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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JARRETT NICHOLS — **APPELLANT**

VS.

2009-CA-01007-COA

STATE OF MISSISSIPPI, BY AND THROUGH THE CITY OF MADISON — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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 judges of this Honorable Court may evaluate possible disqualification or recusal.

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SO CERTIFIED, this the 8 day of October, 2009.

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Jarrett Nichols

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STATEMENTS OF THE ISSUES ON APPEAL

Appeal to this court was taken by Appellant Jarret Nichols, hereinafter referred to as Nichols, from the opinion rendered on May 19, 2009 by the Circuit Court of Madison County, Mississippi, which affirmed the decision by the County Court of Madison County, Mississippi on August 5, 2008, whereby this appeal from the Madison Municipal Court was for a trial de novo, whereby Appellant Jarret Nichols entered a please of nolo contendere to the charges of DUI-1st offense and careless driving on March 7, 2008. The issue presented on appeal is:

1. **WHETHER THE STATE MET ITS BURDEN OF PROOF IN PROVIDING SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF DRIVING UNDER THE INFLUENCE.**

2. **WHETHER A PERSON'S RIGHT TO REFUSE THE INTOXILYZER TEST IS IN AND OF ITSELF SUFFICIENT PROOF TO CONVICT A PERSON OF DRIVING UNDER THE INFLUENCE.**

STATEMENT OF THE CASE

Statement of the Facts

On January 26, 2007, at 3:22 a.m., Jarret Nichols, hereinafter referred to as Nichols, was pulled over by Officer James Craft while he was driving on Holly Hedge Road which is in Madison, Mississippi R. 6-7. In his testimony, Nichols testified that he was a practicing attorney in Jackson, Mississippi and resided in the Northbay subdivision, which is in Madison, Mississippi. R. 25. On

the date in question, Nichols was residing at 110 Cypress, Madison, Mississippi, which is located in Traceland North subdivision. R. at 26. On said night, Nichols turned into Traceland North subdivision when Officer Craft initiated the stop. R. at 26. Upon being stopped, Nichols' provided his drivers license to the officer. *R* at 26. The drivers license listed 121 Silvertree Crossing as his address rather than 110 Cypress. R. at 26. Nichols explained this discrepancy by stating that Nichols and his wife were separated, and she was living at the 121 Silvertree Crossing address. Nichols, on the other hand, was living temporarily at 110 Cypress in Traceland North. R. at 26.

Nichols testified to the events that took place on the night in question which led to his arrest at approximately 3:22 a.m. Nichols' testimony was very confident and detailed as to his whereabouts on said day. He stated that his office is located on Northtown Drive near Time Out Sports Café. R at 26. Around five o'clock p.m., Nichols walked to Time Out to meet a friend. R. at 27. While he was there, he testified that he consumed two beers in while eating the buffet. R. at 27. Shortly thereafter, Nichols walked back to his office to finished up paperwork and drove home. R at 28.

Nichols also testified that on that same day he was battling a chest cold along with a sore throat and stuffy nose. R. at 28. Later that same night, Nichols testified that he stayed on the telephone talking to his now wife from 7:00 p.m. until 10:00 p.m. R. at 28. He further stated that he was having trouble sleeping because he was sick; therefore, he left his house at approximately 2:30 in the morning and drove to the Waffle House on Old Canton road near Lake Harbor. R. at 29. On his way home, Nichols stated that he called his now wife on his cell phone and during the conversation he dropped said cell phone. R. at 30. When Nichols looked up from retrieving his cell phone, he noticed the blue lights behind him. From this point forward, Nichols proceeded to take a left onto St. Augustine. R. at 30. Ultimately, he pulled over in the subdivision where he was residing. R. at. 30.

As mentioned in the first paragraph, upon furnishing his drivers license to the officer, Nichols and the officer were in a disagreement as to where Nichols was residing. R. at 31. At the hearing, Nichols testified as to the conversation between himself and Officer Craft. Nichols stated,

> ...And he said time where was I going; I said "Home." He said, "Home isn't this way." And I said to him, " I don't' live where the address is on my driver's license. I can see my driveway." And he said, "You're a long way from Highwood, son." And I said, I can see my driveway right now, and I have a key. I'll put it in the door and open it for you right now." R. at31.

Officer Craft proceeded to ask Nichols to perform a field sobriety in addition to searching his vehicle which Nichols consented to both request. R at 31. The Officer did not find any illegal substances as a result of his search. R. at 32. After the field sobriety test, Nichols was cuffed and placed in the patrol car. R at. 32. While Nichols was at the police station, he refused to take the intoxilyzer. R. at 42.

Nichols testified that he had never practiced criminal law; therefore, he was not aware of the law that a person automatically loses their license for 90 days should a person refuse the intoxilyzer test. R. at 41.

ARGUMENT

I. WHETHER THE STATE MET ITS BURDEN OF PROOF IN PROVIDING SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF DRIVING UNDER THE INFLUENCE.

As stated in the Appellant's brief, the question is whether the State met its burden of proof in providing sufficient evidence to convict the Appellant of driving under the influnce.It is well known law that the prosecution has the burden of proof in criminal matters Jamison vs. City of Carthage, 864 So.2d 1050, 1052 (Miss. App. 2004.) Here, there was no sufficient evidence presented on behalf of the prosecution that would merit a conviction of driving under the influence.

The were many issues that were contradicted in the officer's testimony in addition to many discrepancies as to the events that occurred on the night in question between Officer Craft and Nichols. First, there was an issue regarding the Appellant's place of residence. As stated above, the officer did not believe the appellant when he stated that he lived in Traceland North because his driver's license listed another address. Nichols, in his testimony, had a very plausible explanation as to why he was no longer living at the address that was listed on his driver's license. At trial, Nichols insisted that he stated to the officer "I can see my driveway" and on the other hand, the officer insisted that Nichols stated that he was in his driveway. R. at 31. The issue regarding Nichols place of residency was the first exchange between Nichols and Officer Craft. Because of the discrepancy with his drivers license, at the very instant Officer Craft met Nichols, he did not believe Nichols was telling the truth.

The fact that Nichols did not have his current address listed on his license is not evidence of him being and driving under the influence. As stated above, Nichols provided a reasonable explanation of such. However, the officer attributes this as one of the attributing factors for charging Nichols of driving under the influence.

There was other contradictory testimony at trial. For example, there was contradictory testimony regarding whether or not Officer Craft searched the car of the Appellant. Office Craft testified that he did not search Nichols vehicle the night of the armrest. R. at 20. However, Nichols' testimony was drastically different. Nichols stated that after he completed the field sobriety test the officer asked if he could search his vehicle. R. at 32. In his testimony, Nichols stated, "Not at all.And at that point both officers opened both of my front doors to a brand-new vehicle and ransacked the vehicle, turned my daughter's book bags upside down, undid everything in my car, dumped all the contents onto the floor, being pens, change, paper, books, all of that–all of that, and came back." R.

at 32. The fact on whether or not Nichols' vehicle was searched is irrelevant. What is important is that there are differing accounts on the events that took place on said night. Officer Craft simply stated that he did not search the vehicle while Nichols testified to a very detailed account of the search.

Furthermore, Officer Craft also testified that he "usually" explained to people the consequences if he or she did not take the intoxilyzer. R at 47. Officer Craft's usage of the word "usually" is key in this instance. Office Craft stated, "I usually do so with everyone, try to, you know, tell them what the implications are if they refuse to take the test...I usually tell them that, you know, without a breath sample, they're not eligible for a hardship license." In this matter or in any other matter, Office Craft cannot state with certainty whether or not he informed Nichols or others on the implied consent law. R at 47-8. The Officer has a duty to explain the consequences to individuals should he or she refuse to take the intoxilyzer test. Here, the officer is not sure whether or not he explained the issue to Nichols. Officer Craft merely stated that he "usually" does.

Officer Craft did state in his testimony that Nichols eyes were red. R at 9. Nichols in his testimony stated that he had been battling a bad cold and had taken cold medication before he had gone to sleep. R. at 28. Because he was sick and had asleep earlier in the night, his eyes were red. Again, Nichols had a plausible explanation, and there was no proof offered to suggest that Nichols' red eyes were due to alcohol consumption.

The one piece of testimony that both Officer Craft and Nichol's agreed to was Nichols weaved or crossed over the center line in the roadway. R. at 6. Nichols testified that while he was leaving the waffle house, he dropped his cell phone near Madison-Ridgeland Academy. R. at 30. Although not the better practice, he picked up his cell phone while he was driving and crossed over the center line. R. at 30. However, there was no proof offered at trial to show that Nichols' crossed

over the center line in the road due to alcohol consumption.

Based on the above, it is evident that the State did not meet the necessary burden of proving its case. Each and every allegation by Officer Craft has been credibly refuted by Nichols. Officer Craft testified that he was not sure he read the basic rights to Nichols. Further, the prosecution's evidence that Nichols had been drinking were the fact that Nichols had red eyes and had driven over the center line. Nichols substantiated that he did in fact have red eyes and did in fact drive over the center line. However, the prosecution failed to establish that Nichol's disposition was due to alcohol consumption.

II. WHETHER A PERSON'S RIGHT TO REFUSE THE INTOXILYZER TEST IS IN AND OF ITSELF SUFFICIENT PROOF TO CONVICT A PERSON OF DRIVING UNDER THE INFLUENCE.

The Appellant does not contest that "If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible to any criminal action under this chapter. Miss. Code Ann. §63-11-41. Multiple courts have held that refusal to a chemical sobriety test is physical evidence rather than testimonial evidence. South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Ricks v. State, 611 So.2d 212 (Miss. 1992).

In the instant matter, there was no other evidence to convict Nichols of driving under the influence other than the fact that he refused to take the intoxilyzer. As stated in the Neville case, refusal to submit to the intoxilyzer can be admitted as evidence. However, there is no case law nor statute that states that refusal to submit to the intoxilyzer is and of itself enough to prove someone is guilty of driving under the influence. Here, the State failed to prove any other facts that contributed to said guilty verdict. Had judges or lawmakers intended to have the Mississippi Code state that refusal to submit to an intoxilyzer is an automatic guilty plea, then certainty said lawmakers would

have provided for such. Refusal to take the intoxilyzer is merely one factor in the totality of circumstances.

Regarding the fact that Nichols refused to take the intoxilyzer, in his ruling, the learned judge stated that "this Court is allowed to take whatever–is allowed to place whatever weight on that and interpret that however it desires. And this–Court, you know, quite frankly, finds that most people refuse to take the test for a reason." R. at 57-8. As stated above, neither case law nor statute state that refusal to take the intoxilyzer alone is enough to convict a person for driving under the influence. However, based on the ruling from this court, it appears that Nichols' refusal alone was the reason Nichols was convicted.

CONCLUSION

The record in this matter reflects dramatically conflicting testimony. Here there is no reason or proof that Nichols lacked any credibility. He admitted to crossing over the center line while he was driving. Officer Craft made allegations that Nichols had been speeding and failed to yield to blue lights. However, there were no citations that indicated such. Nichols was very specific in his testimony even recalling events, such as the search of his vehicle, that were denied by Officer Craft.

Nichols was pulled over Because he crossed over the center line. Had he been speeding or failing to yield, the citations would had reflected such. He was sick; therefore, his eyes would have been glassy. From the instant Officer Craft noticed his license did not match Nichols' story as to his place of residence, he was cast in an unfavorable light by the officer. Despite the testimony of Officer Craft, Nichols was able to concretely refute the allegations made by the officer.

The mere fact that Nichols did not take the intoxilyzer test is not a sole indication that he was impaired to operate a vehicle. Neither case law not the Mississippi Code reflect that. The prosecution failed to offer any proof that proved Nichols to be under the influence of alcohol. Because of these

reasons, the lower court's ruling should be reversed against the overwhelming weight of evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date caused to be mailed by First Class United States Mail, postage prepaid, a true and correct copy of the above foregoing Record Excerpts of Appellant to the following:

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SO CERTIFIED, this the 8 day of October, 2009.

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