

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JILINDA BAKER

APPELLANT

VS.

NO. 2010-KM-1654

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

THE JEFFERSON COUNTY CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S PETITION TO REVERSE THE RULING OF THE COMMISSIONER OF PUBLIC SAFETY.

STATEMENT OF THE FACTS

On June 19, 2010, the Appellant Jilinda Baker, a minor at the time, was charged with DUI-First. The arresting officer Leo Clemmons conducted a field sobriety test on the highway which included using an AlcoSensor test. (Transcript p. 6). The result of the AlcoSensor was .05. (Transcript p. 6). Ms. Baker was transported to the police station where she was informed of her right to refuse the Intoxilyzer 8000. (Transcript p. 6-7). She was also advised that if she did refuse the test, her license would be suspended for ninety days. (Transcript p. 7). She was further advised that if she did not give two sufficient breath samples, it would be deemed a refusal. (Transcript p.

7). Ms. Baker attempted to blow into the machine. (Transcript p. 7). After attempting five or six times, the machine concluded that there was an insufficient sample. (Transcript p. 8).

Ms. Baker moved for nonadjudication under Miss. Code Ann. §63-11-30 and the motion was granted by the Jefferson County Justice Court. (Appellant's Addendum p. 2-5). However, the Department of Public Safety informed the Justice Court that Ms. Baker was not eligible for nonadjudication noting that:

Drivers who refuse to render a sufficient sample of his or her breath or refuse to submit to test shall not be eligible for nonadjudication.

(Appellant's Addendum p. 1). Ms. Baker then filed a Petition to Reverse Ruling of the Commissioner of Public Safety with the Jefferson County Circuit Court arguing that she "had no intent to refuse the test." (Record p. 3-4). A hearing was set for August 9, 2010 and an Order was entered staying the suspension of Ms. Baker's license pending a final decision by the Circuit Court. (Record p. 7 and 10).

During the hearing, Officer Leo Clemmons testified about the roadside field sobriety tests he conducted, the warnings and advisements he made to Ms. Baker about the Intoxilyzer 8000, and Ms. Baker's attempts to take the Intoxilyzer 8000. (Record p. 6-8). He testified that Ms. Baker did not provide a sufficient sample for the Intoxilyzer to be able to calculate her blood alcohol content. (Record p. 8). After being questioned about Ms. Baker's claim that her asthma affected her ability to give a sufficient sample, Officer Clemmons testified:

I'm a firm believer that anybody is capable of giving a proper breath sample in the Intoxilyzer 8000 even if they have asthma or not. . . . Like I said, I'm a firm believer anybody - - that she's a young and healthy woman and was definitely capable of giving a sufficient breath sample.

(Transcript p. 9). When questioned on cross-examination about cases where people just "don't want to complete" the test, Officer Clemmons testified as follows:

Q: And you gave her numerous chances to pass this test?
A: I gave her numerous chances to complete the test, yes, sir.
Q: And do you see cases where people just don't want to complete it?
A: That's correct.
Q: Did you get the impression that's what was happening here?
A: I got the impression that, like I said, that she's fully capable of giving a proper breath sample.
Q: She just refused to do so?
A: That's my opinion, yes, sir.

(Transcript p. 10). Ms. Baker testified that she did attempt to cooperate but was unable to sufficiently blow into the machine. (Transcript p. 12). Ms. Baker further testified that she has asthma but confirmed that she did not have an asthma attack on the night in question. (Transcript p. 12). At the close of the hearing, the Circuit Court denied Ms. Baker's Petition. (Record p. 11). Ms. Baker now appeals that decision.

SUMMARY OF THE ARGUMENT

The Jefferson County Circuit Court's Order denying Ms. Baker's Petition to Reverse the Ruling of the Commissioner of Public Safety should be affirmed. There was absolutely no admissible evidence that Ms. Baker's blood alcohol count fell within the parameters set forth in the Zero Tolerance for Minors Section of the DUI Law. Without evidence that her blood alcohol count fell within those parameters, Ms. Baker cannot have her DUI conviction nonadjudicated.

ARGUMENT

THE JEFFERSON COUNTY CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S PETITION TO REVERSE THE RULING OF THE COMMISSIONER OF PUBLIC SAFETY.

On appeal, Ms. Baker did not raise the issue of her refusal to properly comply with the Intoxilyzer 8000 test as she did before the Circuit Court, but instead questions "whether the Department of Public Safety['s] ruling that nonadjudication was unavailable to a minor who refuses the intoxilyzer but tested .05% blood alcohol level on the AlcoSensor is error." (Appellant's Brief

p. 1). The State would assert that it was not error.

Mississippi Code Annotated §63-11-30(3)(a) reads 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 added). Section 63-11-30(3)(g) reads in pertinent part as follows:

(g) The court shall have the discretion to rule that a first offense of this subsection by a person under the age of twenty-one (21) years shall be nonadjudicated. Such person shall be eligible for nonadjudication only once. The Department of Public Safety shall maintain a confidential registry of all cases which are nonadjudicated as provided in this paragraph. A judge who rules that a case is nonadjudicated shall forward such ruling to the Department of Public Safety. Judges and prosecutors involved in implied consent violations shall have access to the confidential registry for the purpose of determining nonadjudication eligibility. . .

(emphasis added). Accordingly, the courts have the discretion to nonadjudicate a minor's DUI ONLY when there is evidence that his or her blood alcohol concentration is more than .02% and less than .08%.

Both the State and Ms Baker agree that "if a person refuses to take the intoxilyzer and there is no blood alcohol level reading, the Zero Tolerance for Minors section does not apply." (Appellant's Brief p. 3). However, Ms. Baker asserts in her brief that "the question is whether the alcohol concentration reading on [the] AlcoSensor of .05% is sufficient evidence for a court to determine whether the minor's alcohol concentration qualifies the minor for non-adjudication." (Appellant's Brief p. 4). The State would respond that it is not. Mississippi Code Annotated §63-11-19 states that "[a] chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public

Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis.” (*emphasis added*). See also *Fulton v. City of Starkville*, 645 So.2d 910, 913 (Miss. 1994) (holding that “[a] chemical analysis of a person’s breath, blood, or urine is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate”). “These safeguards insure a more accurate result in the gathering of scientific evidence through intoxilyzers and are strictly enforced.” *Fulton*, 645 So.2d at 913 (quoting *Johnston v. State*, 567 So.2d 237, 238 (Miss. 1990)) (*emphasis added*). The AlcoSensor test is not one of the tests approved by the State Crime Lab as it a portable breath test and is not routinely tested for accuracy. The Mississippi Crime Laboratory Implied Consent Policies and Procedures Manual states in Section 1700.200 that “[t]he Department of Public Safety has adopted the Intoxilyzer 5000 with the cooled detection and option and the Intoxilyzer 8000 Mississippi Version both which are manufactured by CMI, Inc. as the only accepted evidentiary instruments for use in breath alcohol testing in the State of Mississippi pertaining to Implied Consent laws in Mississippi Code.” (*emphasis added*). See also *Mississippi Department of Public Safety Crime Laboratory/ Highway Safety Patrol Implied Consent Evidential Breath Alcohol Testing Training Manual*¹. Thus, results from an AlcoSensor test are not admissible evidence of a person’s blood alcohol content. The results of the AlcoSensor are only admissible “for purposes of proving probable cause to arrest and to administer the intoxilyzer.” *Price v. State*, 752 So.2d 1070, 1077 (Miss. Ct. App. 1999). Accordingly, there was no admissible evidence of Ms. Baker’s BAC level and therefore, no proof that she fell within the parameters of Section 63-11-30(3)(a). Without evidence that she fell within those parameters, Ms. Baker was not eligible for nonadjudication.

¹ A copy of both manuals can be found at www.dps.state.ms.us.

Nonetheless, Ms. Baker argues in her brief that the Justice Court Judge ordering the nonadjudication was the trier of fact and determined that her blood alcohol level was .05%. (Appellant's Brief p. 4). Ms. Baker correctly asserts that the judge was the trier of fact; however as in any case where the judge is the trier of fact, his or her findings must be based upon admissible evidence. *See Frei v. State*, 934 So.2d 318, 323 (Miss. Ct. App. 2006) (holding that Mississippi appellate courts will uphold a trial judge's findings of fact "when substantial EVIDENCE in the record supports those findings") (*emphasis added*); and *Morris v. State*, 777 So.2d 16, 25 (Miss. 2000) (holding that the Court would not reverse a judge's fact-finding unless "clearly erroneous and NOT SUPPORTED BY SUBSTANTIAL EVIDENCE") (*emphasis added*). As there was no admissible evidence of Ms. Baker's blood alcohol count, the Justice Court Judge's finding of fact was not based on "substantial evidence" and the Circuit Court properly overruled that finding.

CERTIFICATE OF SERVICE

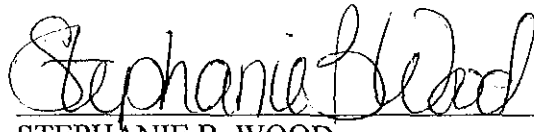
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lamar Pickard
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This the 30th day of August, 2011.

A handwritten signature in cursive script, reading "Stephanie B. Wood", written over a horizontal line.

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