IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LARRY SETZER — APPELLANT

VS. — NO. 2009-KA-0752

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LARRY SETZER **APPELLANT**

vs. **CAUSE No. 2009-KA-00752-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of DeSoto County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **CULPABLE NEGLIGENCE MANSLAUGHTER** (Two counts) and **DUI ASSAULT**.

STATEMENT OF FACTS

The Appellant was indicted under Miss. Code Ann. Section 63-11-30(5) for two counts of causing the death of two people and one count of having caused the permanent disability of another. (R. Vol. 1, pp. 9 - 10).

On 4 February 2009, there was a hearing on a motion to suppress blood test results. (R. Vol. 5, pp. 2 - 78). The Circuit Court denied relief on this motion by Order filed 13 February 2009. (R. Vol. 4, pp. 458 - 461).

On that same date, the prosecution proceeded against the Appellant upon a bill of information, charging the Appellant with having committed two counts of culpable negligence manslaughter and one count of DUI assault under Miss. Code Ann. Section 63-11-30(5). (R. Vol. 4, pp. 465 - 466).

The Appellant executed a "Waiver of Right to Grand Jury Procedure and Petition to Proceed on Information," in which he acknowledged that he had been charged with two counts of culpable negligence manslaughter and one count of DUI assault in bill of information and in which he waived his right to presentment to the grand jury, trial by jury and other rights guaranteed by the State and federal constitutions, and in which he petitioned the Circuit Court to permit him to enter pleas of guilty to the offenses charged in the bill of information. (R. Vol. 1, pp. 467 - 468).

The State and the Appellant entered into a "Stipulation of Facts." In this stipulation, the Appellant acknowledged his right to a trial by jury and his right to confront witnesses against him. He agreed to waive further exercise of those rights, subject to what he characterized as a right to appeal the Circuit Court's disposition of his motion to suppress. The Appellant then went on to stipulate the evidence that the State would offer at trial, and he further stipulated that such evidence would be sufficient to meet the State's burden of proof. However, the Appellant expressly declined to stipulate that his blood was drawn in consequence of his consent or upon probable cause.[1] (R. Vol. 4, pp. 469 - 471).

The Circuit Court held what was described as a bench trial on the stipulation of facts. In the

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[1] Because the issues on this appeal do not include an issue as to the sufficiency or weight of the evidence of the Appellant's guilt, we do not think it will be necessary to set out here the facts establishing the Appellant's guilt as set out in the "Stipulation of Facts". We will instead incorporate the facts contained therein here. The issue on appeal is whether the taking of a blood sample was taken consistent with the law of search and seizure. We will set out the facts relevant to that issue in the argument below.

course of this proceeding, the court entered into a colloquy with the Appellant to ensure that his decision to waive indictment and to be proceeded against by bill of information was a knowing and voluntary one. The court further advised the Appellant's of the various rights he would waive by a plea of guilty. At the conclusion of the bench trial, the Appellant was convicted of the felonies alleged in the bill of information. (R. Vol. 5, pp. 81 - 92). The Appellant was subsequently sentenced upon those convictions in accordance with the recommendation agreed to by the State and the defense. (R. Vol. 5, pp. 112 - 113).

STATEMENT OF ISSUES

1. DID THE APPELLANT CONSENT TO THE DRAWING OF A BLOOD SAMPLE?

2. DID PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES EXIST SO AS TO JUSTIFY THE TAKING OF A BLOOD SAMPLE WITHOUT AUTHORITY OF A SEARCH WARRANT?

SUMMARY OF ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN RULING THAT THE BLOOD SAMPLE WAS PROPERLY TAKEN AND THAT AS A RESULT THAT THE RESULTS OF CERTAIN TESTS PERFORMED ON THE APPELLANT'S BLOOD WOULD BE ADMISSIBLE INTO EVIDENCE

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN RULING THAT THE BLOOD SAMPLE WAS PROPERLY TAKEN AND THAT AS A RESULT THAT THE RESULTS OF CERTAIN TESTS PERFORMED ON THE APPELLANT'S BLOOD WOULD BE ADMISSIBLE INTO EVIDENCE[2]

Facts established at the suppression hearing

The Appellant filed a motion to suppress evidence concerning the taking of his blood and the results of testing of his blood, alleging that the taking of a blood sample from his person was the fruit

[2] We will respond to the Appellant's First and Second Assignments of Error in this response.

of an unlawful search and seizure. (R. Vol. 3, pp. 411 - 413). A hearing was held on this motion.

Jordan Jones, an office with the Southaven police department, testified that he was on duty on 17 April 2007, assigned to the traffic division. He investigated a wreck at the intersection of Goodman Road and Airways Boulevard on that day. When he arrived, he found that four vehicles had been involved in the wreck. The Appellant's was one of them, and it was turned on its side. Jones checked the vehicles and noted that none of the people in them appeared to have major injuries, until he got to one vehicle. In that vehicle he saw two children in the back seat, who appeared to be dead. In the front passenger seat he saw a person who had very serious injuries and who reported that he could not move. After interviewing witnesses to the wreck and viewing physical evidence at the scene, it became clear that the Appellant's vehicle had struck the vehicle containing the children in the rear, driving that vehicle across the intersection and into two other vehicles. The vehicle containing the children was stopped at the intersection at the time the Appellant struck that vehicle.

Jones found the Appellant in the rear of an ambulance. Jones identified himself and advised the Appellant of his *Miranda* rights. Jones asked the Appellant what he remembered of the wreck. The Appellant was very aggressive and uncooperative with the medical technicians. Jones noticed that the Appellant's eyes were bloodshot and red and that his speech was slurred. Jones asked the Appellant to take a portable breath alcohol test. The Appellant consented. The breath test registered .000.

The Appellant was then transported to a hospital, which was located about a mile away at most. Jones left the scene of the wreck when the ambulance left and followed it to the hospital. Jones' purpose in doing so was to ask the Appellant for his consent to the taking of a blood sample.

When Jones arrived at the emergency room, he found that the Appellant had been placed in

a private room. Jones walked into the room and found the Appellant lying on an emergency room bed, wearing a "c" collar. Jones introduced himself again and again advised the Appellant of his *Miranda* rights. The Appellant indicated that he understood his rights. Jones asked him what he remembered of the wreck and asked the Appellant if he would consent to the giving of a blood sample, the sample to be sent to the State crime laboratory. Jones stated that the Appellant told him that he had no problem and that he consented to give a blood sample. The Appellant was not in custody at that time.

Jones then went to find a nurse to draw a blood sample. She agreed to do so as long as the Appellant consented. Jones brought her to the Appellant's room and asked the Appellant again whether he would consent to the drawing of the sample. The Appellant again consented, and the nurse drew the sample. The nurse used a "State blood kit" for the purpose. The blood sample taken and the paperwork concerning filled out, Jones returned to the scene of the wreck and gave the kit to an evidence custodian. The blood sample was drawn at about twenty past one in the morning.

Jones also testified that he had on prior occasions sought a search warrant, and he described the process and the time involved in preparing a statement of underlying facts and circumstances and locating a judge before whom to present such a request. Given the time that the wreck occurred, Jones thought it would have been after midnight before all that could have been accomplished. He estimated that it took between two and half to three and half hours to complete the process of acquiring a search warrant.

When Jones entered the ambulance to speak to the Appellant, the Appellant did not appear to him to be injured. The Appellant, at the time, told the medical technicians that he was not injured. Jones did not know at that time that the Appellant had lost two teeth and had lacerations and an injury to his elbow.

Jones did not accuse the Appellant of being a murderer or threaten the Appellant with life imprisonment. (R. Vol. 5, pp. 5 - 45).

The defense called Teresa Windham. She was employed by Baptist Hospital in DeSoto County on 17 - 18 April 2007. She was the "nurse -in - charge" for the Appellant at that time. She stated that she initially assessed the Appellant's condition when he arrived at the emergency room. The Appellant was alert, conscious of his surroundings, spoke spontaneously and clearly, and was oriented. She made this assessment at a little after one o'clock in the morning.

The Appellant had a "c" collar on and was lying on a backboard. She noted that the Appellant had abrasions to the chest and right side of the abdomen. He also had a laceration to the chest, two broken teeth and a tender left hip.

Windham's notes indicated that she drew blood from the Appellant at 1.40 that morning. Her notes also indicated that an officer with the Southaven police department spoke with the Appellant and his family at 1.50 that morning. At 2.00 o'clock, the Appellant was resting, family at bedside.

Windham could not recall one way or another whether the Appellant gave consent for a blood sample to the police officer. She did state that she would not have drawn blood had the Appellant refused consent. She did recall that the Appellant was very cooperative and did not recall that the Appellant refused consent. She further stated that she had previously drawn blood for medical purposes before the time she drew the 1.40 a.m. blood sample. (R. Vol. 5, pp. 45 - 62).

The Appellant then testified. He said that he first encountered Officer Jones while he, the Appellant, was outside of the ambulance at the scene of the wreck. According to the Appellant, Jones came up to him, slammed a breathalyzer into his mouth and told him how to blow. The Appellant claimed that the officer did not ask whether he would take the test.

The next time the Appellant saw Jones was in the emergency room. The Appellant said he

had been on the telephone with his father when Jones came in. According to the Appellant, Jones asked the Appellant for consent to the taking of a blood sample. The Appellant claimed that he refused consent, at which point Jones supposedly told the Appellant that he was a child murderer and that he was going to jail for life. According to the Appellant, Jones kept this up until he, the Appellant, began to cry. Nonetheless, the Appellant claimed that he never gave Jones, the nurse, or anyone else consent.

On the other hand, the Appellant stated that he never objected to the taking of a blood sample. He said he did not because he thought the sample was needed in the course of providing medical care. He claimed that he had no idea that the sample might be used against him in a criminal case.

Even though Jones had not known the Appellant before the wreck and the Appellant had not seen him afterwards, the Appellant was of the view that Jones lied about having received consent from him. (R. Vol. 5, pp. 62 - 67).

In a detailed, written order the trial court denied relief on the Appellant's motion to suppress, finding that the Appellant consented to the taking of the blood sample and further finding that exigent circumstances existed which permitted the taking of a blood sample without a search warrant therefor. (R. Vol. 4, pp. 458 - 461).

Consent to the taking of the blood sample

While the Appellant here contends that there was no voluntary consent to the taking of the blood sample, in actual fact his position and testimony at trial was that there was no consent at all. There was no testimony to the effect that there was consent but that it was involuntary. What was before the trial court for resolution then, as to this issue, was a straightforward issue of fact, that being whether there was consent. A trial court's resolution of an issue of fact will not be overturned

unless this Court should find that it was clearly erroneous. *Woodward v. State*, 533 So.2d 418, 426 (Miss. 1988).

The facts, restated briefly, are that officer Jones testified that he went to the hospital and spoke with the Appellant and asked the Appellant's consent for a blood sample. Jones stated that the Appellant gave his consent, at which point Jones asked Nurse Windham to take the sample. Jones brought Windham to the Appellant, and the Appellant again consented to the taking of a blood sample. Windham testified that, while she could not recall whether the Appellant consented or refused to consent to the taking of the sample, she would not have taken the sample absent his consent. She further testified that she had already taken a blood sample for medical purposes. She also testified that the Appellant was conscious and alert.

Jones denied having threatened the Appellant in any way.

The Appellant, of course, testified that he never gave consent for the taking of the blood sample and that Jones made him cry. On the other hand, the Appellant also said that he never object to the taking of a blood sample, thinking that it was needed for medical purposes. The Appellant could give no reason why Jones would have committed perjury.

The Appellant states that there was no written consent or waiver of rights, citing *Penick v. State,* 440 So.2d 547 (Miss. 1983). However, regardless of what *Penick* might have suggested concerning a knowledgeable waiver, it is clear that *Penick* requires proof of such only where an accused testifies that his consent was not knowledgeable. *Gilbreath v. State*, 783 So.2d 720, 723 (Miss. Ct. App. 2000). In the case at bar, there was no such testimony on behalf of the defense. The testimony for the defense was that the Appellant did not consent.

The Appellant then complains that there was no written waiver of rights. While not clear whether the Appellant is complaining about the lack of a written waiver of the *Miranda* rights or the

lack of a written consent, it is unimportant which he is complaining about. There is no requirement for either one. *Shaw v. State*, 476 So.2d 22 (Miss. 1985(consent); *Roberson v. State*, 838 So.2d 298 (Miss. Ct. App. 2002)(waiver of *Miranda* rights). Since the Appellant was not in custody at the hospital, it would not have been necessary to give him the *Miranda* warnings.

The Appellant then suggests that he did not have the capacity to consent since he was on an IV and had (allegedly) been given Dilaudid. However, Windham testified as to the Appellant's condition, noting that he was alert and conscious and responsive. The trial court certainly had a substantial factual basis for finding that the Appellant was competent to consent.

The Appellant then complains that the officer did not document the Appellant's consent after the Appellant filed his motion to suppress. We fail to see the point in this. The officer may not have thought it necessary to document it, or he may have forgotten to document it, until a point was made of the matter. That the officer did not document the consent until some eighteen months after the wreck was simply a matter going to the officer's credibility, a matter for the trial court to consider.

The Appellant then says that his testimony and Windham's testimony contradicted Jones' testimony concerning consent. Jones did testify that the Appellant consented to the taking of the blood sample and repeated that consent in Windham's presence. It is certainly true that the Appellant testified that he did not give consent to Jones and did not give consent when Windham was present, but it is not true that Windham contradicted Jones. Windham said she did not recall whether the Appellant stated his consent. On the other hand, she did testify that she would not have taken a blood sample had the Appellant refused consent. She also testified that she had already taken a blood sample for medical purposes. Jones testified that the Appellant did consent in Windham's presence; Windham could not recall one way or another what the Appellant said. This is not a contradiction. That Windham said that she would not have taken the sample without a consent is

strong proof that the Appellant did consent, Windham simply not recalling what he said.

It may be that the Appellant testified that Jones called him a child murderer and such. However, the Appellant did not testify that he gave consent for this or any other such reason. In any event, it was for the trial court to determine what weight and credibility to give to the Appellant's testimony.

The Appellant seems to think that Jones' testimony was impeached because Jones stated that he did not think the Appellant was injured. The fact of the matter is that such injuries the Appellant suffered were minor ones. He had a laceration to his chest, some abrasions or bruises and a tender hip. It is true that he lost two teeth as well, but that might not have been readily apparent by looking at the Appellant. It is true that the Appellant was in a "c" brace, but this appears to have been the consequence of standard practice among emergency medical technicians. On the other hand, the Appellant was conscious, alert and responsive. The officer's testimony was not impeached by the fact of the Appellant's minor injuries, injuries that would not have been observable. As to whether the pain medication and the Appellant's minor injuries affected the Appellant's ability to competently consent to the giving of a blood sample, they clearly did not in view of the observations of the nurse concerning the Appellant's ability to know and understand where he was and what he was doing. In any event, the Appellant did not testify that he was not competent to give consent. That being so, that issue is not properly before this Court. *Sumrall v. State*, 955 So.2d 332, 334 (Miss. Ct. App. 2006).

The Appellant then cites *Wash v. State*, 790 So.2d 856 (Miss. Ct. App. 2001) in support of his notion that he was not competent to give consent. Yet, the Appellant, as we have said, was alert, conscious and responsive, according to Windham. He was shown to have been aware of his circumstances at the time of his consent. This was enough to demonstrate his competency, as *Wash*

provides. *Wash*, at 859. Whether the Appellant spoke to an attorney was neither here nor there, particularly in light of the fact that he never testified that he wanted to speak with one. That the Appellant had minor injuries and might have been receiving pain medication does not for those reasons alone require the conclusion that he was not competent to give consent.

The Appellant also cites *Sumrall v. State*, 995 So.2d 332 (Miss. Ct. App. 2006). The appellant in that case demonstrated his competency, but so too was it here shown that this appellant was competent, again assuming for argument that competency was ever put into issue.

As we have stated above, the trial court entered a detailed finding of fact on the issue. (R. Vol. 4, pp. 458 - 461). The court's findings are fully supported by the evidence presented in the hearing. While it is true that, that the Appellant denied having consented to the taking of the blood sample, this created an issue of fact for the trial court to decide. The court was in the best position to gauge the credibility of the witnesses and their testimony. There is no basis to find that the court's decision was clearly erroneous. *Smith v. State*, 465 So.2d 999, 1002 (Miss. 1985). To the extent that the an issue of the voluntariness of the Appellant's consent was raised, there would have been no abuse of discretion in a finding by the trial court that the Appellant's consent was voluntary. *Comby v. State*, 901 So.2d 1282 (Miss. Ct. App. 2004).

The First Assignment of Error is without merit.

Exigent circumstances

In the Second Assignment of Error, it is said, firstly, that the trial court erred in finding that probable cause existed to support Jones' request for a blood sample. The Appellant, in this respect, claims that the Jones' observation at the scene of the wreck that the Appellant had bloodshot eyes and slurred speech, when considered against the fact that the Appellant registered negative for alcohol, was insufficient to establish probable cause.

First of all, any question of whether probable cause existed to support the taking of the blood sample is insignificant in view of the fact that the Appellant consented to the taking of a blood sample. Regardless of the question of whether probable cause existed to support the taking of the blood sample, with or without warrant therefor, the Appellant's consent was entirely sufficient to permit it. There is no requirement that the State establish probable cause where the search or seizure involved occurred in consequence of a consent. *Peters v. State*, 920 So.2d 1050, 1055 (Miss. Ct. App. 2006).

Nonetheless, the prosecutor at trial asserted that probable cause existed. Jones observed the Appellant whilst he was being looked after in an ambulance. The Appellant's eyes were bloodshot, and his speech slurred. He seemed uncooperative and rather aggressive with the medical technicians. The intersection at which the wreck occurred was a large one, and it was a visually clear intersection. Jones knew, from talking to witnesses, that the Appellant had caused the wreck, striking the decedents' vehicle in the rear and driving it into the intersection and into two other vehicles. While the Appellant's breath test was negative for the presence of alcohol, that test would not have been relevant as to whether the Appellant was impaired by some other substance. The trial court, in agreement with the prosecution, relying upon *Longstreet v. State*, 592 So.2d 16 (Miss. 1991) and *Holloman v. State*, 820 So.2d 52 (Miss. Ct. App. 2002), found that these facts demonstrated that probable cause existed.

The Appellant appears to think that the fact that a drug screen was not requested until May of 2007 is significant. We fail to see this point. The wreck caused by the Appellant occurred on 17 April 2007; there were analyses of the Appellant's blood samples made shortly thereafter. That a request for screening may not have been made until May of 2007, after hospital records indicated the presence of drugs, does not seem to us to be remarkable. That subsequent events confirmed

Jones' belief that the Appellant was impaired does not mean that Jones had no probable cause to believe that he was impaired from what he knew at the time he saw the Appellant at the scene of the wreck. While it may be that no containers for alcoholic beverages were found and that there was no indication that the Appellant had been drinking alcohol, there was certainly a strong indication that the Appellant was impaired by some other substance.

The Appellant then claims that, in the event that this Court should find that probable cause existed for the taking of a blood sample, there were no exigent circumstances present. This Court is asked to judicially notice the number of chancellors and judges located in DeSoto County, who the Appellant supposes could have been awakened in the small hours of the night to consider the issuance of a search warrant.

The wreck caused by the Appellant occurred at about midnight. Jones testified that it could take two to three hours at a minimum to prepare a statement of underlying circumstances and the warrant and to find a judge willing to consider the issuance of a warrant. The wreck involved two deaths, three injuries and four vehicles. (Exhibit 1). While the Appellant tested negative for alcohol, he displayed distinct signs of impairment. Under these circumstances, exigent circumstances existed. *Cf. Deeds v. State*, 27 So.3rd 1135, 1145 (Miss. 2009); *Vaughn v. State*, 972 So.2d 56, 61 (Miss. Ct. App. 2008).

The Appellant claims that exigent circumstances did not exist because he was not attempting to flee or otherwise elude police officers. Perhaps the Appellant was not, but the Appellant ignores the fact that substances such as drugs or alcohol tend to be quickly eliminated by the body. The exigent circumstance involved in cases of this kind arises because of this fact, as this Court's decisions recognize. While the Appellant cites *Smith v. State*, 419 So.2d 563 (Miss. 1982), the instant case does not represent the kind of exigent circumstance that arises from the need to go to

the assistance of a person believed to be in great danger.

The Second Assignment of Error is without merit.

CONCLUSION

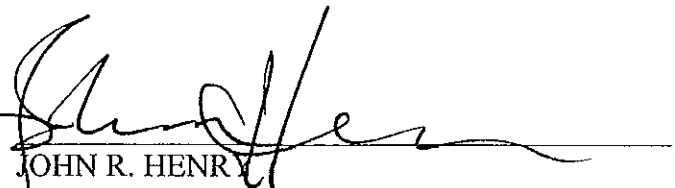
The trial court's finding that the Appellant gave consent to the taking of a blood sample is supported by the evidence and cannot be said to be a clearly erroneous finding. It may be that the Appellant denied having so consented, but the testimony of the Jones and Windham clearly show otherwise. The Appellant suffered relatively minor injuries and was alert and conscious at the time he gave consent.

Beyond this probable cause and exigent circumstances existed for the taking of the blood sample, even had the Appellant refused consent. While the Appellant tested negative for alcohol, his bloodshot eyes and slurred speech and aggressive manner clearly indicated impairment. As for exigent circumstances, the wreck involved two deaths, three injuries and four cars and occurred late at night, making it difficult to secure a search warrant in a reasonable time. Such a warrant would have been issued in view of Appellant's condition and in view of the way the wreck occurred.

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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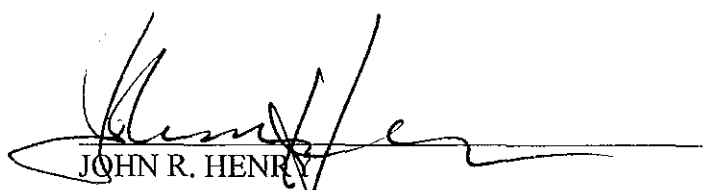

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