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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2011-CA-00729-COA

WILLIAM HOWARD, APPELLANT

VS.

STATE OF MISSISSIPPI, APPELLEE

REPLY BRIEF OF APPELLANT

William Howard, the appellant herein, herewith files his reply to the Brief of Appellee filed in this cause on January 6, 2012. In order to be consistent with the "Brief of Appellant" previously filed in this cause, said Appellant shall hereinafter be referred to as Chris.

SUMMARY OF THE ARGUMENT

Chris takes issue with several matters raised in the Brief of the Appellee, The State of Mississippi, (hereinafter State). They are as follows:

a) The argument of the State that Judge Howard's finding that "nothing within the provisions of § 63-11-30 disallows a conviction on evidence falling within the Zero Tolerance for Minor parameters to be used as a prior conviction for charging a violation as a felony" should be upheld, ignores the prior precedents of this Court holding that ambiguous statutes are to be construed in favor of a criminal defendant;

b) The arguments of the State in its brief do not utilize the proper standard of review because the State's arguments would require the Court to improperly apply an

abuse of discretion standard to the determination of a matter of law;

c) The speculative argument that Chris pled guilty as an adult to the .023 % violation in order to avoid the license suspension under the zero tolerance for minors law, is wrong in law and in fact, and is anything but a logical explanation for his plea; and

d) The claim of waiver or abandonment of Chris' equal protection claim.

ARGUMENT

a) **The argument of the State that Judge Howard's finding that "nothing within the provisions of § 63-11-30 disallows a conviction on evidence falling within the Zero Tolerance for Minor parameters to be used as a prior conviction for charging a violation as a felony" should be upheld, ignores the prior precedents of this Court holding that ambiguous statutes are to be construed in favor of a criminal defendant.**

At page "7" of the State's brief the statement is made that "Judge Howard found nothing within the provisions of ¶ 63-11-30 disallows a conviction on evidence falling within the Zero Tolerance for Minor parameters to be used as a prior conviction for charging a violation as a felony". What Judge Howard actually said in his Order was "The Court has reviewed the entirety of § 63-11-30 MCA and all its annotations and has found that the statute does not directly address this issue."

Chris disagrees with both the State's interpretation of what Judge Howard said and with what he actually said. It is Chris' position, as argued in his previously filed brief that the statute unambiguously excludes Zero Tolerance for Minors convictions from the stacking provisions leading to a felony charge. However, if either the State's interpretation of Judge Howard's ruling or what he actually said are correct then the felony conviction should be set aside.

Chris' position is that the statute clearly disallows the use of convictions of persons under the age of twenty-one convicted of DUI under the Zero Tolerance for minors levels as an underlying conviction to enhance any subsequent DUI offense, other than another Zero Tolerance for Minors offense.

If Chris is wrong and such use is not clearly disallowed, the issue is whether anything in the statute specifically authorizes such use. It is not whether nothing within the statute disallows the use for enhancement.

In *Tipton v. State*, 41 So.3d 679, 682 (Miss. 2010), in holding that the Circuit Court should have granted the defendant a directed verdict, the Supreme Court followed a long line of its cases as well as federal decisions dealing with construction of criminal statutes when it said:

> The interpretation of a statute " is a question of law subject to de novo review." Furthermore, " [i]t is well settled that when a court considers a statute passed by the Legislature, the first question before the Court is whether the statute is ambiguous. If the statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning without the aid of principles of statutory construction."

and

> In considering the arguments advanced by the State, we must apply the " bedrock law in Mississippi that criminal statutes are to be *strictly* construed against the State and *liberally* in favor of the accused." (footnotes omitted)

"A criminal statute . . . must be strictly construed, and any ambiguity must be resolved in favor of lenity" *United States v. Enmons,* 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973); "Statutes imposing criminal penalties must be construed strictly in favor of the accused, a proposition which may not be doubted". *State v. Burnham,* 546 So.2d 690, 692 (Miss.1989)

Additional cases are cited at page "11" of the Appellant's brief previously filed herein are for purposes of brevity are not recited. Under the strict construction standard long utilized by

this Court, unless the statute specifically allows Zero Tolerance convictions to enhance a DUI felony charge, Chris' conviction is improper.

b) The arguments of the State in its brief do not utilize the proper standard of review because the State's arguments would require the Court to improperly apply an abuse of discretion standard to the determination of a matter of law.

In Chris' prior brief the cases of *Bradley v. State*, 919 So.2d 1062, 1063 (¶6) (Miss. Ct. App. 2005) and *Graves v. State,* 822 So.2d 1089, 1090 (¶4) (Miss. Ct. App. 2002) were cited showing the long-standing rule that questions of law in post conviction relief claims are reviewed on a de novo standard rather the abuse of discretion standard which applies to determination of factual matters. In accord see *Hanna v. State,* 49 So.3d 654, 656 (Ct.App.Miss. 2010).

Undoubtedly statutory interpretation is " is a question of law subject to de novo review." (See *Tipton,* Infra and *Gilmer v. State,* 955 So.2d 829, 833 (Miss.2007). The State seems to be suggesting throughout its brief that this Court should deny Chris relief by finding Judge Howard did not abuse his discretion in interpreting the statute, which is not a discretionary matter.

In Judge Howard's Order, (RE p. 18) he found as a fact, and the State acknowledges, that a Zero Tolerance for Minors Conviction for Chris was utilized to enhance Chris' Oktibbeha County DUI to a felony in this case. Again, the issue in this case is whether the statute specifically allow a Zero Tolerance Conviction to enhance to a felony offense. Either it does or it does not. There is no discretionary determination to be made. Judge Howard by his ruling that it does not disallow it, essentially found that the statute does not specifically provide for its use in enhancement of a non-zero Tolerance offense.

Neither Judge Howard in his Ordeny denying Chris Post Conviction Relief nor the State in its brief, appear to place any significance on the language of the statute "**Except as otherwise provided in subsection (3)**" which appears at the beginning of every subparagraph to subsection (2) of § 63-11-30. Certainly the legislature intended that language to mean something. The said language refers readers of the statute to subsection (3) the 'Zero Tolerance for Minors" portion of the statute, to determine the appropriate sentencing range for minors convicted of one or more Zero Tolerance violations.

Therefore, the only possible sensible reading of the phrase "**Except as otherwise provided in subsection (3)**" is that a minor with alcohol levels within the range covered by Zero Tolerance violations, cannot be legally convicted of a first, second, or third or subsequent offense under the provisions of section 63-11-30 (2) for that offense. It makes no sense to then argue that while offenses covered within the provisions or subsection (3) are excluded from being charged under subsection (2), those same excluded offenses can be used to enhance a subsection (2) violation. Therefore, the only logical construction of the statute is that the legislature intended to exclude Zero Tolerance violations from the sentencing provisions contained in subsection (2) for all purposes.

Both Judge Howard in his Order (RE pp 18, 19) and the State at pages "7" through "9" of its brief filed herein rely on *Arnold v. State,* 809 So.2d 753 (Ct.App.Miss.2002) and Attorney General Opinion Number 2001-WL 1082587 for the broad proposition that any three (3) DUI convictions within a five-year period constitute a felony offense. If that were the case, three or more Zero Tolerance convictions within a five-year period would constitute a felony, making the entirety of subsection (3) of § 63-11-30 meaningless.

Arnold, dealt with a situation where the two underlying offenses and the third (felony) charge were all subsection (2) violations. The issued decided adverse was whether the two prior violations, both charged as first offenses in the lower courts, were a sufficient to support the felony charge. The defendant claimed that to be utilized as enhancement he had to have an underlying conviction for a first offense and for a second offense. The court held that it made no difference that both underlying convictions were charged as first offenses. It did not deal with and did not hold that Zero Tolerance violations could be used to enhance a subsection (2) offense.

The Attorney General's opinion relied on by the State, dealt with a question concerning enhancement of one Zero Tolerance violation with another Zero Tolerance violation where a non-adjudication had been granted but the defendant was still on probation. It never dealt with the issue of a Zero Tolerance violation be utilized to enhance a subsection (2) offense.

c) **The speculative argument that Chris pled guilty as an adult to the .023 % violation in order to avoid the license suspension under the zero tolerance for minors law, is wrong in law and in fact, and is anything but a logical explanation for his plea.**

The State's brief at page "8" speculates that Howard pled guilty to the .023% offense (RE p. 12) as an adult in order to avoid a one (1) year driver's license suspension as part of a Zero Tolerance suspension. He apparently did that so he could expose himself to the much harsher penalties provided for by § 63-11-30 (2) (b) which are: a mandatory minimum jail sentence of five (5) days with the potential of being sentenced up to a year of jail time; a mandatory sentence to perform community service work for a period of ten (10) days with the potential to being sentenced to community service for up to a year; a fine of not less than $600.00

and not more than $ 1,500.00; and a mandatory two (2) year suspension of his license.

The more logical explanation for Chris' plea is that he was at the time a nineteen (19) year old kid, who pled guilty to the charge prepared by the State's representatives. He had no attorney to advise him that a .023% BAC was not an offense which would subject him to adult punishment or to appeal a sentence which was well in excess of what the court was authorized to impose because of Chris blood alcohol content and his age at the time.

The State wants the Court to impute to Chris some sinister plan to manipulate the Mississippi statutes for the "benefit" of receiving more punishment that was authorized for the offense he committed. The State's explanation of course ignores the fact that the Holmes County Justice Court Judge, who has received mandated training by the State in connection with his duties, either ignored or didn't know the provisions of the law, and imposed an erroneous, excessive, and illegal sentence upon Chris..

Unwilling to be satisfied with the pound of flesh received from Chris when he only owed an ounce, the State now wants this Court to compound the error and require an additional ten pounds from him by allowing a clearly invalid felony conviction to remain on his record..

d) The claim of waiver or abandonment of Chris' equal protection claim.

The State points out at pages "4" and "6" of its brief that Chris did not brief the constitutional equal protection claim raised in his Post Conviction Relief motion. After reviewing the decision in *Mason v. State,* 781 So.2d 99 (Miss. 2000), raising that issue appeared to be beating a horse that if not already dead had certainly already been severely beaten.

Additionally, since it is Chris' position that the provisions of subsections (2) and (3) of section 63-11-30, as written, do not subject minors with alcohol levels less than .08% to the

same punishment as adult offenders who are required to have more than a .08% alcohol level to violate the statute. Therefore, the statute does not deny Chris equal protection, although what he considers as its erroneous application to him in this case does.

The *Mason* decision arose under a charge filed pursuant to subsection (5) of § 63-11-30. Unlike subsection (2), subsection (5) does not contain the exclusionary language **"Except as otherwise provided in subsection (3)".** Therefore, the *Mason* decision is consistent with the position of Chris in this cause.

It is apparent from reading the statute that the legislature did not intend for minors with an alcohol concentration of less than the presumptive impairment level of .08% to be subjected to adult punishment in the enhancement scheme, but did intend for such punishment to be imposed where death or substantial injuries were caused by minors driving with the lesser levels of greater than .02% but less than .08%.

CONCLUSION

A construction of subsections (2) and (3) of Section 63-11-30 as urged by the State makes the Zero Tolerance for Minors provisions and the language of the statute specifically excluding Zero Tolerance for Minors violations from the punishment scheme established for violators with .08% and above meaningless. It invites the Judiciary to not only ignore the clear intent and will of the Legislature as set forth in the statute, but, to additionally ignore the prior decisions of the appellate Courts of this State.

Chris respectfully requests that the Court reverse the May 2, 2011 Order of the Oktibbeha County Circuit Court and render a decision finding that Chris' conviction of Third offense DUI and the sentence imposed for said conviction were illegal and improper, and should be set aside.

RESPECTFULLY SUBMITTED, this the 20th day of January, 2012.

WILLIAM HOWARD
APPELLANT

BY: _____

JAMES H. POWELL, III
ATTORNEY FOR APPELLANT
MISS. BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, the undersigned Attorney for William Howard, Appellant herein, hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 20th day of January, 2012.

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