IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-00097-COA

SARAH LYNN HUDSPETH — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Sarah Lynn Hudspeth

THIS 17th day of June, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Sarah Lynn Hudspeth

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE ISSUES

ISSUE NO. 1: **WHETHER BLOOD ALCOHOL CONTENT TEST RESULTS WERE INVALID?**

ISSUE NO. 2: **WHETHER THE STATE PROVED CORPUS DELICTI BEYOND A REASONABLE DOUBT?**

ISSUE NO. 3: **WHETHER THE COURT ERRED IN ALLOWING IRRELEVANT OPINION EVIDENCE?**

ISSUE NO.4: **WHETHER THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FOR ALL OF THE ELEMENTS OF AGGRAVATED DUI AND WHETHER THE VERDICT WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Kemper County, Mississippi where Sarah Lynn Hudspeth was convicted of DUI-Manslaughter as codified in Miss. Code Ann. §63-11-30(5) (Rev. 2004). A jury trial was held October 16, 2007, with Honorable Lester F. Williamson, Jr., Circuit Judge, presiding. Mrs. Hudspeth was sentenced to twenty (20) years with fourteen (14) years suspended and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

As forty-three (43) year old Victoria Edwards was rounding a curve on Sport Watkins Road in Kemper County around 10:20 p. m. on December 27, 2006, her car collided with a vehicle being driven by Sarah Hudspeth, the appellant here. [T.129-44; 164-70,178, 187, 202; Ex. 5-7]. At that curve, Sport Watkins Road is approximately twenty-two (22) feet wide; and, the only delineation of a center line are reflectors spaced about 80 feet apart. [T. 147-48, 190-92; Exs. 6-7]. The markers are off center by about nine feet, six inches (9.5 feet). *Id.* After the accident, the two automobiles were straddling the center of the roadway. [T. 142, Ex. 7].

There were no independent eye witnesses to the accident. There was no indication that either vehicle was speeding. [T. 196]. There were no skid marks. [T. 147, 169-71]. Emergency responders found Ms. Edwards "pinned" in her car, without vital signs and without visible injury, except for some bruising on her legs. [T. 155, 207-08].

No autopsy was conducted. *Id.* The coroner simply assumed internal injuries as the cause of Ms. Nelson's death resulting from the accident; but, the coroner's assumption was not proved to be held within a reasonable degree of medical certainty, or within any other standard of certainty. [T.211, 213, 217-19].

Sarah. Hudspeth admitted drinking two beers earlier. [Ex. 5]. Her blood alcohol content registered immediately after the accident at .24 per cent. [T. 139; Exs.4, 5].

SUMMARY OF THE ARGUMENT

The trial court should have excluded Sarah's intoxilyzer results because the state did not prove there was a requisite twenty (20) minute period of observation prior to the administration of the examination. The state did not prove that the officer administering the test was certified on the date performed. Mrs. Hudspeth's trial was rendered unfair when the state was allowed to present an incompetent invalid opinion as to the proximate cause of Ms. Nelson's death from the coroner. The trial court erroneously permitted an irrelevant and prejudicial opinion from the state's accident reconstructionist. The evidence was insufficient for the charge to be presented to the jury and the verdict is not supported by the weight of evidence.

ARGUMENT

ISSUE NO. 1: WHETHER BLOOD ALCOHOL CONTENT TEST RESULTS WERE INVALID?

Greg Campbell was the Kemper County Sheriff's deputy who conducted the Intoxilyzer 8000 breath test on Mrs. Hudspeth. [T. 13-17, 139]. It is the appellant's position that Deputy Campbell did not wait the proscribed twenty (20) minute observation period before subjecting Mrs. Hudspeth to the Intoxilyzer examination and did not present proof that he was certified to administer the test on the date performed. [R. 8]. Thus, the test results were invalid and inadmissible.

Deputy Campbell testified that he received a telephone call at his house concerning the subject accident "round about 22:18 "(10:18 p.m.) on 27 December 2006. [T. 8]. He testified that he reported to the scene at 22:26. [T. 9].

Other officers were already there along with emergency medical responders. *Id.* The officer in charge asked Campbell to deal with Mrs. Hudspeth because that officer knew the decedent's family. *Id.* After about five minutes, which would be approximately 22:31, while Mrs. Hudspeth looked for her purse, Campbell said he ran Mrs. Hudspeth's tag. [T. 10].

Campbell logged 22:31 as the start time for the period of observation into the Intoxilyzer 8000 machine after he drove Hudspeth to the jail. [T. 15]. The drive from the accident scene to the jail was about seven or eight miles. [T. 14]. In his written report, Campbell said he left the accident scene at 22:41 p. m. [T. 20-21]. Also Campbell said he had combined the time of prior officer observation with his time and that his actual start time of uninterrupted observation was 22:37 p. m. [T. 22].

However, any observation Campbell could have performed was not uninterrupted nor complete. Mrs. Hudspeth, who was accompanied by a female fire chief on the drive to the jail, was upset and crying in the back seat of the patrol car. [T.22-28]. Since he was driving, Campbell said that if Mrs. Hudspeth had regurgitated and swallowed or put something in her mouth he would not have been able to know. [T. 25]. Until they arrived at the jail, Campbell could not fully observe Mrs. Hudspeth. Ultimately,

Campbell said his uninterrupted observation period started at 22:46 which is consistent with the Intoxilyzer's recordation of the beginning of the observation period. [T.28]. No one else testified as to the observation period. Hudspeth blew at 23:00. [Ex. 4].

Although current at the time of trial, Campbell never produced documentary proof that he was certified to operate the subject Intoxilyzer 8000 for the date of Sarah Hudspeth examination. [T. 127, 145, 150-51, 228]. The machine in this case was shown to the calibrated properly. [T. 107-10, 118-20; Exs. 2, 3].

According to *Henley v. State* 885 So.2d 89, 91 (Miss. Ct. App., 2004), the State has to prove as part of its "authenticity burden" that an intoxilyzer breath test has been "performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis" under Miss. Code Ann. § 63-11-19 (Supp.2003). The *Henley* court found that an uncertified copy of an officer's permit was sufficient proof of current certification. *Id.* In the present case, there was no documentation presented at all that Deputy Campbell was certified on the day the breath test was administered. [T. 123, 145, 150-51].

The trial court here found that Campbell's testimony alone sufficed to prove his certification. [T. 127]. However, the appellant respectfully suggests this ruling was in error, because the Supreme Court has ruled that testimony alone is insufficient for proof of current intoxilyzer calibration certification. In *Johnston v. State*, 567 So.2d 237, 238-39 (Miss.1990), the state failed to prove by documentary evidence timely intoxilyzer

calibration and the officer's testimony was found to be insufficient under the best evidence rule. *Id.*

The *Johnson* court in reversing said, "[t]he trial court abused its discretion in finding a sufficient predicate for admitting the results of the intoxilyzer in the testimony of [the officer]. This error substantially prejudiced the defendant's right to a fair trial." *Id.*

The *Johnson* court established the three part evidentiary predicate for the admission of blood alcohol content tests. *Id.* A trial court shall determine that the 1) statutory procedures of Miss. Code Ann. § 63-11-19 (1972)[1] are followed, and 2) that the operator of whatever machinery employed was certified to conduct the testing procedures used, and 3) that the accuracy of the machine used was quarterly calibrated and certified. See also, *McIlwain v. State* 700.So.2d 586 (Miss. 1997).

The first two elements of introduction of the breathalyzer reports requirements were not established here. Nor was there any substantial compliance as referenced in *Bearden v.*

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[1]

§ 63-11-19. Requirements as to methods of testing and qualifications of test administrators; certification of administrators; testing and certification of accuracy of methods, machines or devices.

A chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis. The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory. ...

State, 662 So.2d 620 (Miss.,1995).

The strict statutory requirements of *Johnston* controls the Court's decision here . A reversal with new trial is required and respectfully requested.

ISSUE NO. 2: WHETHER THE STATE PROVED CORPUS DELICTI BEYOND A REASONABLE DOUBT?

The state's only evidence of a causal connection between the accident and Ms. Nelson's death was by way of testimony from the coroner for Kemper County, Kathy Lanier, who was also a registered nurse. [T. 202, *et seq*.]. The decedent in this case had no signs of injury except bruises and cuts on her legs. [T. 155, 207-08]. The decedent was a 43 year old, overweight, woman whose medical history was sketchy. [T. 214-15, 218]. There was no proof offered that Ms. Nelson was alive at the time of impact. There were no skid marks to indicate that she responded to a perceived danger. [T. 163-64].

The appellant's position is that Ms. Lanier was not qualified to give an opinion as to the cause of death of Ms. Edwards. Even if Lanier was qualified, her opinion in this case was not reliable as being rendered within any reasonable degree of certainty.

As set out in *King v. State*, 251 Miss. 161, 176, 168 So.2d 637, 643 (1964), neither an autopsy nor "medical evidence" is required to prove the death of a homicide victim. That a person is dead can be simply proved through a witness who saw the decedent after death and who testifies that the person is dead. *Id.* Likewise, cause of death by "criminal agency" can be established by witnesses who observed a homicide, or by

circumstantial proof of death resulting from a criminal act to the exclusion of every other reasonable hypothesis of innocence. *Id.*

In the DUI manslaughter case of *Gibson v. State*, 503 So.2d 230, 232-33 (Miss.1987), an eye witness saw what he thought was a man standing by a truck being hit and knocked into the air by a car which veered off the road. A body was found in the path of the defendant's line of travel about thirty seven feet from the point of impact. *Id.* The coroner removed the decedent to a local funeral home and upon examination came to the conclusion that "immediate cause of death was head injuries" a fact to which he testified at trial. *Id.* The court found these circumstances justified or corroborated the coroner's opinion which sufficiently proved a causal connection between the victim's death and the defendant's drunk driving. *Id.* In the present case, there were no signs of any fatal injuries at all and no proof that Ms. Nelson was not having a heart attack or other acute problems at the time of the accident.

Another case where the facts reveal death by criminal agency is the murder case of *Miskelley v. State* 480 So.2d 1104, 1107-08 (Miss.1985). In *Miskelley,* the evidence showed that the skeletal remains of the young male victim were found at an unusual place, under unusual circumstances including that that the skull of the victim had a hole in the front forehead area and hole in the rear above the left ear. *Id.* The victim's rifle was found nearby hidden in a tree. *Id.* The defendant had made admissions to his girlfriend about being involved in the death. *Id.* Although the admissions alone could not prove *corpus delicti*, the

admissions along with the unusually corroborative circumstances sufficed. *Id.* See also *Buford v. State*, 219 Miss. 683, 69 So.2d 826 (1954). In the present case, Mrs. Hudspeth's admission of driving after having a couple of beers and possible crossing over an imaginary center line does not clear up the lack of proof of cause of death in this case.

Where cause of death is not apparent from the evidence, legal proof of cause of death "must be based on a reasonable degree of medical certainty." *Harrell v. Time Warner/Capitol* 856 So.2d 503, 510-11 (Miss. Ct. App. 2003). Here, since the coroner's opinion was not tendered within any degree of medical certainty or under circumstances indicating medical certainty, the state's evidence is not probative.

In *Kidd v. McRae's Stores* 951 So.2d 622, 626 (Miss. Ct. App.,2007) the court said,"when an expert's opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision. [Citing] *Catchings v. State*, 684 So.2d 591, 597 (Miss.1996). In other words "if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." 951 So.2d 626. See also, *Flaggs v. State* --- So.2d ----, 2008 WL 2169747 (Miss. Ct..App., 2008) [Expert's testimony about blood splatter "far too speculative to have been reliable", and the expert equivocated on the degree of medical certainty.]

The appellant respectfully suggests that the state's evidence failed and a directed verdict should have been granted or JNOV. A reversal with rendered acquittal would be the

proper corrective measure, or a new trial.

ISSUE NO. 3: WHETHER THE COURT ERRED IN ALLOWING IRRELEVANT OPINION EVIDENCE?

The state offered the opinion of accident reconstructionist Mike Cain. [T. 160, et seq.]. Because no point of impact of the two vehicles could be determined and since there were no skid marks, Mr. Cain testified that "[n]o scientific calculations were actually performed in this particular case." [T. 163-64]. Mr. Cain on cross-examination agreed that this case involves "an accident that occurred in the middle of the road leaving no scientific -- or no evidence from which [a] scientific formula can be developed on a road that has basically an imaginary centerline." [T. 197]. Mr. Cain concurred that there is "no way to independently corroborate [his] conclusions in this case." [T. 164].

Defense counsel objected to Cain being qualified as an expert on the basis that his testimony was not "based on scientific methods and procedures." [T. 165]. The trial court found that Cain was qualified to give the opinion based on his training alone. *Id.* The appellant's position is that the trial court did not apply the proper standards.

Under the modified *Daubert* principles adopted in *Mississippi Transp. Comm. v. McLemore*, 863 So.2d 31, 39-40 (¶¶ 21-25) (Miss.2003), Trooper Cain's opinion was irrelevant because it had no reliable relation to the determination of a material fact. In other words, Cain only testified as to what was merely possible, not empirically likely. Cain's opinions were, therefore, meaningless to the fact finder. Although Cain would arguably be

qualified to give an opinion here if he had facts upon which to reasonably rely; but, he did not perform any testing nor analysis upon which to base any opinion. The prejudice to Mrs. Hudspeth was a violation of the fair trial standard.

Admission of expert opinion testimony is governed by Miss. R. Evid. 702[2] and the requirements set out in *McLemore, supra.* 863 So.2d 34-36. First a person offered as an expert must be qualified so that the opinion is reliable, secondly, the witness' knowledge must be able to assist the fact finder so, the opinion must be relevant. *Id.* The trial court's rulings on expert testimony are reviewed on appeal under a standard of whether there was an abuse of discretion. *Webb. v. Braswell*, 930 So. 387, 396-97 (Miss. 2006), *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss.2007).

None of the three requirement of the enumerated principles of Miss. R. Evid.702 were established here. Cain's opinion was not based upon sufficient facts or data. He applied no "reliable principles and methods" generally nor "principles and methods reliably to the facts of the case", because the information simply was not there for him.

In this case there simply was not enough information for Cain to render a reliable

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[2]Miss. R. Evid 702 states:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

opinion. In *Nelson v. State*, 2007-KA-01048-COA (Decided 5-20-08)(petition for rehearing pending at the time of this brief), the defendant offered a firearm's expert to testify about whether a shotgun could unintentionally discharge. However, in *Nelson*, no weapon was ever recovered and it was not even known what kind of weapon was involved except that it was a shotgun. The trial court disallowed the defense expert and the Court of Appeals affirmed stating that, "[t]here simply was not enough information available about the particular shotgun used by Nelson to provide the necessary relevancy and reliability for Bowman's expert testimony." [Nelson Slip. Op. ¶ 26] "...while Bowman conducted his test under the parameters set out by defense counsel, it was based upon incomplete, and possibly inaccurate, information. Therefore, Bowman's testimony and the results of his test could not have offered anything that would have assisted the jury in reaching its verdict." *Id.* at ¶ 27. The *Nelson* court, therefore, found the proffered expert testimony irrelevant. The same analysis should apply here.

This approach is reflected in the *McLemore* opinion where the court recognized that even though a witness may be qualified and his or her techniques and methodology accepted or established, opinions not based on valid data are nevertheless inadmissible; because, such opinions do not meet the reliability requirement of *Daubert*. *McLemore* 863 So. 2d 34-36. The *McLemore* court used the decision in *Black v. Food Lion, Inc.*, 171 F.3d 308, 311-14 (5th Cir.1999) as an example.

In *Black*, a physician's conclusion that a fall caused a patient's fibromyalgia was

simply "not possible since the doctor did not know the exact process or factors triggering the disease"; therefore, the physician's opinion was based on a "conclusion for which there was no underlying medical support." 863 So. 2d. 38. See also, *Giannaris v. Giannaris,* 960 So.2d 462, 470-71 (Miss. 2007) where the Supreme Court found fault with a chancellor's admission of an expert's unreliable opinion "based upon ... five-week[s] training and instincts" and unverified assertions, as not being "based upon sufficient facts or data" as required by Miss. R. Evid. 702. See also, *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir.2000).

As addressed in *McLemore*, part of the trial court's "gatekeeping responsibility." is to make a sure the expert's "reasoning or methodology ... can be applied to the facts in issue." *McLemore,* 863 So. 2d 35-36. So here, even though Cain may have had the necessary training to give an opinion, he lacked the facts upon which to apply his training and experience. Cain's opinion that was nothing more than speculation as in *Giannaris, supra.*.

The fact that Cain's incompetent opinion was based further on an assumption leads to the legal conclusion that the opinion testimony and information about the supposed details of the accident were not what they purported to be, and thus is not authentic under Miss. R. Evid. 901.[3] Authenticity is a condition precedent to admission of evidence. *Middlebrook*

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[3]M.R.E. 901(a) provides:
(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

v. State, 555 So.2d 1009, 1012 (Miss. 1990). If the evidence is not authentic it is irrelevant according to the comments to the rule. See also, *Walker v. State,* 878 So.2d 913, 914-15 (Miss.2004), where the court said, the introduction of irrelevant expert opinion evidence "without employing the available scientific means for authentication, fails the unfair prejudice standard set forth in M.R.E. 403, infringed upon Sarah Hudspeth's right to a fair trial. A new trial is respectfully requested.

ISSUE NO.4: WHETHER THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FOR ALL OF THE ELEMENTS OF AGGRAVATED DUI AND WHETHER THE VERDICT WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

As stated above there was no proof of cause of death here. Mrs. Hudspeth's admissions are insufficient. There was no proof of a negligent act, no proof of a center line, nor valid accident reconstructionist's opinion. Hudspeth's motion for directed verdict should have been sustained or motion for JNOV for acquittal granted.

In *Dunaway v. State*, 919 So.2d 67, 71 (Miss. Ct. App. 2005), a vehicular homicide case, the court addressed the issue of proof of a negligent act. There was a witness who saw Dunaway on the wrong side of the road swerving to avoid oncoming traffic and losing control. *Id.* So, with this, the *Dunaway* court found clear proof of a negligent act. *Id.*

Here in Hudspeth's case, contrary to *Dunaway,* there was no testimony as to any particular negligent act of Hudspeth. Hudspeth could not say for sure what happened and

without any clear center line there was no proof, beyond a reasonable doubt, of a negligent act. The court in *Murphy v. State* 798 So.2d 609, 613 (Miss. Ct. App.,2001), spoke to the elements the state is required to prove in vehicular homicide cases. The State must prove that the defendant "not only consumed alcohol prior to the accident, but that he performed a negligent act that caused the death of another." Citing *Hedrick v. State*, 637 So.2d 834, 837-38 (Miss.1994). See also *Frambes v. State*, 751 So.2d 489, 492(¶ 17) (Miss. Ct. App.1999).

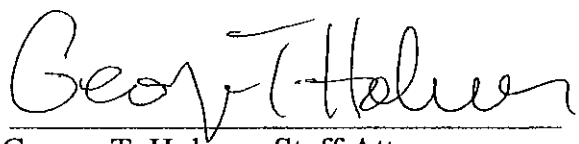
Here, there was no evidence of a negligent act in the record when the court denied the motion for directed verdict not at the time the court denied Hudspeth's JNOV. So, she respectfully requests a reversal of the conviction and rendering of acquittal.

CONCLUSION

Sarah Hudspeth is entitled to have her conviction reversed with a rendering of acquittal or with remand for a new trial.

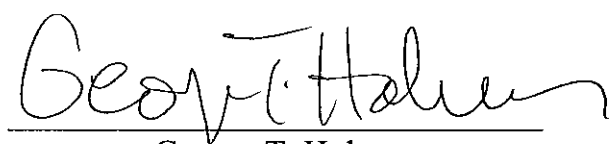
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Sarah Lynn Hudspeth, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 17th day of June, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Lester F. Williamson, Jr., Circuit Judge, P. O. Box 86, Meridian MS 39302, and to Hon. Bilbo Mitchell, Dist. Atty., P. O. Box 5172, Meridian MS 39302, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.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