

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GREG MCDONALD**

**APPELLANT**

**V.**

**NO. 2009-KA-0970-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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**On Appeal from the Circuit Court of Lauderdale County, Mississippi**

**MISSISSIPPI OFFICE OF INDIGENT APPEALS  
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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Greg McDonald, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 20<sup>th</sup> day of October, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**STATEMENT OF THE ISSUES**

**I. THE TRIAL COURT ERRED IN DENYING MCDONALD'S MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT MCDONALD'S REQUEST FOR A MISTRIAL FOLLOWING THE TWO OF THE STATE'S WITNESSES' IMPROPER COMMENTS ON MCDONALD'S POST-MIRANDA SILENCE.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Lauderdale County Circuit Court in Lauderdale County, Mississippi. A grand jury indicted Greg McDonald for DUI Maiming, in violation of Mississippi Code Annotated Section 63-11-30(5) (1972).

The Honorable Lester F. Williamson, Jr, Circuit Court Judge, presided over the jury trial that began on March 23, 2009. McDonald had been previously convicted of driving under the influence (DUI), so he faced the charge of DUI Second Offense. At trial, McDonald stipulated to his previous conviction of a misdemeanor DUI offense and the jury only considered the DUI Maiming charge.

The jury rendered a guilty verdict as to the charged offense. The court considered McDonald's prior DUI offense and sentenced him to serve twenty (20) years in the custody of the Mississippi Department of Corrections (M. D. O. C.) with thirteen (13) years suspended. After serving the first seven (7) years, McDonald is to be placed on ten (10) years of post-release supervision. The first five (5) of those years, McDonald is required to report to authorities and the remaining five (5) years, he will be under non-reporting duties. All of these years are to be served under the supervision of the M. D. O. C. In addition to court costs and fines, the trial court ordered McDonald to reimburse the complainant, Kerry Smith, four thousand five hundred (\$4,500) dollars for the value of Smith's damaged motorcycle.

Aggrieved by this decision, McDonald filed his motion for J.N.O.V., or, alternatively, his motion for a new trial on April 24, 2009. The court denied this motion and McDonald timely files this appeal.

### **FACTS**

On July 19, 2007, an accident occurred on State Boulevard extension in Lauderdale County, Mississippi. Tr. 247-48. The first member of law enforcement to reach the scene was off duty Sheriff Billy Sollie ("Sheriff Sollie"). When Sheriff Sollie arrived, he found medical personnel attending to Kerry Smith ("Smith") as he lay on the ground, a motorcycle in the ditch, and a truck parked in the dirt driveway that led to the nearby creek. Tr. 248. Sheriff Sollie called dispatch from his cell phone. He also inquired of the crowd as to the driver of the truck. Tr. 249-250. The Appellant, Greg McDonald ("McDonald"), responded that he was the driver and that the motorcycle hit him. Tr. 250-251.

One of the officers that responded to the scene was Deputy Odell Hampton ("Deputy Hampton"). Deputy Hampton was in charge of writing up the accident report. Tr. 294. At the time

of the accident, Deputy Hampton had only four (4) to five (5) months experience as a Deputy and had relatively no experience working accidents. Tr. 284-285, 294. Deputy Hampton took no measurements, but did make a "calculated guess" as to the distance between where the motorcycle and truck ended up. Tr. 283. Deputy Hampton did not step off this guess and did not document the position of any debris. In addition, Deputy Hampton did not recall looking for skid marks. Tr. 285.

According to Deputy Hampton, he observed empty beer cans in the passenger floorboard of McDonald's truck, but did not check to see if they had been recently consumed. Tr. 281, 282, 295-297. Deputy Hampton also claimed McDonald smelled slightly of alcohol. Tr. 281. However, Deputy Hampton had no special training which allowed him to make a correlation between odor of alcohol and a person's blood alcohol content. Tr. 295.

Deputy Michael McCarra ("Deputy McCarra") was also called to the scene on July 19, 2007. Tr. 302. According to Deputy McCarra, McDonald smelled of alcohol and marijuana, but Deputy McCarra testified that he recovered neither alcohol nor marijuana from the scene. Tr. 304, 313. Deputy McCarra claimed McDonald was clumsy, slow, and that his eyes were watery and red. Tr. 309. Deputy McCarra also claimed McDonald's speech was slurred, but admitted that he had never met the defendant and did not know McDonald's normal speech pattern. Tr. 304, 312. Nevertheless, Deputy McCarra assumed McDonald was intoxicated. Tr. 304.

Deputy McCarra took McDonald to the Sheriff's Department and asked him to complete three field sobriety tests: (1) the HGN (horizontal gaze nystagmus) test, (2) the walk-and-turn, and (3) the one-leg stand. McDonald indicated six signs of impairment, out of a possible eight clues, on the walk-and-turn test and McDonald was unable to perform the one-leg stand. Tr. 307-08. Deputy McCarra then offered McDonald the Intoxilyzer 8000 test, a test that is used to indicate blood alcohol content. Tr. 309. McDonald exercised his right to refuse the Intoxilyzer test and he was

arrested and charged with DUI refusal. Tr. 311.

Ken Smith alleged that McDonald negligently hit his motorcycle when McDonald made a left turn in front of Smith's bike. Smith claimed that, at the time of the accident, he was headed eastbound on State Blvd Extension. Tr. 147. He claimed that McDonald's truck was headed westbound and made a sharp left turn into Smith's land, causing the accident.

Fourteen (14) months after the accident occurred, Trooper Jason Walton ("Trooper Walton"), an accident reconstructionist for the Mississippi Highway Patrol, was contacted to review the case. Tr. 352. Since the police did not take photographs at the scene of the accident, Trooper Walton relied on the photographs that Smith following the accident. From the officers' statements at the photographs, Trooper Walton determined that McDonald's truck was headed westbound at the time of the accident. Tr. 352, 356.

The defense attempted to offer the expert testimony of Mr. Paul J. Schubert to testify that Trooper Walton did not have sufficient evidence to present an accident reconstructionist report. Tr. 437. The trial court did not allow Schubert to testify, finding in part that his opinion would not help the jury in deciding the issues of the case. Tr. 445.

### **SUMMARY OF THE CASE**

It is uncontested that, on July 19, 2007, McDonald's truck and Smith's motorcycle collided in a very unfortunate accident on State Boulevard Extension in Lauderdale County, Mississippi. McDonald and Smith were the only eyewitnesses to the collision. McDonald was convicted of DUI Maiming as a result of the accident. McDonald's conviction was based on weak and tenuous evidence and the Court should reverse based on the following grounds.

## ARGUMENTS

### **I. THE TRIAL COURT ERRED IN DENYING MCDONALD'S MOTION FOR A NEW TRIAL AS THE VERDICT WAS ~~BASED ON THE OVERWHELMING WEIGHT OF THE EVIDENCE~~**

#### ***i. Standard of Review***

The Mississippi Supreme Court has compared the standard of review of motions for new trials as being similar in nature to the Court sitting as a thirteenth juror. *Ross v. State*, 954 So. 2d 968, 1016 (¶127) (Miss. 2007). "A finding that the verdict was against the overwhelming weight of the evidence indicates that the Court disagrees with the jury's resolution of conflicting evidence and requires a new trial." *Id.*

The Court will order a new trial and allow the evidence to be placed before a second jury if the first jury's guilty verdict was based on "extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict." *Id.* (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984) (Lee, J., *dissenting*). The Court will only disturb the jury's verdict when the verdict is so contrary to the overwhelming weight of the evidence that it would cause an unconscionable injustice if the verdict were allowed to stand. *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005).

#### ***ii. The State presented only weak and tenuous evidence to support the charged offense.***

McDonald was ~~convicted of DUI~~, in violation of Mississippi Code Annotated, Section ~~23-15-01~~ (Supp. 2009). In order to obtain a guilty verdict, the prosecution was required to prove that McDonald : (1) drove his truck while under the influence of an intoxicating liquor, (2) in a negligent manner, (3) and caused mutilation, disfigurement or permanently disabled or destroyed the tongue, eye, lip, nose, or any other limb or organ or member of Kenny Smith. Miss. Code Ann. §§63-11-30(1), (5). The prosecution, however, presented only weak and tenuous evidence to satisfy

each element of the charged offense.

***iii. The State's accident reconstructionist could not find McDonald was the proximate cause of the accident.***

Smith testified that he decided to ride his motorcycle on July 19, 2007. Tr. 143. At some point during his route, Smith claimed he saw a black extended cab GMC truck approaching in the opposite direction. Tr. 147. According to Smith, the approaching vehicle was going straight, but then veered slightly towards the centerline, still remaining in the correct lane of traffic. Tr. 148. Smith contends that he began to brake and sluff off speed when the black GMC crossed the centerline. Tr. 149. As the GMC slowed considerably, Smith decided to ease off the brakes and just go around. Tr. 149,151.

Smith claimed that as he moved over in his own lane to give the GMC room, the GMC gassed it and made a hard left. Tr. 152. Smith immediately slammed on his brakes; in fact, the rear tire of his motorcycle came off the ground he broke so hard. [REDACTED] In a statement to the police given in September of 2007, Smith said he slammed on both the rear and front brakes as hard as he could. [REDACTED]. However, at trial, Smith stated he merely applied both brakes, but only gently applied the rear brakes. Tr. 184.

Fourteen (14) months after the accident occurred, Trooper Walton, an accident reconstructionist for the Mississippi Highway Patrol, was contacted to review the case. Tr. 352. He was provided with photographs that Smith took of the accident vehicles following the accident. None of the officers took photographs of the accident scene. The accident scene was not measured to determine the distance of the debris from the actual vehicles.

[REDACTED]  
Trooper Walton acknowledged that his opinion was based on assumptions, not facts, and [REDACTED]. Tr. 388. Trooper Walton, at the

time of trial, had been an accident reconstructionist since January of 2008, but had never been accepted as an expert prior to this time. Tr. 347.

*iv. Kenny Smith did not prove that he was permanently “maimed or debilitated”*

According to Smith, he used his experience with motorcycles to avoid skidding and locking up his brakes, but he hit the left end of the truck anyway. Tr. 153,155, 156. Smith testified that he was thrown over the hood of the truck, but [REDACTED] injured [REDACTED].  
[REDACTED] and to his [REDACTED] [REDACTED]. Tr. 157-159, 162-163.  
Smith spent five (5) days in the hospital during which time he had a plate and several screws inserted in order to repair his collar bone. Tr. 166. Despite his injuries, Smith returned to work three weeks later and at the time of trial had a full time job, plus two part time jobs. Tr. 209.

Smith did not prove evidence that he was "maimed" or permanently disfigured, as outlined by the statute. [REDACTED] but he did not present any [REDACTED] records or testimony of these injuries. There was no proof presented that these injuries would be lasting injuries. The trial court allowed Smith to testify to the extent of his injuries as an expert, based solely on his experience as a radiology technician.

What is most glaring, perhaps, is that Smith testified he still rode motorcycles by the lake with his six-year-old child. Smith still carries on with the daily operations of his life. The injuries he sustain did not reach the level of “maiming” as contemplated by the law.

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT MCDONALD'S REQUEST FOR A MISTRIAL FOLLOWING THE TWO OF THE STATE'S WITNESSES' IMPROPER COMMENTS ON MCDONALD'S POST-MIRANDA SILENCE.**

*i. The trial court committed reversible error in failing to grant a mistrial following Deputy Hampton and Lieutenant McCarra's improper comments on McDonald's post-Miranda silence.*

~~During the trial, the State's witnesses testified that McDonald refused to talk to police after the police advised him of his constitutional rights. Miranda warnings inform the accused that he has a constitutional right, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, against self-incrimination and assure the accused that his silence will not be used against him. U.S.C.A. Const. Amends. 5, 14. See *Miranda v. Arizona*, 384 U.S. 436, 467-473, 86 S. Ct. 1602, 1624-1627, 16 L.Ed.2d 694 (1966); *Doyle v. Ohio*, 426 U.S. 610, 95 S.Ct. 2240, 2241 (1976); ~~\_\_\_\_\_~~ (citing *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222, 226 (1980)). Likewise, the Mississippi Constitution also protects the accused in criminal prosecutions from being compelled to give evidence against himself. Art. III §26, Miss. Const.~~

*Comments on a prosecutor's repeated mentioning of D's silence*

The trial court, however, ruled that these errors did not require the court to grant a mistrial. The issue before this Court is whether the trial court properly denied McDonald's requests for a mistrial due to these errors that affected his constitutional rights.

Deputy Hampton testified to the following, during direct examination:

**PROSECUTOR:** Okay. Now, when you saw [McDonald at the crash site], what did you do? What were your duties out there?

**DEPUTY HAMPTON:** At the time, I was told to gather information for the report. Lieutenant McCarra had [McDonald's] license in his hand, and I took the information from that and asked Mr. McDonald what happened, but *he had already been Mirandized*, and he stated he didn't have anything to say."

Tr. 271. (Emphasis added).

McDonald's attorney immediately objected to the statements and requested that the court grant a mistrial based on the officer's improper comment on McDonald's post-Miranda silence. [*Id.*] Outside the presence of the jury, the trial court acknowledged that the deputy's statement was

inappropriate, but the court did not believe the comment deprived McDonald of a fair trial. Tr. 278

The court noted the following:

**COURT:** . . . I understand the request for the mistrial. I understand the law about commenting on post-Miranda silence and that being an inappropriate thing. However, I don't think that any defendant is entitled to a perfect trial. *The question is whether there is a fair trial.* And I'm going to, under the circumstance here and considering the very minimal comment here, ask the jury to come back in, and I will direct that they disregard any statement unless you feel like, Mr. Parrish [the defense attorney], it would be more advantageous just to skip over it and make no comment at all....

Tr. 278 (Emphasis and punctuation added)

The defense attorney was certainly placed in a quandary by the statement. The defense informed the court that he would prefer the court not bring additional attention to the error through a limiting instruction. However, Deputy Hampton's statement was not the only comment on McDonald's post-Miranda silence. During direction examination, Lieutenant McCarra provided additional impermissible testimony regarding McDonald's refusal to give information to police after the *Miranda* warning.

**PROSECUTOR:** Okay. Now, when you arrived on the scene, did you talk with Sheriff Sollie about what you needed to do?

**DEPUTY HAMPTON:** When I arrived on scene, Mr. McDonald. . . was already in handcuffs, and Sheriff Sollie took his handcuffs off of him and handed me a driver's license. I immediately Mirandized Mr. McDonald at the time.

. . . .

**PROSECUTOR:** All right. . . the Sheriff took his handcuffs off. I assume he got him out of the vehicle to do that?

**DEPUTY HAMPTON:** Yes, sir.

**PROSECUTOR:** And then you. . . read him his Miranda warnings, and then what did you do?

**DEPUTY HAMPTON:** . . . [A]fter I Mirandized him and he said he. . . indicated that he



*States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1620, 20 L.Ed.2d 476 (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953))). While “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,” *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), “most constitutional errors can be harmless.” *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). The Supreme Court has recognized a limited class of fundamental constitutional errors, “structural errors,” that are not subject to harmless-error analysis and require automatic reversal. *Neder*, 527 U.S. at 7, 119 S.Ct. 1827 (citing *Fulminante*, 499 U.S. at 309, 111 S.Ct. 1246). However, for all other constitutional errors, reviewing courts must apply harmless-error analysis in order to determine whether the error was harmless “beyond a reasonable doubt.” *Neder*, 527 U.S. at 7, 119 S.Ct. 1827 (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. 824). “[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Van Arsdell*, 475 U.S. at 681, 106 S.Ct. 1431. Once the constitutional error has been established, the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 296, 111 S.Ct. 1246.

In this case, the officers’ testimonies should not be deemed harmless error. [REDACTED]

[REDACTED]

[REDACTED] at the grand jury’s trial to the [REDACTED] [REDACTED] [REDACTED] 704 (¶25)

(Miss. 2008). Given the weak and tenuous evidence in which the jury based its guilty verdict, the State cannot show that the jury’s guilty verdict was not affected by the deputies impermissible comments.

**CONCLUSION**

McDonald respectfully requests this Court to reverse this case for a new trial based constitutional errors and because this verdict was against the overwhelming weight of the evidence.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Greg McDonald, Appellant

By: Erin E. Pridgen  
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**CERTIFICATE OF SERVICE**

I, Erin E. Pridgen, Counsel for Greg McDonald, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lester F. Williamson, Jr.  
Circuit Court Judge  
Post Office Box 823  
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Honorable E.J. (Bilbo) Mitchell  
District Attorney, District 10  
Post Office Box 5172  
Meridian, MS 39302

Honorable Jim Hood  
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This the 20<sup>th</sup> day of October, 2009.

  
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