

2009-KM-00178-SCT T

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 disqualification or refusal:

1. Jeremy Winters, Defendant-Appellant;
2. Julie Ann Epps, counsel for Appellant on appeal;
3. Mitchell Creel, counsel for Appellant at trial;
4. The State of Mississippi; the office of Robert S. Smith, D.A., Jim Hood, AG.;
5. District Attorneys office of Bolivar County, prosecutors at trial;
6. Honorable Albert B. Smith, III, Circuit Judge.

This, the 22nd day of December, 2009.

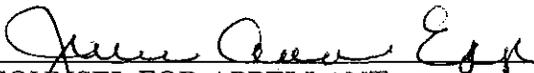

COUNSEL FOR APPELLANT

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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.**

STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

On March 20, 2007, Jeremy Winters was indicted in the Circuit Court of Bolivar County for driving or otherwise operating a 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. . . ." Mr. Winters was charged with having been previously convicted of DUI three times within the last five years. RE 11-12

Winters waived a jury trial, and he was tried by Judge Albert B. Smith, III, on November 28, 2007. Judge Smith found Winters guilty of "FELONY DUI" and sentenced him to one year under the supervision of the Mississippi Department of Corrections to be served in the Intensive Supervision Program/House Arrest Program. He also received probation for four years and was ordered to pay a \$2500.00 fine as well as other costs and fees. Re 6-10.

The judge overruled Berry's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial on January 23, 2008. R.I/93. On February 19, 2008, Winters timely filed a Notice of Appeal to this Court. R.I/93-A.

(ii) Statement of Facts:

At trial, Officer Charles Morris testified that he arrested Jeremy Winters. He administered a test which registered .09% BAC. R.II/78-100

Defendant's expert witness testified that, given the times Winters consumed alcohol, his likely BAC at the time he was driving, as opposed to the time he was tested, was between .06

and .07. R.II/56. The State's expert countered that he believed Winters' BAC was likely between .08% and .09%. R.II/91.

Over the objection of Winters that he could not be found guilty of felony DUI, the trial judge found Winters guilty of "FELONY DUI." RE 4-5.

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:

Both prior to and at trial,¹ Winters vigorously argued that he could not be convicted and sentenced as a felony DUI offender pursuant to §63-11-30(2)(c). Mr. Winters is under the age of 21 years. Moreover, his indictment charges that he is guilty of operating a vehicle with a blood

¹ In addition to his arguments made at trial and post-trial at the sentencing hearing, Mr. Winters filed Motions to Dismiss the Indictment and to Quash the Indictment alleging that the indictment failed to charge "felony" DUI. R.I/35-36, 37-38. He argued his motions at R.II/8-17 and again at sentencing R.II/111-14.

alcohol level that was over .02%. RE 11. Felony DUI requires an indictment for .08 % or more.
Id.

The DUI statute, §63-11-30(1), MCA, makes it unlawful for a person to drive a motor vehicle with a blood alcohol concentration of more than .08% in the case of someone above the age of 21. In the case of someone under the legal age of 21, it is unlawful to drive with a blood alcohol concentration of .02% or over.

Section 63-11-30((3)(a), the so-called “Zero Tolerance for Minors” Law, which applies to persons under 21 years of age, then provides a set of penalties for anyone driving with a BAC of more than .02%, but lower than .08%. For a third or subsequent offense under the Zero Tolerance law where the BAC is more than .02% and less than .08%, the penalty would be a misdemeanor with a fine of no more than One Thousand Dollars (\$1,000.00) and revocation of the offender’s driver’s license until the age of twenty-one or two years, whichever is longer. §63-11-30(3)(d). An offender is also required to complete treatment. §63-11-30(3)(f).

However, rather than applying the Zero Tolerance act in the instant case, the 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. According to the trial judge in the case of a conviction for a third or subsequent offense, §63-11-30(2)(c) required that Winters be found guilty of a felony and fined not less than Two Thousand Dollars nor more than Five Thousand Dollars and be sentenced to serve not less than one year, nor more than five years in the custody of the Mississippi Department of Corrections.² Accordingly, he found that Winters was guilty of “FELONY DUI” and sentenced him for a felony.

² Sentencing under this provision likewise requires treatment and suspension of the offender’s license. §63-11-30(2)(d) and (e).

The problem, however, is that as Winters' correctly claimed, 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. RE 11.

This Court has repeatedly held 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. *E.g.*, *Broadus v. State*, 392 So.2d 203, 205 (Miss. 1980) [indictment failed to state amount of marijuana defendant was charged with selling]; *White v. State*, 374 So.2d 225 (Miss. 1979); *See also*, *Mayfield v. State*, 612 So.2d 1120, 1127 (Miss. 1992) [where there is doubt as to which statute should apply, statute providing lesser penalty will govern]; *Worthy v. State*, 308 So.2d 921, 923 (Miss. 1975) [where fall under either of two statutes, lesser punishment must be imposed]; *Royalty v. McAdory*, 278 So.2d 464, 467 (Miss. 1973) [where under the charge which statute applies, the case will be referred to the statute which imposes the lesser punishment]; *Grillis v. State*, 196 Miss. 576, 585, 17 So.2d 525, 527 (1944) [where charges fall under two statutes, no greater punishment may be administered than that proscribed for lesser statute].

In a case virtually indistinguishable from the instant one, the indictment charged the defendant with possession of more than one ounce of marijuana with intent to transfer. *Ivy v. State*, 589 So.2d 1263-1266 (Miss. 1991). As does the DUI statute, the drug statute set forth graduated penalties depending on the amount of marijuana involved. 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 1263-1266 (Miss. 1991). There is no rational reason for

distinguishing the DUI statute from the drug statute. Because Winters was not charged with a BAC of .08% or above, he may not be convicted or sentenced for that offense. *Id.*

This Court has repeatedly held that in order for a defendant to be convicted and sentenced for a felony, the indictment must state all the essential elements of the offense. *E.g., State v. Buchanan*, 75 Miss. 349, 22 So. 875 (1898) *Irby v. State*, 4 So.2d 881 (Miss. 1941) [fundamental error cognizable for first time on appeal to omit underlying crime]; *Crosby v. State*, 191 Miss. 173, 2 So.2d 813 (1941) [omission of essential element of larceny in burglary indictment plain error]; *In the Interest of Jenkins*, 274 So.2d 143 (Miss. 1973) [fatal error to omit essential elements of larceny in burglary indictment]. An indictment which fails to include all of the essential elements of the offense is bad because it violates due process, the right to notice, and the right to indictment by grand jury in violation of the Mississippi Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitutions. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

As in *Ivy*, a charge of .08% is an essential element of felony DUI. *Id.* Since the indictment here omitted that element, Winters cannot be convicted or sentenced for felony DUI.

CONCLUSION

This Court must reverse Mr. Winters' felony conviction and remand for entry of a misdemeanor conviction and sentence under the Zero Tolerance for Minors act. 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

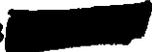
CERTIFICATE

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 Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205 and Laurence Y. Mellen, District Attorney, P. O. Box 848, Cleveland, Mississippi 38732.

This, the 22nd day of December, 2009.



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