

IN THE COURT OF APPEALS OF THE

STATE OF MISSISSIPPI

CONF

RICHARD STUCKEY

**FILED**

APPELLANT

VERSUS

MAR 12 2007

NO. 2006-KM-01589-COA

STATE OF MISSISSIPPI

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSISSIPPI

**BRIEF OF APPELLANT**


ORAL ARGUMENT IS NOT REQUESTED

RESPECTFULLY SUBMITTED,  
RICHARD STUCKEY

BY:

  
MOSE LEE SUDDUTH, JR.

OF COUNSEL:

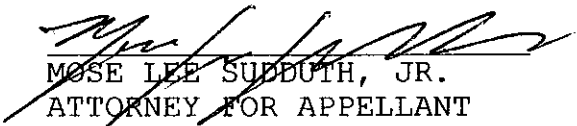
MOSE LEE SUDDUTH, JR.  
ATTORNEY AT LAW  
410 MAIN STREET  
COLUMBUS, MISSISSIPPI 39701  
OFFICE: (662) 327-0939  
FAX: (662) 328-3020  
STATE BAR NUMBER: # 

## **CERTIFICATE OF INTERESTED PARTIES**

The undersigned Attorney of Record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Honorable Paul S. Funderburk  
Circuit Judge  
P. O. Drawer 1100  
Tupelo, Mississippi 38802
2. Don Baker  
Monroe County Prosecutor  
P. O. Box 463  
Aberdeen, Mississippi 39759
3. Richard Stuckey  
Appellant  
P. O. Box 278  
Caledonia, Mississippi 39740
4. Mose Lee Sudduth, Jr.  
Attorney for Appellant  
410 Main Street  
Columbus, Mississippi 39701

SO CERTIFIED on this the 12<sup>st</sup> day of March, A. D., 2007.

  
MOSE LEE SUDDUTH, JR.  
ATTORNEY FOR APPELLANT

## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES.....	1
STATEMENT OF CASE.....	2
STATEMENT OF THE FACTS.....	3-4
SUMMARY.....	5
ARGUMENT:	
APPELLANT'S PROPOSITION NUMBER ONE.....	6-9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

## TABLE OF AUTHORITIES

### APPELLANT'S ISSUE NUMBER ONE:

<u>CITATION</u>	<u>PAGES</u>
<u>Evans v. State</u> , 547 So.2d 38, 40 (Miss. 1989).....	8
<u>Lewis v. State</u> , 831 So.2d 553 (Miss.Ct.App. 2002).....	7, 8
<u>Mason v. State</u> , 799 So.2d 884, 885 (Miss.Ct.App. 2001)..	8
<u>Michael v. State</u> , 918 So.2d 798, 803 (Miss.Ct.App.2005).	6
<u>Odem v. State</u> , 881 So.2d 940, 945 (Miss.Ct.App. 2004)...	6
<u>Smith v. State</u> , 386 So.2d 117, 1119 (Miss. 1980).....	9
§63-11-30, MCA.....	6
§99-3-7(1), MCA .....	9

## **STATEMENT OF ISSUES**

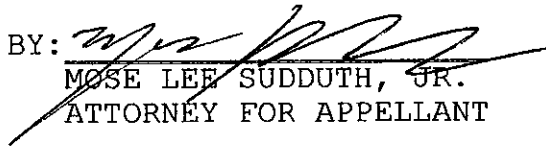
COMES NOW the Appellant, RICHARD STUCKEY, by and through counsel, and files this, his Statement of Issues, respectfully showing as follows:

### **ISSUE NUMBER ONE:**

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

RESPECTFULLY SUBMITTED,

RICHARD STUCKEY,  
APPELLANT

BY:   
MOSE LEE SUDDUTH, JR.  
ATTORNEY FOR APPELLANT

OF COUNSEL:

MOSE LEE SUDDUTH, JR.  
ATTORNEY AT LAW  
410 MAIN STREET  
COLUMBUS, MISSISSIPPI 39701  
OFFICE: (662) 327-0939  
FAX: (662) 328-3020  
STATE BAR NUMBER: #8039

## **STATEMENT OF THE CASE**

RICHARD STUCKEY, the Appellant herein and referred hereafter as "Stuckey", was arrested and charged for the offense of Driving Under the Influence, 1<sup>st</sup> Offense on the 3<sup>th</sup> day of July, 2006 in Monroe, Mississippi by, Brian Mobley, a Mississippi Highway Patrol Officer.

He subsequently entered a plea of nolo Contendere in the Justice Court of Monroe County, Mississippi and was found guilty of the charge of driving under the influence, 1<sup>st</sup> Offense. Subsequently he perfected his appeal to the Circuit Court of Monroe County, Mississippi.

He was Bench tried before the Honorable Paul S. Funderburk on September 11, 2006. He was found guilty of the aforementioned charge and sentenced to 48 hours in jail, to pay a fine of One Thousand (\$1,000.00) fine, all court costs, attend MASEP and suspension of his license as per Mississippi Law. (R. Page 20) (R.E. Page 19)

Stuckey filed his Motion for JNOV or in the Alternative a New Trial on September 11, 2006 and the lower court denied Stuckey's Motion for JNOV or in the Alternative a New Trial on September 11, 2006. (R.E. Page 16-17)

Stuckey filed and perfected his appeal to this Court on September 11, 2006.

## **STATEMENT OF THE FACTS**

On July 3, 2006 Richard Stuckey, hereinafter referred to as "Stuckey" was stopped by a Trooper Smith on Highway 45 South in Monroe County, Mississippi. (R. Page 6) Trooper Smith did not testify at Stuckey's trial. Trooper Brian Mobley, hereinafter referred to as "Mobley" was the only witness to testify for the State and he never saw Stuckey driving or operating the vehicle.

Mobley testified that he saw Stuckey exiting his vehicle from the driver's side, and that he could smell alcohol on Stuckey and that Stuckey admitted that he had consumed some alcoholic beverages earlier in the day. He tested Stuckey on the portable breath test and he tested positive for alcohol. (R. Page 7)

Mobley gave Stuckey no field sobriety tests, stating that Stuckey's speech was slurred and he had a "sauntering stagger", but that he wasn't falling down. (R. Page 8)

Mobley gave Stuckey the 8000 Intoxilyzer Test and he registered 0.13, and Stuckey was then charged with driving under the influence, 1<sup>st</sup> offense. (R. Page 11)

On cross-examination, Mobley testified that he had never seen Stuckey actually drive his vehicle and that his vehicle was parked on the shoulder of the road when Mobley first came in contact with him. (R. Pages 12-13)

Mobley testified that he was sure that he gave the portable

breath test to Stuckey, and that he had a camera in his car, but he did not film this stop and did not have any proof that he gave the portable breath tester to Stuckey. (R. Page 13)

Mobley testified that he gave Stuckey no field sobriety tests, other than the portable breath tester, because Stuckey was obviously intoxicated, but he admitted that it was the smell of alcohol that got his attention and why he gave Stuckey the portable breath tester. (R. Page 14)

Mobley also admitted that he did not know Stuckey and did not know whether he had any type of medical condition that would effect his ability to walk. (R. Page 14)

Mobely testified on re-direct Examination, over objection, that Stuckey had told Mobley he was headed home when he was stopped. (R. Page 15)

Stuckey moved to dismiss the charge against him and the lower court overruled Stuckey's motion. (R. Pages 16-17)

The lower court convicted Stuckey of Driving Under the Influence, 1<sup>st</sup> Offense and sentenced Stuckey to 48 hours in jail, a fine of \$1,000.00, attend MASEP, pay all court costs and suspension of license. (R. Page 20)

Stuckey's motion for new trial or in the alterative a JNOV was denied and he has appealed claiming a serious and fatal error committed by the lower court that requires reversal of his conviction.



## **SUMMARY OF ARGUMENT**

### **ISSUE NUMBER ONE:**

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

Stuckey bases his argument here on the failure of the State to prove the Statutory requirements of §63-11-30 (1)(a), MCA that he was charged under, that provides that it is unlawful to drive or otherwise operate a vehicle within the State of Mississippi while under the influence of intoxicating liquor.

That there was no proof provided to the lower court that Stuckey was driving or operating a vehicle while intoxicated since there was no evidence as to the probable cause or reasonable suspicion for the stop or even if there was a stop.

His motion to dismiss should have been granted and the failure of the lower court to do so was reversible error.

**ARGUMENT:**

**ISSUE NUMBER ONE:**

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN  
OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE  
STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

It is a cornerstone of our criminal justice system that the State has the burden of proving, beyond a reasonable doubt, that a person is guilty of the crime charged. In a driving under the influence charge the State is required to show proof of intoxication and that the person charged was driving or operating a vehicle while under the influence. §63-11-30, MCA. In the case sub judice the State failed to show either of the above.

The standard of review for considering a motion to dismiss is that the lower court must consider "the evidence fairly, as distinguished from in the light most favorable to the plaintiff, and the court should dismiss the case if it would find for the defendant". Michael v. State, 918 So.2d 798, 803 (Miss.Ct.App. 2005)

"All evidence introduced by the prosecution is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion...must be overruled." Odem v. State, 881 So.2d 940, 945 (Miss.Ct.App. 2004)

In the instant case no evidence was ever provided as to why

Stuckey was stopped, or even if he had been stopped. The only witness for the State, Trooper Brian Mobley testified as follows"

Question: "Did you see him drive the vehicle? Drive down the road?"

Answer: "No, sir. He was not driving down the road."

Question: "He didn't turn. He didn't do anything. The vehicle, in fact, was off when you came up; is that right?"

Answer: "It was on the shoulder of the roadway, yes, sir."

(R. Pages 12-13)

No evidence was provided the lower court as to why Trooper Smith was on the scene with Stuckey.

Mobely did testify on redirect that Stuckey admitted driving and to heading home, (R. Page 15) but there was no evidence as to probable cause or reasonable suspicion for the stop, if there was a stop, and whether he had been under the influence when he had been driving.

There is an unlimited number of scenarios as to how Stuckey was at the scene without violating §63-11-30, MCA.

In the case of Lewis v. State, 831 So.2d 553 (Miss.Ct.App. 2002) this court stated:

"We hold that to be guilty of driving or operating a motor vehicle while under the influence of drugs or alcohol, or with an illegally high blood-alcohol, the person must be shown by direct proof or reasonable inferences to have driven the vehicle while in that condition, or as in Jones to be 'operating' the vehicle while sitting behind the wheel, in control with the motor running." (At Page 559)

Here there was no direct proof and no reasonable inference to be drawn as to whether he had been driving while under the influence.

In Lewis this court put forth that "...perhaps intoxicated individuals in vehicles for who no proof exists of past act or future intent to move the vehicle should be guilty of some offense, such as public intoxication, if the vehicle is in a public place. (At Page 559) Stuckey suggested the same in his motion to dismiss: "[Mobley] had probable cause to perhaps maybe check him for public drunk." (R. Page 17)

In Lewis this court found error in an instruction that stated: "...being behind the wheel of a stopped motor vehicle that does not have its motor running is by itself sufficient for the driving or operating element. The extra element of being in control of the vehicle is too ambiguous to give the jury useful direction". (At Page 559)

In a bench trial"...the trial judge is 'the jury' for all purposes of resolving issues of fact". Evans v. State, 547 So. 2d 38, 40 (Miss. 1989) and "A circuit judge setting without a jury is accorded the same deference with regard to this findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." Mason v. State, 799 So.2d 884, 885 (Miss.Ct.App. 2001)

Stuckey would respectfully submit that in the case sub judice that the lower courts findings were not supported by

substantial, credible or reasonable evidence.

To make an arrest without a warrant, an officer must have probable cause that an offense has been committed Smith v. State, 386 So.2d 117, 1119 (Miss. 1980) and in the case sub judice there is no showing as to probable cause to suspect that Stuckey had been driving or operating a vehicle while under the influence. Certainly there was sufficient evidence to find him guilty of public intoxication, but the necessary element showing that he had driven a vehicle while under the influence was lacking.

By statute in Mississippi, a law enforcement officer may arrest, without a warrant, a suspect for a misdemeanor when the misdemeanor was committed in the officer's presence. §99-3-7 (1) (Supp 1999) Here Mobley did not initially stop Stuckey, if in fact Stuckey was even driving, and therefore the only offense that Stuckey could have been charged with by Mobley was a public intoxication, not a DUI.

Mobely never testified to any reason why Trooper Smith was with Stuckey at the scene when Mobely arrived and Trooper Smith was not present at trial to testify as to why Stuckey was under investigation and why did Mobely and not Smith test Stuckey for intoxication.

The evidence presented to the lower court was wholly insufficient to support a verdict of guilty of DUI, and Stuckey's conviction stands to be reversed and rendered.

## **CONCLUSION**

Based upon the error committed by the Circuit Court of Monroe County, Mississippi this Court should reverse and render the conviction of Appellant, RICHARD STUCKEY, or in the alternative, reverse and remand with Appellant being granted a new trial.

**CERTIFICATE OF SERVICE**

I, MOSE LEE SUDDUTH, JR., Attorney for Appellant, RICHARD STUCKEY, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the following:

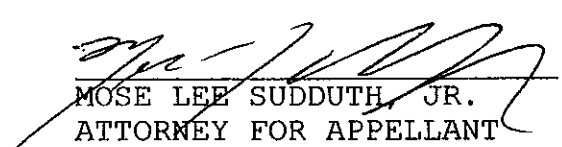
**BRIEF OF APPELLANT**

to the following at their usual office addresses:

Honorable Paul S. Funderburk, Circuit Judge

Honorable Don Baker, Monroe County Prosecutor

SO CERTIFIED on this the 12<sup>st</sup> day of March, A. D., 2007.

  
\_\_\_\_\_  
MOSE LEE SUDDUTH, JR.  
ATTORNEY FOR APPELLANT

