IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-KP-00614-SCT

WAYNE GILPATRICK — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI
ENTERED APRIL 16, 2007

ORAL ARGUMENT REQUESTED

ATTORNEY FOR APPELLANT,
WAYNE GILPATRICK

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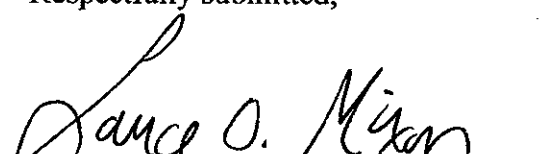
CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

1. State of Mississippi;
2. Wayne Gilpatrick, Appellant;
3. Honorable Jim Hood, Esq., Counsel for Appellee;
4. Honorable Lance O. Mixon, Esq.; Counsel for Appellant;
6. Honorable William Chapman, Circuit Court Judge for Rankin County.
7. District Attorney's Office for the 20th Judicial District.

Respectfully submitted,



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SUMMARY OF THE RESPONSIVE ARGUMENT

In its "Brief for the Appellee," the State avers that Gilpatrick has misapprehended the testimony of the State's forensic toxicologist, John Stevenson, in his original Brief. As will be discussed below in the section titled "Responsive Argument," Gilpatrick's assignment of error pertains to Stevenson's speculative and confusing testimony regarding a formula known as retrograde extrapolation, not an actual application of it. Stevenson's indecisive discussion of retrograde extrapolation, a formula that requires expert testimony, left the issue in the jury's hands without helping it. This testimony was admitted over Gilpatrick's objection, and amounts to clear error requiring a reversal.

The State also argues that the State's evidence at trial was legally sufficient to overcome Gilpatrick's motion for a directed verdict of not guilty. The State, in its Brief, has suggested that Gilpatrick's testimony is relevant to this determination. As will be shown below, only the State's evidence is to be considered on the issue of whether it made a prima facie case, and the evidence at trial was legally insufficient on this burden.

Finally, the State asserts that the verdict was not against the overwhelming weight of the evidence. As discussed in the original Brief of the Appellant, Gilpatrick maintains that the verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would result in an unconscionable injustice.

RESPONSIVE ARGUMENT

I.

The State designates the first issue as, "THE TRIAL COURT DID NOT ERR IN ACCEPTING EXPERT TESTIMONY FROM JOHN STEVENSON, THE STATE'S FORENSIC TOXICOLOGIST." (Appellee's Brief at 1.) The State asserts that, "Stevenson was unwilling to apply retrograde extrapolation to determine what Gilpatrick's BAC may have been at the time of the accident because some relevant factors were unknown to him." (Appellee's Brief at 6.)

The real issue in this case is not that Stevenson applied or did not apply retrograde extrapolation in his testimony, but that he merely discussed it in the manner he did. Gilpatrick readily concedes that Stevenson did not actually apply the retrograde extrapolation formula. Instead, Stevenson avoided a clear application of the formula but was allowed by the trial court to dance around the topic, over Gilpatrick's objections, regarding any testimony at all about retrograde extrapolation. (T. at 111; 113. R.E. at 19; 21.)

As stated in Gilpatrick's original Brief, Stevenson's speculative and indecisive testimony (i.e., that Gilpatrick's blood alcohol content "could have been higher, could have been lower, or could have been the same" at the time of driving) could not have aided or have been helpful to the trier of fact. (Appellant's Brief at 21.) Thus, he left the ultimate determination of a crucial fact – one that would require an expert opinion – to be decided by the jury.

The body of law in Mississippi supports the position that expert testimony must not only be relevant and reliable, but that it must also avoid unsupported speculation. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003). The record shows that Gilpatrick, through his trial counsel, objected to Stevenson's testimony about retrograde extrapolation prior

to Stevenson giving it. The specific objection is quoted as, "Your Honor, to which I object. I don't believe that this witness is qualified as an expert to expound on retrograde extrapolation." (T. at 113; R.E. at 21.) After the trial court overruled this objection, Stevenson continued his discussion, eventually stating that Gilpatrick's BAC at the time of driving "could have been higher, [] could have been lower, [or] could have been the same." (T. at 115; R.E. at 23.) Such testimony does not aid the trier of fact, but may confuse the trier of fact and allow for speculation in the determination of a fact of consequence.

For these reasons, the admission of this testimony amounted to clear error that adversely affected Gilpatrick's substantial right to a fair trial in which the State must prove each element of the offense (that Gilpatrick was actually under the influence at the time of driving) beyond a reasonable doubt.

II.

The State designates the second issue as, "THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT." (Appellee's Brief at 1.) The State asserts that Gilpatrick was prosecuted under the "common law" DUI theory in accordance with Miss. Code Ann. § 63-11-30(1)(a) and that the evidence at trial was legally sufficient on such charge to overcome Gilpatrick's motion for a directed verdict. (Appellee's Brief at 8.)

In its "Brief for the Appellee," the State lays out the evidence that it avers was legally sufficient in a bullet-point format. *Id.* This evidence consisted of testimony that alcoholic beverages were found in Gilpatrick's vehicle and that the vehicle smelled of alcohol. *Id.* Of course, following a vehicular collision, any vehicle that contained alcoholic beverages will very likely smell of alcohol due to the high probability that containers were ruptured as a result of the

impact. In this case, the record does not reflect that Gilpatrick himself smelled of alcohol, and even if that was so, there was no evidence presented that linked the smell of alcohol with the element of being under the influence of alcohol.

The evidence also consisted of testimony by an eyewitness, Joey Thrash, that Gilpatrick had swerved and crossed the center line prior to the occurrence of the collision. (Appellee's Brief at 8; T. at 85-86.) This evidence of improper driving, in and of itself, is not a decisive indicator that Gilpatrick was operating under the influence. It may be evidence of negligence on the part of Gilpatrick, but any improper driving that led to a vehicular accident is not enough to sustain a prima facie case of driving under the influence.

In this case, the additional evidence is not substantial to indicate that Gilpatrick was under the influence. As discussed in the original Brief, the BAC result of .07 was obtained some four hours after the accident was not accurate to determine intoxication at the time of driving. (Appellant's Brief at 22.) Even if it were, the State could not proceed under a *per se* theory of driving under the influence, as the legal limit is .08 pursuant to Miss. Code Ann. § 63-11-30(1)(c). Also, the evidence of alcohol found in Gilpatrick's vehicle, and evidence of the smell of alcohol coming from the vehicle, are not direct indicators that Gilpatrick was under the influence of alcohol at the time of driving.

The State's contention that Gilpatrick's testimony of his own alcohol consumption and having a beer in his hand when he swerved is relevant to this issue is not properly before the Court. (Appellee's Brief at 9.) Gilpatrick's motion for a directed verdict was made at the conclusion of the State's case-in-chief. (T. at 151.) This motion for a directed verdict challenged the legal sufficiency of the State's evidence, and this Court is required to view all evidence in the light most favorable to the State, with the State being entitled to all favorable inferences that may reasonably be drawn from the State's evidence. *Seeling v. State*, 844 So. 2d

439, 443 (Miss. 2003). Therefore, any evidence from Gilpatrick should not be considered in making this determination.

III.

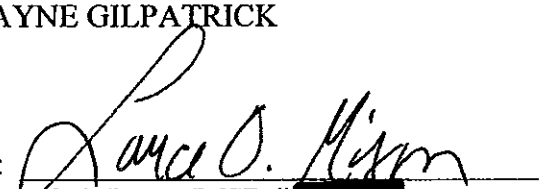
The State designates the third issue as, "THE VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE." (Appellee's Brief at 1.) As discussed in the original Brief, Gilpatrick maintains that the verdict is contrary to the overwhelming weight of the evidence, especially considered in light of *Smith vs. State*, 956 So. 2d 997 (Miss. App. 2007). *Smith* is exhaustively discussed in the first brief, and no recitation of the distinction between *Smith* and the case *sub judice* will be offered here. (See Appellant's Brief at 24-26.)

CONCLUSION

For the above and foregoing reasons, as well those argued in the entire "Brief of the Appellant," Wayne Gilpatrick respectfully requests that this Court reverse and render the judgment of the Circuit Court of Rankin County, or alternatively, reverse and remand for a new trial.

Respectfully submitted,

WAYNE GILPATRICK



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CERTIFICATE OF SERVICE

I, Lance O. Mixon, counsel for appellant Wayne Gilpatrick, hereby certify that I have this day served a true and correct copy of the above and foregoing Reply Brief of the Appellant on the following persons by placing a copy of same in the United States Mail, postage prepaid, first class and addressed as follows:

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This service effective this the 29th day of February, 2008.

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