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Beasley v. State

2012-KM-00644-COA (October 29, 2013)
DUI & Speeding

- D convicted in justice ct. for DUI & speeding on 8/31/02. D appealed. Circuit ct. set trial for 8/29/03, but the case was not tried & continued multiple times over a period of nearly 10 yrs. w/o a trial ever occurring. On 2/23/07, circuit ct. issued writ of procedendo, but then issued an order reinstating the appeal finding the writ was in error & placed the case on docket for 12/12/08. D & counsel failed to appear & court issued 2nd writ of procedendo. D filed a motion to reinstate appeal to active docket, & circuit ct. granted the motion finding the case was erroneously remanded to justice ct. stating D & D's counsel's failure to appear on 12/12/08 was through no fault of their own.
- Over next 3 yrs., the trial was reset 3 more times, with the last trial setting for 3/16/12 . Again, D failed to appear & circuit ct. issues a writ of procedendo. And again, D filed a motion to set aside the writ asserting he had tried to continue the case through the county prosecutor as well as the court administrator.
- "A writ of procedendo is issued by a court of superior jurisdiction to a court of inferior jurisdiction to enforce the lower court's judgment." Ferrell v. State, 785 So. 2d 317, 319 (Miss. Ct. App. 2001)(citing Pool v. State, 176 Miss. 514, 515, 169 So. 886, 887 (1936)).

Beasley v. State

2012-KM-00644-COA (October 29, 2013)

DUI & Speeding

- "The authorities are clear that the appellate court will not disturb the discretionary action of the trial court in dismissing an appeal when it appears that the appellant's failure to appear was due to wilful neglect, where he acted in bad faith, or otherwise trifled with the court, or where the prosecution was prejudiced." Kennard v. State, 240 Miss. 488, 493, 127 So. 2d 848, 850 (1961)).
- D argued the circuit ct. did not have jurisdiction to issue a writ of procedendo b/c once D perfected appeal, justice ct.'s judgment was vacated & there was no standing judgment to which the writ would apply. D further argued that even if circuit ct. did have jurisdiction to issue the writ, it made no finding consistent w/state or federal law citing an appropriate reason for entering the writ in his absence.
- COA held the justice ct. judgment was not vacated as a result of D simply filing an appeal; thus, circuit ct. had jurisdiction to issue the writ of procedendo. However, b/c of the "unique facts of this case" the court erred in issuing the writ.

Beasley v. State

2012-KM-00644-COA (October 29, 2013)
DUI & Speeding

- Court found D almost immediately upon receipt of the Order setting the case for trial on 3/16/12, D's counsel contacted the staff atty. for the presiding judge to inquire about a continuance b/c he had a conflict with the trial date. Staff atty. told D's counsel to contact county prosecutor to coordinate rescheduling. D claimed he tried unsuccessfully numerous times, and again contacted presiding judge & explained the situation. Judge told him to contact court administrator who told him to submit motion for continuance along with an order & she would give to the judge.
- Court held that while D failed to appear on the day the case was set for trial, the record reflects that his failure to do so was not due to wilful neglect or an act of bad faith. Further, there was no evi. that D trifled w/the court or that the prosecution was prejudiced. Court found D and his atty. made a good faith effort to appear on the previous court dates & did not wilfully refuse to appear on court on 3/16/12.
- **Based on D counsel's conversation w/presiding judge & court adm., Court found D's counsel could reasonably assume he would be granted a continuance of trial setting after he sent the motion and order to the court adm.**
- Reversed & Remanded for further proceedings.

Andino v. State

2012-KA-00917-COA (October 29, 2013)
DUI Death

- On 1/15/11, Root, her husband, and her mother, were driving through an intersection when they were struck by D who made a left turn crashing into their vehicle. D was subsequently convicted of felony DUI causing death & sentenced to 20 yrs. W (who had been in front of Root) testified he had just come through the intersection and the light was green. W heard the collision, looked behind him and saw Root's car had been hit by D (light still green). W did not see actual crash take place. O testified that D was asked several times for DL & proof of insurance, but D would not respond. D finally replied he did not speak English and needed to go to the hospital. O smelled a 'very high concentration" of alcoholic beverage on D's breath. O got a subpoena to draw D's blood---BAC .14%.
- Casino video surveillance showed D arrived at casino around 4:50 a.m., went to bat at 5:00 a.m., & consumed 6 beers in a 2 hour period. Last footage showed D at bar at 7:24 a.m. No footage between 7:25 a.m. & 11:35 a.m. Footage showed D leaving casino at 11:35 a.m.
- D appealed arguing there was insufficient evidence to prove intoxication at the time of wreck or that he negligently caused the victim's death.

Andino v. State

2012-KA-00917-COA (October 29, 2013)
DUI Death

- MS SCT has held when considering whether evi. sufficient to sustain a conviction in the face of a motion for dv or for jnov, the critical inquiry is whether the evi. shows b/y a reasonable doubt that the accused committed the act charged, and that he did so under circumstances that every element of the offense existed. Bush v. State, 895 So.2d 836, 843 (Miss. 2005). When there is a challenge to the sufficiency of the evidence, appellate cts. view the evidence in the light most favorable to the prosecution. Id.
- Elements of DUI homicide -- 63-11-30(1)(5):
  - (1) operating a vehicle while under the influence of an intoxicating liquor, or operating a vehicle with .08 or more…in person's blood; &
  - (2) causing the death of another in a negligent manner.
- Forensic toxicologist testified examination of D's blood resulted in BAC of .14%.
- D argued that testimony by D expert rendered the evidence of D's intoxication insufficient. D's expert testified D's gender & weight made it unlikely that D was under the influence of alcohol at the time of the crash based on the equations and formulas he used. However, O's testimony & D's blood test are evidence D was intoxicated at the scene of the crash. Additionally, there was video evidence that D consumed 6 beers, and D admitted that he had 2 beers prior to arriving at the casino.

Andino v. State

2012-KA-00917-COA (October 29, 2013)
DUI Death

- D further argued b/c State did not have an accident reconstructionist there was no conclusive evi. re: his negligence. D cited no authority to support his assertion, thus he is procedurally barred fr/making this argument. Procedural bar notwithstanding, D's argument is w/o merit. Both Root & W testified that Root has right-of-way at the intersection b/c light was green as Root approached it as well as when she crossed through it. Root testified D came out of nowhere & turned into her.
- D argued b/c his blood test was not timely & b/c Root was not tested, law enforcement violated 63-11-8: "The operator of any motor vehicle involved in an accident that results in a death shall be tested for the purpose of determining alcohol content or drug content . . . ***within two hours of such accident, if possible***.

Andino v. State

2012-KA-00917-COA (October 29, 2013)
DUI Death

- "[T]he Legislature's inclusion of the "if possible" language did not deem the two-hour time frame 'necessary to ensure the integrity of the results.' When there is no evidence that the officers 'deliberately delayed the test' or that the defendant was "prejudiced by the delay," [the court will] presume that the officers complied with the statute." Teston v. State, 44 So. 3d 977, 987 (¶21) (Miss. Ct. App. 2008).
- Here, no evi. O deliberately delayed the test, as O acted immediately in obtaining a subpoena & traveled to get D's blood sample. Also no evidence that D was prejudiced by this delay.
- Additionally, there was no evidence to support a finding of probable cause for DUI of Root. Absent consent, a warrant, or a search incident to arrest, there was no basis for testing the other driver's blood. *See* McDuff v. State, 763 So.2d 850, 856 (Miss. 2000).
- Based on the above, Court held D's guilty verdict was not against the overwhelming weight of the evi. or that allowing the verdict to stand would sanction an unconscionable justice.
- Affirmed.

Buckner v. State

2012-CA-00868-COA (October 15, 2013)
Leaving the Scene of an Accident & Aggravated DUI

- Buckner was indicted for 1 ct. leaving the scene of an accident & 3 cts. of aggravated DUI. Charges stemmed fr/single car crash on 4/26/08. Crash resulted in the death of 1 passenger & caused injuries to 2 other passengers. D pled guilty to all 4 cts. of indictment on 1/28/09. D was sentenced on 2/2/09 to 5 yrs. for Ct. I (leaving the scene), 20 yrs. for Ct. II (aggr. DUI), 10 yrs. on Ct. III (aggr. DUI), & 10 yrs. on Ct. IV (aggr. DUI).
- D filed PCR motion challenging the constitutionality of being charged w/a separate count of aggr. DUI for each victim & argued that it subjected him to Double Jeopardy. Trial ct. denied motion finding 2004 amendment to § 63-11-30(5) rectified unconstitutionality of the statute as previously found by MS SCT in Mayfield v. State, 612 So.2d 1120, 1128 (Miss. 1992). D appealed.

Buckner v. State

2012-CA-00868-COA (October 15, 2013)
Leaving the Scene of an Accident & Aggravated DUI

- “When reviewing a [trial] court’s decision to deny a [motion’ for post-conviction relief, this Court will not disturb the trial court’s factual findings unless they are found to be clearly erroneous. However, where questions of law are raised, the applicable standard of review is de novo. Graves v. State, 822 So.2d 1089,1090 (Miss.Ct.App. 2002)(citing Pickett v. State, 751 So.1031, 1032 (Miss. 1999).
- Court held trial ct. correctly concluded that MS Legislature’s 2004 amendment of § 63-11-30(5) explicitly allowed separate convictions for each injury in a single accident, as interpreted by the Court of Appeals: In examining the statute at issue, the language states in pertinent part that a person in violation of this statute “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 . . . for each such death, mutilation, disfigurement or other injury.” Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).
- Court found no ambiguity in the statute & no violation of DJ. Affirmed.

Laney v. State

2012-CP-00596-COA (November 26, 2013)
DUI Manslaughter

- On 10/7/07, Dairo & D were involved in a car crash & Dairo was killed. D spent several weeks in the hospital. O stated he got into ambulance & noticed a “strong smell of an alcoholic beverage in the back of the vehicle which he believed was coming fr/D. O asked D what happened & if she was driving, but D responded she did not remember. O walked the path of the crash & noticed several beer containers. A/R also tried to talk to D at hospital, but stated she could not respond b/c she was heavily medicated. A/R instructed nurse to draw blood which showed BAC of .14%. At the time of the crash, Os could not determine who was driving. Dairo’s ex-wife (W) identified Dairo’s body, & later went to see D in the hospital. W told O that D confessed to her that she was driving when the crash occurred. W also said Dairo did not like to drive & it was his custom to remove his shoes (this account matched evidence found at the scene). Several months after D released fr/hospital, she was arrested & charged w/DUI Manslaughter.
- At trial, D’s son testified he was at hospital when V’s ex-wife tried to talk to D and D was unable to respond. He testified D later told him she could not remember who was driving. D expert testified fr/the info. gathered fr/A/R, the crash report, and photos of scene, it would be impossible to tell who was driving the car.

Laney v. State

2012-CP-00596-COA (November 26, 2013)
DUI Manslaughter

- On 8/19/09, D was convicted of DUI manslaughter & sentenced to 25 yrs. D filed a motion for JNOV, or, in the alternative, a new trial, which the circuit ct. denied on 9/14/09. On 12/6/11, D filed a motion requesting permission to proceed with an out-of-time appeal which was also denied. Trial ct. found D was not indigent & had ability to hire legal counsel for appeal. Furthermore, ct. found that it appeared that 4 attys. had been involved for some level of representation since D's indictment, and that nearly 3 yrs. had passed since D's conviction; thus she was not entitled to relief according to § 99-39-5 & § 99-39-7.
- D appealed arguing the circuit ct. erred in denying her motion to proceed with an out-of time appeal b/c she had difficulties finding an attorney to perfect her appeal after her trial atty. withdrew fr/the case (wanted more $).
- § 99-39-5(1)(i) (Supp. 2013) allows D to file a motion for PCR arguing she is entitled to an out-of-time appeal.
- However, M.R.A.P. 4(e) provides that, "if a defendant has filed a timely motion for a JNOV or a new trial, the time for filing the notice of appeal runs from the date of the entry of the order denying the motion." Further, M.R.A.P. 4(h) allows the circuit court to reopen the time for appeal if the defendant did not receive notice of the entry of judgment or order within twenty-one days of its entry and no party would be prejudiced. A petition to reopen the time for appeal must be made within 180 days of the entry of the judgment or order. The Court has held a circuit ct. is w/o discretion to grant an out-of-time appeal after 180 days after entry of the judgment or order. Williams v. State, 107 So.3d 1016,1018 (Miss.Ct.App. 2013).

Laney v. State

2012-CP-00596-COA (November 26, 2013)
DUI Manslaughter

- Here, the circuit ct. did not abuse its discretion in denying D's motion to proceed with an out-of-time appeal. D had until 10/14/09 to perfect an appeal of her conviction & sentence. She missed the deadline. D had 180 days fr/9/14/09 to request an out-of-time appeal fr/the circuit ct. The 180-day period expired 6/22/10 w/o a request for an out-of-time appeal fr/D. Thus, the circuit ct. COULD NOT grant D permission to proceed.
- However, an appellate ct. may grant an out-of-time appeal where a person is convicted of a crime & through no fault of his own is effectively denied his right to perfect his appeal w/i the time prescribed by law by the acts of his atty. or the trial ct. Dorsey v. State, 986 So.2d 1080, 1084 (Miss.Ct.App. 2008) (quoting McGruder v. State, 886 So.2d 1080, 1084 (Miss. 2003). Movant must show by preponderance of the evi., that he asked his atty. to appeal w/i the time allowed, and that atty. failed to perfect appeal and that such failure was through no fault of the movant. Sellers v. State, 52 So.3d 426, 428 (Miss.Ct.App. 2011) (quoting Dickey v. State, 662 So.2d 1106, 1108 (Miss. 1995).
- Thus, the rules can be suspended when justice demands so.

Laney v. State

2012-CP-00596-COA (November 26, 2013)
DUI Manslaughter

- Here, the record does not support D's contention that she is entitled to an out-of-time appeal. D was aware on the day of sentencing that she had 30 days to file a notice of appeal. She also knew that she was unsatisfied with her trial atty.'s performance & would need to hire a new atty. to proceed w/her appeal. D knew trial atty. would not proceed w/o payment of more money. D knew she would either have to pay her atty., hire a new atty., or proceed on her own. Thus, it cannot be said that the failure to perfect D's appeal was through no fault of her own. The Court declined to suspend the rules to allow D to appeal her conviction & sentence. Affirmed.

Chapman v. State

2012-KM-00732-COA (November 26, 2013)
DUI 1st offense

- O rec'd call fr/dispatch on 9/11/10 stating black truck was running over mailboxes on a residential street. As O was responding, 2nd call was rec'd stating same black truck had hit a boat on the same street. O approached scene, spotted truck & got behind him, following for approx. 2 min. until D pulled into parking lot. O activated blue lts., got out of vehicle, & approached D's truck. O noticed part of truck's chrome grill on the front had been damaged. O asked D about the mailboxes and D stated his power steering had gone out and as a result, he hit some mailboxes. O noticed a smell of an intoxicating beverage coming fr/D and observed 2 beer cans in truck which D claimed were not his. D's speech was a little slurred, & when asked if he had had anything to drink, D responded he had 6 beers. Another officer arrived w/a PBT, but D refused to submit to test. O arrested D and took him to police station where he refused Intox. test. Field sobriety test were done --no clues on HGN, 2 clues on W&T, & 1 clue on 1LS.
- Justice Ct. found D of DUI. D appealed to circuit ct., which, after a trial de novo, also found him guilty. D filed a motion for reconsideration which the court denied.
- D appealed arguing the circuit court's judgment was manifestly erroneous & clearly wrong b/c the State did not meet its burden of proof.

Chapman v. State

2012-KM-00732-COA (November 26, 2013)
DUI 1st offense

- The court affirmed citing Bush v. State, 895 So. 2d 836 (Miss. 2005): "[I]n considering whether the evidence is sufficient to sustain a conviction . . . the critical inquiry is whether the evidence shows beyond a reasonable doubt that [the] 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."
- In order for D to be convicted of DUI under Miss. Code Ann. § 63-11-30(1)(a), the State must show that the defendant was driving a vehicle while he was under the influence of intoxicating liquor….
- 2 officers testified based on their experience as seasoned police officers that D was under the influence at the time of the stop. Also, D admitted he had had 6 beers that day. Although D submitted a receipt showing that the truck's power steering had been replaced as support for his argument that he could not turn the steering wheel when he needed to avoid the mailboxes and the boat, the Court found he did not slow down or attempt to stop when he knew that he was going towards the mailboxes and the boat, nor did he stop to inform anyone of the incident after he hit the mailboxes and the boat. And this was evidence of how D handled the incident supported a finding that he was under the influence.
- The Court found no facts or inferences that pointed so strongly in favor of D as to cast reasonable doubt on his guilt, and that the State met its burden of proof. Affirmed.

Russell v. State

2012-KM-01787-COA (November 19, 2013)
Speeding & DUI 1st offense

- Russell was stopped on 5/8/11 on Hwy. 25 for speeding (70 in a 50) at 2 a.m. O smelled alcohol & noticed blood shot eyes. D admitted to drinking 2 hrs. prior. O performed a field sobriety test which D struggled to complete. During the 1 leg stand, D lost his balance & swayed. On W&T test, D missed heel-to-toe movement & made improper turns. O asked D to submit to PBT & registered positive for the presence of alcohol. D arrested & transported to PD where O administered 2 Intoxilyzer tests indicating D's BAC was .11%. On 7/7/11, D entered a nolo plea in city ct., & appealed to county ct., where after a trial de novo, he was convicted of speeding & DUI. D was sentenced to pay a $50 fine for speeding & 48 hrs. susp. while on 6 mo. probation & a fine of $750 for DUI.
- D appealed citing the following issues: (1) State failed to establish the county ct. had jurisdiction & (2) county ct. erred in allowing the results of the Intoxilyzer 8000 into evidence.

Russell v. State

2012-KM-01787-COA (November 19, 2013)
Speeding & DUI 1st offense

- Jurisdiction – D moved to dismiss the case based on the State's failure to establish jurisdiction. Prosecutor responded to the Court stating:
  - Your Honor, the Court living in that area and being familiar with it, I think the Court well knows where Lakeland and Marshal is and that that is in the City of Flowood. Had I not specifically asked, I think the Court knows that that is in the City of Flowood. We'd ask the Court to take judicial notice of that.

  Judge stated as a practical matter he absolutely knew that's in the City of Flowood, but was uncertain as to whether he could take judicial notice so he took it under advisement so the parties could brief the issue. On 12/16/11, after reviewing the record, trial transcript, and controlling case law on judicial notice, the trial ct. entered an order denying D's motion to dismiss. D was convicted of speeding & DUI and appealed to circuit ct. which affirmed the county ct.'s conviction & sentencing.
- Proof of venue is necessary for a criminal conviction and may be shown by direct or circumstantial evidence. Smith v. State, 646 So.2d 538, 541 (Miss. 1994).
- MS Code Ann. § 99-11-3(1) (Supp. 2013) states: The local jurisdiction of all offenses, unless provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

Russell v. State

2012-KM-01787-COA (November 19, 2013)
Speeding & DUI 1st offense

- D argued the State failed to establish venue b/c O did not specifically state that the events occurred in the City of Flowood, Rankin Co., MS. The Court disagreed stating that although O did not say the magic words there was direct & circumstantial evi. in the record to show the crimes occurred in the City of Flowood, Rankin Co. -- O is a police officer w/the City of Flowood & testified he clocked D at 70 miles per hour in a 55 mile per hour zone as he was traveling eastbound on Lakeland Dr. It was uncontested that the traffic stop occurred "just past Marshal Drive before you get to Highway 471."
- Our MS SCT has held that a court may take judicial notice that a city is in a particular county. Bearden v. State, 662 So. 2d 620, 625 (Miss. 1995). A court can take judicial notice that a landmark such as a street, school, or other institution is in a particular city, if this fact is common knowledge in the area where the trial is held. Id.
- MRE 201(f) provides that judicial notice may be taken at any stage of the proceeding.
- MRE 201(b): judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Russell v. State

2012-KM-01787-COA (November 19, 2013)
Speeding & DUI 1st offense

- The Court stated the lower ct. could have concluded that D was ticketed in Flowood, as venue may be proven by circumstantial evidence. The Court also found that the trial ct. correctly took judicial notice.
- Confrontation Clause – D argued the county ct. erred in admitting the Intox. results b/c doing so violated his rts. to confrontation under the 6th A.—specifically, that D was unable to cross-examine the person who calibrated the machine.
- MS SCT has rejected D's argument. "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." Matthies v. State, 85 So. 3d 838, 844 (Miss. 2012). The issue is therefore without merit. Affirmed.

Mobley v. City of Starkville

2012-KM-00727-COA (November 26, 2013)
DUI 1st

- On 1/23/10, D was pulled over after O observed his car running off the side of the road. O smelled alcohol, D admitted to drinking, & consented to PBT -- positive for alcohol. O also conducted HGN test--observed all 6 clues. D consented to Intox. test --BAC of .09%. D arrested & pled no contest in city ct. Appealed to circuit ct., and after trial de novo, found guilty of DUI. D sentenced to 48 hrs. susp. for 2 yrs. pending good behavior. D appealed.
- D argued the circuit ct's ruling was not based on credible evi. b/c the O who signed the Intox. results was not the actual administrator of the test. Thus, D argued the Intox. was "tricked" into producing its results. COA disagreed.
- At trial, O admitted that while he was certified to conduct the test, his certification card had not yet come in the mail. He used another officer's card and that officer also signed the results of the test.

Mobley v. City of Starkville

2012-KM-00727-COA (November 26, 2013)
DUI 1st

- D did not object to the adm. of the Intox. results at trial, so his challenge on appeal is procedurally barred. See Parkman v. State, 108 So. 3d 443, 446 (Miss. Ct. App. 2012).
- Procedural bar notwithstanding, D's contention was w/o merit. "The results of a breath-analysis test are only called if performed by a person certified to give such a test." Hudspeth v. State, 28 So. 3d 600, 603 (Miss. Ct. App. 2009).
- The Court held undisputed that O was certified to adm. the Intoxilyzer, but had not rec'd his access-operator card on the night D was arrested. Furthermore, there is no evidence using another officer's certification card altered the results of the test. On cross, O testified that although he did not use his own card, the machine runs the same way no matter whose card is used. The Court found no evidence that the results of the test, generated solely by D's breath, would have been different based on the operator of the Intox.
- Here, the City presented evidence that O spoke w/D during traffic stop, smelled odor of alcoholic beverage on D's breath, observed 6 clues on HGN, & that D used his car to maintain his balance throughout the traffic stop. Affirmed.

Gore v. State

2012-KM-01171-COA (December 3, 2013)
DUI 1st

- On 6/18/11 at approx. 10:30 p.m. O stopped D's vehicle for speeding. O "smelled what appeared to be an intoxicant" of D's breath, & asked D to step out of the vehicle. When asked if he had been drinking, D replied he had "some beers" before dinner. PBT administered (2x) and showed a positive presence of alcohol. O arrested D. Intox. test showed BAC of .10%.
- At trial, D mentioned that he held a CDL. D testified he burped or belched while O away fr/patrol car speaking with D's wife.
- D was convicted of DUI 1st offense in justice ct. He appealed to circuit ct. which also found D guilty of DUI & sentenced him to 48 hrs. susp. subject to completion of 6 mo. probation & $520.00 fine.
- D appealed arguing the court: (1) erred in accepting the O's testimony that D was observed for the full 20 minutes b/f the Intoxilyzer test, and thus, the results were not valid & should not have been admitted into evidence; (2) violated his due-process rights & deprived him of a protected property rt. by convicting him of DUI in the absence of the mandatory observation period; & (3) enhanced D's sentence.

Gore v. State

2012-KM-01171-COA (December 3, 2013)
DUI 1st

- Observation Period - § 63-11-5(1) provides for a minimum observation period of 15 min. However, the Intox. 8000 manual & guidelines require a 20 min. observation period prior to taking a breath sample. *See* Hudspeth v. State, 28 So.3d 600, 602 (Miss.Ct. App. 2009).
- MS SCT has concluded that "[a] dispute as to whether the observation lasted the mandatory length of time or whether the observation was performed while in the presence of an officer goes to the weight of the testimony and the credibility of the witnesses. Dominick v. State, 108 So.3d 452, 455 (Miss.Ct.App. 2012) (quoting Fisher v. City of Eupora, 587 So. 2d 878, 882 (Miss. 1991)).
- Further, in Fisher, the Court stated that "[t]he observation itself can be performed as long as the defendant is in the presence of the officer. The officer is not required to stare at the defendant for the observation to be effective." Fisher, 587 So. 2d at 882.

Gore v. State

2012-KM-01171-COA (December 3, 2013)
DUI 1st

- Here, the O testified he was not personally watching D while he spoke to D's wife during the traffic stop, however, neither O or D suggested this took a significant amount of time. O also admitted he was not personally observing D while he activated the Intox; however, D was still in his presence & was being observed by other deputies at the sheriff's office. O testified he did not recall D belching or burping, and Court found that even if D did, neither of those actions is listed in the manual as an act that would void the Intox. results. Thus, no error in admitting the Intox. results into evidence.
- Protected Property Right/Due Process – Court found circuit ct. did not violate D's due process rights. Our supreme court stated in Wheeler v. Stewart, 798 So. 2d 386, 391 (Miss. 2001), that "[u]nder Mississippi law, driving is a privilege and not a . . . right." (citing Lavinghouse v. Miss. Highway Safety Patrol, 620 So. 2d 971 (Miss. 1993)). Therefore, D had no protected property interest in his license to drive.
- Enhancement – Court found it was undisputed that the circuit ct. did not enhance D's sentence. Accordingly, this issue is without merit.
- Affirmed.

Cook v. Rankin County

2012-KM-01553-COA (December 3, 2013)
DUI 1st

- On 3/12/11, O on duty when a BOLO ("be on the lookout) came out for a vehicle that was driving erratically & the driver possibly flashing a badge of some sort. O did not know who made the initial call to law enforcement—thought it was a tip fr/an anonymous caller and was uncorroborated. Call described a gray Chevrolet Avalanche, and gave the license plate #. O saw vehicle that matched description & proceeded b/h D. O did not observe vehicle driving erratically at that time nor did he observe the driver flashing a badge or committing any crimes. O2 was also in the area when the BOLO alert came over the dispatch and met the Avalanche head-on. O2 turned around & got w/i a couple of car lengths b/h the other O and the Avalanche.
- O initiated a stop on the vehicle & upon approach to vehicle observed smell of intoxicating beverage, slurred speech & disorientation by D. Within a few minutes, D admitted to consuming alcoholic beverages & to having "flashed" a business card, not a badge, at other motorists. D had watery eyes, swayed in a circular motion upon exiting vehicle, & held onto vehicle for support. PBT showed positive presence of alcohol. O reported D was extremely nervous, disoriented & declined to take the Intox. test stating that he "probably would not pass" the test.

Cook v. Rankin County

2012-KM-01553-COA (December 3, 2013)
DUI 1st

- D was convicted of DUI 1st offense in justice ct. and appealed to county ct. where he motioned to dismiss the case at the conclusion of the State's case in chief arguing the BOLO that led to the investigatory stop violated his 4th Amendment rights against illegal search and seizure as it was based on an anonymous tip that lacked sufficient indicia of reliability. County ct. denied the motion & entered a detailed order overruling the motion to dismiss. County ct. also entered a judgment of conviction. D appealed to circuit court which affirmed the county ct's conviction.
- D appealed arguing county judge erred in the application of 4th Amendment standards regarding uncorroborated anonymous tips. Specifically, that the O initiated the stop w/o probable cause or reasonable suspicion; thus, all evidence from the seizure was inadmissible as "fruit of the poisonous tree."

Cook v. Rankin County

2012-KM-01553-COA (December 13, 2013)
DUI 1st

- The basic elements of "a determination of probable cause will be the events which occurred leading up to the search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).
- Although the Court's review of the existence of probable cause is de novo, they must look to the trial judge's findings of fact. Dies v. State, 926 So.2d 910, 917 (Miss. 2006).
- The county judge's conclusions of law relied on the decision in Floyd which stated, "Given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an 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." Floyd v. City of Crystal Springs, 749 So.2d 110 (Miss.1999).

Cook v. Rankin County

2012-KM-01553-COA (December 13, 2013)
DUI 1st

- Applying Floyd, the county ct. judge concluded: (1) the BOLO carried info. about reckless/erratic driving along with additional info. the driver had been flashing lights & flashing what appeared to be a badge; (2) Os were confronted not only w/a report of dangerous driving conduct, but also alerted to the very real possibility that someone might be impersonating a police officer and attempting to pull over unsuspecting members of the public; (3) if ever there was an ambiguous situation that warranted immediate investigation, this was such a situation; (4) the report of reckless driving was enough, but by adding the potential criminal nature of the other bizarre conduct, Os could have been outright derelict of duty in their duty to protect the public had they not acted so swiftly.
- Court held the county judge applied the correct legal standard & he did not commit manifest error or make a decision contrary to the overwhelming weight of the evidence. Further, the Court found there is simply no case that holds that a law enforcement officer may not make a stop based on an anonymous tip. Here, the anonymous tip was suitably corroborated to provide reasonable suspicion for an investigatory stop.

Cook v. Rankin County

2012-KM-01553-COA (December 13, 2013)
DUI 1st

- Os rec'd info. over the police radio about reckless & erratic driving by a driver who was flashing his lights at motorists to pull over to the side of the road. The tip reported conduct that could be considered reckless driving and impersonating a law enforcement official. Thus, Os were justified in making an investigatory stop to resolve the ambiguous situation. Further, the tip bore indicia of reliability, as the details of the tip were corroborated when the exact vehicle was spotted where it was stated it would be in the tip, not to mention that the driver of the car was visibly intoxicated when the officers stopped him. Because the investigatory stop was legally justified, as it was not in violation of the 4th Amendment, Ds conviction for misdemeanor DUI was lawful.
- Affirmed.

Mooney v. State

2012-CP-01931-COA (December 10, 2013)
1 ct. DUI Death & 1 ct. DUI Injury

- On 5/23/08,D's car crossed the center line causing a head-on collision—1 person was pronounced dead at the scene & 2 others were seriously injured. A warrant was issued to collect D's blood---positive for cocaine & Soma, a narcotic. D was later arrested by Slidell Police Dept. & extradited to MS.
- D pled guilty to 2 cts. of DUI resulting in death & injury on 5/26/11, & was sentenced to 20 yrs. on each count to run concurrently. D filed a motion to vacate his judgment & sentence which the court treated as a motion for post-conviction relief & denied.
- D appealed arguing he was denied effective assistance of counsel, b/c his atty. failed to pursue a violation of his speedy-trial rights, coerced his pleas of guilty, failed to investigate & prepare for trial, & failed to seek suppression of illegally obtained evidence.
- The defendant, having the burden of proof, must show that, were it not for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668 (1984). A guilty plea is valid so long as it was voluntarily and intelligently made by the criminal defendant before the trial court. Burroughs v. State, 9 So.3d 368 (Miss. 2009).

Mooney v. State

2012-CP-01931-COA (December 10, 2013)
1 ct. DUI Death & 1 ct. DUI Injury

- D's assertions are contradicted by the testimony he gave during his plea hearing. He testified that he understood that he would be waiving certain constitutional rights if he pleaded guilty & affirmed that he was satisfied with the services and the advice that he had received from his lawyer. He also admitted that he had not been coerced or threatened in any way to enter his pleas of guilty.
- In addition, D waived his constitutional right to a speedy trial on the record & continued to plead guilty. "Solemn declarations made in open court carry a strong presumption of verity." Jones v. State, 885 So.2d 83, 87 (Miss.Ct. App. 2004).
- With regard to D's arguments that his atty. failed to investigate & prepare for trial and failed to seek the suppression of the results of the blood test, he offered only his own assertions in support. "In cases involving post-conviction collateral relief, 'where a party offers only his affidavit, then his ineffective[-]assistance[-]of[-]counsel claim is without merit. Watts v. State, 97 So3d 722, 726 (Miss.Ct.App. 2012).
- Affirmed.

Faulkner v. State

2013-KA-00450-COA (February 4, 2014)
DUI Causing Death

- On May 19, 2011, a head-on collision occurred in Batesville, MS. Willard was driving w/his wife & mother in the car, and D was driving a truck. Willard's mother was killed in the collision.
- Just prior to the collision, D had almost run into other cars—3 witnesses testified: 2 of the 3 said that D had swerved into their lane & nearly struck them head-on. One of these 2 Ws stated the driver of the truck was a white female & was "slumped over as if she was asleep or passed out." The other W stated she stopped her vehicle & started blowing her horn, at which point D "went back into her own lane & got out of mine." The 3rd W testified he was traveling east when a truck merged into his lane, scraped his truck, & then sideswiped the trailer he was pulling & knocked the tires off the trailer.
- Os on the scene testified D was very calm, but seemed confused, her eyes were glassy & she was possibly under the influence.

Faulkner v. State

2013-KA-00450-COA (February 4, 2014)
DUI Causing Death

- O took a blood test kit to the hospital, observed it being administered & delivered the sample to the crime lab. At the hospital, D told ER dr. she was currently taking Tylenol with codeine, Soma, Ultram, Ativan, and Prempro (pain relievers, muscle relaxer, and hormone replacement). D also had a urine test which tested positive for acetaminophen, benzodiazepines, and opiates. D's dr. testified people taking those drugs should not be operating motor vehicles & he would not let someone leave the hospital & drive after taking any of these drugs, and if they did, he would report them to the authorities.
- D chose not to testify. Jury found D guilty of DUI homicide & was sentenced to 25 yrs.

Faulkner v. State

2013-KA-00450-COA (February 4, 2014)
DUI Causing Death

- D appealed arguing the trial ct. erred in the denial of her motion for a new trial, or in the alternative, jnov.
- "The critical inquiry is whether the evidence shows beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed … the sufficiency of the evidence is determined by examining whether any rational trier of fact after viewing the evidence in light most favorable to the prosecution could have found the essential elements of the crime beyond a reasonable doubt." Barfield v. State, 22 So.3d 1175, 1185 (Miss. 2009).
- Here, State was required to prove b/y a reasonable doubt both elements of the statute: 1) D operated a vehicle under the influence, & 2) D caused the death of another in a negligent manner.
- The urinalysis tested positive for Ativan and opiates. While an assessment was not completed that would show the exact amount of these substances in D's system, the urinalysis did show the presence of these substances. That paired with the evidence of her driving erratically and dangerously establishes that she was driving negligently and that such driving resulted in Dover's death. The Court held the evidence shows beyond a reasonable doubt that D committed the act charged, & she did so under such circumstances that every element of the offense existed. Affirmed.

Miller v. State

2012-KA-01630-COA (February 4, 2014)
Sale of a Controlled Substance/Confrontation Clause

- D convicted for sale of a controlled substance & sentenced to 30 yrs. as a habitual offender w/o eligibility for parole or probation. At trial, forensic scientist testified substance was cocaine—not analyst that personally performed the original test, but was the technical reviewer.
- D appealed arguing his 6th amendment right was violated by technical reviewer testifying instead of the technician who performed the actual test.
- Court has previously addressed this issue. "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 analyses even though she did not perform the tests firsthand." Grim v. State, 102 So.3d 1073, 1081 (Miss. 2002); see also Jenkins v. State, 102 So.3d 1063, 1067-68(Miss. 2012).
- No violation of D's 6th A. rts.
- Affirmed.

Smith v. State

No. 2012-KA-01744-COA (February 25, 2014)
DUI 3rd

- On 12/13/11, D was involved in a 2 vehicle crash where she pulled out onto a highway and stopped. The other car, thinking she would continue to cross slowed down, but realized she was not moving and slammed on his breaks but could not avoid impact. D's passenger was injured as were the 2 individuals in the other car. O at scene observed D slurring her speech, D could not remain balanced while standing, and smelled alcohol on her breath. D agreed to a breath test and registered a BAC of .10%. D was arrested for felony DUI (previous convictions of DUI Jan. 2011 & Sept. 2011).
- D was convicted of DUI 3rd & sentenced to 5 yrs., w/2 ½ yrs. to serve & 2 ½ yrs. PRS. D was ordered to attend the DUI drug court program upon release & to pay a fine of $2,000, all court costs, & restitution to the 3 other parties involved.
- D appealed arguing the court erred in sentencing her to pay restitution b/c the jury's determination of her guilt for felony DUI did not include any findings that her driving contributed to or caused the accident, subsequent injuries, & property damage. Thus, D claimed the circuit judge abused his discretion in sentencing her to pay restitution.

Smith v. State

No. 2012-KA-01744-COA (February 25, 2014)
DUI 3rd

- § 99-37-3(1) provides the following w/respect to restitution:
  - When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; provided; however, that the justice court shall not order restitution in an amount exceeding $5,000.00.
- Case of 1st impression in MS.
- While the State conceded that neither medical bills nor vehicle-repair estimates were entered into evidence, such evidence was unnecessary b/c D's counsel failed to object to the amount of restitution awarded. The State argued that the circumstantial proof presented of the causal connection b/t D's driving under the influence & the pecuniary damages was sufficient to satisfy the requirements of the restitution statute. COA agreed.
- Here, not only did W testimony reveal that D had been drinking b/f the crash occurred & D was visibly intoxicated at the scene of the crime, D's BAC was above the legal limit over two hours after the accident occurred.

Smith v. State

No. 2012-KA-01744-COA (February 25, 2014)
DUI 3rd

- Mississippi's restitution statute (§99-37-3) does not contain a specific-causation requirement that a causal connection be shown between the D's criminal conduct & the damages incurred. Nonetheless, it would appear that the evidence underlying D's DUI guilty verdict & the evidence of injuries presented at the sentencing hearing provided sufficient proof of a causal connection between D's criminal actions & the victims' injuries. The restitution ordered was directly related to damages the victims sustained as a result of the accident. *See* State v. Goeller, 77 P.3d 1272 (Kan. 2003). Therefore, the Court held the order of restitution did not violate Mississippi's restitution statute.
- Affirmed.

Rogowski v. State

2013-KM-00222-COA (February 11, 2014)
Disorderly Conduct/Checkpoint

- D was stopped at a DL checkpoint & refused to present DL. O opened D's door & unbuckled his seatbelt. D "locked out his arms & legs" & refused to get out of the vehicle. D was then forcibly removed, D struggled for a few moments, & was ultimately handcuffed & arrested for disorderly conduct. D was convicted in justice ct. and again in county ct. which imposed a fine of $500.00. D appealed to circuit ct. which affirmed the conviction.
- D argued the checkpoint was an illegal seizure that violated his rights secured by the 14th Amendment to the US Constitution. Further, D argued that the gravity of the public concern about drivers license safety, if any even exists, did not outweigh the severity of the interference with individual liberty created by this checkpoint.
- It is well settled that routine traffic stops are justifiable because they are only minimally intrusive, and the checkpoints themselves are "very effective" in determining whether drivers are properly licensed. Dale v. State, 785 So.2d 1102 (Miss.Ct.App.2001).
- Uniform traffic stops are generally viewed favorably when the purposes are to enhance road safety, protect the public from unlicensed drivers, identify unregistered vehicles, and locate intoxicated drivers. However, when traffic stops are used to look for evidence of "ordinary criminal wrongdoing," such as possession of illegal drugs, then there is a lack of probable cause to support the seizure that results in an illegal seizure. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

Rogowski v. State

2013-KM-00222-COA (February 11, 2014)
Disorderly Conduct/Checkpoint

- D also contended there were no established procedures or guidelines for the operation of the checkpoint. The Court stated that it had previously declined to hold sheriff's department officials are required to have "set departmental procedures" for operating traffic-stop checkpoints & did not see any reason to depart from this holding. *See* Dale, 785 So.2d at 1106.
- Here, O testified that he & other deputies were conducting a routine traffic safety checkpoint and all vehicles were routinely and regularly stopped. Nothing in the record suggests that D was subjected to a random stop where only some individuals were stopped. The testimony established the checkpoint was set up to serve the permissible interest of highway safety.
- D was not subjected to any more intrusion into his liberty interests by the stop/seizure than the intrusion suffered by all other drivers passing through the DL checkpoint.
- Affirmed.

Questions/Comments

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