IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KHADER HANNA ISTIPHAN — **Appellant**

vs. — **CASE NO. 2010-KM-01785-COA**

CITY OF MADISON — **Appellee**

BRIEF OF APPELLEE, THE CITY OF MADISON, MISSISSIPPI

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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 Circuit Judge may evaluate possible disqualification or recusal.

Honorable William Agin
County Court Judge

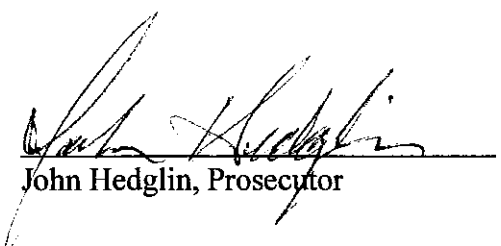
Honorable William Chapman
Circuit Court Judge

Tommy Savant, Esq.
Trial Counsel for Appellant

Minor F. Buchanan, Esq.
Appellate Counsel for Appellant

Khader Hanna Istiphan
Appellant

John Hedglin, Esq.
Prosecutor/Counsel for the Appellee



John Hedglin, Prosecutor

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STATEMENT OF THE CASE

The State accepts the Appellant's statement of facts, but not the inferences or interpretations offered in the Appellant's brief.

SUMMARY OF ARGUMENT

The evidence presented by the state is more than sufficient to support a conviction, based on cases previously decided by the appellate courts. It was the function of the trial judge, sitting as the finder of fact, to interpret the evidence and determine the credibility of the witnesses.

The appellate court should not disturb findings of fact by the trial court where there is sufficient evidence to support a conviction, as there clearly is here.

The toxicology report offered by the defense clearly was inadmissible under the Mississippi Rules of Evidence.

The record does not reflect the necessary basis for a claim of ineffective assistance of counsel.

NOTE: Appellant's first assignment of error deals with a procedural issue under Miss. Code Section 11-51-81. In light of the Court's recent decision in Jones v. City of Ridgeland, 48 So.3d 530 (Miss.2010), this issue appears to be moot, and the City will not address that issue.

ARGUMENT

1. Sufficiency of the Evidence

In the present case, there is evidence that Istiphan exhibited erratic driving, the odor of an alcoholic beverage, and argumentative and disruptive behavior. Istiphan also admitted drinking and possibly taking pain medication.

In short, the defendant Istiphan exhibited the "classic signs of intoxication" as the appellate court characterized this type of behavior in Palmer v. City of Oxford, 860 So.2d 1203 (Miss. 2003).

Finally Istiphan refused to take the intoxilyzer test, which is admissible as evidence of guilt. Christian v. State, 859 So.2d 1068 (Miss.App.2003).

Most important, all of this was documented on the video admitted into evidence, which allowed the judge, sitting as the finder of fact, to make an independent and neutral determination as to Istiphan's actions and demeanor, separate and apart from the testimony of either the police officer or the defendant.

The Mississippi Supreme Court has always condemned the practice of "second-guessing" the jury with respect to factual determinations.

The law pertaining to a defendant's request to overturn a jury verdict based on the weight of the evidence is clear and well established.

In Herring v. State, 691 So.2d 948,957 (Mississippi 1957), the Court noted:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Thornhill v. State, 561 So.2d 1025, 1030 (Miss.1989), rehearing denied, 563 So.2d 609 (Miss.1990). Only when the verdict is so contrary to the overwhelming

> weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. Benson v. State, 551 So.2d 188, 193 (Miss.1989) (citing McFee v. State, 511 So.2d 130, 133-134 (Miss.1987)). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. Mitchell v. State, 572 So.2d 865, 867 (Miss.1990).

In Morgan v. State, 681 So.2d 82,93 (Miss. 1996), the Court held:

> When this Court reviews the sufficiency of the evidence, we look to all of the evidence before the jurors to determine whether or not a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. Jackson v. State, 614 So.2d 965, 972 (Miss.1993). The evidence which supports the verdict is accepted as true, and the State is given the benefit of all reasonable inferences flowing from that evidence. Id. (citing Hammond v. State, 465 So.2d 1031, 1035 (Miss.1985)). We will not reverse a trial judge's denial of a motion for a new trial unless we are convinced that the verdict is so contrary to the weight of the evidence that, if it is allowed to stand, it would sanction an unconscionable injustice. Groseclose v. State, 440 So.2d 297, 300 (Miss.1983).

In Gibson v. State, 660 So.2d 1268,1272 (Miss. 1995), Justice Pittman, in a dissenting opinion, reviewed the applicable standard:

> In Wash v. State, 521 So.2d 890 (Miss.1988), this Court addressed whether the jury verdict of guilty should be overturned because it was against the weight of the evidence. The Court, in emphasizing the limitations upon its scope of review of a finding of fact made by the jury, said, " 'the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict.' " Id. at 896 (quoting Billiot v. State, 454 So.2d 445, 463 (Miss.1984)). Put another way, "the reviewing court cannot set aside a verdict unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence." Dixon v. State, 519 So.2d 1226, 1229 (Miss.1988); Marr v. State, 248 Miss. 281, 159 So.2d 167 (1963).

In Pharr v. State, 465 So.2d 294,301 (Miss. 1984), the Court held:

> Where a defendant has moved for j.n.o.v., the trial court must consider all of the evidence--not just the evidence which supports the state's case--in the light most favorable to the state. May v. State, 460 So.2d 778, 781 (Miss.1984). The state must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Glass v.

> State, 278 So.2d 384, 386 (Miss.1973). If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. May v. State, 460 So.2d 778, 781 (Miss.1984).
>
> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. May v. State, 460 So.2d 778, 781 (Miss.1984); Fairchild v. State, 459 So.2d 793, 798 (Miss.1984); Pearson v. State, 428 So.2d 1361, 1364 (Miss.1983).

In Holmes v. State, 660 So.2d 1225,1227 (Miss. 1995) the Court held:

> Holmes asserts the State showed no evidence of violence or threat of injury, therefore the jury's verdict was wrong and against the overwhelming weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that reasonable and fair-minded jurors could only find the defendant not guilty. Green v. State, 614 So.2d 926, 932 (Miss.1992).
>
> In this case a single witness, Sims, stated that Holmes snatched over one hundred dollars out of his hand and ran away. Sims said Holmes later offered to repay the money if Sims would drop the charges. The jury clearly believed Sims. Testimony from a single credible witness is sufficient to sustain a conviction. Williams v. State, 512 So.2d 666, 670 (Miss.1987).

Where the trial judge sits as the finder of fact in a bench trial, his findings of fact are entitle to the same deference as those of a jury. Christian v. State, 859 So.2d 1068, 1072 (Miss.App.2005).

In the case before the Court, the defendant's argument is based on the premise that the appellate court should disregard the trial judge's findings regarding credibility of the witnesses and interpretation of the evidence. As the cases cited above demonstrate, the appellate court should not disturb the factual findings on the part of the trial judge, where, as here, there are facts in evidence which support the verdict.

Clearly, this assignment of error is without merit.

2. Admissibility of Toxicology Report

Appellant complains that the trial judge unfairly excluded the toxicology report offered by Istiphan, but failed to cite any basis under the Mississippi Rules of Evidence which would have supported the report's admission.

Even assuming that a toxicology report regarding a blood test taken purely for purposes of litigation, not medical treatment, would otherwise qualify under the "business records" exception of MRE 803(6), that rule requires the sponsoring testimony of a "custodian or other qualified witness" that the report was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation. . . ." There was no witness with the ability to establish the requisite predicate.

There is not assertion in the Appellant's brief that the report was self-authenticating, nor is there any basis in the record for such an assertion.

The only other basis for admission in the absence of a sponsoring witness would be the general "interest of justice" exception of MRE 803(24), which seems to be the gist

of the appellant's argument. However, that exception specifically requires that the adverse party be advised of the offeror's intent sufficiently in advance of trial to provide the adverse party "with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." The record is devoid of any indication that these conditions were satisfied.

Moreover, it should be noted that the document purporting to be a "toxicology report" did not reflect:

a. The identity of the person who drew the blood;

b. The qualifications of the person who drew the blood;

c. The identity of the person who performed the analysis;

d. The qualifications of the person who performed the analysis;

e. The procedure by which the identity of the person from who the blood was extracted was determined (i.e., how did the hospital know that the person presenting himself to be Khader Istiphan and requesting a blood analysis was in fact the defendant);

f. Was the blood drawn at the hospital laboratory, or was a pre-drawn sample presented to the hospital (NOTE: THE REPORT ITSELF STATES "We do not perform chain of custody control of our specimens." How can a document be self-authenticating which contains a disclaimer as to its own authenticity?).

The sole argument on behalf of the report's admissibility is that it would have been helpful to the defendant; that is not the standard for admissibility.

The appellant fails to offer a single credible basis under the rules of evidence that would justify entry of the report into evidence.

3. Assistance of Counsel

On a claim of ineffective assistance of counsel, the benchmark is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. However there is a strong presumption that counsel's conduct was within the wide range of reasonable professional conduct and that such actions were not the result of strategic decisions. Even if the defendant proves that counsel's performance fell below the standard required for a reasonably competent lawyer, the defendant must still prove that he suffered prejudice on account of that deficient performance. The defendant must show that but for counsel's deficient performance that there was a reasonable probability that the result of the proceedings would have been different. It is insufficient to only show that the errors had some conceiveable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. A reasonable probability is one sufficient to undermine the confidence in the outcome. Brawner v. State, 947 U.S. 254, 260 (Miss.2006).

The standard under Mississippi law is similar. In Howard v. State, 945 S.2d 326, 341 (Miss.2006), the Court held:

> The standard for determining if a defendant received effective assistance of counsel is well settled. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, [2064,] 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient *and* that the deficiency prejudiced the defense of the case. *Id.* at 687, 104 S.Ct. [at 2064]. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. [at 2064]). The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Id.*

There is no indication in the present case that Mr. Savant had sufficient advance notice of the existence of the toxicology report to secure the presence of necessary witnesses or arrange alternate methods of submitting the report into evidence. There is no indication anywhere in the record that Mr. Savant was advised of the existence of the purported analysis at any time prior to the beginning of the trial.

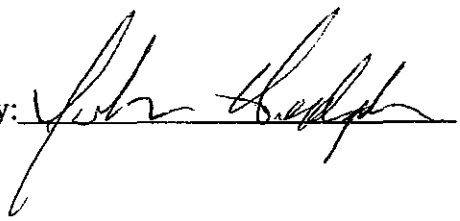
More important, there was no affidavit or other evidence submitted with the post-trial motion that testimony establishing the requisite basis for admissibility was even available. It is certainly not sufficient to assert that Mr. Savant should have called additional witnesses; there must be evidence in the record that such witnesses were in existence and they would have been able to offer the testimony necessary to sponsor the exhibit.

Finally, the other evidence, as outlined above, was sufficient to uphold the judge's decision. As Brawner points out, it is not sufficient to suggest that the additional evidence might have made a difference in the outcome; there must be "reasonable probability" that the outcome would be different. Given the fact that the judge had the opportunity to review a video of the encounter and the defendant's admission that he had been drinking, it is impossible to say that it would be "likely" that there would have been a different outcome based on the toxicology report.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court affirm the defendant's conviction.

THE CITY OF MADISON, MISSISSIPPI

by: 

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CERTIFICATE OF SERVICE

I certify that this pleading was mailed to Judge Edwin Hannan (Senior County Court Judge since the retirement from the bench of Judge William Agin, the trial judge in this case) and Minor F. Buchanan, Esq. on June 10, 2011 at his usual business address.