IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER FLUKER — APPELLANT

VS.

NO. 2009-KM-0237-COA
CONSOLIDATED WITH
2009-KM-0238-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. OFFICER WILLIAMS HAD REASONABLE SUSPICION TO STOP FLUKER'S VEHICLE.

II. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT FLUKER'S CONVICTION FOR VIOLATING MISSISSIPPI CODE ANNOTATED § 63-3-617.

III. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING FLUKER'S REQUESTED MODIFICATION OF THE RECORD.

STATEMENT OF THE CASE

This is an appeal against a judgement from the Circuit Court of Grenada County, Mississippi, in which the Appellant was convicted and sentenced for his misdemeanor crimes of driving on or near the center line and DUI, first offense.

STATEMENT OF THE FACTS

On May 25, 2008, Officer Ben Williams of the Mississippi Highway Patrol stopped Christopher Fluker on Mississippi Highway 8 in Greneda County. (T. 5-6). Through the course of the stop, it became evident to Williams that Fluker was under the influence of alcohol. (T. 8). After admitting to Williams that he was drinking alcohol just prior to the stop, Fluker failed to pass field sobriety tests administered by Williams and was arrested for suspicion of driving under the influence. (T. 7).

Fluker's traffic stop and subsequent arrest were based on three specific traffic violations Officer Williams observed as he was traveling toward Fluker on the opposite side of the highway. (T. 4-5). First, Williams testified that the tint on the windows was "blacked out," inferring that it was not within the legal limits for vehicle registered in Mississippi. (T. 4). Second, Williams noted that Fluker was driving on or near the center line for more than 200 yards. (T. 4-5). He referenced this by noting that Fluker was third in a line of cars and that he was closer to the center of the highway than the other two cars. (T. 4-5). Additionally he continued to observe Fluker's vehicle in his rearview mirror as he passed and determined from his knowledge and experience that Fluker had traveled that course for more than the 200 yards. (T. 5). Third, Williams testified that Fluker was traveling sixty-two miles per hour in an area with a fifty-five mile per hour speed limit. (T. 5). Once Williams turned around and pulled Fluker over he noticed that the vehicle was registered in Tennessee and that the Mississippi regulations for window tint would not apply. (T. 6). In fact, Fluker was only charged with driving near the center of the road and suspicion of driving under the influence. (T. 6).

Once under arrest, Fluker was transported by Williams to the station and offered an Intoxilyzer test, which he refused. (T. 7). After spending approximately 30 minutes with Fluker,

Williams testified that based on his knowledge, training, and twenty-one years of law enforcement experience, he developed the opinion that Fluker was intoxicated. (T. 8). Further, Williams pointed to Fluker's driving behavior, the strong odor of alcoholic beverages emanating from both his car and his person, Fluker's staggering walk, low tone, red eyes, dilated pupils, and inability to recite the alphabet as further evidence that he was impaired. *Id.*

SUMMARY OF THE ARGUMENT

Officer Williams' stop of Fluker's vehicle rested on the reasonable suspicion that multiple traffic laws were violated. Fluker was observed driving on or near the center line for more than 200 yards, the tint on his windows was outside of the range prescribed by Mississippi statute for a vehicle registered in this state, and Fluker was driving sixty-two miles per hour in an area with a posted speed limit of fifty-five. Each of these violations was testified to by Williams in court.

The State of Mississippi met its burden of proof of the elements under Miss. Code Ann. § 63-3-617. Officer Williams testified in court as to his knowledge of the statute and described his observation of Fluker violating the statute. Specifically, Williams indicated that Fluker was closer to the center line than either of the two cars in front of him and that he observed Fluker driving near the center line long enough to cite him for the violation.

Fluker fails to meet his burden of proving that any alleged deficiency was prejudicial to his defense resulting in an unreliable result at the conclusion of the trial. Counsel's decisions to call or not call certain witnesses and ask certain questions fell within the wide range of reasonable professional assistance allowed under the standards of *Strickland v. Washington.*

The Circuit Court of Grenada County did not err in refusing Fluker's motion to modify the record. Fluker's proposed modification and affidavit failed to add or correct anything in the record that was omitted or improperly recorded during the trial proceedings. Therefore it falls outside of

Rule 10's flexible, but narrow application and was rightfully denied by the Circuit Court.

ARGUMENT

I. REASONABLE SUSPICION EXISTED TO STOP FLUKER'S VEHICLE

Fluker's contention that the trial court erred in finding probable cause existed for the stop of his vehicle has two fatal flaws. First, the correct standard applied to the constitutionality of investigatory traffic stops is the less stringent standard of reasonable suspicion on the part of the detaining officers. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 114 (¶16)(Miss. 1999). Second, the record shows that based on the facts known to Officer Williams at the time of the initial observation and traffic stop, Fluker was in violation of multiple traffic laws. These violations acted as an objective basis for Williams' reasonable suspicion and the subsequent traffic stop.

The Fourth Amendment of the U.S. Constitution and Art. 3 § 23 of the Mississippi State Constitution protect, in almost identical language, one's right to be secure from unreasonable search and seizure. *Floyd*, 749 So. 2d at114 (¶14). While an officer must generally have probable cause to meet this constitutional requirement for an arrest or warrantless search, the standard is less stringent in the context of an investigatory traffic stop. *Id.* at ¶16. "The Mississippi Supreme Court has recognized that under reasonable circumstances an officer may stop a suspect to resolve an ambiguous situation...on less information than is constitutionally required for probable cause to arrest." *Loveless v. City of Booneville*, 972 So. 2s 723, n. 10 (Miss. Ct. App. 2007) (quoting *Floyd*, 749 So. 2d at 114 (¶16)). This lesser standard requires nothing more than a "reasonable suspicion, grounded in specific and articulable facts"on the part of the officer. *Id.*

Additionally, the *Floyd* court set guidelines for determining the existence of reasonable suspicion. *Floyd*, 749 So. 2d at 114 (¶17). "[T]he court must consider whether, taking into account the totality of the circumstances, the detaining officers had a particularized and objective basis for

suspecting the particular person stopped of criminal activity." *Id.* Thus, the definition outlined in *Floyd* of reasonable suspicion objectively bases the constitutionality of an investigatory traffic stop on the facts known to the officer at the time of the stop. *Adams v. City of Booneville*, 910 So. 2d 720, 724 (¶16) (Miss. Ct. App. 2005) (citing *U.S. v. Escalante*, 239 F.3d 678, 680-81 (5th Cir. 2001)).

Officer Williams' stop of Fluker and his subsequent arrest occurred after Williams observed Fluker violating three separate traffic laws. First, as Williams was traveling toward Fluker, he noted the "blacked out" window tint, a possible violation of Miss. Code. Ann. § 63-7-59(2). It was only after turning around and pulling Fluker over that he noted the car was registered in Tennessee, thus not subject to the statute. (T. 5). Second, Williams observed and testified that Fluker was driving on or near the center line for a distance more than 200 yards. (T. 5). Third, Fluker was driving at a rate of speed which exceeded the posted speed limit. (T. 5).

On their own, any of these observations by Williams at the time of the stop would constitute the "particularized and objective basis for suspecting the particular person stopped of criminal activity" needed to support a finding that Williams acted with reasonable suspicion. *Floyd*, 749 So. 2d at 114 (¶17). All three of the violations were testified to by Williams under oath. (T. 4-8). Fluker was cited for two of the three violations at the time of his stop, during which time Williams first noticed the strong smell of alcohol. (T. 5). Fluker's conduct in driving near the center line for more than 200 yards and speeding constituted conduct that violated cited traffic law and provided an objective basis for the stop. *Adams*, 910 So. 2d at 724 (¶16). Coupled with the other two violations, it is clear that, at the time of the traffic stop, Officer Williams' decision to stop Fluker followed a reasonable suspicion grounded in Fluker's disregard and violation of multiple traffic laws.

II. THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT FLUKER'S CONVICTION FOR VIOLATING MISSISSIPPI CODE ANNOTATED § 63-3-617.

After a careful reading of both the statute and the trial record it is clear that the State has met its burden of proof for the elements of Mississippi Code Annotated § 63-3-617, the pertinent part of which reads: "It shall be unlawful for the driver of any truck or other vehicle to drive in or near the center of any highway for a distance of more than two hundred yards..." Miss. Code Ann. § 63-3-617. During trial, the evidence was undisputed. Officer Williams testified that he observed Fluker breaking the law and was cross-examined only about the section number of the statute and the physical presence of a copy of the statute in the courtroom. (T. 5, 8-9).

Fluker has asked the court to review the sufficiency of the evidence. Upon review, the Court must view the evidence in the light most favorable to the State. *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005). This includes giving the State "the benefit of all reasonable inferences that can be reasonably drawn from the evidence." *Bell v. State*, 910 So. 2d 640, 647 (¶16) (Miss. Ct. App. 2005) (Citing *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Therefore, the test is not whether the reviewing court "believes that the evidence at the trial established guilt beyond a reasonable doubt," but whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush*, 895 So. 2d at 843 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

At several points in the record Williams made statements that illustrated his understanding of the law and explained how his observations led to the charge against Fluker for driving on or near the center of the road for more than 200 yards. Miss. Code Ann. 63-3-617 (1972). First, Williams referenced the statute and its elements, including the required distance of 200 yards, on the record. (T. 4). Additionally, he cited Fluker for the violation immediately after pulling him over. (T. 5).

From his knowledge of the elements and the immediate citation, it can reasonably be inferred that he knew and understood the law when he observed, stopped, and charged Fluker.

Second, during his initial observation of Fluker, Williams testified that he was traveling "closer to the center line" than the two cars directly in front of him. (T. 4). Williams' use of his knowledge and training helped him keep a trained eye on the proportional difference between those two cars driving within the limits prescribed by law and Fluker, who was obviously outside of that limit. Furthermore, Williams' statement specifically referred to the "center line" of Mississippi Highway 8. (T. 4). This statement unambiguously tracks the language of Miss. Code Ann. § 63-3-617, leaving no reason to question his position in the road or speculate that position relative to the number of lanes.

Third, Williams testified that he not only observed Fluker driving in violation of the statute as he was traveling toward him, but that he continued to observe him in his rearview mirror after they passed one another. (T. 4-5). At sixty-two miles per hour it is reasonable to infer that Williams could observe Fluker travel the 200 yards necessary under the statute in less than ten seconds. Based on Williams' description of the circumstances surrounding the stop, his training, and experience, and his testimony which demonstrates knowledge of the elements of the crime charged, it is reasonable to infer that Williams observed Fluker driving near the center line of Mississippi Highway 8 for a distance greater than 200 yards.

After twenty-one years of law enforcement, Officer Williams possesses unique knowledge of Mississippi's traffic laws and experience on the road. (T. 7). The record shows that these attributes allowed Williams to focus on Fluker's vehicle in a line of cars, continue his observation until he was sure of a violation, and confidently issue a citation as is his responsibility as a Mississippi State Trooper.

III. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

Fluker's counsel provided effective assistance at Fluker's circuit court trial that subjected the State to a "meaningful adversarial setting." *Amos v. State*, 911 So. 2d 644, 656 (¶22) (Miss. Ct. App. 2005). Although ultimately unsuccessful, Jim Arnold, Esq., met the Constitutional imperative of effective counsel while advocating for Fluker in both of the lower court trials in Grenada County. It is only in hindsight that alleged inadequacies are questioned and challenged as deficient or prejudicial.

A claim of ineffective assistance of counsel is only viable where the appellant can prove deficiencies in counsel's performance that meet both prongs of the test set forth in *Strickland v. Washington*. *Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1984). The first prong of this test mandates that Fluker prove that defense counsel rendered deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this test, counsel's errors must be so egregious that counsel was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment of the United States Constitution. *Id.* The second prong tests whether any alleged deficiency prejudiced the outcome of Fluker's case. *Id.* This inquiry requires Fluker to show that the errors made by counsel deprived him of a fair trial with a reliable result. *Id.* The analysis is conducted with deference to trial counsel's performance and takes the totality of the circumstances into consideration, in effect creating a strong presumption that counsel's performance falls within a wide range of reasonable professional assistance. *Stevenson v. State*, 798 So. 2d 599, 602 (¶6) (Miss. Ct. App. 2001). This presumption may only be rebutted by demonstrating a reasonable probability that, but for counsel's deficient performance, a different result would have occurred. *Strickland*, 466 U.S. at 694). Additionally, on direct appeal, the inquiry is restricted solely to the evidence within the four corners of the record. See *Colenburg v. State*, 735 So. 2d 1099, 1102 (¶6) (Miss. Ct. App. 1999).

Furthermore, Fluker bears the burden of proving both prongs of the test are met. *Lewis v. State*, 997 So. 2d 1001, 1006 (¶23) (Miss. Ct. App. 2009). Otherwise, "it cannot be said that a conviction...resulted from a breakdown in the adversary process that renders the result unreliable," and relief must be denied. *Strickland,* 466 U.S. at 687. Fluker alleges only two instances within the record in support of his claim. While not admitting that these instances constituted deficient performance, the State contends that Fluker fails to show any prejudice where the overwhelming weight of the evidence proved his guilt.

Officer Williams testified that Fluker drove near the center line for more than 200 yards, meeting both of the elements of the violation for which he was found guilty. (T. 5). Additionally, Williams testified that Fluker admitted to consuming alcohol just thirty minutes prior to the stop, failed the field sobriety test that Williams administered, and that, after spending 30 minutes during and after the stop with Fluker, it was clear that he was intoxicated. (T. 8). Fluker asserts that counsel's lack of familiarity with the statute under which he was charged and the lack of an alleged proper cross examination resulted in a lower standard of proof for the State and created prejudice in the result. However, Fluker fails to specifically indicate how a revised cross examination would refute or otherwise impeach the testimony of Officer Williams in such a way that would yield a different result, or demonstrate the current one unreliable. *Strickland*, 466 U.S. at 687. "Failure to cross-examine, by itself, does not evince prejudice or mistake." *Bryant v. State*, 748 So. 2d, 780, 791 (¶52) (Miss. Ct. App. 1999). On direct examination the existence of the statute and its elements were established by Williams' testimony. (T. 5). Williams testified to the violation of multiple traffic laws sufficient to establish reasonable suspicion for the traffic stop. (T. 4-5). Williams further testified that Fluker was at the time intoxicated to the point of impairment. (T. 8). Further examination of Williams could have yielded testimony more damaging than that already offered, or

more detail, solidifying the State's position in the mind of the trier of fact. The line of questioning undertaken by Arnold falls squarely within the ambit of trial strategy. *Jackson v. State*, 815 So. 2d 1196, 1200 (¶8) (Miss. 2002). There is no indication that further questioning of Williams would have yielded a different result, thus no indication that Arnold's actions fell outside of the wide range of reasonable professional assistance guaranteed to Fluker. There is simply no proof that counsel's performance prejudiced the outcome of the trial, or that its result was unreliable where the weight of the evidence clearly pointed to Fluker's guilt.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING FLUKER'S REQUESTED MODIFICATION OF THE RECORD.

In early June of this year, approximately five months after Fluker was convicted of driving near the center line and DUI, first offense, the Circuit Court of Grenada County denied Fluker's motion for modification of the record. The modification sought to include, for appellate review, an untested affidavit made up of Fluker's own testimony concerning events that occurred out of court. While Fluker attempts to justify this modification of the record on the Mississippi Rules of Appellate Procedure, it is clear that, while flexible, the rules specifically prohibit this type of modification to the record.

Mississippi Rule of Appellate Procedure 10(e) authorizes the correction or modification of the record where "any difference arises as to whether the record truly discloses what occurred in the trial court." M.R.A.P. 10(e). The limits to this rule are prescribed in 10(f):

> Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except *insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court* with respect to those issues that are the bases of appeal.

M.R.A.P. 10(f) (emphasis added). Additionally, the comment to Rule 10(f) states: "Subdivision (f) clearly states that the flexible procedures of this rule are not intended to permit a party to augment the record with matters entered *ex parte*." M.R.A.P. 10 cmt. While the rules seek to offer a fair and flexible way to modify the record when needed, the court generally will not rely on information from testimony that does not appear in the official record unless it was inadvertently or improperly omitted. *Chapman v. City of Quitman*, 954 So. 2d 468, 471 n.1 (Miss. Ct. App. 2007).

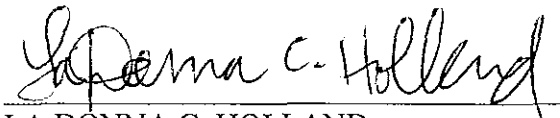
The allegations in Fluker's affidavit clearly fall outside of the knowledge established and vetted by the adversarial process during trial. By filing this motion and affidavit some five months after trial, Fluker sought to interject the record with his own testimony, untested by the State, on matters that were not at issue during trial. There was no evidence available to the Circuit Court Judge to prove or disprove the truth of the matters asserted by Fluker. Furthermore, Fluker's attempt to enter this new testimony *ex parte* into the record is clearly addressed and rejected by Rule 10(f) and the official comment that follows. Fluker's proposed modification and affidavit failed to add or correct anything in the record that was omitted or improperly recorded during the trial proceedings. Therefore, the proposed modification falls outside of Rule 10's flexible, but narrow application and was rightfully denied by the Circuit Court.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this honorable Court to affirm the Appellant's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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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