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Bondegard v. State

(DUI 1st)

NO. 2010-KM-01727-COA (Miss. Ct. App. November 22, 2011)

- On 10/14/09, O saw D's vehicle pull up to gas pump & come inside. D purchased 12 pack of beer. Once D saw O he became "extremely nervous & fidgety." D's face was flushed & he smelled of alcohol. O testified D was literally shaking & had trouble paying w/his credit card. D went outside several times & made phone calls. D's friend picked up D, leaving D's vehicle parked at gas pump. About 15 min. later, O was conducting an unrelated traffic stop near gas station & saw D get out of his friend's car. D got in his truck & drove off, missing the entrance & driving into a ditch b/f reaching the roadway. O pursued D, lost sight of him, & eventually found D's truck parked in friend's driveway. D saw patrol car & ran into the house. D refused to come out saying that was his house. After a struggle, O subdued D & placed him under arrest.

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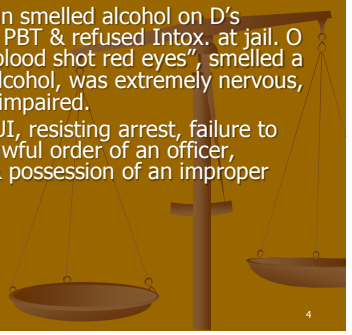
- O testified he again smelled alcohol on D's person. D refused PBT & refused Intox. at jail. O observed D had "blood shot red eyes", smelled a "strong odor" of alcohol, was extremely nervous, & his speech was impaired.
- O charged D w/DUI, resisting arrest, failure to comply with the lawful order of an officer, careless driving, & possession of an improper driver's license.



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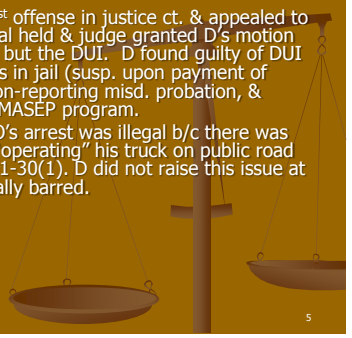
- D convicted of DUI 1st offense in justice ct. & appealed to circuit ct. *De novo* trial held & judge granted D's motion for DV on all charges but the DUI. D found guilty of DUI & sentenced to 48 hrs in jail (susp. upon payment of $1,000 fine), 3 yrs non-reporting misd. probation, & ordered to complete MASEP program.
- D appealed arguing O's arrest was illegal b/c there was no evidence he was "operating" his truck on public road as set forth in § 63-11-30(1). D did not raise this issue at trial so it is procedurally barred.



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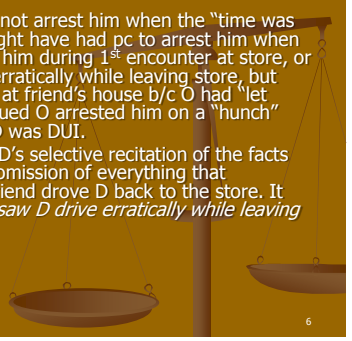
- D also claimed O did not arrest him when the "time was ripe." D argued O might have had pc to arrest him when O smelled alcohol on him during 1st encounter at store, or even when D drove erratically while leaving store, but lacked pc to arrest D at friend's house b/c O had "let [him] go free." D argued O arrested him on a "hunch" rather than RS that D was DUI.
- Court remarked that D's selective recitation of the facts involved a complete omission of everything that happened after D's friend drove D back to the store. It was then that the *O saw D drive erratically while leaving the store*.



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- G/R: 4th Amend. provides that an indiv. has the rt. to be free fr/unreasonable searches & seizures.
- "The existence of 'probable cause' or 'reasonable grounds' justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The determination depends upon particular evidence and circumstances of the individual case." *Jones v. State*, 993 So. 2d 386, 392 (¶ 10) (Miss. Ct. App. 2008).
- A warrantless arrest is lawful if "at the moment the arrest was made, the officers had probable cause to make it--

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- If at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *United States v. Johnson*, 445 F.3d 793, 796 (5th Cir. 2006)(quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).
- Here, O clearly articulated facts (smell, nervous, fumbled w/credit card, impaired speech, bloodshot eyes, erratic driving) that would cause a reasonably prudent person to believe D was DUI. Court stated that just b/c O did not arrest D a/t 1st encounter did not mean O forfeited the right to arrest D for additional events that occurred 15 minutes later. *O did not lose PC to arrest D simply b/c O had to find him. If that were the case, an offender could escape prosecution simply by leaving an officer's sight.*
- Affirmed.

Graves v. State
(Felony DUI)

NO. 2011-KA-00006-COA (Miss. Ct. App. January 24, 2012)

- In May 1999, O observed D's vehicle cross over center line 4-5 times w/i a short distance. O pulled D over & observed D's eyes were watery & bloodshot; speech slurred; odor of intoxicating beverage coming fr/inside van; D stumbled out of van & was unable to walk unassisted.
- D voluntarily submitted to PBT--revealed positive presence of alcohol. O transported D to the jail & administered Intox. (BAC was .16% although this fact was omitted fr/opinion).
- D indicted as habitual offender for felony DUI. At trial, D stipulated he had 2 prior DUI convictions in LA. Jury found D guilty & circuit judge sentenced D as a habitual offender to the max. term of 5 yrs in the custody of the MDOC w/o eligibility for parole or probation.

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- D appealed pursuant to a *Lindsey* brief which states it's appellate counsel's responsibility to determine that his client's case presents no arguable issues on appeal & to file a brief showing that counsel has thoroughly reviewed the record & has found nothing to support an appeal; to send his client a copy of the brief, informing his client that he found no arguable issue for appeal & advising his client of the right to file a *pro se* supplemental brief. *See Lindsey v. State,* 939 So. 2d 743 (Miss. 2005).
- If D raises any arguable issue(s) in his *pro se* brief or the appellate court finds any arguable issues upon its independent review of the record, the appellate court must , if circumstances warrant, require counsel to file a supplemental brief of the issue. *Id.*

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- Here, D's atty. indicated they had diligently searched the procedural & factual history of D's action & searched the record for any arguable issues that could be presented in good faith on appeal, but found none.
- D's atty. requested Court to allow an additional 40 days for D to file a *pro se* supplemental brief should he desire; however, Court had not received any supplemental filing by D.
- Finding no arguable issues for review, the Court affirmed. *See McClain v. State*, 928 So. 2d 210, 211 (¶8) (Miss. Ct. App. 2006).

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Reynolds v. City of Water Valley
(DUI 1st)

NO. 2010-KM-00900-COA (Miss. Ct. App. December 6, 2011)

- On 09/06/08 at approx. 4:30 am, O noticed D's vehicle stopped approx. 6 car lengths b/h him at a red light. D continued on while O performed a security check at a business. O saw D again traveling well below the speed limit. O saw 2 males in the car & passenger drinking fr/a white cup. Passenger pointed at O's car & D slowed to approx. 5 to 8 mph.
- O followed D & called in license plate which came back negative for a stolen vehicle. O observed D's vehicle turn and head towards the elementary school. O decided to turn around & initiate a traffic stop b/c he believed it suspicious that the car was going toward the school at 4:30 am & he was concerned about previous break-ins. D had trouble keeping his balance as he exited the car. O testified that D had slurred speech, glazed & bloodshot eyes, & smelled of alcohol.

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(CON'T)

- O arrested D for DUI & transported him to the jail where O attempted to administer the Intoxilyzer. D blew into the machine, but stopped b/f an accurate sample could be gathered. Intoxilyzer printed a refusal. D was taken to sheriff's dept. & formally charged w/DUI.
- D convicted of DUI in municipal ct. O admitted at no time during his contact w/the car did he witness any traffic violations or improper driving. O also admitted he saw no indication that D was DUI before traffic stop. D appealed to circuit ct. for a *de novo* trial. D moved for directed verdict & motion to dismiss on the grounds that there was insufficient PC for O to have initiated the traffic stop. Both motions were denied & D again convicted.

Reynolds v. City of Water Valley
(CON'T)

- D appealed & this Court looked at whether the officer's investigatory stop was the result of RS based upon specific & articulable facts, which, if taken together w/rational inferences fr/those facts would result in the conclusion that criminal activity has occurred or is imminent. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); *McCray v. State*, 486 So.2d 1247, 1249-50 (Miss. 1986).
- D argued O did not have PC to conduct stop that led to the arrest & DUI conviction. D asserted O failed to articulate any illegal activity or violation that gave O sufficient PC or RS to initiate the traffic stop. Court agreed.

Reynolds v. City of Water Valley
(CON'T)

- The MS SCT stated in *Gonzales v. State*, 963 So.2d 1138, 1142 (¶ 14) (Miss. 2007) to determine whether the search & seizure were unreasonable, the inquiry is 2 fold: (1) whether O's actions were justified at its inception, & (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 19-20.
- *To satisfy the 1st prong, the officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id.* at 21.
- If O did not have requisite RS then evidence obtained during the stop--in this case, evidence of DUI– would be deemed fruit of the poisonous tree & be inadmissible. *Haddox v. State*, 636 So. 2d 1229, 1233 (Miss. 1994).

Reynolds v. City of Water Valley
(CON'T)

- Mere hunches or looking suspicious are insuff. to establish RS for an investigatory stop. *Qualls v. State*, 947 So. 2d 365, 371 (¶ 16) (Miss. Ct. App. 2007).
- Here, O testified D's behavior was suspicious & initiated an investigatory stop based on the following: (1) D stopped 6 car lengths b/h him at red light; (2) Car slowed speed dramatically upon seeing him; & (3) Car, although on a public street, was driving toward the elementary school at 4:30 am.
- Court concluded the investigatory stop was not based on specific & articulable facts that a crime had occurred or was imminent. *O testified D did not violate any traffic laws, car not stolen, & D did not exhibit the usual signs of DUI-- swerving, failing to dim headlights, or abrupt stopping & starting.* O testified one reason he was suspicious & made the stop was b/c of recent break-ins at the school. It was not until after this traffic stop did O suspect DUI.

Reynolds v. City of Water Valley
(CON'T)

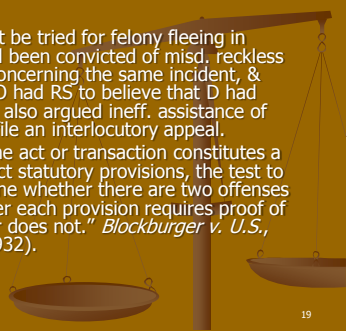
- Court held simply no evidence D had committed any criminal offense or was about to engage in criminal activity. Since O lacked the proper RS to initiate a Terry stop, any evidence found as a result of the stop was considered fruit of the poisonous tree & should have been suppressed at the hearing.
- Dissent - Court applied the wrong standard of review - when reviewing trial court's decision to admit or exclude evidence in the absence of a motion to suppress--such as the D's case--the Court is to apply an abuse of discretion standard of review on appeal.
- J. Carlton stated the law clearly allows an investigatory stop based on RS which was provided here. J. Carlton also cites to § 63-3-509 (1) when she discussed D's car oddly dropping fr/25 mph to 5-8 mph.

Watts v. State
(Felony Fleeing)
NO. 2010-KA-00917-SCT (Miss. Ct. App. February 2, 2012)

- D stopped at roadblock by Marion PD & Lauderdale Co. SO. O asked D for DL & commented he smelled aroma of alcohol coming fr/D's vehicle. D then took off & O gave chase. D refused to stop & continued until he lost control hitting a tree (100-135 mph). D then fled on foot & was not apprehended.
- D & his atty. went to SO & D signed a confession admitting he fled roadblock, was going over 100 mph knowing officers were chasing him, he hit a tree, and then fled.
- D was indicted for felony fleeing in violation of § 97-9-72 on 7/24/08. On 8/27/08, D entered plea of guilty to reckless driving.
- D moved to dismiss indictment for felony fleeing arguing DJ. TC denied motion & D was convicted by jury for felony fleeing.

Watts v. State
(CON'T)

- D argued he could not be tried for felony fleeing in circuit ct. after he had been convicted of misd. reckless driving in justice ct. concerning the same incident, & State failed to prove O had RS to believe that D had committed a crime. D also argued ineff. assistance of counsel for failing to file an interlocutory appeal.
- G/R: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).



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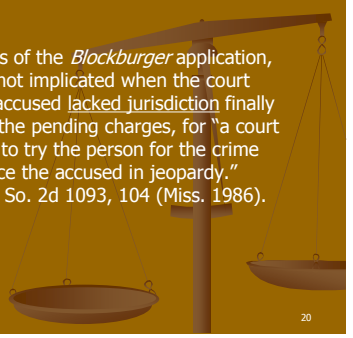
- However, regardless of the *Blockburger* application, former jeopardy is not implicated when the court which 1st tried the accused lacked jurisdiction finally to adjudicate all of the pending charges, for "a court without jurisdiction to try the person for the crime charged cannot place the accused in jeopardy." *Butler v. State*, 489 So. 2d 1093, 104 (Miss. 1986).



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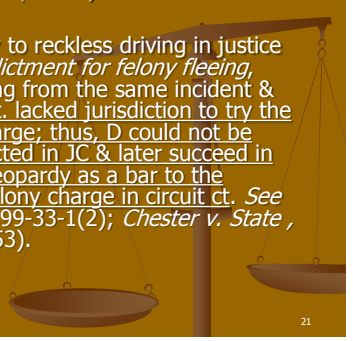
(CON'T)

- Here, D pled guilty to reckless driving in justice ct. *while under indictment for felony fleeing,* both charges arising from the same incident & conduct. Justice Ct. lacked jurisdiction to try the pending felony charge; thus, D could not be acquitted or convicted in JC & later succeed in asserting former jeopardy as a bar to the already pending felony charge in circuit ct. *See* Miss. Code Ann. § 99-33-1(2); *Chester v. State* , 216 Miss. 748 (1953).



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(CON'T)

- Suff. of Evidence - D argued State failed to prove O had RS to believe he had committed a crime. D argued State did not elicit testimony fr/any officer concerning what if any crime D allegedly committed. However, D failed to mention that O who approached D's vehicle at roadblock detected the smell of intoxicating beverage fr/vehicle.
- Ineff. Assistance of Counsel – D argued atty. ineffective for failing to file an interlocutory appeal of DJ claim. B/c DJ claim w/o merit, D unable to demonstrate prejudice .
- No cumulative error.
- Affirmed.

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Moreno v. State
(DUI Manslaughter & Mayhem)
NO. 2009-CT-01001-SCT (Miss. Ct. App. February 9, 2012)

- In 2005, D pled guilty to 1 ct. DUI Manslaughter & 2 cts. DUI Mayhem in Hattiesburg, MS. He was sentenced to 25 yrs w/15 susp. on the death & 25 yrs on each injury, w/20 yrs susp (all to run c/s). The judge who issued his arrest warrant later represented him in circuit ct.
- After his guilty plea, D filed a PCR alleging DJ & ineff. assistance of counsel. PCR dismissed. D appealed & COA affirmed. D filed a 2nd PCR arguing improper venue & a new claim of DJ. Petition summarily dismissed & D did not appeal.
- On 3/16/09, D filed petition in SCT requesting permission to proceed in the trial ct. on a claim of ineff. assistance of counsel a/t the SCT handed down an opinion disciplining his atty. for representing D a/t having signed an arrest warrant ag. him as a municipal judge. SCT ordered an evidentiary hearing to determine whether or not D rec'd ineff. assistance of counsel.

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Moreno v. State
(CON'T)

- A/t the evidentiary hearing, trial ct. found D had entered his plea ag. the advise of counsel & D failed to produce evidence to support that his counsel was deficient OR that any such deficiency resulted in prejudice to him. D appealed, & again reasserted his venue & DJ claims that had previously been denied. COA addressed the claims but denied relief (*Moreno v. State*, No. 2009-CP-01001-COA (Miss. Ct. App. March 1, 2011). SCT granted D's request for writ of cert.
- SCT 1st held the Court incorrectly ordered an evidentiary hearing in 2009. D should have filed in trial ct., not SCT. Notwithstanding the Court's error, the Court affirmed trial ct.'s denial of relief on the ineff. assistance claim.
- The Court held COA erred in finding D had set forth DJ argument in his 1st PCR. Although he did raise DJ, it was on a totally different basis.

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Moreno v. State
(CON'T)

- SCT stated COA also incorrectly included in its statement of facts that D pled guilty in municipal court to DUI, driving without a license, driving without proof of insurance, and leaving the scene of an accident. There was NO PROOF IN THE RECORD that D pleaded guilty to those charges. This issue was not argued b/f the trial ct. in D's 3rd PCR. Thus, D improperly raised that issue in his appeal & COA improperly considered & denied it.
- COA improperly considered & denied D's claim of improper venue. SCT held there is no authority for the proposition that a venue issue can be raised & considered for the 1st time on appeal fr/a trial ct's denial of PCR.

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Moreno v. State
(CON'T)

- D filed 02/09/2012 petition for writ of cert. with the SCT which the Court granted.
- D's argument focused entirely on DJ. D argued: (1) he plead guilty to DUI first, before he plead guilty to DUI manslaughter & mayhem, & (2) for the first time, argued his counsel was ineff. for failing to recognize and argue DJ violation.
- Double Jeopardy- The Court found that the DJ violation that D argued in his 1st petition had a completely different basis than the case at hand. Further, the Court found no proof existed in the record that D plead guilty to DUI first before he plead guilty to DUI manslaughter & mayhem, and the issue was not argued b/f the TC in the D's 3rd petition. Thus the D improperly raised the DJ issue in this current appeal, and the COA improperly considered & denied it.

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Van Wagner v. State
(Aggravated DUI)
NO. 2010-KA-01631-COA (Miss. Ct. App. February 14, 2012)

- On 04/25/09, D was arrested for DV of his girlfriend. The next day both she & D were involved in a 1 car wreck. At scene, O found passenger had been thrown fr/ car lying on side of the road w/unlocked chains wrapped around her legs. O found 2 beer cans & top of a liquor bottle at scene. D told O his girlfriend had been driving, but witnesses said D was the one driving. One of the tires on the vehicle was flat. Both D & passenger were taken to hospital--passenger later died. O testified he smelled alcohol when entering the D's hospital room. O testified he rec'd consent fr/D & drew blood for an alcohol test--BAC was .11%.
- At trial, an expert in accident reconstruction testified that D was the driver & there was no indication of a blow out at the time of the wreck.

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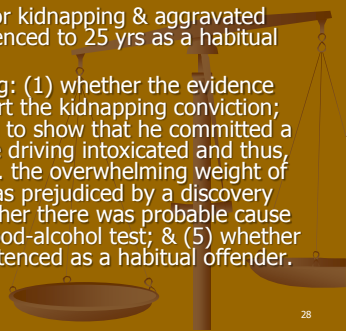
Van Wagner v. State
(CON'T)

- D was convicted for kidnapping & aggravated DUI and was sentenced to 25 yrs as a habitual offender.
- D appealed arguing: (1) whether the evidence was suff. to support the kidnapping conviction; (2) the state failed to show that he committed a negligent act while driving intoxicated and thus, the verdict was ag. the overwhelming weight of evidence; (3) D was prejudiced by a discovery violation; (4) whether there was probable cause to administer a blood-alcohol test; & (5) whether D was illegally sentenced as a habitual offender.



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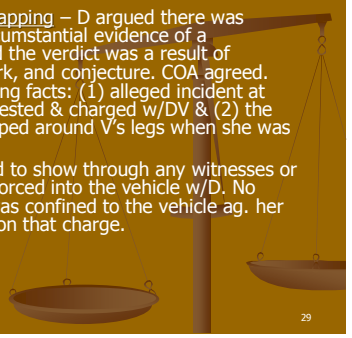
Van Wagner v. State
(CON'T)

- Suff. of Evid. re: Kidnapping – D argued there was neither actual nor circumstantial evidence of a kidnapping. D claimed the verdict was a result of speculation, guesswork, and conjecture. COA agreed. State relied on following facts: (1) alleged incident at park where D was arrested & charged w/DV & (2) the unlocked chains wrapped around V's legs when she was thrown fr/vehicle.
- Court held State failed to show through any witnesses or evidence that V was forced into the vehicle w/D. No evidence to show V was confined to the vehicle ag. her will. D entitled to DV on that charge.



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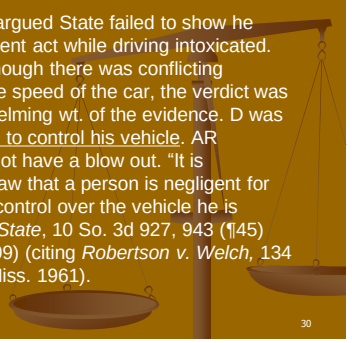
Van Wagner v. State
(CON'T)

- Weight of Evi. - D argued State failed to show he committed a negligent act while driving intoxicated. Court held that although there was conflicting testimony about the speed of the car, the verdict was not ag. the overwhelming wt. of the evidence. D was negligent for failing to control his vehicle. AR concluded he did not have a blow out. "It is elementary in tort law that a person is negligent for failing to maintain control over the vehicle he is driving." *Lepine v. State*, 10 So. 3d 927, 943 (¶45) (Miss. Ct. App. 2009) (citing *Robertson v. Welch*, 134 So. 2d 391, 493 (Miss. 1961).



Van Wagner v. State
(CON'T)

- Discovery Violation – During trial, both State & D were surprised by O's testimony that he had obtained consent fr/D prior to administering a blood-alcohol test. D claimed this irreparably prejudiced him b/c his defense to the test rested on lack of consent. B/c BOTH were surprised, judge ruled consent form would be allowed. Judge also allowed O to be on standby to testify if either side had further questions for him. "[T]he Mississippi Supreme Court has ruled that a violation of Rule 9.04 is considered harmless error unless it affirmatively appears from the entire record that violation caused a miscarriage of justice." *Gray v* State, 926 So. 2d 961, 971 (¶25) (Miss. Ct. App. 2006).

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Van Wagner v. State
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- Here, Court found that any possible violation of Rule 9.04 did not result in a miscarriage of justice. D was given a reasonable opportunity to inquire about the consent form fr/O.
- Suff. PC to administer test – Multiple eye witnesses told O that D had been driving. **Smell of alcohol is sufficient to establish pc**. *McDuff v. State*, 763 So. 2d 850, 855 (¶16) (Miss. 2000). Additionally, the wreck showed negligent driving.
- D sentenced as habitual offender - D claimed his sentence was illegal b/c: (1) an improper amendment to the indictment post-trial, & (2) defective proof of prior convictions. Six weeks prior to trial the State filed a motion to amend D's indictment to charge him as a habitual offender. Granted prior to trial. At the sentencing hearing, State amended indictment again --

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Van Wagner v. State
(CON'T)

- to correct the county in which the burglary had occurred. Court held the amendment to D's indictment did not alter D's defense in any way and was proper. "[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood as to prejudice the defendant's case." *Alexander v. State*, 875 So. 2d 261, 269 (¶31) (Miss. Ct. App. 2004).
- D also attacked the State's proof of prior convictions claiming they were defective. Court held State's proof was sufficient. D's pen-packets where admitted & there was testimony fr/the Dir. of Criminal Records Division for the AL Dept. of Corrections. D was given the opportunity to challenge the pen-packet during the sentencing hearing. Pen-packets are competent evidence to show prior convictions. *Frazier v. State*, 907 So. 2d 985, 991 (¶16)(Miss. Ct. App. 2005).

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Van Wagner v. State
(CON'T)

- Dissent – J. Maxwell argued there was sufficient evidence to support the kidnapping charge—D had been arrested for severely beating V, he later admitted fighting w/V, & she was discovered the next day in his presence, bound in a chain, still in possession of the domestic-abuse card the deputy had given her when he arrested D the day before.

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Havard v. State
(DUI Death)
NO. 2011-CP-00027-COA (Miss. Ct. App. February 21, 2012)

- On 10/15/99, D was convicted in George Cty. Circuit Ct. for DUI Death & was sentenced to 20 yrs w/8 yrs susp. & 5 yrs probation. Conviction affirmed on appeal. D violated terms of probation when he possessed alcohol in a dry county & drove under the influence of alcohol. Trial ct. revoked D's probation & sentenced him to 6 yrs of his 8 yrs susp. sentence w/the remaining 2 yrs to be served on PRS. D subsequently filed a PCR which the trial ct. denied. D appealed.
- B/c SCT affirmed D's conviction & sentence on direct appeal, D was required to seek & obtain permission fr/the supreme ct. b/f he could properly pursue a PCR motion in the trial ct. The record failed to include any request by D. Accordingly, the Court held the trial ct. was *w/o jurisdiction* to decide D's PCR motion. Thus, the judgment was vacated & the case remanded to the trial ct. to dismiss the PCR motion for lack of jurisdiction.

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Istiphan v. State
(DUI 1st)
NO. 2010-KM-01785-COA (Miss. Ct. App. March 6, 2012)

- On 01/08/09, at approx. midnight, O observed D's vehicle weaving in the roadway & crossing over the center lane markings. O further noted that he smelled alcohol emitting fr/inside the vehicle. D admitted to consuming 2 drinks approx. 2 hrs prior to the stop.
- O attempted to adm. PBT, HGN, & Walk and Turn, but D would not cooperate & exhibited argumentative demeanor. O testified that he again smelled alcohol & D demonstrated coordination impairment when O was trying to get him to complete the walk and turn test.
- After determining he was not going to be able to successfully administer any of the field sobriety tests, O placed D under arrest for DUI.
- Once at the PD, D notified O he was having an anxiety attack & needed medical attention. The O alerted Madison Rescue & AMR who conducted an exam on D.

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Istiphan v. State
(CON'T)

- While at PD, D refused to take Intox. test. D charged w/careless driving & DUI. D requested to go to hospital to receive medical treatment & was released.
- D had a blood sample drawn & tested for presence of alcohol (approx. 3 hrs later); however, TC found the toxicology report to be inadmissible at trial.
- D entered plea of *nolo contendere* in city ct. for DUI & careless driving. D appealed to cty. ct. -*de novo trial*- & was again found guilty of DUI in violation of MS Code § 63-11-30(1)(a). Judge sentenced D to 48 hrs susp., $900 fine, & MASEP completion.
- D filed a motion for JNOV, or in the alternative, a new trial—cty. ct. denied motion.

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Istiphan v. State
(CON'T)

- D appealed to circuit ct., which affirmed the judgment of the cty. ct.
- D appealed to SCT which assigned case to COA. D argued: (1) Whether D was denied effective assistance of counsel; (2) verdict ag. the overwhelming wt. of evidence; (3) trial ct. erred in disallowing the evidence of the toxicology report; (4) failure to admit the toxicology report effectively denied D a fair trial; (5) verdict ag. the wt. of evidence denied him a fair trial; & (6) lower ct. erred in not granting a motion for a new trial.

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Istiphan v. State
(CON'T)

- Evi. Sufficient & Not Ag. Overwhelming Wt. of Evidence- Ample evidence was offered by City in support of D's conviction. O testified: observed D's vehicle weaving in the roadway; he smelled alcohol coming fr/D's person & vehicle; D admitted he had been drinking; D exhibited an uncooperative & argumentative demeanor; D demonstrated coordination impairment; and D refused Intox. test. Furthermore, a video recording of the traffic stop & of the events that occurred in the booking room were also admitted into evidence.

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Istiphan v. State
(CON'T)

- Toxicology Report & Ineffective Counsel - D argued trial ct. erred in denying into evidence his toxicology report taken by the hospital approx. 3 hrs a/t his traffic stop.
- D argued in accordance w/MRE 803(6), he adequately identified the toxicology report & established it as his medical record. He also argued it should have been considered if for no other reason than for its extreme probative value.
- Court found TC did not err in refusing to admit the toxicology results fr/the hospital into evidence. D had a copy of the report allegedly given to him when he was discharged. No custodian of records fr/the hospital was there to testify that the report was a business record under MRE 803(6). D's testimony was insuff. to satisfy the requisite predicate of the rule. The toxicology report was not self-authenticating.

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Istiphan v. State
(CON'T)

- D's testimony was insufficient to satisfy the requisite predicate as stated in Rule 803(6).
- D also argued that his trial counsel rendered ineff. assistance of counsel b/c his atty. failed to get the toxicology report properly admitted into evidence. Court found the direct appeal record was insuff. to determine whether D was denied ineff. assistance of counsel. This claim would be more appropriately raised in a PCR motion. *See Fluker v. State*, 44 SO. 3d 1029, 1034 (¶13) (Miss. Ct. App. 2010).

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Evans v. State
(DUI 1st)
NO. 2010-KM-01225-COA (Miss. Ct. App. March 20, 2012)

- O stopped D for speeding --105 mph in a 65 mph zone. O noticed when he took D's license the strong smell of intoxicating beverage emitting from inside D's vehicle. D's eyes were dilated & his speech slurred.
- O attempted to administer PBT, but D would not blow hard enough for a proper reading. O transported D to police station. During the drive, D admitted to consuming alcoholic beverages earlier that day. O offered D the Intoxilyzer test, but D refused.
- O issued D 4 citations: DUI, no proof of liability insurance, careless driving, & speeding.
- D found guilty in justice court, and appealed to circuit ct. where after a trial *de novo,* he was found guilty of DUI. Circuit ct. imposed a 48 hr susp. sentence, ordered D to pay a fine & court costs, as well as, to attend MASEP.

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Evans v. State
(CON'T)

- D appealed arguing: (1) verdict ag. the overwhelming weight of evidence; (2) State failed to prove O possessed sufficient qualifications & certifications to administer the breath-analysis test; (3) trial court erred by failing to appoint him counsel.
- Wt. of Evidence - D argued the video recording of the roadside stop & transport to PD was not admitted into evidence at trial; State presented no test results to establish intoxication; State failed to show Intoxilyzer refusal; O demonstrated bias toward him; no proof other than O's testimony that D was intoxicated; & no proof of PC existed as to why the O stopped his vehicle on the night in question.

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Evans v. State
(CON'T)

- Here, the Court found the State offered ample evidence in support of D's DUI conviction: D was traveling at an extremely high rate of speed; O smelled alcohol emitting from D's vehicle; D had slurred speech and dilated eyes; D admitted to drinking earlier in the day; & D initially refused to take the Intoxilyzer test.
- The Court found that the above evidence did not preponderate so heavily against the verdict that allowing the verdict to stand would sanction unconscionable injustice. Additionally, the Court found that PC clearly existed for the traffic stop. O witnessed D's vehicle traveling 105 mph in violation of the 65 mph limit. Court recognized that as a general rule, "the decision to stop an automobile is reasonable where the police have PC to believe that a traffic violation occurred." *Henderson v. State,* 878 So.2d 246, 247 (¶7) (Miss. Ct. App. 2004).

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Evans v. State
(CON'T)

- Qualifications & Regulation to Administer Test- D argued the State failed to prove O possessed the qualification & certifications required to administer breath-analysis tests. D cited *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990) stating, " 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."
- D also cited to § 63-11-19 for the proposition that the State failed to prove as part of its authenticity burden that D's breath test was "performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis."

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Evans v. State
(CON'T)

- O testified he was *unable to get test results* from PBT b/c D would not blow hard enough for it to register. O offered D the Intox. test, but *D refused*. Thus, Court found no breath-analysis test results were presented at trial to establish D's guilt. Thus, the question as to O's sufficient qualification & certifications to administer tests was irrelevant.
- Right to Counsel - D claimed TC violated his rt. to counsel by failing to appoint him an atty. at trial.
- D had indicated he wanted counsel & asserted he was indigent. However, D proceeded *pro se* after receiving 2 continuances to obtain counsel. D also appeared for trial in circuit ct. w/o counsel, and asked for a continuance, which the court granted. Ct. ordered trial to commence on 6/28/10; however, D appeared again w/o counsel, and the court told D the trial would proceed.

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Evans v. State
(CON'T)

- Court recognized that an indigent is entitled to competent counsel to defend him; however the record showed that D *neither requested a court-appointed attorney nor properly qualified himself as indigent* with the circuit court prior to trial. *Wynn v. State*, 964 So. 2d 1196, 1204 (Miss. Ct. App. 2007).

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Smith v. State
(Felony DUI)
NO. 2010-KA-01123-COA (Miss. Ct. App. March 20, 2012)

- O responded to a 1 car wreck. Upon arriving, vehicle had left hwy, overturned, & ended up back on hwy facing wrong direction. O spoke w/D & detected alcohol on her breath & slurred speech. D admitted to consuming some beers earlier that evening. O administered PBT which detected the positive presence of alcohol. Intox. test indicated D's BAC was 0.11%. D was arrested for DUI.
- After prosecution rested at trial, D moved for DV b/c prosecution had not presented evidence of prior DUI convictions. Prosecution was allowed over D's objection to reopen its case-in-chief & presented evidence of D's 2 prior convictions.

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Smith v. State
(CON'T)

- D convicted of felony DUI & sentenced to serve 2 yrs & fined $2000.
- D appealed arguing: indictment was legally insufficient in that it referred to "weight volume" instead of "alcohol concentration"; prosecution failed to proved D had been convicted of DUI 3 x in 5 yrs; ct. erred when it admitted D's statements to O; & ct. erred in allowing prosecution to reopen its case-in-chief.
- Sufficiency of Indictment - D claimed she could not understand what the indictment charged.
- G/R: "It is a well-established principle of law that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged." *Gray v. State*, 728 So. 2d 36, 69 (¶167) (Miss. 1998).

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Smith v. State
(CON'T)

- An indictment is legally sufficient if the accused is given fair notice of the charge he faces fr/a reading of the indictment as a whole. *Smallwood v. State*, 584 So. 2d 733, 738 (Miss. 1991).
- Court held found the indictment ag. D included suff. info. to place her on **notice regarding the charge she faced**.
- Sufficiency of Evidence- D argued there was insuff. evidence to convict her of felony DUI b/c prosecution failed to demonstrate she had been convicted of 2 prior DUI offenses w/i 5 yrs of her most recent DUI conviction. D's most recent DUI conviction occurred on 7/8/10, and her 2 prior convictions occurred on 4/27/04 & 8/31/06.
- D is mistaken as to the essential elements of felony DUI- the **offenses must have occurred w/i 5 yrs**….

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Smith v. State
(CON'T)

- In *Smith v. State*, 950 So. 2d 1056, 1058 (¶ 10) (Miss. Ct. App. 2007), this Court stated that § 63-11-30(2)(c) "requires that the offenses must have been *committed* within a period of 5 yrs of each other, not the convictions." Evidence of both the date of the offense and that the offense/arrest resulted in a conviction are necessary for a conviction. *Id.*
- Admissibility of Pre-Miranda stmts. - O testified that he had not given D any Miranda warnings before he asked her whether she had been drinking. O explained he asked D these questions to investigate the accident.
- "In a non-custodial setting where interrogation is investigatory in nature (general on-the-scene investigation), Miranda warnings are not required in order that a D's statements be admissible." *Hopkins v. State*, 799 So. 2d 874, 878 (Miss. 2001).

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Smith v. State
(CON'T)

- D was not under arrest when O asked her whether she had been drinking. D was not deprived of her freedom in any manner whatsoever when O asked questions intended to further his investigation of the 1 car wreck. O did not arrest D until *after* he had determined that she had been driving under the influence of alcohol.
- Reopening Prosecution's Case in Chief- D argued ct. violated its duty of impartiality in a criminal trial. "Trial courts must not allow the state to reopen its case unless there is mere inadvertence or some other compelling circumstance and no substantial prejudice will result." *Lyle v. State*, 987 So. 2d 948, 951 (¶13) (Miss. 2008).

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Smith v. State
(CON'T)

- State had thought the ct. had indicated that the proper procedure was to read evidence of D's 2 priors into the record during jury instructions. After ct. informed State this was incorrect, prosecutor explained he misunderstood the instructions by the ct., and that he had hand-certified copies of the abstracts of D's 2 prior DUI offenses.
- Court held that prosecutor's failure to introduce evidence of D's 2 prior DUI offenses was *due to mere inadvertence in the form of misunderstanding of the circuit court's instructions & D did not suffer substantial prejudice* as a result of the circuit court's decision to allow prosecution to reopen its case-in-chief.
- D claimed judge partial to State; however, judge prompted both prosecutor & D during the same exchange—treated both sides equally.

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Questions/Comments

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