IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2008-KA-00146-SCT

JOHN DEEDS — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF DESOTO COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

T. SWAYZE ALFORD ([redacted])
Attorney of Record for Appellant
HOLCOMB DUNBAR, P.A.
Post Office Drawer 707
Oxford, Mississippi 38655
(662) 234-8775 phone
(662) 238-7552 fax

STATUTES AND OTHER AUTHORITIES

ARGUMENT

I. The Trial Court Erred in Refusing To Dismiss The Charges Against The Appellant On The Grounds Of Double Jeopardy.

The trial court improperly denied John Deeds' motion to dismiss based on double jeopardy. Both the United States Constitution and the Mississippi Constitution protect individuals from repeated prosecutions for the same crime. U.S. Const. Amend. 5; MISS. CONST. ART. III, § 22. The United States Constitution, which does not require an acquittal or conviction as required by the state constitution, states: ". . .nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" U.S. CONST. Amend. 5. Pursuant to the 14th Amendment, this clause is enforceable to the states, including Mississippi. *Benton v. Maryland*, 395 U.S. 784, 787 (1969). In fact, the Mississippi Supreme Court has acknowledged that state rights are construed consistently with the authoritative constructions of the United States Constitution. *Lee v. State*, 469 So.2d 1225, 1228 (Miss. 1985). Accordingly, John Deeds has clearly been subjected to repeated prosecutions for the same offense, and his conviction in circuit court violated double jeopardy.

The State refutes this argument by distinguishing the cases cited by appellant, claiming that Deeds' reliance on *Jamison v. City of Carthage*, 864 So. 2d 1050 (Miss.Ct.App. 2004) and *Bennett v. State*, 528 So. 2d 815 (Miss. 1988) is misplaced, in that both Jamison and Bennett were afforded a complete first trial while Deeds was not. (Appellee's Brief, Pgs. 4-6). The State also notes that in *Winters v. State*, 797 So.2d 307 (Miss.Ct.App. 2001), the Mississippi Court of Appeals stated that "in the case of a bench trial, double jeopardy does not attach until the first witness is sworn." (Appellee's Brief, P. 4). However, a glaring similarity between the *Bennett* case and the present case is that no witnesses were sworn in the *Bennett* case. However, notwithstanding this fact, the circuit

court's felony conviction of Bennett violated double jeopardy. *Bennett* at 819. Likewise, in the present case no witness was sworn. Instead, the municipal court dismissed the misdemeanor D.U.I charge at the request of the prosecution, due to a lack of evidence. This was clearly indicated on the Order. Therefore, the municipal court's dismissal operated as an adjudication and double jeopardy attached at that time.

A case recently decided by the Mississippi Court of Appeals offers great insight into why Deeds' conviction in circuit court after his municipal court dismissal amounted to double jeopardy. In *Loveless v. City of Booneville*, the Mississippi Court of Appeals stated:

> The simple, yet to us controlling, consideration is that the accused must be placed in jeopardy twice for double jeopardy to exist. It happens when the second event involves a completely new beginning, i.e., when the second proceeding takes place before a new trier of fact, whether that be a different judge or jury, or the same judge starting with a clean slate. 972 So.2d 723, 728 (Miss. Ct. App. 2007).

While Loveless was not subjected to double jeopardy, his trial was only a "brief postponement before the first and only trier of fact". *Id.* This is not the case for Deeds.

Rather, Deeds' trial in circuit court was a completely new beginning. It was a second proceeding, which took place before a different judge. This second proceeding occurred after the municipal court judge dismissed Deeds' case due to insufficient evidence. Following *Loveless*, the municipal court's dismissal order clearly operated as an adjudication, and Deeds' subsequent D.U.I. conviction violated double jeopardy.

II. The Trial Court Abused Its Discretion In Admitting The Results of the Appellant's Blood Test Into Evidence.

A. A Proper Chain of Custody Was Not Established

A proper chain of custody proving the genuineness of Deeds' blood was not established as

the very foundation of the chain cannot be ascertained. The State correctly states that "[t]he purpose of requiring a chain of evidence . . .is to afford reasonable assurances that the evidence is genuine . . . ." (Appellee's Brief, P. 7). However, when the State cannot even prove that the evidence was collected pursuant to the correct procedures, then the evidence should not be considered genuine.

Miss. Code Ann. Section 63-11-9 states, "[u]nder Section 63-11-7, any qualified person acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein." MISS. CODE ANN. § 63-11-9 (1996). This law is a safeguard. When a safeguard is deficient, the State bears the burden of showing that the deficiency did not affect the accuracy of the results. *McIwain v. State*, 700 So.2d 586, 590 (Miss. 1997). Therefore, since the State cannot show that a qualified person drew Deeds' blood, and since the State cannot show that proper procedures were used (such as not using an alcohol swab), then the State has the burden of showing that the procedures did not affect the accuracy. This the State cannot do and Deeds' respectfully suggests that the chain of custody was not properly established in this instance.

The State first relies on *Ellis v. State*, 934 So.2d 1000 (Miss. 2006), in which this Court allowed the admission of blood evidence after a deputy testified as to seeing the defendant's blood drawn, even though he could not remember the exact procedures used. (Appellee's Brief, P. 7). Additionally, the State points to *Gibson v. State*, 503 So.2d 230 (Miss. 1987), in which this Court stated that "[t]he test for continuous possession i.e. 'chain of custody' of evidence is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence. (Appellee's Brief, P. 8). Deeds does not dispute the plain reading of the law, but does dispute that these two cases are analogous to his. In fact, both *Ellis* and *Gibson* are distinguishable from the present case.

In *Ellis,* the nurse's identity and qualifications were known and available to the defendant. *Ellis* at 1002. In *Gibson*, the identity of the individual who drew the defendant's blood was identified, the procedures used to draw the defendant's blood were identified, and, the nurse herself testified, giving the defense an opportunity to cross-examine, that she would have prepared the skin without alcohol prior to drawing the defendants blood. *Gibson* at 232-234. Therefore, in both *Ellis* and *Gibson*, the prosecution was able to lay a proper foundation for the introduction of the blood test results. However, in the present case, the very ***identity*** of the individual who drew Deeds' blood is unknown. (Tr. Vol. 3, Pgs. 33, 100). Likewise, the individual's ***qualifications*** are unknown and the ***procedures*** used to draw his blood are unknown. (Tr. Vol. 3, Pgs. 33, 100, and 105) (emphasis added).

The State attempts to gloss over the fact that the nurse who drew Deeds' blood did not testify as to the procedures used to draw his blood. Rather, the State points out Officer Gibbs testified that he saw the nurse draw Deeds' blood and claims that this is sufficient. (Appellee's Brief, P. 8). While Officer Gibbs did testify that he watched the procedure, he does not know if Deeds' arm was swabbed, (Tr. Vol. 3, P. 38), much less if his arm was swabbed with alcohol or not. *See, e.g.*, *People v. Ward*, 178 N.Y.S.2d 708, 708-09 (N.Y.Co.Ct. 1958) (it was error for trial court to admit blood test results when arm was swabbed with alcohol for antiseptic rather than in accordance with standard operating procedures). Rather, he only assumes that the nurse swabbed the arm, and **hoped "that she knew what she was doing when she drew the blood, but I can't speculate, and I don't remember."** (*Id.*) (emphasis added). Simply hoping that such procedures are correctly performed certainly does not meet the State's burden and the trial court abused its discretion by finding that a

proper foundation was laid.

The State also directs this Court to a recently decided Mississippi Court of Appeals case, *Lepine v. State*, 2007-KA-02197-COA, which held that the three part test set forth by *Johnston v. State*, 567 So.2d 237 (Miss. 1990), is no longer required for admission of a defendant's blood alcohol content test results. (Appellee's Brief, P. 11). Rather, the only requirement is proof that the procedure was reasonable. *Id.* While the State claims that nothing in the record shows that the procedures used were less than reasonable, it is unreasonable that the State is unable to present any evidence of what procedures were used. Officer Gibbs' testimony failed to adequately establish that a licensed registered nurse, a qualified person, drew Deeds' blood, failed to establish the nurse's identity, failed to establish what size needle was used, and failed to establish whether an alcohol swab was used. (Tr. Vol 3, Pgs. 100, 105). This lack of evidence is less than reasonable. It was impossible for Deeds to present a proper defense when he is not even allowed to discover what procedures were used against him.

As is clear from the record, the State has failed to lay the proper foundation and has failed to establish the first link in the chain of custody. By admitting the blood results into evidence, the trial court failed to give Deeds an opportunity to develop his defense and to ascertain what procedures were followed and whether they were correctly performed. Thus, the blood evidence should not have been admitted in Deeds' trial and his conviction should be reversed.

B. Appellant was Deprived of His Sixth Amendment Right to Confront Witnesses Against Him.

The State next claims that the admission of blood test results without a foundation of the procedure used to collect the blood did not violate Deeds' Sixth Amendment right to confrontation.

(Appellee's Brief, P. 11-12). Stating that the Confrontation Clause does not apply to physical objects but rather is restricted to witnesses, the State asserts that because the individual who extracted Deeds' blood did not testify, and therefore her testimony was not used against Deeds, the Confrontation Clause does not apply. (*Id.*). However, the Confrontation Clause seeks to ensure reliability of evidence. *See, e.g., Belvin v. State,* 922 So.2d 1046, 1050 (Fl. App. 4th Dist. 2006). Deeds was not able to discover whether proper procedures were used to take his blood, and therefore not able to assess the reliability of the same. These procedures should be considered testimonial evidence, the admission of which is explicitly barred by the Confrontation Clause without a proper opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004).

A testimonial statement is one "given to the police or individuals working in connection with the police for the purpose of prosecuting the accused." *Hobgood v. State*, 926 So.2d 847, 852 (Miss. 2006), *cert. denied*, 549 U.S. 1118 (2007). In the present case, the individual who drew Deeds' blood was clearly working in connection with the police, since she was working at the direction of Officer Gibbs. Therefore, Deeds' blood was clearly drawn for the purpose of aiding in his prosecution. Additionally, a statement is testimonial when used to prove past events or when there is no ongoing emergency. *Williams v. State*, 960 So.2d 506, 510 (Miss. Ct. App. 2006), *cert. denied,* 959 So.2d 1051 (Miss. 2007) and 128 S.Ct. 722 (U.S. 2007). Again, in the present case, when the unidentified individual took Deeds' blood pursuant to unidentified procedures at the direction of Officer Gibbs, it was done in an effort to prove he was driving while intoxicated. As such, the individual took his blood to prove a past event and while there was no ongoing emergency.

The State cites *Evans v. State*, 499 So.2d 781 (Miss. 1986), for the proposition that the Confrontation Clause is restricted to witnesses and does not apply to physical evidence. (Appellee's

Brief, pg. 12). While this may be true, the appellant respectfully suggests that *Evans* and the cases relied on by the Evans court were decided before *Crawford v. Washington* and therefore did not address the important testimonial evidence exclusion set forth by *Crawford.*

The reliability of Deeds' blood test can only be determined if the procedures used in drawing his blood are known, specifically whether or not an alcohol swab was used to prepare his skin. Since the prosecution does not even know who drew his blood, much less the procedures used, it is impossible to ensure the reliability of the results. Accordingly, Deeds was denied a fundamental and essential requirement of a fair trial when he was denied the opportunity to confront the individual who drew his blood. For this reason, the Defendant's conviction should be reversed.

C. The Taking of Appellant's Blood Was a Violation of His Fourth Amendment Rights

Contrary to the States contentions, the taking of Deeds' blood was in violation of his Fourth Amendment right against unlawful searches and seizures. Absent an emergency situation, a blood sample is valid if taken pursuant to either (1) consent; (2) a warrant; (3) probable cause; or (4) as a search incident to a lawful arrest. *McDuff v. State*, 763 So.2d 850 (Miss. 2000). In the present case, there was no consent, no warrant, no probable cause, and no arrest. Therefore, the taking of Deeds' blood was an unlawful search and seizure.

The State first claims that probable cause existed in this case, relying on the case of *Wilkerson v. State*, 731 So.2d 1173 (Miss. 1999). (Appellee's Brief, P. 13). Noting "that blood searches based on probable cause are legal", the State compares facts from Deeds' case to that of *Wilkerson*. (*Id.*) In *Wilkerson*, probable cause was established based up facts known by the officer or from eyewitness statements: (1) the defendant was involved in a head on collision; (2) the collision occurred in the other vehicle's lane of traffic; (3) the defendant was previously driving

recklessly and at a high rate of speed; and (4) the defendant had a strong odor of intoxicants about him. (*Id.*).

Comparing Deeds' case to *Wilkerson*, the State claims that the following facts were known by Officer Gibbs: (1) Deeds was involved in a head on collision; (2) the collision occurred in the victim's lane of travel; (3) Officer Gibbs smelled alcohol both in the vehicle and on Deeds breath; and (4) Officer Gibbs saw a half empty bottle of whisky in Deeds' vehicle after the collision. (*Id.*). However, the record shows that some of these claims were not actually known by Officer Gibbs and thus, there was insufficient probable cause to draw Deeds' blood.

First, Officer Gibbs did not actually witness the accident (Tr. Vol. 3, P. 91). Further, he does not recall gathering any eyewitness statements, including any statements from the occupants of the third vehicle involved in the accident. (Tr. Vol. 3, P. 95). Additionally, although he noticed a half empty bottle of whisky in the car, Officer Gibbs testified that there was no evidence of slurred speech, nor did he smell alcohol on Deeds breath. (Tr. Vol. 3, P. 104). Rather, he obtained a blood sample from Deeds based on an order from his lieutenant. (Tr. Vol. 3, P. 88). Based on the knowledge of Officer Gibbs and the evidence he had before him, there was insufficient probable cause to order the blood test. Rather, Officer Gibbs had only mere or reasonable suspicion which is not enough for a warrantless blood test. *Rooks v. State*, 529 So.2d 546, 554-55 (Miss. 1988).

The State also relies on *Vaughn v. State*, 972 So.2d 56 (Miss.Ct.App. 2008), claiming exigent circumstances existed for Officer Gibbs to perform the warrantless search because Officer Gibbs did not have time to get a warrant signed by Judge McGarrh, who lives out in the county, and, because of the dissipation rate of alcohol. (Appellee's Brief, Pgs. 13-14). However, *Vaughn* is also easily distinguisible from the present case.

Before the officer requested Vaughn's blood, he was placed under arrest. *Vaughn* at 58. In fact, Vaughn was arrested and handcuffed at the scene of the accident. *Id.* at 60. Therefore, the blood draw was characterized as a search incident to a lawful arrest. *Id.* at 61. In the present case, the defendant was not placed under arrest at any time. Furthermore, Officer Gibbs did not even attempt to secure a warrant for Deeds' blood. (Tr. Vol. 3, P. 37). Therefore, while the blood draw was legal in *Vaughn,* even without a warrant, there was sufficient probable cause for the officer to order it, and it was made as a search incident to a lawful arrest. *Id.* This is not the case, however, in the present situation as Deeds was not under arrest and there was insufficient probable cause to order a blood test in Tennessee, outside of the officer's jurisdiction, Olive Branch, Mississippi.

A police officer has no authority as a police officer outside of his jurisdiction. *See, McLean v. State of Mississippi*, 96 F.2d 741 (5th Cir. 1938)(Mississippi sheriff has neither office nor color of office while in another state where Mississippi laws are not in force); *U.S.A. v. Sawyer*, 92 P.3d 707, 709 (Okla. Crim. App. 2004)("[g]enerally, a police officer's authority cannot extend beyond his jurisdiction."). Rather, he has only the authority of a private citizen. *See, e.g., Perry v. State,* 794 S.W.2d 141, 143 (Ark. 1990)(officer acting outside his jurisdiction only had the authority of a private citizen); *McDuff v. State*, 763 So.2d 850, 858 (Miss. 2000) (McRae & Diaz, JJ., dissenting in part and concurring in part) ("[o]utside of the state's boundaries, Mississippi police officers have powers no greater than those possessed by any citizens." They "are without the authority to require a person to submit to blood alcohol testing or **order one done**."). *See also*, Op.Att.Gen., 1991 WL 577908 (Miss.A.G.)(unless acting under the fresh pursuit doctrine, municipality police have no police authority outside municipal limits); Op.Atty.Gen. No. 94-0409,1994 WL 410515 (Miss.A.G.)(generally, police officers have no authority outside the corporate limits of their

municipality except under the hot pursuit doctrine, as set out in Miss. Code Ann. §99-3-13). As such, Officer Gibbs only had the authority of a private citizen at the time he ordered Deeds' blood draw since he was not acting under the fresh pursuit doctrine. In essence, this means that Officer Gibbs had no authority to order the withdrawal of Deeds' blood in Tennessee. Therefore, the results of the blood alcohol test performed in Tennessee, without Deeds' consent, and ordered by a private individual were inadmissible.

Likewise, Officer Gibbs clearly had time to attempt to obtain a warrant before he ordered the blood draw. However, he chose not to. Rather, Officer Gibbs testified the he and Lieutenant Sanders "never discussed" obtaining a search warrant. (Tr. Vol. 3, P. 34). Also, Officer Gibbs never attempted to contact Judge McGarrh or any other official to get a warrant signed although he is "sure that there" was someone else who could sign a warrant. (*Id.*). Furthermore, Officer Gibbs stated he returned to police headquarters before he went to the hospital (Tr. Vol. 3, P. 98). This would have been a perfect opportunity to try and obtain a search warrant. However, just as important to this issue is the clear fact that John Deeds was not in any condition to leave the scene of the accident or the hospital, but was rather unconscious. (Tr. Vol. 3, Pgs. 36-37). Therefore, there were no exigent circumstances warranting the warrantless search.

Additionally, the State did not produce competent evidence as to the dissipation rate of alcohol, sufficient to establish exigent circumstances. Pursuant to Mississippi Rule of Evidence 701, lay witness testimony is limited to opinions or inferences "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." M.R.E. 701(c). While the State points the Court to Officer Gibbs' testimony that based on his experience as a DUI officer, blood alcohol decreases with time, (Appellee's Brief, Pg. 14), Gibbs himself stated on cross examination that he

is not trained to know exactly how dissipation works, he has no specialized knowledge in the scientific theory and that he was giving his understanding of dissipation as a layperson, and in fact has no idea how fast or slow alcohol dissipates. (Tr. Vol. 3, Pgs. 37-38). Therefore, Gibbs' testimony relating to alcohol dissipation should not have been relied upon by the trial court, especially as it related to Gibbs' argument that exigent circumstances surrounded his decision to obtain Deeds' blood without securing a warrant.

As is clear from the record, Officer Gibbs had no authority as a police officer to order the blood draw. Even if he had, Gibbs lacked Deeds' consent to order the blood draw, he did not have a search warrant to order the blood draw, he lacked sufficient probable cause to order the blood draw, it was not performed as a search incident to a lawful arrest, and there was no emergency circumstances that would justify a warrantless search. Therefore, the blood draw constituted an impermissible search and seizure in violation of the Fourth Amendment and the results of the test should not have been admitted at trial. Accordingly, Deeds' conviction should be reversed.

CONCLUSION

The record evidence and arguments presented show that the trial court committed four main errors. First, the trial court failed to dismiss the charges against the defendant, John Deeds, on the grounds of double jeopardy, when the record shows he was subjected to prosecution twice for the same offense. Second, the trial court refused to exclude the blood sample results from evidence although the prosecution failed to lay the proper foundation for their admittance. Third, in violation of the Sixth Amendment's Confrontation Clause, the Defendant was not allowed the opportunity to question the person who drew his blood in order to evaluate the procedures used by him or her, which would have allow Deeds to evaluate the reliability of such evidence. Fourth, the trial court

also erred in admitting the blood test results as the blood sample was retrieved in violation of Defendant's Fourth Amendment right against unlawful searches and seizures.

For these reasons, the Defendant respectfully requests the court to reverse and render the trial court's decisions, thereby vacating his conviction.

THIS, the 13 day of April, 2009.

JOHN DEEDS

BY: Swayze Alford
T. SWAYZE ALFORD [redacted]
Attorney for Appellant

OF COUNSEL:

HOLCOMB DUNBAR, P.A.
Post Office Drawer 707
Oxford, Mississippi 38655
(662) 234-8775 phone
(662) 238-7552 fax

CERTIFICATE OF FILING AND SERVICE

I, T. SWAYZE ALFORD, of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant, John Deeds, to:

Steven Jubera, Esq.
Assistant District Attorney
365 Losher St.
Hernando, MS 38632

Honorable Robert P. Chamberlin
Circuit Court Judge
Seventeenth Judicial District
State of Mississippi
Post Office Box 280
Hernando, MS 38632

And, the original and three (3) copies of the same to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Post Office Box 249
Jackson, MS 39205-0249

THIS, the 13 day of April, 2009.

T. SWAYZE ALFORD