating the vehicle. Ross testified that the driver of the black Honda was driving fast and in an aggressive and erratic manner. Ross stated that the erratic driving of the black Honda made her very uncomfortable; therefore, Ross sped up to get away from the vehicle. After Ross sped up, she looked in her rearview mirror and saw that the black Honda had swerved behind her in the center lane, driving into the path of the SUV. Ross testified that the driver of the black Honda returned to the left lane upon seeing the SUV, and the SUV swerved into the right lane to avoid hitting the black Honda. However, the driver of the SUV swerved back toward the left lane to avoid hitting other vehicles that were traveling in the right lane. Ross testified that the driver of the SUV lost control of the vehicle, crashed into the median, and flipped over once. Thurman, a passenger in the SUV, gave similar testimony regarding these events.

***2** ¶ 5. After the wreck, Ross pulled over on the shoulder of the road. The driver of the black Honda also stopped, made a U-turn, drove back to the SUV, and got out of the vehicle. Ross described the driver as a short, dark-haired, thin female. Thurman testified that she blacked out after the SUV crashed into the median. Upon regaining consciousness, Thurman called out to the other passengers of the SUV, but her calls went unanswered. Thurman crawled out of the back of the SUV and stood on the side of the road. Thurman testified that after she exited the SUV, a hysterical woman, later identified as Teston, approached her screaming, crying, and apologizing for the accident. Based on Teston's behavior, Thurman assumed that she caused the accident.

¶ 6. Officer Wesley Brantley of the Biloxi Police Department arrived at the scene of the accident at 7:32 p.m. Upon arriving, Officer Brantley interviewed the witnesses. First, he spoke to Teston and

Jason Stewart, a passenger in Teston's vehicle. Officer Brantley testified that his initial contact with Teston was very brief. Teston identified herself as the driver of the black Honda and told Officer Brantley that she witnessed the accident, failing to mention her involvement in the accident. Officer Brantley asked both Teston and Stewart to write a statement and requested their driver's licenses.

¶ 7. Afterward, Officer Brantley spoke to other witnesses and ran the driver's licenses that he had collected. Officer Brantley went to speak to Teston for a second time and noticed that her speech was slurred, she was mumbling and confused, and her eyes were dilated and glassy. Officer Brantley believed that Teston was impaired, but he did not smell any alcohol on her breath. After interviewing Teston, Officer Brantley spoke to Ross, who told him that the driver of the black Honda caused the accident.

¶ 8. Shortly thereafter, dispatch contacted Officer Brantley and informed him that Teston's driver's license was suspended for failure to pay a ticket. Then, at 8:53 p.m., Officer Brantley arrested Teston for driving with a suspended license. After being placed under arrest, Teston asked Officer Brantley to retrieve her medication from the console of her vehicle. Officer Brantley testified that he found a bottle of Lorcet in the console. However, the Lorcet was actually prescribed to Stewart. Upon finding the medication, Officer Brantley advised **Teston** of her *Miranda* rights and asked her how many Lorcets she had taken that day. **Teston** responded that she had taken two Lorcets. Officer Brantley asked **Teston** if she had taken any other medication, and **Teston** responded that she had taken a Xanax pill and a Goody's PM right after the accident to calm her down.

¶ 9. Officer Brantley waited for a tow truck to arrive so that **Teston's** vehicle could be towed to the police department. After the tow truck arrived, Officer Brantley took **Teston** to the police department, and the tow truck followed. While conducting an inventory of **Teston's** vehicle, police officers found one bottle of Xanax, one bottle of Soma, and two bottles of Lorcet, all of which were prescribed to **Teston**, in the glove compartment of the black Honda. While at the police station, **Teston** was interviewed by another officer. After the interview, Officer Brantley asked **Teston** if she would consent to a blood test, and she agreed. Officer Brantley transported **Teston** to the hospital, and her blood sample was drawn at 10:09 p.m. The blood test revealed that **Teston** had 110 nanograms per milliliter (ng/ml) of hydrocodone in her system.

***3** ¶ 10. On April 4, 2005, **Teston** was indicted for eight counts of driving under the influence and negligently causing the death or serious injury of another. Counts I, II, III, and IV were specific charges and charged **Teston** with driving under the influence of hydrocodone. Counts V, VI, VII, and VIII were general charges, not specifically indicating any drug. The trial court granted **Teston's** motion for a directed verdict on Counts V, VI, VII, and VIII of the indictment, **stating** that the **State** failed to present evidence of impairment under any substance besides hydrocodone. **Teston** also made a motion in limine to exclude expert testimony by Dr. Edward Barbieri regarding **Teston's** level of impairment at the time of the accident. The trial court denied the motion. Dr. Barbieri testified that **Teston** was impaired at the time of the accident. Conversely, Dr. Robert Ryan, **Teston's** expert witness, testified that **Teston** could not have been impaired at the time of the accident.

¶ 11. On January 18, 2007, the jury found **Teston** guilty of three counts of driving under the influence of hydrocodone and negligently causing the death of Lindsay, Maksim, and Beth and one count of driving under the influence and negligently causing serious injury to Joshua. **Teston** was sentenced to serve consecutive terms of fifteen years on each count, for a total of sixty years, with thirty years suspended and five years of post-release supervision, in the custody of the MDOC, leaving **Teston** with thirty years to serve.

ANALYSIS

I. Whether the trial court erred by allowing the State to proceed to trial on Counts V, VI, VII, and VIII of the indictment.

¶ 12. **Teston** argues that her indictment subjected her to double jeopardy, caused substantial prejudice to her defense, and violated her constitutional right to be informed of the charges filed against her. Conversely, the **State** argues that **Teston** suffered no prejudice from her indictment because the trial court granted her a directed verdict on Counts V, VI, VII, and VIII.

[1][2] ¶ 13. "Double jeopardy allows a defendant to be protected against ... multiple punishments for the same offense." *Houston v. State*, 887 So.2d 808, 814(23) (Miss.Ct.App.2004) (citing *Greenwood v. State*, 744 So.2d 767, 770(14) (Miss.1999)). The same elements test is used to determine whether or not double jeopardy attaches. *Id.* If the offenses contain the same elements, "they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Id.*

¶ 14. Teston was indicted for eight counts of driving under the influence and negligently causing death or serious injury to another pursuant to Mississippi Code Annotated section 63-11-30(1)(b) and (5) (Supp.2008). Section 63-11-30(1)(b) and (5) provides in pertinent part that:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who ... (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle....
>
> ***4** ....
>
> (5) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a separate felony for each such death, mutilation, disfigurement or other injury and shall be committed to the custody of the **State** Department of Corrections....

¶ 15. In Counts I, II, III, and IV, **Teston** was specifically indicted for driving under the influence of hydrocodone and negligently causing the death or serious injury of another, with one count for each victim. Counts V, VI, VII, and VIII charged **Teston** with the same crime. However, these four counts did not specifically name any substance that **Teston** was allegedly driving under the influence of. **Teston** filed several motions to dismiss Counts V through VIII of the indictment. The **State** explained that it expected **Teston** to attack the credibility of the blood test because **Teston** admitted to taking Xanax; however, her blood test came back negative for Xanax. The **State** argued that the other counts were needed to fall back on in the event that the jury determined that the blood test was not reliable. The trial court elected to rule on the motions after the **State** had an opportunity to present evidence on the charges. After the prosecution rested, **Teston** moved for a directed verdict. The trial court denied the motion and announced that it would rehear the motion after the defense put on its case. **Teston** later renewed her motion for a directed verdict. The trial court granted the motion in regard to Counts V through VIII, **stating** that there was no evidence that **Teston** was impaired by any substance other than hydrocodone.

[3] ¶ 16. Based on our review of the record, we find that the trial court did not err in allowing the **State** to proceed on the indictment. Given the language of the statute, the **State** was not required to specifically list the substance or substances that **Teston** allegedly was driving under the influence of at the time of the accident. **Teston** was aware that the **State** planned to present evidence that she had taken Lorcet, Xanax, and Soma, regardless of whether her blood tested positive for the drugs. Thus, **Teston** was aware of the charges against her. Most important, when the allegations were not proven, the trial court properly granted **Teston** a directed verdict on Counts V, VI, VII, and VIII. **Teston** was only convicted of one count of driving under the influence of hydrocodone and negligently causing the death or injury of another for each death or injury so caused. Therefore, we find that **Teston's** argument is without merit.

II. Whether the trial court erred by denying Teston's motion to suppress her blood test results when Teston's blood was drawn more than two hours after the accident.

[4][5] ¶ 17. The admissibility of evidence is left to the sound discretion of the trial court. *Jones v. State*, 913 So.2d 436, 438(5) (Miss.Ct.App.2005) (quoting *White v. State*, 742 So.2d 1126, 1134(29) (Miss.1999)). This Court will not disturb a trial court's ruling absent a finding that the trial court abused its discretion. *Id.*

***5** ¶ 18. **Teston** argues that the trial court erred by denying her motion to suppress her blood test results because her blood was not drawn until three hours after the accident, in violation of Mississippi Code Annotated section 63-11-8 (Rev.2004). The State contends that the trial court properly allowed Teston's

blood test results into evidence because the statute's time requirement is not strictly applied.

[6] ¶ 19. Section 63-11-8(1) provides in pertinent that:

> The operator of any motor vehicle involved in an accident that results in a death shall be tested for the purpose of determining the alcohol content or drug content of such operator's blood, breath or urine. Any blood withdrawal required by this section shall be administered by any qualified person and shall be administered within two (2) hours after such accident, *if possible*. ...

(Emphasis added). The provision to draw blood within two hours of an accident is not an unyielding mandate. *See Wilkerson v. State*, 731 So.2d 1173, 1177(12) (Miss.1999). Rather, we have held that in light of the circumstances, the statute requires substantial compliance. *See Wash v. State*, 790 So.2d 856, 859(10) (Miss.Ct.App.2001). In *Wilkerson*, the supreme court held that the results of a blood test performed more than two hours after an accident were properly admitted into evidence. *Wilkerson*, 731 So.2d at 1177(11).

¶ 20. In *Wilkerson*, the defendant's blood sample was not drawn until two and a half hours after the accident. *Id.* The supreme court found that section 63-11-8 stated that the blood test should be performed within two hours, if possible. *Id.* at (12) (citing Miss.Code Ann. § 63-11-8 (1972)). The supreme court found that the delay in the defendant's blood test was caused by the travel time to the hospital and the time it took for the nurse to obtain permission from her supervisor to perform the blood test. *Id.* Thus, the supreme court held that the trial court did not err by admitting the results of the blood test into evidence because the police officer substantially complied with the statute. *Id.*

¶ 21. Also, in *Wash*, the defendant's blood sample was not drawn until two and a half hours to three hours after the accident. *Wash*, 790 So.2d at 858(4). This Court stated that "[w]ere this two[-]hour time frame necessary to ensure the integrity of the test results, it is doubtful that the [L]egislature would have included [the words 'when possible'] in the statute." *Id.* at 859(10). This Court found that there was no evidence that the police officers deliberately delayed the test results, and the Court did not find that the defendant was prejudiced by the delay. *Id.* Thus, the Court found that the defendant's argument was without merit.

[7] ¶ 22. In the present case, Officer Brantley testified that dispatch called and informed him about the accident at 7:18 p.m. He arrived on the scene at 7:32 p.m. After arriving at the scene, Officer Brantley identified the witnesses. His initial contact with Teston was brief. During his second contact with Teston, Officer Brantley noticed that she was impaired. However, Officer Brantley was not aware of Teston's involvement in the accident at that time. Officer Brantley arrested Teston for driving with a suspended driver's license at 8:53 p.m. After her arrest, Teston asked Officer Brantley to get her medication out of her vehicle. At that time, Officer Brantley saw the prescription medications in Teston's vehicle and asked her how many pills she had taken that day. Then, Officer Brantley had to wait for a tow truck to arrive so that the tow truck could follow him back to the police station with Teston's vehicle. While Teston was questioned at the police station, Officer Brantley obtained her consent to perform a blood test. Then, he transported Teston to the hospital, and the blood test was administered at 10:07 p.m.

***6** ¶ 23. Based on our review of the record, we find no evidence of deliberate delay on behalf of Officer Brantley. The evidence shows that Officer Brantley was not immediately aware that Teston was under the influence, and he was not immediately aware of her involvement in the accident. Further delay was caused by the time it took for the tow truck to arrive, the travel time to the police station, and the travel time to the hospital. Also, we do not find any evidence that Teston was prejudiced by the lapse in time. Thus, we find that the trial court did not err by admitting Teston's blood test results into evidence.

III. Whether the trial court erred by allowing the State's expert to testify and give his opinion regarding Teston's level of impairment at the time of the accident.

¶ 24. Teston argues that the trial court erred by allowing Dr. Barbieri, the State's expert witness, to testify regarding Teston's level of impairment for two reasons: (1) Dr. Barbieri's opinions were obtained based upon an inaccurate and incomplete hypothetical, and

(2) Dr. Barbieri's testimony was not based on credible, scientific evidence. Conversely, the State maintains that the prosecutor posed an accurate and complete hypothetical to Dr. Barbieri, and the trial court conducted a thorough *Daubert* hearing and properly admitted Dr. Barbieri's testimony.

[8][9] ¶ 25. The admissibility of expert testimony lies within the sound discretion of the trial court. *See Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34(¶ 4) (Miss.2003). This Court reviews the trial court's admittance of expert testimony under an abuse of discretion standard. *Id.* Therefore, this Court will not disturb the trial court's ruling unless it is clear that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion. *Id.*

[10] ¶ 26. Mississippi Rule of Evidence 702 addresses testimony by experts, stating that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Our supreme court adopted the standard set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-97, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) to determine the admissibility of expert testimony. *See McLemore*, 863 So.2d at 35-40 (¶¶ 6-25). The *Daubert* test requires a two-prong inquiry: (1) the trial court must determine whether the expert testimony is relevant, meaning that it must assist the trier of fact; and (2) the trial court must determine whether the proffered expert testimony is reliable. *Id.* at 38(¶ 16) (citations omitted).

a. Whether the hypothetical posed by the State was based on sufficient and accurate facts.

*7 ¶ 27. Rule 702 provides that expert testimony must be based upon sufficient facts or data. M.R.E. 702. Teston argues that the State obtained the testimony with an inaccurate and incomplete hypothetical.

[11] ¶ 28. First, Teston complains that the State mischaracterized witness testimony regarding her driving, describing Teston's driving as "very erratic." Ross did testify that Teston was driving in an erratic and aggressive manner. Although she did not use the term "very" erratic, we find that Teston's complaint here is without merit.

¶ 29. Next, Teston complains that the State omitted facts showing that Teston remained in control of her vehicle. However, defense counsel posed a hypothetical to Dr. Barbieri during cross-examination, asking whether someone under the influence of hydrocodone would be able to safely operate a vehicle. Therefore, we find that the hypothetical was based on sufficient and accurate facts. This complaint is also without merit.

¶ 30. Last, Teston argues that the State failed to mention that Officer Brantley did not notice any signs of impairment during his initial contact with Teston. However, the trial court added the following to the hypothetical:

> THE COURT: Dr. Barbieri, assuming in addition to those characteristics [the State] gave to you as part of this hypothetical, you also considered that within minutes of the accident one of the officers identified Ms. Teston as a potential witness, had a conversation with her about whether or not she observed the accident and has testified that he did not at that time observe any of the impaired conditions which he observed some 50 minutes later, being slurred speech, mumbling, confusion, etc., would that change your opinion?
>
> DR. BARBIERI: Well, that would tend to indicate that either he misrepresented or misobserved [sic] the first time or something happened in that interval.
>
> THE COURT: Would it change your opinion?
>
> DR. BARBIERI: It would only-it would not change my opinion
>
> THE COURT: All right. Subject to that objection, [defense counsel], I'm going to allow the testi-

mony.

Since the trial court intervened and supplemented the State's hypothetical, we find that the hypothetical contained sufficient facts. Teston's argument here is without merit.

b. Whether Dr. Barbieri's testimony was based on credible, scientific evidence.

¶ 31. Teston raises several issues in regard to the reliability and relevance of Dr. Barbieri's sources and the procedures he relied upon in his testimony. Specifically, Teston maintains that there is no credible, scientific basis for retrograde extrapolation of hydrocodone.

[12][13] ¶ 32. *Daubert* provides an illustrative list of factors to determine the reliability of expert testimony, which consists of the following:

> [W]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.

***8** *McLemore*, 863 So.2d at 37(¶ 13) (citation omitted). This is a non-exhaustive list of factors, and the applicability of each factor depends on the nature of the case, the area of expertise, and the subject of the testimony. *Id.*

[14] ¶ 33. The trial judge questioned Dr. Barbieri extensively during the *Daubert* hearing. Based on his credentials, Dr. Barbieri was qualified to be an expert in the field of forensic toxicology and pharmacology. Thus, this is not an issue in this case.

¶ 34. However, Teston argues that the study that Dr. Barbieri relied upon did not test retrograde extrapolation of hydrocodone. Teston further argues that Dr. Barbieri did not take multiple dosing or Teston's weight into account in his analysis.

¶ 35. Dr. Barbieri testified that there were not any studies concerning retrograde extrapolation of hydrocodone. However, Dr. Barbieri testified that depending on the history of the individual in question, he could estimate the level of hydrocodone in that person's system at a point in time prior to the administration of the blood test. He explained that he would use the level of hydrocodone found in the person's system, his knowledge of the half-life of the drug, and his knowledge of the distribution of pharmacal kinetics. Dr. Barbieri testified that when a person takes a drug orally, the levels of the drug in the bloodstream will rise as the drug is absorbed into the body. After the drug reaches its maximum effect, it will peak, and the concentration of the drug in the body will begin to decrease without further consumption of the drug. Dr. Barbieri testified that hydrocodone reaches its peak level between an hour and an hour and a half.

¶ 36. Dr. Barbieri relied upon the Barnhart and Caldwell study conducted in 1977 to determine the mean peak level of hydrocodone in a person's system. In this study, five men were each administered one 10-milligram pill of hydrocodone. Results indicated the peak level of hydrocodone is about 25 ng/ml. Dr. Barbieri agreed that weight and multiple dosing could affect the absorption rate and the level of hydrocodone in a person's body.

¶ 37. During his testimony, Dr. Barbieri used several different peak levels, ranging from 20 ng/ml to 30 ng/ml, to determine the average level of hydrocodone that could be found in a person's body after taking a 10-milligram pill. Dr. Barbieri stated that Teston would have to take four 10-milligram Lorcet pills to reach a level of 110 ng/ml. Dr. Barbieri testified that there is not a threshold limit for impairment for hydrocodone, but he personally uses 100 ng/ml of hydrocodone as the level of impairment. However, he stated that a person can be impaired at any level, and that Teston's blood level of 110 ng/ml was significant impairment.

¶ 38. Based on Teston's level of impairment three hours after the accident, Dr. Barbieri opined that Teston was impaired at the time of the accident. Dr. Barbieri testified that going back to the time of the accident and assuming that Teston did not take any pills after the accident, Teston would have had approximately 200 ng/ml of hydrocodone in her system, which is a lethal dosage. Dr. Barbieri testified that hydrocodone has a half-life of four hours, and you

multiply the half-life by five to determine how long the drug will stay in the bloodstream. Therefore, hydrocodone could be found in a person's bloodstream up to twenty hours after ingestion. When asked if his opinion would change if Teston stated that she had taken two Lorcets that day, Dr. Barbieri testified that his opinion would not change.

*9 ¶ 39. The trial court found that Dr. Barbieri used an established methodology for testing the presence of hydrocodone and used acceptable protocol to form his expert opinion regarding Teston's impairment. The trial judge stated that Dr. Barbieri's credibility was an issue for the jury to decide. Therefore, the trial judge denied Teston's motion and allowed Dr. Barbieri's expert testimony.

[15][16] ¶ 40. As previously stated, the *Daubert* test lists several factors to consider when determining the reliability of scientific procedures. *McLemore*, 863 So.2d at 37(¶ 13) (citation omitted). This list is not exhaustive, and there are times when certain factors might not be applicable in a case:

> It might not be surprising that in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may not have ever interested any scientist....

Id. (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). Therefore, trial courts have considerable leeway in determining the reliability of expert testimony. *Id.* (citing *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167). Furthermore, the trial court is not required to " 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' as self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *Id.* (quoting *Kumho Tire*, 526 U.S. at 157, 119 S.Ct. 1167).

[17] ¶ 41. The *Daubert* test does not require trial judges to become experts themselves. *Jones v. State*, 918 So.2d 1220, 1227(¶ 18) (Miss.2005) (citing *McLemore*, 863 So.2d at 40(¶ 25)). However, "[w]e are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony." *Id.* The record reflects that the trial judge conducted a thorough *Daubert* analysis, asking numerous follow-up questions to gain an understanding of Dr. Barbieri's testimony.

¶ 42. Additionally, we find that Dr. Barbieri's testimony was sufficient to pass the *Daubert* test for reliability. Dr. Ryan, Teston's expert witness, also testified that there were no studies testing retrograde extrapolation of hydrocodone. In fact, Dr. Ryan stated that there are not many studies at all testing hydrocodone because "this drug is just so old that those reports are not available." It is apparent that, as stated in *Kumho Tire*, no scientists have been interested in the subject matter. Therefore, it has not been subject to peer review. Despite not having a study directly on this point, Dr. Barbieri used the half-life of hydrocodone in his analysis and the peak levels of hydrocodone from the Barnhart and Caldwell study. Teston does not dispute that hydrocodone has a half-life of four hours. However, she complains that the Barnhart and Caldwell study did not include women. It is important to note that the peak levels for females listed in the Knoll report that Dr. Ryan relied upon and the peak levels established in the Barnhart and Caldwell study were similar. Additionally, Dr. Barbieri maintained that multiple dosing may have an effect on the rate of absorption and the peak levels of hydrocodone into the bloodstream. Further, Dr. Barbieri's method of determining the level of hydrocodone in Teston's system prior to the administration of her blood test can be tested.

*10 ¶ 43. The trial court is in the best position to determine relevancy and reliability of expert testimony, and in this case, the trial court determined that Dr. Barbieri's testimony was relevant and reliable. Based upon a review of the record, we find that the trial court did not abuse its discretion by allowing Dr. Barbieri's expert testimony.

IV. Whether the trial court erred by denying Teston's motion for a JNOV or, in the alternative, for a new trial.

¶ 44. Teston argues that the trial court erred by denying her motion for a JNOV because the State failed to prove that she was impaired at the time of the accident. Teston also argues that the trial court erred by denying her motion for a new trial because the verdict was against the overwhelming weight of the evidence. Because the discussion of these assignments of error is related, we will address the issues together

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as Teston did in her brief.

[18][19][20][21][22][23] ¶ 45. A motion for a JNOV attacks the legal sufficiency of the evidence. *Le v. State*, 913 So.2d 913, 956 (¶ 163) (Miss.2005). This Court reviews the trial court's denial of a motion for a JNOV as follows:

> We must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Id. at 956-57 (¶ 163). Teston was convicted under Mississippi Code Annotated section 63-11-30(1)(b) and (5), which makes it unlawful for a person to drive under the influence and negligently cause death or injury to another. The State had the burden of proving that Teston was driving under the influence and negligently caused the deaths of Lindsay, Maksim, and Beth and negligently caused serious injury to Joshua. We must review the evidence and determine whether it is such that the jury could not find Teston guilty of the crime.

[24][25][26][27] ¶ 46. A motion for a new trial attacks the weight of the evidence. *Le*, 913 So.2d. at 957 (¶ 164). It is within the trial court's sound discretion whether to grant or deny a motion for a new trial. *Id.* The trial court should grant a new trial when it finds that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Id.* On appeal, this Court must accept as true the evidence that supports the verdict, and this Court will not disturb the trial court's decision absent a finding that the trial court abused its discretion. *Id.*

a. Ross's and Thurman's Testimony

***11** [28] ¶ 47. Teston argues that Ross's and Thurman's testimony that she was driving aggressively was contrary to the testimony that she was driving the same speed as the other vehicles and that she was able to stop and return to the scene of the accident safely. Teston maintains that the fact that she was able to remain in control of her vehicle is evidence that she was not impaired at the time of the accident.

¶ 48. Ross testified that Teston was driving faster than the other vehicles on the road. Ross and Thurman testified that Teston was driving in an aggressive manner. Ross also testified that Teston remained in control of her vehicle during the incident, and she was able to come to a safe stop and return to the scene of the accident.

¶ 49. Despite Teston's ability to remain in control of her vehicle, the jury found that Teston was impaired at the time of the accident. Based upon our review of the record, we find that the evidence supports this finding. Therefore, we find that the trial court did not abuse its discretion.

b. Officer Brantley's Testimony

¶ 50. **Teston** argues that, based on Officer Brantley's testimony, the **State** failed to prove that she was under the influence at the time of the accident. Officer Brantley testified that his initial contact with **Teston** was brief. At that time, he had obtained **Teston's** and Stewart's driver's licenses and gave them a form to write a statement regarding the accident. After Officer Brantley left **Teston** and Stewart, he interviewed other witnesses, talked to his supervisors, and reviewed the scene of the accident. Officer Brantley then returned to get **Teston's** statement. At that time, he noticed that **Teston** was visibly impaired-slurred speech, mumbling, confused, and dilated, glassy eyes.

¶ 51. **Teston** argues that Officer Brantley's testimony proves that she was not impaired at the time of the accident because he did not notice any signs of impairment during his initial contact with her. **Teston** contends that she was left unsupervised for an undetermined amount of time, and she was noticeably impaired when Officer Brantley returned. **Teston** maintains there was no evidence that she was impaired at the time of the accident. Therefore, through Officer Brantley's testimony, the **State** failed to prove

that she was impaired at the time of the accident.

¶ 52. The jury could have decided that **Teston** was not impaired at the time of the accident. However, the jury accepted as true that Officer Brantley was not able to properly observe **Teston's** behavior during his initial contact with her and determined that **Teston** was impaired at the time of the accident. We find that the evidence supports this finding. Therefore, the trial court did not abuse its discretion.

c. Expert Testimony

1. Dr. Barbieri

¶ 53. **Teston** argues that Dr. Barbieri's testimony failed to prove that she was impaired at the time of the accident. Dr. Barbieri testified that the peak level for one 10-milligram Lorcet pill is an average of 25 ng/ml. He explained that if Teston had taken the pills after the accident, a person would have to take four Lorcet pills to reach her level of impairment. Based on Teston's level of 110 ng/ml of hydrocodone in her system, Dr. Barbieri opined that Teston had to be impaired at the time of the accident. He determined the amount of time hydrocodone stayed in a person's system and multiplied the half-life of the drug times five. Using this equation, Dr. Barbieri testified that since the half-life of hydrocodone is four hours, the drug can be detected in a person's system up to twenty hours later. Dr. Barbieri testified that a person can be impaired at any dosage no matter how small, but Teston's level of hydrocodone demonstrated significant impairment.

***12** ¶ 54. Teston argues that Dr. Barbieri's analysis did not account for multiple dosing. However, Dr. Barbieri agreed that multiple doses could affect peak levels. Teston argues that her behavior after the accident was not consistent with the effects of hydrocodone. Dr. Barbieri testified that hydrocodone is a central nervous system depressant and often made people lethargic and sleepy. He agreed that being hysterical is not an effect of hydrocodone. However, he opined that a person could be under the influence of hydrocodone and still be hysterical based on some other event.

¶ 55. Teston argues that Officer Brantley found no signs of impairment at the time nearest to when the accident occurred, and this is evidence that she was not impaired at the time of the accident. Dr. Barbieri agreed that if a trained DUI officer talked to a witness and did not notice any signs of impairment at that time but noticed signs of impairment later, it was obvious that something had changed between the officer's first and second meeting with Teston. However, Dr. Barbieri also stated that it was possible that the officer had an opportunity to properly observe the defendant during the second extended visit.

2. Dr. Ryan

¶ 56. Dr. Ryan testified regarding the effects of multiple dosing. Dr. Ryan testified that it was not valid scientific evidence to rely upon a report involving a single dose of hydrocodone and to extrapolate back. However, Dr. Ryan admitted that there was not a study specifically demonstrating the effects of multiple doses of hydrocodone because "this drug is just so old that those reports are not available." Dr. Ryan also relied on a single dose study and his knowledge of the effects of multiple dosing.

¶ 57. During his testimony, Dr. Ryan relied on the Knoll report, which was a two-part study involving both male and female participants. In the Knoll report, participants were given a one-milligram pill of hydrocodone, and the scientists recorded the peak level of the drug in their bodies. In the second phase of the study, each participant was given a fifteen-milligram pill of hydrocodone, and each participant's peak level was recorded. The results indicated that peak levels were higher when the participants were administered the fifteen-milligram pill. Based on this conclusion, Dr. Ryan opined that Teston could have taken two Lorcet pills after the accident, which would have caused Teston's level of hydrocodone to rise to 110 ng/ml.

¶ 58. Dr. Ryan also testified that hydrocodone would not have caused Teston's eyes to be dilated. He also stated that hysterical behavior is not an effect of hydrocodone because the drug has the opposite effect-lethargy.

¶ 59. Essentially, this was a battle of the experts. The jury had a choice to accept as true the testimony of Dr. Barbieri or the testimony of Dr. Ryan. Based on the verdict, it is clear that the jury gave more weight and credibility to Dr. Barbieri's testimony. We find that the evidence supports this decision. Thus, the

trial court did not abuse its discretion.

d. The trial court did not err by denying Teston's motion for a JNOV or, in the alternative, a motion for a new trial.

***13** [29] ¶ 60. Teston makes many fact specific arguments. "Matters regarding the weight and credibility to be accorded to the evidence are to be resolved by the jury." *Le*, 913 So.2d at 956-57(163). Based on the evidence, the jury found that, beyond a reasonable doubt, Teston was guilty of driving under the influence and negligently causing the deaths of Lindsay, Maksim, and Beth and causing serious injury to Joshua. After considering all of the evidence in the light most consistent with the verdict and giving the State all favorable inferences that may be reasonably drawn from the evidence, we find that in regard to the element of impairment, the evidence was such that the jury could find Teston guilty. Also, when accepting as true the evidence favorable to the State, we find that the verdict was not contrary to the overwhelming weight of the evidence. Therefore, we find that the trial court did not err by denying Teston's motion for a JNOV and her motion for a new trial. Teston's arguments are without merit.

V. Whether the trial court erred by refusing to allow Teston's recorded statement into evidence and by prohibiting defense counsel from questioning Officer Brantley about the recorded statement.

¶ 61. Teston argues that the trial court erred by refusing to admit her recorded statement taken at the police department into evidence. Teston maintains that the State was allowed to mislead the jury by only offering the statement she made at the scene of the accident into evidence. Also, Teston argues that the trial court erred by prohibiting her from questioning Officer Brantley about the recorded statement.

[30] ¶ 62. Teston relies on Mississippi Rule of Evidence 106 in support of her argument. Rule 106 states that:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

M.R.E. 106. Teston contends that the statement she made at the scene of the accident and the statement she made at the police department are one statement. Therefore, she claims that she should have been allowed to admit the recorded statement into evidence. We fail to discern this logic.

¶ 63. At the scene of the accident, Teston told Officer Brantley that she took two Lorcet pills that day. She later told him that she took a Xanax and a Goody's PM after the accident. Officer Brantley failed to ask Teston what time she took the Lorcet pills. At the police department, Teston told an investigator that she took one Lorcet pill that morning, and she took two more Lorcet pills after the accident in addition to the Xanax and Goody's PM. Based on this evidence, Teston gave two separate statements, at two separate locations, and at two separate times. It is obvious that Teston attempted to introduce her recorded statement into evidence as a self-serving statement.

***14** ¶ 64. This Court has held that a defendant has no right to introduce a self-serving statement into evidence in lieu of taking the stand. *See Jackson v. State*, 766 So.2d 795, 805(29) (Miss.Ct.App.2000). In *Jackson*, the trial court precluded defense counsel from eliciting testimony regarding a statement in which the defendant denied his involvement in the crime. *Id.* at 804(26). This Court stated that "hearsay statements such as these are inadmissible when there has been no testimony of any kind offered to support them," especially when the defendant chooses not to testify. *Id.* at 805(29) (quoting *Clanton v. State*, 539 So.2d 1024, 1028 (Miss.1989)). Thus, the Court found that the trial court did not err by prohibiting defense counsel from eliciting testimony regarding the defendant's self-serving statement because he was not subject to cross-examination. *Id.*

¶ 65. Like the defendant in *Jackson*, Teston also seeks to introduce a self-serving statement into evidence without being subject to cross-examination. Teston has no right to introduce such a statement into evidence in lieu of taking the stand to testify to the matter herself. Thus, we find that the trial court did not err by denying Teston's motion to admit the recorded statement into evidence, and the trial court did not err by prohibiting defense counsel from eliciting testimony regarding this statement.

VI. Whether the trial court erred by reversing its ruling on Teston's motion in limine and allowing the State to introduce evidence of Teston's arrest for driving with a suspended driver's license.

¶ 66. Teston argues that the trial court erred by reversing its ruling on her motion in limine, which would have prohibited the State from introducing evidence of her arrest for driving with a suspended driver's license. Teston contends that the evidence of her arrest was irrelevant and used to prejudice the jury. Also, Teston argues that the trial court's decision to reverse its ruling on her motion after voir dire violated her right to a meaningful voir dire.

¶ 67. Mississippi Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to Mississippi Rule of Evidence 402, irrelevant evidence is not admissible.

[31] ¶ 68. In her motion in limine, Teston sought to exclude any mention of her arrest. The State confessed that it would not be admissible, and the trial court granted the motion. After voir dire, the State made a motion for the trial court to reconsider its ruling. The State explained that it intended to introduce evidence of the arrest as an explanation of why Officer Brantley did not administer Teston a field sobriety test. Defense counsel admitted that it intended to vigorously cross-examine Officer Brantley on this point. The trial court reconsidered its ruling and determined that a fair assessment of the facts could not be presented to the jury without allowing the **State**, during its direct examination, to introduce evidence of **Teston's** arrest. Thus, the trial court granted the **State's** motion. The trial court also instructed the jury that the evidence of the arrest could not be used as evidence of **Teston's** guilt to the crimes charged.

***15** ¶ 69. Giving deference to the trial court, we find that the evidence of **Teston's** arrest was relevant, not only in regard to why a field sobriety test was not performed, but also to explain the sequence of events leading up to **Teston's** blood test. Relying upon the trial court's initial ruling on her motion in limine, **Teston states** that her defense counsel did not question the venire regarding potential prejudice based on **Teston's** arrest. We agree that **Teston** was entitled to a meaningful voir dire. However, the trial judge did instruct the selected jurors that they could not consider evidence of **Teston's** arrest as an inference of guilt. "[W]hen a trial court instructs the jury, it is presumed the jurors follow the instructions of the court." *Grayson v. State*, 879 So.2d 1008, 1020(32) (Miss.2004) (quoting *Williams v. State*, 684 So.2d 1179, 1209 (Miss.1996)). Thus, this Court presumes that the jury did as it was instructed to do. For the foregoing reasons, we find that the trial court did not err in reversing its ruling on Teston's motion in limine after voir dire was conducted.

VII. Whether the State made improper statements regarding Teston's failure to testify.

¶ 70. Teston argues that the trial court erred by denying her motions for a mistrial because the State improperly commented on her failure to testify during its opening statement and closing statement. The State maintains that Teston failed to make a contemporaneous objection to the comment allegedly made during the opening statement, and the comment made in its closing argument was not a comment on Teston's failure to testify.

[32][33] ¶ 71. It is within the trial court's sound discretion to grant or to deny a motion for a mistrial. *Wright v. State*, 958 So.2d 158, 161(¶ 6) (Miss.2007) (citing *Shelton v. State*, 853 So.2d 1171, 1183(¶ 41) (Miss.2003)). This Court reviews a trial court's denial of a motion for a mistrial under an abuse of discretion standard. *Id.* (citing *Pulphus v. State*, 782 So.2d 1220, 1223(10) (Miss.2001)).

[34][35][36][37] ¶ 72. A defendant has a constitutional right not to take the stand in his or her own defense. *Id.* at 161(¶ 7) (citing U.S. Const. amend. V; Miss. Const. art. 3, § 26). To protect this right, attorneys are prohibited from making a comment on the defendant's failure to testify. *See Dora v. State*, 986 So.2d 917, 923(11) (Miss.2008); *see also Whitlock v. State*, 941 So.2d 843, 845-46(¶ 7) (Miss.Ct.App.2006). Each comment should be examined on a case-by-case basis and examined within the context in which it was made. *See Dora*, 986 So.2d at 923(12); *see also Whitlock*, 941 So.2d at 846(¶ 9). If the trial court finds that an improper comment was

> after having killed these children, to wait as long as possible with her fingers crossed until her hydrocodone level may go down. It may be hours.
>
> So they want to blame me or the State of Mississippi for not taking her blood because she's a liar. She's the one that delayed this process. Nobody else. If she would have approached anybody right off the bat and says [sic], I did it, I'm sorry, you could bet we'd still be here, and you could bet we'd be in the same situation we are right now. **She can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe and just-**

(Emphasis added). Defense counsel then objected to the prosecutor's comment, and the trial court overruled the objection. The prosecutor continued his argument and stated that:

> -and say, well, maybe we got a little benefit of time, but it's not our fault because the police should have. That's just not the way it is. She lied because she's impaired on hydrocodone, and she wanted to wait as long as she could.

Then, the trial court admonished the prosecutor to direct his comments to the jury.

¶ 77. Teston maintains that the prosecutor's comment-"She can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe"-is an improper comment on her failure to testify. Viewed in isolation, this comment may be construed as an improper comment on Teston's failure to testify. However, the comment must be reviewed within the context in which it is made. *See Whitlock*, 941 So.2d at 846(¶ 9) (citation omitted).

[39] ¶ 78. In *Wright*, the supreme court stated that:

> There is a difference, however, between a comment on the defendant's failure to testify and a comment on the failure to put on a successful *defense*. The [S]tate is entitled to comment on the lack of *any* defense, and such comment will not be construed as a reference to the defendant's failure to testify by innuendo and insinuation.

Wright, 958 So.2d at 161(¶ 7) (internal citation omitted). The Court further stated that:

> [N]ot every comment regarding the lack of any defense is automatically deemed to point toward the defense's failure to testify. Attorneys are to be given wide latitude in making their closing arguments.

***18** *Id.* at 166(¶ 24) (internal citation omitted). Based upon our review of the record, we find that the prosecutor did not make an improper statement on Teston's failure to testify.

¶ 79. In its closing statement, defense counsel argued that the blood evidence was prejudicial because Officer Brantley failed to have Teston's blood tested immediately. One of the State's arguments is that Teston did not inform Officer Brantley that she was involved in the accident. In response to this argument, defense counsel stated in its summation that Teston saw the accident in her rearview mirror. Thus, she was not aware that she caused the accident. Defense counsel also argued that it was difficult for Teston to admit to her involvement because of the nature of the accident. In response to defense counsel's comments, the prosecutor stated that Teston knew that she caused the accident and lied to Officer Brantley about her involvement because she did not want him to find that she was under the influence.

¶ 80. When viewed in the context of the entire argument, the disputed statement-"She can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe"-is not a comment on Teston's failure to testify. The prosecutor simply responded to the comments that defense counsel made during closing argument. Therefore, we find that the trial court did not err by denying Teston's motion for a mistrial.

VIII. Whether the trial court erred by denying Teston's circumstantial-evidence instruction.

[40] ¶ 81. Teston argues that the trial court erred by denying the circumstantial-evidence instruction because the State did not present any direct evidence that she was driving the black Honda that caused the accident. We find that this issue is without merit.

[41][42] ¶ 82. A circumstantial-evidence instruction is warranted where the State cannot produce an eyewitness to the crime or cannot get a confession from

the alleged perpetrator. *Davis v. State*, 914 So.2d 200, 208(¶ 41) (Miss.Ct.App.2005) (citing *Stringfellow v. State*, 595 So.2d 1320, 1322 (Miss.1992)). In these instances, the trial court is required to give a circumstantial-evidence instruction because the State's case against the defendant would be purely circumstantial. *Brown v. State*, 961 So.2d 720, 728(¶ 18) (Miss.Ct.App.2007) (citing *Jones v. State*, 797 So.2d 922, 928(¶ 26) (Miss.2001)). However, the trial court is not required to give a circumstantial-evidence instruction where the State presents direct evidence of the crime. *Id.* (citations omitted).

¶ 83. Teston maintains that the State's evidence was purely circumstantial because neither Ross nor Thurman could identify her as the driver of the black Honda. During the trial, Ross testified that the driver of the black Honda was a short, dark-haired, thin female. When asked if she could identify in the courtroom the driver of the vehicle, Ross responded that she was not certain if she could do so. However, Ross testified that she assumed that Teston was the driver of the vehicle because she saw Stewart standing next to the passenger side of Teston's car. Thurman testified that she assumed that Teston was the driver of the black Honda because Teston approached her in a hysterical manner, apologizing for the accident.

***19** ¶ 84. Additionally, Officer Brantley testified that Teston identified herself as the driver of the black Honda. Teston also argues that although she identified herself to Officer Brantley as the driver of the black Honda, Officer Brantley did not ask her if she was driving at the time of the accident. We find that this is of no consequence. Based on our review of the record, we find that the State presented direct evidence identifying Teston as the driver of the black Honda, and we did not find any evidence in the record that would refute this fact. Thus, we find that the trial court did not err by denying Teston's circumstantial-evidence instruction.

IX. Whether Teston's sentence was grossly disproportionate to the crime.

[43][44][45] ¶ 85. Teston argues that her sentence is grossly disproportionate to the crime because other defendants received less time for the same offense. If the defendant is convicted of the crime charged, her sentence will be determined within the sound discretion of the trial court. *Moody v. State*, 964 So.2d 564, 567(¶ 13) (Miss.Ct.App.2007) (citing *Jones v. State*, 885 So.2d 83, 88(¶ 12) (Miss.Ct.App.2004)). On appeal, this Court will not disturb a sentence imposed by the trial court when that sentence falls within the statutory guidelines. *Id.* (citing *Triplett v. State*, 840 So.2d 727, 732(¶ 18) (Miss.Ct.App.2002)). "However, where a sentence is 'grossly disproportionate' to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment." *Grimes v. State*, 909 So.2d 1184, 1188(¶ 13) (Miss.Ct.App.2005) (quoting *Stromas v. State*, 618 So.2d 116, 122 (Miss.1993)).

[46] ¶ 86. The trial court sentenced Teston pursuant to Mississippi Code Annotated section 63-11-30(5). Subsection (5) provides that anyone who violates the statute "shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years for each [offense]...." Miss.Code Ann. § 63-11-30(5). The determination of whether the sentences for multiple violations should run consecutively or concurrently is within the trial court's discretion. *Id.*

¶ 87. In this case, Teston was found guilty on all four counts and was sentenced to serve consecutive terms of fifteen years on each count, totaling sixty years, with thirty years suspended and five years of post-release supervision, leaving Teston with thirty years to serve. We find that Teston's sentence is not grossly disproportionate to the crimes committed because the trial court sentenced her within the guidelines provided by the statute. Thus, we find that Teston's argument is without merit.

¶ 88. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF COUNTS I, II AND III-DRIVING UNDER THE INFLUENCE AND NEGLIGENTLY CAUSING THE DEATH OF ANOTHER, AND COUNT IV-DRIVING UNDER THE INFLUENCE AND NEGLIGENTLY CAUSING SERIOUS INJURY TO ANOTHER, AND SENTENCE OF FIFTEEN YEARS ON EACH COUNT, WITH THIRTY YEARS SUSPENDED AND FIVE YEARS OF POST-RELEASE SUPERVISION, TO BE SERVED CONSECUTIVELY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF

CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE AND MYERS, P.JJ., IRVING, CHANDLER, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. GRIFFIS, J., NOT PARTICIPATING.

Miss.App.,2008.
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910 So.2d 598
(Cite as: 910 So.2d 598)

C

Court of Appeals of Mississippi.
David Michael TURNER, Appellant,
v.
STATE of Mississippi, Appellee.
No. 2003-KA-01781-COA.

Feb. 22, 2005.

Background: Defendant was convicted in the Circuit Court, DeSoto County, George B. Ready, J., of driving under influence (DUI) third offense. Defendant appealed.

Holdings: The Court of Appeals, Chandler, J., held that:
(1) evidence was sufficient to support conviction, and
(2) defendant was not entitled to circumstantial evidence instruction.

Affirmed.

West Headnotes

[1] Criminal Law 110 753.1

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.1 k. In General. Most Cited Cases

Criminal Law 110 753.2(3.1)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(3.1) k. In General. Most Cited Cases

Criminal Law 110 977(4)

110 Criminal Law
110XXIII Judgment
110k977 Judgment in General
110k977(4) k. Judgment Notwithstanding the Verdict. Most Cited Cases
Motions for a directed verdict or a judgment notwithstanding the verdict (JNOV) or a request for a peremptory instruction attack the legal sufficiency of the evidence.

[2] Automobiles 48A 355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Evidence was sufficient to show that defendant was operating vehicle, as required to support conviction for driving under influence (DUI), even though police officer did not see him driving, officer did not see keys in ignition, and vehicle was off road and not running; dispatch had informed officer of vehicle matching description of defendant's being driven erratically and then that vehicle had stopped, tire marks led from road to vehicle, defendant was in driver's seat of vehicle when officer approached, and defendant told officer he had driven to that location but stopped due to flat tire. West's A.M.C. § 63-11-30(1).

[3] Automobiles 48A 332

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak332 k. Driving While Intoxicated. Most Cited Cases

Automobiles 48A 355(6)

48A Automobiles
48AVII Offenses

48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
To be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or to be operating the vehicle while sitting behind the wheel, in control with the motor running. West's A.M.C. § 63-11-30(1).

[4] Automobiles 48A ⚷355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
When there is other sufficient evidence of impaired operation, no eyewitness testimony of impaired operation is needed to sustain a conviction for driving under influence of intoxicating liquor (DUI). West's A.M.C. § 63-11-30(1).

[5] Automobiles 48A ⚷355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Evidence was sufficient to show that defendant was under influence of intoxicating liquor or substance that impaired his ability to operate motor vehicle, as required to support conviction for driving under influence (DUI); defendant admitted consuming six to seven beers and three Xanax pills within previous 24 hours, police officer observed that defendant's speech was slurred, he had bloodshot eyes, and he was unsteady on his feet, and defendant failed numerous field sobriety tests. West's A.M.C. § 63-11-30(1)(a, b).

[6] Automobiles 48A ⚷332

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak332 k. Driving While Intoxicated. Most Cited Cases
Conviction for driving under influence (DUI) while under influence of intoxicating liquor or other substance that impaired person's ability to operate motor vehicle did not require proof that defendant's blood alcohol content was .08 or more. West's A.M.C. § 63-11-30(1)(a, b).

[7] Criminal Law 110 ⚷911

110 Criminal Law
110XXI Motions for New Trial
110k911 k. Discretion of Court as to New Trial. Most Cited Cases

Criminal Law 110 ⚷935(1)

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) k. Weight and Sufficiency of Evidence in General. Most Cited Cases
A motion for a new trial attacks the weight of the evidence and is addressed to the trial court's sound discretion.

[8] Criminal Law 110 ⚷747

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k747 k. Conflicting Evidence. Most Cited Cases
It is the exclusive province of the jury to weigh the credibility of the evidence and resolve any conflicts therein.

[9] Criminal Law 110 ⚷1038.3

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General
110k1038 Instructions
110k1038.3 k. Necessity of Requests. Most Cited Cases
Defendant waived claim that he was entitled to circumstantial evidence instruction, in trial for driving under influence (DUI), where defendant effectively withdrew request for instruction after State objected on grounds of direct evidence indicating defendant's guilt.

[10] Criminal Law 110 ⚿814(17)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(17) k. Circumstantial Evidence. Most Cited Cases
Defendant was not entitled to circumstantial evidence instruction, in trial for driving under influence (DUI), where defendant's admission to consuming three Xanax within 24 period and six or seven beers, and that he had driven to location where he was arrested constituted direct evidence of defendant's guilt.
***599** Jack R. Jones, Southaven, attorney for appellant.

Office of the Attorney General by Jean Smith Vaughan, attorney for appellee.

Before KING, C.J., CHANDLER and ISHEE, JJ.

CHANDLER, J., for the Court.

¶ 1. David Turner was indicted for third offense DUI for operating a motor vehicle while under the influence of intoxicating liquor and under the influence of any other substance which had impaired his ability to operate a motor vehicle in violation of Mississippi Code Annotated section 63-11-30(1) (Rev.2004). After a jury trial, Turner was convicted and sentenced to serve five years in the custody of the Mississippi Department of Corrections, to pay a $2,000 fine and court costs and to undergo drug and alcohol treatment. Turner appeals, arguing that the trial court erroneously denied his motion for a JNOV or a new trial and erroneously denied his proffered jury instruction on circumstantial evidence.

¶ 2. Finding no error, we affirm.

FACTS

¶ 3. On the morning of August 26, 2002, Officer Robert Riggs with the Horn Lake Police Department responded to a dispatch advising him of a possible intoxicated driver traveling southbound on Hurt Road. While Officer Riggs was en route, a dispatch advised him that the vehicle had stopped on Hurt Road. Officer Riggs arrived at the scene at 6:26 a.m. He observed a white van in a drainage ditch located approximately ten to fifteen feet from the shoulder of the road. The van was leaning over on its side and had a flat tire. There were tire tracks approximately forty yards long leading from the roadway to the van. The road and ground contiguous to the road were flat, dry and smooth, and the ditch was the only obstacle in the area.

¶ 4. Officer Riggs approached and saw **Turner** in the driver's seat, but could not see whether or not the van's keys were in the ignition. He asked **Turner** to exit the van. **Turner** did so, and as he walked around the van he leaned on it for support. **Turner stated** repeatedly that he had a flat tire, that he was trying to get home, and that he had someone coming to pick up the van. Officer Riggs extracted the keys from **Turner's** pocket. Officer Riggs smelled alcohol on **Turner's** breath and noticed that his speech was slurred. Officer Riggs asked **Turner** how much he had had to drink. At first, **Turner** said he did not know. Upon further questioning, **Turner stated** that he drank the night before and that morning, but he did not know how much.

***600** ¶ 5. Officer Riggs called Officer Troy Rowell to the scene to administer a standardized field sobriety test. Officer Rowell asked **Turner** where he had been traveling from, and **Turner** said he was coming from a friend's house in Memphis when he had a flat tire. Officer Rowell read **Turner** his Miranda rights. Then, **Turner** consented to perform the field sobriety test.

¶ 6. Officer Rowell questioned **Turner** before administering the test. The following is taken from Officer Rowell's trial testimony:

> I asked him how much he had had to drink that night, or how much he had had to drink, and he asked me since when. I asked him since the previous night, being that this happened about 6:45 in the morning, and he **stated** that he was unsure. I asked him to try to remember for me how much he had had to drink. At that time he **stated** that he had had six to seven beers.

Turner stated that it had been about two hours since his last drink. He opined that he was not too impaired to drive because he had driven there from Memphis. Officer Rowell noticed during the conversation that **Turner** had bloodshot eyes, was unsteady on his feet, and staggered as he walked around. He swayed from side to side, mumbled, and slurred words. Officer Rowell detected the smell of intoxicating liquor on **Turner's** breath.

¶ 7. Officer Rowell administered the standardized field sobriety test. **Turner** exhibited six indicia of intoxication during the performance stage of the walk and turn test and was unable to perform the one leg stand test. Officer Rowell asked **Turner** if he had taken any medication that night. **Turner** said that he had taken three Xanax pills within the last twenty-four hours. It was Officer Rowell's opinion that **Turner** was too intoxicated to drive.

¶ 8. Officer Riggs took **Turner** into custody. During booking at the police station, **Turner** was sitting on a bench, with one arm handcuffed to the bench, when he passed out and fell from the bench onto the floor. Officer Riggs was unable to rouse **Turner** for several minutes. **Turner** consented to take the Intoxilizer 5000 test, which registered his blood alcohol content at .028.

¶ 9. Officer Rowell testified that a blood alcohol content of .028 was below the legal limit of .08. He also testified that blood alcohol content dissipates over time, and that the Intoxilizer test was administered to Turner approximately two and a half hours after Turner was stopped by Officer Riggs. Officer Rowell also testified that the Intoxilizer detects alcohol only, not drugs. He testified that, based his training and experience, Xanax can impair a person's ability to operate a motor vehicle. The court admitted evidence of Turner's two prior DUI convictions, one on June 26, 2002 and one on May 28, 2002.

LAW AND ANALYSIS

I. THAT THE COURT IMPROPERLY OVERRULED THE MOTIONS FOR DIRECTED VERDICT, PEREMPTORY INSTRUCTION AND JNOV, OR ALTERNATIVELY, NEW TRIAL IN THAT THE VERDICT OF THE JURY IS NOT SUPPORTED LEGALLY AND FACTUALLY BY THE EVIDENCE PRESENTED AT TRIAL.

[1] ¶ 10. Turner argues that he was entitled to a directed verdict, a peremptory instruction, or a JNOV, or that he was entitled to a new trial because the verdict was against the overwhelming weight of the evidence. Motions for a directed verdict***601** or a JNOV or a request for a peremptory instruction attack the legal sufficiency of the evidence. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). Each of these challenges requires this Court to consider the propriety of the trial court's ruling based upon the evidence before the court when made and, therefore, we "properly review[ ] the ruling on the last occasion the challenge was made in the trial court." *Id.* Turner's last challenge to the sufficiency of the evidence was his motion for a JNOV.

¶ 11. Regarding the legal sufficiency of the evidence, this Court must view all the evidence in the light most favorable to the verdict. *Wetz v. State*, 503 So.2d 803, 808 (Miss.1987). We take all the credible evidence consistent with the verdict as true, and give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Id.* "We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Id.*

¶ 12. Mississippi Code Annotated section 63-11-30(1) (Rev.2004) provides that "[i]t is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law ...." The jury found that Turner had violated § 63-11-30(1)(a)

and (b).

[2][3][4] ¶ 13. Turner argues that there was insufficient evidence concerning two elements under the statute. He argues that there insufficient evidence that he operated a vehicle, and insufficient evidence that he was impaired while doing so. Turner avers that there was insufficient evidence showing he operated the van because no officer saw him driving the van, Officer Riggs did not see the van's keys in the ignition, the van was off the road, and the van was not running.

> To be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol content, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or ... to be "operating" the vehicle while sitting behind the wheel, in control with the motor running.

Lewis v. State, 831 So.2d 553, 558(¶ 18) (Miss.Ct.App.2002). When there is other sufficient evidence of impaired operation, no eyewitness testimony of impaired operation is needed to sustain a conviction. *Holloway v. State*, 860 So.2d 1244, 1246-47(¶ 12) (Miss.Ct.App.2003). In this case, there was sufficient credible evidence from which it could be reasonably inferred that Turner had been operating the vehicle prior to being stopped by Officer Riggs. The police dispatch informed Riggs of a white van driving erratically and, later, that the van had stopped. There were tire marks leading from the road to the van. Officer Riggs discovered Turner in the driver's seat of the white van. Turner told Officer Rowell he had driven to that location from Memphis. Turner stated that the van had a flat tire. There was no evidence that anyone else had been driving the van.

[5] ¶ 14. Turner argues that there was insufficient evidence that he was impaired while operating the van because the Intoxilizer revealed his blood alcohol content to be below the legal limit, because he was cooperative with the police, because a flat tire is a legitimate reason to be off the ***602** road, and because he was sufficiently lucid to call a wrecker service to retrieve the van. He avers that his poor performance of the field sobriety tests was reasonably attributable to his being awake all night, and maintains that he was merely asleep, not passed out, when he fell off the bench at the police station.

[6] ¶ 15. In securing **Turner's** conviction for violation of § 63-11-30(1)(a) and (b), the **State** did not have to prove that **Turner's** blood alcohol content was .08 percent or more when he operated the vehicle. Such proof is required for guilt only under section (c) of the statute. To prove **Turner's** guilt under sections (a) and (b), the **state** had to prove only that **Turner** was under the influence of intoxicating liquor and under the influence of "any other substance which has impaired such person's ability to operate a motor vehicle." *Id.* We find that there was sufficient credible evidence that **Turner** was under the influence of alcohol and of any other substance while driving the van. Miss.Code Ann. § 63-11-30(1)(a) and (b) (Rev.2004). **Turner** admitted to Officer Rowell that he had consumed six to seven beers and had most recently consumed alcohol two hours before being stopped. He also admitted to consuming three Xanax pills within the previous twenty-four hours. Officer Rowell testified that Xanax can impair someone's ability to operate a motor vehicle. Officer Rowell observed that Turner had bloodshot eyes, was unsteady on his feet, slurred his speech, and that the smell of alcohol emanated from Turner's breath. During the field sobriety test, Turner exhibited six indicia of intoxication and was unable to perform the one leg stand test. From this evidence, one could reasonably infer that, when Turner was driving the van, he was under the influence of alcohol and of Xanax which impaired his ability to operate the van. *See Harris v. State*, 830 So.2d 681, 683(¶ 3) (Miss.Ct.App.2002). This issue is without merit.

[7][8] ¶ 16. Turner argues that he is entitled to a new trial because the verdict was against the overwhelming weight of the evidence. A motion for a new trial attacks the weight of the evidence and is addressed to the trial court's sound discretion. *Wetz v. State*, 503 So.2d 803, 812 (Miss.1987). "The trial judge should not order a new trial unless [the judge] is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Id.* We will only reverse the trial court's denial of a motion for a new trial if we determine that the trial court abused its discretion. *Id.* In reviewing the decision of the trial court, we accept as true all of the evidence favoring the State. *Id.* It is the exclusive province of

the jury to weigh the credibility of the evidence and resolve any conflicts therein. *Groseclose v. State*, 440 So.2d 297, 300-01 (Miss.1983). Considering the evidence of Turner's guilt under § 63-11-30(1)(a) and (b), adduced above in our review of the sufficiency of the evidence, the jury's returning a verdict of guilty was a reasonable conclusion. The verdict was not against the overwhelming weight of the evidence and the trial court was within its discretion in denying Turner's motion for a new trial.

II. THAT THE TRIAL COURT ERRED IN FAILING TO GRANT THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION, D-2.

¶ 17. Turner avers that he was entitled to a circumstantial evidence instruction. A circumstantial evidence instruction is required only when the State's case is entirely circumstantial, and the instruction is not required when there is both direct and circumstantial evidence of the defendant's guilt. *603*Gilleylen v. State*, 255 So.2d 661, 663 (Miss.1971). Direct evidence has been held to include evidence such as eyewitness testimony, the defendant's confession to the offense charged, or the defendant's admission as to an important element thereof. *Lynch v. **State***, 877 So.2d 1254, 1265(¶ 23) (Miss.2004).

¶ 18. **Turner** requested a circumstantial evidence instruction. The **State** objected to the instruction, arguing that **Turner's** admission to consuming six to seven beers and three Xanax tablets was direct evidence obviating the need for a circumstantial evidence instruction. **Turner's** attorney agreed. Then, the trial court ruled that **Turner's** admissions were direct evidence of his guilt and denied the instruction. On appeal, **Turner** argues that the court's denial of the instruction was error because the case against him was entirely circumstantial.

[9][10] ¶ 19. By agreeing with the **State** that he was not entitled to a circumstantial evidence instruction, **Turner** effectively withdrew his request for the instruction and thus waived his right to attack the denial of the instruction on appeal. *O'Flynn v. Owens Corning Fiberglas*, 759 So.2d 526, 536(¶ 32) (Miss.Ct.App.2000). Notwithstanding the fact that this issue is barred from our review, no circumstantial evidence instruction was required in this case. Turner's admissions to drinking six to seven beers that night, consuming three Xanax pills within the last twenty-four hours, and driving from Memphis constituted admissions on the elements of impaired operation of a motor vehicle as defined by § 63-11-30(1)(a) and (b), and were direct evidence of his guilt. *Lewis*, 831 So.2d at 558(¶ 23). Therefore, the evidence against Turner was not purely circumstantial and Turner was not entitled to a circumstantial evidence instruction.

¶ 20. **THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF CONVICTION OF FELONY DRIVING UNDER THE INFLUENCE AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $2,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO DESOTO COUNTY.**

KING, C.J., BRIDGES AND LEE, P.JJ., IRVING, MYERS, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR.
Miss.App.,2005.
Turner v. State
910 So.2d 598

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972 So.2d 56
(Cite as: 972 So.2d 56)

C

Court of Appeals of Mississippi.
Ronald VAUGHN, Appellant
v.
STATE of Mississippi, Appellee.
No. 2006-KA-00065-COA.

Jan. 8, 2008.

Background: Defendant was convicted in the Circuit Court, Warren County, Isadore W. Patrick, Jr., J., of aggravated driving under the influence, and he appealed.

Holdings: The Court of Appeals, Myers, P.J., held that:
(1) trial court's ruling that there existed sufficient probable cause at the time of defendant's arrest to order the taking of a blood sample was supported by the record; and
(2) defendant's blood test after his arrest was admissible under the search incident to the lawful arrest exception to the warrant requirement.

Affirmed.

Irving, J., concurred in part and in result.

West Headnotes

[1] Criminal Law 110 1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence Wrongfully Obtained. Most Cited Cases
(Formerly 110k1158(4))
When reviewing a trial court's ruling on a motion to suppress, appellate court must assess whether substantial credible evidence supports the trial court's finding considering the totality of the circumstances.

[2] Criminal Law 110 1153.6

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.6 k. Competency of Evidence. Most Cited Cases
(Formerly 110k1153(1))
The standard of review for the admission or suppression of evidence is abuse of discretion.

[3] Criminal Law 110 1152.20

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.20 k. Province of Court and Jury. Most Cited Cases
(Formerly 110k1152(1), 110k1147)
Appellate court reviews a trial court's denial of a judgment notwithstanding the verdict (JNOV) or a motion for new trial under an abuse of discretion standard.

[4] Criminal Law 110 1134.70

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.70 k. In General. Most Cited Cases
(Formerly 110k1134(8))
When looking at the denial of a judgment notwithstanding the verdict (JNOV), the appellate court looks to the sufficiency of the evidence at trial, and critical inquiry is whether the evidence shows beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; where the evidence fails to meet this test, it is insufficient to support a conviction.

[5] Criminal Law 110 1156(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(2) k. Sufficiency of Evidence. Most Cited Cases
With regard to motion for a new trial, appellate court will look to the weight of the evidence presented at trial and will only overrule the trial judge's denial of a motion for new trial when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.

[6] Searches and Seizures 349 ⚷78

349 Searches and Seizures
349I In General
349k78 k. Samples and Tests; Identification Procedures. Most Cited Cases
Blood searches based upon probable cause are legal. U.S.C.A. Const.Amend. 4.

[7] Criminal Law 110 ⚷1158.2

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.2 k. Search and Arrest. Most Cited Cases
(Formerly 110k1158(2))
Appellate court's standard of review for a trial court's finding of probable cause for search is abuse of discretion. U.S.C.A. Const.Amend. 4.

[8] Automobiles 48A ⚷419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
Trial court's ruling that there existed sufficient probable cause at the time of defendant's arrest for driving under the influence (DUI) to order the taking of a blood sample was supported by the record; officer testified that defendant was non-responsive, incoherent, and his eyes were dilated when the officer arrived at the scene of accident, officer detected the smell of marijuana and possibly alcohol on defendant and in his car, officer observed a bottle of alcohol in defendant's car, and witnesses to the accident relayed information regarding how the accident occurred and about defendant's behavior immediately after the accident. U.S.C.A. Const.Amend. 4.

[9] Automobiles 48A ⚷349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most Cited Cases

Automobiles 48A ⚷411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In General. Most Cited Cases

Automobiles 48A ⚷419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
Results of defendant's blood test after his arrest for driving under the influence (DUI) were admissible under the search incident to the lawful arrest exception to the warrant requirement; police had developed sufficient information to believe defendant had committed a crime at the time of car accident and his arrest was proper, and police had probable cause to believe he was under the influence of drugs or alcohol due to his behavior at the scene. U.S.C.A. Const.Amend. 4.

[10] Automobiles 48A ⚷411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In General. Most Cited Cases

Automobiles 48A ⚷419

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases
Results of defendant's blood test after his arrest for driving under the influence (DUI) were admissible under exigent circumstances exception to warrant requirement; police had developed sufficient information to believe defendant had committed a crime at the time of the accident and his arrest was proper, and defendant's blood needed to be tested quickly in order to preserve the evidence of drugs or alcohol in his system. U.S.C.A. Const.Amend. 4.

[11] Searches and Seizures 349 ⚿42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In General. Most Cited Cases
A warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate that a warrant should properly issue. U.S.C.A. Const.Amend. 4.

[12] Criminal Law 110 ⚿404.30

110 Criminal Law
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.10 Foundation or Authentication
110k404.30 k. Chain of Custody. Most Cited Cases
A trial court is given great discretion when determining whether the State has established a proper evidentiary chain of custody.

[13] Criminal Law 110 ⚿404.30

110 Criminal Law
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.10 Foundation or Authentication
110k404.30 k. Chain of Custody. Most
ited Cases
:fendant has the burden of proof to establish a break in the chain of custody by showing that th an indication or reasonable inference of prol tampering with the evidence or substitution of evidence.

[14] Criminal Law 110 ⚿404.45

110 Criminal Law
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.45 k. Exhibition of Person o Body Parts; Samples. Most Cited Cases
Defendant, who was convicted of aggravated driving under the influence (DUI), did not establish that there was a break in the chain of custody with respect to his blood sample or that there was tampering; State produced testimony from officer who witnessed the blood being taken from defendant, officer testified he handed the vials of blood to another officer who placed them in sealed evidence bag and the vials were taken to crime lab, crime lab employee entered information regarding sample in computer system and performed testing on the blood and sent blood to national lab for further testing.
***57** Michael E. Robinson, attorney for appellant.

Office of the Attorney General by Ladonna C. Holland, attorney for appellee.

Before MYERS, P.J., GRIFFIS and CARLTON, JJ.

MYERS, P.J., for the Court.

¶ 1. Ronald Vaughn was convicted of aggravated driving under the influence following an accident in which his car struck a police officer on foot. Vaughn sought to suppress the results of a blood sample taken after the accident. However, the trial court denied his motion. Vaughn seeks review of the trial court's denial of his motion to suppress the blood samples and their results. Vaughn also challenges ***58** the trial court's denial of his motion for a directed verdict or new trial because the blood samples were improperly introduced at trial. Finding no error, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶ 2. On February 9, 2004, Michael Hollingsworth, a

deputy for the Warren County Sheriff's Department, was working a funeral detail. Deputy Hollingsworth parked his car, with lights flashing, on Highway 80 in order to direct traffic so that the funeral procession could continue to the nearby cemetery. A car driven by Ronald Vaughn approached and attempted to pass the funeral procession, driving east in the westbound lane. As Vaughn was passing the procession, his car struck Deputy Hollingsworth, who was attempting to flag him down. Deputy Hollingsworth flew into oncoming traffic, was thrown onto a truck, and then landed in a nearby ditch.

¶ 3. After the accident, **Vaughn** left his vehicle. When approached by others at the scene of the accident, **Vaughn** became confrontational, cursing and threatening to leave. **Vaughn** then fell to the ground after being told by those on the scene he would not be leaving until police arrived. Highway Patrol Officer Scott Henley arrived soon thereafter at the scene of the accident. He approached **Vaughn**, who was unresponsive. The officer testified he observed that **Vaughn** smelled of alcohol and marijuana and his eyes were dilated. Officer Henley further testified to having observed a bottle of gin and a bag of marijuana in **Vaughn's** car. **Vaughn** was arrested and charged with aggravated driving under the influence (DUI).

¶ 4. **Vaughn** was then transported by Trooper Daniel Lewis of the Mississippi Highway Patrol to River Road Hospital in Vicksburg. After arriving at the hospital, Officer Henley requested that a blood sample be taken from **Vaughn**. Henley observed a nurse take the sample from **Vaughn** and he handed the container to Trooper Lewis, who sealed the sample. Henley then transported the sample to the Mississippi Crime Laboratory, where the sample later tested positive for marijuana, ecstasy, and methamphetamine. Remarkably, Hollingsworth recovered from the accident, but did suffer a very serious injury, which required extensive therapy. **Vaughn** was subsequently convicted of aggravated DUI.

¶ 5. **Vaughn** asserts the samples should have been excluded for two reasons. First, **Vaughn** argues that the blood samples were taken in violation of his Fourth Amendment rights. Second, **Vaughn** contends that the **State** failed to establish a proper chain of custody of the blood samples; thus, the trial court should have excluded the blood samples from evidence.

¶ 6. **Vaughn** contends that the blood test violated his Fourth Amendment rights because he did not consent and there was no valid search warrant. **Vaughn** points out that there was no emergency or exigent circumstance which prevented the police from obtaining a valid search warrant to take the blood sample. **Vaughn** also argues that he was either not actually under arrest at the time the sample was taken or that the arrest itself was unlawful. **Vaughn** asserts the **State** failed to initially establish a chain of custody and failed to establish that the blood samples actually belonged to **Vaughn**.

¶ 7. Finally, **Vaughn** contends that he established a clear break in the chain of custody regarding the blood sample, and that the blood evidence should have been excluded at trial. **Vaughn** seeks to have the trial court's decision reversed or, in the alternative, to grant him a new trial.

59** ¶ 8. First, the **State** argues that **Vaughn** is barred from appealing the denial of his motion to suppress because he failed to allege this assignment of error in his motion for JNOV or new trial. *Alonso v. **State, 838 So.2d 309, 313(¶ 10) (Miss.Ct.App.2002) (citing *Seals v. **State***, 767 So.2d 261(¶ 6) (Miss.Ct.App.2000)). Notwithstanding the bar, however, the **State** contends that Officer Henley acted properly in ordering the blood test without a search warrant or consent. The **State** argues that Mississippi Code Annotated section 63-11-5(1) (Rev.2004) provides that consent is implied if a person operates a vehicle on the public roads of Mississippi and, as such, Officer Henley had authority to order the blood test. Additionally, the **State** argues Officer Henley properly complied with the law since he had both reasonable grounds and probable cause to believe **Vaughn** was under the influence of drugs or alcohol at the time of the accident. Further, the **State** denies **Vaughn's** contention that he was not under arrest. The **State** contends that the arresting officers were conducting a search incident to lawful arrest when taking the sample, and further that exigent circumstances were present, necessitating taking the sample without a warrant. The **State** argues that nearly two hours had lapsed before **Vaughn** was transported to the hospital from the scene of the accident, thus creating exigent circumstances.

¶ 9. With regard to **Vaughn's** second argument, the **State** contends that **Vaughn** failed to present evidence showing that the chain of custody of the evidence had been broken. The **State** further asserts that it is not required to call every single person as a witness who handled the evidence to establish a proper chain of custody. Additionally, the **State** points out that **Vaughn** has failed to present evidence that the blood sample was altered or tampered with during the testing process.

STANDARD OF REVIEW

[1][2] ¶ 10. "When reviewing a trial court's ruling on a motion to suppress, we must assess whether substantial credible evidence supports the trial court's finding considering the totality of the circumstances." *Shaw v. State*, 938 So.2d 853, 859(¶ 15) (Miss.Ct.App.2005) (citing *Price v. State*, 752 So.2d 1070, 1073(¶ 9) (Miss.Ct.App.1999)). "The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion." *Troupe v. McAuley*, 955 So.2d 848, 855(¶ 19) (Miss.2007) (citing *Poole v. Avara*, 908 So.2d 716, 721(¶ 8) (Miss.2005)).

[3][4] ¶ 11. This Court reviews a trial court's denial of a JNOV or a motion for new trial under an abuse of discretion standard. *Dilworth v. State*, 909 So.2d 731, 736(¶ 17) (Miss.2005) (citing *Howell v. State*, 860 So.2d 704, 764 (¶ 212) (Miss.2003)). When looking at the denial of a JNOV, the court looks to the sufficiency of the evidence at trial. *Dilworth*, 909 So.2d at 736(¶ 17). "[T]he critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' " *White v. State*, 958 So.2d 241, 245(¶ 12) (Miss.Ct.App.2007) (citing *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005)). Further, the evidence should be viewed in the light most favorable to the non-moving party. *Bush*, 895 So.2d at 843(¶ 17).

[5] ¶ 12. With regard to the motion for a new trial, the court will look to the weight of the evidence presented at trial. *White*, 958 So.2d at 246(¶ 13). This Court will only overrule the trial judge's denial of a motion for new trial "when [the verdict] ***60** is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.*

DISCUSSION

I. WHETHER THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS THE BLOOD TEST AND RESULTS VIOLATED VAUGHN'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE

[6][7][8] ¶ 13. The trial court admitted Vaughn's blood sample and the results of the toxicology reports into evidence, finding that there was sufficient probable cause at the time of the arrest to order the taking of a blood sample. "[B]lood searches based upon probable cause are legal." *Wilkerson v. **State***, 731 So.2d 1173, 1177(¶ 13) (Miss.1999). Our standard of review for a trial court's finding of probable cause is abuse of discretion. *Holloman v. **State***, 820 So.2d 52, 55(¶ 11) (Miss.Ct.App.2002).

¶ 14. The lower court noted many factors which amounted to sufficient probable cause. Officer Henley testified that **Vaughn** was non-responsive, incoherent, and his eyes were dilated when the officer arrived at the scene of the accident. Officer Henley further testified he detected the smell of marijuana and possibly alcohol on **Vaughn** and in his car. Further, Henley testified he observed a bottle of alcohol in **Vaughn's** car. In addition, witnesses to the accident relayed information regarding how the accident occurred and about **Vaughn's** behavior immediately after the accident.

¶ 15. **Vaughn** relies on this Court's ruling in *Shaw v. **State***, 938 So.2d 853 (Miss.Ct.App.2005) in challenging the admission of the blood test and results at trial. **Vaughn** argues that there was a violation of his Fourth Amendment rights of unreasonable search and seizure because he claims there were no exigent circumstances. However, the case *sub judice* is distinguishable from *Shaw* in several ways. First, the blood drawn from the suspect in *Shaw* was done pursuant to an invalid search warrant which contained false statements made by the acquiring officer. *Id.* at 857-58 (¶ 11). The officer in *Shaw* claimed falsely in the affidavit that the suspect refused to submit to a breath analysis test and that the suspect was under arrest prior to the warrant being issued. *Id.* Additionally, the

officer in *Shaw* testified at trial that the suspect was actually not under arrest before the blood test was performed. *Id.* at 858(¶ 12). According to the record in the case *sub judice,* Vaughn was arrested and handcuffed at the scene of the accident *before* the blood test was ordered or administered. Per contra, the police in *Shaw* did not develop probable cause until after the blood test was ordered. *Id.* In *Shaw,* this Court noted that "[o]ur supreme court has held that probable cause developed by an officer subsequent to an unlawful search and seizure of the defendant's blood could not retroactively cure such prior violation." *Id.* at 858(¶ 13) (citing *McDuff v. State,* 763 So.2d 850, 856(¶ 18) (Miss.2000)).

¶ 16. The trial court's ruling that there existed sufficient probable cause to admit Vaughn's blood test is supported by the record. In *McDuff v. State,* 763 So.2d 850, 856(¶ 19) (Miss.2000), the court held that "the drawing of the two (2) tubes of ... blood, done specifically at the request of law enforcement, was improper because this was done without probable cause, a warrant or consent, and was not incident to a lawful arrest." The police officers in *McDuff* did not see or speak to the suspect at the time of the accident, or before the blood test was ordered. *Id.* at 852 (¶ 4-5). ***61** The court found probable cause did not exist prior to the blood test and the suspect was not placed under arrest at the time of the test. *Id.* at 856(¶ 19). Therefore, the court found probable cause was developed *after* the test was administered, and the subsequent probable cause finding was too late to correct the unlawful search and seizure of the suspect's blood. *Id.* at 856(¶ 18).

[9] ¶ 17. Additionally, we agree with the State's contention that the blood test was admissible under the search incident to the lawful arrest exception to the warrant requirement. *Id.* at 856(¶ 19). Here, the record clearly reflects that police had developed sufficient information to believe Vaughn had committed a crime at the time of the accident, and his arrest was proper. Testimony at trial revealed that Vaughn was handcuffed and under arrest shortly after the officers arrived at the accident scene. Vaughn was properly under arrest, since he was not free to leave the accident, and police had probable cause to believe he was under the influence of drugs or alcohol due to his behavior at the scene.

[10][11] ¶ 18. In addition to having probable cause, the officers were working under exigent circumstances. "A warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate that a warrant should properly issue." *Holloman v. State,* 820 So.2d 52, 55(¶ 10) (Miss.Ct.App.2002) (citing *Sanders v. State,* 678 So.2d 663, 667 (Miss.1996)). Vaughn's blood needed to be tested quickly in order to preserve the evidence of drugs or alcohol in his system. *Id.* Therefore, exigent circumstances existed to permit a search.

¶ 19. We find there was sufficient evidence to lead Officer Henley to suspect that Vaughn was under the influence of drugs or alcohol at the time of the accident and arrest. This Court cannot find that the trial court abused its discretion in admitting the blood test and results into evidence. Nor can this Court find that the trial court violated Vaughn's Fourth Amendment rights by admitting the blood test into evidence. The trial court's refusal to grant a directed verdict or a motion for a new trial was not error.

II. WHETHER THE TRIAL COURT ERRED IN FINDING NO BREAK IN THE CHAIN OF CUSTODY OCCURRED AND FINDING THAT THERE WAS NO TAMPERING OR SUBSTITUTION OF THE BLOOD TEST EVIDENCE

[12][13][14] ¶ 20. Vaughn argues that the State erred in failing to introduce testimony from everyone involved in testing the blood evidence at the Alameda, California testing site. However, "[e]stablishing a proper chain of custody ... has 'never required the proponent to produce every person who handled the object, nor to account for every moment of every day.' " *Pittman v. State,* 904 So.2d 1185, 1191(¶ 11) (Miss.Ct.App.2004) (quoting *Butler v. State,* 592 So.2d 983, 985 (Miss.1991)). Vaughn's assertions that a break in the chain of custody occurred or that there was evidence of tampering are without merit. A trial court is given great discretion when determining whether the State has established a proper evidentiary chain of custody. *Pittman* 904 So.2d at 1191(¶ 11) (citing *Morris v. State,* 436 So.2d 1381, 1388 (Miss.1983)). Vaughn has the burden of proof to establish a break by showing that "there is an indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." *Ellis v.*

State, 934 So.2d 1000, 1005(¶ 20) (Miss.2006).

***62** ¶ 21. The State produced testimony from Officer Henley, who witnessed the blood being taken from Vaughn. Officer Henley additionally testified he handed the vials of blood to Officer Lewis, who placed them in a sealed evidence bag. Officer Henley then testified he took the evidence to the Mississippi Crime Lab, where it was given to John Stevenson, a Crime Lab employee, who entered information regarding the sample in the computer system. Stevenson performed testing on the blood and sent the blood to National Medical Laboratory for further testing. The State produced evidence from National Medical Laboratory, accounting for all persons who handled or tested the blood at their California facility. From the testimony reviewed in the record, there is sufficient testimony from individuals who handled the sample to establish a chain of custody. Further, Vaughn points to no evidence which would show probable tampering or substitution of evidence. Vaughn has offered no proof that anything irregular occurred with the blood sample. We cannot find that the trial court committed error in failing to grant Vaughn a directed verdict or a new trial based on the admission of the blood test into evidence. This Court finds no error in the admission of the evidence against Vaughn.

¶ 22. **THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY OF CONVICTION OF AGGRAVATED DRIVING UNDER THE INFLUENCE AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FIFTEEN YEARS TO SERVE, AND FIVE YEARS OF POST-RELEASE SUPERVISION IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.**

KING, C.J., LEE, P.J., CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. IRVING, J., CONCURS IN PART AND IN RESULT.
Miss.App.,2008.
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936 So.2d 400
(Cite as: 936 So.2d 400)

H

Court of Appeals of Mississippi.
James J. WEIL, Appellant
v.
STATE of Mississippi, Appellee.
No. 2004-KA-02371-COA.

April 18, 2006.
Rehearing Denied Aug. 15, 2006.

Background: Defendant was convicted by jury in the Circuit Court, Lee County, Thomas J. Gardner, III, J., of driving under the influence (DUI), third offense. Defendant appealed.

Holdings: The Court of Appeals, King, C.J., held that:
(1) sufficient evidence supported conclusion that defendant had been driving while being under influence of marijuana;
(2) sufficient evidence supported conclusion that defendant's driving ability was impaired;
(3) defendant was not entitled to suppression of his conversation with police officer under evidentiary rule governing admissibility of offers to compromise; and
(4) defendant was not entitled to instruction to effect that he, by operating vehicle on roadways, gave his consent to chemical testing.

Affirmed.

Irving, J., concurred in result only.

West Headnotes

[1] Criminal Law 110 ⚿1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable Doubt. Most Cited Cases
In reviewing a challenge of legal sufficiency of the evidence, appellate court must determine whether any rational juror could have found that the state proved each and every element of the crime charged beyond a reasonable doubt.

[2] Criminal Law 110 ⚿1159.2(2)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(2) k. Verdict Unsupported by Evidence or Contrary to Evidence. Most Cited Cases
In reviewing a claim that the verdict was against the overwhelming weight of the evidence, appellate court will only reverse a conviction if allowing it to stand would sanction an unconscionable injustice.

[3] Criminal Law 110 ⚿935(1)

110 Criminal Law
110XXI Motions for New Trial
110k935 Verdict Contrary to Evidence
110k935(1) k. Weight and Sufficiency of Evidence in General. Most Cited Cases
The power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

[4] Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Sufficient evidence supported conclusion that defendant had been driving while being under influence of marijuana, as element of driving under the influence of impairing substance (DUI); arresting officer testified that he smelled strong odor of burnt marijuana coming from defendant's vehicle, that defendant had

poor balance, bloodshot eyes, slurred speech, and dilated pupils, which officer opined were consistent with signs of someone under the influence of marijuana, and, most importantly, officer testified that when he asked defendant if he had been smoking marijuana that evening, defendant indicated that he had smoked a small amount. West's A.M.C. § 63-11-30(1)(b).

[5] Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving While Intoxicated. Most Cited Cases
Sufficient evidence supported conclusion that defendant's driving ability was impaired, as element of offense of driving under the influence of impairing substance (DUI); arresting officer testified that defendant had poor balance, bloodshot eyes, slurred speech, and dilated pupils, and, when officer approached defendant's vehicle at checkpoint, defendant sped off. West's A.M.C. § 63-11-30(1)(b).

[6] Criminal Law 110 ⚿1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or Deductions from Evidence. Most Cited Cases
In reviewing a challenge to legal sufficiency of the evidence, state is given the benefit of all reasonable inferences that may be drawn from the evidence presented to the jury.

[7] Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In General. Most Cited Cases
(Formerly 110k1153(1))
Appellate court reviews challenges to the admissibility of evidence under an abuse of discretion standard.

[8] Criminal Law 110 ⚿408

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k408 k. Negotiations for Compromise. Most Cited Cases
Defendant was not entitled to suppression of his conversation with police officer after officer advised him that he was under arrest, during which defendant asked if officer would dismiss charges or help him out in court at later date if defendant sought rehabilitation, under evidentiary rule governing admissibility of offers to compromise, in prosecution for driving under the influence of impairing substance (DUI), as rule necessarily contemplated situations in which offer of compromise was made to or by one who had authority to compromise claim or charge in question, but officer, as law enforcement agent who personally observed defendant committing felony and executed his duty to take defendant into custody, had no authority to negotiate charge against defendant. Rules of Evid., Rule 408.

[9] Criminal Law 110 ⚿822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In General. Most Cited Cases
On appellate review to challenge to jury instructions, they are to be read together as a whole, with no one instruction to be read alone or taken out of context.

[10] Criminal Law 110 ⚿770(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k770 Issues and Theories of Case in General
110k770(2) k. Necessity of Instructions. Most Cited Cases

Criminal Law 110 ⚷829(1)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(1) k. In General. Most Cited Cases

Criminal Law 110 ⚷830

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k830 k. Erroneous Requests. Most Cited Cases
Defendant is entitled to have jury instructions given which present his theory of the case; however, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case.

[11] Automobiles 48A ⚷357(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 Instructions
48Ak357(6) k. Driving While Intoxicated. Most Cited Cases
(Formerly 48Ak357)

Automobiles 48A ⚷415

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak415 k. Motorists' Right to Test or to Additional or Alternative Test. Most Cited Cases

Automobiles 48A ⚷418

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak418 k. Consent, Express or Implied. Most Cited Cases
Defendant was not entitled to instruction to effect that he, by operating vehicle on roadways, gave his consent to chemical testing, as instruction was incomplete statement of the law, in prosecution for driving under the influence (DUI), third offense; while implied consent law permitted officers with probable cause to have driver submit to breath, urine, or blood test, it did not require them to perform each test, and, while defendant passed breath test, he admitted to having smoked marijuana and appeared to be under the influence of an intoxicating substance which impaired his driving ability, so that it would have been superfluous to have defendant undergo additional testing. West's A.M.C. § 63-11-30(1)(b).
***402** Lori Nail Basham, attorney for appellant.

Office of the Attorney General by Jose Benjamin Simo, attorney for appellee.

EN BANC.

KING, C.J., for the Court.

¶ 1. A Lee County Circuit Court jury found James J. Weil guilty of Driving Under the Influence (DUI) third offense. He was sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections, with two years to serve and two and one-half years suspended, followed by two and one-half years of post-release supervision. Aggrieved, Weil raises the following issues on appeal:

I. Whether the trial court improperly denied the Appellant's motion for a JNOV, or alternatively for a new trial in that the verdict of the jury was contrary to the law and to the overwhelming weight of the evidence.

II. Whether the trial court erred in failing to suppress Appellant's statement to the police.

III Whether the trial court erred in refusing jury instruction D-5.

FACTS

¶ 2. On the evening of March 31, 2004, the Tupelo

Police Department set up a driver's license checkpoint on Blair Street. At 11:00 p.m., **Weil** encountered the checkpoint. As Officer Joe Sturm approached **Weil's** vehicle, **Weil** sped off. Sturm jumped in his vehicle and chased **Weil** about a quarter of a mile down the road where **Weil** stopped his car. When Officer Sturm approached **Weil's** vehicle, the windows were down and Sturm smelled burnt marijuana. Sturm asked **Weil** to step out of the vehicle, and placed him under arrest for failing to yield to the officer directing traffic. Sturm asked **Weil** if he had consumed any alcohol, and **Weil** replied that he had consumed four servings of beer. Sturm then asked if he had consumed any marijuana, to which **Weil** replied, "not a whole lot." Sturm observed that **Weil** had poor balance, bloodshot eyes, slurred ***403** speech, and dilated pupils. Sturm testified that he did not perform a field sobriety test due to his concern for **Weil's** safety. Instead, Sturm administered an Intoxilizer test in which it was determined that **Weil** had a blood-alcohol content of .047, well under the legal limit. Based upon his observation of **Weil** and the smell of marijuana emanating from the car, Sturm additionally placed him under arrest for "DUI other."

ISSUES AND ANALYSIS

I. Whether the trial court improperly denied the Appellant's motion for a JNOV, or alternatively for a new trial in that the verdict of the jury was contrary to the law and to the overwhelming weight of the evidence.

[1][2][3] ¶ 3. Weil argues that the verdict was both legally insufficient and against the overwhelming weight of the evidence because the evidence at trial focused on Weil's alcohol consumption, rather than marijuana or other intoxicating substance consumption. In reviewing a challenge of legal sufficiency, this Court must determine whether any rational juror could have found that the State proved each and every element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In reviewing a claim that the verdict was against the overwhelming weight of the evidence, this Court will only reverse a conviction if allowing it to stand would sanction an unconscionable injustice. *Bush*, 895 So.2d at 844(¶ 18) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). Further, "the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Id.* (citing *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947(¶ 18) (Miss.2000)).

¶ 4. Weil was found guilty of DUI third offense. He was specifically charged with violating Mississippi Code Annotated § 63-11-30(1)(b)(Rev.2004). The elements of this crime are (1) operating a motor vehicle (2) while under the influence of any substance other than alcohol (3) which has impaired the driver's ability to operate a motor vehicle. Miss.Code Ann. § 63-11-30(1)(b). Additionally, because it was charged as a third offense, the **State** was required to prove that **Weil** had twice previously been convicted of driving under the influence within the last five years preceding the current charge. Miss.Code Ann. § 63-11-30(2)(c)(Rev.2004). The defense conceded that **Weil** had been twice convicted of DUI within the last five years.

[4] ¶ 5. The first element of § 63-11-30(1)(b), operating a motor vehicle, is not in dispute. **Weil** attacks the second element of the offense, being under the influence of a substance other than alcohol. Officer Sturm testified that he smelled a strong odor of burnt marijuana coming from **Weil's** vehicle. He also testified that **Weil** had poor balance, bloodshot eyes, slurred speech, and dilated pupils, which Sturm opined were consistent with signs of someone under the influence of marijuana. Most importantly, Sturm testified that when he asked **Weil** if he had been smoking marijuana that evening, **Weil** indicated that he had smoked a small amount. Officer Jason Brockman, who assisted Sturm with the arrest, also testified that he smelled a strong odor of marijuana emerging from the vehicle. He also observed that **Weil** had a difficult time standing and balancing. Additionally, both officers testified as to their training at the regional counter drug training academy and other programs in which they were trained to recognize the signs of intoxication from ***404** alcohol and narcotic drugs. Both officers testified that, based on their training and experience, they believed that **Weil** was under the influence of marijuana. We find that a rational juror could have found that the **State** proved the second element of the offense beyond a reasonable doubt.

[5][6] ¶ 6. Regarding the third element of DUI other,

no direct evidence was presented as to **Weil's** driving ability being impaired. However, in reviewing a challenge to legal sufficiency, the **State** is given the benefit of all reasonable inferences that may be drawn from the evidence presented to the jury. *Jerninghan v. State*, 910 So.2d 748, 751(¶ 6) (Miss.Ct.App.2005) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). Officer Sturm testified that when he approached **Weil's** vehicle at the checkpoint, **Weil** sped off. From this, a reasonable inference can be made that **Weil's** judgment was impaired and thus his driving ability was also impaired. We also find that a reasonable juror could have inferred from the testimony of the officers regarding **Weil's** poor balance, bloodshot eyes, slurred speech, and dilated pupils that his driving ability was impaired. Additionally, we do not find that the verdict in this case preponderates heavily against the evidence.

II. Whether the trial court erred in failing to suppress Appellant's statement to the police.

¶ 7. According to Officer Sturm's testimony, after Sturm advised Weil that he was under arrest for DUI, Weil told the officer that he recognized that "he had a problem," and asked if he sought rehabilitation would Sturm "dismiss the charges or help him out in court at a later date." Weil claims that the trial court erred in failing to suppress this statement as an offer to compromise under Mississippi Rules of Evidence Rule 408.

[7] ¶ 8. This Court reviews challenges to the admissibility of evidence under an abuse of discretion standard. *Shaw v. State*, 915 So.2d 442, 445(¶ 8) (citing *Jefferson v. State*, 818 So.2d 1099, 1104(¶ 6) (Miss.2002)). Mississippi Rules of Evidence Rule 408 states in pertinent part,

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

[8] ¶ 9. Weil's argument fails because Rule 408 necessarily contemplates situations in which an offer of compromise is made to or by one who has the authority to compromise the claim or charge in question. Sturm, a law enforcement agent, personally observed **Weil** committing the felony of DUI third offense and executed his duty to take the offender into custody. Sturm had no authority to negotiate the charge against **Weil**. Therefore, this issue lacks merit.

III. Whether the trial court erred in refusing jury instruction D-5.

[9][10] ¶ 10. **Weil** submitted the following jury instruction to the trial court which was refused:

> The Court instructs the jury that by operating a vehicle on the roadways of the **State** of Mississippi, the Defendant gave his consent to a chemical test or tests of his breath, blood or urine for the purpose of determining the presence in his body of any other substance that would impair his ability to operate a motor vehicle.

***405** The standard of review regarding jury instructions is as follows,

> [T]he instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case. However, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case.

Young v. State, 891 So.2d 813, 820(¶ 16) (Miss.2005) (citing *Howell v. State*, 860 So.2d 704, 761 (¶ 203) (Miss.2003)).

[11] ¶ 11. Weil claims that the instruction was erroneously refused because it supported his theory of the case, which was that Weil's blood-alcohol content was within the legal limit and he had not ingested any marijuana. The trial court refused the instruction as being an incomplete statement of the law. We agree. Although the implied consent law permits officers with probable cause to have a driver submit to a breath, urine, or blood test, it does not require them to perform each test. Although Weil passed the Intoxilizer test, he admitted to having smoked marijuana and appeared to be under the influence of an intoxicating substance which impaired his driving ability.

With the level of proof the officers had, it would have been superfluous to have Weil undergo additional testing. Therefore, we find that this issue also lacks merit.

¶ 12. **THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION OF DUI THIRD OFFENSE AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TWO AND ONE-HALF YEARS TO SERVE, TWO AND ONE-HALF YEARS SUSPENDED, AND TWO AND ONE-HALF YEARS POST-RELEASE SUPERVISION IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE AND MYERS, P.JJ., SOUTHWICK, CHANDLER, GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR. IRVING, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.
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to present its case and be heard in its support.... [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.,* at 681–682, 50 S.Ct., at 454–455.

[18] In any event, the Alabama Supreme Court did not hold here that petitioners' suit was of a kind that, under state law, could be brought only on behalf of the public at large. Cf. *Corprew v. Tallapoosa County,* 241 Ala. 492, 3 So.2d 53 (1941) (discussing state statutory quo warranto proceedings). To conclude that the suit may nevertheless be barred by the prior action in *Bedingfield* would thus be to deprive petitioners of their "chose in action," which we have held to be a protected property interest in its own right. See *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429–430, 102 S.Ct. 1148, 1154–1155, 71 L.Ed.2d 265 (1982); *Phillips Petroleum Co. v. Shutts,* 472 U.S., at 812, 105 S.Ct., at 2974–2975 (relying on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *Hansberry v. Lee,* 311 U.S., at 37, 61 S.Ct., at 116. Thus, we are not persuaded that the nature of petitioners' action permits us to deviate from the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution.

[19] Of course, we are aware that governmental and private entities have substantial interests in the prompt and determinative
805
resolution of challenges to important legislation. We do not agree with the Alabama Supreme Court, however, that, given the amount of money at stake, respondents were entitled to rely on the assumption that the *Bedingfield* action "authoritatively establish[ed]" the constitutionality of the tax. 662 So.2d, at 1130. A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party. That general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution.

V

Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property. Accordingly, the judgment of the Alabama Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

517 U.S. 806, 135 L.Ed.2d 89

806
Michael A. WHREN and James L. Brown, Petitioners,

v.

UNITED STATES.

No. 95–5841.

Argued April 17, 1996.

Decided June 10, 1996.

Defendants were convicted in the United States District Court for the District of Columbia, Norma Holloway Johnson, J., of drug offenses, and they appealed. The Court of Appeals affirmed, 53 F.3d 371, and certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved; (2) temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment's prohibition against unreasonable seizures regardless

of whether "reasonable officer" would have been motivated to stop the automobile by a desire to enforce the traffic laws; and (3) balancing inherent in Fourth Amendment inquiry does not require court to weigh governmental and individual interests implicated in a traffic stop.

Affirmed.

1. Arrest ⚿68(4)

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes "seizure" of persons within the meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⚿63.5(6)

Automobiles ⚿349(2.1)

Automobile stop is subject to constitutional imperative that it not be unreasonable under the circumstances; as a general matter, decision to stop automobile is reasonable where police have probable cause to believe that traffic violation has occurred. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⚿58

"Inventory search" is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items, and to protect against false claims of loss or damage. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Searches and Seizures ⚿79

"Administrative inspection" is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme.

See publication Words and Phrases for other judicial constructions and definitions.

5. Searches and Seizures ⚿58, 79

Exemption from need for probable cause and warrant that is accorded to searches made for the purpose of inventory or administrative regulation is not accorded to searches that are not made for those purposes. U.S.C.A. Const.Amend. 4.

6. Automobiles ⚿349(2.1), 349.5(3)

Constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved. U.S.C.A. Const.Amend. 4.

7. Constitutional Law ⚿211(3), 215

Constitution prohibits selective enforcement of the law based on considerations such as race.

8. Automobiles ⚿349(2.1, 17), 349.5(3)

Temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment's prohibition against unreasonable seizures regardless of whether "reasonable officer" would have been motivated to stop the automobile by a desire to enforce the traffic laws. U.S.C.A. Const.Amend. 4.

9. Automobiles ⚿349(2.1)

Balancing inherent in Fourth Amendment inquiry does not require court to weigh governmental and individual interests implicated in a traffic stop. U.S.C.A. Const. Amend. 4.

10. Searches and Seizures ⚿40.1

Probable cause justifies a search and seizure. U.S.C.A. Const.Amend. 4.

Syllabus *

Plainclothes policemen patrolling a "high drug area" in an unmarked vehicle observed a truck driven by petitioner Brown waiting at a stop sign at an intersection for an unusually long time; the truck then turned suddenly, without signaling, and sped off at an "unreasonable" speed. The officers stopped the vehicle, assertedly to warn the driver about

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

traffic violations, and upon approaching the truck observed plastic bags of crack cocaine in petitioner Whren's hands. Petitioners were arrested. Prior to trial on federal drug charges, they moved for suppression of the evidence, arguing that the stop had not been justified by either a reasonable suspicion or probable cause to believe petitioners were engaged in illegal drug-dealing activity, and that the officers' traffic-violation ground for approaching the truck was pretextual. The motion to suppress was denied, petitioners were convicted, and the Court of Appeals affirmed.

Held: The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective. Pp. 1772–1777.

(a) Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred. See, *e.g., Delaware v. Prouse,* 440 U.S. 648, 659, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 660. Petitioners claim that, because the police may be tempted to use commonly occurring traffic violations as means of investigating violations of other laws, the Fourth Amendment test for traffic stops should be whether a reasonable officer would have stopped the car for the purpose of enforcing the traffic violation at issue. However, this Court's cases foreclose the argument that ulterior motives can invalidate police conduct justified on the basis of probable cause. See, *e.g., United States v. Robinson,* 414 U.S. 218, 221, n. 1, 236, 94 S.Ct. 467, 470, n. 1, 477, 38 L.Ed.2d 427. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. Pp. 1772–1774.

(b) Although framed as an empirical question—whether the officer's conduct deviated materially from standard police practices—petitioners' proposed test is plainly designed to combat the perceived danger of pretextual stops. It is thus inconsistent with this Court's cases, which [807] make clear that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. See, *e.g., Robinson, supra,* at 236, 94 S.Ct. at 477. Nor can the Fourth Amendment's protections be thought to vary from place to place and from time to time, which would be the consequence of assessing the reasonableness of police conduct in light of local law enforcement practices. Pp. 1774–1776.

(c) Also rejected is petitioners' argument that the balancing of interests inherent in Fourth Amendment inquiries does not support enforcement of minor traffic laws by plainclothes police in unmarked vehicles, since that practice only minimally advances the government's interest in traffic safety while subjecting motorists to inconvenience, confusion, and anxiety. Where probable cause exists, this Court has found it necessary to engage in balancing only in cases involving searches or seizures conducted in a manner unusually harmful to the individual. See, *e.g., Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1. The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice. Pp. 1776–1777.

53 F.3d 371 (C.A.D.C.1995), affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Lisa Burget Wright, Washington, DC, for Petitioners.

James A. Feldman, Washington, DC, for Respondent.

For U.S. Supreme Court briefs, see:

1996 WL 75758 (Pet.Brief)

1996 WL 115816 (Resp.Brief)

1996 WL 164375 (Reply Brief)

[808] Justice SCALIA delivered the opinion of the Court.

In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable offi-

cer would have been motivated to stop the car by a desire to enforce the traffic laws.

I

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's
809 window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws, including 21 U.S.C. §§ 844(a) and 860(a). At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." App. 5.

Petitioners were convicted of the counts at issue here. The Court of Appeals affirmed the convictions, holding with respect to the suppression issue that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." 53 F.3d 371, 374–375 (C.A.D.C. 1995). We granted certiorari. 516 U.S. 1036, 116 S.Ct. 690, 133 L.Ed.2d 595 (1996).

II

[1, 2] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the
810 meaning of this provision. See *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979); *United States v. Martinez–Fuerte,* 428 U.S. 543, 556, 96 S.Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. See *Prouse, supra,* at 659, 99 S.Ct., at 1399; *Pennsylvania v. Mimms,* 434 U.S. 106, 109, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977) *(per curiam).*

Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. See 18 D.C. Mun. Regs. §§ 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle"); 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); 2200.3 ("No person shall drive a

vehicle . . . at a speed greater than is reasonable and prudent under the conditions"). They argue, however, that "in the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.

811A

[3–5] Petitioners contend that the standard they propose is consistent with our past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas. We are reminded that in *Florida v. Wells,* 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990), we stated that "an inventory search[1] must not be a ruse for a general rummaging in order to discover incriminating evidence"; that in *Colorado v. Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987), in approving an inventory search, we apparently thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation"; and that in *New York v. Burger,* 482 U.S. 691, 716–717, n. 27, 107 S.Ct. 2636, 2651, n. 27, 96 L.Ed.2d 601 (1987), we observed, in upholding the constitutionality of a warrantless administrative inspection,[2] that the search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." But only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative 812regulation, is not accorded to searches that are *not* made for those purposes. See *Bertine, supra,* at 371–372, 107 S.Ct., at 740–741; *Burger, supra,* at 702–703, 107 S.Ct., at 2643–2644.

Petitioners also rely upon *Colorado v. Bannister,* 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980) *(per curiam),* a case which, like this one, involved a traffic stop as the prelude to a plain-view sighting and arrest on charges wholly unrelated to the basis for the stop. Petitioners point to our statement that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants" of the car. *Id.,* at 4, n. 4, 101 S.Ct., at 44, n. 4. That dictum *at most* demonstrates that the Court in *Bannister* found no need to inquire into the question now under discussion; not that it was certain of the answer. And it may demonstrate even less than that: If by "pretext" the Court meant that the officer really had not seen the car speeding, the statement would mean only that there was no reason to doubt probable cause for the traffic stop.

1. An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage. See *South Dakota v. Opperman,* 428 U.S. 364, 369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976).

2. An administrative inspection is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme—for example, unannounced inspection of a mine for compliance with health and safety standards. See *Donovan v. Dewey,* 452 U.S. 594, 599–605, 101 S.Ct. 2534, 2538–2542, 69 L.Ed.2d 262 (1981).

It would, moreover, be anomalous, to say the least, to treat a statement in a footnote in the *per curiam Bannister* opinion as indicating a reversal of our prior law. Petitioners' difficulty is not simply a lack of affirmative support for their position. Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States v. Villamonte–Marquez*, 462 U.S. 579, 584, n. 3, 103 S.Ct. 2573, 2577, n. 3, 77 L.Ed.2d 22 (1983), we held that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid "because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana." We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), we held that [813]a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," *id.*, at 221, n. 1, 94 S.Ct., at 470, n. 1; and that a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches, see *id.*, at 236, 94 S.Ct., at 477. See also *Gustafson v. Florida*, 414 U.S. 260, 266, 94 S.Ct. 488, 492, 38 L.Ed.2d 456 (1973). And in *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978), in rejecting the contention that wiretap evidence was subject to exclusion because the agents conducting the tap had failed to make any effort to comply with the statutory requirement that unauthorized acquisitions be minimized, we said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." We described *Robinson* as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S., at 136, 138, 98 S.Ct., at 1723.

[6, 7] We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

B

[8] Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of "reasonableness." They insist that the standard[814] they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an "objective" one.

But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Why one would frame a test designed to combat pretext in such fashion that the court

cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option. If those cases were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. See, *e.g., Robinson, supra,* at 236, 94 S.Ct., at 477 ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed") (footnotes omitted); *Gustafson, supra,* at 266, 94 S.Ct., at 492 (same). But even if our concern had been only an evidentiary one, [815]petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, cf. *Gustafson, supra,* at 265, 94 S.Ct., at 491; *United States v. Caceres,* 440 U.S. 741, 755–756, 99 S.Ct. 1465, 1473–1474, 59 L.Ed.2d 733 (1979), and can be made to turn upon such trivialities. The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others." Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992), reprinted as Addendum to Brief for Petitioners. This basis of invalidation would not apply in jurisdictions that had a different practice. And it would not have applied even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser.

Petitioners argue that our cases support insistence upon police adherence to standard practices as an objective means of rooting out pretext. They cite no holding to that effect, and dicta in only two cases. In *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), the petitioner had been arrested by the Immigration and Naturalization Service (INS), on the basis of [816]an administrative warrant that, he claimed, had been issued on pretextual grounds in order to enable the Federal Bureau of Investigation (FBI) to search his room after his arrest. We regarded this as an allegation of "serious misconduct," but rejected Abel's claims on the ground that "[a] finding of bad faith is . . . not open to us on th[e] record" in light of the findings below, including the finding that " 'the proceedings taken by the [INS] differed in no respect from what would have been done in the case of an individual concerning whom [there was no pending FBI investigation],' " *id.,* at 226–227, 80 S.Ct., at 690–691. But it is a long leap from the proposition that following regular procedures is some evidence of lack of pretext to the proposition that failure to follow regular procedures *proves* (or is an operational substitute for) pretext. *Abel,* moreover, did not involve the assertion that pretext could invalidate a search or seizure for which there was probable cause—and even what it said about pretext in other contexts is plainly inconsistent with the views we later stated in *Robinson, Gustafson, Scott,* and *Villamonte–Marquez.* In the other case claimed to contain

supportive dicta, *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), in approving a search incident to an arrest for driving without a license, we noted that the arrest was "not a departure from established police department practice." *Id.,* at 221, n. 1, 94 S.Ct., at 470, n. 1. That was followed, however, by the statement that "[w]e leave for another day questions which would arise on facts different from these." *Ibid.* This is not even a dictum that purports to provide an answer, but merely one that leaves the question open.

III

[9] In what would appear to be an elaboration on the "reasonable officer" test, petitioners argue that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here. That balancing, petitioners claim, does not support investigation of minor traffic infractions[817] by plainclothes police in unmarked vehicles; such investigation only minimally advances the government's interest in traffic safety, and may indeed retard it by producing motorist confusion and alarm—a view said to be supported by the Metropolitan Police Department's own regulations generally prohibiting this practice. And as for the Fourth Amendment interests of the individuals concerned, petitioners point out that our cases acknowledge that even ordinary traffic stops entail "a possibly unsettling show of authority"; that they at best "interfere with freedom of movement, are inconvenient, and consume time" and at worst "may create substantial anxiety," *Prouse,* 440 U.S., at 657, 99 S.Ct., at 1398. That anxiety is likely to be even more pronounced when the stop is conducted by plainclothes officers in unmarked cars.

It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. That is why petitioners must rely upon cases like *Prouse* to provide examples of actual "balancing" analysis. There, the police action in question was a random traffic stop for the purpose of checking a motorist's license and vehicle registration, a practice that—like the practices at issue in the inventory search and administrative inspection cases upon which petitioners rely in making their "pretext" claim—involves police intrusion *without the probable cause that is its traditional justification.* Our opinion in *Prouse* expressly distinguished the case from a stop based on precisely what is at issue here: "probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations." *Id.,* at 661, 99 S.Ct., at 1400. It noted approvingly that "[t]he foremost method of enforcing traffic and vehicle safety regulations ... is acting upon observed violations," *id.,* at 659, 99 S.Ct., at 1399, which afford the " 'quantum of individualized suspicion' " necessary to ensure that police[818] discretion is sufficiently constrained, *id.,* at 654–655, 99 S.Ct., at 1396 (quoting *United States v. Martinez–Fuerte,* 428 U.S., at 560, 96 S.Ct., at 3084). What is true of *Prouse* is also true of other cases that engaged in detailed "balancing" to decide the constitutionality of automobile stops, such as *Martinez–Fuerte,* which upheld checkpoint stops, see 428 U.S., at 556–562, 96 S.Ct., at 3082–3085, and *Brignoni–Ponce,* which disallowed so-called "roving patrol" stops, see 422 U.S., at 882–884, 95 S.Ct., at 2580–2582: The detailed "balancing" analysis was necessary because they involved seizures without probable cause.

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, see *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), unannounced entry into a home, see *Wilson v. Arkansas,* 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), entry into a home without a warrant, see *Welsh v. Wisconsin,* 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), or physical penetration of the body,

see *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as |819petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

[10] For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

* * *

Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct. The judgment is

Affirmed.

517 U.S. 820, 135 L.Ed.2d 102

|820**Brian J. DEGEN, Petitioner,**

v.

UNITED STATES.

No. 95–173.

Argued April 22, 1996.

Decided June 10, 1996.

Civil forfeiture proceeding was brought seeking property used in connection with or purchased with proceeds of illegal drug transactions which formed basis of claimant's criminal indictment. The United States District Court for the District of Nevada, Edward C. Reed, Jr., J., 755 F.Supp. 308, ruled that claimant was barred, under fugitive disentitlement doctrine, from entering a defense, and claimant appealed. The Court of Appeals, affirmed, 47 F.3d 1511, and certiorari was granted. The Supreme Court, Justice Kennedy, held that fugitive disentitlement doctrine did not permit district court to enter summary judgement in favor of government in civil forfeiture case, on grounds claimant was outside United States and could not be extradited to face federal drug charges.

Reversed and remanded.

1. Constitutional Law ⚿303
Forfeitures ⚿5

In ordinary case citizen has right to hearing to contest forfeiture of his or her property, a right secured by due process clause, and implemented by federal rule. U.S.C.A. Const.Amend. 14; Supplemental Admiralty and Maritime Claims Rule C(6), 28 U.S.C.A.

2. Forfeitures ⚿5

"Fugitive disentitlement doctrine" does not allow court in civil forfeiture suit to enter judgment against claimant because he or she is fugitive from, or otherwise is resisting related criminal prosecution. U.S.C.A. Const.Amend. 14; Supplemental Admiralty and Maritime Claims Rule C(6), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

708 So. 2d 1358, *; 1998 Miss. LEXIS 120, **

C. L. WILLIAMS v. STATE OF MISSISSIPPI

NO. 96-KA-01227-SCT

SUPREME COURT OF MISSISSIPPI

708 So. 2d 1358; 1998 Miss. LEXIS 120

March 26, 1998, Filed

PRIOR HISTORY:
[1]** DATE OF JUDGMENT: 10/28/96. TRIAL JUDGE: HON. BILLY JOE LANDRUM. COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT.

DISPOSITION:
AFFIRMED.

LexisNexis(TM) HEADNOTES - Core Concepts

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN1] In *Miss. Code Ann. § 63-11-307(7)* (1996), the Mississippi legislature added the following language: for the purpose of determining how to impose the sentence for a second, third or subsequent conviction under this section, the indictment shall not be required to enumerate previous convictions. It shall only be necessary that the indictment state the number of times that the defendant has been convicted and sentenced within the past five years under this section to determine if an enhanced penalty shall be imposed. The amount of fine and imprisonment imposed in previous convictions shall not be considered in calculating offenses to determine a second, third or subsequent offense of this section. *Miss. Code Ann. § 63-11-30(7)* (1996).

Criminal Law & Procedure > Accusatory Instruments > Indictments
[HN2] The Supreme Court of Mississippi specifically overruled *Page v. State, 607 So. 2d 1163 (Miss. 1992)* and *Ashcraft v. City of Richland, 620 So. 2d 1210 (Miss. 1993)*, to the extent they interpret *Miss. Code Ann. § 63-11-30* to require the indictment to specifically show a previous conviction for driving under the influence (DUI) First prior to being convicted for DUI Second and a conviction of DUI Second prior to being convicted for DUI Third.

Criminal Law & Procedure > Appeals > Reviewability
[HN3] The Supreme Court of Mississippi has held that it is the duty of an appellant to provide authority and support of an assignment of error. The court has repeatedly held that failure to cite any authority may be treated as a procedural bar, and it is under no obligation to consider the assignment. If a party does not provide this support, the court is under no duty to consider assignments of error when no authority is cited.

Governments > Legislation > Enactment
[HN4] Defining crimes and prescribing punishments are exclusively legislative functions as a matter of constitutional law. The authority to say what constitutes a crime, and what punishment shall be inflicted is in its entirety a legislative question.

Criminal Law & Procedure > Defenses > Ignorance & Mistake
Governments > Legislation > Interpretation
[HN5] The plain language of *Miss. Code Ann. § 63-11-30* (1996) is clear that a Driving Under the Influence Third offense within a five-year period will subject a violator to a felony charge.

Criminal Law & Procedure > Defenses > Ignorance & Mistake
[HN6] Mistake of law is not a defense to a crime.

Criminal Law & Procedure > Accusatory Instruments > Indictments
[HN7] Indictments must supply enough information to the defendant to identify with certainty the prior convictions relied upon by the state for enhanced punishment.

Criminal Law & Procedure > Accusatory Instruments > Indictments
[HN8] All *Miss. Code Ann. § 63-11-30* (1996) requires in an indictment is for a defendant to be informed of the specific prior convictions relied upon by the state. The unambiguous language of § 63-11-30 is clear that three driving-under-the-influence convictions within a five-year time frame will subject the violator to a felony charge.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
[HN9] Each prior conviction is an element of the felony offense. The state has to prove the prior convictions in order to meet its burden under *Miss. Code Ann. § 63-11-30(2)(c)* (1996) and obtain a conviction for felony driving under the influence.

Governments > Legislation > Interpretation

[HN10] The plain language of *Miss. Code Ann. § 63-11-30(7)* (1996) merely requires two prior driving-under-the-influence (DUI) convictions within a five-year time period of the third DUI charge in order to charge the defendant with felony DUI.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence
Criminal Law & Procedure > Sentencing > Forfeitures
Transportation Law > Private Motor Vehicles > Operator Licenses
[HN11] For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of 5 years, such person shall be guilty of a felony and fined not less than $ 2,000.00 nor more than $ 5,000.00 and shall be imprisoned not less than 1 year nor more than 5 years in the state penitentiary. The law enforcement agency shall seize the vehicle operated by any person charged with a third or subsequent violation of subsection (1) of this section, if such convicted person was driving the vehicle at the time the offense was committed. Such vehicle may be forfeited in the manner provided by *Miss. Code Ann. § § 63-11-49* through 63-11-53. Except as may be otherwise provided by paragraph (e) of this subsection, the Commissioner of Public Safety shall suspend the driver's license of such person for 5 years. The suspension of a commercial driver's license shall be governed by § 63-1-83. *Miss. Code Ann. § 63-11-30(2)(c)* (1996). Section 63-11-30(1) enumerates what actions will subject a person to prosecution for driving under the influence.

Criminal Law & Procedure > Trials
[HN12] There is no requirement that the prosecution of a felony driving under the influence comply with the guidelines for bifurcation found in Miss. Unif. Cir. & County Ct. Prac. R. 11.03.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes
[HN13] *Miss. Code Ann. § 63-11-5(3)* (1996) states the traffic ticket, citation or affidavit issued to a person arrested for a violation of this chapter shall conform to the requirements of § 63-9-21(3)(b). Section 63-9-21(3)(b) reads as follows: the traffic ticket, citation or affidavit which is issued to a person arrested for a violation of the Mississippi Implied Consent Law shall be uniform throughout all jurisdictions in the State of Mississippi. It shall contain a place for the trial judge hearing the case or accepting the guilty plea, as the case may be, to sign, stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised of his right to have an attorney. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit.

Criminal Law & Procedure > Grand Juries > Procedures > Return of Indictments
[HN14] Once a grand jury has convened and found that probable cause exists, there is no further need for a preliminary hearing.

Criminal Law & Procedure > Grand Juries > Procedures > Return of Indictments
[HN15] Miss. Const. § 27 requires that a grand jury return an indictment before a prosecution for a felony may be had.

Criminal Law & Procedure > Accusatory Instruments > Informations
[HN16] No person shall, for any indictable offense, be proceeded against criminally by information, except by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment. Miss. Const. art. 3, § 27.

COUNSEL:
ATTORNEY FOR APPELLANT: ANTHONY J. BUCKLEY.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: BILLY L. GORE, DISTRICT ATTORNEY: JEANNENE T. PACIFIC.

JUDGES:
ROBERTS, JUSTICE. PITTMAN, P.J., SMITH, MILLS AND WALLER, JJ., CONCUR. BANKS, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY PRATHER, C.J., SULLIVAN, P.J., AND McRAE, J.

OPINIONBY:
ROBERTS

OPINION:

[*1359] NATURE OF THE CASE: CRIMINAL - FELONY

BEFORE PITTMAN, P.J., McRAE AND ROBERTS, JJ.

ROBERTS, JUSTICE, FOR THE COURT:

STATEMENT OF THE CASE

P1. C.L. Williams was indicted by the Grand Jury of Jones County, Mississippi, on April 22, 1996, for the crime of felony DUI in violation of *Miss. Code Ann. § 63-11-30(2)(c)*. The offense occurred on January 9, 1996, when Williams was stopped on Interstate 59 in the City of Laurel, Mississippi. Williams submitted to an intoxilyzer test that showed his blood-alcohol content (BAC) to be .191. He had been convicted twice previously for DUI, with the first conviction on August 1, 1991, and the second on July 21, 1993.

P2. Williams' **[**2]** trial was had on August 28, 1996, with the Honorable Billy Joe Landrum presiding. At the conclusion of the evidence the jury returned with a guilty verdict. Judge Landrum sentenced Williams to five years with the Mississippi Department of Corrections, with forty-two months suspended and eighteen months to serve in the penitentiary. He was also placed on forty-two months probation and assessed a fine of $ 2,000, plus court costs.

P3. Williams' motion for a new trial was denied by the trial court. Aggrieved by the decision of the lower court, Williams has appealed to this Court raising the following:

I. WHETHER THE LOWER COURT ERRED IN OVERRULING WILLIAMS' MOTION TO DISMISS THE FELONY CAUSE ON THE GROUNDS THAT THE INDICTMENT WAS LEGALLY INSUFFICIENT TO CHARGE A FELONY.

II. WHETHER THE LOWER COURT ERRED IN OVERRULING WILLIAMS' MOTION FOR A BIFURCATED TRIAL, THEREBY ALLOWING THE TWO UNDERLYING MISDEMEANORS TO BE PUBLISHED AND ARGUED TO THE JURY.

III. WHETHER THE OFFENSE WAS PROPERLY BEFORE THE LOWER COURT BECAUSE THE ARRESTING OFFICER DID NOT ISSUE A UNIFORM STANDARD TICKET FOR THE THIRD OFFENSE.

P4. In light of this Court's recent decisions in ***McIlwain*** **[**3]** ***v. State***, *700 So. 2d 586 (Miss. 1997)* and ***Weaver v. State***, *1997 Miss. LEXIS 624*, No. 95- *KA-01034-SCT, 1997 WL 703057* (Miss. Nov. 13, 1997), we find all three issues are without merit. The lower court's decision is affirmed.

STATEMENT OF THE FACTS

P5. C.L. Williams was traveling along Interstate 59 in the Laurel, Mississippi, on the evening of January 9, 1996. He passed an officer who was checking for speeding vehicles with radar. Officer Bryan Boutwell testified that Williams was driving with his headlights on bright, so Boutwell followed him. Boutwell stated that he observed Williams cross the center line with the left side of his car. Williams was stopped and asked to produce a valid driver's license, which he did not do. Boutwell testified that he could smell the odor of alcohol and requested Williams to get out of the car.

P6. At this point, Boutwell observed Williams to have slurred speech and glossy eyes. Williams failed the hand-held portable intoxilyzer. Officer Doug Hill, the DUI officer on duty, was contacted. Williams was **[*1360]** asked to perform three field sobriety tests. In the opinions of the officers, Williams failed these tests. Williams was placed under **[**4]** investigative detention for possible DUI, and transported to the Laurel Police Station. Having been previously convicted of two misdemeanor DUIs, Williams was charged with third offense felony DUI after he registered .191 BAC on the printout of the CMI Intoxilyzer 5000 test.

P7. At the close of the State's case-in-chief, Williams moved for a directed verdict on the ground the evidence was insufficient as a matter of law to sustain a conviction of felony DUI. Williams claimed the proof only demonstrated two first offense misdemeanors and that by virtue of the charges alleged in the indictment he was entitled to a bifurcated trial. The defense presented no witnesses, and Williams did not testify in his own behalf. The jury found Williams guilty of felony DUI. Judge Landrum imposed the sentence and assessed the fine and court costs. Williams' motion for a new trial was overruled. Williams now seeks relief from the lower court's decision by appealing to this Court.

DISCUSSION OF THE ISSUES

I. WHETHER THE LOWER COURT ERRED IN OVERRULING WILLIAMS' MOTION TO DISMISS THE FELONY CAUSE ON THE GROUNDS THAT THE INDICTMENT WAS LEGALLY INSUFFICIENT TO CHARGE A FELONY. [5]**

P8. Williams made a pre-trial motion and a motion for a directed verdict at the close of the State's case on the ground that the face of the indictment alleged nothing more than a misdemeanor based on this Court's holding in ***Page v. State***. Both motions were overruled. On appeal, Williams argues that the indictment fails to specifically charge that he had been convicted of anything other than two first offense violations of the implied consent law within five years prior to the felony charge.

P9. Williams contends the indictment must show as a condition precedent to the third offense felony charge that the defendant has been charged and convicted specifically of a "first offense" and then a "second offense". He states that the indictment fails to allege the requisite elements of the felony offense.

P10. In response to this Court's decisions in ***Page v. State***, *607 So. 2d 1163 (Miss. 1992)* and ***Ashcraft v. City of Richland***, *620 So. 2d 1210 (Miss. 1993)*, the Legislature in 1994 enacted a new paragraph to *Miss. Code Ann. § 63-11-30*. 1994 Miss. Laws ch. 340, § 4, approved March 14, 1994, effective June 6, 1994. [HN1] In subsection (7) the Legislature **[**6]** added the following language:

For the purpose of determining how to impose the sentence for a second, third or subsequent conviction under this section, the indictment shall not be required to enumerate previous convictions. It shall only be necessary that the indictment state the number of times that the defendant has been convicted and sentenced within the past five (5) years under this section to determine if an enhanced penalty shall be imposed. The amount of fine and imprisonment imposed in previous convictions shall not be considered in calculating offenses to determine a second, third or subsequent offense of this section.

Miss. Code Ann. § 63-11-30(7) (1996).

P11. [HN2] This Court specifically overruled ***Page*** and ***Ashcraft*** to the extent they interpret the statute to require the indictment to specifically show a previous conviction for DUI First prior to being convicted for DUI Second and a conviction of DUI Second prior to being convicted for DUI Third. ***McIlwain***, *700 So. 2d at 589.* "The obvious intent of this statute is to remove repeat DUI offenders from our streets. This goal will be better accomplished by simply reading the clear language **[**7]** of the statute." ***Id.***

P12. Williams argues that ***Page*** stands firmly behind URCCC 7.06, which supersedes the statutes. Williams provides this Court with no authority for this argument. **[*1361]** [HN3] "This Court has held that it is the duty of an appellant to provide authority and support of an assignment." ***Hoops v. State***, *681 So. 2d 521, 526 (Miss. 1996);* ***Kelly v. State***, *553 So. 2d 517, 521 (Miss. 1989).* "This Court has repeatedly held that failure to cite any authority may be treated as a procedural bar, and it is under no obligation to consider the assignment." ***Weaver***, *1997 Miss. LEXIS 624,* *10, *1997 WL 703057,* *4, *citing* ***McClain v. State***, *625 So. 2d 774, 781(Miss. 1993).* "If a party does not provide this support this Court is under no duty to consider assignments of error when no authority is cited." ***Hoops***, *681 So. 2d at 526;* ***Hewlett v. State***, *607 So. 2d 1097, 1106 (Miss. 1992).*

P13. Williams' failure to cite authority clearly invokes the procedural bar; thus, this issue is barred. Alternatively, his argument is without merit. This Court has recently stated that [HN4] "defining crimes and prescribing punishments are exclusively legislative **[**8]** functions as a matter of constitutional law." ***Weaver***, *1997 Miss. LEXIS 624,* *10, *1997 WL 703057,* at *4 (*citing* ***Winters v. State***, *473 So. 2d 452, 456 (Miss. 1985)).* "'The authority to say what constitutes a crime, and what punishment shall be inflicted is in its entirety a legislative question ....'" ***Id.*** (*quoting* ***Winters***, *473 So. 2d at 456).*

P14. In order to comply with the language in *Miss. Code Ann. § 63-11-30(7)*, the indictment merely had to state "'the number of times that the defendant has been convicted and sentenced within the past five (5) years under this section to determine if an enhanced penalty shall be imposed'" in order to charge Williams with felony DUI. ***Weaver***, *1997 Miss. LEXIS 624,* *9, 11, *1997 WL 703057,* *4 (*quoting Miss. Code Ann. § 63-11-30(7)*). The indictment charging Williams was filed on April 22, 1996, well after the amendment to *Miss. Code Ann. § 63-11-30* became effective. The indictment stated Williams "has two or more convictions for violation of *Section 63-11-30(1) of the Mississippi Code* of 1972. Said offenses all have occurred within a five year period of this offense, evidence of which is attached hereto by court abstracts as Exhibits 1 and **[**9]** 2." The abstracts showed the charge, date of violation and court date, and the judgment and the sentence imposed by the court in each of Williams' two previous DUI convictions. "The attachment of the abstracts provide a clear and concise statement of the charges as required by both the DUI indictment case law and the Rules of Circuit Court Practice." ***McIlwain***, *700 So. 2d at 589.* The indictment in the case presently before the Court complied with the requirements of *Miss. Code Ann. § 63-11-30(7)*, as well as this Court's subsequent holding in ***McIlwain***.

P15. Williams asserts that the Constitution demands that he be made aware that his continued violations would increase the punishment for the offense. He contends that adding paragraph seven to *Miss. Code Ann. § 63-11-30* cannot circumvent the constitutional requirements described in ***Benson v. State***, *551 So. 2d 188, 196 (Miss. 1989).*

P16. This Court has found these arguments unpersuasive. [HN5] "The plain language of *Miss. Code Ann. § 63-11-30* is clear that a DUI-Third offense within a five year period will subject a violator to a felony charge. [HN6] Mistake of law is not a defense to a crime." ***Weaver***, **[**10]** *1997 Miss. LEXIS 624,* *7, *1997 WL 703057,* *3. Williams, like Weaver, makes a very liberal reading of this Court's decision in ***Page***. "What ultimately is constitutionally important is that 'sufficient information. . .[be] afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment ....'" ***Page***, *607 So. 2d at 1169* (*quoting* ***Benson***, *551 So. 2d at 196).* Despite this Court's partial overruling of ***Page*** and ***Ashcraft***, the Court reiterated that [HN7] indictments must "'supply enough information to the defendant to identify with certainty the prior convictions relied upon by the State for enhanced punishment.'" ***McIlwain***, *700 So. 2d at 589* (*quoting* ***Benson***, *551 So. 2d at 196).*

P17. As the Court stated in ***Weaver***, [HN8] "all this requires is for [a defendant] to be informed of the specific prior convictions relied upon by the State." ***Weaver***, *1997 Miss. LEXIS 624,* *9, **[*1362]** *1997 WL 703057,* *4. This information was explicitly and specifically enumerated in the indictment charging Williams with felony DUI. Further, this Court in ***Weaver*** held that the unambiguous language of *Miss. Code Ann.* **[**11]** *§ 63-11-30* is clear that three DUIs within a five year time frame will subject the violator

to a felony charge. ***Id.*** *1997 Miss. LEXIS 624,* *7, at *3. Williams cannot say he was not made aware of the prior convictions relied upon by the State to charge him with felony DUI.

P18. After a thorough review of the record, we find that the indictment charging Williams with felony DUI was sufficient according to the requirements of *Miss. Code Ann. § 63-11-30(7)* and this Court's recent decisions in ***McIlwain*** and ***Weaver***. Williams was properly informed of the charge against him, along with the underlying prior convictions that raised his third offense DUI to a felony charge. The trial court did not err by overruling Williams' motion to dismiss the felony cause of the indictment.

II. WHETHER THE LOWER COURT ERRED IN OVERRULING WILLIAMS' MOTION FOR A BIFURCATED TRIAL, THEREBY ALLOWING THE TWO UNDERLYING MISDEMEANORS TO BE PUBLISHED AND ARGUED TO THE JURY.

P19. Williams' attorney argued to the lower court that *Miss. Code Ann. § 63-11-30(7)* made the statute one of enhanced punishment. Therefore, he argues on appeal that the court should have followed URCCC 11.03, which **[**12]** requires bifurcation. Williams states that since the underlying misdemeanors no longer have to be specifically charged, a felony DUI trial should be bifurcated.

P20. In ***Page***, this Court held that "'each prior conviction is an element of the felony offense, and each must be specifically charged.'" ***McIlwain***, *700 So. 2d at 588* (*quoting* ***Page***, *607 So. 2d at 1168).* This Court did not completely overrule its holding in ***Page*** by its decision in ***McIlwain***. The language used by the Court was as follows:

> Today we specifically overrule ***Page v. State***, *607 So. 2d 1163 (Miss. 1992)* and ***Ashcraft v. City of Richland***, *620 So. 2d 1210 (Miss. 1993)* **to the extent** that they interpret the statute to require that the indictment must specifically show a previous conviction for DUI First prior to being convicted for DUI Second and a conviction of DUI Second prior to being convicted for DUI Third.

700 So. 2d at 589 (emphasis added).

P21. This Court's holding in ***Page*** was twofold; first, the Court stated that each prior conviction is an element of the felony offense. ***Page***, *607 So. 2d at 1168.* Second, **[**13]** the Court held that each prior conviction must be specifically charged. ***Id. McIlwain*** overruled the holding in ***Page*** only to the extent that it required "the indictment must specifically show a previous conviction for DUI First prior to being convicted for DUI Second and a conviction of DUI Second prior to being convicted for DUI Third." ***McIlwain***, *700 So. 2d at 589.* The first part of the Court's holding in ***Page*** is still good law. In other words, [HN9] each prior conviction is still an element of the felony offense. ***Page***, *607 So. 2d at 1168.* The State has to prove the prior convictions in order to meet its burden under *Miss. Code Ann. § 63-11-30 (2)(c)* and obtain a conviction for felony DUI. ***Weaver***, *1997 Miss. LEXIS 624,* *19, *1997 WL 703057,* *7.

P22. We find that the dissenters in ***Weaver*** misinterpreted the holding by the Court in ***McIlwain***. Chief Justice Lee wrote, "this Court ostensibly abandoned the notion that each previous conviction was an element of the felony charge." ***Weaver***, *1997 Miss. LEXIS 624,* *22, *1997 WL 703057,* *9. That is not the holding in ***McIlwain***. There, the Court interpreted *Miss. Code Ann. § 63-11-30(7)* **[**14]** to no longer require a DUI First conviction prior to a DUI Second and a DUI Second prior to a DUI Third. [HN10] The plain language of *Miss. Code Ann. § 63-11-30(7)* merely requires two prior DUI convictions within a five year time period of the third DUI charge in order to charge the defendant with felony DUI. ***McIlwain***, *700 So. 2d at 589.* The **[*1363]** Court did not overturn the portion of ***Page*** that holds each prior conviction to be an element of the felony offense.

P23. Justice Banks dissented to the majority's holding in ***Weaver*** as well. He wrote, " § 63-11-30(2)(a-e) prescribe penalties, not elements, and they provide for enhanced penalties for subsequent convictions. The elements of felony DUI are contained in § 63-11-30(1)." ***Weaver***, *1997 Miss. LEXIS 624,* *24-25, *1997 WL 703057,* *10. *Miss. Code Ann. § 63-11-30(2)(c)* contains the **elements** of felony DUI.

> [HN11] For ***any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony*** and fined not less than Two Thousand Dollars ($ 2,000.00) nor more than Five Thousand Dollars ($ 5,000.00) and **[**15]** shall be imprisoned not less than one (1) year nor more than five (5) years in the State Penitentiary. The law enforcement agency shall seize the vehicle operated by any person charged with a third or subsequent violation of subsection (1) of this section, if such convicted person was driving the vehicle at the time the offense was committed. Such vehicle may be forfeited in the manner provided by Sections 63-11-49 through 63-11-53. Except as may be otherwise provided by paragraph (e) of this subsection, the Commissioner of Public Safety shall suspend the driver's license of such person for five (5) years. The suspension of a commercial driver's license shall be governed by Section 63-1-83.

Miss. Code Ann. § 63-11-30(2)(c) (1996) (emphasis added). *Miss. Code Ann. § 63-11-30(1)* (1996) enumerates what actions will subject a person to prosecution for a DUI. As stated earlier, "defining crimes and prescribing punishments are exclusively legislative functions as a

matter of constitutional law." ***Weaver***, *1997 Miss. LEXIS 624*, *10, *1997 WL 703057*, *4. What constitutes (i.e. the elements) a felony DUI is defined by the legislature in *Miss. Code Ann. § 63-11-30(2)(c)* (1996).

P24. ***McIlwain*** **[**16]** overruled ***Page*** to the extent that it required numbers to be attached to the prior DUI convictions. The language in ***McIlwain*** does not overrule the entire holding of this Court in ***Page***. Two prior convictions within a five year time period of the third charge must be proven by the State in order to obtain a conviction for felony DUI. [HN12] There is no requirement that the prosecution of a felony DUI comply with the guidelines for bifurcation found in URCCC 11.03. Therefore, the lower court did not commit error by denying Williams' motion for a bifurcated trial.

III. WHETHER THE OFFENSE WAS PROPERLY BEFORE THE LOWER COURT BECAUSE THE ARRESTING OFFICER DID NOT ISSUE A UNIFORM STANDARD TICKET FOR THE THIRD OFFENSE.

P25. Williams contends that because there was no third offense DUI ticket issued charging him with a third DUI under the Implied Consent Law his case should be reversed and rendered. He argues that under *Miss. Code Ann. § 63-11-5(3)* the traffic ticket issued to a person arrested for violation of the implied consent law shall conform to the requirements of *Miss. Code Ann. § 63-9-21(3)(b)*. Williams claims that because he was not issued **[**17]** a Uniform Traffic Ticket he was not properly charged with a felony DUI.

P26. Williams misconstrues the statutes and the prior decisions of this Court. [HN13] *Miss. Code Ann. § 63-11-5(3)* (1996) states "the traffic ticket, citation or affidavit issued to a person arrested for a violation of this chapter shall conform to the requirements of Section 63-9-21(3)(b)." *Miss. Code Ann. § 63-9-21(3)(b)* (1996) reads as follows:

> The traffic ticket, citation or affidavit which is issued to a person arrested for a violation of the Mississippi Implied Consent Law shall be uniform throughout all jurisdictions in the State of Mississippi. It shall contain a place for the trial judge hearing the case or accepting the guilty plea, as the case may be, to sign, stating **[*1364]** that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised of his right to have an attorney. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit.

P27. The State responds that the basis for Williams' prosecution was not a Uniform Ticket Citation. Williams was charged with **[**18]** a felony by an indictment returned on April 22, 1996, by the Jones County grand jury. This indictment served several purposes.

1. The indictment furnished Williams with a description of the charge against him to enable him to prepare a defense and availed him of his conviction or acquittal to protect him from further prosecution for the same crime.

2. The indictment informed the court of the facts alleged so that it could decide whether they were sufficient in law to support a conviction if it should be obtained.

3. The indictment served to guard against malicious, groundless prosecution.

See ***Jefferson v. State***, *556 So. 2d 1016, 1021 (Miss. 1989).*

P28. This Court has held [HN14] "once a grand jury has convened and found that probable cause exists, there is no further need for a preliminary hearing." ***Mayfield v. State***, *612 So. 2d 1120, 1129 (Miss. 1992).* The ***Mayfield*** analysis applies here. A statutorily sufficient indictment, as measured by *Miss. Code Ann. § 63-11-30(7)*, goes beyond the requirements of *Miss. Code Ann. § 63-11-5(3)* and § 63-9-21(3)(b). An indictment in compliance with these statutes and the recent holdings by this Court in **[**19]** ***McIlwain*** and ***Weaver*** is sufficient to charge a defendant with felony DUI. If an indictment serves as the basis for the prosecution for a felony DUI, a traffic ticket, citation, or affidavit is not required.

P29. Further, prior holdings of this Court suggest that an indictment must be returned by a grand jury prior to prosecution of a defendant for a felony. [HN15] Section 27 of the Mississippi Constitution requires that a grand jury return an indictment before a prosecution for a felony may be had. ***State v. Sansome***, *133 Miss. 428, 438, 97 So. 753, 754 (1923);* ***Box v. State***, *241 So. 2d 158, 159 (Miss. 1970)*, overruled on other grounds by ***Jefferson v. State***, *556 So. 2d 1016 (Miss. 1989).*

P30. However, the Court would note that this could have been done by criminal information pursuant to art. 3, § 27 of the Miss. Const. That section provides [HN16] "no person shall, for any indictable offense, be proceeded against criminally by information, except. . .by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment." Miss. Const. art. 3, § 27. In this particular case pursuant **[**20]** to *Miss. Code Ann. § 63-11-5(3)* (1996), under the Implied Consent Law, "the traffic ticket, citation, or affidavit issued to a person arrested for a violation of this chapter shall conform to the requirements of Section 63-9-21(3)(b)." *Miss. Code Ann. § 63-9-21(3)(b)* (1996) provides:

The traffic ticket, citation or affidavit which is issued to a person arrested for a violation of the Mississippi Implied Consent Law shall be uniform throughout all jurisdictions in the State of Mississippi. It shall contain a place for the trial judge hearing the case or accepting the guilty plea, as the case may be, to sign, stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised of his right to have an attorney. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit.

P31. The indictment was sufficient to charge Williams with felony DUI. Williams' third argument is without merit. The lower court was correct in denying Williams' pre-trial motion and motion for directed verdict **[*1365]** claiming the felony was not properly before **[**21]** the court.

CONCLUSION

P32. The indictment charging Williams with felony DUI was sufficiently drafted. This Court's holding in ***McIlwain*** requires the indictment to enumerate two prior convictions for DUI within a five year time period of the third DUI offense in order to charge the defendant with felony DUI.

P33. The lower court did not err by denying Williams' motion to bifurcate the proceedings. The two prior convictions for misdemeanor DUI are still requirements of the felony and must be alleged in the indictment. ***McIlwain*** only did away with the interpretation of *Miss. Code Ann. § 63-11-30* that required the indictment to specifically show a DUI First conviction prior to a DUI Second conviction and a DUI Second conviction prior to a DUI Third conviction.

P34. The indictment sufficiently charged Williams with felony DUI. An indictment must be issued by a grand jury before a prosecution for a felony can be had. The indictment went well beyond the information requirements of a traffic ticket, citation, or affidavit; any of which would have sufficed to have served as a basis for Williams' prosecution. We find the felony charge was properly **[**22]** before the court.

P35. The lower court did not commit error in the proceedings below. Williams was sufficiently charged and found guilty of felony DUI, and the lower court decision is affirmed.

P36. CONVICTION OF FELONY DUI AND SENTENCE OF FIVE (5) YEARS AS AN HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FORTY-TWO (42) MONTHS SUSPENDED, LEAVING EIGHTEEN (18) MONTHS TO SERVE, WITH CONDITIONS, AND PAYMENT OF A FINE OF TWO THOUSAND ($ 2,000.00) DOLLARS AND COURT COSTS AFFIRMED.

PITTMAN, P.J., SMITH, MILLS AND WALLER, JJ., CONCUR. BANKS, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY PRATHER, C.J., SULLIVAN, P.J., AND McRAE, J.

CONCURBY:
BANKS

CONCUR:

BANKS, JUSTICE, CONCURRING:

P37. I concur in the result. For the reasons expressed in my dissent in ***Weaver v. State***, *1997 Miss. LEXIS 624*, No. 95-*KA-01034-SCT, 1997 WL 703057* (Miss. Nov. 13, 1997), I do not agree with the majority's analysis of Issue II regarding the proper way to handle what I view as the enhanced penalty present in our DUI statutory scheme. I remain unconvinced that each prior conviction is an element of felony DUI. I am fortified in that view by the realization **[**23]** that this Court has specifically embraced that position in the rule regarding amendment of indictments.

P38. As I stated in ***Weaver,*** *Miss. Code Ann. § 63-11-30(2)* (a-e) prescribe penalties, not elements, and they provide for enhanced penalties for subsequent convictions. The elements of felony DUI are contained in *Miss. Code Ann. § 63-11-30(1)*. We have said as much in the rules. The plain language of URCCC 7.09, concerning amendment of indictments, makes it readily apparent that prior offenses used to charge the defendant as an habitual offender are not substantive elements of the offense charged. Remarkably, the rule cites as an example the very statute at issue in ***Weaver*** and in the present case:

> All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement ***(e.g., driving under the influence, Miss. Code Ann. § 63-11-30)***.

URCCC **[**24]** 7.09 (emphasis added).

P39. I concur in the result reached by the majority only because the circumstances **[*1366]** here, in contrast to those in ***Weaver,*** clearly indicate that the error in failure to bifurcate the proceedings is harmless.

PRATHER, C.J., SULLIVAN, P.J., AND McRAE, J., JOIN THIS OPINION.