IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPI

JARRETT NICHOLS — Appellant

vs. — NO. 2009-CA-01007-COA

STATE OF MISSISSIPPI, BY AND THROUGHT THE CITY OF MADISON — Appellee

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, THE STATE OF MISSISSIPPI, BY AND THROUGH THE CITY OF MADISON, MISSISSIPPI

JOHN HEDGLIN, MSB #[redacted]
P.O. BOX 40
MADISON, MISSISSIPPI 39130-0040
(601) 898-1118

IN THE COURT OF APPEALS OF THE STATE OF MISISSIPPI

JARRETT NICHOLS **Appellant**

vs. **NO. 2009-CA-01007-COA**

CITY OF MADISON **Appellee**

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 Circuit Judge may evaluate possible disqualification or recusal.

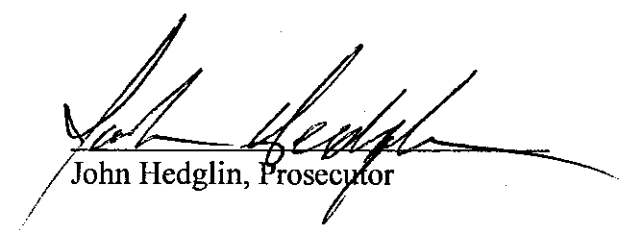
Honorable William Chapman, III
Circuit Court Judge
Madison County

Honorable Ed Hannan
County Court Judge
Madison County

Vann Leonard, Esq.
Counsel for Appellant

Jarrett Nichols
Appellant

John Hedglin, Esq.
Prosecutor/Counsel for the Appellee



John Hedglin, Prosecutor

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE COURT OF APPEALS HAS JURISDICTION OVER THIS APPEAL.
2. WHETHER THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN A CONVICTION.

STATEMENT OF THE CASE

On January 26, 2007, at approximately 3:22 a.m., Madison police officer James Craft observed a vehicle driven by the defendant proceeding at a high rate of speed, running off the roadway and swerving into the opposing traffic lane. T.6.

When Craft stopped the vehicle, he observed a very strong odor of alcoholic beverage coming from the interior of the vehicle, and observed that the defendant/driver's speech was somewhat slurred, and that his eyes were red and pupils were dilated. T. 7-9.

The officer then detected the smell of an intoxicating beverage coming from the defendant's person. T.9.

The officer testified that the defendant was argumentative. T.9.

The officer took the defendant into custody, transported him to the Madison police department and offered him the intoxilyzer test. The officer testified unequivocally that he read the defendant the intoxilyzer warnings advising the defendant that his license would be suspended if the defendant refused the intoxilyzer test. T.47. (The officer indicated that he believed he also made additional efforts to convince the defendant to take the intoxilyzer over and above the statutory warnings, but could not be completely certain about that. T.47. However, the fact remains that the officer testified without reservation that he read the defendant the required statutory advisement that his license would be suspended.) The defendant refused to take the test. T.42, 48. The defendant testified that he had no recollection of being advised that his license would be suspended,

but admitted that he only remembered what "stood out" to him on the night he was arrested. T.42.

The defendant also admitted having consumed beer (T.27) and possibly cold medication (T.28) prior to being arrested.

The record does not reflect that the appellant herein ever sought or obtained permission to appeal under Miss. Code Section 11-51-81.

SUMMARY OF ARGUMENT

Miss. Code Section 11-51-81 states that no appeal shall be allowed from a case originating in municipal court except by authorization of the circuit judge or a judge of the supreme court. The record does not reflect any such order.

Moreover, the evidence presented by the state is more than sufficient to support a conviction, based on cases previously decided by the appellate courts. It was the function of the trial judge, sitting as the finder of fact, to interpret the evidence and determine the credibility of the witnesses.

The appellate court should not disturb findings of fact by the trial court where there is sufficient evidence to support a conviction, as there clearly is here.

ARGUMENT

1. Section 11-51-81 states that no appeal will be allowed from a case originating in municipal court without authorization of either the circuit judge or a judge of the supreme court. No such order is reflected in the record; therefore this court has no jurisdiction over this appeal. Williams v. Town of Flora, 13 So.3d 875, 877 (Miss.Ct.App.2009).

2. Moreover, in the present case, there is evidence that Nichols exhibited erratic driving, the odor of an alcoholic beverage, slurred speech, red eyes and dilated pupils, and argumentative behavior. Nichols also admitted drinking beer and possibly taking cold medication.

In short, the defendant Nichols exhibited the "classic signs of intoxication" as the appellate court characterized this type of behavior in Palmer v. City of Oxford, 860 So.2d 1203 (Miss. 2003).

Finally Nichols refused to take the intoxilyzer test, which is admissible as evidence of guilt. Christian v. State, 859 So.2d 1068 (Miss.App.2003).

The Mississippi Supreme Court has always condemned the practice of "second-guessing" the jury with respect to factual determinations.

The law pertaining to a defendant's request to overturn a jury verdict based on the weight of the evidence is clear and well established.

In Herring v. State, 691 So.2d 948,957 (Mississippi 1957), the Court noted:

> 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. Thornhill v. State, 561 So.2d 1025, 1030 (Miss.1989), rehearing denied, 563 So.2d 609 (Miss.1990). Only when 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. Benson v. State, 551 So.2d 188, 193 (Miss.1989) (citing McFee v. State, 511 So.2d 130, 133-134 (Miss.1987)). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. Mitchell v. State, 572 So.2d 865, 867 (Miss.1990).

In Morgan v. State, 681 So.2d 82,93 (Miss. 1996), the Court held:

> When this Court reviews the sufficiency of the evidence, we look to all of the evidence before the jurors to determine whether or not a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. Jackson v. State, 614 So.2d 965, 972 (Miss.1993). The evidence which supports the verdict is accepted as true, and the State is given the benefit of all reasonable inferences flowing from that evidence. Id. (citing Hammond v. State, 465 So.2d 1031, 1035 (Miss.1985)). We will not reverse a trial judge's denial of a motion for a new trial unless we are convinced that the verdict is so contrary to the weight of the evidence that, if it is allowed to stand, it would sanction an unconscionable injustice. Groseclose v. State, 440 So.2d 297, 300 (Miss.1983).

In Gibson v. State, 660 So.2d 1268,1272 (Miss. 1995), Justice Pittman, in a dissenting opinion, reviewed the applicable standard:

> In Wash v. State, 521 So.2d 890 (Miss.1988), this Court addressed whether the jury verdict of guilty should be overturned because it was against the weight of the evidence. The Court, in emphasizing the limitations upon its scope of review of a finding of fact made by the jury, said, " 'the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict.' " Id. at 896 (quoting Billiot v. State, 454 So.2d 445, 463 (Miss.1984)). Put another way, "the reviewing court cannot set aside a verdict unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence." Dixon v. State, 519 So.2d 1226, 1229 (Miss.1988); Marr v. State, 248 Miss. 281, 159 So.2d 167 (1963).

In Pharr v. State, 465 So.2d 294,301 (Miss. 1984), the Court held:

> Where a defendant has moved for j.n.o.v., the trial court must consider all of the evidence--not just the evidence which supports the state's case--in

> the light most favorable to the state. May v. State, 460 So.2d 778, 781 (Miss.1984). The state must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Glass v. State, 278 So.2d 384, 386 (Miss.1973). If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. May v. State, 460 So.2d 778, 781 (Miss.1984).
>
> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. May v. State, 460 So.2d 778, 781 (Miss.1984); Fairchild v. State, 459 So.2d 793, 798 (Miss.1984); Pearson v. State, 428 So.2d 1361, 1364 (Miss.1983).

In Holmes v. State, 660 So.2d 1225,1227 (Miss. 1995) the Court held:

> Holmes asserts the State showed no evidence of violence or threat of injury, therefore the jury's verdict was wrong and against the overwhelming weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that reasonable and fair-minded jurors could only find the defendant not guilty. Green v. State, 614 So.2d 926, 932 (Miss.1992).
>
> In this case a single witness, Sims, stated that Holmes snatched over one hundred dollars out of his hand and ran away. Sims said Holmes later offered to repay the money if Sims would drop the charges. The jury clearly believed Sims. Testimony from a single credible witness is sufficient to sustain a conviction. Williams v. State, 512 So.2d 666, 670 (Miss.1987).

Where the trial judge sits as the finder of fact in a bench trial, his findings of fact are entitle to the same deference as those of a jury. Christian v. State, 859 So.2d 1068, 1072 (Miss.App.2005).

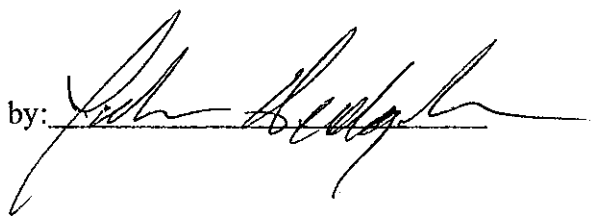
In the case before the Court, the defendant's argument is based on the premise that the appellate court should disregard the trial judge's findings regarding credibility of the witnesses and interpretation of the evidence. As the cases cited above demonstrate, the appellate court should not disturb the factual findings on the part of the trial judge, where, as here, there are facts in evidence which support the verdict.

Clearly, this assignment of error is without merit.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court affirm the defendant's conviction.

THE STATE OF MISSISSIPPI, BY AND
THROUGH THE CITY OF MADISON,
MISSISSIPPI

by: 

John Hedglin MSB#2190
P.O. Box 40
Madison, Mississippi 39130-0040
(601) 856-6111

CERTIFICATE OF SERVICE

I certify that this pleading was mailed to :

Honorable William Chapman, III
Circuit Court Judge
P.O. Box 1626
Canton, MS 39046

Honorable Edwin Y. Hannan
County Court Judge
P.O. Box 1626
Canton, MS 39046

Vann F. Leonard, Esq.
P.O. Box 16026
Jackson, Mississippi 39236-6026

on November 10, 2009 .