

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LOYAL JOHNSON

APPELLANT

V.

NO. 2008-KA-0583-SCT

STATE OF MISSISSIPPI

APPELLEE

**BRIEF OF THE APPELLANT**

ORAL ARGUMENT NOT REQUESTED

**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. Loyal Johnson
3. Honorable Forrest Allgood and the Noxubee County District Attorney's Office
4. Honorable James T. Kitchens, Jr.

THIS 15<sup>th</sup> day of May 2009.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Loyal Johnson, Appellant

By:



Leslie S. Lee, Counsel for Appellant

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## **STATEMENT OF THE ISSUE**

### **WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

## **STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Noxubee County, Mississippi, and a judgment of conviction for the crime of Felony Driving Under the Influence against the appellant, Loyal Johnson. Tr. 294, C.P. 13, R.E. 13. The trial judge subsequently held a sentencing hearing and found Johnson to be an habitual offender under Miss. Code Ann. §99-19-81 (1972), and sentenced the Appellant to five (5) years without the benefit of early release or parole, to pay a five thousand dollar fine (\$5,000.00), and to pay restitution in the amount of two thousand six hundred twenty eight dollars (\$2,628.00). Tr. 306-07, C.P. 33-34, R.E. 14-15. The conviction and sentence followed a jury trial on March 23 and March 24, 2005, Honorable James T. Kitchens, Jr., Circuit Judge, presiding. Loyal Johnson is presently incarcerated with the Mississippi Department of Corrections.

## **FACTS**

According to the trial testimony, on May 26, 2004, Joni Davis (Davis) and his wife, Francesca Davis (Francesca), were returning from an evening at Davis's mother's house in Macon, Mississippi. Tr. 85-86, 94. They left to return home around 9:45-9:50 p.m. Davis was driving. Tr. 86. While traveling on Walnut Street towards the highway, Davis testified he saw a car coming towards him in his lane. Davis tried to get over further to the right but was blocked by a ditch. Tr. 87-88. The car hit him on the driver's side, causing damage to

his car. Tr. 88. After the wreck, the driver briefly continued down the road and stopped. The driver came back and asked if Davis was alright. Davis testified the driver was the Appellant, Loyal Johnson. There was apparently another person in the car, but Davis stated only Johnson got out. Tr. 89.

Davis claimed that Johnson "was acting drunk." He claimed Johnson was talking in a "slurred way," and that Johnson asked him to lie for him, and say Johnson was not driving. Davis stated Johnson's eyes were red and glossy and that he smelled like beer. As soon as Davis started to call the police, Johnson left. Tr. 90. Davis estimated Johnson left at 10:00 p.m. Davis testified Johnson was wearing a blue shirt and jeans, and had on black slippers. Davis claimed the man with Johnson then moved from the passenger seat to the driver's seat, and he drove Johnson away. Tr. 91.

Davis stated the car which hit him was a 1994 black Chrysler, and that the Chrysler had damage to right front. Tr. 92. Davis further testified that he saw Loyal Johnson a few days later. He claimed Johnson offered him money if Davis would lie for him and say that he was not driving. Tr. 93. Davis testified Johnson again offered him money the last time they were in court. Tr. 93-94.

On cross-examination, Davis admitted he had only one working headlight on the left side of his car. Tr. 97-98. The accident occurred on a curve in the road. Tr. 98. Davis testified there were no lines on the road that you could see. Tr. 102. Davis added to his testimony on direct, and claimed Johnson offered him money three or four times. Tr. 107. Davis denied asking Johnson for money to fix his car. Tr. 111-12.

Francesca Davis testified to substantially the same facts as Davis related. She stated that as they went into the curve, Johnson hit them. She stated that part of their car was off the road when the accident occurred. Tr. 117. Contrary to Davis's testimony, however, Francesca testified that Johnson offered them \$500.00 on the spot if they would not call the police. Tr. 118, 120.

Macon Police Officer Eddie Franklin was dispatched to the scene of the accident. Officer Franklin testified he never left his car, but talked to witnesses at the scene. He then left to locate Johnson. Tr. 121-23. Johnson lived five to ten minutes away. Tr. 123. When he arrived at Johnson's residence, he observed a red vehicle dropping Johnson off. Officer Franklin asked Johnson to stop, but instead Johnson fled. The driver of the red car was later determined to be Morgan McMillan. McMillan lived less than a mile away. Tr. 124.

Officer Franklin chased Johnson into the woods and apprehended him. Officer Franklin testified Johnson had a beer in his hand and stated, "I messed up." Johnson was very talkative, his eyes were red and he smelled of alcohol. Tr. 125. Johnson had the keys to his 1994 Chrysler in his pocket. Officer Franklin stated that from the time he was called to the scene of the accident until to the time he apprehended Johnson was no more than about ten to fifteen minutes. Tr. 126. Officer Franklin testified Johnson told him his car was in a repair shop in Meridian. Johnson's car was eventually located at Morgan McMillan's house. Tr. 127. Johnson was administered a test on the Intoxilyzer 5000 about an hour and twenty minutes later. The test indicated Johnson's breath alcohol content to .112 percent. Tr. 136-38, State's Exhibit 4.

On cross-examination, Officer Franklin stated he received the call about the accident just before 10:00 p.m. Contrary to his direct examination, he stated he did get out of his car and talked to some witnesses. Tr. 144. Officer Franklin also admitted that while he was trying to administer the Intoxilyzer, Johnson told him he was suffering from some disease. However, he testified Johnson never told him he had asthma. Tr. 152.

Chief Robert Brown was also called to testify for the State. He related how he was called to the jail to find Johnson falling and rolling on the floor stating he could not breathe. Tr. 166. Chief Brown stated he was not concerned about Johnson's condition since this was normal for Johnson. He testified Johnson told him he could not blow into the Intoxilyzer because he had emphysema. Tr. 167. Chief Brown also laid the foundation for the admission of Johnson's two prior DUI convictions. Tr. 168-71, State's Exhibit 6 and 7.

In his defense, Johnson called Hettie Barron, a friend of his. Tr. 175-76. Barron was visiting with her father in Macon because he was ill. She testified Johnson came to her father's house about 10:30 a.m. on May 26, 2004, the day of the accident. Johnson stayed with Barron the entire day and into the evening. Tr. 176-77. Barron testified that Johnson had nothing alcoholic to drink the entire day and night. She believed Johnson left sometime after 9:00 p.m. He was in good condition when he left. She also related that she was personally aware that Johnson took medication for asthma. Tr. 177.

Barron further testified that Johnson was suffering from other ailments, including problems with his back and stomach. Johnson also has a speaking problem. Barron stated that Johnson's eyes have never been clear, but are cloudy with a pinkish color. Tr. 178. She



also testified that she witnessed Davis ask Johnson for some money shortly after the accident. Tr. 179-80.

The defense next called Morgan McMillan. McMillan related that Johnson came to his house and told him he had been in an accident. Johnson asked McMillan to look at the damage and recommend a repair shop. Tr. 193. Johnson told him that the guy who ran into him wanted to work something out. Tr. 197. McMillan did not notice any smell of alcohol on Johnson and invited him into his house. Johnson was very nervous and was shaking. McMillan offered him some drinks to calm him down. To be specific, McMillan gave Johnson two shots of brandy. Tr. 194. After the brandy, McMillan gave Johnson a beer. Tr. 195.

McMillan stated Johnson drank for about 10 minutes and then sat there for a while. He was probably at the house for about 30 minutes. He estimated Johnson arrived at his house around 9:30 p.m. Tr. 201-02. McMillan took Johnson home, but never saw any police officers at Johnson's house. He did see police later when they came and took Johnson's car away from his house. Johnson's car was located in front of his house. Tr. 195.

Finally, Loyal Johnson took the stand in his own defense. Johnson related that at the time of the accident, he was on medical leave from Bryan Foods. He was taking several different types of pain medications for his back. Tr. 204. He testified that he was with Hettie Barron on the day of the accident to help her with her father. He did not leave until sometime around 9:30 p.m. He denied drinking any alcohol at Barron's father's house. Tr. 205. He explained that he did pick up Leonard Rooper, and gave him a ride home.

Johnson testified that as he was going around a curve, he thought he was passing a four wheeler. The vehicle was on his side of the road with only one headlight. Although the other vehicle tried to get back over in his proper lane, they collided. Johnson related that the road had no lines on it and the curve was very dangerous. Tr. 206. After the accident, Johnson backed up and got out of the car. Tr. 207. He stated Davis looked afraid. They talked for about 10 minutes trying to determine whose fault the accident was, and if their insurance would cover it. Tr. 208.

Johnson admitted he did not have any insurance, but denied he ever offered Davis money not to report the accident. He did, however, admit to leaving the scene when Davis called police. He explained he was driving on a suspended driver's license. Tr. 209. He went to Morgan McMillan's house and examined the damage to his car. Tr. 210. McMillan then offered him a drink because he was nervous. Tr. 210-11. As McMillan had previously testified, Johnson confirmed he had two shots of brandy and a bottle of beer. He denied parking the car behind McMillan's house. After drinking, he asked McMillan to drive him home. Tr. 211.

Johnson explained that after he was dropped off, he realized he had not feed his dog all day. He then went around to the back of his house to feed the dog when he heard banging on the front door. Tr. 212. Johnson's mother told whomever it was that Johnson was not home. As he was going back around to see who it was, he saw a flashlight coming around the side of the house. Tr. 213. Johnson testified Officer Franklin did not chase him into the

woods. Tr. 214. He also related that Officer Franklin did not take him directly to jail. Tr. 215. They waited a while and then drove to a nearby graveyard. Tr. 216.

They eventually arrived at the jail and Johnson was seated in the breathalyzer room. Tr. 217. Johnson testified he agreed to take the test, but then had an asthma attack. Johnson stated he had been taking asthma medication for about three years. Tr. 218. He confirmed he fell on the floor because he could not breathe. Tr. 219. Johnson was not laughing at Chief Brown when he was on the floor. He was in pain. Tr. 229. He believed the asthma attack was caused by trying to blow into the Intoxylizer. Tr. 220. He tried to blow three or four times, but the machine keep reading insufficient. Tr. 221.

Johnson denied ever offering Joni Davis money to keep from prosecuting the case, but he did testify the Davis asked him for money. Tr. 221-22. Again, Johnson denied drinking any alcohol before the accident. Tr. 222. He also denied leaving the scene of the accident simply because police were on the way. Tr. 223. He stated he left, not because he had been drinking, but because he was driving with a suspended license. Tr. 240. Johnson also freely admitted he had two prior DUIs, one in 2002 and one in 2003. Tr. 232.

### **SUMMARY OF THE ARGUMENT**

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented failed to establish beyond a reasonable doubt the charge that Johnson was under the influence when he had the accident with Joni Davis, or that he was even at fault in the accident. The evidence of impairment provided by the State consisted only of Davis and his wife. No independent expert testified that Johnson caused the accident or was

driving negligently. The State produced no witness who saw Johnson drinking before the accident.

On the contrary, Johnson provided a witness, Hettie Barron, who was with him the entire day and saw him drink no alcohol. Johnson presented a second witness, Morgan McMillan, who corroborated that Johnson was not in any way impaired after the accident, but was only nervous. McMillan testified under oath that he provided Johnson alcohol *after* the accident. The State failed to call any expert to show this alcohol consumption could not have caused Johnson to have a BAC of .112% an hour and a half later. On these facts, Johnson is clearly entitled to a new trial, as the jury's verdict was contrary to the overwhelming weight of the evidence. Allowing the verdict to stand on this evidence would manifest an extreme injustice.

### **ARGUMENT**

#### **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

In trial counsel's Motion for J.N.O.V. or in the Alternative a New Trial, and for Setting of a Reasonable Bond Pending Appeal, Johnson specifically argued that the jury's verdict was against the weight of the evidence. C.P. 44, R.E. 16. The trial judge denied this motion. C.P. 46, R.E. 18. The trial judge erred in refusing to grant this motion.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant

a new trial.” *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). “Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.” *Id.* See also *Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

This Court has also held that a reversal on the grounds that the verdict was against the overwhelming weight of the evidence, “unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.” *Bush v. State*, 895 So.2d 836 (¶18) (Miss. 2005), quoting *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Instead, it only means that this Court, sitting as a “thirteenth juror,” simply disagrees with the jury’s resolution of the conflicting testimony. *Id.*

The evidence that Johnson was driving under the influence which impaired his ability to drive was weak. It is important to note that Johnson was indicted under Miss. Code Ann. §63-11-30(1)(b) (Rev. 2002). He was not charged with having a blood alcohol concentration (BAC) in excess of .08% under §63-11-30(1)(c). The State was required to prove that Johnson unlawfully operated “a vehicle while being under the influence of an intoxicating liquor or some other substance which had impaired his ability to operate a vehicle.” C.P. 3, 28. The fact that Johnson had a BAC over .08% an hour and a half after the accident does not prove he was impaired at the time of the accident. This is especially true when an explanation was given to the jury that he consumed alcoholic beverages subsequent to the wreck. Tr. 194-95.

Johnson testified it was Davis who was actually driving negligently, crossing over into his lane of traffic. Tr. 206. It is crucial to note that this accident happened on a dangerous curve, at night, on a road with no dividing lines. *Id.* Davis was also driving with one headlight out. Tr. 97-98, 206. The State offered no expert testimony regarding who was at fault in the accident. Hettie Barron was able to explain to the jury why Johnson may have appeared intoxicated. She stated she was personally aware that Johnson suffered from asthma and was taking medication for it. She also let the jury know that Johnson suffered from back and stomach pain. Tr. 178. Furthermore, slurred speech and pink eyes are not unusual for Johnson. Tr. 178.

The jury was also allowed to hear prejudicial hearsay evidence that someone in Johnson's car had thrown a beer bottle out of Johnson's car at the scene. Tr. 122. Neither Davis or his wife ever testified to this, but Officer Franklin was allowed to relate it as substantive fact. Officer Franklin admitted a beer bottle was not found at the scene, nor was he even sure anything was thrown, much less a beer bottle. Tr. 145-46. Officer Franklin was also allowed to testify that Johnson's car was found *behind* McMillian's house, despite the fact that he had no personal knowledge of this. Tr. 127, 159-60.

Johnson was convicted on speculation and innuendo, not on facts or reasonable inferences based in fact. In the present case, the evidence presented at trial failed to prove beyond a reasonable doubt that Johnson was operating a motor vehicle while under the influence, and that he was impaired at the time of the accident. It is required that the state prove each of the elements of the offense beyond a reasonable doubt before the jury can

reach a guilty verdict. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), citing *In re Winship*, 397 U.S. 358, 361-62 (1970). Verdicts based on such weak evidence as presented at this trial can not be allowed to stand. *Hawthorne v. State*, 883 So.2d 86 (¶13)(Miss. 2004).

In those cases where there is sufficient credible evidence presented by the State to prove the essential elements of the crime, it remains within the power of the trial court to award the defendant a new trial when the court concludes, based on its evaluation of all of the evidence, that the jury's verdict was so against the weight of the evidence that to permit it to stand would work a substantial miscarriage of justice.

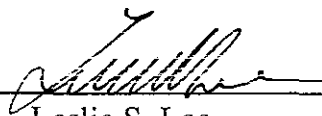
*Kelly v. State*, 910 So.2d 535 (¶12) (Miss. 2005), citing *Simmons v. State*, 722 So.2d 666, 674 (Miss.1998). Johnson should be granted a new trial.

### CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Loyal Johnson is entitled to have his conviction for Felony Driving under the Influence reversed and remanded for a new trial.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Loyal Johnson, Appellant

By:

  
\_\_\_\_\_  
Leslie S. Lee

**CERTIFICATE**

I, Leslie S. Lee, do hereby certify that I have this the 15<sup>th</sup> day of May 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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