IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICHARD STUCKEY — APPELLANT

VS.

NO. 2006-KM-1589

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

PROPOSITION: The Trial Court correctly overruled Stuckey's Motion to Dismiss at the end of the State's case and at the end of trial.

STATEMENT OF THE CASE

On July 3, 2006, Richard Stuckey was charged with Driving Under the Influence, First Offense, Mississippi Code Anno. 66-11-30(1)(a) and careless driving. At trial in Monroe County Justice Court, Stuckey entered pleas of Nolo Contendere to each of these charges and then perfected his appeal to Monroe County Circuit Court for a trial de novo. (T. 4) No pretrial motions were filed. The charge of careless driving was dismissed on motion of the prosecutor on the day of trial. (T. 5)

Highway patrolman Brian Mobley testified that he first observed Stuckey exiting his vehicle from the driver's side after Officer Smith stopped Stuckey. (T. 6) Officer Mobley took care of the case from that point. He smelled alcoholic beverages on Stuckey and asked him to walked to the rear of the vehicle. (T. 7,8) He questioned Stuckey about whether or not he had been drinking and Stuckey stated that he had consumed some alcoholic beverages earlier in the day. (T. 7) Officer

Mobley observed that Stuckey speech was slurred and he was not steady on his feet. (T. 7,8) Officer Mobley then asked Stuckey to take a portable breath test. Stuckey voluntarily took the test and tested positive for alcohol. (T. 7)

Officer Mobley handcuffed Stuckey and placed him in the patrol car and transported him to the Monroe County Sheriff's Office. (T. 7,8) Officer Smith stayed with the car and waited for the tow truck. (T. 7,8)

Officer Mobley testified that he is certified to operate the Intoxilyzer 8000 Machine. The parties at trial stipulated that the machine was properly calibrated, that Officer Mobley was certified to operate the Intozilyzer 8000 and that Stuckey did take the test. (T. 9, 10) The Intoxilyzer 8000 calibration certificates as well as Officer Mobley's certificate to operate the Intoxilyzer 8000 were entered into evidence. The documents were marked as separate exhibits to Officer Mobley's testimony by stipulation. (T. 9,10)

Officer Mobley testified that he offered Stuckey the test and told him that he had the right to refuse the test. (T. 10) Stuckey indicated that he would like to take the test. (T. 10) Officer Mobley testified that he administered the test and the machine operated as it normally does. (T. 10) Officer Mobley testified that Stuckey registered 0.13 on the Intoxilyzer 8000 breath-testing instrument at the Monroe County sheriff's office. (T. 11)

Officer Mobley testified that he then charged Stuckey with DUI and told him he had the right to call for medical or legal assistance. Officer Mobley testified that he then went to the Justice Court Clerk's Office and swore out an affidavit against Stuckey. (T. 11, 12)

Officer Mobley testified that he saw Stuckey behind the wheel of the vehicle which was pulled over on the shoulder of the road when he arrived to assist Officer Smith. (T. 13) He testified that the only field sobriety test he gave Stuckey was the portable intoxilyzer. (T. 13,14) Since there

were other obvious signs that Stuckey was intoxicated, further field tests were unnecessary. (T. 14) Officer Mobley testified that he did discuss with Stuckey whether in fact he had been driving and Stuckey stated that he was "headed home". (T. 15)

At the close of the state's case, counsel for Stuckey moved the court to dismiss the charges against him because the officer who conducted the testing and the arrest failed to ever see the Stuckey actually driving the vehicle. (T. 16) The trial court denied the Stuckey's motion to dismiss the charge against him, holding that

> "[t]he Supreme Court has stated on more that one occasion that a defendant can be shown to be operating a motor vehicle by circumstantial evidence of being found behind the wheel by an officer, which was done in this case. Furthermore, the defendant admitted that he was driving the vehicle. He was . . . headed home.
>
> The officer had probable cause to suspect the defendant to be operating the vehicle under the influence. He saw him exit the vehicle. He smelled alcoholic beverages on his breath. The portable breath test indicated positive for the use of alcoholic beverages. The defendant had slurred speech and was not steady on his feet.
>
> For those reasons the motion to dismiss is overruled."
>
> (T. 17)

The defense rested and renewed its motion to dismiss which the court again denied for the same reasons. (T. 18)

SUMMARY OF THE ARGUMENT

The State clearly proved all the statutory requirements of Miss. Code Anno.§ 63-11-30 (1) (a)[1], which provides that it is unlawful to drive or to otherwise operate a vehicle within the state of Mississippi while under the influence of intoxicating liquor. In fact, the evidence of Stuckey's intoxication and his admission that he was driving the vehicle were entered into evidence with no objection at all by the defense. The Supreme court has repeatedly held that circumstantial evidence is sufficient to show that a driver was operating or driving a vehicle while under the influence of alcohol.

Further, without a Motion to Suppress, or at the very least a contemporaneous objection, the trial court correctly admitted all the evidence offered to support the Stuckey's conviction for DUI pursuant to §63-11-30(1)(a) and such evidence was sufficient to support a conviction for DUI.

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[1] Miss. Code Anno. § 63-11-30 (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based on the number of grams of alcohol per one hundred (100) milliliters of blood or gram of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter; (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or (e) has an alcohol concentration of four one-hundredths percent (.04%) or more in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such persons blood, breath or urine, administered as authorized by this chapter for persons operating a commercial motor vehicle.

ARGUMENT

THE STATE'S PROOF AND THE REASONABLE INFERENCES THEREFROM PROVED THAT STUCKEY OPERATED HIS VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL PRIOR TO PULLING OFF ON THE SIDE OF THE ROAD.

Stuckey asserts that the state failed to prove that he drove his vehicle while under the influence of alcohol because Officer Mobley did not see Stuckey driving his vehicle. The state counters that the evidence presented at trial and the reasonable inferences amply support a finding that the defendant did, in fact, drive or otherwise operate his vehicle while intoxicated.

The Supreme Court has held that a defendant can be shown to be operating a motor vehicle by circumstantial evidence as in the case *sub judice*. The facts of the case are undisputed. Officer Mobley saw Stuckey exit the vehicle from the driver's door and he smelled alcoholic beverages on his breath. (T. 7) A half a can of open beer was found in the vehicle. (T. 7) Officer Mobley observed that Stuckey had slurred speech, was unsteady on his feet and smelled of alcoholic beverages. (T. 8) Stuckey voluntarily took a portable breath test which was positive for the use of alcoholic beverages. (T. 7) Officer Mobley also testified that while at the scene he discussed with Stuckey whether he had in fact been driving. (T. 15) Stuckey admitted he was driving the vehicle, stating that he was "headed home". (T. 15) There was no proof or inference that there was any other person on the scene or that anyone else was driving. Officer Mobley took Stuckey to the Monroe County Sheriff's Office where Stuckey registered 0.13 on the Intoxilyzer 8000 breath-testing instrument. (T. 11) The evidence clearly supports Stuckey's conviction for operating a vehicle while under the influence alcohol pursuant to §63-11-30 (1)(a).

In *Holloway v. State*, 860 So.2d 1244, 1246-47 (Miss. App. 2003), the Court of Appeals stated, "A person may be arrested, tried, and convicted of operating a motor vehicle under the

influence of an intoxicating liquor even if there is no eyewitness presented who viewed the defendant operating the vehicle, provided there is sufficient evidence." Accord, *Turner v. State*, 910 So.2d 598, 610 (Miss. App. 2005). It is sufficient to show proof supporting a reasonable inference that the defendant was driving the vehicle. *Turner*, 910 So.2d at 610. Moreover, "[r]easonable doubt need not be removed about whether the defendant had actually driven the motor vehicle prior to his discovery." *Holloway*, 860 So.2d at 1247, citing *Lewis v. State*, 831 So.2d 553, 557 (Miss. App. 2002).

In *Kramm v. State*, 949 So.2d 18, the Defendant told the officer that he had hit a car about a mile east of the retirement home. He also asserted that his insurer would cover any damage. The Court held that these admissions, coupled with the absence of any proof or inference that anyone else was driving, were sufficient to sustain the state's burden. In the instant case, defense counsel did not at any time object at trial on grounds that the evidence should be suppressed for lack of probable cause or make a pretrial motion to suppress the evidence. Defense counsel argued at trial that the prosecution was required to show proof of intoxication and that the person charged was driving or operating a vehicle while under the influence and that the prosecution had failed to prove an element of §63-11-30, MCA because Officer Mobley did not see Stuckey driving the car. Counsel for Stuckey did not object to any of the testimony of Officer Mobley regarding the obvious intoxication of Stuckey at the time Officer Mobley came to the scene. (T. 7-9) He did not object to Officer Mobley's testimony that Stuckey admitted that he had been drinking or his admission that he had been driving. (T. 15) In fact, defense counsel stated that he had no objection to the evidence and stipulated that the Intoxilizer 8000 was properly calibrated, that Officer Mobley was certified to administer the test and that Stuckey took the test. (T. 9) Counsel for Stuckey offered no objection

and indeed *stipulated* to the results of the Intoxilizer breath test showing that Stuckey registered 0.13.

Without a Motion to Suppress, or at the very least a contemporaneous objection, the trial court correctly admitted all the evidence offered to support the Stuckey's conviction for DUI pursuant to §63-11-30(1)(a) and such evidence was sufficient to support a conviction for DUI. Counsel for Stuckey allowed all the evidence regarding Stuckey's intoxication and operation of the motor vehicle to be entered into evidence without objection or motion to suppress. This Court has held that "[A] trial judge cannot be put in error on a matter which was not presented to him for decision. *McLendon v. State*, 945 So.2d 372, 383 (Miss. App. 2006). "It is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal. [citations omitted]" *Thornhill v. State*, 561 So.2d 1025, 1029 (Miss. 1989), cited in *White v. State*, 809 So.2d 776, 779 (Miss. App. 2002).

CONCLUSION

The state respectfully submits the arguments presented by Stuckey are without merit. Testimony admitted at trial without objection proved that Stuckey did drive or otherwise operate a motor vehicle while under the influence of alcohol pursuant to § 63-11-30 (1)(a). Accordingly, his conviction and sentence for DUI should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of May 14, 2007.

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