IN SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-01005-SCT

THOMAS IRBY — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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THOMAS IRBY — APPELLANT

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STATE OF MISSISSIPPI — APPELLEE

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. Thomas Irby

THIS 13th day of October, 2009.

Respectfully submitted,

THOMAS IRBY

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE CASE

This appeal is from the Circuit Court of Clarke County, Mississippi where Thomas Irby was convicted of "DUI maiming" in a jury trial presided by the Honorable Robert W. Bailey, Circuit Judge, May 11-13, 2009 . Irby was sentenced to twenty-five (25) years as an habitual offender and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

A two vehicle accident occurred in the early afternoon of May 10, 2008 on County Road 430 in rural Clarke County. [T. 92-93, 252-56]. There were no eye witnesses. [T. 203].

In this accident, Thomas Irby, the appellant, was driving a Ford Ranger pick-up truck, which collided with a Dodge Caravan van occupied by Olivia Miller and Justin

Miller, Olivia was driving. *Id.* Olivia and Justin were divorced at the time of the accident, but, were in the process of reconciliation, and had remarried at the time of the trial. [T. 251].

A Clarke County sheriff's deputy responded to the accident scene, drew a diagram of what he observed indicating the final resting place of the vehicles and filed a report. [T. 182, 185, 189; Ex. 10]. The two vehicles came to rest on the West side of the highway after the impact. [T. 92-93, 184, 316; Exs. 10, 11]. The officer took no photographs and no numeric measurements. [T. 199-200, 202, 207-08, 320-21]. He did not speak with either driver about the circumstances of the accident before filing his report. [T. 189, 199-200, 202]. The officer interviewed Olivia Miller five (5) days after the accident, after filing his report. [T. 209, 226, 232]. No accident reconstructionist was consulted and none testified. [T. 187].

The deputy said he observed two sets of skid marks, one for each vehicle. [T. 182, 200, 227]. The skid marks were not initially on the deputy's diagram, but were added to Exhibit 10 at trial. [T. 183]. The deputy said he saw gouge marks near the center of the highway, which were not included on his diagram either. [T. 184, 205]. No skid or gouge marks were reported in the South bound lane. [T. 188-89]. One state witness only saw one set of skid marks from the Miller vehicle and saw no gouge marks. [T. 315, 319-20, 324 ; Ex. 13 No. 7].

Olivia Miller and Thomas Irby both injured their legs and feet in the accident. [T.

256]. Justin Miller, who was reportedly in a coma for four weeks after the accident, received more serious permanently disabling brain injuries. [T. 262-66; Ex. 12]. At the time of trial, Justin was reported as being not able to use his right arm or legs, nor able to speak clearly; and, he requires continuous care after returning from the Shepherd Center in Atlanta which specializes in brain injuries. *Id.* Justin was still receiving therapy at the time of the trial, and Olivia estimated both of their medical expenses to be around $2,000,000 to date. *Id.*

Irby's charges of DUI maiming pertained only to the injuries suffered by Justin. [R. 4]. There was no medical testimony, Irby stipulated to the seriousness of Justin's injuries associated with the accident. [T. 267-68].

The responding sheriff's deputy said he detected a "strong smell of alcohol" in Irby's truck, and found an empty beer can on the floorboard. [T. 94, 190, 210-11]. The deputy did not speak with Irby at the scene but obtained a purported consent to blood tests from Irby at Jeff Anderson Region Medical Center emergency room in Meridian about four (4) hours after the accident. [T. 96, 102-03; Exs. 2, 3, 4, 5]. Irby was described by the deputy as being "happy go lucky" at the hospital with slurred speech. [T. 192]. However, this was when Irby was being prepared for surgery for a collapsed lung. [T. 220]. Olivia Miller, who rode in the same ambulance as Irby, said she smelled alcohol on Irby. [T. 261-62].

The deputy did not speak with Olivia until five (5) days after the accident and after

he had filed his report. [T. 226, 231-32]. No blood test was requested for Olivia. [T. 233].

The chemical analysis of blood drawn from Irby after the accident showed no alcohol in Irby's system. [T. 131, 236-37]. The analysis did, however, indicate a presence of two controlled substances, Benzodiazepine (Alprazolam or Xanax) and Hydrocodone, plus a cocaine metabolite, Benzoylecgonine. [T. 116, 118-20, 122-24, 131-32, 146; Exs. 7, 9].

The time of ingestion of the suspected substances could not be extrapolated. [T. 122-23, 132]. Even though there was no detectible cocaine, the toxicologist speculated that Irby could have had unmetabolized cocaine in his system at the time of the accident. [T. 153]. The cocaine metabolite, Benzoylecgonine, has "no pharmacological activity," no influence. [T. 147, 152-53].

The amount of Hydrocodone, a semisynthetic narcotic analgesic with "opiate qualities", was measured above the therapeutic amount and has the side effect of drowsiness. [T. 119-20, 124, 131-32,146, 149-50]. The state's expert toxicologist could not say if the amount of Hydrocodone in Irby's system was toxic or impairing to him specifically or not. [T. 148-49].

The toxicologist said, in regard to the combined effect of the Hydrocodone and Benzodiazepine, "if the individual showed signs of impairment ... then these substances can be responsible for the production of that impairment." [T. 152]. No witness

described Irby as drowsy.

Olivia testified that she and Justin were on their way to go shopping for a gift and were North bound on County Road 430. [T. 249-50]. She said as they topped a hill, she saw a pick-up truck about a tenth (.10) mile in front of her headed South in the North bound lane. [T. 252-53]. Olivia said she was afraid to veer right because of a ditch, and since the truck did not give any indication of turning into the proper lane, she quickly decided to steer to her left. [T. 254]. When she did, Olivia said the pick-up truck veered to its right and the two vehicles collided, almost head-on, but at a slight angle. *Id.* One state witness described the ditch which Olivia was afraid of was six feet off the road and only two (2) feet deep. [T. 322-23; Ex. 13 No. 15].

Testimony from two state witnesses indicated that, earlier on the day of the accident, Irby had ran off another road in Clarke County. [T. 291-96, 298-300]. One of the witnesses said Irby did not appear to be in any condition to drive after this first incident. *Id.* The other witness to the first incident did not give any indication of Irby's condition and in fact went to considerable effort to try and get help to extract Irby truck from the swampy area where it was stuck. *Id.*

SUMMARY OF THE ARGUMENT

The court erroneously allowed introduction of Irby's purported blood sample consent form and the evidence of the chemical analysis of the blood drawn pursuant to

said consent form. The trial court erroneously limited Irby's cross-examination of the investigating deputy. The evidence did not legally establish that Irby was under the influence of controlled substances at the time of the accident and did not show that any negligent act of Irby was a proximate cause of the accident.

ARGUMENT

ISSUE NO. 1: WAS BLOOD EVIDENCE IMPROPERLY ADMITTED?

Irby was indicted pursuant to Miss. Code Ann. §§63-11-30(1) and(5) (Rev. 2007).[1] [R. 4; RE 11]. It was, then, necessary for the state to show the presence of alcohol or controlled substance in Irby's system and show negligence on the part of Irby as a proximate cause of the accident. *Gilpatrick v. State*, 991 So. 2d 130, 133 (¶16-19) (Miss. 2008

Irby filed a pretrial motion in limine pertaining to the blood evidence, which was called up for hearing but continued, and Irby also objected to the blood evidence at trial when offered. [T. 6, 26-27; R. 18-20; RE 15]. The motion in limine was based, *inter alia*, on lack of valid consent, and, the trial objections was also but added a lack of a sufficient

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MCA §63-11-30(1): It is unlawful for any person to drive or otherwise operate a vehicle within this state who ... (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle ... (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law. (5): Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables ... another shall, upon conviction, be guilty of a ... felony.

evidentiary foundation, namely, that the nurse who drew the blood did not testify as to the voluntariness of Irby's consent. [R. 18-20; RE 15; T. 26-27, 97-100]. When evidence of voluntariness of a confession in a criminal case is rebutted, it is well known that the State must present testimony from all witnesses to waiver of the right to counsel and right against self-incrimination. *Agee v. State,* 185 So. 2d 671 (Miss. 1966). See also, *Taylor v. State* 789 So. 2d 787, 792-93 (Miss. 2001).

The argument for the necessity of the nurses' testimony is twofold. First there is the common law predicate required under *Agee, supra.* Secondly, the nurses testimony was required for the state to establish a totality of the circumstances of the consent.

Irby's alleged consent was obtained when he was being prepared for surgery for a collapsed lung. [T. 220]. Defense counsel pointed out the obvious lack of a complete legible signature on the purported consent form. [T. 222-23; Ex. 4; RE 19]. Only "Tomas" is legible, the last name tails off as if the writer was unconscious. *Id.* Also, the signature towards the bottom, is approximately four inches from the signature line. [Ex. 4; RE 19]. It was so unapparent that Irby had signed the form, that the nurse had to draw a line from the signature line to where Irby allegedly scrawled the word "Tomas." *Id.* Consent is valid only where a person knowingly and voluntarily waives the right not to be searched. *Penick v. State*, 440 So. 2d 547, 551 (Miss. 1983).

In *Cutchens v. State*, 310 So. 2d 273, 280 (Miss. 1975), Cutchens was convicted of culpable negligence manslaughter and, as Irby did here, challenged a consent to permit a

sample of his blood to be drawn claiming the consent was invalid "because he was unconscious or as expressed by his attorney, 'he was out on his feet' at the time the consent was signed." The trial court did not allow the issue to be decided outside the present of the jury. Although the testimony showed the "circumstances surrounding the consent that Cutchens gave," and that the consent was voluntary. *Id.* The *Cutchens* court said, "[i]t would have been better practice to have examined into the voluntariness of the consent outside of the presence of the jury ... [i]f the evidence had shown lack of voluntary consent, a reversible error would have resulted requiring reversal and remand."

Here in Irby's case, the trial court did not allow the issue to be addressed outside the presence of the jury, and, contrary to *Cutchens*, the circumstances were not developed otherwise through testimony sufficiently to show that Irby's consent was indeed freely, voluntarily and knowingly given.

The type of evidence necessary to show that a consent is valid was shown in *Comby v. State*, 901 So. 2d 1282, 1285-86 (Miss. Ct. App. 2004). In *Comby*, the trial court heard testimony, outside the presence of the jury, "from the nurses who were present when Comby signed the consent form, the deputy who obtained Comby's consent, and Comby himself." *Id.* The trial court determined that Comby voluntarily consented to having his blood drawn. See also *Logan v. State*, 773 So. 2d 338, 343(¶ 13) (Miss. 2000).

The *Comby* court noted that the Mississippi Supreme Court has held that "where the defendant appears to be aware of the circumstances surrounding his consent, the

consent is valid . 901 So. 2d 1285-86. [Citing *Wash v. State*, 790 So. 2d 856, 859(¶ 8) (Miss. Ct. App. 2001) (citing *Mitchell v. State*, 609 So. 2d 416, 421 (Miss. 1992)]. The evidence in *Comby* established that the defendant was aware that he had been involved in a motor vehicle accident and "[w]hile being loaded into the ambulance Comby had the presence of mind to tell the officers that his driver's license was in the car in the glove compartment." Testimony from the emergency medical technician "testified that Comby was able to answer all of his questions en route to the hospital." *Id.* Attending emergency room nurses "testified that Comby appeared to understand what was going on," and answered their questions. About all that is known about Irby's condition at the wreck site was that he was calling for his mother. [T. 260]. At the hospital, Irby was not even able to sign his name. [T. 222-23; Ex. 4; RE 19].

The evidence here does not show that Irby validly consented to his blood being drawn. As stated in *Jones v. State ex rel. Mississippi Dept. of Public Safety*, 607 So. 2d 23, 28 (Miss. 1991), "consent is not valid where the consenter is impaired or has a diminished capacity... [c]onsent must be voluntary and absent diminished capacity in order to be valid." The preponderance of evidence here shows that Irby was indeed impaired. From the state's standpoint, the evidence of a valid consent is incomplete at best.

When defense counsel raised two objections during the state's case in chief, the trial court overruled both stating that Irby had waived his motion in limine by not re-

noticing it following the initial continuance. [T. 219]. In other words, the trial court ruled that Irby could not object to the evidence at trial. Irby would respectfully show that this ruling was incorrect, amounted to an abuse of discretion, and irreparably prejudiced Irby to the extent that he was denied due process under the Fifth Amendment and Article 3 § 26 of the Mississippi Constitution of 1890, and denied a fair trial.

There is no rule requiring an objection to the evidentiary foundation for blood tests, including consent, be made pretrial rather than at trial. To the contrary, case law clearly shows that a defendant can raise an objection to the admission of evidence by pretrial motion or by contemporaneous objection at trial when the evidence is offered. *Brown v. State*, 829 So. 2d 93, 102 (¶19) (Miss. 2002), *Gilmore v. State*, 772 So. 2d 1095, 1097(¶ 6) (Miss. Ct. App. 2000).

The Mississippi Supreme Court has been consistent on the principle that failure of the state to establish a complete predicate for admission of blood evidence is clear grounds for reversal. In *Johnston v. State*, 567 So. 2d 237, 238-39 (Miss. 1990), the state failed to prove by documentary evidence timely intoxilyzer calibration *Id.*

The *Johnson* court in reversing said, "[t]he trial court abused its discretion in finding a sufficient predicate for admitting the results of the intoxilyzer in the testimony of [the officer]. This error substantially prejudiced the defendant's right to a fair trial." *Id.*

The *Johnson* court established the three part evidentiary predicate for the admission of blood alcohol content tests. *Id.* See also, *McIlwain v. State* 700 So. 2d 586 (Miss. 1997).

In *McDuff v. State,* 763 So. 2d 850, 856 (Miss. 2000), the court reversed a DUI homicide conviction for the admission of blood test evidence taken without probable cause, warrant or consent, and not incident to lawful arrest, finding violation of the Fourth Amendment to the United States Constitution and article 3, § 23 of the Mississippi Constitution. The *McDuff* court said, "the trial court abused its discretion in allowing the results of the blood test into evidence, and in doing so committed reversible error." *Id.* [citing *Parker v. State*, 606 So. 2d 1132, 1137-38 (Miss. 1992)]. Since Irby's alleged consent was admitted without proof of a valid consent and without a warrant and arguably without probable cause, since the officer never even tried to speak with Irby before seeking the consent, admission of the blood evidence was reversible error in this case. So, a new trial is respectfully requested.

ISSUE NO. 2: WERE THE DEFENDANT'S CONFRONTATION RIGHTS PROTECTED?

The jury heard testimony about Irby's alleged consent , and his purported consent form was introduced into evidence. [T. 96, 102-03; Ex. 10]. Yet, when defense counsel sought to cross-examine the Clarke County deputy about Irby's condition relative to his ability to consent to the blood sample in front of the jury, the trial court sustained the state's objection, stating that the topic could only be addressed in a pretrial motion, and by not bringing the pretrial motion on for hearing, Irby had waived his right to challenge the consent and consequently, waived the right to cross-examine the officer on this evidence in front of

the jury. [T. 216-19, 237].

The arguable lack of consent was a fair topic for cross-examination, especially if the court was relying on the trial testimony as proof of a valid consent. Irby's position is that the trial court's truncating the cross-examination of the deputy sheriff on the relevant topic was an improper limitation of Irby's right to confront his accusers under Article 3 §26 of the Mississippi Constitution and the Sixth Amendment to the federal constitution and that this prejudiced the appellant and denied him a fair trial. Mississippi has long followed wide open cross-examination as codified in Miss. R. Evid. 611(b).[2]

The Mississippi Supreme Court, in reversing a murder conviction, in *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974), stated that:

> The right of confrontation and cross examination . . . extends to and includes the right to fully cross-examine the witness on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony. [emphasis added].

In *Suan v. State,* 511 So. 2d 144, 146-48 (Miss. 1987), the Mississippi Supreme Court reversed an escape conviction because the trial court limited defense counsel's full cross-examine of a prosecution witness. The *Suan* court said, ". . . one accused of a crime has the right to broad and extensive cross-examination of the witnesses against him,." These rights of confrontation and cross-examination were not fully afforded to Irby as required, and a new

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Miss. R. Evid. 611(b) Scope of Cross-Examination. Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

trial should be granted. In *Sayles v. State*, 552 So. 2d 1383, 1387-88 (Miss. 1989), the court found arbitrary curtailment of cross-examination on a proper subject of cross-examination grounds for reversal. See also *Hill v. State*, 512 So. 2d 883 (Miss. 1987).

Therefore, Irby is entitled to and respectfully request a new trial where he can fully exercise his rights to confront the state's evidence.

ISSUE NO. 3: IS THE VERDICT SUPPORTED BY THE EVIDENCE?

In deciding whether a jury verdict is against the overwhelming weight of the evidence, the Supreme Court will reverse only when the verdict "is so contrary to the overwhelming weight of evidence that allowing it to stand would sanction an unconscionable injustice." *Taggart v. State,* 957 So. 2d 981, 987 (Miss. 2007).

Under this issue, the State has "the benefit of all reasonable inferences that may be drawn from the evidence." *Edwards v. State,* 469 So. 2d 68, 70 (Miss. 1985). "If the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required." *Id.*

Accepting the state's evidence in the best possible light consistent with the verdict, without the testimony of an expert in accident reconstruction, there was no way for the jury to determine that any negligence on the part of Irby was a proximate cause of the accident. Moreover, there was insufficient proof that Irby was impaired by any controlled substance.

The physical evidence was inconclusive. Where the vehicle came to rest was clear, but, where they were before the impact was never objectively proven. The investigating officer said he observed gouge and two sets of skid marks, but took no measurements and no photographs. [T. 199-200, 202, 207-08, 320-21]. This testimony was contradicted by another state witness who saw no gouge marks and only one set of skid marks. [T. 315, 319-20, 324 ; Ex. 13 No. 7].

The only evidence of the point of impact was from Olivia Miller's testimony. However, in her description of the accident, it was her decision to veer to her left and not her right which caused the accident. [T. 254]. One state witness described the ditch which Olivia was afraid of as being six feet off the road and only two (2) feet deep. [T. 323]. Plus, Olivia was traveling 35-45 mph in a 25 mph zone. [T.322].

Irby had no alcohol in his system and the cocaine metabolite caused no impairment. [T.131, 147, 152-53, 236-37]. The state's evidence of impairment was speculative and inconclusive as well. The time of ingestion of the suspected substances could not be extrapolated. [T. 122-23, 132]. The amount of Hydrocodone, was not shown to be toxic or impairing to Irby specifically. [T. 148-49]. Regarding the Hydrocodone and Benzodiazepine, the toxicologist merely speculated that, "if the individual showed signs of impairment ... then these substances can be responsible for the production of that impairment." [T. 152].

In *Dunaway v. State*, 919 So. 2d 67, 71 (Miss. Ct. App. 2005), a vehicular homicide case, the court addressed the issue of proof of a negligent act. There was a witness who saw

Dunaway on the wrong side of the road swerving to avoid oncoming traffic and losing control. *Id.* So, with this, the *Dunaway* court found clear proof of a negligent act. *Id.* In the present case, there was testimony that Irby was allegedly on the wrong side of the highway, but he was not otherwise described as driving erratically. In fact, when Irby did take corrective measures, it was Ms. Miller's negligence of turning into the wrong lane, which proximately caused the accident when she could have veered to the right, she had a six foot clearance.

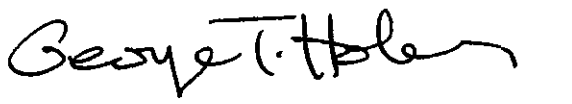
The court in *Murphy v. State* 798 So. 2d 609, 613 (Miss. Ct. App. 2001), spoke as to the elements the state would be required to prove, comparably, in a vehicular homicide case. The State must prove that the defendant "not only consumed alcohol prior to the accident, but that he performed a negligent act that caused the death of another." Citing *Hedrick v. State*, 637 So. 2d 834, 837-38 (Miss. 1994). See also *Frambes v. State*, 751 So. 2d 489, 492(¶ 17) (Miss. Ct. App.1999). There was insufficient proof that any negligent act of Thomas Irby proximately caused the accident in this case, so the trial court should not have denied Irby's motion for directed verdict at the close of the case or should have granted Irby's JNOV. So, Irby respectfully requests a reversal of the conviction and rendering os acquittal.

CONCLUSION

Thomas Irby is entitled to have his conviction reversed with remand for a new trial.

Respectfully submitted,

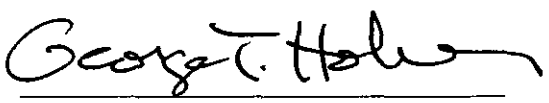
THOMAS IRBY

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 13th day of October, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Robert W. Bailey, Circuit Judge, P.O. Box 1167 Meridian, MS 39302, and to Hon. Dan Angero , Asst. Dist. Atty., P. O. Box 5172, Meridian MS 39302, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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