

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAUSE NO. 2011-CA-00729-COA

WILLIAM HOWARD, APPELLANT

VS.

STATE OF MISSISSIPPI, APPELLEE

APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY

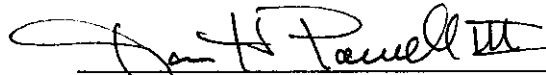
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant, William Howard certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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RESPECTFULLY SUBMITTED, this the 3rd day of November, 2011.



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STATEMENT OF ISSUES

- 1. The Court erroneously denied Appellant's Post Conviction Relief Petition by failing to find that the Appellant's conviction and sentence imposed in Cause Number 2008-0074-CR, in the Circuit Court of Oktibbeha County, Mississippi for the felony offense of third offense DUI was illegally imposed in violation of and contrary to the provisions of Section 63-11-30 of the Mississippi Code of 1972, as amended.**

2.

STATEMENT OF THE CASE

1. NATURE OF CASE

This matter is an appeal from a denial of a Petition for Post Conviction Relief (RE p. 3), filed by Appellant William Howard (hereinafter Chris) in the Circuit Court of Oktibbeha County, Mississippi. Said Petition sought relief from Chris' conviction and sentence in Oktibbeha Circuit Court criminal cause number 2008-073-CR wherein Chris pled guilty to the felony offense of third offense DUI.

On May 2nd, 2011, Honorable Lee Howard, Circuit Judge, entered an Order (RE p. 18) denying relief, without a hearing and Chris subsequently perfected his appeal of said denial.

2. STATEMENT OF FACTS

Chris, whose date of birth is February 28, 1987 (RE pp. 11, 12), was indicted (RE p. 10) by the Oktibbeha County Grand Jury for the offense of third offense DUI on January 17, 2008. The indictment alleged that on the 15th day of September, 2007, Chris operated a vehicle while under the influence of an intoxicating liquor or some other substance which had impaired his ability to to operate a vehicle, and that he had two prior DUI convictions.

The indictment (RE p. 10) alleged that Chris was convicted in the Municipal Court of the City of Lexington, Mississippi, of a First offense DUI on July 21, 2004, for an offense which occurred on July 18, 2004; and that he was convicted of a Second DUI offense in the Justice Court of Holmes County, Mississippi, on September 26, 2006 for an offense which occurred on September 1, 2006. Copies of the abstracts of these alleged prior convictions appear at pages 11 and 12 of Appellant's Record Excerpts.

Chris was seventeen (17) years of age on July 18, 2004, the date of commission of his first alleged offense; nineteen (19) years of age on September 1, 2006, the date of commission of his second alleged offense; and twenty (20) years of age on September 15th, 2007, the date of commission of the alleged felony offense in Oktibbeha County. Chris, without counsel, pled guilty to both said first and second offense charges.

The Abstract of Court Record of Chris' first offense conviction in the City of Lexington, Municipal Court is confusing in that it reflects that he refused the breath test, but that he also had a .143% blood alcohol content. (RE p. 11). The said second offense abstract (RE p.12) reflects that Chris had a .023% blood alcohol content at the time of the offense.

For Chris' first offense conviction, the Lexington Municipal Court suspended Chris' fine and ordered him to pay assessments of \$178.50 (RE p. 11). Because of his age (19 years) and blood alcohol concentration (.023%) , Chris should have been charged, tried, and sentenced for his second offense charge pursuant to Section 63-11-30 (3) of the Mississippi Code of 1972, as amended, as a "Zero Tolerance for Minors" violation. Instead, Chris was sentenced as if he were an adult with a blood alcohol concentration of .08 % or above, and was fined \$801.00 plus assessments of \$236.50 and ordered to serve and served five (5) days in the Holmes County Jail, followed by ten (10) days community service. (RE p. 12).

The Oktibbeha County Indictment against Chris, (RE p. 10) does not allege his blood alcohol concentration on September 15, 2007, the date of said alleged offense. The Transcript of Chris' guilty plea before the Circuit Court of Oktibbeha County on April 28, 2008, likewise does not contain any mention of an alleged blood alcohol concentration for Chris.

Said guilty plea transcript additionally fails to reveal any inquiry by the Court into the sufficiency of the facts of the case to support Chris' guilty plea. Specifically, the Court never inquired into: Chris' age or blood alcohol concentration on the date of the alleged felony DUI he was pleading to; or Chris' age or blood alcohol levels for either of his alleged prior convictions which formed the basis for the felony charge.

Chris on April 28, 2008, was sentenced by Judge Howard to a term of five (5) years in the Mississippi Department of Corrections. He was placed in the Intensive Supervision/House Arrest Program for a period of one year, and the remaining four (4) years of his sentence were suspended, conditioned upon his successful completion of said Intensive Supervision/House Arrest Program, with the defendant being placed on supervised probation for said remaining four (4) year period. (RE pp. 14-15).

Chris was also Ordered to pay all costs of court and a fine of two thousand dollars (\$2,000.00) at the rate of one hundred dollars (\$100.00) per month until fully paid. (RE p. 16).

Chris successfully completed his year on the Intensive Supervision/House Arrest Program, and is at this time still reporting monthly to his probation officer pursuant to the terms of said sentence.

SUMMARY OF ARGUMENT

Chris' application for Post Conviction Relief, to the Circuit Court of Oktibbeha County, was erroneously denied. Relief should have been granted, because Section 63-11-30 of the Mississippi Code of 1972, as amended, was erroneously applied at the time of Chris' conviction of the felony of third offense DUI and in the sentence imposed. The Circuit Court again

erroneously construed and applied said Section 63-11-30 in denying Chris Petition for Post Conviction Relief.

ARGUMENT

STANDARD OF REVIEW

"When reviewing a lower court's decision to deny a [motion] for post-conviction relief, this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised, the applicable standard of review is de novo." *Bradley v. State*, 919 So.2d 1062, 1063 (¶6) (Miss. Ct. App. 2005) (citing *Graves v. State*, 822 So.2d 1089, 1090 (¶4) (Miss. Ct. App. 2002)).

The heart of Chris' appeal is that the Circuit Court incorrectly applied the law as contained in Section 63-11-30 to the facts of his case, and that said misapplication resulted in the improper denial of his request for post conviction relief. Judge Howard in his *Order* which denied Post Conviction Relief to Chris made the following finding: "The Court therefore finds that the issues raised by Petitioner are solely matter of law and do not require an evidentiary hearing." (RE p. 19) Therefore, the appropriate standard of review of said denial is a de novo review by this Court.

ISSUE ON APPEAL

The Court erroneously denied Appellant's Post Conviction Relief Petition by failing to find that the Appellant's conviction and sentence imposed in Cause Number 2008-0074-CR, in the Circuit Court of Oktibbeha County, Mississippi for the felony offense of third offense DUI was illegally imposed in violation of and contrary to the provisions of Section 63-11-30 of the Mississippi Code of 1972, as amended.

Chris contended in his Post Conviction Relief petition that his alleged second offense DUI conviction in the Justice Court of Holmes County, Mississippi (RE p. 12) was improperly utilized in his indictment (RE p. 10) to elevate his September 15th, 2007 charge of DUI in Oktibbeha County to a felony. The basis of his contention is that the said Holmes County Justice Court conviction was based on a blood alcohol content of .023% and that the offense occurred at a time when he was nineteen (19) years of age. Because of those factors, said conviction constituted an offense under the *Zero Tolerance for Minors* provisions of said Section 63-11-30 and is required to be excluded from consideration as a prior offense pursuant to the provisions of Section 63-11-30 (2) (a) (b) and (c) .

Judge Howard, in his May 2, 2011 *Order* denying Chris Post Conviction Relief, found that the said Holmes County Justice Court conviction utilized to enhance the criminal charge against Chris to a felony was in fact based on a Blood Alcohol Content of .023% and that Chris was nineteen (19) years of age at the time of said offense. (RE p. 18) He erroneously found however, that Section 63-11-30 MCA did not directly address the issue (RE p. 18) and cited the case of *Arnold v. State*, 809 So.2d 753 (2002) and an opinion issued by the Mississippi Attorney General, being Opinion No. 2001-492, 2001 WL 1082587, as a basis for denying Chris relief from his conviction and sentence. (RE pp. 18, 19)

THE APPLICABLE STATUTE

The relevant portions of Section 63–11-30 applicable to the issues raised in this appeal are as follows:

§ 63-11-30. Operation of vehicle while under influence of intoxicating liquor, drugs or controlled substances, or other substances impairing ability to operate vehicle or with blood alcohol concentrations above specified levels; penalties generally;

granting of hardship driving privileges; penalties for violations resulting in death, disfigurement, etc., of another; penalties for multiple offenses; concurrent running of suspensions

(1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter; (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or (e) has an alcohol concentration of four one-hundredths percent (.04%) or more in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's blood, breath or urine, administered as authorized by this chapter for persons operating a commercial motor vehicle.

(2) (a) **Except as otherwise provided in subsection (3)**, upon conviction of any person for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, such person shall be fined not less than Two Hundred Fifty Dollars (\$250.00) nor more than One Thousand Dollars (\$1,000.00), or imprisoned for not more than forty-eight (48) hours in jail or both; and the court shall order such person to attend and complete an alcohol safety education program as provided in Section 63-11-32. The court may substitute attendance at a victim impact panel instead of forty-eight (48) hours in jail. In addition, the Department of Public Safety, the Commissioner of Public Safety or his duly authorized agent shall, after conviction and upon receipt of the court abstract, suspend the driver's license and driving privileges of such person for a period of not less than ninety (90) days and until such person attends and successfully completes an alcohol safety education program as herein provided. Commercial driving privileges shall be suspended as provided in Section 63-1-83.....

(b) **Except as otherwise provided in subsection (3)**, upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not less than Six Hundred Dollars (\$600.00) nor more than One Thousand Five Hundred Dollars (\$1,500.00), shall be

imprisoned not less than five (5) days nor more than one (1) year and sentenced to community service work for not less than ten (10) days nor more than one (1) year.

.....

(c) **Except as otherwise provided in subsection (3), for any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars (\$2,000.00) nor more than Five Thousand Dollars (\$5,000.00), shall serve not less than one (1) year nor more than five (5) years in the custody of the Department of Corrections; provided, however, that for any such offense which does not result in serious injury or death to any person, any sentence of incarceration may be served in the county jail rather than in the State Penitentiary at the discretion of the circuit court judge.....**

((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.

(b) Upon conviction of any person under the age of twenty-one (21) years for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, such person shall have his driver's license suspended for ninety (90) days and shall be fined Two Hundred Fifty Dollars (\$250.00); and the court shall order such person to attend and complete an alcohol safety education program as provided in Section 63-11-32. The court may also require attendance at a victim impact panel.....

(c) Upon any second conviction of any person under the age of twenty-one (21) years violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than Five Hundred Dollars (\$500.00) and shall have his driver's license suspended for one (1) year.

(d) For any third or subsequent conviction of any person under the age of twenty-one (21) years violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than One Thousand Dollars (\$1,000.00) and shall have his driver's license suspended until he reaches the age of twenty-one (21) or for two (2) years, whichever is longer.....

(5) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any

other limb, organ or member of another shall, upon conviction, be guilty of a separate felony for each such death, mutilation, disfigurement or other injury and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years for each such death, mutilation, disfigurement or other injury, and the imprisonment for the second or each subsequent conviction, in the discretion of the court, shall commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction. Any person charged with causing the death of another as described in this subsection shall be required to post bail before being released after arrest.....
(Emphasis added)

Section 63-11-30 MCA clearly establishes separate and distinct punitive provisions for adults and minors, if the minors blood alcohol content is over .02% but less than .08%. If a minor has a blood alcohol content of .08% or above, such minor is then and only then, subject to conviction and punishment under the provisions of Section 63-11-30 (2) .

By the clear and unambiguous terms of said subsection (2), a minor cannot be legally convicted of or sentenced for a first, second, or third or greater offense under Section 63-11-30 (2) (a), (b), or (c) unless blood alcohol content is .08% or greater for such offense. Blood alcohol content of less than .08% for minors is specifically excluded from each level of a Section 63-11-30 (2) violation, by the language set out therein “**Except as otherwise provided in subsection (3)**”. (emphasis added) Because the statute under subsection (3) makes all violations by minors within the blood alcohol content range of greater than .02% but less than .08% subject exclusively to the provisions of the *Zero Tolerance for Minors* provisions contained in subsection (3).

Likewise, subsection (3) makes clear its exclusive application to minors with more than .02% but less than .08% blood alcohol content, by stating “**If such person's blood alcohol**

concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply.”

The Court reviews the interpretation of statutes *de novo*. See *Gilmer v. State*, 955 So.2d 829, 833 (Miss.2007). In statutory interpretation:

[t]he first question ... is whether the statute is ambiguous. When a statute is unambiguous, this Court applies the plain meaning of the statute and refrains from the use of statutory construction princip[les]. The [C]ourt may not enlarge or restrict a statute where the meaning of the statute is clear. In interpreting statutes, this Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning. *Tillis v. State*, 43 So3d 1127, 1131 (Miss. 2000)

A statute imposing criminal penalties must be "strictly construed" in favor of the accused. *Boatner v. State*, 754 So.2d 1184, 1189 (¶14) (Miss. 2000) .

There is nothing ambiguous about Section 63-11-30. It establishes levels of punishment for first, second and third or subsequent violations, where blood alcohol content is .08% or above, and separate provisions and levels of punishment for first, second and third or subsequent violations by persons falling within the Zero Tolerance for Minors violations.

No mix and match authorization is provided for within the statutory scheme. Each violation by a minor, where there are test results, is either an .08% or above violation or it is a Zero Tolerance for Minors violation. It takes three violations of .08% or above within a five (5) year period to constitute a felony offense. In Chris' case, he was improperly convicted of a felony where he had perhaps one violation of .08% or above in the Lexington Municipal Court; one violation in the Justice Court of Holmes County, which clearly is subject to the Zero Tolerance for Minors provisions; and the offense that he was indicted on, for which nothing in the record reveals what category it falls under.

While the Justice Court of Holmes County, imposed a sentence upon Chris which was greater than that allowed for by the Zero Tolerance for Minors provisions, that improper sentence doesn't change the fact that he, at that time, was only guilty of a Zero Tolerance for Minors violation. Allowing the felony conviction to stand based on an improper application of the law by the Holmes County Justice Court, simply compounds the injustice to Chris. He like every other citizen has the right to expect that a punishment for any violation he may commit will be limited to no more than the maximum provided for by law, and that he will not improperly be labeled a felon, for conduct which was clearly less than that required to constitute a felony offense.

LAW UTILIZED BY CIRCUIT COURT FOR DENIAL OF RELIEF

Judge Howard cited two sources in his May 2, 2011 *Order* (RE pp 18,19) as his basis for denying Chris relief on his improper conviction and sentence claims. Those sources or authorities are *Arnold v. State*, 809 So.2d 753 (2002) and Attorney General Opinion, Number 2001-0492, 2001 WL 1082587.

Arnold v. State, 809 So.2d 753 (2002) appears to hold only that prior DUI convictions do not have to be designated in an indictment as first or second offenses for enhancement purposes. It does not deal in any respect with using a Zero Tolerance for Minors violation as an enhancement for a felony charge and is therefore not relevant to the issue in Chris' case.

In the above referenced Attorney General's opinion, Michael A. Boland, in his capacity as the Flowood City Prosecutor, requested an opinion concerning whether a non adjudicated DUI under the Zero Tolerance For Minors provision, could be used for enhancement purposes, if the same minor received another DUI under the Zero Tolerance law.

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 30 day of November, 2011.


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