IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SAMUEL HEATH IVY	**APPELLANT**
VERSUS	**CASE NO.2007-KM-00077-COA**
STATE OF MISSISSIPPI	**APPELLEE**

APPEAL FROM

THE CIRCUIT COURT OF WINSTON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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

Samuel Heath Ivy, Appellant

Stephanie L. Mallette, Attorney for Appellant

Allen Austin Vollor, Attorney for Appellant (Trial Counsel)

Taylor Tucker, Prosecuting Attorney

James M. Hood III, Attorney General

Honorable Clarence E. Morgan, III, Trial Judge

STEPHANIE L. MALLETTE
Attorney for Appellant

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STATEMENT OF THE CASE

This is a criminal appeal from the Winston County Circuit Court where Samuel Heath Ivy was convicted of driving under the influence of alcohol. (T. 59-60). He was sentenced to forty-eight hours confinement, suspended, a fine of $471.50, assessments of $230.00, other court costs, and completion of the Mississippi Alcohol Safety Education Program(T. 59-60). The trial court denied Samuel Heath Ivy's Motion for a New Trial and/or JNOV (R.E. 4). Aggrieved, he files this appeal.

Trial was originally held July 11, 2006, in the Municipal Court of Louisville, Mississippi (R.E.2). Upon conviction, Samuel Heath Ivy appealed to the Circuit Court for a trial *de novo* (R.E 2.). Trial was held on October 23, 2006, in the Winston County Circuit Court (T.1). After a bench trial, Samuel Heath Ivy was convicted by the Circuit Court of driving under the influence (T.59-60). Samuel Heath Ivy was sentenced to forty-eight hours confinement, suspended, a fine of $471.50, assessments of $230.00, costs and completion of the Mississippi Alcohol Safety Education Program (T. 59-60). The order overruling Samuel Heath Ivy's Motion for a New Trial and/or JNOV was entered December 15, 2006 (R.E. 4). From this order, Samuel Heath Ivy files this appeal.

On the evening of April 28, 2006, Samuel Heath Ivy went to the Pearl River Resort in Choctaw, Mississippi, with a friend to watch a band preform (T. 44). They listened to music for approximately four hours (T. 45). Samuel Heath Ivy consumed four twelve ounce Budweiser beers from their arrival at 8:00 P.M. until midnight (T. 45). He consumed no alcohol after midnight (T. 46). He was sure he had consumed only four Budweiser beers because he remembered how much his bar tab was. (T.46). Ivy and his friend then ate food at a restaurant at the Resort (T. 46). Though Heath and his friend were originally planning on spending the night, other friends who were supposed to join Ivy and his friend at the casino and give Ivy's friend a ride back to Starkville never arrived due to mechanical trouble with their vehicle. (T. 46, 53). Ivy then left to take his friend back

to Starkville, Mississippi. On the highway from Philadelphia/Choctaw, Mississippi, Mississippi State Highway 15/25, Ivy noticed blue lights behind him and pulled over (T.46-47). Ivy does not dispute that the events occurred in the City of Louisville, Mississippi.

Ivy testified that he could only roll his car window down about 4 inches (T. 47). The officer approached and asked to see Ivy's driver's license (T.47). Ivy unbuckled his seat belt, reached into his front right pocket, removed his wallet containing his driver's license, and gave it to Officer Lovern of the Louisville Police Department (T. 47). Another officer approached Ivy with a portable breath test device (T. 48). After opening his door, Ivy took the portable breath test (T. 48). Within a few seconds, even before he was out of his vehicle, the officer placed Ivy in handcuffs and under arrest for driving under the influence (T. 48). Though disputed by subsequent testimony from the officer, Officer Alexander took Ivy to the patrol car, and walked in a normal manner (T. 49) Ivy denied slurring his speech (T. 49). Ivy said he knew what it felt like to be intoxicated and testified he was not intoxicated at the time of arrest (T. 49). Ivy was taken to jail (T. 49-50). He inquired about the Intoxilyzer and was willing to submit to a breath test to determine the presence of alcohol and his BAC pursuant to his duty under Mississippi's implied consent law; however, the Intoxilyzer machine was not operational. (T.50). Ivy contradicted the testimony of the officers with his testimony that he was not swerving. No alcohol was found in the vehicle, and Mr. Ivy denied that he was operating a vehicle while under the influence of alcohol or other substance to such a level that he was impaired. (T. 51).

Officer Jimmy Lovern of the Louisville Police Department has a different account of the events of the early morning of April 29, 2006. While on patrol, he noticed Ivy's vehicle speeding at approximately 2:00 a.m. on April 29, 2006, in Louisville (T. 4). As he pulled behind the vehicle, he said he saw Ivy's vehicle swerve, crossing the broken line once and the yellow line off the

shoulder once (T.5, T.13). Ivy promptly complied with Officer Lovern's blue lights by pulling over to the shoulder of the road (T. 6). Lovern stated that he smelled intoxicating beverage of some sort as he approached the vehicle (T. 6). Officer Lovern also testified that Mr. Ivy fumbled with his license as he removed it from his wallet. (T. 7). Neither officer requested that Mr. Ivy submit to any Standardized Field Sobriety Tests as neither was certified in performing such tests. (T. 9) Officer Lovern did not offer an Intoxilyzer test to Mr. Ivy nor did he offer a blood test to determine Mr. Ivy's precise blood alcohol content.

Officer Keith Alexander of the Louisville Police Department also had a different account of the events. Officer Alexander arrived at the scene of the traffic stop from a different direction (T. 32). He approached Ivy's car and began talking to Ivy (T.32-33). Alexander smelled an intoxicating smell from the vehicle (T.33). Though having never met Mr. Ivy before, Office Alexander testified that Mr. Ivy's speech was slurred impliedly from the effects of alcohol. (T. 33). Officer Alexander administered a portable breath test, and noted that the results of this test were positive; however it is unknown what the actual reading was as that information is inadmissible due to its unreliability (T. 33,33-34). Alexander denies handcuffing Ivy at this point, and he also stated that he had to help Ivy as he got out of the vehicle because he stumbled. (T. 34-35).

SUMMARY OF THE ARGUMENT

I. The Court's verdict was against the overwhelming weight of the evidence.

ARGUMENT

I. Factual Background

On the evening of April 28, 2006, Samuel Heath Ivy went to the Pearl River Resort in Choctaw, Mississippi, with a friend to watch a band preform (T. 44). They listened to music for approximately four hours (T. 45). Samuel Heath Ivy consumed four twelve ounce Budweiser beers from their arrival at 8:00 P.M. until midnight (T. 45). He consumed no alcohol after midnight (T. 46). He was sure he had consumed only four Budweiser beers because he remembered how much his bar tab was. (T.46). Ivy and his friend then ate food at a restaurant at the Resort (T. 46).Though Heath and his friend were originally planning on spending the night, other friends who were supposed to join Ivy and his friend at the casino and give Ivy's friend a ride back to Starkville never arrived due to mechanical trouble with their vehicle. (T. 46, 53). Ivy then left to take his friend back to Starkville, Mississippi. On the highway from Philadelphia/Choctaw, Mississippi, Mississippi State Highway 15/25, Ivy noticed blue lights behind him and pulled over (T.46-47). Ivy does not dispute that the events occurred in the City of Louisville, Mississippi.

Ivy testified that he could only roll his car window down about 4 inches (T. 47). The officer approached and asked to see Ivy's driver's license (T.47). Ivy unbuckled his seat belt, reached into his front right pocket, removed his wallet containing his driver's license, and gave it to Officer Lovern of the Louisville Police Department (T. 47). Another officer approached Ivy with a portable breath test device (T. 48). After opening his door, Ivy took the portable breath test (T. 48). Within a few seconds, even before he was out of his vehicle, the officer placed Ivy in handcuffs and under arrest for driving under the influence (T. 48). Though disputed by subsequent testimony from the officer, Officer Alexander took Ivy to the patrol car, and walked in a normal manner (T. 49) Ivy

denied slurring his speech (T. 49). Ivy said he knew what it felt like to be intoxicated and testified he was not intoxicated at the time of arrest (T. 49). Ivy was taken to jail (T. 49-50). He inquired about the Intoxilyzer and was willing to submit to a breath test to determine the presence of alcohol and his BAC pursuant to his duty under Mississippi's implied consent law; however, the Intoxilyzer machine was not operational. (T.50). Ivy contradicted the testimony of the officers with his testimony that he was not swerving. No alcohol was found in the vehicle, and Mr. Ivy denied that he was operating a vehicle while under the influence of alcohol or other substance to such a level that he was impaired. (T. 51).

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II. Argument

I. WHETHER THE JUDGE'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND THEREFORE, THE TRIAL COURT ERRED IN NOT GRANTING A MOTION FOR NEW TRIAL?

In *Bush v. State*, the Mississippi Supreme Court reviewed the standard for determining whether a jury's verdict was against the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, at 834 (Miss. 2005) (citing *Herring v. State*, 691 So. 2d 948 at 957 (Miss. 1997)). The *Herring* Court wrote that the Court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Id.* The *Bush* Court, though, citing *Herring* favorably, gave an admonition that evidence should be weighed in the light most favorable to the verdict and also cites favorably *McQueen v. State. McQueen v. State*, 423 So.2d 800 at 803 (Miss. 1982). The *Bush* Court states:

> "A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.' *McQueen*, at 803. Rather as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* The difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead the proper remedy is to grant a new trial.' (Footnote omitted except as discussed below).

In footnote 3, the *Bush* Court cited examples of incorrect standards in reviewing a challenge to the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005). The *Bush* Court found specifically that, as was stated in *Turner v. State*, "The Court must accept as true the evidence which supports the verdict," and that the Court "must accept as true the evidence favorable to the State," are incorrect standards in reviewing challenges to the sufficiency of the evidence. *Id, Turner v. State*, 726 So.2d 117 at 125 (Miss. 1998).

The Winston County Circuit Court's opinion reads as follows:

> The Court finds by his own admission he was drinking that night. He was speeding in excess, a good bit in excess, of what the speed limit would be. And at the same time he was not only weaving, he was going off the side of the road on the passenger side off on the shoulder. That would certainly be sufficient to have him stopped. Then the officer's testimony is he had to hold him up to keep him from falling in the road.
> That is sufficient to establish beyond a reasonable doubt that he is guilty of first offense the DUI. (T. 59-60).

Heath Ivy had a difficult trial. He faced two officers' testimony concerning his apparent intoxication. He only had his own recollection and testimony to rely upon. Two means normally available to someone charged with DUI were unavailable to him. First, he was not allowed to comply with Mississippi law by submitting to a breath test as the Intoxilyzer was not functioning. Mr. Ivy was precluded from acquiring potentially exculpatory evidence due to no fault of his own. The State of Mississippi requires a driver to submit to a breath test if the driver is operating a motor vehicle upon the streets, roads, and highway with the expressed purpose of preventing impaired drivers from operating motor vehicles or else the driver is subject to very serious administrative penalties. The legislature has declared that impairment is presumed when a person's blood alcohol concentration exceeds the statutorily-prescribed .08 reading. The Intoxilyzer is supposed to be an impartial scientific measurement of the amount of alcohol in a person's breath. The Intoxilyzer is used and prescribed by statute to take away arbitrary and capricious determinations of impairment. This objective measure of impairment could have revealed that Mr. Ivy was not impaired within the meaning of state law. Granted, a person can still be prosecuted for driving under the influence if the Intoxilyzer reading is below .08. However, Mr. Ivy should have been afforded the opportunity to present scientific evidence that his blood alcohol concentration was below the level the legislature has set for *per se* impairment. However, it can never be known if such evidence existed due to the

nonfeasance of the officers. Apparently, there is only one Intoxilyzer in Winston County, Mississippi. Knowing that the Intoxilyzer was out for repairs, the officers could have just as easily spent the statutorily-required observation period driving to Choctaw County, Webster County, or Oktibbeha County, so that Mr. Ivy could submit to an Intoxilyzer test. The officers' election to proceed with a so-called "common law" driving under the influence charge exemplifies their reliance on extraordinarily subjective and circumstantial factors (smell of alcohol, unsteady on the feet, alleged weaving, PBT, etc.) when a scientifically accurate test was available--although inconvenient. The Implied Consent Statute in M.C.A. § 63-11-5(2) requires:

> "If the officer has reasonable grounds and probable cause to believe such person to have been driving a motor vehicle upon the public highways, public roads, and streets of this state while under the influence of intoxicating liquor, such officer shall inform such person that his failure to submit to such chemical test or tests of his breath shall result in the suspension of his privilege to operate a motor vehicle upon the public streets and highways of this state for a period of ninety (90) days in the event such person has not previously been convicted of a violation of Section 63-11-30, or, for a period of one (1) year in the event of any previous conviction of such person under Section 63-11-30."

M.C.A. § 63-11-5(2). It is illogical to believe that an officer is required by law to inform a suspect that his license will be suspended for a period of time if he refuses to submit to a test to determine his blood alcohol concentration and then not offer the test. If the legislature requires an officer to inform a suspect of what will happen for a refusal, it is quite obvious that the officer must offer a test for that suspect to refuse. The scenario as it occurred was that Mr. Ivy was told that he would be severely penalized for a refusal to submit to a test he was not offered if the officers complied with M.C.A. § 63-11-5(2). If they did not comply, then the Court will have to make a determination of what effect their violation of the law has on the ultimate conviction.

Second, Mr. Ivy was not offered an opportunity to have his blood drawn and tested for alcohol content. While this may not be considered an ordinary option by law enforcement organizations equipped with Intoxilyzer equipment, it should have been available when the Intoxilyzer was not available. Winston County has a hospital with an emergency room. One of the only reasons a person can still be convicted of a so-called "common law DUI" is so that law enforcement can still charge persons who drive while impaired under the influence of alcohol with a crime despite their refusal to submit to tests. The common law driving under the influence charge closes a loophole wherein a driver could voluntarily accept the penalties provided under the Implied Consent Law by accepting a license suspension and refuse any tests to preclude a driving under the influence conviction if the sole basis of that conviction could only be an Intoxilyzer or blood test result showing that person's blood alcohol concentration exceeded .08.

The testimonial evidence clearly created probable cause for the stop and for further investigation. Ivy testified that he had only four twelve ounce beers over six to two hours before the traffic stop and before a substantial meal. He testified he did not fumble with his driver's license. The passenger was substantially intoxicated and had been in close proximity to Ivy for several hours before the traffic stop. Ivy had spent the evening at a location where alcohol was served. He denied slurring his speech. He stated that he was handcuffed before he had any opportunity to walk unaided. While probable cause likely existed to investigate further, given the direct conflict between his testimony and the officers' testimony, the evidence was not sufficient to prove that Mr. Ivy was impaired within the meaning of state law especially given the acute absence of any objective measures of his blood alcohol concentration. Ivy was in their custody, and he had no ability to seek objective evaluation of his blood alcohol concentration. Their failure to seek out available objective scientific measures shows that the officers were more

concerned with convenience and saving time than discovering the truth about the situation. All of the evidence offered by the prosecution was circumstantial evidence. Heath Ivy's testimony provided a reasonable alternative explanation to the events of the evening. While the officers did offer their lay opinion as to intoxication, no definitive proof was offered because the officers elected to not seek objective, definitive proof to the detriment of Mr. Ivy. The officers did not do any standardized field sobriety tests nor did they seek out anyone who was certified to conduct those tests. The officers disregarded scientific tests to determine the level of Mr. Ivy's impairment, if any. The simple reality is that when Mr. Ivy blew into the portable breath test, the officers disregarded any possibility that Mr. Ivy's blood alcohol concentration could be less than .08. This case is another example of why the portable breath test as administered by law enforcement officers should be *per se* banned. The portable breath test is not admissible because it is not reliable. If it is not reliable and admissible as evidence of impairment, then it should not be used. It should not be referenced nor should it be considered in any way. The only things the trial court should have considered in reaching its decision were those things the officers observed with regard to Mr. Ivy and Mr. Ivy's testimony, and the failure of the officers to provide Mr. Ivy the opportunity to comply with the Implied Consent Law. Given that the latter was not considered, the conviction was against the overwhelming weight of the evidence. As such, the conviction should be reversed and remanded for new trial.

CONCLUSION

The Appellant, Samuel Heath Ivy, submits to this Court that the Circuit Court of Winston County erred in failing to grant the Defendant's Motion for a New Trial because the verdict was against the overwhelming weight of the evidence. Therefore, this Court should vacate the conviction and remand for a new trial.

This the 31st day of August, 2007.

RESPECTFULLY SUBMITTED,

SAMUEL HEATH IVY

BY: _____

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CERTIFICATE OF SERVICE

I, Stephanie L. Mallette, attorney for the Appellant, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

Honorable Taylor Tucker
City of Louisville Prosecuting Attorney
P.O. Box 7
Louisville, MS 39339

Honorable James M. Hood III
Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Honorable C.E. Morgan, III
Circuit Court Judge
P.O. Box 721
Kosciusko, MS 39090

This the 31st day of August, 2007.

STEPHANIE L. MALLETTE

CERTIFICATE OF MAILING

I, Stephanie L. Mallette, attorney for the Appellant, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief and Record Excerpts in the matter *Samuel Heath Ivy versus State of Mississippi (Appellee)*, case number 2007-KM-00077-COA, for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 31st day of August, 2007.

STEPHANIE L. MALLETTE