IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2009-KA-00752-SCT

LARRY SETZER **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Larry Setzer, Appellant
2. State of Mississippi, Appellee
3. Glynes Lannom, Victim
4. Phillip Beasley, Victim
5. T. Swayze Alford, Attorney for Appellant
6. Steven Jubera, Esq., Assistant District Attorney, Desoto County, Hernando, Mississippi
7. Hon. Robert P. Chamberlin, Circuit Court Judge, Seventeenth Judicial District, State of Mississippi

I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal.

THIS the 21 day of January, 2010.

T. Swayze Alford

T. SWAYZE ALFORD (MSB [redacted])
Attorney for Appellant

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STATEMENT OF THE ISSUES

1. Whether the trial court erred by allowing the admission of Appellant's blood test results by ruling that Appellant consented to having his blood drawn by the Southaven Police Department?

2. Whether the trial court erred by ruling that probable cause and/or exigent circumstances existed entitling the Southaven Police Department to withdraw the Appellant's blood without first obtaining a search warrant?

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ON APPEAL FROM THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS BELOW

On February 13, 2009, appellant Larry Setzer was convicted in a bench trial in the Circuit Court of Desoto County, Mississippi, of two counts of manslaughter in violation of Mississippi Code Annotated Section 97-3-47, and one count of D.U.I. causing death or permanent bodily injury in violation of Mississippi Code Annotated Section 63-11-30(5) (Rev. 2004). [R. 473; R.E.473].

On April 7, 2009, the Appellant was sentenced to serve a term of fifteen (15) years in the custody of the Mississippi Department of Corrections for Count 1. [R. 478]. For Count 2, Appellant was sentenced to fifteen (15) years suspended to run concurrent with Count 1, and for Count 3, Appellant was sentenced to serve ten (10) years of post-release supervision. [R. 478-79]. It is from the Court's admission of blood test evidence and his subsequent conviction that Appellant appeals.

FACTS

On April 17, 2007, Larry Setzer was operating a motor vehicle in DeSoto County, Mississippi. [R. 469]. While driving, he rear-ended another vehicle, resulting in the death of two passengers. [R. 469]. One other person was injured. [R. 469]. Following the accident, Officer Jordan Jones was in charge of the accident scene. [Tr. P. 20, Vol. 5]. Officer Jones was certified

as a police officer through the State of Tennessee and State of Mississippi, having gone to their law enforcement academies. [Tr. P. 18, Vol. 5]. In his training, he was taught the importance of documenting things he considered in his investigation. [Tr. P. 18, Vol. 5]. Sgt. Jones admits, that with nine years of experience, he understood it was important to contemporaneously document things as they occurred. [Tr. P. 19, Vol. 5]. By the date of the accident, Sgt. Jones had probably prepared a thousand (1,000) accident reports over his career. [Tr. P. 18, Vol. 5].

When Jones arrived at the accident scene, he knew it was a bad accident. [Tr. P. 19, Vol. 5]. Jones realized shortly after he arrived at the accident scene that two people were deceased. [Tr.19, Vol. 5; R. 428]. Sgt. Jones located Appellant in the rear of a Southaven Fire Department ambulance [Tr. P. 10, 23, Vol. 5] but testified he did not believe Mr. Setzer was injured. [Tr. P. 23, 24, Vol. 5]. Contrary to this testimony, ambulance records state that Appellant suffered from two broken teeth, lacerations to his right elbow, and abrasions to his back. [R. 132-133]. In fact, Appellants injuries were of the nature that necessitated placing him in a cervical collar ("C-collar") and on a spine board. [R. 133]. At this point, Appellant contends that Officer Jones slammed a breathalyzer in Appellant's mouth and told Appellant how to blow[1]. [Tr. P. 63, Vol. 5]. He did not request Appellant take the breathalyzer. [Tr. P. 63, Vol. 5]. The portable breathalyzer test resulted in a reading of "000", thereby ruling out alcohol use. [Tr. P. 11-12, Vol. 5; R. 25]. Afterwards, Appellant was transported to Baptist Memorial Hospital-DeSoto. [R. 132].

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[1] The State contends the Appellant consented to the breathalyzer test before it was administered. [Tr. P. 11-12, Vol. 5; R. 25]. The Appellant states that this test was performed without his consent. [Tr. P. 63, Vol. 5]. However, because the test resulted in a negative reading, the trial court ruled that the test was not inculpatory as to the charges Appellant faced. [R. 460; R.E 460].

Appellant next spoke to Sgt. Jones while laying on a backboard in the emergency room [Tr. P. 63, Vol. 5] where he was being treated for broken teeth, a head injury, a neck sprain, and pains and abrasions to his neck, chest and abdomen. [R. 85-92]. Appellant was in "a neck brace, a C-collar, the thing that goes around your neck to keep your head immobile." [Tr. P. 28, Vol. 5]. Appellant's conversation with Officer. Jones was not pleasant. [Tr. P. 63, Vol. 5]. During this conversation, Jones tried, on more than one occasion, to get Appellant to consent to a blood test, but Appellant refused. [Tr. P. 63, Vol. 5]. It was during this conversation that Jones accused Appellant of being a child murderer and informed Appellant he was going to jail for life. [Tr. P. 63, Vol. 5]. Jones' pressure continued until Appellant began to cry. [Tr. P. 64, Vol. 5]. Notwithstanding Jones' tactics, Appellant did not give Jones permission for his blood to be drawn for a crime lab analysis. [Tr. P. 64, Vol. 5]. Nor did Appellant give any hospital personnel permission for his blood to be drawn for use by the State for a criminal prosecution. [Tr. P. 64, Vol. 5]. Setzer had no knowledge that the blood that was being drawn was to be used against him in a criminal case. [Tr. P. 64, Vol. 5].

While questioning Setzer, Sgt. Jones states he did not observe, and was not aware, that Mr. Setzer had two missing teeth [Tr. P. 24, Vol. 5], and had a severe injury and lacerations to his elbow [Tr. P. 25, Vol. 5]. Jones contends he advised Appellant of his Miranda rights but there is no signed Miranda waiver from Appellant [Tr. P. 25, Vol. 5] as Jones did not attempt to obtain a written waiver. [Tr. P. 25, 30, Vol. 5]. The Mississippi Uniform Crash Report was prepared after the accident from Jones' notes but likewise, does not reflect that Jones advised Setzer of his Miranda rights. [Tr. P. 27-28, Vol. 5]. Further, Sgt. Jones did not write down anywhere the time he allegedly provided Appellant his Miranda rights. [Tr. P. 28, Vol. 5]. Sgt.

Jones has no written evidence to substantiate that he gave Appellant his Miranda rights even though Jones could have requested through his portable radio that a Miranda form be brought to him for Appellant to sign. [Tr. P. 31, Vol. 5].

Likewise, Sgt. Jones failed to secure a form signed by Appellant that would have authorized a nurse to draw Appellant's blood and instead directed nurse Teresa Windham to draw Appellant's blood. Jones further failed to seek a search warrant from a judicial officer. [Tr. P. 43, Vol. 5]. Additionally, Appellant was not under arrest at the time his blood was drawn for law enforcement testing purposes. [Tr. P. 43, Vol. 5]. Although Jones contends that he documented everything in the Mississippi Accident Crash Report, [Tr. P. 33, Vol. 5], the report does not reflect that Appellant gave permission for his blood to be drawn. Likewise, Nurse Windham does not recall Appellant giving Sgt. Jones permission for blood to be drawn for the police department to send to the crime lab for analysis. [Tr. P. 55-56, Vol. 5]. She simply cannot recall one way or the other whether Appellant gave Sgt. Jones permission to take the blood. [Tr. P. 56, Vol. 5].

Sgt. Jones had time to review the evidence he and other officers gathered the day after the accident, but he prepared no supplemental report to the Mississippi Uniform Crash Report. [Tr. P. 37, Vol. 5]. Nor did he prepare a supplemental report two or three days later. [Tr. P. 37, Vol. 5]. On April 25, 2007, the Mississippi Crime Lab reported that a blood alcohol analysis of the sample was negative. [R. 43]. On May 21, 2007, after noting that hospital records reported a positive finding of benzodiazepines, Lt. Mark Little of the Southaven Police Department requested that the crime lab perform a drug screening analysis. [R. 25,47]. This test was performed on June 21, 2007, [R. 48], resulting in a positive reading for Alprazolam in the

amount of 73 ng/mL. [R. 52].

On November 17, 2007, Appellant was indicted on two counts of DUI resulting in death and one count of DUI resulting in permanent injury. [R. 9]. Thereafter, on October 21, 2008, Appellant filed a Motion to Suppress all testimony and other evidence regarding the taking and testing of his blood and the results for four reasons: (1) he did not consent to the blood draw; (2) he was not under arrest; (3) the State did not secure a search warrant; and, (4) there was no evidence of probable cause or exigent circumstances that negated obtaining a search warrant. [R. 411-413]. Specifically, the Appellant requested that the following testimony by suppressed:

a. The State's expert Lynn Flarity of NMS Labs;

b. Any NMS Labs' reports detailing analyses of drugs allegedly detected in Defendant's blood;

c. The State's experts from the Mississippi Crime Lab to the extent their testimony concerned the State's testing or chain of custody of Defendant's blood;

d. The testimony of any officers to the extent their testimony concerned the State's testing or chain of custody of Defendant's blood;

e. The testimony of the State's expert Dr. Lesa Lynn Jordan to the extent her testimony concerned collecting blood on the State's behalf and the chain of custody of that blood sample.

[R. 412-413].

It is undisputed that Sgt. Jones prepared no report, supplemental or otherwise, stating that Appellant consented to have his blood drawn until November 12, 2008–approximately 18 months after the accident and approximately three weeks after Appellant's Motion to Suppress the blood sample was filed. [R. 428]. On February 12, 2009, Appellant's suppression motion was denied by the trial court for three main reasons: (1) Sgt. Jones obtained the Appellant's

consent to draw his blood, (2) Sgt. Jones had probable cause, and (3) exigent circumstances existed to obtain the sample without a warrant. [R. 458-461; R.E. 458-461]. As a result, the State used the toxicology results in its case against Appellant. Subsequently, Appellant was convicted in a bench trial [R. 473; R.E. 473] and sentenced to both a prison term and post release supervision. [R. 478-479].

SUMMARY OF THE ARGUMENT

Larry Setzer's blood was seized pursuant to an unlawful search and seizure, in violation of the Fourth Amendment to the United States Constitution and Section 23 of the Mississippi Constitution. In addition, the evidence presented at the underlying suppression hearing demonstrates a lack of consent by the Appellant. Further, the surrounding facts and circumstances did not provide probable cause for the Southaven Police Department to draw Appellant's blood. Moreover, there were no exigencies necessitating a warrantless search and the Appellant was not under arrest at the time his blood was drawn. As such, the trial court erred in denying Appellant's Motion to Suppress and by allowing the admission of the blood test results.

ARGUMENT

The right to be free from unreasonable searches and seizures is guaranteed by the Fourth Amendment of the United States Constitution and the Mississippi Constitution. *See*, U.S. CONST. amend. IV and MISS. CONST. Art. 3, § 23. This prohibition "applies when an intrusion into the body-such as a blood test - is undertaken without a search warrant, absent an emergency situation." *Cole v. State*, 493 So.2d 1333, 1336 (Miss. 1986), *citing Schmerber v. California*, 384 U.S. 757, 770-71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Section 23 of the Mississippi

Constitution provides even greater protections to our citizens than those found within the United States Constitution. *State v. Woods,* 866 So.2d 422, 426 (Miss. 2003). And, this constitutional protection is to be "liberally construed in favor of individual citizens and strictly construed against the State." *Graves v. State,* 708 So.2d 858, 861 (Miss. 1997) (emphasis added).

At the time Appellant's blood was drawn, the Appellant was not under arrest and no warrant was obtained by the State authorizing law enforcement to independently obtain a blood sample absent authority from a neutral judge or magistrate. In addition, there were no exigent circumstances which would have excused the State from submitting appropriate underlying facts and circumstances to a neutral judge to determine if probable cause existed for the issuance of a search warrant compelling Appellant to provide blood. The State, through Officer Jones, did not even attempt to contact a judge and request a search warrant to draw the blood.

The State's conduct in failing to make any attempt, much less a good faith attempt, to request a search warrant from a judicial officer is fatal to the State's case. In an attempt to salvage the illegal taking of Appellant's blood without a warrant, the State, in desperation, claims there were exigent circumstances allowing it to ignore the requirements of the Fourth Amendment of the United States Constitution and Section 23 of the Mississippi Constitution and that Appellant consented to the draw. Both positions are objectively untenable. It was therefore error for the trial court to deny Appellant's suppression motion. [R. 458-461; R.E. 458-461].

I. THE APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE DID NOT CONSENT TO THE BLOOD DRAW.

An appellate court reviews the admissibility of evidence and voluntariness of consent to a blood draw by applying an abuse of discretion standard. *Turner v. State,* 12 So.3d 1, 5 (Miss.App. 2008). In the present case, the trial court erred in admitting the Appellant's blood

test results into evidence as Appellant did not consent to the blood draw.

Absent an emergency situation, a blood sample is valid if the State has either (1) consent, (2) a valid warrant, (3) probable cause; or (4) the search was incident to a lawful arrest. *McDuff v. State*, 763 So.2d 850, 856 (Miss. 2000). In determining whether consent to a warrantless search was voluntary, a court must examine the totality of the circumstances. *Turner* at 5. Consent to a search must be voluntary, and not the "product of duress or coercion, express or implied." *Jones v. State ex rel Miss. Dept. of Public Safety*, 607 So.2d 23, 27 (Miss. 1991), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854, 875 (1972). And, when a search is based on consent alone, it must be accompanied by a *knowledgeable* waiver of rights. *Penick v. State*, 440 So.2d 547, 551 (Miss.1983). As such, Mississippi law requires that consent to a search, including a blood alcohol test, be given knowingly *and* voluntarily. The State did not meet this burden and the Appellant was prejudiced by the Court's decision to admit his blood test results into evidence. Indeed, the record demonstrates no voluntary consent in this case.

The Appellant was involved in a serious car accident, resulting in him sustaining broken teeth and other injuries that required transporting him to the hospital and placing him in a C-collar. [R. 85-92;132-133]. Appellant received an IV and Dilaudid for his injuries which would have lowered his ability to give knowing and voluntary consent. [R. 91, 94]. Sgt. Jones did not obtain a written waiver of rights from Appellant. [Tr. P. 30, Vol. 5]. Sgt. Jones, an experienced officer with nine years experience, [Tr. 19, Vol. 5], did not document anything concerning the Appellant's alleged consent to the blood draw until after Appellant's Motion to Suppress was filed. [R. 428]. The State did not list consent as a reason for obtaining the blood draw until 18

months after the accident and after the Appellant filed his motion to suppress. [R.428]. Based on the totality of the circumstances, it is clear that Appellant did not consent to the blood draw and the State, after the Appellant filed his Motion to Suppress, attempted to bootstrap its failure (not get a warrant) by contending probable cause, exigent circumstances and consent existed.

Initially, the only discovery information supplied to the Appellant and his counsel by the State was a report from Detective Mark Little, stating that Sgt. Jordan Jones of the Southaven Police Department "had the E.R. personnel collect a blood sample." [R. 24]. Interestingly however, Sgt. Jones did not list consent as his reason for drawing the Appellant's blood until November 12, 2008, approximately *18 months after the incident and the blood draw*, and *after* the Appellant filed his Motion to Suppress. [R.428].

In the supplemental report drafted November 12, 2008, Officer Jones, for the first time, stated that Appellant consented to the blood test. [R.428]. The supplemental report further stated that Appellant consented in front of the nurse at the emergency room. [R.428]. At the suppression hearing, Sgt. Jones again asserted that Appellant consented to the testing. [Tr. P. 13, Vol. 5]. This, however, is contrary to both Appellant's testimony and that of nurse Teresa Windham, whom Jones specifically referenced in his report.

At the hearing, Appellant testified that he did not give consent for Sgt. Jones to draw his blood. [Tr. P. 63-64, Vol. 5]. In fact, Appellant testified that Sgt. Jones repeatedly tried to get him to consent, called him a "child murderer", and told him he "was going to jail for life." [Tr. P. 63, Vol. 5]. Teresa Windham testified that she did not recall Sgt. Jones asking nor Appellant consenting to the blood draw. [Tr. P. 55-56, Vol. 5]. She simply did not recall one way or the other. [Tr. P. 56, Vol. 5].

Although Sgt. Jones stated in his supplemental report that Appellant did not seem injured, [R.428], Jones testified at the suppression hearing that the Appellant may not have seen him "because he was in a C-collar looking straight up." [Tr. P. 12, Vol. 5]. Further, Sgt. Jones was impeached significantly at the suppression hearing on numerous material facts. Such inconsistencies and implausible responses as to why he did or didn't do certain things can only be categorized as disingenuous.

For example, Sgt. Jones stated that notwithstanding being with Appellant in the ambulance and being close enough to insert a portable breathalyzer in Appellant's mouth, being with Appellant in Appellant's hospital room while attempting to obtain "consent" and again in the room with the Appellant and Nurse Windham, he claims the Appellant never appeared injured to him. Contrast Officer Jones' testimony with the objective facts: both ambulance and hospital records indicate that Appellant suffered from numerous injuries, including those to the head, mouth, neck, back, and abdomen. [R. 85-92;132]. Further, nurse Teresa Windham recognized that the Appellant was injured when he arrived at the hospital. [Tr. P. 53, Vol. 5]. Sgt. Jones himself recognized that seriousness of the accident. [Tr. P. 19, Vol. 5]. Ambulance and hospital records also indicate that the Appellant was given an IV and Dilaudid for his injuries [R.91, 94], which would have lowered his capacity to give knowing and voluntary consent. It is apparent that all people involved, except Jones, recognized the seriousness of Appellant's injuries.

The record lacks sufficient facts to support the State on its heavy burden of proof that Appellant knowingly and voluntarily consented to the blood draw. The trial court referred to four cases in denying Appellant's Motion to Suppress. [R. 461; R.E. 461]. Only two of these

cases addressed consent; however, these two cases are factually distinguishable from the present.

In *Wash v. State*, the Appellant was convicted of negligent homicide while driving under the influence of alcohol. *Wash v. State*, 790 So.2d 856, 858 (Miss.Ct.App. 2001). Aggrieved by his conviction, the Appellant claimed on appeal that the trial court erred in allowing the introduction of blood test evidence. The Court of Appeals affirmed his conviction, ruling that the Appellant consented to the blood test because he told police officers that, although he would not take a breathalyser test, "he would be willing to do anything else to meet their satisfaction." *Id.* (Internal citations omitted). Further, Wash spoke with an attorney before consenting to the blood draw. *Id.* at 859. "Wash had the presence of mind to refuse a breathalyser test and to request to speak with an attorney before consenting to the drawing of his blood. He was certainly competent to give valid consent." *Id.* (emphasis added). Unlike the *Wash* case, Appellant however was not competent to give valid consent. He was injured and receiving Dilaudid intravenously. Similarly, he did not have the opportunity to discuss with an attorney whether or not he should consent to the blood draw.

Likewise, the Court of Appeals affirmed Appellant's manslaughter conviction in *Sumrall v. State* despite his claim that he did not consent to have his blood drawn. *Sumrall v. State*, 955 So.2d 332 (Miss.Ct.App. 2006). The evidence showed that the officer who approached Sumrall in the hospital smelled alcohol on his breath, was aware of the presence of alcohol containers in his car, found that Sumrall was coherent, alert, and responsive, and gave Sumrall warnings regarding his constitutional rights. *Id.* at 333-34. Sumrall even signed a consent form allowing his blood to be drawn. Therefore, there was "adequate support" to deny Sumrall's motion to exclude the blood test evidence. *Id.* There was not adequate support in the present case to deny

the motion to suppress. Appellant did not sign a consent form, [Tr. P. 30-31, Vol. 5], and there is no indication in the record that Appellant's breath smelled of alcohol or that there was a presence of alcohol at the scene. [Tr. P. 69, 74, Vol. 5]. In this case, the State's entire case proving waiver/consent is the oral recollection of Sgt. Jones. This "recollection" is dubious at best, as it comes 18 months after the fact, and is contradicted by the attending nurse and Appellant. As a matter of law, this is insufficient to overcome the State's heavy burden to waive a Constitutional right. The lower court erred by concluding that the facts of the present case presented similar circumstances to *Wash* and *Sumrall*, and the trial court further erred by denying Appellants' suppression motion relating to the blood test results.

II. THE STATE LIKEWISE DID NOT HAVE PROBABLE CAUSE AND THERE WERE NO EXIGENT CIRCUMSTANCES NEGATING THE NECESSITY OF A SEARCH WARRANT.

A. Lack of Probable Cause

The trial court also ruled that Sgt. Jones had sufficient probable cause to draw Appellant's blood. [R. 461; R.E. 461]. This conclusion was based solely on Sgt. Jones' testimony that Appellant had slurred speech and red eyes. [Tr. 10-11, Vol. 5]. Under the facts of this case, slurred speech and red eyes are simply not enough, given the disingenuous testimony of Sgt. Jones on so many undisputed objective facts.

A trial court's finding of probable cause is reviewed under an abuse of discretion standard. *Vaughn v. State*, 972 So.2d 56, 60 (Miss.App. 2008). Probable cause is "a practical, non-technical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are

sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it. *Strode v. State,* 231 So.2d 779, 782 (Miss.1970). More simply, "probable cause means more than a bare suspicion . . . ." *Wagner v. State,* 624 So.2d 60, 66 (Miss.1993). It is not a uniform mechanical list used for every scenario. Instead, probable cause is based upon the totality of the circumstances presented by a particular case. *Brown v. State,* 19 So.3d 85, 91 (Miss.Ct.App. 2008), *citing Maryland v. Pringle,* 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

Indeed, the Southaven Police Department apparently did not believe that circumstances amounting to probable cause existed as it did not request a drug screening until May of 2007, after it noticed that hospital records, produced a week after the accident, indicated the presence of drugs. [R.47, 82].[2] Additionally, the first mention of Appellant's slurred speech and red eyes was approximately 18 months after the accident and after Appellant filed his Motion to Suppress. [Tr. P.10-11, Vol. 5]. Moreover, Appellant's medical records show that he suffered broken teeth, a head injury, neck sprain, and pains and abrasions to his neck, chest and abdomen. [R. 85-92]. Although Sgt. Jones contended he did not know the Appellant suffered from two broken teeth or any injuries at all [Tr. 24, Vol. 5], Appellant's slurred speech, if in fact it was slurred, is just as likely attributable to that fact as to any other.

Importantly, there was no evidence that Appellant smelled of alcohol, no evidence of drugs, or otherwise any evidence that Appellant exhibited any signs of impairment or intoxication. *See, e.g, McDuff* at 855 (the smell of alcohol, erratic driving, alcohol containers or

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The Appellant contends his medical records were improperly obtained. The State does not admit they were improperly obtained but agreed not to use them in its case in chief or rebuttal. [Tr. P. 4, Vol. 5].

drug paraphernalia in plain sight help officers establish probable cause.). In *Wash, supra,* relied upon in part by the trial court, the officers responding to the scene of the accident also had probable cause to issue the blood test. *Wash* at 859. Eyewitnesses directed the officers to a paper bag containing a can of beer that Wash threw in the bushes. Also, the officers testified that Wash staggered as he walked, his breath smelled of alcohol, and his eyes were red. *Id.* This evidence was in addition to the circumstances of the accident that indicated negligent driving by Wash. *Id.* All of this evidence was adequate to establish probable cause.

At the time Appellant's blood was drawn, there was no evidence that Appellant was driving in an intoxicated condition, that he staggered, or that alcohol, drugs or drug paraphernalia was found in Appellant's car. Simply put, it is clear that Sgt. Jones did not have probable cause to request the blood sample at the hospital. Under the facts available to him at the time he ordered the blood draw, red eyes and slurred speech (if true) were not enough to establish probable cause.

B. There Were No Exigent Circumstances

Even if the trial court did have a substantial basis in finding that probable cause existed, there were no exigent circumstances that negated the requirement of a search warrant. "A warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate that a warrant should properly issue." *Holloman v. State,* 820 So.2d 52, 55 (Miss.Ct.App. 2002).

The "emergency" or "exigency" doctrine is accepted as a narrowly defined exception to the general requirement of a warrant for all searches and seizures. *Smith v. State,* 419 So.2d 563,

570 (Miss. 1982) (*rev'd on other grounds*) (emphasis added). The basic elements of the emergency exception are: (1) The police must have reasonable grounds to believe that there is an emergency and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize the evidence; (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *Id.*

The reasonableness of those circumstances must be evaluated on a case by case basis. *Id.* at 571. Here, there was no evidence of an exigent circumstance presented by the State. Sgt. Jones found Appellant at the scene in an ambulance receiving medical treatment. [Tr. P 10, Vol. 5]. From the accident scene, Appellant was taken to the hospital where he remained until the next morning. [R. 94]. Appellant was not fleeing the scene or otherwise attempting to evade the police. He was receiving medical treatment for his broken teeth and myriad of other injuries. It is clear that Sgt. Jones was motivated by an intent to seize evidence, rather than probable cause or exigent circumstances. The State cannot now assert probable cause as their basis for the search, nor can they claim the existence of exigent circumstances. This is true, especially when Sgt. Jones did not make even a basic attempt to present the matter to an impartial magistrate.

This Court can take judicial notice of the fact that at the time Jones refused to seek approval from a judge for a search warrant, DeSoto County and the Seventeenth Judicial Circuit Court District, where Appellant was convicted, had three Circuit Judges, three Chancellors, a DeSoto County Court Judge, a Southaven, Mississippi Municipal Judge, and four Justice Court Judges. Thus, there were a total of twelve judges that the State, Sgt. Jones and the Southaven Police Department could have attempted to reach and present whatever evidence was available at

the time to the judge for a judicial determination of whether there was probable cause for the issuance of a search warrant. Sgt. Jones failed to take even the simple step of having the police dispatcher call one of the above Judges to determine if he was available. Only one credible conclusion can be gleaned from Sgt. Jones' conduct and actions – he had made up his mind that he was going to obtain the blood sample from Appellant regardless of what the law required him to do. Such conduct by law enforcement officers has been condemned by courts for years. *See e.g.*, *Shaw v. State*, 938 So.2d 853, (¶14) (Miss.App. 2005), citing *Katz v. U.S.*, 389 U.S. 347, 359, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and *McDonald v. U.S.*, 335 U.S. 461, 455-56, 69 S.Ct. 191, 93 L.Ed 153 (1948) ("The presence of a search warrant serves a high function.").

CONCLUSION

The testimony of the Appellant, Nurse Windham, and the Appellant's medical records do not support the State's contention that the Appellant "gave" consent to have his blood drawn. Moreover, no consent form or other evidence is available to corroborate Sgt. Jones' version of events. Even more telling, however, is the complete lack of any report detailing the alleged consent at the time the blood was taken. Certainly an experienced officer, such as Sgt. Jones, would document such important information, knowing the seriousness of the accident and that two people were deceased and another injured. Rather, the State tries to salvage its case on a supplemental report first drafted and submitted approximately 18-months after the accident and after Appellant's Motion to Suppress was filed. This report contained glaring inconsistencies from the facts and circumstances reported on April 17, 2007, the date of the accident. The drawing of the Appellants' blood was constitutionally impermissible. Accordingly, Appellant respectfully requests this Court reverse the court's ruling on Appellant's Motion to Suppress.

CERTIFICATE OF SERVICE

I, T. SWAYZE ALFORD, of Swayze Alford Attorney at Law, do hereby certify that I have this date forwarded via Federal Express and/or U.S. mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant, LARRY SETZER, to:

Steven Jubera, Esq.
Assistant District Attorney
365 Losher St.
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Mississippi Attorney General
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Honorable Robert P. Chamberlin
Circuit Court Judge
Seventeenth Judicial District
State of Mississippi
P. O. Box 280
Hernando, MS 38632

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

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, the 21 day of January, 2010.

T. SWAYZE ALFORD