IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEREMY WINTERS — APPELLANT

VS. — NO. 2009-KM-0178-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

In this appeal involving yet another conviction for felony DUI the question presented is whether or not a youthful offender was properly sentenced under the general felony DUI law found in Miss.Code Ann. §63-11-30(1)(c) as opposed to sentencing under the "Zero Tolerance for Minors" law found in Miss.Code Ann. §63-11-30(3)(a) which applies to persons under twenty-one (21) years of age.

A trial by jury was waived, and the defendant was tried at the bench by judge alone. (R. 47)

"[T]he trial judge found that because the evidence showed that Winters' BAC was above .08%, his sentence was subject to the provision in §63-11-30(3)(a) which provides that where a minor's BAC is .08% or more, the provisions of subsection (2) shall apply." (Brief of Appellant at 3)

Winters contends his indictment fails to charge felony DUI because it does not charge " . . . a BAC of .08% or above, [therefore,] he may not be convicted or sentenced for that offense." (Brief

of Appellant at 5)

We contend, on the other hand, the use of the word "felonious" gave Winters sufficient notice the State would prove a BAC of .08% or more. *Cf.* **Spearman v. State,** No. 2008-KA-01684-COA decided March 2, 2010 [Not Yet Reported] [In a prosecution for attempted burglary use of the word "attempt" in the indictment gave Spearman sufficient notice the State would prove the crime was not successfully committed.]

This is in addition to the State's discovery which made more certain that which was already certain. (C.P. at 5-6, 7-8, especially 14-15, 34)

JEREMY WINTERS, a twenty (20) year old Caucasian male thrice previously convicted in the state of Mississippi of driving his motor vehicle while under the influence of intoxicants, prosecutes a criminal appeal from the Circuit Court of Bolivar County, Mississippi, Albert B. Smith, III, Circuit Judge, presiding.

Following a one (1) day bench trial conducted on November 28, 2007, before judge alone, young Winters was convicted of felony DUI based upon the commission of a 3rd DUI offense within the past five (5) years. (R. 108-09; C.P. at 83-84)

On January 15, 2008, following a sentencing hearing, Winters was sentenced to serve one (1) year in the Intensive Supervision Program (ISP) with four (4) years of probation upon successful completion. (C.P. at 86)

An indictment returned on or about March 20, 2007, omitting its formal parts, stated, the following:

> "[that] JEREMY WINTERS . . . on or about November 11, 2006, . . . did unlawfully, wilfully, and feloniously drive or otherwise operate a [motor] vehicle while under the influence of an intoxicating liquor, or while having two one-hundredths percent (.02%) or more by weight volume of alcohol in his blood and that the said Jeremy

> Winters, has been previously convicted twice before within the last five (5) years thereof, said prior convictions being more particularly described as follows: * * * * * * " (C.P. at 3)

Three (3) prior DUI convictions were thereafter charged and identified in Winters's indictment, *viz.*, conviction in Justice Court in Sunflower County on April 26, 2005, for an offense committed on April 10, 2005; conviction in Municipal Court in Cleveland on March 16, 2006, for an offense committed on August 5, 2005, and conviction in Municipal Court in Cleveland on March 16, 2006, for a third offense committed on February 12, 2006. (C.P. at 3)

One (1) issue is raised on appeal to this Court:

"The trial court erroneously convicted and sentenced Winters for felony DUI under the general DUI statute when Mr. Winters's offense fell under the zero tolerance for minors law." (Brief of Appellant at ii, 1-2)

Mitchell J. Creel, a practicing attorney in Greenville, filed numerous motions and represented Winters very effectively at trial.

Mr. Creel vigorously objected at trial to the sentencing of Winters on the very basis now appealed (C.P. at 37-38; R. 15-17, 37-39), and he has certainly preserved the issue for appellate scrutiny.

The representation on appeal by Julie Ann Epps of Canton has been equally effective and challenging.

STATEMENT OF FACTS

Winters has articulated abbreviated but accurate statements of the case and facts which we adopt here. We add only the following.

Young Winters, a minor, was arrested around 1:56 a.m. on November 11, 2006, by law enforcement authorities in Cleveland for driving under the influence of intoxicants on Highway 61 in Bolivar County. (*See* State's exhibit S-4) A chemical analysis of Winters's breath by Cleveland

police officer, Robert Morris, at 2:44 a.m and again at 2:46 a.m., resulted in a finding that Winters's BAC was at least .09%. (R. 62, 84) (*See also* State's exhibits S-2 and S-4)

This was Winters's 4th arrest for DUI.

Pre-trial comments by defense counsel defined the issue as follows: "Over .08, Judge, is really the issue. We know he's over the .02 it appears." (R. 40)

Two (2) witnesses testified for the State of Mississippi.

Charles Morris testified he was qualified to administer the breath test on the Intoxilyzer 8000. (R. 79) Morris issued three Uniform Traffic citations to Jeremy Winters, one of which was for a DUI. (R. 79) The incident report introduced as exhibit D-2 was prepared by Morris. All facts found therein - including a BAC of .09% following a breath test on the intoxilyzer 8000 - are true and correct to the best of his knowledge. (R. 79)

Maury Phillips, the implied consent section chief at the Mississippi Crime Laboratory and the State's expert, refuted the expert opinion of Dr. Henry Outlaw, the defendant's expert witness. (R. 82-102) According to Phillips, Winters's BAC at the time of the stop was .09%. (R. 82, 84, 91-92, 99)

Dr. Henry Outlaw, a retired chemistry professor and expert in the fields of pharmacology and toxicology (R. 52-53, 56), testified for the defense that Winters's BAC at the time of the arrest was between .068 and .076 or "less than .08". (R. 59, 63-64)

Jeremy Winters, twenty-one (21) years of age at the time of his bench trial, testified he submitted a breath sample on November 11th and was charged with felony DUI. (R. 103)

> Q. [BY DEFENSE COUNSEL:] You submitted a breath sample, did you not?
>
> A. Yes, sir.

Q. Tell the Court, ten minutes before you stopped, what you were doing and what you consumed of alcohol.

A. I was at a hotel room at the Delta Inn, in Cleveland and had plans to stay with the girl I was with. She got a little upset. I had a beer there. As I was leaving, I had another beer. And I was stopped ten minutes after that.

Q. When you were stopped, did you have - - was there a beer in the console of the truck?

A. Yes, sir.

Q. How much beer was in it?

A. About half a can, about six ounces.

Q. All right. Prior to that, did you have a little food that night?

A. Yes, sir.

Q. What did you have?

A. I ate a burger and fries at burger King. A Whopper, to be exact.

Q. And when was that?

A. That was November the 5th.

Q. No, no, no, no. What time was it?

A. Oh.

Q. What time were you at Burger King?

A. I would say 5:30 or 6 o'clock. Sometime after I got off work.

Q. And before you had the beer and a half at the - - before the stop, during the time period, how many beers did you consume prior to that?

A. Three.

Q. Okay. And why were you consuming this last beer going down the road?

A. I really didn't want to take it back to my home.

Q. Where were you going?

A. To my mom's house.

Q. Were you trying to get rid of your beer?

A. Yes.

Q. Do you agree that - -

Is this the truth, the whole truth?

A. Yes, sir. (R. 103-04)

After hearing all the evidence, Judge Smith ruled as follows: "After listening to everything . . . I find Mr. Winters guilty of DUI. That's the order of the Court. He'll be bound over." (R. 108)

MR. CREEL: Judge Smith, is there any way I can ask - - request a bond?

THE COURT: No. That young man has been in and out of it way too long.

Four DUI's. I want him in jail. He's a menace to society. (R. 109)

Sentencing took place over a month later on January 15, 2008. (R. 109-121) At the hearing young Winters admitted this was his 4th DUI. (R. 116)

Defense counsel, citing **Frazier v. State,** 817 So.2d 663 (Ct.App.Miss. 2002), argued at sentencing that Winters was under 21 years of age and should be sentenced under the Zero Tolerance law found in Section 63-11-30. (R. 111) Judge Smith, who stated he had heard enough, disagreed. (R. 114) He sentenced Winters to four (4) years probation and the RID program. (R. 117-18)

A motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was

filed on January 23, 2008. As grounds therefor, Winters argued, *inter alia,* the sentence imposed was in excess of the statutory guidelines and was against the rules of lenity. Winters claimed he " . . .was a minor at the time of the offense and he was entitled to be sentenced under Section 63-11-30(3)(d) . . . rather than being sentenced under Section 63-11-30(2)(c) . . . and the sentence imposed by the Court constituted 'plain error' in accordance with *Frazier v. State* [citation omitted] . . ." (C.P. at 91-92)

The motion was overruled the day of filing, January 23, 2008. (C.P. at 93)

SUMMARY OF THE ARGUMENT

The rule of lenity, i.e., a rule inviting leniency and mercy, was applied in sentencing. Winters, in the wake of a conviction for his 4th DUI prior to reaching age 21, was sentenced to a year of ISP and probation upon its successful completion. If this is not leniency and mercy, we don't know what is.

Winters's indictment charged a felony by alleging he *"feloniously"* drove or operated a motor vehicle with a blood alcohol content of "two one-hundredths percent (.02%) *or more* by weight volume of alcohol in his blood." [emphasis supplied]

It is clear the trial judge found beyond a reasonable doubt that Winters's BAC at the time he operated his motor vehicle was not between .02% and .08%; rather, Winters's blood alcohol concentration was at least .08% or more. (R. 112) Judge Smith concluded as a matter of law that Winters was guilty of felony DUI and that the Zero Tolerance Law did not apply.

This complies with Miss.Code Ann. §63-11-30(3)(a) which reads, in part, as follows: "If such person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply."

The trial judge did not err in sentencing the defendant as a 3rd offense felony offender because

he was, in fact, a 3rd offense felony offender.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT UNDER §63-11-30(1)(c) AS A 3rd OFFENSE FELONY OFFENDER RATHER THAN UNDER §63-11-30(3)(a), THE ZERO TOLERANCE FOR MINORS LAW.

Winters argues that because he " . . . was not charged [in the indictment] with a BAC of .08% or above, he may not be convicted or sentenced for that offense." (Brief of Appellant at 5) According to Winters, a BAC of .08% or above in his particular case is an essential element of the offense of felony DUI which must be charged.

Moreover, Winters says that " . . . where the indictment or evidence makes it unclear which section or subsection of a statute applies, a court must utilize the statute that imposes the least punishment." (Brief of Appellant at 4)

Miss.Code Ann. §63-11-30 (1) reads, in its pertinent parts, as follows:

> (1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; **(c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law,** or two one-hundredths percent **(.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law,** in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter; * * * * * *

Winters's indictment charged he "feloniously" drove or operated a motor vehicle with a blood alcohol level of ".02% or more." (C.P. at 3) This language tracked the language of the statute for operators under twenty-one (21) years of age. The indictment did not recite a BAC of ".08% or

more" because the statute, in plain and ordinary English, reserves that BAC " . . . for persons who are above the legal age to purchase alcoholic beverages under state law."

Miss.Code Ann. §63-11-30(3)(a) reads, in its entirety, as follows:

> (3)(a) This subsection shall be known and may be cited as Zero Tolerance for Minors. The provisions of this subsection shall apply only when a person under the age of twenty-one (21) years has a blood alcohol concentration of two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). **If such person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply.** [emphasis supplied]

Subsection (2) reads, in its pertinent parts, as follows:

> (2)(c) Except as otherwise provided in subsection (3), for any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars ($2,000.00) nor more than Five Thousand Dollars ($5,000.00), shall serve not less than one (1) year nor more than five (5) years in the custody of the Department of Corrections; provided, however, that for any such offense which does not result in serious injury or death to any person, any sentence of incarceration may be served in the county jail rather than in the State Penitentiary at the discretion of the circuit court judge. * * *

Winters, relying largely upon **Ivy v. State**, 589 So.2d 1263-66 (Miss. 1991), and **Frazier v. State,** *supra,* 817 So.2d 663 (Ct.App.Miss. 2002),contends that because he was under twenty-one (21) years of age at the time of the offense he could not be sentenced for felony DUI, i.e, third offense DUI, because

> " . . . the indictment does not in fact charge felony DUI. All the indictment charges is that Winters' BAC exceeded .02%. It fails to charge that his BAC was .08% or more. The latter is an essential element of felony DUI." (Brief of Appellant at 4)

This is an interesting argument that has caused us some concern.

The position of the State prior to trial was that "[t]he statute does not require us to include

the cap in there. The cap goes to the sentencing not as to what the state has to prove or put into the indictment." (R. 16-17)

We agree.

The **Frazier** case is distinguishable because it was decided in 2002, and Frazier's blood alcohol concentration is not reflected in the opinion. The opinion only tells us that Frazier was a minor at the time of his second offense.

The **Ivy** case is distinguishable because Ivy, a first offender with no prior felony record, did not have as an impediment to sentence imposition for marijuana possession a statutory provision akin to the last sentence found in Miss.Code Ann. §63-11-30, subsection (3)(a), which reads as follows: "If such person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply."

Rule 7.06 of the Uniform Circuit and County Court Rules reads, in part, as follows:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. * * * * * *

The indictment in the case *sub judice* passed constitutional muster as a felony indictment. It charged that Winters "feloniously" drove or operated a vehicle while either under the influence or while having ".02% or more" by weight volume of alcohol in his blood.

Winters's indictment put him on notice the State had charged him with a felony and intended to prove his BAC was not only greater than .02% but was, in fact, ".08% or more."

It did, and it was.

Winters freely admitted drinking and driving and, in fact, admitted through his lawyer his

BAC was at least .02%. (R. 40) He had no defense other than proffering expert testimony demonstrating his BAC was somewhere between .02% and .08%. Convincing the judge he was between .02% and.08%, would affect his sentencing.

Winters had his own expert, Henry Outlaw, attesting to a BAC below .08% (R. 63-64) which would have reduced the charge to a misdemeanor under the Zero Tolerance for Minors Law. It simply cannot be said that Winters was denied due process of law and the right to notice of the charge. Winters got all of the process and notice he was due.

In our opinion the word "felonious" conveys to the average person the idea that a felony has been charged. In Winters's case as a minor this would be a BAC of .08% or above.

In **Martin v. State,** 163 Miss. 454, 142 So. 15 (Miss. 1932), we find the following definition of the word "felonious."

> " 'Felonious' is a technical word of the law, and means 'done with the intent to commit a crime; of the grade or quality of a felony; * * * "

Winters, citing **Ivy v. State,** *supra*, 589 So.2d 1263-66, proffers in support of his argument an analogy between our DUI statute and the drug statute which, according to Winters, " . . . set[s] forth graduated penalties depending on the amount of marijuana involved." (Brief of Appellant at 4) He opines "[t]here is no rational reason for distinguishing the DUI statute from the drug statute." (Brief of Appellant at 5)

Appellee, in turn, makes an analogy of its own between our general attempt statute and our general DUI statute.

In **Spearman v. State,** *supra*, No. 2008-KA-01684-COA decided March 2, 2010, slip opinion at 11 (¶20) [Not Yet Reported], a prosecution for attempted burglary, the Court of Appeals quoted a passage from **Neal v. State,** 936 So.2d 463, 467 (¶13) (Ct.App. Miss. 2006), standing for

the proposition " . . . that using the word 'attempt' [in an indictment for an attempted offense] puts a defendant on notice that the State will prove that the crime was not completed." *Id.*, slip opinion at 11.

In **Spearman** we find the following observation:

> Here, the specific crime of burglary of a building is listed in the indictment. The overt act - cutting the lock off of the Pickled Okra walk-in cooler - is also listed in the indictment. The use of the word "attempt" gave Spearman sufficient notice that the State would prove that the crime was not successfully committed.

In like manner, use of the word "felonious" in the indictment now under scrutiny was sufficient to put Winters, a minor, on notice the State intended to prove his crime was in the nature of a felony, i.e., a BAC of .08% or above. *See also* the State's discovery at C.P. 15-16, 34)

We agree wholeheartedly with prosecutor Mitchell that "[t]he statute does not require us to include the cap in there. The cap goes to the sentencing prerogatives, not as to what the State has to prove or put into the indictment." (R. 17)

The proof accepted by Judge Smith demonstrated that Winters's blood alcohol level at the time Winters drove or operated his blue truck on Highway 61 in Bolivar County fell short of a BAC between .02% and .08% which would make the Zero Tolerance for Minors Law applicable to him. The judge accepted the testimony of the State's expert that Winters's BAC was .08% or greater and found him guilty of felony DUI. (R. 84, 91, 99, 112) Accordingly, the last sentence in subsection (3)(a) controlled the posture of Winters's conviction and sentence. (R. 113-14)

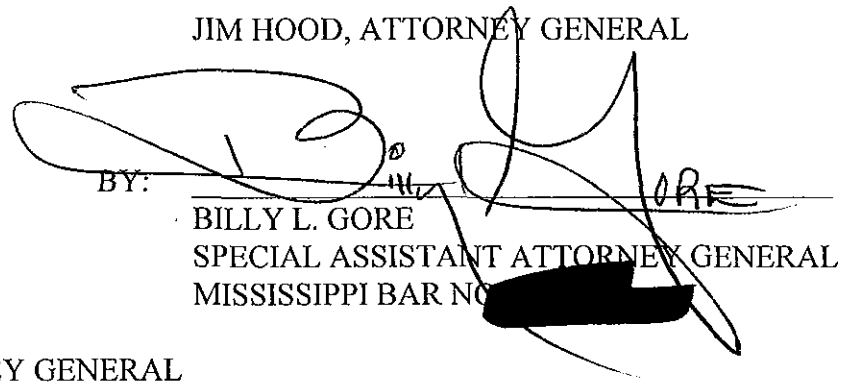
CONCLUSION

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction of felony DUI and the sentence to one (1) year in the Intensive Supervision Program (ISP) should be affirmed.

Respectfully submitted,

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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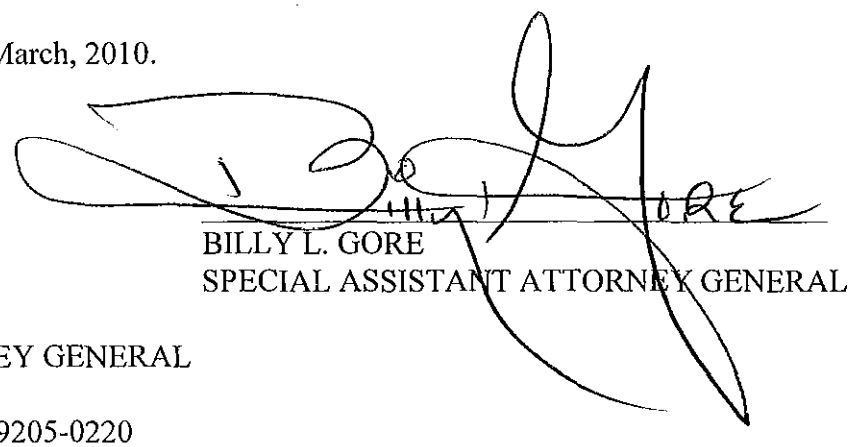
This the 11th day of March, 2010.



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