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Easterling v. State

(Aggravated DUI)
NO. 2010-KA-02075-COA (Miss. Ct. App. May 8, 2012)

- On 9/22/07, D, D's husband, & a friend (Jenkins), traveled to New Orleans to celebrate D's belated wedding anniversary. Jenkins was pregnant & to be the designated driver so she refrained fr/any significant drinking. They left NO around 5 am to return to MS. During the trip, the SUV struck the rear bumper of a truck causing it to flip over & go off the road down an embankment. The truck was crushed by the impact & the driver killed.

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- Jenkins originally told officers she was the driver of the Durango, but at trial, she testified D was driving & had repeatedly asked her to accept responsibility since D had a pending DUI. D & her husband told Jenkins she would only get probation.
- 3 disinterested witnesses to the fatal collision testified the driver of the Durango was the non-pregnant female. 1 witness testified to overhearing the conversation b/t D & Jenkins immediately a/t the wreck when D was trying to convince Jenkins to say she was the driver.

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- On November 23, 2010, D was convicted of aggravated DUI in circuit ct. & was sentenced to 20 yrs.--5 yrs. to serve, 2 yrs. House Arrest, & upon successful completion of the program, 13 yrs. of PRS w/5 yrs. of reporting. D was fined $1,500 & ordered to pay $2,500 to the victim's compensation fund.
- Prior to trial, State filed a motion u/MRE 404(b) attempting to show D had a prior DUI charge.
- The trial judge ruled the evidence was more prejudicial than probative & refused to allow the State to introduce the prior DUI in its case-in-chief—stating "should the defendant open the door[,] the State shall be able to use the prior DUI arrest."

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- A civil wrongful death suit had been filed & both D & Jenkins had been deposed under oath regarding the collision.
- On cross-examination of D at trial, the State asked the following question: "Now, Ms. Easterling, at your deposition this question was asked of you: 'Have you ever had any criminal charges filed against you?'" D's atty. objected.

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The State argued the question was being used for impeachment purposes & went to D's credibility b/c at her deposition, D answered negatively when questioned if she had ever had any criminal charges filed against her before the wreck. State argued it was a false statement under oath b/c D had a prior DUI pending against her. Circuit ct. ruled the question would be allowed finding D had opened the door to her credibility when she took the stand in her defense & the question went to her credibility & honesty.

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- On appeal, D argued the circuit ct. erred by allowing the State to introduce her prior DUI charge, and it was error in restricting defense counsel's closing argument.
- G/R: Standard of Review for admission or suppression of evidence is abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003).
- Admission of Prior DUI - State argued the argument is procedurally barred b/c D failed to object to the State's continued questioning of her regarding the facts of her prior criminal charge. COA agreed with circuit ct.

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- The Court held that questioning D about a prior occasion where she admittedly lied under oath on a relevant matter was appropriate to test her credibility as a witness. *See* M.R.E. 608(b); *Brent v. State*, 632 So. 2d 936, 944 (Miss. 1994).
- However, the State's question inquiring into the nature of the criminal charge, a DUI, may well have been a relevant question where the probative value was substantially outweighed by the danger of unfair prejudice under MRE 403, particularly considering D was then on trial for aggravated DUI.

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- Nevertheless, D counsel did not object to the question concerning the nature of the prior charge ,but instead asked D to repeat her answer. D counsel also failed to object to the DA's one reference to the prior DUI in her closing argument.
- G/R: "[F]ailure to make a contemporaneous objection constitutes waiver of an issue on appeal." *Redmond v. State,* 66 So. 3d 107, 110 (¶11) (Miss. 2011) (citing *Derouen v. State,* 944 So. 2d 748, 751(¶7) (Miss. 2008)).
- The Court held that D's contentions were waived, and thus, without merit.

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- Closing arguments - D counsel attempted to read verbatim from a US Supreme Court's opinion (*United States v. Wade,* 388 U.S. 218 (1967)) attempting to point out the fallibility of eyewitness identification.
- DA objected arguing the case was a federal opinion taken out of context and not related to factual evidence presented in the case. The circuit ct. agreed.
- G/R: At trial, counselors are clearly limited to arguing "facts introduced in evidence, deductions and conclusions he may reasonably draw therefrom, and the application of the law to the facts." *Ivy v. State,* 589 So. 2d 1263, 1266 (Miss. 1991).

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- "[Counsel] must confine himself to the facts introduced in evidence [during trial] and to the fair and reasonable deductions and conclusions to be drawn therefrom, and to the application of the law, as given by the court, to the facts." *Id.*
- Here, D's counsel was attempting to argue that a Supreme Court Justice had stated in a written opinion that eyewitness testimony was not credible.
- However, the trial judge found that to allow D's counsel to read the opinion was improper and would give undue influence to the argument that eyewitness testimony was not credible. COA agreed. Affirmed.

Baker v. State

(DUI 1st)

NO. 2010-KM-01654-COA (Miss. Ct. App. May 15, 2012)

- On 6/19/10, 20 year old D was arrested & charged w/1st offense DUI under section 63-11-30(3)—The Zero Tolerance Law. O conducted SFSTs that included an AlcoSensor test (PBT) showing BAC of .05%. D was transported to the station & advised of her right to refuse, that if she refused her DL would be suspended for 90 days, & that if she failed to give 2 sufficient breath samples it would be deemed a refusal. D attempted to blow into the machine, but the machine timed out after several attempts rendering the sample insufficient.
- D moved for a Nonadjudication and the judge granted it. DPS later informed the judge by letter that the Nonadjudication was improper b/c D had refused to render a sufficient sample.

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(cont'd)

- D filed a petition to reverse the DPS ruling in circuit ct. claiming she had not intended to refuse the test.
- At the hearing, O testified that D had failed to give a sufficient sample to determine her BAC. D claimed her asthma affected her ability to give a sufficient sample; however, she stated she did not have an asthma attack on the night of the test.
- Circuit ct. denied D's petition & affirmed the DPS ruling.
- On appeal, D argued DPS ruling was improper & that a Nonadjudication should have been available since although she refused the Intox. 8000, she tested .05% on the PBT.

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(cont'd)

- Zero Tolerance for Minors Act – *shall* only apply when a person under the age of 21 has a BAC of .02 or more, but lower than .08. If .08 or more, the provisions of subsection (2) *shall* apply.
- MS SCT has held "[a] chemical analysis of a person's breath, blood, or urine, is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate." *McIlwain v. State*, 700 So. 2d 586 (Miss. 1997). *See also* MCA § 45-1-17.

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- The MS Crime Lab Implied Consent Policies & Procedures Manual Regulation 1700.200 states:
  - The Department of Public Safety has adopted the Intoxilyzer 5000 with the cooled detection option & the Intoxilyzer 8000 Version both of which are manufactured by CMI, Inc. ***as the only accepted evidentiary instruments for use in breath alcohol testing in the State of Mississippi*** pertaining to Implied Consent laws in Mississippi Code. (emphasis added).
  - § 63-11-19 explicitly states that only valid methods to determine a person's BAC are the "methods approved by the State Crime Laboratory."
  - In the Crime Lab's manual, the regulations indicate the 2 models of the Intoxilyzer are "the only acceptable evidentiary instruments for use in breath alcohol testing in the State of Mississippi."

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- Here, the Court found D did not submit a sufficient sample for the Intox. 8000 test. D was informed her failure to provide a sufficient sample would be deemed a refusal of the test. Under the Zero Tolerance for Minors Act, the Court has discretion to rule the 1st DUI offense Nonadjudicated IF the minor's BAC is between .02% & .08%. The PBT is insufficient evidence of D's BAC for a Nonadjudication.
- Affirmed.

Parkman v. State
(DUI 1st)
NO. 2011-KM-00723-COA (Miss. Ct. App. June 19, 2012)

- On 11/1/09 at approx. 5:07 am, D approached a safety checkpoint . O observed D swerving across the road. O stopped D & asked him for ID & proof of insurance. O detected an odor of alcohol, & asked D to pull off the road so he could investigate further. O asked D whether he had been drinking-- D stated his last drink was at approx. 5:00 pm the previous day. O asked D whether he had any alcohol in the vehicle & D stated he had an open bottle of vodka. O also noticed a cup containing OJ in plain view. When asked what was in the cup, D admitted that it contained OJ & vodka. D agreed to a PBT which showed positive presence of alcohol.

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(cont'd)

- At approx. 5:29 am, D arrested DUI, careless driving, and possession of alcohol. D transported to station, where D gave 2 breath samples into Intoxilyzer 8000—1st sample obtained at 5:47 am w/BAC of .135; 2nd sample obtained at 5:49 am w/BAC of .129.
- D entered a plea of nolo contendre in municipal ct. & appealed his conviction to cty. ct.-- *de novo* bench trial held & D found guilty of DUI 1st offense & careless driving. D appealed to circuit ct. which affirmed.

Parkman v. State
(cont'd)

- D appealed arguing the results were inadmissible b/c: (1) O did not observe D for 20 minutes prior to administering the test; (2) the person charged w/calibrating the machine did not testify, violating D's 6th Amendment rt. to confrontation; (3) State failed to produce certificates of calibration, & (4) State did not prove guilt b/y a reasonable doubt.

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(cont'd)

- Standard of Review: "The standard of review regarding the admission or exclusion of evidence is abuse of discretion." *Hudspeth v. State*, 28 So. 3d 600, 602 (¶5) (Miss. Ct. App. 2009) (quoting *Morris v. State*, 963 So. 2d 1170, 1175 (¶15) (Miss. Ct. App. 2007)).
- "[A]bsent an abuse of that discretion, the trial court's decision will not be disturbed on appeal." *Id.* (quoting *McCoy v. State*, 820 So. 2d 25, 31 (¶15) (Miss. Ct. App. 2002)).

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(cont'd)

- Observation Period – D argued O failed to observe him for 20 min. prior to administering the intoxilyzer test.
- Miss. Code Ann. §63-11-5(1) (Rev. 2004) states: "[n]o such tests shall be given by any officer or any agency to any person within fifteen (15) minutes of consumption of any substance by mouth."
- However, a 20 minute observation period is required u/MS Dept. of Public Safety's guidelines & Intoxilyzer 8000 Implied Consent Policies & Procedures Manual:
  - According to the Mississippi Department of Public Safety's guidelines and the Intoxilyzer 8000 Implied Consent Policies and Procedures manual, a twenty-minute observation period is required immediately before a breath sample is taken.

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- The manual defines observation period as "[a] period during which the person being tested has been observed to determine that he has not ingested alcohol or other fluids, regurgitated, vomited, eaten, smoked, or placed anything into his mouth in the 20 minutes immediately prior to the collection of a breath sample." *Hudspeth*, 28 So. 3d at 602 (¶6).

MS SCT has stated "[t]he length of time that a person charged with driving under the influence must be observed prior to the administration of the breath test is mandatory. In MS, by statute, that length of time is 15 min.; however, police procedure requires that the person be observed for 20 min. **The 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.**

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(cont'd)

- A dispute as to whether the observation lasted the mandatory length of time or whether the observation was performed while in the officer's presence goes to the weight of the testimony & credibility of the witnesses. *Fisher v. City of Eupora*, 587 So. 2d 878, 882 (Miss. 1991).
- Here, O stopped D at 5:07 am. O testified they were en route to station 5:29 am, & intoxilyzer test was given at 5:49 am. O testified he did speak w/tow truck driver prior to departing, but our SCT has held that an "officer is not required to stare at the defendant for the observation to be effective." *Id.*

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(cont'd)

- When asked whether he had observed D for more than 20 min., O answered affirmatively.
- Calibration Certificates – D argued no calibration certificates were introduced into evidence & moved to exclude Intox. 8000 test results based on Confrontation Clause.
- Court held that after a review of the record, D never raised the issue of calibration certificates, and thus, the issue was procedurally barred. "A defendant is procedurally barred from raising an objection on appeal that is different than that raised at trial." *Jones v. State*, 606 So. 2d 1051 (Miss. 1992).

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(cont'd)

- D's 6th Amend. Rt. to Confrontation – D argued the person charged w/calibrating the machine did not testify, violating D's 6th Amend. rts.
- In a 2011 decision, the COA considered the exact issue raised by D and held the intoxilyzer calibration records are nontestimonial in nature; therefore, "the Confrontation Clause does not require the testimony of their preparer." *Matthies v. State*, 2010-KM-00783, 2011 WL 2120060 (Miss. Ct. App. May 31, 2011).
- Subsequently, our SCT granted *Matthies'* petition for writ of certiorari, and held that "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*, 2010-CT-00783, 2012 WL 1216232 (Miss. Apr. 12, 2012).
- As such, the State met its burden of proving D's guilt b/y a reas. doubt. Affirmed.

Dominick v. State
(DUI 1st, Careless Driving)
NO. 2011-KM-00720-COA (Miss. Ct. App. July 31, 2012)

- On 11/6/10, D left bar around 10:30 pm w/her boyfriend. They went to Waffle House & ate for about an hour. At approx. 12:20 am, D was stopped by O, who testified that D's car "bumped" or "simply rode" the fog line prior to changing lanes. D initially told O she had not been drinking, but when O asked D to step out of vehicle, D said she had consumed 4 beers (Later D obtained a statement fr/the bartender stating she had consumed only 3 beers.). O observed smell of alcohol on D's breath. O gave D PBT which tested positive for presence of alcohol. SFSTs were done—Horizontal Gaze Nystagmus test, Walk & Turn test, & One Leg Stand test.
- D placed under arrest & transported to station for breath test—BAC .12%.

Dominick v. State
(cont'd)

- D entered a plea of nolo contendre in Rankin Co. Municipal Court. & was found guilty. D appealed to cty. ct., where the judge conducted a bench trial *de novo* & D was found guilty of DUI & careless driving. D appealed to circuit court which affirmed the cty. ct. ruling. D was sentenced to 48 hrs. (credit for time served), fine of $1,000 ($500 suspended), plus court costs & assessments, & 90 days probation.
- D appealed arguing error to allow Intox. 8000 results into evidence (1) w/o allowing D her rt. u/6th Amend. to confront the person in charge of calibrating the machine; (2) O failed to keep D in his presence during entire 20 minute observation period; & (3) O lacked PC or RS to stop D's vehicle.

Dominick v. State
(cont'd)

- MS SCT has held the person who calibrated an intoxilyzer is not required to testify and that the certification is not always testimonial. *Matthies v. State,* 85 So. 3d 872, 875-76 (¶12, 14) (Miss. Ct. App. 2011).
- In rejecting D's argument, the Court analyzed *Melendez -Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009) and cases from other jurisdictions noting:

> The certificates at issue do nothing more than verify the accuracy of the equipment. Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies. Therefore, the calibration records in this case are different from the lab analysts' certificates at issue in *Melendez-Diaz,* which were prepared after the drug seizure to establish at the D's trial that the substance obtained from him was cocaine. *Matthies,* 85 So. 3d at 875 (¶13).

Dominick v. State
(cont'd)

- MS SCT granted certiorari & recently affirmed the COA's holding in *Matthies. See Matthies v. State,* 85 So. 3d 838, 844 (¶22) (Miss. 2012).
- Furthermore, the Court held the O administered the intoxilyzer test & testified to the BAC revealed by the test. The person who calibrated the intoxilyzer is not required to testify.
- D also argued that O did not observe her for a required uninterrupted 20 min. prior to administering the breath test; thus, the results of the Intoxilyzer 8000 test should not have been admitted into evidence.

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(cont'd)

- G/R: Miss. Code Ann. § 63-11-5(1) (Rev. 2004) provides for a minimum observation period of 15 min. & states:
  - "No such tests shall be given by any officer or any agency to any person within fifteen (15) minutes of consumption of any substance by mouth." While the statutory period is a minimum of fifteen minutes, the Mississippi Department of Public Safety's guidelines and the Intoxilyzer 8000 Implied Consent Policies and Manual require a twenty-minute observation period prior to testing. *Hudspeth,* 28 So. 3d at 602 (¶6).
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Dominick v. State
(cont'd)

- In *Fisher v. City of Eupora,* 587 So. 2d 878, 882 (Miss. 1991), the MS SCT analyzed decisions from other jurisdictions as to the observation period prior to testing and concluded:
  - "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."
- Here, O testified that he observed D for the required time. D argued that O left her handcuffed in the back of his patrol car while he retrieved her cell phone from her car & during that time she was not under observation.

Dominick v. State
(cont'd)

- Court found there to be no testimony that O's observation of D was obstructed. As in *Fisher,* D "was not out of the officer['s] range of vision." *Id.* at 880.
- O also testified D did not throw up or put anything in her mouth. D never testified she consumed anything during the observation period which would have made the testing invalid under the statute.
- State introduced video from O's patrol car that showed the patrol car & D's car were in very close proximity & D was not out of O's range of vision at any time.

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(cont'd)

- D also disputed there was PC for the traffic stop, arguing that her driving was not careless & therefore the stop of the vehicle was illegal according to the 4th Amend., as well as, Art. 3, Section 23 of MS's Constitution.
- G/R: "The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. U.S.*, 517 U.S. 806, 810 (1996).
- Test for probable cause "is an objective test based on the facts known to the O at the time of the stop." *U.S. v. Escalante*, 239 F. 3d 678, 681 (5th Cir. 2001).

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(cont'd)

- Here, O testified D's car "bumped" or "simply rode" the fog line prior to changing lanes. D did not dispute this, & her testimony validated O's conclusion. The Court found that while a review of the videotape fr/the front bumper of O's vehicle was not clear, it also did not contradict O's conclusion. The Court agreed w/the cty. court that "the car was too far away too see what the officer saw." (See *Martin v. State*, 43 So. 3d 533 (Miss. Ct. App. 2010) (holding that sufficient probable cause existed where a vehicle bumped the fog line of a county highway).

Dominick v. State
(cont'd)

- Although D could explain why she changed lanes, that information was not known to the officer at the time.
- Thus, the Court held that there were several articulated reasons for the stop, and D did not explain why she "bumped" the fog line or center line to the right.
- Court held sufficient evidence supported a finding that PC existed. Affirmed.

McMurtry v. State

(Careless Driving & DUI 1st)

NO. 2011-KM-00967-COA (Miss. Ct. App. August 28, 2012)

- On 11/9/09, at approx. 7:05 pm 2 callers notified PD of a reckless driver--1 of the callers followed D & updated O his location. O caught up w/D & followed him. O witnessed D drift from one edge of his lane to the other. After D failed to stop at a stop sign, O turned on his blue lights. D did not stop, but instead turned & continued driving for, what O described as "...a pretty good time." D finally stopped after O turned on his siren.
- O testified upon approaching D's vehicle, he immediately smelled the odor of an intoxicant coming fr/D's area. O also observed that D's pupils were dilated. O asked D if he had been drinking & D stated he had 1 beer. O asked if that was it, & D held up 2 fingers & stated he had consumed 2 beers.

McMurtry v. State

(cont'd)

- D got our of vehicle & O could still smell the odor of an intoxicant coming fr/D's breath. D was swaying back and forth while they were talking & D's speech was slightly slurred.
- D consented to PBT which tested positive for alcohol. D also consented to 2 field sobriety tests. D was asked to recite the alphabet from F-W. D tried 3x but could not complete the test. D was also unable to count backwards from 42-17. D was then arrested for DUI.
- While waiting for a tow truck, D consented to O searching his van. O found a red cup that was still cold to the touch & stated it smelled like a "mixed drink."

McMurtry v. State

(cont'd)

- D was transported to station where intoxilyzer test indicated BAC of .16%. D charged w/DUI & careless driving.
- D pled nolo contendre to both charges in municipal court, then appealed to county court for a *de novo* trial.
- At trial, arresting officer & Crime Lab testified regarding the operation & accuracy of the Intox. 8000.
- Dr. Stephen Hayne, an expert in the field of clinical pathology, testified for D. He testified D's retrograde extrapolation calculation indicated D's BAC was .03% at the time O stopped D.
- On rebuttal, Maury Phillips fr/MS Crime Lab contradicted Hayne's calculations.

McMurtry v. State
(cont'd)

- County Court found D guilty of DUI & careless driving. D appealed to circuit court which affirmed county ct's judgment.
- On appeal, D argued cty. ct. erred when it allowed State to present results of D's Intoxilyzer 8000 test w/o allowing D to cross-examine the person who had calibrated the machine. (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).
- MS SCT has rejected D's argument. "**[R]ecords 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, 844 (par. 19) (Miss. 2012)(emphasis added).

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(cont'd)

- D also claimed State should have been obligated to present calibration certificates for the Intoxilyzer 8000 (Citing *Melendez-Diaz v. Mass.*, 577 U.S. 305 (2009)).
- D's counsel objected to the admission of the Intoxilyzer results, arguing that "based upon the *Melendez-Diaz* holding...that the prosecution would have to bring in some sort of testimony about the calibration of the machine."
- However, Court held that D's objection did not encompass the fact that the prosecution did not produce the Intoxilyzer 8000 calibration certificates.

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- The Court found that D raised "an error on appeal different from that raised at the trial level." *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992) (holding that D is procedurally barred from raising an objection on appeal that is different than that raised on trial).
- G/R: "A trial judge will not be found in error on a matter not presented to him for decision." *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988).
- Probable Cause – D argued O did not have PC to stop him. Since D did not raise this issue before the county court, this issue is also procedurally barred.

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- Sufficiency of Evidence – D claimed State failed to prove b/y a reasonable doubt he was guilty of DUI or careless driving--
  - "...the 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...[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. Should the facts and inferences considered in a challenge to the sufficiency of the evidence point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, the proper remedy is for the appellate court to reverse and render." (Citing *Bush v. State*, 895 So. 2d 836, 843 (par. 16) (Miss. 2005).

McMurtry v. State
(cont'd)

- The Court will determine that there was sufficient evidence to sustain the jury's verdict if the evidence was "of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense. *Id.*

McMurtry v. State
(cont'd)

- 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." Miss. Code Ann. § 63-3-1213 (Rev. 2006).
- Here, 2 independent drivers called & reported D was driving recklessly. O testified he saw D "kind of drifting" from right to left. O explained he charged D w/careless driving b/c "it was pretty obvious that [McMurtry] could not maintain control of [his] vehicle to keep it in his direct lane." Additionally, D did not stop when O turned on blue lights nor did D come to a complete stop at a stop sign. O testified on cross D was "swerving in the roadway."
- The Court held there was sufficient evidence to conclude that D was driving "without due regard for the width" of the road.

McMurtry v. State
(cont'd)

- DUI – It is unlawful for any person to drive or operate a vehicle in MS if he has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons at or above the legal age to purchase alcoholic beverages. Miss. Code Ann. §63-11-30(c) (Rev. 2006).
- D argued that although he was intoxicated at the time he took the intoxilyzer test, he was not intoxicated when he was driving. D noted that the O administered the breath test 1 hour & 45 min. after the traffic stop. D's argument is based on a "retrograde-extrapolation" calculation produced by D's expert witness, Dr. Hayne, a clinical pathologist.

McMurtry v. State
(cont'd)

- Retrograde Extrapolation is "a scientific method of making a determination of [one's blood-alcohol content] at a particular point in time by predicting an earlier unknown value by calculating a known later value with a series generally used average values, and projecting that result back in time." *Evans v. State*, 25 So. 3d 1061, 1065 (¶9) (Miss. Ct. App. 2008).
- The calculation was based on multiple variables, including the volume of alcohol D had consumed, when D had consumed it, when D had eaten, and how much he had eaten.
- The county court judge noted that Dr. Hayne's calculations relied on the concept that D "could have drank [sic] nine or eighteen beers and then gotten in his [van] and tried to drive."

McMurtry v. State
(cont'd)

- The county ct. judge did not find that Dr. Hayne was uninformed regarding retrograde extrapolation, but noted that he "had to make a bunch of assumptions that are information only in the possession of [McMurtry] who has an obvious interest in making that formula work."
- The Court found Dr. Hayne's testimony was not credible and "absolutely incomprehensible." The credibility of the witnesses is not for this Court to decide. *Gary v. State*, 11 So. 3d 769 (Miss. Ct. App. 2009). Affirmed.

Howard v. State

(PCR - Felony DUI)

NO. 2011-CA-00729-COA (Miss. Ct. App. June 5, 2012)

- On April 28, 2008, D pleaded guilty in circuit ct. to felony DUI, 3rd offense. D was 20 yrs. old at the time of his 3rd offense, and 17 at the time of his 1st offense (BAC .14%). D's 2nd DUI was at the age of 19 w/BAC of .02%.
- D was sentenced to 5 yrs. w/1st year to be served on house arrest followed by sup. probation for 4 yrs. upon successful completion of the house arrest. D was also ordered to pay a $2,000 fine.
- D argued his conviction & sentence for the DUI 3rd violated § 63-11-30 b/c his DUI 2nd fell under the Zero Tolerance for Minors section of DUI sentencing provisions. See Miss. Code Ann. § 63-11-30(3)(a).
- Trial Ct. dismissed D's motion for PCR & D appealed.

Howard v. State

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- Standard of Review - A trial court's dismissal of a motion for post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. *Evans v. State*, 75 So. 3d 1119, 1120 (¶4) (Miss. Ct. App. 2011).
- G/R: Zero Tolerance for Minors section shall apply to sentencing when § 63-11-30(1) is violated by a person who is under 21 yrs. of age and has a BAC of greater than .02% but less than .08%.

Howard v. State

(cont'd)

- Here, at the time of D's 2nd conviction, he was under 21 & his BAC was .02%. As such, he *should* have been sentenced under the Zero Tolerance for Minors subsection.
- However, the Court found that there was nothing in the statute to indicate that a conviction under this subsection cannot be used as a sentence enhancement for subsequent DUI convictions, regardless of whether the subsequent convictions fall under the Zero Tolerance subsection.
- The trial ct. relied on *Arnold v. State*, 809 So. 2d 753, 757 (Miss. Ct. App. 2002), which states that any 3rd conviction of DUI may be sentenced as a felony charge. The Court reasoned although *Arnold* did not involve the Zero Tolerance subsection, a D merely has to be convicted of 3 DUIs w/i 5 yrs., w/o any further stipulations. Affirmed dismissal of D's PCR.

Levario v. State

(DUI Causing Death)

NO. 2010-IA-02028-SCT (Miss. June 21, 2012)

- On July 26, 2008, D was involved in a car crash resulting in the death of Coulliette. At the scene, D rec'd 5 traffic tickets, 1 of them was for DUI—the ticket was never signed by the clerk of the court. On July 28, 2008, O who issued the tickets submitted a handwritten affidavit charging D w/DUI Causing Death. On 8/18/08 D pleaded not guilty to the felony charge and the case was continued to 10/23/08. On 10/23/08, D pled guilty to DUI Causing Death & ordered to pay a fine of $300 and to attend MASEP.
- State filed motion to set aside judgment, arguing that the justice ct. lacked jurisdiction to accept the plea on a charge of Felony Causing Death. Motion granted.
- In October 2009, Jackson Co. Grand Jury indicted D with Felony DUI Causing Death for the 7/26/08 incident.

Levario v. State

(cont'd)

- D filed a Motion to Dismiss claiming double jeopardy. Circuit court overruled the motion, and D appealed arguing (1) whether double jeopardy prohibited the State from indicting and prosecuting D for Felony DUI Causing Death in circuit court because of an earlier DUI conviction in justice court that had been set aside, & (2) whether the State violated D's due process rights in seeking to set aside his conviction in justice court and in prosecuting him in circuit court for Felony DUI Causing Death.
- Here, the Court held that double jeopardy did not prohibit the State from indicting and prosecuting D for Felony DUI Causing Death in circuit court, because the justice court did not have jurisdiction to convict D of the felony.

Levario v. State

(cont'd)

- Court cited *Watts v. State*, 78 So.3d 901 (Miss. 2012), holding that "[b]ecause the justice court lacked jurisdiction to try the pending felony charge, [the defendant] could not be acquitted or convicted in justice court and later succeed in asserting former jeopardy as a bar to the already-pending felony charge in circuit court." Thus, if the justice court lacked jurisdiction for its conviction of D, he could not assert DJ to avoid subsequent indictment & prosecution in circuit court.
- Court also found that no statutory provision gives justice courts the authority or jurisdiction to reduce a felony charge to a misdemeanor.

Levario v. State
(cont'd)

- Here, D was never charged w/misdemeanor DUI 1st offense. Clerk never signed the affidavit on the ticket. Instead, O who issued the ticket executed a separate affidavit charging D w/Felony DUI Causing Death. The justice court could not have reduced the felony charge & convicted D of a misdemeanor as only the circuit courts have jurisdiction to reduce a felony to a misdemeanor. See Miss. Code Ann. § 99-33-1(3).
- Violation of Due Process Rts. – Court held D's arguments had no merit, and that the Court need not address whether the State had a right to appeal the justice court's judgment b/c the State did not *appeal* that judgment; rather the State filed a *motion in justice court* to *set aside* the conviction. The proceeding to set aside the conviction in justice court was procedurally proper.

Levario v. State
(cont'd)

- D also argued the State's filing of its motion to set aside the conviction was untimely & violated unnamed "filing deadlines which would certainly have passed...." The Court held this argument failed b/c Miss. Code Ann. § 9-11-33 does not impose filing deadlines or timing requirements.
- D's also argued that the "Order Setting Aside Criminal Judgment" was an improper *ex parte* communication – Court held it did not constitute impermissible *ex parte* contact b/c it did not communicate any position on the merits & no party stood to gain a procedural or tactical advantage b/c of it. *See* Miss. Code of Judicial Conduct, Canon 3(B)(7)("A judge shall not initiate, permit, or consider ex parte communications...except that...ex parte communications for...administrative purposes...that do not deal with substantive matters or issues on the merits are authorized[,] provided...the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication....").

Levario v. State
(cont'd)

- Lastly, D sought to apply the doctrine of prosecutorial vindictiveness to protect his fundamental rt. to plead guilty. D argued the State acted vindictively & sought to punish him...for exercising his rt. to accept his punishment.
- Court held the doctrine inapplicable b/c D had no rt. to plead guilty to a charged felony in justice court.
- Thus, the Court concluded D's due process rts. were not violated. Affirmed.

Jenkins v. State

(Confrontation Clause; Substance Testing)
NO. 2010-CT-00203-SCT (Miss. October 4, 2012)

- O observed D stumbling as he walked down the street. O approached D & noticed slurred speech, breath smelled of alcoholic beverage, eyes bloodshot, & his balance was unsteady. O took D into custody for public intox.
- At that point, O noticed a white tissue in D's mouth. D then grabbed & swallowed a loose white rock fr/tissue--2 additional rocks were found in the tissue, which were taken into evidence & submitted to the MS Crime Lab.
- D was arrested for public intoxication & possession of a controlled substance.

Jenkins v. State

(cont'd)

- State called as a witness the Associate Director of the MS Crime Lab & Gulf Coast Regional Lab Manager to testify on behalf of the crime lab tech who was on indefinite medical leave. W was the "*technical reviewer*" on the case - he made sure that the technical conclusions of the report were consistent w/the lab findings. W testified based on the his review of the analyst's analysis & reached his own conclusion the substance was cocaine.
- D council objected & argued that the witness did not conduct the actual examination nor participate in or observe the testing of the substance. Trial Judge heard testimony fr/W regarding his involvement in the testing process & held his participation as the technical reviewer was sufficient to satisfy the 6th Amend. Right to Confrontation. W was accepted as an expert witness & allowed to testify re: the test results & chain of custody.

Jenkins v. State

(cont'd)

- D found guilty of possession of a controlled substance (cocaine) & on a appeal COA affirmed. D filed petition for writ of cert. which was granted to examine one issue—whether the trial court erred by allowing the lab supervisor to testify in place of the analyst who had performed the substance testing.
- G/R: 6th Amend. guarantees a criminal D the rt. to confront & cross-examine the witnesses ag. him. USSC has held the 6th Amend. Confrontation Clause bars the admission of "testimonial statements" made by a witness who does not appear at trial, unless the witness is unavailable & the defendant had a prior opportunity to cross-examine him. *Crawford v. Wash.*, 541 U.S. 36 (2004); *Bullcoming v. N.M.*, 131 S. Ct. 2705 (2011) (quoting *Melendez-Diaz v. Mass.*, 557 U.S. 305 (2009).

Jenkins v. State
(cont'd)

- "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 analysis even though [he or] she did not perform the tests first hand.'" *McGowen v. State*, 859 So. 2d 320, 340 (Miss. 2003).

Jenkins v. State
(cont'd)

- Here, the testifying witness was the laboratory supervisor. The W was not involved in the actual testing, but did review the report for accuracy & signed the report as the "case technical reviewer." W was able to explain competently the types of tests that were performed & the analysis conducted. W performed procedural checks by reviewing all the data submitted to ensure that the data supported the conclusions contained in the report. Based on the data reviewed, W reached his own conclusion that the substance tested was cocaine.
- Thus, the Court held W satisfied the *McGowen* test b/c he had "intimate knowledge" about the underlying analysis & the report prepared by the primary analysis.
- Accordingly, D's const. rt. to confrontation was not violated. Affirmed.

Questions/Comments

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