

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-1415-COA

JAISON HARNESS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. THE TRIAL COURT ERRED WHEN IT ADMITTED THE TESTIMONY OF JOSEPH COTTEN AS AN ACCIDENT RECONSTRUCTIONIST BECAUSE COTTEN FAILED TO QUALIFY AS AN EXPERT UNDER M.R.E. 702; THUS, THE SUBSTANTIAL RIGHT OF MR. HARNESS TO A FUNDAMENTALLY FAIR TRIAL WAS FATALY COMPROMISED.

Error may not be predicated upon a ruling which admits or exclude evidence unless a substantial right of the party is affected.<sup>1</sup> Harness' fundamental right to a fair trial were affected by the trial court permitting Cotten to testify as an expert witness. This was error.

The analytical framework provided by the modified *Daubert* [ v. *Merrill Dow Pharmaceutical Inc.*<sup>2</sup> standard requires the trial court to perform a two-pronged inquiry in determining whether expert testimony is admissible under 702. The modified *Daubert* rule is not limited to scientific expert testimony - rather, the rule applies equally to all types of expert testimony. First, the court must determine that the expert testimony is relevant - that is, the requirement that the testimony must "assist the trier of fact" means the evidence must be relevant. Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one. *Daubert* provides "an illustrative, but not an exhaustive, list of factors" that trial courts may use in assessing the reliability of expert testimony.<sup>3</sup>

In spite of the States's contention in their brief, the thrust of Harness' argument is that at the time of the accident in question, Officer Cotton's involvement in this case was as an investigator and/or accident reconstructionist in training. He had the training only to mark the vehicles and roadway with paint at the scene.

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<sup>1</sup> M.R.E. 103.

<sup>2</sup> 509 U.S. 579, 133 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

<sup>3</sup> *Id.*

His opinion at the time, therefore, was not based on knowledge, skill, experience, training, or education to be able to testify as an expert witness. Thus part of his trial testimony were based on calculation, analysis and information formulated while he was not an expert and had never been certified by a court as an expert. Hence, part of his trial testimony was not the product of reliable, scientific methods.<sup>4</sup> At the time of his computation, Cotten was not qualified as an expert by knowledge, skill, experience, training, or education. His testimony was not based on sufficient facts or data. He spoke to only one lay witness, Bobby Moore. He spoke briefly with Officer Natyyo Gray after arriving at the scene.

Furthermore, Cotten's testimony was not the product of reliable principles and methods. His initial calculations were wrong because he failed to use the proper weight for the vehicles. He had to therefore recalculate the weight of the vehicles. As a result, Cotten testimony demonstrated that he did not apply the principles and methods reliably to the facts of the case. For the foregoing reasons and authorities, Harness' conviction must be reversed and this cause remanded for a new trial.

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<sup>4</sup> M.R.E. 702.

- II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED INTO EVIDENCE A DIAGRAM BY JOSEPH COTTEN AS IT WAS AN INCORRECT AND INCOMPLETE DEPICTION OF THE ACCIDENT SCENE, IRRELEVANT, CONFUSING TO THE JURY AND PREJUDICIAL TO A FAIR HEARING OF THE CAUSE AGAINST MR. HARNESS.

A trial judge has great discretion in determining the relevancy and admissibility of evidence.<sup>5</sup> The trial judge's ruling on such matters will not be reversed, unless the judge abuse this discretion so as to be prejudicial to the accused.

M.R.E. 103, Rulings on Evidence, states

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or exclude evidence unless a substantial right of the party's is affected.

M.R.E. 401, Definition of "Relevant Evidence" states:

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

M.R.E. 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time states:

Although relevant, evidence may be excluded if its probable value is substantially outweighed by the danger of undue prejudice, confusion of the issue, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In its brief, the State chose not to address Cotten's testimony where he admits that his hand written diagram incorrectly depicted Harness' vehicle at the accident scene. It instead contends that the purpose of the diagram was to show an overview of the scene of the accident. Contrary to the State's assertion, the diagram did not help the jury see the

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<sup>5</sup> *Fisher v. State*, 690 So. 2d 268, 274 (Miss. 1996).

scene as whole where the vehicles were not as they appeared in the photographs taken at the scene. It also asserts that the diagram would be used only to support Cotten's testimony regarding the measurements he took. However Cotten admitted his initially calculation were wrong because he failed to use the proper weight for the vehicles.

Reversible error resulted when the diagram was admitted. Harness substantial right to a fair trial were thereby affected. The diagram was not relevant because it was not drawn to scale, depicted the vehicles in the wrong direction from the known evidence and did not have a tendency to make the existence of who or what cause the collision more probable or less probable than it would be without the evidence. Harness' conviction should therefore be reversed and a new trial ordered.

III. THE TRIAL COURT ERRED IN DENIAL OF THE MOTION TO DISMISS AND MOTION TO SUPPRESS DUE TO THE DESTRUCTION OF BLOOD DRAWN FROM MR. HARNESS; DESTRUCTION OF THIS CRUCIAL EVIDENCE DEPRIVED HIM OF HIS FUNDAMENTAL RIGHTS TO DUE PROCESS OF LAW AND TO CONFRONT EVIDENCE MOUNTED AGAINST HIM UNDER AMENDS. V, VI, XIV, U.S. CONST. AND ART. III §§ 14 AND 26, MISS. CONST.

When Harness filed his motion for discovery in July 2004 and motion to compel the production of a sample of his blood for independent testing in September 2004, a blood sample existed. The State's failure to preserve the evidence upon request denied Harness' a fundamental right to a fair trial.

The blood samples were essential to Harness obtaining a fair trial. His right to independently test the sample were essential to show he was not driving while intoxicated. The first test was repeated because it did not meet crime laboratory standards. A second test was conducted but a third test was needed to determine the accuracy of the results. The fact the samples were destroyed before a final, definitive test could be conducted as



Harness requested adversely affected his substantial fundamental right to a fair trial. His conviction herein should therefore be reversed and remanded for a new trial.

IV. THE STATE FAILED TO ESTABLISH AN ADEQUATE EVIDENTIARY FOUNDATION TO ADMIT EVIDENCE OF A BLOOD SAMPLE ALLEGEDLY DRAWN FROM MR. HARNESS. THE TRIAL COURT FURTHER ERRED WHEN IT HELD M.R.E. 803.5 APPLIED TO PERMIT PRESENTATION OF OTHERWISE INADMISSIBLE EVIDENCE TO THE JURY

M.R.E. 901, Requirement of Authentication or Identification provides:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

M.R.E. 803, Hearsay Exception; Availability of Declarant Immaterial provides

(5) a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Herein, it is essential to recognize that state in its brief failed to address the fact that the state's witness, CMMC nurse Noreen Kenny, testified she had no recollection of Mr. Harness, Officer Cotton, the morning of August 23, 2003 and most importantly, complying with the request of Officer Cotton to draw blood from Mr. Harness for a blood alcohol analysis. She clearly did not have past knowledge of the information for M.R.E. 803 to apply. Additionally, she could not recall the incident.

The trial court was in error, as the state contends in its brief, when it opined that M.R.E. 803 would not be immaterial if the witness once had knowledge. This analysis incorrectly applies only half of the equation. The rule requires the witness to (1) once have

knowledge but (2) now have insufficient recollection to enable him to testify fully and accurately. In its brief the state presents an incomplete analysis of the trial court's reasoning. Its evident by the state's recitation of the court's reasoning that the court concluded that simply because the witness now does not have the knowledge the evidence her testimony can be admitted under the rule. It fails to apply the first requirement of the rule, that the witness once have knowledge. Kenny instead testified that she did not have this required knowledge.

Herein, Harness is simply requesting that the rules of evidence be correctly applied and followed. If fairly and accurately applied, his conviction should be reversed and remanded for a new trial.

V. THE TRIAL COURT VIOLATED THE FUNDAMENTAL RIGHT OF MR. HARNESS TO MOUNT A DEFENSE WHEN ADMISSION OF THE RELEASE AND SETTLEMENT HE RECEIVED FROM HAMPTON'S INSURER AND EVIDENCE OF A COMPLAINT FILED AGAINST HIM ALLEGING THE NEGLIGENCE OF A SECOND, UNKNOWN INDIVIDUAL

It's Harness' contention that he did not contribute to Hampton's death. In fact the excluded evidence would show that Hampton or a third person was responsible for the collision. Thus Harness was not criminally liable for Hampton's death. This was the issue before the court.

The proffered evidence was not meant to tell the jury what verdict to reach. It was instead offered for a fair consideration of guilt or innocence. It's within the jury province to accept or reject the evidence. They should have been permitted to do so.

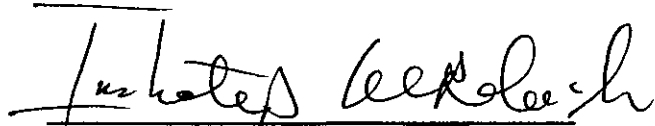
## CONCLUSION

Premises considered, Harness' conviction for negligently driving under the influence of an intoxicating substance resulting in the death of Clyde Hampton should be reverse and remanded for a new trial..

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the forgoing was hand delivered and/ or mailed first class, postage prepaid, to the following individual

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This the 25<sup>TH</sup> day of August, 2008.

  
Imhotep Alkebu-lan