IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS IRBY — APPELLANT

VS. — NO. 2009-KA-1005

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

THOMAS IRBY **APPELLANT**

vs. **CAUSE No. 2009-KA-01005-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 Clarke County, Mississippi in which the Appellant was convicted and sentenced for his felony of "**DUI MAIMING**".

STATEMENT OF FACTS

Jerry Ivey was a "road deputy" with the Clarke County Sheriff's Department on 10 May 2008. He was sent to County Road 430 to investigate a car collision there at about two of the clock on the afternoon of that day. When he arrived at the scene of the collision, he found a pickup truck and a minivan standing on the side of the road, facing west. The pickup truck belonged to the Appellant; the van to someone named Miller. The pickup truck was redolent of alcohol, and Ivey saw a beer can lying inside it. One of the passengers from the Miller van was being rolled to an ambulance. The Appellant was in his truck and was being treated by

emergency personnel.

The Appellant was taken to hospital. Ivey went to see him there and obtained from the Appellant a consent to draw blood. The Appellant gave his oral and written consent, and blood was then drawn by a registered nurse. Ivey then took the blood samples to the Mississippi Crime Laboratory in Meridian. (R. Vol. 2, pp. 91 - 108). The blood sample was taken some three to three and a half hours after the collision. (R. Vol. 3, pg. 191)

Before visiting the Appellant in hospital, Ivey made measurements of tire tracks. It was obvious to Ivey how the collision occurred. The Miller vehicle was being driven in the northbound lane of the highway. The Appellant was driving his vehicle south but in the northbound lane. The vehicles collided at a "reflective angle". (R. Vol. 3, pp. 204 - 206).

John Stevenson, a forensic scientist with the Mississippi Crime Laboratory specializing in blood alcohol analysis and drug analysis, then testified. The Appellant's blood tested positive for Alprazolam, commonly known as Xanax. One effect of the drug is to cause drowsiness. Hydrocodone was also present in the Appellant's blood, as well as a "breakdown product" of cocaine. Stevenson further testified that cocaine metabolizes very rapidly. Samples of the Appellant's blood were sent to a laboratory in Pennsylvania for quantitative analysis. (R. Vol. 2, pp. 108 - 134).

Dr. Laura Labay, a forensic toxicologist with NMS Laboratories in Willow Grove, Pennsylvania, was called to testify. Analysis of the Appellant's blood sample yielded a concentration of 410 nanograms per milliliter of the cocaine "breakdown product", 90 nanograms per milliliter of hydrocodone, and Xanax in a concentration of 87 nanograms per milliliter. As for the quantity of Xanax found in the Appellant's blood sample, Dr. Labay testified that the therapeutic range runs from 10 to 50 nanograms per milliliter and that the drug is potentially

toxic at a concentration greater than 75 nanograms per milliliter. Fatigue and drowsiness are common side effects involved with the use of the drug. Drowsiness is a side effect of the use of hydrocodone. (R. Vol. 2, pp. 135 - 150).

The drugs found in the Appellant's blood sample could have impaired the Appellant's ability to operate a motor vehicle in a safe fashion. They could have adversely affected the Appellant's alertness, judgment, perception, coordination, response time and sense of care and caution. (R. Vol. 3, pp. 151 - 153).

Olivia Miller, the driver of the minivan, testified that her husband and she were driving on County Road 430 on 10 May 2008. As they passed a house belonging to one Roger Robinson, Mrs Miller, who was driving the van, observed a Ford Ranger being driven in her lane. Mrs Miller slowed her vehicle and thought the driver of the Ranger, who was the Appellant, would move into his proper lane. But the Appellant never did, and he appeared to be driving at a high rate of speed. Mrs Miller, finally deciding that the Appellant was not going to get into the proper lane, attempted to avoid the Appellant by driving into the Appellant's lane, she deciding that her right side of the road was too dangerous to use. The collision then occurred.

Mrs Miller suffered numerous injuries, and she underwent three rounds of surgery to correct what the Appellant caused. Her husband, though, suffered severe brain injury. At the time of trial, her husband had only the use of left arm and head. Mrs Miller described his physical state in detail. Mrs Miller further testified that she was in close proximity to the Appellant at one point while they were each being treated by medical personnel. The Appellant smelled of alcohol and admitted that he had been drinking that morning. (R. Vol. 3, pp. 249 - 289).

Billy Gene Jay, Jr. then testified. He said that he had know the Appellant for some years. On the morning of 10 May 2008 he saw the Appellant. The Appellant had run his truck off Causeyville Road. Jay stopped to see if the Appellant needed assistance. The Appellant said that he was not hurt but needed help in getting his truck back on the road. Jay had the capability to pull the Appellant's truck back onto the road but declined to do so since Jay thought the Appellant did not need to be driving. Jay thought the Appellant should not be driving because the Appellant explained that the reason he had driven off the road was because he had been in a conversation with the good Lord. According to the Appellant, he closed his eyes to "seal the deal", and when he opened his eyes he found that he was off the road and in water. Jay knew that a deputy sheriff lived further down the road, so he went to that person's residence. The deputy was not home, so Jay rang emergency services. (R. Vol. 3, pp. 289 - 296).

Sherrie Hostetler was called to testify. She said she saw something strange at about one o'clock on the afternoon of 10 May 2008 on Causeyville Road. What she saw was a brown truck in a ditch. The ditch was full of water and the truck was completely surround by the water. The Appellant was in the truck, said he was not injured, and that he had called for help but did not know if help was coming. Mrs Hostetler offered to get someone to pull the Appellant out of the ditch, but the person she spoke to declined for fear that the Appellant was impaired and should not be driving. (R. Vol. 3, pp. 297 - 300)

The State produced two more witnesses to testify concerning skid marks and the condition of the road and such things as that, but we do not feel it necessary to set that testimony out here. (R. Vol. 4, pp. 304 - 337).

STATEMENT OF ISSUES

1. DID THE STATE SUFFICIENTLY ESTABLISH THAT THE APPELLANT CONSENTED TO THE GIVING OF A BLOOD SAMPLE?

2. DID THE TRIAL COURT UNDULY LIMIT THE DEFENSE CROSS-EXAMINATION OF THE WITNESS IVEY?

3. WAS THE VERDICT SUPPORTED BY THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE STATE ESTABLISHED THAT THE APPELLANT CONSENTED TO THE GIVING OF A BLOOD SAMPLE

2. THAT THE TRIAL COURT DID NOT UNDULY LIMIT THE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM

3. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE

ARGUMENT

1. THAT THE STATE ESTABLISHED THAT THE APPELLANT CONSENTED TO THE GIVING OF A BLOOD SAMPLE

In the First Assignment of Error, the Appellant complains, firstly, that the State failed to establish that his consent to give a blood sample was voluntarily made. This is so, says the Appellant, because the State did not present the testimony of the nurse or nurses who took the blood sample. The Appellant then goes into an argument to the effect that the trial court should have had a hearing out of the presence of the jury to determine the voluntariness of his consent. From there, the Appellant drifts into another argument to the effect that the trial court refused him the right to object to the blood evidence at trial.

The facts undergirding this assignment of error are as follow. Prior to trial, the Appellant filed a motion in limine, in which he claimed that the blood sample had been taken without his

consent. He also claimed that the blood sample was taken pursuant to Miss. Code Ann. Section 63-11-7 and that that provision permitted testing of blood samples for the presence of ethyl alcohol only. The Appellant further claimed that no alcohol was found in the blood sample and that there had not been a quantitative analysis of the substances that were found in the blood sample The relief sought was exclusion of any and all evidence concerning "other substance[s]" obtained under authority of Section 63-11-7. This motion was set for a hearing. (R. Vol. 1, pp. 18 - 22).

There was no hearing on the motion on the scheduled date for the hearing, the motion to have been rescheduled. (R. Vol. 2, pp. 26 - 27). The motion was not reset, however, apparently because it was explained to the defense that the State intended to seek admission of the blood evidence on the basis of consent, rather than on the basis of anything set out in Section 63 -11-7. (R. Vol. 2, pp. 95 - 100; Vol. 3, 218).

In the course of the trial, the State showed that the witness Ivey went to the hospital to which the Appellant had been taken. The Appellant had been injured, but he spoke to Ivey. Ivey specifically asked the Appellant for permission for a blood sample, and the Appellant granted his consent. Ivey read the contents of a consent form to the Appellant; The Appellant signed the consent form. The Appellant's signature was witnesses by the registered nurse who took the blood sample. (R. Vol. 2, 95 - 97; Exhibit 4).

At that point in the testimony, the Appellant entered an objection to the introduction of the consent form, the basis for the objection being that the registered nurse had not been brought forward to testify. There was then a somewhat confusing argument made by the defense, referring to Section 63-11-7 and consent, but the position by the defense, apparently, was that the State was required to present the testimony of the witness to the consent in order to lay the

predicate for admission of the consent form. In response, the prosecutor stated that Ivey could and would testify that he was present when the Appellant consented to the taking of the blood sample and that he saw the Appellant sign the consent form. The defense then made some comment about chain of custody and stated that it would be the defense position that the Appellant never signed the consent form. The Appellant's objection was then overruled. (R. Vol. 2, pp. 98 - 100).

Ivey then went on to testify concerning the consent forms, the fact that one nurse read the consent form to the Appellant, the fact that the Appellant signed the form. The Appellant did not sign on the signature line but somewhat below it. The nurse who drew the blood sample and another nurse signed as witnesses. The consent forms were introduced into evidence. (R. Vol. 2, pp. 100 - 104).

The State then presented the testimony of experts concerning the results of the analyses performed on the blood sample. After the conclusion of that testimony, Ivey was recalled to testify about other aspects of his investigation.

On cross-examination, the defense instigated a line of questioning about the circumstances surrounding the Appellant's consent to the taking of the blood sample and whether Ivey would have proceeded differently had consent not been given. The State objected to this line of questioning, asserting that what Ivey might or might not have done had the Appellant not consented was irrelevant. The Appellant then attempted to ask Ivey whether any of the victims were unconscious while he was at the hospital, which prompted another objection by the State. (R. Vol. 2, pp. 215 - 216).

There was another hearing outside the presence of the jury. The prosecutor pointed out that the Appellant had filed a pre-trial motion concerning the admissibility of the drug test. The

prosecutor further pointed out that testimony and reports concerning the results of the tests were already in evidence. It was the prosecutor's view that it was too late to challenge the admissibility of the blood test or tests. The defense response was that it was attempting to attack consent, by putting questions to Ivey about the extent of the Appellant's injuries and the presence of witnesses. The defense further stated that whether there was an alternative way to obtain the blood sample went to Ivey's motive or intent. (R. Vol. 2, pg. 218). We will note, though, that the defense did not attempt to explain what relevance Ivey's motive or intent had in the case.

The trial court noted the filing of the motion in limine and the fact that it was never brought forward for a hearing. Consequently, in the court's mind the issue or issues raised in that motion were waived by the failure to bring it on for a hearing in a timely fashion. Beyond that, though, was the fact that the State's theory, with respect to the admissibility of the results of the tests on the blood sample, was that the Appellant consented to the giving of the sample. That being so, whether there was an alternate means of obtaining the sample was not relevant. The trial court then permitted the defense it make a record on the matter of what Ivey would have done had the Appellant refused consent. (R. Vol. 2, pp. 218 - 224).

As we have said, the Appellant raises several issues here. We will address them separately.

1. Was it necessary to produce the testimony of the nurses who witnessed the consent?

The Appellant objected at trial to the admission of the consent form signed by the Appellant unless one of the nurses was called to testify as to having witnesses the Appellant's signature. The State responded that Ivey could testify and had testified as to the Appellant's consent. The trial court overruled the objection. (R. Vol. 2, pg. 97).

The Appellant offers two reasons why one or both of the nurses who signed the consent

form as witnesses were required to be called to testify. First, citing *Agee v. State*, 185 So.2d 671 (Miss. 1966), he says that when voluntariness of a confession in a criminal case is rebutted, the State must present all witnesses to the waiver of the right to counsel and privilege against self - incrimination. The second reason a notion that the State is required to prove the "totality of the circumstances of the consent". The Appellant, however, does not cite any authority to the effect that the State must call as witnesses those persons who signed a consent form.

The rule set out in *Agee* is specific to and limited to questions concerning voluntariness of a confession. This Court has clearly limited the application of *Agee* to voluntariness - of - confession issues. *Abram v. State*, 606 So.2d 1015, 1030 (Miss. 1992)(Only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the state under *Agee*). The Mississippi Court of Appeals has recognized this limitation of *Agee* in the context of a consent - to -search issue. *Jackson v. State*, 935 So.2d 1108, 1113 (Miss. Ct. App. 2006). *Agee* has no application in the case at bar.

As for the "totality of the circumstances of the consent" argument, it is true that the question of whether consent was given is a question resolved by considering the "totality of the circumstances". *Logan v. State*, 773 So.2d 338, 343 (Miss. 2000). There are several considerations to be taken into account in this regard. *Culp v. State*, 933 So.2d 264 (Miss. 2005).

In the case at bar, Ivey clearly testified that the Appellant gave consent and clearly described the circumstances surrounding the giving of the consent. The Appellant was an adult, was cooperative, was alert and awake, and Ivey's request was made in a hospital. The Appellant, interestingly enough, did not testify at trial. Nor did the Appellant move forward with his motion in limine or with an amended motion in limine. The Appellant thus did not put Ivey's testimony on this point into issue. That being so, it is difficult to see the necessity of having the

nurses' testimony.[1]

The Appellant points to the fact that he was about to have surgery when he gave his consent. Perhaps this is so, yet that fact alone would not require the conclusion that he was incapable of giving consent. The fact that his handwriting was lower on the consent form than would have been expected was explained by the fact that the Appellant was lying in a hospital bed when he signed it. Ivey was clear, though, that the Appellant was awake and alert when he was asked for consent, was read the consent form, and signed the consent form. (R. Vol. 3, pp. 221 - 222). None of this was put into issue by the Appellant.

Nonetheless, the Appellant, citing *Comby v. State*, 901 So.2d 1282 (Miss. Ct. App. 2004), asserts that the testimony of the nurses was necessary. It is true that the nurses involved in *Comby* did testify as to that appellant's mental condition. However, *Comby* does not hold that each person present when a consent to the giving of a blood sample is made must testify. In the case at bar, the nurses, if available, might have testified. Why they did not is not apparent from the record. But there is no requirement of which we are aware that they should have testified. Since it was the State's burden to establish consent, it was a matter for the State to decide as to what witnesses to call for that purpose.

Ivey clearly established that the Appellant voluntarily consented to the giving of a blood sample. The Appellant did not produce testimony to contradict Ivey. Ivey's testimony was sufficient to permit the trial court to find that the consent was valid. The Appellant presents no authority to the effect that each person present at the time a consent to the giving of a blood

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[1] Even if *Agee* had application in the case at bar, which it does not, the failure of the Appellant to put Ivey's testimony concerning consent into issue would have made it unnecessary to have all of those who were present testify. Ivey's testimony would have created a prima facie case for admission.

sample must be brought forward to testify, and we have found no such authority. In the case at bar, Ivey's testimony showed that the Appellant was aware of the circumstances when he gave his consent. This, as *Comby* states, was sufficient, particularly where, as in the case at bar, there was no testimony to put Ivey's testimony in issue

2. Did the trial court err in failing to have a hearing out of the presence of the jury to determine the voluntariness of the consent; did the trial court prohibit the Appellant from objecting to the admission of the blood evidence on the ground of a lack of a proper predicate

As the prosecutor was in the process of proving the Appellant's consent, the defense objected. The ground asserted was that a Miss Westbrook, the nurse who actually took the blood sample and one of two nurses who signed as witnesses, was required to testify. The prosecutor replied that he was not required to call those who were present to testify. He also observed that the issue of consent had been raised in a pre-trial motion, one that the Appellant did not bring forward for a hearing. The jury was then retired. (R. Vol. 2, pp. 97 - 98).

The defense then explained or attempted to explain why it did not bring its motion in limine forward. It then repeated its contention that the State had failed to lay the predicate for the introduction of the consent form "from either Ms Westbrook or the witness". The prosecutor reiterated his position that Ivey could and would authenticate the document, and that Ivey's testimony was sufficient for the purpose. The prosecutor further pointed out that Ivey had already testified, without objection, that the Appellant had given his consent. The defense maintained that Westbrook's testimony was essential and represented to the court that the defense would contend that the Appellant did not sign the consent form. The Appellant's objection was overruled. (R. Vol. 2, pp. 99 - 100; 95).

This objection by the defense was quite limited. It did not seek a full - blown hearing, out of the presence of the jury, on the issue of consent. The objection was simply that in the defense

view the State was required to present Westbrook's testimony before the consent form could be put into evidence. This is what the trial court's ruling went to.

The second time the matter of the consent came up at trial was in the course of the Appellant's cross-examination of Ivey. The Appellant entered upon a line of questioning concerning whether Ivey would have gotten a blood sample from the Appellant anyway had the Appellant refused consent. The State objected, the ground being that the State was relying upon consent and not a statutory provision that might have permitted the taking of a blood sample without the Appellant's consent. The Appellant persisted. At that point, the trial court stated that it would permit the Appellant to make his record.

Once the jury retired, the prosecutor pointed out that the consent form and the testimony about consent had been admitted, together with testimony about the results of the drug screens. The prosecutor took the position that it was too late to challenge admissibility and that questions addressed to Ivey as to what he would have done had the Appellant not given consent were simply irrelevant. In response, the defense asserted that those questions concerning what would have happened had the Appellant not given consent were relevant to Ivey's "motive". They were also said to have gone to "intent". However, the defense wholly failed to explain what "motive" or "intent" on the part of the deputy had to do with the case, in view of the fact that admissibility was bottomed on the position that the Appellant gave consent. (R. Vol. 3, pp. 215 - 218).

The trial court found that the Appellant did not bring his motion in limine forward for a ruling and that for that reason it was waived. It further held that the State's theory was that the Appellant gave consent and offered evidence in support of that theory. Whether an alternative to consent existed was irrelevant. It then gave the defense the opportunity to make its record. (R. Vol. 3, pp. 218 - 224).

To the extent that the complaint made by the Appellant is that he was denied the opportunity to object to the introduction of blood evidence on the basis of a lack of a proper predicate, this is manifestly untrue.

The Appellant's first objection was entertained and overruled. That objection concerned whether Westbrook's testimony was required as a part of the predicate; the trial court correctly held that it was not.

The second imbroglio concerned a line of questions on an irrelevant issue. The State clearly based admissibility of the blood evidence on consent. It did not assert admissibility on some other theory. That being so, the Appellant's questions about some other basis of admissibility were clearly irrelevant.

It is certainly true that the trial court found that the Appellant waived his motion in limine by his failure to bring it on for a hearing. That motion, though, alleged that the blood sample had been taken under authority of Miss. Code Ann. Section 63-11-7 and sought exclusion of any evidence arising from the taking of the blood sample under that section. (R. Vol. 1, pp. 18 - 20). The Appellant did not bring this on for a hearing. The court was correct in considering it waived. *Holly v. State*, 671 So.2d 32, 37 (Miss. 1996). But it is not true that the trial court did not permit the Appellant to attempt to raise the issue embraced by the motion in limine at trial. The Appellant did attempt to raise that issue but was overruled on it since the State did not assert and the proof did not show that blood was taken under the provisions of Section 63-11-7.

To the extent that the Appellant means to be understood that he did not receive a full - blown hearing, out of the presence of the jury, on the issue of consent, the plain fact is that the Appellant never sought one. It appears that his approach was to question the witnesses about whether the blood would have taken without consent. In any event, by the time the Appellant got

round to asking to make his record, the fact of his consent had already been put into evidence. To the extent that the Appellant means to say that the trial court erred in refusing to permit the him the opportunity to explore the issue, there was no longer an issue to explore. There had already been testimony about the Appellant's consent, and the blood sample analyses had already been testified to. The Appellant, though, was in no way restricted from examining the State's witnesses about the consent. And had the Appellant wished a full hearing on the issue of consent, as opposed to the non-issue of whether the blood could have been taken without consent, the trial court surely would have permitted the Appellant such a hearing.[2]

The Appellant then asserts that the record did not demonstrate that he was capable of consent. Ivey's testimony clearly demonstrated that the Appellant knew where he was and what he was doing. That the Appellant was in possession of his faculties was also demonstrated by the fact that he was able to speak with one of the victims just after the collision. (R. Vol. 3, pp. 261 - 262; 283 - 284). This was sufficient to establish the Appellant's competency to consent.

The Appellant cites *McDuff v. State*, 763 So.2d 850 (Miss. 2000) for the proposition that admission of evidence arising from a blood sample that was taken without probable cause, warrant or consent and not incident to a lawful arrest is error. In the case at bar, there was

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[2] The Appellant suggests that a complete predicate for the admission of the consent and resulting tests results on the blood sample was not made, citing *Johnson v. State*, 567 So.2d 237 (Miss. 1990). However, the Appellant raised no issue as to whether the blood sample was properly taken or whether the testing procedures availed of by the laboratory were properly performed. *Johnson* concerned an issue of whether an intoxilyzer had been properly calibrated, and the Court observed that testing of blood and other body fluids must be performed by proper methods. Since there was no objection or issue raised concerning whether the taking and testing of the blood sample were performed by "proper methods", the Appellant is in no position now to assert that the were not. The issues raised by the Appellant, as we have pointed out above, were specific and limited and did not include any issue as to whether the blood tests were properly performed.

consent by the Appellant, and there was no evidence or testimony to put the fact of consent into issue. Since there was consent, it is unnecessary to consider whether Ivey had or needed probable cause to take a blood sample.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT UNDULY LIMIT THE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM

The Appellant, in the Second Assignment of Error, again complains that he was not permitted to challenge the propriety of the consent he gave, casting the supposed error in constitutional terms.

We have set out above the facts undergirding this issue. Again, the Appellant was in no way prohibited from cross - examining the witness Ivey about the circumstances underlying the consent. What the Appellant was not permitted to do was to examine Ivey about the non-issue of whether a blood sample would have been taken had consent not been given. This was not an issue because the State did not base admissibility under any theory other than consent. It is true that the trial court did not permit the defense attorney to romp about in this non-issue, but it is not true that the defense attorney was not permitted to examine Ivey about the consent.

With respect to the comments made by the trial court about the motion in limine, again, context is important. The Appellant never brought that motion on for a hearing prior to trial. During trial, by the time the Appellant made mention of it, the fact of the consent as well as the test results on the blood sample had been put into evidence. It was too late at that point to object. In any event, the motion was not concerned with consent as much as it was with whether the Appellant's blood could have been properly drawn under authority of Miss. Code Ann. Section 63-11-7. And again, it was not the theory of the State that the sample was admissible by virtue of

that statute.

One criminally accused in this State has the right to a "wide open" cross -examination of the witnesses against him. However, this right may be limited by a trial court to relevant matters. *Heflin v. State*, 643 So.2d 512, 518 (Miss. 1994). In the case at bar, the trial court did not limit the Appellant's ability to examine the State's witnesses concerning the Appellant's consent. It did limit the examination with respect to whether the blood sample might have been taken under Section 63-11-7 in view of the fact that the State was not relying upon that statute but on consent as the basis for admission of the results of tests of the sample. There was no error in this.

The Second Assignment of Error is without merit.

3. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE

In the Third Assignment of Error, the Appellant apparently contends that the trial court erred in refusing to direct a verdict in his favor, thereby acquitting him. There is, however, some confusion in that he cites language from *Taggart v. State*, 957 So.2d 981 (Miss. 2007) that is applicable to claims of error in the denial of relief on a motion for a new trial. Nonetheless, the Appellant later clearly takes the position that the evidence was insufficient to permit a verdict of guilty. This Court has often set out the standard to be availed of when presented with such a claim:

> [w]e must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt [of the accused] must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. (citation omitted).

[A]ll evidence introduced by the State is to be accepted as true, together with any reasonable inferences that can be drawn from that evidence.

E.g. Taggert v. State, 957 So.2d 981, 986 (Miss. 2007).

Taking the evidence in favor of the verdict as true, together with all reasonable inferences therefrom, we think it is clear that the State presented sufficient evidence to permit reasonable jurors to find guilt. Briefly restated, the evidence was that the Appellant was driving on the wrong side of the road, made no attempt to get into his proper lane, and was speeding. Blood tests showed that the Appellant had Xanax and hydrocodone in his system. There was testimony that the levels of these drugs found in the Appellant's blood would have impaired the Appellant's ability to safely and properly operate a motor vehicle.

There was also evidence that the Appellant had managed to drive himself off the road and into a body of water shortly before his collision with the Millers' vehicle. The Appellant claimed that this occurred because he was having a conversation with the Lord and had his eyes closed "to seal the deal". At least one person who observed the Appellant during this peculiar baptism of his was not inclined to help the Appellant since he did not think that the Appellant was fit to operate a motor vehicle.

The Appellant was charged with having violated Miss. Code Ann. 63-11-30. (R. Vol. 1, pg. 4). The State was required to prove that the Appellant operated a motor vehicle under the influence of a substance which impaired his ability to operate a motor vehicle and in a negligent manner maimed another. Section 63-11-30(1)(b), (5). The State clearly proved that the Appellant was under the influence of Xanax and hydrocodone, at least. There were substances that can certainly impair a person's ability to safely operate a motor vehicle.

The Appellant asserts here several specific reasons why, in his view, the State's evidence was insufficient to permit the jury to consider the case. He was not so specific at trial, making only a generic claim that the evidence was insufficient. (R. Vol. 4, pg. 338). Because the points raised here were not raised below, they may not be considered here. *Moore v. State*, 958 So.2d 824 (Miss. Ct. App. 2007). Nonetheless, assuming *arguendo* that the specific points raised here by the Appellant are properly before the Court, there is no merit in them.

The Appellant suggests, relying upon *Dunaway v. State*, 919 So.2d 67 (Miss. Ct. App. 2005), that there was insufficient evidence of his negligence. It is more or less admitted that the Appellant was driving in the wrong lane, but the Appellant tends to suggest that it was Mrs Miller's act of attempting to avoid the Appellant that was the cause of the accident.

It is true that the facts in *Dunaway* included an act of driving in the wrong lane and speeding. However, nothing in the opinion suggests that driving in the wrong lane for a relatively extended period of time, as in the case at bar, is not negligence. The act of driving in the wrong lane of traffic with an unobstructed view of the road has been found to support, in part, a charge of culpable negligence. *Gandy v. State*, 373 So.2d 1042 (Miss. 1979). If driving in such a manner will support, in part, culpable negligence, all the more will it support negligence. In any event, it is negligence to drive in one's left lane of traffic absent certain exceptions. Miss. Code Ann. Section 63-3-601 (Rev. 2004); *Lum v. Jackson Indus. Uniform Services, Inc.*, 253 Miss. 342, 175 So.2d 501 (1965). Those exceptions are not applicable here.

As to the suggestion that it was Mrs Miller's negligence that was the cause of the collision, this is ludicrous. Mrs Miller attempted to avoid the Appellant, and she made the decision to go left rather than right because she did not think she could safely go to the right. But

it was the Appellant's negligence in driving in the wrong lane that forced Mrs Miller to attempt to leave her lane of traffic. The suggestion that the Appellant's negligence ought to be discounted or ignored because it supposedly caused Mrs Miller to drive negligently should not be taken seriously.

The Appellant complains about the lack of an accident reconstructionist. This despite the fact that there was eyewitness testimony as to the fact that the Appellant was in the wrong lane at the time of the collision and despite the fact that it was obvious to Ivey where the impact occurred. It is true that the State did not present an accident reconstructionist. It is also true that Ivey testified that it was quite clear to him what occurred. Since there was eyewitness testimony as to how the Appellant was operating his motor vehicle just before and at the time of the collision, we fail to see how a reconstructionist would have been necessary. Mrs Miller's testimony was completely sufficient to establish the Appellant's negligent operation of a motor vehicle. Her testimony was corroborated by what Ivey testified he saw at the scene.

The Appellant attempts to make much of the fact that no alcohol was found in the blood sample. He also claims that the metabolite of cocaine caused no impairment. As for the lack of alcohol, this is neither here nor there. He certainly had levels of Xanax and hydrocodone sufficient to cause impairment. As for the metabolite of cocaine, it is of no consequence whether the metabolite was capable of causing impairment. On the other hand, it may have been that cocaine had been broken down rapidly and that the Appellant was impaired by it at the time of the collision. In any event, the State's evidence concerning the Xanax and hydrocodone was entirely sufficient to establish impairment.

The State proved that the Appellant had levels of Xanax and hydrocodone in the

Appellant's blood sufficient to have impaired him. The State further proved that the Appellant, just prior to striking the Miller's vehicle, ran off the road and seemed to be impaired at that time. The State further proved that the Appellant was driving in the left lane prior to the collision with the Miller vehicle, and doing so without cause or reason. This act was most certainly a negligent act by the Appellant. The State further proved the nature and extent of the injuries caused by the Appellant. This evidence was sufficient to permit a reasonable jury to find guilt. The trial court, therefore, committed no error in denying the Appellant's motion for a directed verdict.

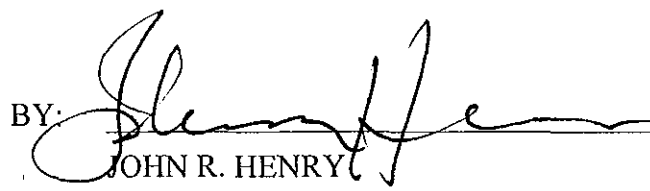
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence 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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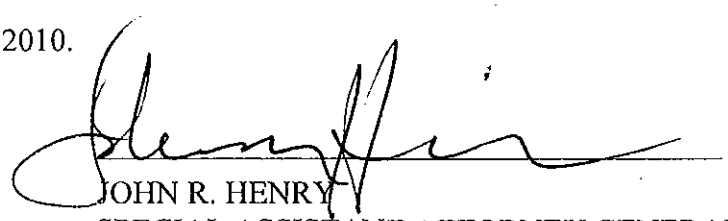
This the 22nd day of January, 2010.



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