IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KM-00529-COA

RAYMOND DRABICKI A/K/A RAYMOND ROBERT DRABICKI A/K/A RAYMOND R. DRABICKI — **APPELLANT**

v.

CITY OF RIDGELAND, MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	02/24/2012
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN III
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KEVIN DALE CAMP
ATTORNEY FOR APPELLEE:	BOTY MCDONALD
CITY PROSECUTOR:	BOTY MCDONALD
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
TRIAL COURT DISPOSITION:	CONVICTED OF FIRST-OFFENSE DRIVING UNDER THE INFLUENCE AND SENTENCED TO FORTY-EIGHT HOURS IN THE CUSTODY OF THE SHERIFF OF MADISON COUNTY, MISSISSIPPI, AND FINED $750, WITH THE SENTENCE SUSPENDED FOR TWO YEARS UNLESS SOONER INVOKED; AND CONVICTED OF RECKLESS DRIVING AND FINED $100
DISPOSITION:	AFFIRMED – 06/25/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

IRVING, P.J., FOR THE COURT:

¶1. In July 2009, in Ridgeland Municipal Court, Raymond Drabicki entered a plea of no contest to driving under the influence pursuant to Mississippi Code Annotated section 63-11-

30(1)(c) (Rev. 2004) and reckless driving pursuant to Mississippi Code Annotated section 63-3-1201 (Rev. 2004). The municipal court found Drabicki guilty of both offenses, and he appealed his conviction to the County Court of Madison County, which, after a trial de novo, also found him guilty of both offenses. Drabicki filed a motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial, which the county court denied. He appealed to the Madison County Circuit Court, which affirmed his conviction. Feeling aggrieved, Drabicki now appeals and argues that the Intoxilyzer results should not have been admitted into evidence, that the circuit court erred in considering untruthful testimony from the arresting officer, and that the circuit court erroneously denied his motion to strike the appellee's brief.

¶2. Finding no error, we affirm.

FACTS

¶3. On March 28, 2009, Officer Daniel Soto, with the Ridgeland Police Department, observed Drabicki traveling at a high rate of speed on Lake Harbor Drive in Ridgeland, Mississippi. Officer Soto was stationary in the parking lot of the Shell gas station at the corner of Lake Harbor and Old Canton Road. Officer Soto indicated that he noticed that Drabicki's front tires were spinning as Drabicki's vehicle came through the Lake Harbor and Old Canton intersection heading west. He immediately began to pursue Drabicki and reached a speed of eighty-seven miles per hour in an effort to stop him. Officer Soto also noted that during the pursuit, Drabicki hit a puddle of water, lost control of the vehicle, and nearly hit another vehicle.

¶4. Once Officer Soto stopped Drabicki, he opened Drabicki's car door and ordered him to exit the vehicle. Officer Soto testified that as soon as he opened the car door, he smelled alcohol. He asked Drabicki how much he had to drink, and Drabicki responded by stating that he had two drinks at Buffalo Wild Wings. Officer Soto asked Drabicki to submit to a portable breath test, to which Drabicki complied. The results registered positive for alcohol.

¶5. Officer Soto asked Drabicki to perform several field sobriety tests. Drabicki complied, and Officer Soto first administered the horizontal-gaze-nystagmus test, where he observed all six of the recognized clues indicating intoxication. Next, Officer Soto administered the walk-and-turn test and noted that four out of eight clues indicated intoxication. Officer Soto stated that Drabicki could not maintain his balance during the instructions, that Drabick started the test before instructions were completed, that he missed the heel-to-toe movement on his steps, and that he also made improper turns. On the one-leg-stand test, Officer Soto noted that Drabicki swayed and used his arms for balance, two out of four possible clues indicating intoxication. Officer Soto placed Drabicki under arrest and transported him to the Ridgeland Police Department. Because the Intoxilyzer machine there was not working, he took Drabicki to the Madison Police Department to administer the test. Drabicki consented, and the results of the Intoxilyzer registered a .16 blood-alcohol content.

¶6. Additional facts, as necessary, will be related in our analysis and discussion of the issues.

ANALYSIS AND DISCUSSION OF THE ISSUES

I. Admission of the Intoxilyzer Results

¶7. Decisions regarding the admissibility of evidence will be reversed only if the trial court has abused its discretion. *Palmer v. City of Oxford*, 860 So. 2d 1203, 1207 (¶10) (Miss. 2003). "The discretion of the trial court must be exercised within the boundaries of the Mississippi Rules of Evidence." *Id*. at 1207-08 (¶10). Drabicki argues that the county court erred in admitting the Intoxilyzer results because doing so violated his right to confrontation under the Sixth Amendment.

¶8. The Mississippi Supreme Court has specifically stated that the admission of the certificates indicating the results of the Intoxilyzer is not a violation of the right to confrontation in the absence of the calibrating officer's testimony. *See Harkins v. State*, 735 So. 2d 317, 319 (¶5) (Miss. 1999). In fact, one of the only times that the State must "present testimony and allow cross-examination of the calibrating officer" is when "there is a genuine issue as to the authenticity of the certification[.]" *McIlwain v. State*, 700 So. 2d 586, 591 (¶22) (Miss. 1997).

¶9. Drabicki cites *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), for the proposition that the Confrontation Clause requires the in-person testimony of the calibrating officer. We disagree. While *Melendez-Diaz* does hold that the Sixth Amendment guarantees to a defendant the right to confront at trial the analyst who has done the drug analysis of any contraband alleged to have been sold by the defendant, *id*. at 311, our supreme court in *Matthies v. State*, 85 So. 3d 838, 843-44 (¶19) (Miss. 2012), stated that even in the wake of *Melendez-Diaz*, "records pertaining to [I]ntoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative

of the Confrontation Clause of the Sixth Amendment." The analysts in *Melendez-Diaz* would have testified to the actual chemical content of the substance, making the certificates of such analysis testimonial. *Id.* at 842 (¶16). However, in *Matthies,* the calibration officer would have only testified to the accuracy of the testing device, and as a result, did not have to appear in court, as in the present case. *See id*. at 844 (¶¶19-20).

¶10. Next, Drabicki argues that the court erred in finding that the calibration certificate was genuine and authentic as required under Rule 902 of the Mississippi Rules of Evidence because the signature of the calibrating officer was stamped and not literally signed. Drabicki's assertion is incorrect. A calibration certificate bearing the seal of the Mississippi Crime Laboratory is and the signature of the calibrating officer attesting to the truth of the certificate's contents is self-authenticating. *Pulliam v. State*, 856 So. 2d 461, 464-65 (¶13) (Miss. Ct. App. 2003). The operator of the Intoxilizer, Robert Bickley, signed the certificate in accordance with Rule 902. Immediately preceding Bickley's signature is a statement reading, in pertinent part, that "[t]he above instrument, used for breath analysis to determine alcohol content, was tested on below date and found to be in working condition. Calibration of the instrument certified to meet acceptable standards of accuracy."

¶11. The stamped signature that Drabicki is referring to is that of Maury Phillips, the section chief of the Implied Consent Section of the Mississippi Crime Lab. Phillips's stamped signature includes a statement that only attests that the document is a true and correct copy of the original document that is on file in his office. Phillips's signature does not attest to the accuracy of the instrument or truthfulness of the contents of the certificate.

Accordingly, this issue is without merit.

¶12. The dissent insists that because the document was actually a copy of the original certificate, it should have been offered under Mississippi Rule of Evidence 902(4) and not Mississippi Rule of Evidence 902(1). The dissent further argues that because there is no evidence that Wendy Hathcock—who affixed Phillips's stamped signature—was authorized to make a Rule 902(4) certification, then the certificate is inadmissible under Rule 902(4). Rule 902(1) reads as follows:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . A document bearing a seal purporting to be that of the United States, or of any State . . . or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

The certificate at issue here meets the requirements of Rule 902(1) because it contains both the Mississippi state seal and Bickley's attesting signature. It is true, as the dissent points out, that Drabicki objected at trial to the admissibility of the certificate. However, he did not object on the basis that the copy of the certificate was not the best evidence under Mississippi Rule of Evidence 1002 and that admitting the certificate under 902(1) was improper. Drabicki's only objection was that Phillips's stamped signature did not properly attest to the document because it was not an actual signature. Therefore, Drabicki is procedurally barred from arguing on appeal that Rule 902(4) was the proper rule for admission of the certificate, and this Court cannot now raise the issue for him.

¶13. Procedural bar notwithstanding, the argument that the copy of the certificate was inadmissible under Rule 902(4) is without merit. Under Rule 902(4), extrinsic evidence

proving authenticity is not required when the document in issue is

> [a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

Phillips's signature certified that the certificate was a correct copy, as required by the rule. There is no prohibition under this rule against the custodian's signature being stamped on the certified document. There was also no argument in the court below raising and preserving the issue of whether Hathcock was authorized to affix the stamped signature on the certificate. Therefore, this issue is also procedurally barred, and this Court cannot raise the issue for Drabicki.

II. Officer Soto's Testimony

¶14. Drabicki contends that his conviction should be overturned because Officer Soto gave false testimony at trial. More specifically, Drabicki contends that Officer Soto lied about the weather conditions on the night of Drabicki's arrest, Drabicki's near collision with another vehicle during the pursuit, and the identity of the officer who asked Drabicki whether he had had anything to drink. We have perused the record, including the videotape of the traffic stop, and we disagree with Drabicki's characterization of Officer Soto's testimony. There is nothing to suggest that he gave false testimony with respect to any of these matters. Accordingly, this issue is without merit.

III. Motion to Strike Appellee's Brief

¶15. Drabicki argues that because the appellee's brief was filed well outside of the time limit of Rule 31(b) of the Mississippi Rules of Appellate Procedure, the brief should have been stricken from the record at the circuit court level, and his conviction should have been reversed. Rule 31(d) of the Mississippi Rules of Appellate Procedure states that "[i]f an appellee fails to file the appellee's brief as required, such brief, if later filed, may be stricken from the record on motion of the appellant or on the motion of the appropriate appellate court." The rule places the decision to strike the appellee's brief within the court's discretion. The rule does not provide that the conviction of the appellant should be reversed.

¶16. Our supreme court has held that an appellate court has two options when the appellee has not filed a brief. The failure can either be held as a confession of error and the conviction can be reversed when the record is complicated or large in volume, or the court may disregard the appellee's failure to file a brief and affirm the conviction when there is a "sound and unmistakable basis . . . upon which the judgment may be safely affirmed." *Miller v. Pannell*, 815 So. 2d 1117, 1119 (¶7) (Miss. 2002). Here, the record is not complicated or large in volume, and the basis of the conviction is unmistakable.

¶17. The dissent takes issue with our citation to a civil case, *Pannell*, for guidance as to what an appellate court should do when the appellee has not filed a brief and suggests that the better standard is that contained in *Chatman v. State*, 761 So. 2d 851, 854 (¶9) (Miss. 2000). Suffice it to say that *Chatman* cites to and quotes from *Muhammad v. Muhammad*, 622 So. 2d 1239, 1242 (Miss. 1993), a civil case, for the standard it enunciates. *Id*. at 1242.

In our view, the standards are essentially the same, for if there is no sound and unmistakable basis upon which the judgment may be safely affirmed, the court cannot say with confidence that the case should be affirmed.

¶18. The dissent also insists that a November 10, 2011 order effectively reversed Drabicki's convictions and that a judgment should have been rendered in his favor. Respectfully, we disagree. The order reads, in part, "if appellee fails to file a brief within fourteen (14) days after notification of such deficiency[,] this cause shall be dismissed and any conviction of appellant that is the subject of the appeal shall be reversed." The dissent's specific argument is that since the City of Ridgeland failed to file a brief within fourteen days after the November 10 order, Drabicki's conviction stood reversed because the circuit court failed to suspend the requirements of Rule 2(a)(2) of the Mississippi Rules of Appellate Procedure, as it could have done pursuant to the provisions of Rule 2(c). First, it should be noted that Rule 2 addresses the dismissal of an appeal and is aimed at the appellant's dereliction in prosecuting his appeal. The City of Ridgeland did not initiate the appeal. Drabicki did. While we admit that Rule 2(a)(2) permits an appeal to be dismissed "when a party fails to comply substantially with [the] rules," it is obvious that the rule is aimed at punishing the appellant, not the appellee. Otherwise, there would be no need for our jurisprudence delineating the process to be followed when an appellee fails to comply with the requirement to file a brief. Additionally, applying Rule 2(a)(2) as the dissent does would have unjust consequences. For example, an appellee could defeat the right of an appellant to appellate review by simply not complying with the rules. Clearly, that is not the intent of

the rule even though that would be the required result, since an appellee is considered a party under Rule 2(a)(2).

¶19. We also point out that there is another, and more fundamental, problem with reaching the result that the dissent would have us reach. To reverse and render Drabicki's conviction because the City failed to file a brief would require this Court to overlook clear precedent by our supreme court. The circuit court sat as an appellate court in the consideration of Drabicki's appeal. Therefore, it was bound by supreme court precedent, as are we, regarding the proper procedure for resolving the issues raised by an appellant when the appellee has not filed a brief. As stated, our supreme court, as well as this Court, has expressly provided what actions an appellate court should take when an appellee fails to submit a brief. Dismissal of the appeal is not one of them, nor is reversal of the conviction. *See Pannell*, 815 So. 2d at 1119 (¶7); *Archie v. City of Canton*, 92 So. 3d 1279, 1282 (¶10) (Miss. Ct. App. 2012). The dissent offers no authority in support of its position that we are required to reverse and render Drabicki's conviction because the City of Ridgeland failed to file a brief. Nor has the dissent offered any authority for its position that we are bound by an erroneous order entered by the circuit court, allegedly reversing and rendering Drabicki's DUI conviction for a reason not sanctioned in our jurisprudence.

¶20. Finding no merit to any of the issues raised, we affirm Drabicki's conviction and sentence.

¶21. **THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY OF CONVICTION OF FIRST-OFFENSE DRIVING UNDER THE INFLUENCE AND SENTENCE OF FORTY-EIGHT HOURS IN THE CUSTODY OF THE SHERIFF OF**

MADISON COUNTY, AND FINE OF $750, WITH THE SENTENCE SUSPENDED FOR TWO YEARS UNLESS SOONER INVOKED; AND CONVICTION OF RECKLESS DRIVING, AND FINE OF $100 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

GRIFFIS, P.J., ISHEE, MAXWELL AND JAMES, JJ., CONCUR. BARNES AND FAIR, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY LEE, C.J., AND FAIR, J. CARLTON, J., NOT PARTICIPATING.

ROBERTS, J., DISSENTING:

¶22. I must respectfully dissent from the majority's conclusion that the case before us is error free and can be safely affirmed with confidence. The majority finds that the Circuit Court of Madison County did not err when it affirmed Drabicki's convictions after it allowed the City of Ridgeland to file an untimely appellee's brief, and after it had already effectively reversed Drabicki's convictions. Furthermore, the majority finds the County Court of Madison County did not err when it admitted, as self-authenticating, two calibration certificates of the Intoxilyzer 8000 used to test Drabicki. However, I conclude that the circuit court failed to follow the Mississippi Rules of Appellate Procedure when it allowed the City to file its brief well after the circuit court had effectively reversed Drabicki's convictions in a sua sponte order. In addition, I have grave doubts about the admissibility of the Intoxilyzer 8000 calibration certificates under Rule 902 of the Mississippi Rules of Evidence. Given these issues, I cannot say with confidence that we can safely affirm. Consequently, I would reverse and render Drabicki's convictions for DUI first offense and reckless driving.

¶23. After a non-jury bench trial at the county court level, Drabicki appealed both his

convictions to the circuit court on February 8, 2010. On May 18, 2010, the circuit court entered an agreed-upon order extending the time in which Drabicki had to file a brief. On July 19, 2010, Drabicki filed his brief with the circuit court. The circuit court entered four separate agreed orders extending the time in which the City had to file an appellee's brief, the final deadline for submission being April 21, 2011. The record is then silent for six months until October 6, 2011, when the circuit court sua sponte entered an order requiring the City to file an appellate brief by November 8, 2011.[1] No brief was filed by the City. On November 10, 2011, the circuit court again sua sponte entered an order regarding notice of the City's deficiency in failing to file a brief. The circuit court ordered the City to correct its deficiency within fourteen days. If the deficiency was not corrected within that time period, the circuit judge ordered that "*this cause shall be dismissed and any conviction shall be reversed*." (Emphasis added). In addition, the November 10, 2011 order stated that the circuit court would not consider further extensions of time to file a brief. The City filed no brief within this fourteen-day period.

¶24. The circuit court entered yet another sua sponte order on December 29, 2011, finding the City had failed to file its brief after receipt of the fourteen-day notice. Instead of reversing Drabicki's convictions as required by its prior order, the circuit court ordered the City to show cause for its failure to comply with the circuit court's November 10, 2011 order or face potential sanctions. Once again the record is silent until January 31, 2012, when the

[1] Boty McDonald is counsel for the City.

City finally filed its brief with the circuit court. Drabicki filed a motion on February 10, 2012, to strike the City's brief as untimely filed, but the record gives no indication that the circuit court ever ruled on Drabicki's motion. The circuit court entered a judgment on February 24, 2012, affirming the convictions and remanding the case back to the county court for execution of the judgment of that court.

¶25. Drabicki appealed to the Mississippi Supreme Court on March 29, 2012. Boty McDonald filed his entry of appearance as counsel for the City on May 23, 2012. Drabicki filed his brief on August 9, 2012. The City's brief was due thirty days later. The City failed to file a brief. This Court's clerk notified McDonald of the deficiency and gave him fourteen days' notice to correct it. McDonald ignored the clerk's warning. To this date, McDonald has once again failed to file a brief on behalf of the City. Consequently, it is necessary to discuss the standard of review where no appellee's brief exists.

¶26. The majority cites *Miller v. Pannell*, 815 So. 2d 1117 (Miss. 2002), as the standard on how this Court should review the City's failure to file an appellate brief. However, *Miller* is a civil chancery court matter. *Miller* states:

> [The] [a]ppellees . . . did not file a brief. We have two options in this situation. The first alternative is to take the appellees' failure to file a brief as confession of error and reverse. This should be done when the record is complicated or of large volume and the case has been thoroughly briefed by the appellant with apt and applicable citation of authority so that the brief makes out an apparent case of error. The second alternative is to disregard the appellees' error and affirm. This alternative should be used when the record can be conveniently examined and such examination reveals a sound and unmistakable basis or ground upon which the judgment may be safely affirmed.

Miller, 815 So. 2d at 1119 (¶7) (citations omitted). I believe the more analogous and

appropriate standard comes from *Chatman v. State*, 761 So. 2d 851 (Miss. 2000). In *Chatman*, the supreme court addressed circumstances in which the government failed to file a brief incident to a criminal appeal. According to the supreme court:

> The State failed to file a timely brief in this appeal. An appellee's failure to file a brief on appeal is tantamount to confession of the errors alleged by the appellant. However, automatic reversal is not required if this Court can say with confidence that the case should be affirmed.

Chatman, 761 So. 2d at 854 (¶9). While the standards appear similar, I believe that this standard of review is the more appropriate and applicable one to the case before us, as it addresses the rare and peculiar instance where the government fails to file an appellate brief in a criminal matter.

¶27. Upon applying the *Chatman* standard to the case before us, I conclude that this case merits reversal as a confession of error due to the numerous issues presented to which the City failed to respond, and the fact that I cannot say with confidence that the matter can be safely affirmed.

¶28. The first issue is the circuit court's failure to reverse and render Drabicki's convictions, pursuant to the circuit court's own order, when the City failed to comply with the Mississippi Rules of Appellate Procedure. Under Rule 12.03(D) of the Uniform Rules of Circuit and County Court Practice, the time in which to file an appellate brief in an appeal from county court to circuit court is governed by Rule 31 of the Mississippi Rules of Appellate Procedure. Since the City failed to comply with the circuit court's orders regarding the submission of a responsive brief under Rule 31, the circuit court issued the

November 10, 2011 sua sponte order invoking Rules 2 and 31 of the Mississippi Rules of Appellate Procedure.

¶29. The November 10, 2011 order states, in part:

> [T]here has been an obvious failure to defend against the appeal and a failure to comply substantially with the Mississippi Rules of Appellate Procedure, either of which warrant[s] this cause being dismissed and any conviction of the appellant that is the subject of this appeal being reversed . . . . [I]f [the City] fails to file a brief within fourteen (14) days after notification of such deficiency[,] this cause **shall** be dismissed and any conviction of the appellant that is the subject of the appeal **shall** be reversed.

(Emphasis added). The record shows the City's counsel timely received the circuit court's fourteen-day deficiency notice, and the City did nothing. It was only after the circuit court's threat of sanctions from another sua sponte order that the City filed its brief on January 31, 2012. That clearly fell outside the fourteen-day deadline required to correct a deficiency under Rule 2(a)(2), which the circuit court had issued to the City.

¶30. On November 24, 2011, fourteen days after the circuit court's November 10, 2011 order, Drabicki's convictions effectively stood reversed, and a judgment should have been rendered in his favor. It was not. After issuance of the notice of deficiency to the City and its receipt of the notice, the circuit court allowed the City to submit a brief without stating whether the circuit court intended to suspend the requirements of Rule 2(a)(2) under Rule 2(c). The circuit court never indicated that it intended to suspend Rule 2(a)(2). Rule 2(a)(2) states: "The attorney for the party in default has the burden to correct promptly any deficiency or see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency

has issued." For reasons unknown, the circuit court merely appears to have changed its mind without finding any "interest of expediting decision[] or . . . other good cause" required by Rule 2(c) to suspend the rules.

¶31. Given the absence of any justification for these two errors, I believe Drabicki's convictions were reversed on November 24, 2011, by the circuit court's own order. Reinstating Drabicki's convictions after they were effectively reversed raises serious constitutional double-jeopardy concerns.

¶32. In addition to the circuit court's failure to reverse and render this matter, I have other concerns with respect to the admissibility of the two Intoxilyzer 8000 calibration certificates. Since Drabicki was charged under Mississippi Code Annotated section 63-11-30(c) (Rev. 2004) for driving under the influence, the accuracy of the Intoxilyzer's results is crucial to the prosecution's case. Without proper predicate evidence of the Intoxilyzer's accuracy, the blood-chemistry basis for Drabicki's DUI conviction evaporates. While not deciding the admissibility of the certificates, I nevertheless feel a discussion of the relevant rules of evidence and their application in this case is necessary in determining if Drabicki's convictions can "safely" be affirmed.

¶33. During the county court non-jury trial, the following exchange occurred while the City was attempting to introduce the calibration certificates for the Intoxilyzer 8000:

> The Court: The question then becomes, can this document come in under any of the exceptions to the hearsay rule of 803, and if it can, does it have to be authenticated by an independent witness under, what 901; or may it come in -- if there [is] some basis for self-authentication under

902, seems to me.

. . . .

Mr. McDonald: Well, Your Honor, *under the shotgun approach*, I would offer both paragraph 1, a domestic document under seal, and paragraph 11, certified records of regularly conducted activities; and, Judge, I would also argue . . . not only hearsay Rule 803, paragraph 6, records of regularly conducted activity, but also paragraph 8, public records and reports.

(Emphasis added). It is clear from this exchange that the City did not have in mind any singular basis for the admissibility of the calibration certificates. In fact, the record demonstrates the City offered paragraphs one, two, four, and eleven under Rule 902 of the Mississippi Rules of Evidence as a basis for admissibility. Eventually, the following exchange occurred:

The Court: . . . So we're probably back to 902(1) as a basis for self-authentication, would we not be?

Mr. McDonald: Yes, sir.

This discussion continues on, and it appears from the record that Rule 902(1) is the eventual basis under which the calibration certificates are admitted into evidence. The City had no sponsoring witness to identify or authenticate the certificates. They were admitted as general exhibits, as self-authenticating documents.[2] The exhibits purported to demonstrate that the Intoxilyzer 8000 machine at the Madison Police Department had been tested and calibrated

[2] These copies of the Intoxilyzer 8000 calibration certificates are prosecution exhibits 2 and 3.

both before and after Drabicki was tested and that the machine was within acceptable standards of accuracy.[3]

¶34. Rule 902(1) permits self-authentication of domestic public documents under seal when there is:

> A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

This rule would allow the *original* Intoxilyzer 8000 calibration certificates to be admitted as self-authenticating, as they are prepared under seal by the Mississippi Crime Laboratory, and the calibration technician personally signed the certificates attesting to the truth of the certificates' contents.[4] However, this case does not involve the original calibration certificates. Rather, the City provides certified *copies* of the calibration certificates, which, it appears, should have been offered under Rule 902(4). In fact, the record demonstrates the City offered what it knew were copies of the original calibration certificates:

> The Court: All right. Under what basis, then, is this - - are these documents being offered?

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[3] The Intoxilyzer 8000 machine at the Ridgeland Police Department was not functioning the night of March 28, so Ridgeland Police Officer Soto took Drabicki to the Madison Police Department to use its Intoxilyzer 8000.

[4] Mississippi Code Annotated section 45-1-17 (Rev. 2011) authorizes the creation and existence of the Mississippi Crime Laboratory by providing: "The commissioner shall have the authority to establish, staff, equip[,] and operate a crime detection and medical examiner laboratory, and to cooperate with the University Medical Center and other hospitals and laboratories in its operation.

Mr. McDonald: Well, Your Honor, I'm offering it as a certified copy of a court record.

The Court: Well, a certified copy of a court record - - are you talking about from the lower court?

Mr. McDonald: No, sir - - well, from a - - a certified copy of the records maintained by the Madison Police Department.

Where certified *copies* of public records are being offered as evidence, Rule 902(4) provides that:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . . .
>
> A *copy* of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, *certified as correct by the custodian or other person authorized to make the certification*, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(Emphasis added). Applying this rule to the case before us, I detect several evidentiary nuances with respect to the copies of the calibration certificates that place their admissibility as self-authenticating public documents in doubt. The original calibration certificates are, according to Rule 902(1), self-authenticating documents, which are prepared under seal by the Mississippi Crime Laboratory and signed by the calibration technician attesting to the truth of the certificates' contents. Therefore, if the City presented the originals to the county court, there would be no issue here. However, at some point the Mississippi Crime Laboratory copied these original calibration certificates, affixed a stamped certification that

appears to comply with Rule 902(4), and eventually these copies, or what appear to me to be copies of copies, were offered into evidence by the City.[5] Drabicki timely and appropriately objected to their admissibility and preserved his issue for appeal. My concern does not focus on the number of times the original documents were copied or whether Rule 902(4) allows copies to be made *ad infinitum*. Such a discussion is not warranted here. Rather, my concern centers on whether, under Rule 902(4), Wendy Hathcock was authorized to issue a certification on behalf of Maury Phillips.

¶35. Phillips, the section chief of the Implied Consent Section of the Mississippi Crime Laboratory, is the official custodian of the original Intoxilyzer 8000 calibration certificates, presumably for every machine in Mississippi. When the Implied Consent Section issues a certified copy of a calibration certificate, a large certification stamp is affixed to the copy that attests to the truth and correctness of the copy and contains a stamped replication of Phillips's signature. The stamp also contains a blank "by" line, where Wendy Hathcock has her hand-written signature that appears to be on behalf of, or as an agent for, Phillips. There is no indication on the attestation of Hathcock's representative capacity. She could be the deputy section chief or a janitor. We simply cannot tell from the face of the document. Rule 902(4) requires that the certification indicate "the other person is authorized to make the

[5] The certification stamp itself, which certifies the copies of the calibration certificates in the record before us, appears to meet the Rule 902(4) requirement that it comply with paragraphs (1), (2), or (3) of Rule 902. In this instance, the certification is made under seal and would likely meet the paragraph (1) criteria. However, Rule 902(4) still requires, it appears to me, that the custodian or an authorized person issue the paragraph (1), (2), or (3) certification.

certification." However, there is no indication that Hathcock is authorized to make a Rule 902(4) certification for a certified copy of an original. It appears to me that Rule 902(4) requires some indication of a person's official capacity or authorization to issue a certification, and since no such indication is apparent on the face of the document, I have serious concerns regarding the admissibility of these exhibits. In addition, Drabicki raises numerous questions as to whether the signature is authentic or genuine such that the copies of the calibration certificates can be self-authenticating. Since the City failed to file an a brief with this Court, Drabicki's assertions are unanswered. Drabicki's brief states an apparent case of error in that regard.

¶36. The majority cites *Pulliam v. State*, 856 So. 2d 461, 464-65 (¶13) (Miss. Ct. App. 2003), which found that calibration certificates were self-authenticating where they bore the seal of the Mississippi Crime Laboratory and had a signature attesting to the truth of the documents' contents. In the current case, the majority's conclusion that Intoxilyzer calibration certificates are self-authenticating solely based on the signature of the calibration technician does not, I believe, adequately address the specifics of the rules of evidence *or* the arguments raised in Drabicki's brief. As I interpret Rule 902(1) and *Pulliam*, an *original* calibration certificate would be self-authenticating solely based on the calibration technician's signature. However, we do not have an original document in the case before us.

¶37. The majority may point to the fact that in *Pulliam*, "[u]pon reopening its case, the State offered duplicates of the certificates of calibration immediately before and after Pulliam's test. Both were admitted into evidence." *Pulliam*, 856 So. 2d at 464 (¶10). But

the *Pulliam* Court did not mention whether those "duplicates" were multiples of original documents or if they were copies of a single original. In fact, *Pulliam* has no detailed analysis of the documents the State entered into evidence. If the calibration certificates in *Pulliam* were multiples of original documents, then they clearly satisfy Rule 902(1). If, however, the calibration certificates were copies of a single original, then the *Pulliam* Court, in my considered opinion, incorrectly applied Rule 902(1). As I read and interpret the Mississippi Rules of Evidence, Rule 902(1) provides self-authentication to original documents or to the certifications of original documents.

¶38. The commentary to Rule 902(1) states, in part: "A wide range of Mississippi public records fall into this category, including acknowledgments and *certificates authenticating copies of public records*." (Emphasis added). Therefore, as I understand Rules 902(1) and 902(4) as applied to this case, the certification of a copy, by use of the Implied Consent Section stamp, could provide the self-authenticating basis for the copied calibration certificates, provided that the signatory, Hathcock, was authorized to sign and certify the copy. Once again, since there is no indication of Hathcock's capacity or her authorization to sign and certify the copies of the Intoxilyzer calibration certificates, the requirements under 902(4) do not appear to be satisfied.

¶39. Another matter of concern warrants discussion. Once again, the present procedural posture of this case places this Court in a delicate position relative to the proper role of the judiciary. By affirming Drabicki's convictions as valid when the City voluntarily chose not to defend their validity, we come perilously close to becoming an advocate for the

prosecution. Drabicki's two-day suspended jail sentence and two-year probationary period have now expired, and it appears that the only remaining issue is his payment of the $2,000 fine, court costs, and assessments. By failing to file a brief, the City may well have deliberately decided to abandon the prosecution of Drabicki.[6] Other states, when confronted with such a conundrum, have determined that the government has abandoned its prosecution of the defendant or treated the government's actions as grounds for a pro forma reversal. *See* 5 Am. Jur. 2d *Appellate Review* § 538 (1995); *see also State v. Files*, 441 A.2d 27, 29-30 (Conn. 1981) (motion to remand for new trial granted based on state's lack of due diligence in defending a criminal appeal); *People v. Keeney*, 238 N.E.2d 614, 615 (Ill. Ct. App. 1968) (state's failure to file an appellee's brief places the court in an abhorrent role of both advocate and judge such that reversal may be warranted); *People v. Spinelli*, 227 N.E.2d 779, 779 (Ill. Ct. App. 1967) (prosecuting government's failure to file an appellee's brief resulted in pro forma reversal); *Com. v. Paasche*, 459 N.E.2d 1223, 1224-25 (Mass. 1984) (state's failure to file an appellee's brief in a criminal case could indicate a failure to prosecute). The City's continual defaults in handling this appeal beg the question as to whether it desires to prosecute this case or has abandoned its prosecution. Such actions place this Court in an untenable judicial dilemma, where we may be affirming convictions that the City has

[6] I take judicial notice of this Court's own docket. It reflects there are three similar cases presently pending in this Court. In each one, the City of Ridgeland's attorney, McDonald, failed to timely file an appellee's brief with the circuit court. In addition, in each of these appeals, McDonald again failed to file an appellee's brief with this Court. Those cases are *Lobo v. City of Ridgeland*, 2012-KM-00525-COA; *Drabicki v. City of Ridgeland*, 2012-KM-00528-COA; and *Carlson v. City of Ridgeland*, 2012-KM-01091-COA.

abandoned or no longer desires to prosecute.

¶40. Due to the procedural and substantive issues within this case, I cannot say that Drabicki's convictions can safely be affirmed with confidence under the *Chatman* standard. Furthermore, I believe this case was effectively reversed and rendered by the circuit court on November 24, 2011. As such, I would reverse and render all of Drabicki's convictions. Because the majority affirms, I must respectfully dissent.

LEE, C.J., AND FAIR, J., JOIN THIS OPINION IN PART.