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Jenkins v. State

102 So. 3d 1063 (Miss. 2012), as modified on denial of reh'g (Dec. 20, 2012)

- On January 27, 2007, O observed D stumbling down the street. O approached & noticed D's speech was slurred, breath smelled of alcohol, eyes were bloodshot, and balance was unsteady.
- O noticed a white tissue in D's mouth. A white rock was in the tissue. D grabbed & swallowed a loose rock while being arrested. Two additional rocks were found in the tissue, which were submitted to the MS Crime Lab. D was arrested for public intoxication and possession of a controlled substance.

Jenkins v. State

- At trial, the State called Gross--the associate director of the crime lab & manager of Gulf Coast Regional Laboratory to testify regarding the identification of the controlled substance. Gross was the supervisor & technical reviewer on the case. He was called to testify b/c technician who performed the testing was on indefinite medical leave.
- D objected arguing this person did not conduct actual examination.

Jenkins v. State

- Outside presence of jury, Court heard testimony from Gross as to his involvement in the testing process.
- Trial Court found that his participation as the technical reviewer was sufficient to satisfy the 6th Amendment Rt. to Confrontation. Court accepted him as an expert witness & he was allowed to testify regarding test results & chain of custody.

Jenkins v. State

- D found guilty of possession of a controlled substance & was sentenced to life as a habitual offender.
- Jenkins appealed citing the confrontation clause.
- COA affirmed & SCT granted D's petition for writ of certiorari to examine whether the trial court erred by allowing the laboratory supervisor to testify in place of the analyst who had performed the substance testing on the cocaine?

Jenkins v. State

- G/R: 6th Amendment guarantees D the rt. to confront & cross examine the witnesses against him. *See* U.S. Constitution amend. VI; Miss. Const. art. 3, § 26. The USSCT has held 6th Amend. Confrontation Clause bars admission of "testimonial statement" made by a witness who does not appear at trial unless witness is unavailable AND D had prior opportunity to cross-examine. *See* ***Crawford v. Washington***, 541 U.S. 36 (2004).
- Forensic lab reports created specifically to serve as evidence against accused at trial are among the core class of testimonial statements governed by the Confrontation Clause. ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009).

Jenkins v. State

- 2 part test to determine if a witness satisfies D's Rt. To Confrontation: (1) whether witness has "intimate knowledge" of the particular report, even if witness was not primary analyst or did not perform analysis firsthand; (2) whether witness was "actively involved in production" of the report at issue. Court requires a witness to be knowledgeable about both the underlying analysis & the report itself to satisfy the protections of the Confrontation Clause. See ***Conners v. State***, 92 So. 3d 676 (Miss. 2012).

Jenkins v. State

- In ***McGowan v. State***, 859 So. 2d 320 (Miss. 2003), the Court held "when the testifying witness is a court-accepted expert in the relevant field who participated in the analysis *in some capacity, such as by performing procedural checks*, then the testifying witness's testimony does not violate a defendant's Sixth Amendment rights."(emphasis added).
- Here, the Court made a comment that they do not always require the particular analyst who conducted the test to testify b/c they recognize that some tests involve multiple analysts. Gross satisfied the ***McGowan*** test b/c he had "intimate knowledge" about the underlying analysis & the report prepared by the primary analyst.

Jenkins v. State

- The Court held that "A supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was 'actively involved in the production of the report and had intimate knowledge of the analyses even though [he or] she did not perform the tests first hand.'" ***McGowan***, 859 So. 2d at 340.
- Affirmed.

Missouri v. McNeely

569 U.S._ (April 17, 2013)

- 2:08 am officer stops D for speeding and crossing center line
- Officer noticed blood shot eyes, slurred speech and odor of alcoholic beverage on D's breath
- D admitted to drinking a "couple" of beers
- D did poorly on SFST's and refused a PBT
- On the way to the station, D indicated that he would be refusing the breath test
- The officer decided to bypass the station and take him directly to the hospital for a blood draw

Missouri v. McNeely

- D refused to provide a blood sample and the officer directed the lab technician to draw his blood
- The blood sample was obtained at 2:35 am – BAC .015%
- Officer later testified that:
- He made no effort to obtain a warrant even though he was "sure" a prosecutor was on call and
- He had no reason to believe that a judge would be unavailable
- The only reason he did not get a warrant is because he did not think he had to

Missouri v. McNeely

- The ONLY issue that the USSC considered was whether the "natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the 4th Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."
- The court did not consider, and the State did not argue, that exigent circumstances existed because a warrant could not have been obtained within a reasonable amount of time.
- Majority opinion would not identify all the relevant factors to determine the reasonableness of acting without a warrant (i.e., they left us hanging).

Missouri v. McNeely

- The natural dissipation of alcohol in the blood stream does not constitute exigency in EVERY case sufficient to conduct a blood test without a warrant.
- The courts will have to determine on a case-by-case basis whether an officer should have obtained a warrant rather than seeking a warrantless blood draw.
- Majority stressed getting a warrant is the default and a warrantless draw will need to be justified by more than just loss of evidence due to dissipation of alcohol.

Missouri v. McNeely

What they said:

- Look to "totality of circumstances"
- Can an officer "reasonably" obtain a warrant "without significantly undermining the efficacy of the search"
- The case is not evaluated on 20/20 hindsight
- "BAC evidence…..naturally dissipates over time in a gradual and relatively predictable manner."
- Delay would be present anyway because of the time it takes to transport the suspect to the hospital SO…
- Gave hypo: warrant process will not significantly increase the delay because one officer would be getting a warrant while the other is transporting to the hospital

Missouri v. McNeely

What they said:

- Advances in technology allow for warrants to be obtained quickly (especially when the evidence to establish PC is "simple")
  - Discussed telephonic warrants
  - Discussed "standard-form" warrants
  - Court acknowledged that advanced technology will not eliminate all delay from warrant process
- "Time consuming formalities" may interfere with getting a warrant quickly
- Judges availability may prevent a warrant from being obtained (cited the need for late night warrant)

Missouri v. McNeely

What they said:

- If technological developments are such that a warrant can be obtained quickly, and considering that "BAC evidence is lost gradually and relatively predictably," a warrant should be obtained
- BUT:
  - Long periods of time that pass will "raise questions about the accuracy of the calculation." (referring to back extrapolation)
  - SO….delay in getting a warrant is relevant

Missouri v. McNeely

Factors To Consider:

- Look to totality of circumstances
- Alcohol dissipation still the most relevant factor
  - How much evidence will be sacrificed?
  - Has enough time passed to diminish value of using back extrapolation?
  - What facts are known to officer?
    - Is suspect fully absorbed?
    - How much has suspect eaten, start/stop time of drinking etc.
    - Is info from suspect reliable?
    - Emphasize the fact that most officers will never know with any reliable certainty any of these facts

Missouri v. McNeely

Factors To Consider:

- Time it takes for typical DUI investigation
- Transport to jail
- Reading of Implied Consent
- Speaking with attorney or other
- Observation period(s)
- Breath test sequence
- Time that has already passed until the point of refusal plus the time it would take to get a warrant.

Missouri v. McNeely

Factors To Consider:

- How fast can a warrant be obtained
  - What technology is available?
  - Telephonic warrant?
  - Ease of warrant – standard-form warrant?
  - Is a judge available?
  - Has the warrant process started and there are factors that are causing delay in obtaining the warrant?
  - Can one officer create the warrant while the other is transporting to the hospital?
- If a crash is involved, the time it takes to investigate the scene and transport suspect to hospital

Missouri v. McNeely

Factors to consider:

- The court confirmed that the facts in *Schmerber* were sufficient to justify exigency:
  - Officer goes to scene of crash shortly after it happens
  - Smells odor of alcohol, sees bloodshot, watery and glassy eyes
  - Officer sees suspect again at the hospital within 2 hours of crash and saw similar impairment
  - Court holds that the time needed to investigate the scene, take suspect to hospital, and dissipation was sufficient
  - So….most crash cases should be easier to argue (remember *Deeds* case?)

Freeman v. State

NO. 2012-KM-00192-SCT (May 30, 2013)

- On September 8, 2008, O stopped vehicle driven by D. The facts are contested, but O recorded stop on video. As a result of the stop, D was arrested for DUI. O administered Intoxilyzer test and D's BAC was .09. D was charged with DUI 1st offense, careless driving, speeding, and littering.
- Before trial, D subpoenaed all of the police records including the video tape from the in-car camera. Neither prosecutor or officer produced the video tape of the traffic stop. However, at trial, the video was shown and admitted into evidence. D was convicted. At the end of the trial, *D requested the video to be preserved pending appeal to county court.*

Freeman v. State

- Appeal was continued b/c O was on active military duty. *D specifically noted in agreeing to the continuance that he wished all evidence to be preserved, specifically the video of the arrest, and that he did not waive any objection/rights if any such evidence is missing and/or destroyed.*
- D requested & State responded to discovery request replying that video had been destroyed. While O was on military leave laptop w/the recording was housed and kept at DPS. Upon O's return , it was discovered the hard drive on the laptop on which the tape was stored was corrupted. The file was unable to be restored. D filed a motion to dismiss the case which the trial court denied.
- D argued the video would have shown that the facts were not as O had testified. D also argued certification of the radar equipment was not a certified copy showing the radar unit had been calibrated correctly.
- County Ct. found D guilty of speeding, littering and DUI 1st offense.

Freeman v. State

- D appealed to circuit ct. which affirmed county ct.'s ruling. D appealed arguing:
- (1) whether the destruction of the video tape, which was the subject of a court order requiring its preservation, deprived D of his due process rts. & his rt. to present a defense pursuant to the 6th Amendment & Art. 3, Sections 14 & 26 of the MS Const.;
- (2) whether DUI & speeding verdicts were not supported by suff. evi. or were ag. the overwhelming wt. of the evidence;
- (3) whether the arresting officer lacked probable cause to stop D; &
- (4) whether the arresting officer lacked probable cause to arrest D for DUI.

Freeman v. State

- D maintained the destroyed video showed D's vehicle abiding by traffic laws, showed his speech was not slurred, & showed his coordination was not impaired.
- O testified that he observed D's vehicle which appeared to have been running off the road. O witnessed D swerve and once he got behind D, he estimated D's speed by following him. B/c he was exceeding the posted speed limit of 55 mph, O initiated radar which displayed D's speed at 69 mph. O testified he then activated blue lights and his video and pulled D over. O stated D threw a cup under the vehicle, that he smelled presence of alcoholic beverage, and that when he asked D if he had been drinking, he stated two beers. O testified D's speech was slurred and coordination impaired. PBT was administered which indicated presence of alcohol--# was so high that it indicated a false positive as well as he smelled the presence of mouthwash. A 2nd PBT was administered, and the indicator went down, but was still above limit (D contended that it was below .08). Both agreed that O showed the disputed reading on the video.

Freeman v. State

- Court held the destruction of the video tape did violate D's due process rts., evi. supported conviction for speeding, & O had PC to stop D.
- Destruction of Videotape – G/R: Pursuant to Due Process Clause of 14th Amendment "criminal prosecutions must comport with prevailing notions of fundamental fairness…D must be afforded a meaningful opportunity to present a complete defense. *See* ***California v. Trombetta***, 467 U.S. 479 (1984).

Freeman v. State

- State has duty to preserve evidence that might be expected to play a significant role in suspect's defense. ***Id.*** at 488-89. This duty applies to impeachment evidence. ***United States v. Bagley***, 473 U.S. 667 (1985). Impeachment evidence is favorable to D "so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." ***Id.***
- G/R: In destruction of evidence cases, Court applies a 3 part test to determine whether the State's loss of evidence violates a D's due process rights: (1) evidence in question must possess exculpatory value that was apparent before the evidence was destroyed; (2) evidence must be of such a nature that the D would be unable to obtain comparable evidence by other reasonably available means; & (3) prosecution's destruction of evidence must have been in bad faith. See ***State v. McGrone***, 798 So. 2d 519 (Miss. 2001).

Freeman v. State

- Here, Court stated there is a unique factual scenario that is not adequately addressed by the typical application of the 3 part test. D & cty. ct. deemed the evidence material to the defense. Cty. ct. even **ordered** the State to preserve the evidence. Thus, the State was under an affirmative duty via a court order to preserve the video.
- Both O & D agree video would clarify the material disputed facts.
- Court found that the loss of the video while the State was under a court order to preserve the video clearly impaired D's defense.
- In ***Arizona v. Youngblood***, 488 U.S. 51 (1988), the USSCT expressed concern with imposing "on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution.

Freeman v. State

- Here, the Court stated that this was clearly not a case which preserving the destroyed video would have imposed unreasonable requirements on the police to employ guesswork as to what should be preserved, or to preserve an unreasonable quantity of evidence (i.e., unlike most cases on the issue in which destruction was a matter of routine in accord with their normal practice). The evidence in question was specifically requested, and was the subject of a court order to preserve.
- Court found that D did everything in his power to have video copied and preserved yet the State inconceivably ignored discovery requests & violated the court order imposing an affirmative duty to preserve the video (State failed to give a legitimate reason as to why they violated the court order).
- Court further held that the O's self contradictory testimony & his admission that the video would resolve multiple disputed material facts, the destruction of the objective video undermined the confidence in the outcome of the trial.

Freeman v. State

- Sufficiency of Evidence – D argued State did not put forth suff. evi. to support speeding conviction b/c: (1) O not qualified to operate specific radar device at issue & (2) Radar Unit Certification allowed into evi. was inadmissible hearsay & violated D's right to confrontation. Court held sufficient evidence supported speeding conviction.
- State failed to obtain a certified copy of the Radar Unit Certification; however, cty. ct. admitted the uncertified certification as a business record under MRE 803(6) w/O as the custodian.
- D argued that O is not a proper custodian to authenticate the uncertified document.
- Court held that admission of the uncertified Radar Unit Certification was improper. O clearly did not qualify a custodian or qualified witness as he does not have knowledge of the contents of the Radar Unit Certification—he was not involved in the preparation of the certification nor did he possess the proper knowledge to be able to testify as to its accuracy.

Freeman v. State

- B/c the record contained no other evi. regarding the radar device's accuracy, the reading was inadmissible; however, sufficient evidence existed to support the speeding conviction---O testified he estimated D's speed by *following or pacing* him.
- "While we strongly encourage the State to properly introduce radar readings in the future, under the specific facts of this case, the testimony regarding Officer Patrick's estimations of Freeman's speed by following him is sufficient evidence to uphold the speeding conviction."
- Affirmed in Part; Reversed in Part & Rendered.

Ludwig v. State

NO. 2012-KM-00461-COA (June 4, 2013)

- On 3/17/10 (St. Patrick's Day) around 8:00 p.m., O was arriving at the scene of a traffic stop to assist a deputy when O noticed a truck pass dangerously close to the deputy, who was standing at the driver's side window of the vehicle he had stopped. O followed the close-passing truck & observed it run off of the road & onto the shoulder. O then activated blue lights, & saw the truck run off of the road & onto the shoulder a 2nd time.
- D pulled over & O approached car, informing D that he was pulled over for running off the road. O testified that he smelled alcoholic beverage coming fr/D's vehicle & D's eyes were glassy & bloodshot. D admitted he had consumed 2 beers, 2 shots of whiskey, & a margarita in addition to a burrito, chips, & salsa at a Mexican restaurant. He also later admitted to O he had been drinking fr/around 5:30 pm until 7:45 pm.
- O called the deputy (who was a DUI officer), fr/the prior stop to assist him. O administered PBT on D--tested positive for presence of alcohol. Deputy performed SFSTs (HGN, OLS, WAT) & administered another PBT. Deputy arrested D for careless driving & DUI. D was taken to jail. At 9:27pm & 9:29 pm, Intoxilyzer 8000 test was administered, which indicated D's BAC to be .10%.

Ludwig v. State

- D pled nolo contendere in justice court & appealed to county court. At trial, Dr. Hayne testified for D as an expert in clinical, anatomic, and forensic pathology, and calculated that if D's BAC was .10% around 9:30 pm, then based upon relevant data, D's BAC would have been .067% at 8:15 pm & .083% at 8:30 p.m.
- D was convicted of both charges in county court, and sentenced to 48 hrs. in jail, suspended, with 2 yrs. probation in addition to completion of MASEP & ordered to pay a $900 fine. On the careless driving charge, D was ordered to pay a $25 fine. D appealed to circuit court which affirmed the county ct.'s ruling.

Ludwig v. State

- D appealed arguing: county ct. erred in allowing the calibration certificate of the Intoxilyzer 8000 into evidence, there was no PC to stop his car, & evidence insufficient to support conviction for DUI.
- Authenticity of Calibration Certificate – D argued State failed to prove the person certifying the truthfulness of the Intoxilyzer 8000 certificate of calibration had reviewed the document; thus, the signature on the certificate was not authentic.
- The calibration certificates contained a stamp with Maury Phillip's signature (section chief of the Implied Consent Section of the MS Crime Lab). D argued that because the certificates were stamped by a third party, the certificates were not self-authenticating & thus, were inadmissible.

Ludwig v. State

- "[I]f the calibration certificates bear the seal of the crime lab and the signature of the one attesting to the truth of their contents, then the certificates are considered self-authenticating." ***Pulliam v. State***, 856 So. 2d 461 (Miss. Ct. App. 2003).
- "Nothing in the rules suggests that when an official public record has been admitted, that the party offering the document still must prove the authority of the person named in the certificate." ***Callahan v. State***, 811 So. 2d 420 (Miss. Ct. App. 2001).

Ludwig v. State

- PC to stop D's car - D claimed O's account was untrustworthy b/c: (1) Deputy did not notice D's truck as it passed close by him and (2) Deputy was unaware O witnessed D's truck run off the road.
- Miss. Code Ann. § 63-3-1213 – Careless Driving - "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."

Ludwig v. State

- G/R: "The decision to stop an automobile is reasonable where the police have probable cause to believe that traffic violation has occurred." ***When v. U.S.***, 517 U.S. 806, 810 (1996).
- "Carelessness is a matter of reasonable interpretation, based on a wide range of factors." ***Henderson v. State***, 878 So. 2d 246 (Miss. Ct. App. 2004).
- Court found that O's testimony, which provided that D's truck passed so close to the deputy that the mirror could have struck the officer and then ran off the road onto the shoulder, was sufficient to find PC for a traffic stop based on careless driving.

Ludwig v. State

- Sufficiency of Evi. – D argued evidence insuff. to support DUI conviction.
- D argued he may have been intoxicated at 9:27 p.m., but he was not over the legal limit while he was driving approximately one hour earlier (referring to Dr. Hayne's "Retrograde Extrapolation" theory).
- There is no requirement that the State must prove a D's exact BAC at the time of the incident, only that D's BAC was equal to or above the legal limit. See ***Smith v. State***, 942 So. 2d 308 (Miss. Ct. App. 2006)(BAC test was relevant and admissible despite being administered over four hours after accident).

Ludwig v. State

- D was charged under both 63-11-30 (1)(a) & (c)- thus, a defendant can be charged & convicted for driving under the influence by the testimony of a witness who observed the defendant exhibiting signs of intoxication, or by the results of the Intoxilyzer. Regardless, the Court held that D's admission of alcohol consumption and the officer's testimony were sufficient to find D guilty of DUI—O stated D admitted to drinking 2 beers, 2 shots of whiskey, & 1 margarita. Deputy testified D smelled like alcohol, speech was slurred, his face was flushed, he swayed while standing, and his eyes were bloodshot & watery. After conducting SFSTs on D, Deputy decided to arrest him for DUI.
- Court held there was sufficient evidence to find D guilty of DUI.
- Affirmed.

Huhn v. City of Brandon

NO. 2012-KM-00490-COA (June 4, 2013)

- On 10/24/10 around 2:00 a.m., O observed D's vehicle swerving, prompting O to initiate traffic stop. O noticed strong smell of alcohol coming fr/vehicle as he approached. D admitted to having one beer earlier in the evening. D stated the reason for swerving was that she leaned over to retrieve some personal property in the vehicle.
- O then administered SFSTs:
  - HGN – O testified that D failed
  - WAT - Showed 4 of 8 signs of impairment
  - HTT – Failed, not because of impairment, but, rather, a misunderstanding of the test's instructions
  - OLS – Passed
- D refused PBT. D was then arrested for DUI & careless driving. D refused breath test at the police station as well. D was found guilty in municipal court, as well as, on appeal to county court. Circuit court affirmed conviction.

Huhn v. City of Brandon

- D appealed her denial of her motion for JNOV and also argued the county ct. judge applied the incorrect legal standard.
- Common Law DUI, which "can be proven in cases where the defendant's blood-alcohol results are unavailable but there is sufficient evidence that the defendant operated a vehicle under circumstances indicating [her] ability to operate the vehicle was impaired by the consumption of alcohol." ***Istiphan v. City of Madison***, 81 So. 3d 1200 (Miss. Ct. App. 2012).
- Court held that O's testimony, which described D swerving across the road, running a red light, entering an improper lane, the odor of alcohol, admission of consuming one beer, and the SFST results were sufficient to support a conviction for common law DUI.

Huhn v. City of Brandon

- It is erroneous for D to argue on appeal that the conviction must be reversed b/c the co. ct. improperly relied on the standard for sufficiency of the evidence instead of the standard for conviction. Court held that it was clear from the county court judge's extensive analysis of the evidence and the applicable law that the D's guilt was well-founded both on the law and the evidence.
- Affirmed.

Drabicki v. City of Ridgeland

NO. 2012-KM-00529-COA (June 25, 2013)

- On 3/28/09 O noticed D's tires spinning as he passed through an intersection. O reached a speed of 87 MPH in order to stop him. D hit a puddle of water during the pursuit, causing D to lose control of his vehicle and nearly hit another vehicle. Once stopped, O smelled alcohol when he opened D's door and ordered him to exit the vehicle. O administered PBT, which tested positive for alcohol. When asked how much he had to drink, D responded he had 2 drinks.
- O administered several SFSTs:
  - HGN: 6/6
  - WAT: 4/8—could not maintain balance during instructions, started before instructions completed, missed heel-to-toe, & made improper turn
  - OLS: 2/4—swayed & used arms for balance
- O arrested D and took him to Ridgeland PD--Intoxilyzer was not working, so O took D to Madison PD to administer the test. D consented to the Intoxilyzer and BAC was .16. D found guilty in municipal ct. & county ct. On appeal, the circuit ct. affirmed the conviction.

Drabicki v. City of Ridgeland

D argued on appeal the Intoxilyzer results should not have been admitted into evidence, that the circuit ct. erred in considering untruthful testimony fr/the arresting officer, and that the circuit ct. erroneously denied his motion to strike the appellant's brief.

- Admission of Intoxilyzer results – D argued cty. ct. erred in admitting the Intoxilyzer results because doing so violated his right to confrontation under the Sixth Amendment. D cited ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), for the proposition that the Confrontation Clause requires the in-person testimony of the calibrating officer. The Court disagreed.

Drabicki v. City of Ridgeland

- The MS SCT in ***Matthies v. State***, 85 So.3d 838 (Miss 2013) stated that even in the wake of ***Melendez-Diaz***, "records pertaining to Intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment."
- The analysts in ***Melendez-Diaz*** would have testified to the actual chemical content of the substance, making the certificates of such analysis *testimonial*. However, in ***Matthies***, the calibration officer would only have testified to the accuracy of the testing device, and as a result, did not have to appear in court, as in the present case.

Drabicki v. City of Ridgeland

- Authentication of Calibration Certificate – D agued that the court erred in finding that the calibration certificate was genuine and authentic as required under MRE Rule 902 b/c the signature of the calibrating officer was stamped and not literally signed.
- D questioned the stamped signature of Maury Phillips, the section chief of the Implied Consent Section of the MS Crime Lab. Court held "Phillip's stamped signature includes a statement that only attests that the document is a true and correct copy of the original document that is on file in his office. Phillip's signature does not attest to the accuracy of the instrument or truthfulness of the contents of the certificate." Further, "there is no prohibition under this rule against the custodian's signature being stamped on the certified document .(emphasis added).
- The certificate at issue here meets the requirements of Rule 902(1) b/c it contains both the MS state seal and Bickley's attesting signature.
- D did not object on the basis that the copy of the certificate was not the best evidence under MRE Rule 1002. Court held D is procedurally barred from arguing on appeal that Rule 902(4) was the proper rule for admission of the certificate.

Drabicki v. City of Ridgeland

- Officer's Testimony – D argued conviction should be overturned b/c officer gave false testimony. D argued O lied about the weather conditions on the night D was arrested, D's near collision w/another vehicle during the pursuit, and the identity of the officer who asked D whether he had had anything to drink.
- Court found nothing in the record or on the video to suggest that the O gave false testimony.

Drabicki v. City of Ridgeland

- Motion to Strike Appellee's Brief – D argued that b/c appellee's brief was filed well outside of the time limit of Rule 31(b) of the MS Rules of Appellate Procedure, the brief should have been stricken from the record at the circuit ct. level, and his conviction should have been reversed.
- Rule 31(b) states that "[i]f an appellee fails to file the appellee's brief as required, such brief, if later filed, may be stricken from the record on the motion of the appellant or on the motion of the appropriate appellate court.
- The rule places the decision to strike the appellee's brief within the court's discretion. The rule does not provide that the conviction of the appellant should be reversed.

Drabicki v. City of Ridgeland

- Our supreme ct. has held that an appellate court has 2 options when the appellee has not filed a brief—the failure can either be held as a confession of error & the conviction can be reversed when the record is complicated or large in volume, or the court may disregard the appellee's failure to file a brief and affirm the conviction when there is a "sound and unmistakable basis…upon which the judgment may be safely affirmed." ***Miller v. Pannell***, 815 So. 2d 1117 (Miss. 2002).
- Here, record is not complicated or large in volume, and the basis of the conviction is unmistakable.
- Affirmed.

Dorsey v. State

NO. 2012-CA-00109-COA (June 11, 2013)

- 2/9/08 – D stopped & charged DUI
- 11/30/09 – D indicted for Felony DUI
- Indictment alleged 2 prior DUI convictions:
  - 9/21/06 - Madison Co. Justice Court (offense date: 1/15/06)(appealed to Madison Co. Court on 10/6/06 & D was convicted again).
  - 10/10/06 - Ridgeland Municipal Court (offense date: 2/15/06.

Issue on Appeal: Insufficient evidence to support his Felony DUI conviction?

Dorsey v. State

- D argued his first DUI conviction from justice court is "non-existent/did not exist" b/c it was appealed to cty. court & a judgment of guilt was rendered. Therefore, he claimed "his conviction in the Justice Court was gone for all of the intents and purposes of the law[,]" and the indictment was fatally defective.
- G/R: Indictment should contain "the essential facts constituting the offenses charged and shall fully notify the defendant of the nature and cause of the accusation." ***Wilkins v. State***, 57 So.3d 26 (Miss.Ct.App. 2010).
- Here, while it might be more correct to list the county court DUI conviction that resulted from the appeal of the justice court, the indictment was sufficient to inform D of the offense that constituted his prior DUI conviction.

Dorsey v. State

- "By [the] appeal to the circuit court from the judgment of the justice of the peace convicting the appellant, the judgment of the justice was superseded. But it was not vacated. It remained in force, liable to be merged in the judgment of the circuit court when rendered in the trial of the case anew by that court on the appeal." ***Ex parte Caldwell***, 62 Miss. 774 (1885).
- D's 9/21/06 conviction in justice ct. did not become nonexistent; rather, it merged w/the county cts.'s conviction on appeal.
- Affirmed.

Blakeney v. State

NO. 2012-KM-00615-COA

Facts:

- Brien Blakeney was convicted of DUI in Starkville Municipal Court. Blakeney appealed to the Oktibbeha County Circuit Court. All parties agreed to a nonadjudication, including the judge; however, the judge entered an order finding D guilty.
- Blakeney appealed arguing the trial court erred when it failed to sign the order of nonadjudication when Blakeney qualified for the ruling and all parties had agreed to the nonadjudication.

Blakeney v. State

- Mississippi Code Annotated section 63-11-30(3)(g) states: "The court shall have the discretion to rule that a first offense of this subsection by a person under the age of twenty-one (21) years shall be nonadjudicated. Such person shall be eligible for nonadjudication only once."
- D was eligible for a nonadjudication & upon review of the trial transcript, it was clear the trial judge agreed to the nonadjudication. Entry of an order finding D guilty was obviously in error.
- Reverse & remand for resentencing.

Carter v. State

NO. 2012-KM-00674-COA (July 16, 2013)

- D was found guilty of DUI 2nd in municipal ct. D appealed to cty. ct. & after a *trial de novo*, a jury convicted him of DUI 2nd. D appealed conviction to circuit ct. alleging that the court erred in overruling his *motion in limine* to prohibit the prosecution from mentioning his prior DUI. Circuit Ct. affirmed.

- D cited ***Strickland v State***, 784 So.2d 957 (Miss. 2001), where the Court stated that "prior convictions are only relevant as to the sentencing and should only be admitted during a separate sentencing phase."

Carter v. State

Issue:

- Did the county court err in overruling the *motion in limine* to prohibit the prosecution from mentioning Carter's prior DUI conviction in front of the jury?

- Since the ***Strickland*** case, the MS SCT has held that a "prior conviction is a necessary element of second-offense DUI." ***Lyle v. State***, 987 So. 2d 948 (Miss. 2008).

- "Since the State is required to prove all the essential elements of a crime charged, it [is] not unfair prejudice to present evidence of prior DUI convictions." ***Smith v. State***, 950 So. 2d 1056, (Miss Ct. App. 2007).

- Affirmed.

Merritt v. State

NO. 2012-KA-00809-COA (July 16, 2013)

Facts:
D hit a tow truck driver & carried him a few car-lengths after she struck both the wrecker and him. Various witnesses described D's car as speeding into the accident & then speeding away. Police chased D. D ran a red light, got onto an ramp to the interstate, crossed a ditch back to the frontage road, sideswiped a barricade, braked hard, & eventually stopped a short distance later. D then stepped out of the vehicle & surrendered. According to O, D reeked of alcohol, had bloodshot eyes, slurred speech, & admitted to having 14 drinks that night. D did not take a breath test nor was a blood test performed. The wrecker driver survived, but was in the hospital for months & had permanent injuries.

- D contended at trial she was trying to avoid a car door when she sideswiped the wrecker. She also claimed she was distracted by her companion in the vehicle who was in hysterics after she was thrown out of the club for stripping on the dance floor.

Merritt v. State

- On appeal, D argued: (1) court erred in admitting D's out-of-court statement to O regarding how much she had had to drink that night; (2) court erred in allowing O to be recalled as a witness after he was not able to identify D when first called; (3) court erred in the jury instructions.

Merritt v. State

- Miranda Warnings - O gave D Miranda warning before D made the comment on how much she had been drinking. D had agreed that she understood the warning. "Oral Miranda warnings and waivers are effective if proven to the satisfaction of the trier of fact." ***Taylor v. State***, 789 So. 2d 787 (Miss. 2001).

- Allowing Witness to Be Recalled - "It is within the trial court's discretion to decide whether to allow a witness to be recalled to the stand." ***Ellis v. State***, 661 So. 2d 177 (Miss. 1995). No abuse of discretion was shown.

- Jury Instructions - Evidence of refusal is admissible as evidence of guilt, as provided by MCA § 63-11-41. The refusal of the breath test is a "… physical act rather than a communication" and it does not violate D's 5th amendment rights against self incrimination. ***Ricks v. State***, 611 So 2d 212. Additionally, the SCT has held the jury must be instructed that its verdict is to be unanimous--this was accomplished by instruction C-4. ***Edlin v. State***, 523 So. 2d 42 (Miss. 1988).

Affirmed.

Porter v. State

NO. 2012-CA-00440-COA
(PCR, DUI Manslaughter, DUI Mayhem)

- In Nov. 2006, D was driving in left lane of a 4-lane hwy., when she collided with another vehicle, which was being driven in the right lane. The collision killed one of other driver's daughters & injured the other.
  - D consented to a blood draw, which was taken approx. 3 hours later.
  - Tests revealed that D's blood contained:
    - 2.9micrograms/mL of Carisprodal,
    - 5.9 micrograms/mL of Meprobamate, and
    - 99 nanograms/mL of Hydrocodone.

- D pled guilty to DUI manslaughter & DUI mayhem in Marion Co. Circuit Court & was sentenced to 20 yrs., w/15 yrs. to serve, followed by 5 yrs. PRS on the DUI Death, and 20 yrs. w/5 yrs. to serve, followed by 15 yrs. PRS—5 yrs. of which were to be reporting PRS. These sentences were to run consecutive.

Porter v. State

- D subsequently filed for PCR & claimed ineffective assistance of counsel, insufficient factual basis for her guilty plea, circuit ct. erred when it amended her sentencing order after the term of court during which she had pled guilty, & she was not the proximate cause of the accident.
- COA only addressed the claim of an insufficient factual basis for the guilty plea.

Porter v. State

- Rule 8.04(A)(3) of the Uniform Circuit and County Court Rules provides that "[b]efore the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that ***there is a factual basis for the plea***." (emphasis added). "A sufficient factual basis requires an evidentiary foundation in the record which is sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." ***Smith v. State***, 86 So. 3d276 (Miss.Ct.App. 2012). "We review the entire record to discern whether a sufficient factual basis exists. ***Id***. at 280-81.
- A D can establish a factual basis for a guilty plea simply by pleading guilty; however, the guilty plea "must contain factual statements constituting a crime or accompanied by independent evidence of guilt. ***Hannah v. State***, 943 So. 2d 20 (Miss. 2006).
- Finally, an appellate court is not limited to a review of a D's plea transcript when determining if a factual basis existed for a guilty plea. ***Boddie v. State***,875 So. 2d 180 (Miss. 2004). Instead, the Court may review the record as a whole. ***Id***.

Porter v. State

- Here, there must be a sufficient factual basis that D (1) was impaired by controlled substances prior to the accident; (2) was operating a vehicle in Marion County, Mississippi; and (3) performed a negligent act that cause Alyssa's death and Carmen's serious bodily injury. *See* ***Joiner v. State***, 835 So.2d 42 (Miss. 2003).
- In Smith's guilty plea hearing, the prosecution discussed the evidence that it was prepared to present in the event that Smith had opted to go to trial. However, there was nothing from which the Court may have inferred D's guilt. D's guilty-plea petition did not include sufficient details to satisfy the standard. On D's guilty-plea petition, the following statement appeared: "I plead 'GUILTY' and request the [court] to accept my plea of 'GUILTY' and to have entered my plea of 'GUILTY' on the basis of (state involvement in crime." A blank line followed the statement. On the blank line, D or D's attorney wrote: "under the influence of prescription medication." There is no reference to any of the other necessary elements of the crime.

Porter v. State

- During the guilty-plea hearing, the State did not recite the evidence that it was prepared to present nor did the D discuss the facts of the wreck. Although the State attached affidavits to its response to D's PCR motion, and those affidavits indicated that D was driving erratically before the collision, those affidavits were never discussed before D pled guilty or during the guilty-plea hearing. Nor did the State introduce the affidavits into the record when D pled guilty. Further, the indictments did not include specific factual details—Count I merely accused D of causing Alyssa's death "in a negligent manner" and Count II did not even allege that D committed a negligent act that caused Carmen's serious bodily injury.
- Court found there was simply no factual basis to support a conclusion that D performed a negligent act that caused the death of Alyssa or the injury of Carmen. Therefore, the circuit ct.'s decision to dismiss D's PCR motion was clearly erroneous.
- Reversed & remanded D's charges to circuit court's active trial docket.

Questions/Comments

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