

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2007-KM-02049-COA

MICHAELS S. EVERS, JR.

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY,
MISSISSIPPI**

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

**ROY E. CARPENTER, JR.
CITY OF STARKVILLE PROSECUTING ATTORNEY
P. O. BOX 56
STARKVILLE, MISSISSIPPI 39760-0056**

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 judges of the Court of Appeal may evaluate possible disqualification or recusal.

1. Appellant Michael S. Evers, Jr.;
2. Honorable Lee J. Howard, Oktibbeha County Circuit Judge, P. O. Box 1344, Starkville, Mississippi 39760;
3. Mose Lee Sudduth, Jr., Attorney for the Appellant, 410 Main Street, Columbus, Mississippi 39701;
4. Roy E. Carpenter, Jr., City of Starkville Prosecuting Attorney, P. O. Box 56, Starkville, Mississippi 39760-0056.

State of Mississippi Ex Rel City of Starkville, Appellee

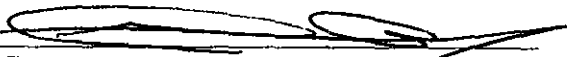
By: 
Roy E. Carpenter, Jr.
City of Starkville Prosecuting Attorney
P. O. Box 56
Starkville, MS 39760-0056

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STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

1. Whether the lower court erred in overruling Defendant's motion to dismiss at the end of the State's case and at the conclusion of the trial.

STATEMENT OF THE CASE

Michael S. Evers, Jr., appeals to this Court, the denial of his Motion for Directed Verdict at the conclusion of the State's case and the trial.

STATEMENT OF THE FACTS

On or about the 26th day of February, 2006, Officer Tim Cook of the Starkville Police Department (hereinafter referred to as "Cook") was assisting another officer with a wreck on Nash Street and Highway 182. The defendant was traveling on Division Street and turned onto Nash Street proceeding North. The Defendant was operating his vehicle in the wrong lane of traffic. (R. Page 9) Cook obtained the Defendant's attention and the defendant jerked his vehicle back into the proper lane of traffic. (R. Page 10) Cook on approaching the defendant could smell a heavy presence of intoxicating liquor. (R. Page 10) The defendant admitted to Cook to drinking a "couple". (R. Page 10) Field sobriety tests were conducted by Cook indicating that the driver was impaired. R. Page 11) Cook then transported the defendant to the Oktibbeha County Jail where a test of his breath indicated a .14% BAC. (State's Exhibit 4) The defendant was charged with driving under the influence, 1st offense, and careless driving.

SUMMARY OF THE ARGUMENT

The trial court was correct in its finding that there was sufficient probable cause to stop the defendant for careless driving and that the subsequent test proved conclusively that the defendant was operating a motor vehicle under the influence of alcohol.

ARGUMENT

Defendant claims that there was no probable cause to conduct a traffic stop. The United States Supreme Court has stated as a general rule, “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806, 810 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) Careless driving is defined by Miss. Code Ann. §63-3-1213:

“Any person who drives any vehicle in a careless or imprudent manner; without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving...”

Miss. Code Ann. § 63-3-1213.

The defendant was operating his motor vehicle in the wrong lane of traffic, almost striking the officer. He was driving in a careless or imprudent manner without due regard for the width of the roadway and the fact that the officer and other people were in the opposite lane of traffic. The officer’s observations were sufficient for him to conclude that the traffic violation of careless driving had occurred.. *See Saucier v. Poplarville*, 858 So.2d 933 (Miss. Ct. App. 2003).

Probable cause to administer a field sobriety test can be the basis of probable cause to arrest and administer a breath test. *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997). There is further a long line of precedent in Mississippi which holds that the smell of alcohol emanating from a car is enough to provide an officer with probable cause to make an arrest. *Dale v. State*, 785 So.2d 1102 (Miss. Ct. App. 2001).

Based on the officer's observations of defendant's driving, smell of alcohol, results of the field sobriety tests and the admission by the defendant that he had several drinks, the defendant was taken to the Oktibbeha County Sheriff's Department for the intoxilzyer test. The defendant's test results were .146 percent.

Driving Under the Influence is defined by Miss. Code Ann. §63-11-30(1)(c):

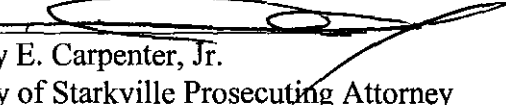
"It is unlawful for any person to drive or otherwise operate a vehicle within this state who...(c) has an alcohol concentration of eight one-hundredths percent or more...

Miss. Code Ann. § 63-11-30(1)(c).

Clearly the defendant was operating his vehicle with an alcohol concentration of greater than .08 percent.

CONCLUSION

This Court should affirm the trial court's overruling Defendant's Motion to Dismiss and sustain the findings of guilt.

Respectfully submitted,
City of Starkville, Appellee
By: 
Roy E. Carpenter, Jr.
City of Starkville Prosecuting Attorney
P. O. Box 56
Starkville, MS 39760-0056

CERTIFICATE OF SERVICE

I, Roy E. Carpenter, Jr., caused the foregoing Brief of Appellee to be served on the following persons in the following means:

Honorable Judge Lee J. Howard
Oktoberbeha County Circuit Judge
P. O. Box 1344
Starkville, MS 39760-0056

Mose Lee Sudduth, Jr., Esquire
Attorney for Appellant
410 Main Street
Columbus, MS 39701

(x) (BY MAIL) By causing to be mailed today via United States Postal Service, postage pre-paid;

() (BY FAX) By causing to be transmitted the above-described document by facsimile machine to the fax number(s) as shown. The transmission was reported as complete and without error. (Service by Facsimile Transmission to those parties on the attached List with fax numbers indicated);

() (BY PERSONAL SERVICE) By causing to be delivered by hand to the offices of the addressee(s); and/or

() (BY E-MAIL) By transmitting by electronic mail to the e-mail addressee(s) – as indicated on the attached Service List.

This the 10th day of June, 2008.


ROY E. CARPENTER, JR.