

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOE LOUIS BROOKS

APPELLANT

V.

NO.2007-KA-00978-COA

STATE OF MISSISSIPPI

APPELLEE

FILED

NOV 26 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Leslie S. Lee, Miss. Bar No. [REDACTED]

301 N. Lamar St., Ste 210

Jackson MS 39201

601 576-4200

Counsel for Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOE LOUIS BROOKS

APPELLANT

V.

NO.2007-KA-00978-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed 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 disqualifications or recusal.

1. State of Mississippi
2. Joe Louis Brooks
3. Honorable Bilbo Mitchell and the Lauderdale County District Attorney's Office
4. Honorable Robert Walter Bailey

THIS 26th day of November 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Joe Louis Brooks, Appellant

By:



Leslie S. Lee, Counsel for Appellant

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
ISSUE NO. 1 THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE	5
ISSUE NO. 2. THE TRIAL JUDGE ERRED IN NOT GRANTING AN INSTRUCTION INFORMING THE JURY IT IS NOT ILLEGAL TO DRINK AND DRIVE	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES:

<i>Benson v. State</i> , 551 So.2d 188 (Miss. 1989)	6
<i>Christain v. State</i> , 859 So.2d 1068 (Miss.App. 2003)	6, 7
<i>Goff v. State</i> , 778 So.2d 779 (Miss.App. 2000)	9
<i>Hawthorne v. State</i> , 883 So.2d 86 (Miss. 2004)	7
<i>Heidelberg v. State</i> , No. 2006-KA-01125-COA (Miss.App. 2007)	7
<i>Herring v. State</i> , 691 So.2d 948 (Miss. 1997)	6
<i>Humphrey v. State</i> , 759 So.2d 368 (Miss. 2000)	9
<i>Jackson v. State</i> , 645 So.2d 921 (Miss. 1994)	9
<i>McFee v. State</i> , 511 So.2d 130 (Miss. 1987)	6
<i>Miller v. State</i> , 733 So.2d 846 (Miss.App. 1998)	9
<i>Moore v. State</i> , 806 So.2d 308 (Miss.App. 2001)	9
<i>Roberson v. State</i> , 838 So.2d 298 (Miss.App. 2002)	9

STATUTORY AUTHORITY:

Miss. Code Ann. §63-11-30(1)(a)	6, 7
---------------------------------------	------

OTHER AUTHORITY:

Black's Law Dictionary (8 th Edition 2004)	9, 10
---	-------

STATEMENT OF THE ISSUES

ISSUE NO. 1 THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

ISSUE NO. 2. THE TRIAL JUDGE ERRED IN NOT GRANTING AN INSTRUCTION INFORMING THE JURY IT IS NOT ILLEGAL TO DRINK AND DRIVE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for the crime of Felony Driving Under the Influence against the appellant, Joe Louis Brooks. Tr. 340. The trial judge subsequently held a hearing and found Brooks to be an habitual offender under Miss. Code Ann. §99-19-81 (1972), and sentenced the Appellant to five (5) years without the benefit of early release or parole, and to pay a \$2,000 fine along with costs. Tr. 343-44, C.P. 48, R.E. 19. The conviction and sentence followed a jury trial on May 29 and May 30, 2007, Honorable Robert Walter Bailey, Circuit Judge, presiding. Joe Louis Brooks is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony, on July 19, 2005, Officer Mark Chandlee of the Meridian Police Department was on patrol and stopped a car¹ around 1:47 p.m. with no tag. Tr. 101, 105. Chandlee approached the car and saw black male driver and black female

¹Officer Chandlee referred to the vehicle as a truck during his direct examination. He corrected himself during cross when his report indicated Brooks was driving a passenger car. Tr. 112.

passenger. He asked driver for his driver's license and proof of insurance. The driver said he did not have a licence. Tr. 103. The driver told Chandlee his name was Joe Louis Brooks. Tr. 103-04. Brooks was cooperative and did not try to hide his identity. Tr. 119.

Chandlee subsequently discovered Brooks's license had been suspended for a driving under the influence (DUI) charge. Before having Brooks exit the vehicle, Chandlee testified that he could smell alcoholic beverage coming from Brooks's facial area. Brooks's eyes also seemed red and he appeared to have slurred speech. When asked if he had anything to drink, Brooks stated he had one beer. Tr. 104, 118. Chandlee initially testified that he only smelled alcohol and could not tell if the smell was from liquor or beer. He subsequently testified it was a strong beer smell. Tr. 117. He also testified that although his speech was slurred, Chandlee could understand what Brooks was saying. Tr. 122.

Chandlee called for backup and Officer Dareaell Thompson arrived at the scene. Tr. 105-06. Dareaell Thompson then assisted Chandlee by watching the driver while Chandlee placed his passenger² under arrest for possession drug paraphernalia. Tr. 106. Chandlee did not question Brooks further, as he was handling the arrest of the passenger. Tr. 108. Chandlee also testified that he did not know Brooks before this incident, but did see him in municipal court a few weeks before this trial. Tr. 122. Brooks did not smell of alcohol at municipal court, did not have red and bloodshot eyes, and talked very clearly. Tr. 130.

Dareaell Thompson testified that he was called by Chandlee as back up in a traffic stop. Tr. 195-96. He did not know the driver. Tr. 196. Chandlee went to deal with the

² The passenger was identified by Brooks as Cleo Townsend. Tr. 225, 258.

passenger, and Dareaell Thompson noticed a strong smell of alcohol coming from the driver. The driver told him he had half a beer. Tr. 197. Chandlee then placed both the driver and passenger under arrest and took them to the station. He remained at the scene to wait for the wrecker to tow the car. Tr. 198.

Although trained in DUI investigations, Chandlee called for the DUI officer on duty, Terrell Thompson³. Tr. 126-28, 134. Terrell Thompson testified that he only offered the intoxilyzer test to suspects who failed the standard field sobriety tests (SFSTs). Tr. 136. He also stated that even if he got enough clues from the SFSTs, but that the suspect did not exceed .08% on the intoxilyzer, the suspect would not be charged. Tr. 191. In this case, Brooks was told several times to step off the wall, but he continued to prop up against the wall. Tr. 143-44. Terrell Thompson opined that Brooks needed somewhere to lean because he could not keep his balance. Tr. 144. He stated Brooks told him he was not going to take his test and remained leaning on wall. Terrell Thompson claimed Brooks could not walk straight or keep his balance. Tr. 145. Brooks kept shifting his weight from side to side. Tr. 146

In his report written at the time, however, Terrell Thompson stated that he only noticed a strong smell of alcohol coming from Brooks's breath. His report indicated Brooks stated he had one beer. He noted Brooks's eyes were blood red and his speech was slurred. Tr. 164. His written report did not mention Brooks refused SFSTs or what specific coordination problems Brooks exhibited. Tr. 164-65. Terrell Thompson testified that

³ Officer Terrell Thompson is Officer Dareaell Thompson's twin brother. Tr. 201.

although he had processed hundreds of cases, if he checked a form which said a suspect had coordination impairment, he remembers the exact details without the need to write them down in a report. Tr. 163, 167-68. He further testified that Brooks refused the intoxilyzer test. Tr. 150. Brooks also had two prior DUI convictions. Tr. 152-53, Ex. 2.

Brooks testified that he did not have anything to drink the day he was stopped for having no tag. Tr. 223. He told the officer he was driving a car he was working on and had nothing to drink. Tr. 229. Brooks testified Dareaell Thompson shortly after he was stopped by Chandlee. Dareaell Thompson had them all walk across the street to some shade. Tr. 231. Dareaell Thompson administered several SFSTs to Brooks at the scene. Tr. 232. He then told Brooks that he did not think Brooks had much to drink, so he was going to give him a break. Tr. 233, 276. However, when Brooks denied any drug use, Dareaell Thompson got angry and said he would be charged anyway. Tr. 233, 235.

At the station, Brooks stated one of the Thompsons (he was not sure which), told him he would have to take the intoxilyzer. He wanted to know why since he had already done SFSTs at the scene. Tr. 236-37. Brooks asked for a blood test. Tr. 239. Brooks said he eventually gave in and went into the intoxilyzer room with one of the Thompsons. Tr. 242. However, as soon as he entered the room, he changed his mind about taking the test. He noticed a strong smell of alcohol in the room, so he refused the test. Tr. 243. Brooks testified the officers were lying. Tr. 250.

In rebuttal, the State recalled Officer Terrell Thompson to deny Brooks requested a blood test. Tr. 287-88. He also denied that his brother Dareaell Thompson was at the station

when Brooks was booked. Tr. 287. Marlene Williams, a DUI caseworker with the Meridian Police Department, was called to rebut Brooks's claim that she was present when he was booked. Tr. 296-97. Finally, Officer Dareaell Thompson was recalled to rebut Brooks's testimony that he administered SFSTs to Brooks at the scene. Tr. 301. He also confirmed he did not return to the station after the stop, but stayed at the scene to wait on a wrecker. Tr. 302.

SUMMARY OF THE ARGUMENT

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented failed to establish beyond a reasonable doubt the charge that Brooks was under the influence when he was pulled over by Meridian police for having no tag. The evidence provided by police was inconsistent and did show any impairment. At most, Brooks smelled of alcohol and had red eyes. The defense theory of the case was that Brooks was not under the influence. Therefore, the trial judge erred in denying a defense instruction which told the jury it was not illegal to drink alcohol and drive in the State of Mississippi. Allowing the verdict to stand on this evidence would manifest an extreme injustice.

ARGUMENT

ISSUE NO. 1: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for New Trial, Brooks specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 49, R.E. 20. The trial

judge denied this motion. C.P. 53, R.E. 24. The trial judge erred in refusing to grant this motion.

“In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.” *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). “Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.” *Id.* See also *Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Besides the facts already cited above, the evidence that Brooks was under the influence was extremely weak. Officer Chandlee admitted Brooks was not driving erratically, and had not violated any other traffic laws when he was pulled over. Tr. 114-15. Terrell Thompson testified Chandlee told him that he decided to bring Brooks in because Chandlee smelled alcohol and Brooks had a suspended license. Tr. 139. Officer Dareaell Thompson said he could understand what Brooks said at the scene. Tr. 200. Although he did not notice how Brooks was acting when he got out of car, he did not struggle. Brooks did not fall down or stumble. He just noticed Brooks's eyes were red. Tr. 206.

Although the State was not required to prove driving impairment under Miss. Code Ann. §63-11-30(1)(a), being under the influence means more than just consuming alcohol and having red eyes. In *Christain v. State*, 859 So.2d 1068 (¶19) (Miss.App. 2003), this

Court held no evidence of impairment was necessary when a defendant is charged under subsection (1)(a)⁴. However, the Court went on to say that Christain's traffic violation was evidence of impairment. *Id.* In the case *sub judice*, having no vehicle tag has nothing to do with driving impairment.

The only significant evidence that Brooks was under the influence came from Officer Terrell Thompson. Although he mentioned none of this specifically in his report at the time, almost two years and several hundred suspects later, he remembers Brooks could not maintain his balance and had to lean up against the wall to keep from falling. Tr. 163, 165-70. None of the officers testified they had any trouble understanding what he was saying, yet they all mentioned he had slurred speech. It is significant to note that twice during trial, there was some mention of the difficulty of understanding Brooks as a witness. Tr. 223, 253. There was no evidence or even a suggestion that Brooks was under the influence at trial.

Verdicts based on such weak evidence should not be allowed to stand. *Hawthorne v. State*, 883 So.2d 86 (¶13)(Miss. 2004). Brooks should be granted a new trial.

ISSUE NO. 2. THE TRIAL JUDGE ERRED IN NOT GRANTING AN INSTRUCTION INFORMING THE JURY IT IS NOT ILLEGAL TO DRINK AND DRIVE.

During the jury instruction conference, trial counsel offered Instruction D-3 to the court. The instruction read:

You the jury are instructed that in the State of Mississippi it is not illegal to drive after having consumed a quantity of alcohol. It is therefore, not

⁴ The principals of *Christain* were recently reiterated in *Heidelberg v. State*, No. 2006-KA-01125-COA (¶12) (Miss.App. October 30, 2007).

unlawful to drink alcoholic beverages and then drive or operate a motor vehicle in this State. The prohibition is against driving under the influence of alcohol, which impairs a person's ability to operate said motor vehicle. But not every person who has consumed an alcoholic beverage and operates a motor vehicle is in violation of the law. The person who is not under the influence of alcohol is the one who consumes an alcoholic beverage and is not thereby impaired in the operation of a motor vehicle.

C.P. 46, R.E. 17.

The trial court then heard arguments from both sides on the proposed instruction.

BY MR. ANGERO: Judge, I objected to D-3 in that it's blue sky. It's of no assistance to the jury. It's cumulative in the matter in which it is – a correct statement of the law and as – on S-1 which defines the State's burden of proof in the language required by the statute. And as to the Court informing the jury that it's not illegal for people to drink alcohol and drive, I think that's a matter of argument as to whether someone is, quote, under the influence or not, and I don't think that it's appropriate for the Court to instruct them on that particularly when the elements of the crime are already set out.

BY THE COURT: Mr. Stephenson, you want to be heard?

BY MR. STEPHENSON: Yes, sir. As far as – the crime obviously is driving under the influence; however, driving under the influence is sort of blue sky in itself. And under the influence means in other cases anyway – I mean, that it – it interferes with your ability or impairs your ability to operate your motor vehicle. It's much the same thing as you can't define breaking and entering, burglary, things like that. I know, you know, you can't find reasonable doubt just without something in there to say, you know, sort of define; but as far as it impairs your ability to drive; then, you know, under the influence can mean anything.

BY THE COURT: Well, this instruction has always given the Court problems because it goes from under the influence to impairment, and the statute doesn't mention the word "impairment." I don't know. We're not supposed to define "reasonable doubt," and so I don't know if we're supposed to define "under the influence" other than it's a factual issue for the jury to determine. So I'm going to refuse D-3 as typed.

Tr. 310-11, R.E. 15-16.

This Court has held that where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error. *Roberson v. State*, 838 So.2d 298 (¶21) (Miss.App.2002), citing *Humphrey v. State*, 759 So.2d 368 (¶ 33) (Miss.2000). The State may have shown Brooks consumed alcohol through the officers' testimony that they smelled alcohol on his breath and he had red eyes. However, this alone may not prove Brooks was under the influence. There was disputed evidence that Brooks was under the influence. Brooks was therefore entitled to have the jury instructed on his theory of the case. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). "Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value' to that evidence. *Miller v. State*, 733 So.2d 846 (¶7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss.App. 2000). Brooks has clearly met this burden.

In *Moore v. State*, 806 So.2d 308 (¶12-13) (Miss.App.2001), this Court found no error in denying defense instructions on the necessity of impairment, where the court had already granted a instruction similar to Brooks's proffered D-3. Without such an instruction, the jury has no way to determine what constitutes "under the influence."

Black's Law Dictionary defines driving under the influence as, "The offense of operating a motor vehicle in a physically or mentally impaired condition, esp. after consuming alcohol or drugs. Generally, this is a lesser offense then driving while intoxicated. But in a few jurisdictions the two are synonymous." Black's Law Dictionary

533 (8th Edition 2004). When looking for the definition of driving while ability impaired, the dictionary refers back to “Driving under the Influence.” *Id.* Driving under the influence and driving while impaired are essentially the same thing. There have been no Mississippi cases which define the difference. Common sense dictates that to be under the influence means that one’s driving ability is impaired in some manner.

From the facts in this case, the jury *could* have found that Brooks had consumed some sort of alcohol beverage before driving. However, without the instruction, the jury had no means of finding Brooks not guilty if the jury found he had been drinking but was not under the influence. Denial of this instruction, which was a correct statement of the law and not covered in any other instruction, was reversible error.

CONCLUSION

Given the facts presented in the trial below, Brooks is entitled to have his conviction reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Joe Louis Brooks, Appellant

By:



Leslie S. Lee

CERTIFICATE

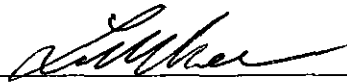
I, Leslie S. Lee, do hereby certify that I have this the 26th day of November 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

Honorable Robert Walter Bailey
Circuit Judge
P.O. Box 1167
Meridian, MS 39302

Honorable E.J. "Bilbo" Mitchell
District Attorney
P. O. Box 5172
Meridian, MS 39302

Honorable Charlie Maris
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

Mr. Joe Louis Brooks, MDOC [REDACTED]
South Mississippi Correctional Institution
P.O. Box 1419
Leakesville, MS 39451



Leslie S. Lee

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No [REDACTED]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200