

CERTIFICATE OF INTERESTED PARTIES

The undersigned Attorney of Record certifies that the following list of 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 disqualification or recusal:

1. Honorable Lee J. Howard
Circuit Judge
P. O. Box 1344
Starkville, Mississippi 39760
2. Roy Carpenter
Starkville City Prosecutor
220 5th Street North
Columbus, Mississippi 39702
3. Michael S. Evers, Jr.
Appellant
1191 Prairie Waters Dr.
Columbus, Mississippi 39701
4. Mose Lee Sudduth, Jr.
Attorney for Appellant
410 Main Street
Columbus, Mississippi 39701

SO CERTIFIED on this the 12th day of June A. D., 2008.

2007-KM-

02049-COA-T

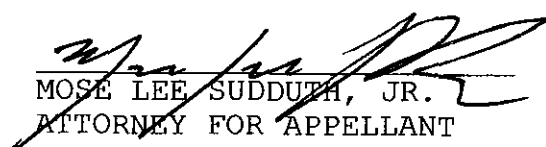

MOSE LEE SUDDUTH, JR.
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES.....	1
STATEMENT OF CASE.....	2
STATEMENT OF THE FACTS.....	3-5
SUMMARY.....	6
ARGUMENT:	
APPELLANT'S PROPOSITION NUMBER ONE.....	7-11
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

APPELLANT'S ISSUE NUMBER ONE:

<u>CITATION</u>	<u>PAGES</u>
<u>Evans v. State</u> , 547 So.2d 38, 40 (Miss. 1989).....	10
<u>Harrison v. State</u> , 800 So.2d 1134 (Miss. 2001).....	8
<u>Henderson v. State</u> , 878 So.2d 246 (Miss.Ct.App. 2004)...	8
<u>Leuer v. City of Flowood</u> , 744 So.2d 266 (Miss. 1999)....	9
<u>Mason v. State</u> , 799 So.2d 884 (Miss.Ct.App. 2001).....	10
<u>Michael v. State</u> , 918 So.2d 798 (Miss.Ct.App.2005).....	7
<u>Odem v. State</u> , 881 So.2d 940 (Miss.Ct.App. 2004).....	8
<u>Smith v. State</u> , 386 So.2d 117 (Miss. 1980).....	10
<u>U.S. v. Escalante</u> , 239 F.3d 678 (5th Cir. 2001).....	10
§63-11-30, MCA.....	7
§63-3-1213 Miss. Code Ann(Rev. 2004).....	8

STATEMENT OF ISSUES

ISSUE NUMBER ONE:

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

RESPECTFULLY SUBMITTED,

MICHAEL S. EVERS, JR.,
APPELLANT

BY: 
MOSE LEE SUDDUTH, JR.
ATTORNEY FOR APPELLANT

OF COUNSEL:

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STATEMENT OF THE CASE

MICHAEL S. EVERS, JR., the Appellant herein and referred hereafter as "Evers", was arrested and charged for the offenses of Driving Under the Influence, 1st Offense and Carless Driving on the 1th day of February, 2006 in the City of Starkville, Mississippi by Tim Cook, a Starkville City Police Officer.

He subsequently was found guilty in the Municipal Court of Starkville, Mississippi of the charges of driving under the influence, 1st Offense and Careless Driving. Subsequently he perfected his appeal to the Circuit Court of Oktibbeha County, Mississippi on August 23, 2006.

He was Bench tried before the Honorable Lee J. Howard on October 15, 2007. He was found guilty of the aforementioned charges and sentenced to pay a fine of Five Hundred Dollars (\$500.00) fine, all court costs, attend MASEP and suspension of his license as per Mississippi Law and to pay a fine of Fifty Dollars (\$50.00). (R.E. Page)

Evers filed his Motion for JNOV or in the Alternative a New Trial on September 11, 2006 and the lower court denied Evers' Motion for JNOV or in the Alternative a New Trial on November 13, 2007. (R.E. Page)

Evers filed and perfected his appeal to this Court on November 13, 2007.

STATEMENT OF THE FACTS

On February 26, 2006 MICHAEL S. EVERS, JR., hereinafter referred to as "Evers" was stopped by Starkville Police Department Officer Tim Cook, hereinafter referred to as "Cook". Cook was the only witness to testify for the City during the trial. (R. Page 8)

Cook testified that he was working a wreck on Nash Street when he saw a vehicle come around a curve on the wrong side of the street and Cook admitted that there were no center lines on Nash Street. Cook said the vehicle stopped when he flagged it down. (R. Page 10)

Cook said that he could smell alcohol on Evers and that Evers admitted that he had consumed a couple of drinks. He directed Evers to exit his vehicle and to perform some field sobriety tests. Cook said he noticed nothing unusual about Evers as he got out of his car or about him physically. (R. Page 11)

Cook had Evers perform three field sobriety tests: HG[N], walk and turn and one leg stand. He performed all three and Cook testified that he found clues on all three tests. (R. Pages 12-13)

Cook took Evers into custody and took him to the Oktibbeha County Sheriff's Department for testing on the intoxilyzer. (R. Page 14)

Cook gave Evers the 8000 Intoxilyzer Test and he

registered 0.146, and Evers was then charged with driving under the influence, 1st offense. (R. Page 25)

On cross-examination, Cook testified that from the curve to Highway 182 was approximately 57-75 yards and that during the night that people park on the street in front of their houses and that Cook could not see around the curve as to whether any cars were on the street. (R. Pages 29-30)

Cook testified that Evers got back in his land of traffic and that no other cars were traveling on Nash Street when Evers was came around the curve and up to Cook. (R. Page 32)

Cook admitted that Evers appeared normal and walked normal, and that the only thing that had captured his attention was the smell of alcohol, and that the smell did not mean that he was intoxicated. (R. Page 33)

Under cross-examination Cook testified that he had waited the mandated twenty minutes prior to testing Evers, however he could not explain the time of observation in connection with the time placed on the machine test sheet. (R. Pages 34-37)

The lower court stated that Cook had tried to explain the this, but that the court hadn't understood Cooks testimony. (R. Page 38)

Cook testified on re-direct Examination that the time he placed Evers in the patrol car and his observation time began at the Sheriff Department (R. Page 39)

Evers moved to dismiss the charge against him and the

lower court overruled Evers' motion. (R. Pages 40-42)

The lower court convicted Evers of Driving Under the Influence, 1st Offense and Careless Driving and sentenced Evers to pay fines in the amount of \$550.00, attend MASEP, pay all court costs and suspension of license. (R.E. Page)

Evers' motion for new trial or in the alterative a JNOV was denied and he has appealed claiming a serious and fatal error committed by the lower court that requires reversal of his conviction.

SUMMARY OF ARGUMENT

ISSUE NUMBER ONE:

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

Evers bases his argument here on the failure of the State to prove the Statutory requirements of §63-11-30 (1)(a), MCA that he was charged under, that provides that it is unlawful to drive or otherwise operate a vehicle within the State of Mississippi while under the influence of intoxicating liquor.

That there was no proof provided to the lower court that Evers was driving or operating a vehicle while intoxicated since there was no evidence as to the probable cause or reasonable suspicion for the stop.

His motion to dismiss should have been granted and the failure of the lower court to do so was reversible error.

ARGUMENT:

ISSUE NUMBER ONE:

THAT THE LOWER COURT COMMITTED REVERSIBLE ERROR IN
OVERRULING APPELLANT'S MOTION TO DISMISS AT THE END OF THE
STATE'S CASE AND AT THE CONCLUSION OF THE TRIAL.

It is a cornerstone of our criminal justice system that the State has the burden of proving, beyond a reasonable doubt, that a person is guilty of the crime charged. In a driving under the influence charge the State is required to show proof of intoxication and that the person charged was driving or operating a vehicle while under the influence. §63-11-30, MCA, and that the arresting officer had probable cause for the initial stop in order for the arrest and conviction to stand. In the case sub judice the State failed to show either of the above.

The standard of review for considering a motion to dismiss is that the lower court must consider "the evidence fairly, as distinguished from in the light most favorable to the plaintiff, and the court should dismiss the case if it would find for the defendant". Michael v. State, 918 So.2d 798, 803 (Miss.Ct.App. 2005)

"All evidence introduced by the prosecution is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion...must be overruled."

Odem v. State, 881 So.2d 940, 945 (Miss.Ct.App. 2004)

§63-3-1213 Miss. Code Ann(Rev. 2004) which states in part that:

"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. Careless driving shall be considered a lesser offense than reckless driving."

The pivotal question is whether or not Evers was actually committing careless driving and that Cook had requisite reasonable suspicion or probable cause to stop him and to proceed with his investigation and to legitimize Evers' arrest for driving under the influence.

This court has held the standard for probable cause as follows: [T]he test for probable cause in Mississippi is the totality of the circumstances. . . . It arises when the facts and circumstances with an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.' Harrison v. State, 800 So.2d 1134, 1138 (Miss. 2001)

This court has held that "[c]arelessness is a matter of reasonable interpretation, based on a wide range of factors." Henderson v. State, 878 So.2d 246,247 (Miss.Ct.App. 2004), and "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.'" Henderson, 878 So.2d at 247

Here in the instant case there was no testimony that Evers was violating any traffic offense other than the testimony of Cook that he came wide around a curve on a street and not at an excessive rate of speed.

On cross-examination, Cook testified that from the curve to Highway 182 was approximately 57-75 yards and that during the night that people park on the street in front of their houses and that Cook could not see around the curve as to whether any cars were on the street. (R. Pages 29-30)

Cook testified that Evers got back in his land of traffic and that no other cars were traveling on Nash Street when Evers was came around the curve and up to Cook. (R. Page 32)

The Mississippi Supreme Court closest definition of the kind of driving that will violate the careless driving statute stated that, "[T]he [careless driving] statute echoes the familiar tort law standard, requiring that drivers on Mississippi roads exercise the same standard of care as a prudent person would in the same circumstances." Leuer v. City of Flowood, 744 So.2d 266, 270 (Miss. 1999).

Respectfully, in the instant case there was no evidence presented by the City of Starkville showing that Evers was not acting in a prudent manner. In fact he reacted properly and quickly when Cook directed him to stop. (R. Page 10)

The stop, to be legal, must have an objective basis, and must have been based upon more than a pure, subjective conclusion

or "hunch" of Cook.

If from the facts of the case sub judice, Evers driving was not sufficiently bad to be stopped and "...if it is clear that what the police observed did not constitute a violation of the cited traffic law, there is no "objective basis" for the stop, and the stop is illegal. U.S. v. Escalante, 239 F.3d 678, 680-81 (5th Cir. 2001).

In the case sub judice, Cook's actions in stopping Evers were not supported by the facts and the stop was without probable cause.

In a bench trial"...the trial judge is 'the jury' for all purposes of resolving issues of fact". Evans v. State, 547 So. 2d 38, 40 (Miss. 1989) and "A circuit judge setting without a jury is accorded the same deference with regard to this findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." Mason v. State, 799 So.2d 884, 885 (Miss.Ct.App. 2001)

Evers would respectfully submit that in the case sub judice that the lower courts findings were not supported by substantial, credible or reasonable evidence.

To make an arrest without a warrant, an officer must have probable cause that an offense has been committed Smith v. State, 386 So.2d 117, 1119 (Miss. 1980) and in the case sub judice there is no showing as to probable cause to suspect that Evers had

been driving or operating a vehicle while under the influence.

Cook admitted that Evers appeared normal and walked normal, and that the only thing that had captured his attention was the smell of alcohol, and that the smell did not mean that he was intoxicated. (R. Page 33)

The evidence presented to the lower court was wholly insufficient to support a verdict of guilty of Careless Driving and DUI, and Evers' convictions stands to be reversed and rendered.

CONCLUSION

Based upon the error committed by the Circuit Court of Oktibbeha County, Mississippi this Court should reverse and render the convictions of Appellant, MICHAEL S. EVERS, JR., or in the alternative, reverse and remand with Appellant being granted a new trial.

CERTIFICATE OF SERVICE

I, MOSE LEE SUDDUTH, JR., Attorney for Appellant, MICHAEL S. EVERS, JR., do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the following:

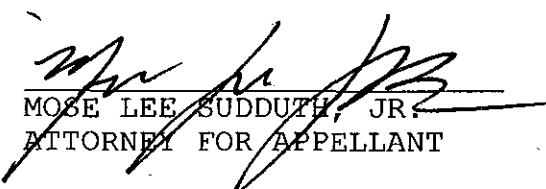
BRIEF OF APPELLANT

to the following at their usual office addresses:

Honorable Lee J. Howard, Circuit Judge

Honorable Roy Carpenter, Starkville City Prosecutor

SO CERTIFIED on this the 12st day of June, A. D., 2008.


MOSE LEE SUDDUTH, JR.
ATTORNEY FOR APPELLANT