IN THE SUPREME COURT OF MISSISSIPPI

JEREMY WINTERS — APPELLANT

VS. — NO. 2009-KM-00178-SCT

STATE OF MISSISSIPPI — APPELLEE

****

APPEAL FROM BOLIVAR COUNTY, MISSISSIPPI

****

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

JULIE ANN EPPS; MSB [redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

ATTORNEY FOR APPELLANT

2009-KM-00178-SCTR+

REPLY BRIEF OF APPELLANT

REQUEST FOR ORAL ARGUMENT

Jeremy Winters requests oral argument because the case presents an issue of importance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF OF APPELLANT

STATEMENT OF ISSUES

I. 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.

SUMMARY OF THE ARGUMENT

It is axiomatic that both the state and federal constitutions prohibit a conviction and sentence for an offense not charged in the indictment. Here Mr. Winters was charged with third offense DUI for driving with a BAC of more than .02%. Since Mr. Winters is under 21, he could not be convicted and sentenced to a felony because a felony conviction requires an indictment for a BAC of .08% or more.

ARGUMENT

II. 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.

A. Standard of Review:

This case involves questions of law which are subject to de novo review by this Court. *Lambert v. State*, 941 So.2d 804, 807 (Miss. 2006).

B. The Merits:

The State in its brief concedes that Winters properly preserved this issue for appeal. The State, however, fails to demonstrate why this Court should depart from its prior holdings that an indictment must charge all the essential elements of the offense. *See,* cases cited in the initial brief.

In *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), the United States Supreme Court held that any, fact, except prior convictions, which has the potential to increase the maximum

punishment for an offense is an element of the offense which must be alleged and proved beyond a reasonable doubt. Where drug quantity plays a role in determining the sentence, *Apprendi* requires that quantity is an essential element which must be both charged and proved. *United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781 (2000); *Hampton v. State,* 860 So.2d 827, 828 (Miss.App. 2003) (where penalty depends on drug quantity, the nature and quantity of the drug involved is an essential element of the crime that must be alleged in the indictment and proven beyond a reasonable doubt at trial).

The State concedes that the indictment in the instant case failed to allege that Winters had a BAC of ".08% or more" but contends that this cap goes to sentencing and is not an essential element of the offense. Similar arguments have been rejected so many times in the context of drug sentencing as to require little citation. *United States v. Cotton, supra; Hampton v. State, supra.* The amount of alcohol in Winters' body was an essential element if the state was going to sentence him as an adult offender.

The state argues that notwithstanding the failure of the indictment to specify an essential element, the indictment was sufficient because it used the word "feloniously." The problem with that argument is that all the word "feloniously" adds to the indictment is to render it ambiguous in the absence of a further allegation specifying that the amount of alcohol in Winters' blood was ".08% or more." On the one hand, it uses the word "feloniously;" on the other hand, it fails to allege the operative factual elements charging the essential element of a BAC of .08% or more.

The law in this jurisdiction is plain. Where the indictment is ambiguous as to which of two sections of a statute is being charged, the sentence must be under one providing the lesser penalty. *Grillis v. State,* 196 Miss. 576, 586, 17 So.2d 525, 527 (1944). In *Grillis,* the Court held that where "there is substantial doubt as to which of the two [applicable statutes] is to be applied, the case will be referred to the statute which imposes the lesser punishment."

The state fails to distinguish the case of *Ivy v. State,* 589 So.2d 1263-1266 (Miss. 1991), from Winters' case. As does the DUI statute, the drug statute sets forth graduated penalties for possession of marijuana depending on the amount of marijuana involved. §41-39-139(c)(2)(A-G), *M.C.A.*

Because the indictment in *Ivy* charged only possession of more than one ounce, but failed to further charge that the defendant possessed more than a kilogram of marijuana, the Court held that Ivy could not be sentenced for the greater amount—only for possession of more than one ounce and less than one kilogram. *Ivy v. State,* 589 So.2d at 1263-1266.

The constitution requires that before a defendant can be convicted of a felony, there must be indictment by grand jury, and that indictment must allege all the essential elements of the offense. *Crosby v. State*, 191 Miss. 173, 2 So.2d 813 (1941) [omission of essential element of larceny in burglary indictment plain error]. *Art. 3,§27, Miss.Const.*

Since the indictment failed to charge the essential factual elements elevating the charge to a felony, BAC of more than .08%, Winters must be sentenced under the Zero Tolerance for Minors act for a misdemeanor.

CONCLUSION

In *Frazier v. State,* 817 So.2d 663 (Miss. 2003), the Court found **plain** error where the judge had sentenced a minor for DUI under the general sentencing provision where he was not charged with having a BAC of .08% or more. The Court must likewise find error here.

RESPECTFULLY SUBMITTED,
JEREMY WINTERS, APPELLANT

BY: _____
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have mailed by first class mail, postage prepaid, the original and three copies of the foregoing to Kathy Gillis, Clerk of this Court at P. O. Box 248, Jackson, Mississippi 39205 and a true and correct copy to the Honorable Albert B. Smith, III, Circuit Judge, at P. O. Drawer 478, Cleveland, Mississippi 38732, and Billy Gore, Special Assistant ttorney General, P. O. Box 220, Jackson, Mississippi 39205 and Laurence Y. Mellen, District Attorney, P. O. Box 848, Cleveland, Mississippi 38732.

This, the 26th day of March, 2009.

JULIE ANN EPPS

JULIE ANN EPPS; MSB [redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

ATTORNEY FOR APPELLANT