

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SAMUEL HEATH IVY

APPELLANT

VS:

CAUSE NO. 2007-KM-00077-COA

CITY OF LOUISVILLE, MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE
ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

SAMUEL HEATH IVY

APPELLANT

VS.

CAUSE NO. 2007-KM-00077-COA

CITY OF LOUISVILLE, MISSISSIPPI

APPELLEE

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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

The State of Mississippi

Samuel Heath Ivy, Appellant

Stephanie L. Mallette, Attorney for Appellant

Allen Austin Vollor, Trial Attorney for Appellant

Honorable Clarence E. Morgan, III, Circuit Judge

The City of Louisville, Mississippi, Appellee

Taylor Tucker, Prosecuting Attorney for the City of
Louisville, Mississippi

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STATEMENT OF THE ISSUE

- I. THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR A NEW TRIAL BASED ON THE VERDICT WAS CONTRARY TO THE LAW AND THE EVIDENCE PRESENTED AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

Samuel Heath Ivy was issued a Uniform Traffic Ticket (RE 7) on April 29, 2006, for willfully and unlawfully driving a motor vehicle in this state under the influence of intoxicating liquor. The ticket was issued as the result of Samuel health Ivy being stopped for speeding within the city limits of The City of Louisville, Mississippi (RE 9, T-4).

On July 11, 2006, Samuel Heath Ivy was convicted in the Municipal Court of the City of Louisville, Mississippi of Driving Under The Influence (RE 5).

Samuel Heath Ivy filed a Notice Of Appeal to the Circuit Court of Winston County, Mississippi, on August 10, 2006 (RE 2).

The Circuit Court of Winston County, Mississippi, conducted a bench trial on October 23, 2006, and entered a Judgment finding Samuel Heath Ivy guilty of driving under the influence of intoxicating liquor (RE 18).

Samuel Heath Ivy filed his Motion For A New Trial, Or In The Alternative A Judgment Notwithstanding The Verdict on December 5, 2006 (RE 13).

The Circuit Court of Winston County, Mississippi, entered an Order Overruling Motion For A New Trial, Or In The Alternative A Judgment Notwithstanding The Verdict on December 4, 2006 (RE 15).

Samuel Heath Ivy filed his Notice Of Appeal to this Honorable Court on January 10, 2007 (RE 22).

SUMMARY OF THE ARGUMENT

The Court did not err in denying the Motion For New Trial based on the facts that the verdict was contrary to the law and the evidence presented and was against the overwhelming weight of the evidence.

The evidence as presented was more than sufficient to find Samuel Heath Ivy guilty of driving under the influence of intoxicating liquor. The standard of review of the Appellate Court is well established in the State of Mississippi. The credible evidence consistent with defendant's guilt must be accepted as true. Christian v State of Mississippi, 859 So 2d 1068, No 2002-KM-01592-COA(Miss 2003). As a matter of fact in Harris v State of Mississippi, 830 So 2d 681, 2001-KA-00845-COA(Miss 2002), the court held that the trial court is required to consider the evidence introduced in the light most favorable to the State and accept as true all of the evidence introduced at trial of the State, including all reasonable reference that may be drawn therefrom.

In the present case the evidence as produced at trial was more than sufficient for the trial judge, pursuant to a bench trial, to find Samuel Health Ivy guilty. The evidence showed that Samuel Heath Ivy was speeding (T-4, 11, 24); weaving in the road (T-5, 12, 13, 26, 27); smelled of intoxicating beverage (T-6, 17, 33, 34, 35, 36); had problems finding his driver's license (T-7, 18); admitted to

having been drinking (T-7, 20, 36, 44); stumbled (T-8, 9, 20, 21, 34, 38, 39, 40); had slurred speech (T-9, 20, 21, 34, 36, 42); and staggering (T-35, 36, 40).

As to the issue of the failure to perform the breath test, the evidence clearly showed that the machine was inoperable (T-8, 50). It is well established law that an officer can testify as to his observation and opinion based on that observation. Christian v State of Mississippi, 859 So 2d 1068, 2002-KM-01592-COA(Miss 2003).

Samuel Keith Ivy also complains of the officer's failure to advise him of his right to a blood test. Section 63-11-13, Mississippi Code of 1972, Annotated, as amended, gives a person the right to have a test administered for the purpose of determining the amount of alcohol in his blood. However, the police officer is not required to advise the defendant of this right. Green v State of Mississippi, 710 So 2d 862, 97-KA-00132-SCT(Miss 1998). Samuel Heath Ivy made two (2) telephone calls to a friend about the different rights he had (T-50).

Samuel Heath Ivy also argues that the evidence was not sufficient to prove that he was impaired. In Christian v State of Mississippi, 859 So 2d 1068, 2002-KM-01592-COA(Miss 2003), the Court held:

"...that the State was not obligated to offer proof on impairment of Christian's driving ability only proof of his driving under the influence of intoxicating liquor."

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR A NEW TRIAL BASED ON THE VERDICT WAS CONTRARY TO THE LAW AND THE EVIDENCE PRESENTED AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The first issue to be determined is the standard the Court must use in its review. The assignment of error alleges that the trial court erred in overruling the Motion For A New Trial. This motion is based first on the verdict being contrary to the law and the evidence, and secondly that the verdict was against the overwhelming weight of the evidence. In Harris v State of Mississippi, 830 So 2d 681, 2001-KA-00845-COA(Miss 2002) the court held:

"...the trial court is required to consider evidence introduced in the light most favorable to the State and accept as true all of the evidence introduced at trial by the State, including all reasonable references that may be drawn therefrom."

This was also set forth in Christian v State of Mississippi, 859 So 2d 1068, 2002-KM-01592-COA(Miss 2003). Therefore, all evidence presented must be reviewed in the light most favorable to the State of Mississippi.

The evidence in the present case is overwhelming in showing the guilt of Samuel Health Ivy in driving under the influence of intoxicating liquor. Samuel Heath Ivy, himself, admitted that he was driving (T-46) and had been drinking (T-44). Officers Jimmy Lovern and Jason Pugh both

testified that Samuel Heath Ivy was speeding (T-4, 11, 24). There was testimony from two (2) officers in two (2) separate patrol cars that clocked Samuel Heath Ivy at approximately the same time (T-11, 25). The motor vehicle Samuel Heath Ivy was driving was weaving in the road (T-5, 12, 13, 26, 27, 29). The smell of intoxicating beverage was emitting from Samuel Heath Ivy (T-6, 17, 33, 35, 36). The officers also testified that it appeared that Samuel Heath Ivy had a problem in locating and producing his driver's license (T-7, 18, 34). Samuel Heath Ivy almost stumbled into the roadway when he exited his motor vehicle (T-7, 9, 21, 34 38, 39, 40). The officers also had to steady and assist Samuel Heath Ivy in getting to the patrol car (T-9, 21, 34, 35, 36, 38, 39, 40). Samuel Heath Ivy also had slurred speech (T-9, 20, 21, 34, 36, 42). As a matter of fact, Samuel Heath Ivy admitted that he had been drinking that night prior to driving the motor vehicle (T-21, 36, 44, 45). All of this evidence is more than sufficient for the court to find Samuel Heath Ivy guilty of driving under the influence of intoxicating liquor. In Christian v State of Mississippi, 859 So 2d 1068, 2002-KM-01592-COA(Miss 2003) and Harris v State of Mississippi, 830 So 2d 681, 2001-KA-00845-COA(Miss 2002), the court found evidence, less than was present in the present case, to be sufficient to find the defendant guilty of driving under the influence.

I think it is also important at this point to emphasis that an officer can give opinion testimony as to whether the

defendant was under the influence, Christian v State of Mississippi, 859 So 2d 1068, 2002-KM-01592-COA(Miss 2003). Officer Keith Alexander testified that in his opinion Samuel Heath Ivy was under the influence (T-36, 38).

In his brief Samuel Heath Ivy complains that no test was given and that he was not informed that he had the right to have a blood test performed. The evidence clearly shows that the intoxilizer was not working the morning in question (T-8, 50).

Samuel Heath Ivy also raises the issue of his not being offered the opportunity to obtain a blood test. Section 63-11-13, Mississippi Code of 1972, Annotated, as amended, gives individuals the right to have a test administered for the purpose of determining the amount of alcohol in his blood. However, there is no requirement for law enforcement officers to advise motorist of his right to an independent blood alcohol concentration test. Green v State of Mississippi, 710 So 2d 862, 97-KA-00132-SCT(Miss 1998). Samuel Heath Ivy was given the opportunity to make a phone call, and he actually made two (2) calls to a friend about the different rights that he may have (T-50). In the Green case the defendant was given the opportunity to make a phone call for medical or legal assistance, which he did not exercise.

Samuel Heath Ivy also raises the issue of impairment, which is not relevant to the current charge. Samuel Heath Ivy was charged with driving under the influence of

intoxicating liquor. In Christian v State of Mississippi,
859 So 2d 1068, 2002-KM-01592-COA(Miss 2003), the Court held
that:

"...the State was not obligated to offer proof
on impairment of Christian's driving ability
only proof of his driving under the influence of
intoxicating liquor."

CONCLUSION

The record is full of facts, which would justify the trial court in a bench trial to find Samuel Heath Ivy guilty of driving under the influence of intoxicating liquor. Therefore, this court pursuant to the standard of review should affirm the action of the trial court.

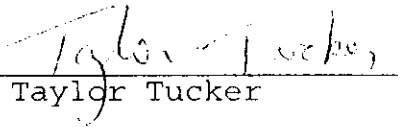
Other issues, which seem to be raised on appeal were never raised at the trial court level and therefore are not properly before this Court. These issues are the requirement to notify Samuel Heath Ivy of his right to have an independent blood test and the requirement to transport Samuel Heath Ivy to the location of a properly working intoxilizer.

Therefore, the Circuit Court of Winston County, Mississippi, was correct in overruling the Motion For A New Trial, Or In The Alternative A Judgment Notwithstanding The Verdict.

Respectfully submitted,

CITY OF LOUISVILLE,
MISSISSIPPI

BY:

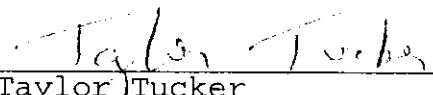

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CERTIFICATE OF SERVICE

I, the undersigned, Taylor Tucker, Counsel of Record for the Appellee, City of Louisville, do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the foregoing Brief Of Appellee to the Honorable Clarence E. Morgan, III, Circuit Court Judge, at his usual mailing address of P. O. Box 721, Kosciusko, MS 39090, and to the Honorable Stephanie L. Mallette, Attorney of Record for the Appellant, at her usual mailing address of 205 Jefferson Street, Suite A, Post Office Box 80170, Starkville, MS 39759-0170.

THIS the 15th day of October, 2007.


Taylor Tucker

REPRODUCTION OF STATUTES, ETC.

Westlaw.

MS ST § 63-11-13

Page 1

Miss. Code Ann. § 63-11-13

C

WEST'S ANNOTATED MISSISSIPPI CODE

TITLE 63. MOTOR VEHICLES AND TRAFFIC REGULATIONS

CHAPTER 11. IMPLIED CONSENT LAW

→§ 63-11-13. Obtaining additional test

The person tested may, at his own expense, have a physician, registered nurse, clinical laboratory technologist or clinical laboratory technician or any other qualified person of his choosing administer a test, approved by the state crime laboratory created pursuant to section 45-1-17, in addition to any other test, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by such arrested person shall not preclude the admissibility in evidence of the test taken at the direction of a law enforcement officer.

Current through End of the 2007 Regular Session and 1st Ex. Session

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