IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEFFREY DALE BEECHAM — APPELLANT

VS. — NO. 2009-KA-00251-COA

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT
Jeffrey Dale Beecham

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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 representatives are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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   Appellant

2. John D. Watson
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3. Honorable Steven P. Jubera
   District Attorney
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4. Honorable Robert P. Chamberlin
   Circuit Court Judge, 17th Circuit
   DeSoto County Courthouse
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Appellant certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case.

By: John D Watson
Attorney for Appellant

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2. Whether the court below erred in allowing the testimony of the State's accident reconstructionist due to the fact that it did not meet the standards of Daubert and that he was not qualified to testify as an expert.
3. Whether the court below erred in allowing the introduction of the death certificate which was hearsay and denied the defendant the right to confront the statements contained therein.
4. Whether the court below erred in allowing into evidence the picture of the steering wheel in the victim's vehicle which depicted blood which inflamed the jury.
5. Whether the court below erred in denying the Defendant's motion for a directed verdict and D-1 peremptory instruction, and abused its discretion in denying Defense motions for directed verdict, J.N.O.V., or in the alternative, a new trial, as the verdict of the jury was against the overwhelming weight of evidence.
6. Whether the sentence imposed by the below court was cruel and unusual punishment.
7. Whether the court erred in allowing in the accident report.

II.

STATEMENT OF THE CASE

Jeffrey Dale Beecham was convicted of DUI Causing Death in the Circuit Court of DeSoto County, Mississippi. Appellant now appeals this decision.

1. COURSE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On November 13, 2007, the Grand Jury indicted Jeffrey Dale Beecham for DUI Causing Death in violation of Section 63-11-30(5) Mississippi Code 1972 Annotated, as amended. Clerk's papers at 8 on December 1st, 2008, the indictment was amended to charge the Appellant as a Section 99-19-81 habitual offender. A jury was empaneled and sworn on December 2, 2008, and all evidence was heard on December 2, 3, and 4, 2008. On December 4, 2008, a jury returned a guilty verdict on the charge of DUI Causing Death. Clerk's papers at 129. Defense motions for J.N.O.V. or, in the alternative, motion for new trial was denied. Id. at 149. Appellant filed Notice of Appeal from the guilty verdict on February 6, 2009. Id. at 150.

2. STATEMENT OF RELEVANT SUBSTANTIVE FACTS

Mitchell Lovelace, Sr., on direct examination, testified that he was married to the victim, Freda Lovelace. T. at 81. She left for a band concert that night around 6 p.m. T. at 83. Mrs. Lovelace died on May 19th, 2007. T. at 83. On cross-examination, he testified that Mrs. Lovelace took prescription medication. T. at 86.

Brad Kerr, on direct examination, testified that he is employed by the Horn Lake Police Department and that he was the first officer on the scene. T. at 88. He took photographs of the scene. T. at 90. On cross-examination, he testified that the decedent was leaving in an area marked entrance only and that it is dangerous to pull out of that area as decedent did. T. at 99.

Michael Mueller, on direct examination, testified that he is employed by the Horn Lake Fire Department and on the scene the Appellant stated that he had drank a pint of vodka. T. at 102.

Frazer Toole, on direct examination, testified that he is employed by the Horn Lake Fire Department and that on the scene Appellant told him that he had just bought a bottle of vodka. T. at 105. On cross-examination, he testified that the Appellant complained of a tailbone injury. T. at 106.

Roger Hutchins, on direct examination, testified that he is a detective with the Horn Lake Police Department. T. at 108. He was in charge of drawing the Appellant's blood. T. at 111. On cross-examination, he testified that the area the decedent exited from did not have a stop sign because it was an entrance not an exit. T. at 117.

Joanita Brown, on direct examination, testified that she is employed by Best Nurses to draw blood. T. at 127. She drew the blood of the Appellant. T. at 128.

J. C. Smiley, on direct examination, testified that he is an expert in the field of toxicology and was accepted by the Court as such. T. at 136. He performed test on the blood and determined that the blood contained 0.26 percent ethyl alcohol. T. at 147. He testified as to how a person's motor skills and ability to multitask might be affected with that BAC level. T. at 150. On cross examination, he testified that he could not say in this particular case that the Appellant would have been effected in any particular way. T. at 150.

Lance Weems, on direct examination, stated that he is employed by the Horn Lake Police Department. Over objection by the Appellant, he was accepted as an expert in accident reconstruction. T. at 160-61. He worked the scene of the accident. It had rained earlier that day. T. at 168. He took measurements and pictures. T. at 169. The

posted speed limit is 35 mph. T. at 184. He estimated the Appellant to be traveling between 47 and 50 mph and the decedent to be traveling around 14 mph. T. at 184. On cross-examination, he stated that the decedent was traveling from an area with a blindspot. T. at 198. He testified that on his diagram it was supposed to be a 97, but it says 87. He said his handwriting is just bad. T. at 199. He guessed as to how much water to put on the roadway to conduct his test. T. at 201. He testified it would be dangerous for a person to exit as the decedent did. T. at 204. The Appellant was in his appropriate lane of travel. T. at 204. He assumed the decedent stopped at some point but had no way of knowing if she actually did. T. at 207. His report stated the decedent would have been traveling 10 to 13 mph unlike his testimony in which he stated 14 mph. T. at 209. His report stated the Appellant would have been traveling 47 to 50 mph and he testified to 50 mph. T. at 209. The jury viewed the scene of the accident. T. at 233.

III.

SUMMARY OF THE ARGUMENT

The court below erred in allowing the blood alcohol evidence. There was no sufficient probable cause for the warrant.

The court below erred in allowing the testimony of the State's accident reconstructionist. It did not meet the standards of Daubert and he was not qualified to testify as an expert.

The court below erred in allowing the introduction of the death certificate. It was hearsay and denied the Defendant the right to confront the statements contained therein.

The court below erred in allowing into evidence the picture of the steering wheel in the victim's vehicle which depicted blood which inflamed the jury. The use of gruesome photographs depicting the victim's blood was an unnecessary element of the State's case, having

little to no probative value, and serving only to ignite the passions of the jury with unduly prejudicial effect on the defendant.

The court below erred in denying the Defendant's motion for a directed verdict and D-1 peremptory instruction, and abused its discretion in denying Defense motions for directed verdict, J.N.O.V., or in the alternative, a new trial, as the verdict of the jury was against the overwhelming weight of evidence. The verdict of the jury was against the overwhelming weight of evidence. The State failed to prove all of the elements of DUI Causing Death. Because the State did not prove its case for DUI Causing Death beyond a reasonable doubt, a reasonable jury could not have returned a conviction of DUI Causing Death. Therefore, reversal is appropriate.

The maximum sentence imposed by the Court was cruel and unusual punishment.

The court erred in allowing in the accident report.

IV.

ARGUMENT

The Appellant would argue based upon the authorities and legal arguments made herein that the court erred in allowing blood alcohol evidence, allowing testimony of the State's accident reconstructionist, allowing the introduction of the death certificate, allowing into evidence the picture of the steering wheel in the victim's vehicle, denying the Defendant's Motion for a directed verdict and D-1 peremptory instruction, and imposing the maximum sentence.

ISSUE NUMBER 1

The court below erred in allowing the blood alcohol evidence due to the fact there was not sufficient probable cause for the warrant.

In Wilkerson v. State, 731 So.2d 1173 (Miss. 1999). this Court held that: "Probable cause for a search is a common sense determination that the facts and circumstances known to the police officer, either through his own direct knowledge or gained second-hand from reliable

sources, are such that contraband or evidence material to a criminal investigation will be found in a particular place. It must be more than mere or reasonable suspicion, but it need not meet the requirements of proof beyond a reasonable doubt. . . ."

In the case at bar, the officer relied on the smell of alcohol and the fact that Appellant was uncooperative with paramedics. Id. at 44. Paramedic Frazer Tool testified that Appellant complained of an injured tailbone and that that could be a very painful injury. Id. at 106. This injury could certainly explain why Appellant would be uncooperative with paramedics. In Wilkerson, there was more than just the smell of alcohol to obtain the warrant. Other factors that were present were the collision in the other vehicle's lane of traffic and there was no evidence the Defendant had been driving recklessly. In Deeds v. State, 2008-KA-00146-SCT, probable cause was determined to be sufficient based upon the smell of alcohol, the accident occurring in the other vehicles lane, and bottles of alcohol being present in the Defendant's car. Once again that is much more than we have in the case at bar. Based upon this, Appellant would request that the Court find that there was not sufficient probable cause to draw the blood and this evidence should have been suppressed.

ISSUE NUMBER 2

> The court below erred in allowing the testimony of the State's accident reconstructionist due to the fact that it did not meet the standards of Daubert and that he was not qualified to testify as an expert.

The Appellant filed a motion in limine to contest the testimony of the accident reconstruction expert. The Court allowed the testimony.

Pursuant to Miss. Rule Evid. 702, "If 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.

Appellant concedes that the Mississippi Supreme Court has established that accident reconstruction is recognized when a qualified expert testifies to such. Lambert v. State, 931 So.2d 600 (Miss. 2005). However, Appellant argues that the trial court abused its discretion by declaring Lance Weems an expert. Appellant pointed out Sgt. Weems lack of experience. Weems testified that this case was the first real case he had reconstructed. T. at 28. Further, he had never been qualified as an expert in a court. T. at 29. He testified that he just guessed as to how much water to put on pavement to measure the drag factor. T. at 34. Based upon the lack of experience of Sgt. Weems the Appellant requests this Court to rule that his testing should not have been allowed.

ISSUE NUMBER 3

The court below erred in allowing the introduction of the death certificate which was hearsay and denied the Defendant the right to confront the statements contained therein.

The State introduced the decedent's death certificate to which the Appellant objected that it was hearsay and allowed the State to get evidence in that established an opinion as to cause of death without having to call the witness which violated his right to confrontation. T. at 85 & 125. The standard of review governing the admission or exclusion of evidence is abuse of discretion. ***Williams v. State***, 991 So. 2d 593, 597 (Miss. 2008) (citations omitted). However, "[t]his Court reviews de novo a Confrontation Clause objection." ***Smith v. State***, 986 So. 2d 290, 296 (Miss. 2008) (citations omitted). The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The denial of the right to confrontation has recently been addressed in Melendez-Diaz v. Massachusetts, 129 S. Ct. (2009). Appellant asserts that applying Melendez-Diaz v. Massachusetts to the case at bar would preclude the State from introducing the death certificate or at least redacting the statement as to cause of death. Appellant conceded that the victim was deceased; however, Appellant did not concede the cause of death in that the accident occurred on March 27, 2007 and the victim died May 19, 2007. T. at 81. Appellant prays that this Court find that the death certificate, in particular the statement on it declaring a cause of death, allowed the State to circumvent the confrontation clause and establish an element of the offense without confrontation and find that this violated Appellant's rights.

ISSUE NUMBER 4

The court below erred in allowing into evidence the picture of the steering wheel in the victim's vehicle which depicted blood which inflamed the jury.

The Mississippi Rules of Evidence require that evidence pass a threshold issue of relevance, and then pass through the "ultimate filter," Mississippi Rule of Evidence 403, before that evidence is admissible. See McGowan v. State, 859 So. 2d 320 (Miss. 2003). "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401.

The Defense made continuing objections to the admissibility of gruesome photographs of the victim's blood on the steering wheel. T. at 162. The issue in this case was whether or not the Defendant was guilty of all of the elements of DUI Causing Death. The photographs of the deceased's blood served no probative value regarding whether Defendant caused victim's death by DUI.

However, even if the photographs are relevant, their probative value is minimal at best. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Miss. R. Evid. 403. "[T]he trial court must consider: (1) whether the proof is absolute or in doubt as to identity of the guilty party, as well as, (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury." Hughes v. State, 735 So. 2d 238, 263 (Miss. 1999) (citing McNeal v. State, 551 So. 2d 151, 159 (Miss. 1989) (emphasis added)). The photographs were unnecessary elements of the State's case, and their only purpose was to enflame the passions of the jury. For the foregoing reasons, the lower court erred in admitting this photograph.

ISSUE NUMBER 5

Whether the court below erred in denying the Defendant's motion for a directed verdict and D-1 peremptory instruction, and abused its discretion in denying Defense motions for directed verdict, J.N.O.V., or in the alternative, a new trial, as the verdict of the jury was against the overwhelming weight of evidence.

Appellant concedes that a reviewing court, in determining whether a verdict is contrary to the overwhelming weight of the evidence, must accept as true the evidence which supports the verdict. Robinson v. State, 662 So. 2d 1100, 1105 (Miss. 1995). It may only reverse where the trial court has abused its discretion in not granting a new trial. Id. In light of Robinson, the Appellant respectfully argues that the lower court abused its discretion in not granting J.N.O.V., or in the alternative, a new trial because the weight of the evidence fails to support a case for DUI Causing Death beyond a reasonable doubt. Only then should the verdict be disturbed on appeal. Haymer v. State, 613 So. 2d 837, 840 (Miss. 1993) (citing Benson v. State, 551 So. 2d 188, 193 (Miss. 1989). See also Tucker v. State, 647 So. 2d 699, 702 (Miss. 1994).

Furthermore, Due Process requires that the state prove each element of the offense beyond a reasonable doubt. Washington v. State, 645 So. 2d 915, 918 (Miss. 1994).

The defense also assigns error in the lower court for failing to grant defense motions for directed verdict citing insufficient evidence. "An Appellant attacking the sufficiency of the evidence is alleging that there is no competent evidence introduced on one or more of the elements of the crime charged." Jones v. State, 856 So.2d 285, 294 (Miss. 2003). In this case those elements are that the Defendant was negligent, that he was intoxicated, and that he caused the victim's death. Appellant would point out that it was uncontradicted that the decedent was negligent in causing this accident. T. at 99 and 117. Had decedent not been negligent, the accident would have never happened. Appellant was traveling in his proper lane and decedent pulled right into his pathway out of an entrance only. The testimony was that the reason it was entrance only was because it would be dangerous to exit into the roadway from there. T. at 99 and 117. The insufficiency of evidence should have compelled the lower court to grant defense motions for direct verdict, and it was error not to do so.

The Appellant asserts that allowing this verdict of murder to stand would work an unconscionable injustice because the State's evidence was not sufficient to prove that the Appellant was the cause of the victim's death, was intoxicated, and was negligent. The State failed to carry its burden of proof beyond a reasonable doubt.

This court should therefore reverse the lower court's order denying J.N.O.V. or in the alternative a new trial, and overturn the murder verdict in favor of acquittal or a new trial.

ISSUE NUMBER 6

The maximum sentence imposed by the court was cruel and unusual punishment.

The Defendant was sentenced to twenty-five (25) years as a Section 99-19-81 habitual offender which was the maximum sentence he could receive. Appellant argues that this sentence

is cruel and unusual in that it is disproportionate to other sentences imposed. The Mississippi Supreme Court laid out the factors to be considered when courts are faced with this situation. In Pool v. State, 724 So.2d 1044, (Miss. 1998), the court stated that the trial judge must first conduct a threshold comparison of the crime committed to the sentence imposed in order to determine whether an inference of gross disproportionality arises. Id. at 1050. Appellant contends that his sentence is grossly disproportionate based upon the fact that he was sentenced to the maximum 25 years and Appellant presented numerous cases at sentencing of sentences imposed in the jurisdiction that Appellant was sentenced in as well as other jurisdictions. See Attached.

Once gross disproportionality is met, then the factors set forth in the United States Supreme Court case of Solem v. Helm, 463 U.S. 277, 290-91, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) are as follows:

(1) The gravity of the offense and the harshness of the penalty.

In looking at the first factor, the harshness of the penalty is severe in that Appellant was sentenced to the maximum 25 years to be served day for day. As to the gravity of the offense, although DUI resulting in death from its very language is a serious offense, the facts of this case are not typical of the facts normally seen on these type cases. It was uncontradicted that the decedent was traveling out of an entrance only into the Appellant's path who had the right of way. It was further testified that to enter the roadway from the entrance would be dangerous. T. at 99 and 117. Decedent basically pulled out in front of the Appellant who had no time to stop. Apparently the jury determined that the Appellant was traveling over the speed limit, but it would not have been at an excessive rate. Further, prior to trial the state had offered the Appellant a plea offer of eight (8) years in the Mississippi Department of Corrections as a non-habitual offender. T. at 310. Factors two and three of Solem have previously been discussed.

For these reasons, Appellant prays that this Court overturn his sentence and send this matter back for the Court to impose something less than the maximum.

ISSUE 7

The court erred in allowing into evidence the accident report.

The State offered into evidence the accident report prepared by Sgt. Weems. The Appellant objected. T. at 175. The court allowed the report into evidence. T. at 279. The trial court relied upon Copeland v. Jackson, 548 So.2d 970 (Miss. 1989) and Fisher v. State, 690 So.2d 268 (Miss. 1996). Copeland stated that the report is simply a substitute for the officer appearing in person and testifying. Id. at 975-76. In the case at bar, the officer was present to testify and therefore the accident report should not have been allowed into evidence. Appellant prays that the Court find error in this issue and reverse his conviction.

V.

CONCLUSION

The evidence presented at trial heavily supports that the State cannot prove that Jeffrey Dale Beecham was negligent. Because the evidentiary burden of proof beyond a reasonable doubt was not met, the jury was clearly unreasonable in returning a DUI Causing Death verdict.

Considering all of the relevant and admissible evidence, the verdict of the court is against the overwhelming weight of the evidence. The court below therefore abused its discretion in denying Defense motions for directed verdict, J.N.O.V., or in the alternative, a new trial. Upholding the lower court ruling would work an unconscionable injustice upon Jeffrey Dale Beecham.

This court should therefore reverse the lower court's order denying J.N.O.V. or in the alternative a new trial, and overturn the DUI Causing Death verdict.

CERTIFICATE OF SERVICE

I, John D. Watson, counsel for Appellant, hereby certify that I have this day mailed with postage prepaid a true and accurate copy of the Appellant's Brief to the following persons:

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This the 18th day of January, 2010.

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