

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01362 COA**

**STEPHEN HOLLOWAY A/K/A STEPHEN EDWARD
HOLLOWAY**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

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| DATE OF JUDGMENT: | 11/16/95 |
| TRIAL JUDGE: | HON. ROBERT H. WALKER |
| COURT FROM WHICH APPEALED: | HARRISON COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | ROGER WAYNE WOODALL |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS |
| DISTRICT ATTORNEY: | CONO CARANNA |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | NEGLIGENTLY CAUSING THE DEATH OF ANOTHER WHILE DRIVING WITH A BLOOD ALCOHOL CONTENT OF .10% OR GREATER: SENTENCED TO SERVE A TERM OF 20 YRS IN THE CUSTODY OF THE MDOC |
| DISPOSITION: | AFFIRMED IN PART, REVERSED IN PART, AND REMANDED- 3/10/98 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 4/8/98 |

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Stephen Holloway was convicted under Miss. Code Ann. § 63-11-30(4) of negligently causing the death of another while driving with a blood alcohol content of .10% or greater. He was sentenced to

a term of twenty years in the custody of the Mississippi Department of Corrections. He makes the following arguments on appeal: **(1) that the police officers lacked probable cause to justify their warrantless arrest; (2) that the officers disregarded Miss. Code Ann. § 63-11-21 by requiring him to submit to a blood test, notwithstanding his refusal to do so; (3) that the officers disregarded Miss. Code Ann. § 63-11-7 by forcibly taking a blood sample when he was neither dead nor unconscious; (4) that the failure of the Mississippi State Crime Laboratory to adopt testing procedures as required by Miss. Code Ann. § 63-11-19 should have precluded the use of blood test results at trial; (5) that the State failed to prove his blood alcohol in terms of "weight volume of alcohol"; (6) that the State's expert failed to meet the admissibility requirements of the Mississippi Rules of Evidence; (7) that the police officers deprived him of his right to access to a telephone for the purpose of obtaining legal or medical assistance pursuant to Miss. Code Ann. § 63-11-5; (8) that the court failed to properly instruct the jury on the issue of contributory negligence; and (9) that the passage of the law requiring service of at least 85% of a criminal sentence operates as an ex post facto law and is thus unconstitutional as applied to him.** Finding only Holloway's sentencing argument deserving of merit, we reverse and remand for a sentencing hearing in accordance with this opinion and affirm on all other grounds.

FACTS

On April 25, 1993, at approximately 8:00 a.m., Stephen Holloway arrived at a Gulfport bar where he drank beer and coffee throughout the day until approximately 5:10 p.m. when he left the lounge in his truck. He traveled east along Victory Street, until he came to a "T" intersection controlled by a stop sign. Holloway ran the stop sign, crossing over Teagarden Road, and entered a private driveway. Roy Fiveash, Jr. was traveling north on Teagarden Road on his motorcycle when Holloway backed out of the driveway into Fiveash's lane of traffic. Fiveash hit Holloway's truck, which caused Fiveash to lose control of his motorcycle and hit a utility pole. Fiveash died as a result of the injuries he sustained in the accident. Holloway then left the scene of the accident and traveled north on Teagarden Road to the intersection of Pass Road, where he stopped to inspect the damage to his truck. A witness to the accident followed Holloway to that location and informed Holloway that he had injured someone and that he should return to the scene of the accident. Holloway ignored the witness and then turned west on Pass Road and drove to his apartment. The accident was reported to the police department, and Officer Steven Schlicht was dispatched to the location of the accident.

When the officer arrived at the accident site, witnesses gave him the description and the tag number of the vehicle involved in the accident. Based on the information he received at the scene, Officer Schlicht determined that Stephen Holloway was the owner of the vehicle in question. Officers Schlicht and Jordan then proceeded to Holloway's apartment to question him about the accident. Holloway opened the door and identified himself to the officers. The officers noticed that Holloway had red, watery eyes, that he was unsteady on his feet, and that he smelled of intoxicants. The officers then arrested Holloway and advised him of his *Miranda* rights. Officers Weatherford and Vance then requested a search warrant in order to obtain a sample of Holloway's blood. After receiving the warrant, the officers transported Holloway to the Gulfport Memorial Hospital so that a blood sample could be obtained. The blood was drawn at 12:35 a.m. and was later submitted to the Mississippi State Crime Laboratory for testing. The blood test revealed a blood alcohol content of .19%. Holloway was subsequently indicted and then convicted of the felony offense of negligently

causing the death of another while driving with a blood alcohol content of .10% or greater. It is from this conviction that he appeals.

DISCUSSION

I. DID THE POLICE OFFICERS HAVE PROBABLE CAUSE TO JUSTIFY A WARRANTLESS ARREST?

Holloway argues that the police officers should have obtained a search warrant before making a warrantless entry into his apartment and arresting him. He maintains that the warrantless arrest led officers to make certain observations which were later used as a basis to obtain a search warrant so that a sample of his blood could be obtained. Recognizing that the fruits of an illegal arrest may not be used to strengthen an initial arrest, our inquiry must first focus on whether or not the police officers had probable cause to arrest Holloway without a warrant. *Smith v. State*, 386 So. 2d 1117, 1118 (Miss. 1980).

An arrest must be considered in conjunction with **Miss. Code Ann. § 99-3-7 (1972)** which provides in part: "An officer or private person may arrest any person without warrant, . . . when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it" "The existence of 'probable cause' or 'reasonable grounds' justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. The determination depends upon the particular evidence and circumstances of the individual case." *Blue v. State*, 674 So. 2d 1184, 1202-03 (Miss. 1996).

In the present case, police officers were dispatched to the scene of the accident where witnesses began providing information about the suspect vehicle that had struck Fiveash and had left the scene. They gave a description of the vehicle and provided the tag number which was then traced back to Holloway. When the officers arrived at Holloway's apartment, they found a damaged truck matching the description that had been given by the witnesses to the accident. The officers then knocked on the door of the apartment, and Stephen Holloway responded and identified himself. When Holloway opened the door, the officers noticed that he had red, watery eyes and slurred speech. They also noticed that he was unsteady on his feet and smelled strongly of intoxicants. Based on this myriad of facts connecting Holloway to the accident, it is clear that the police officers had sufficient probable cause to justify arresting Holloway without a warrant. Without dispute, of course, the search that followed Holloway's arrest was incident to arrest and was legally justified under the circumstances. *Alexander v. State*, 503 So. 2d 235, 238 (Miss. 1987). Accordingly, we find no merit in Holloway's first assignment of error.

II. DID THE POLICE OFFICERS DISREGARD MISS. CODE ANN. § 63-11-21 BY REQUIRING HOLLOWAY TO SUBMIT TO A BLOOD TEST, NOTWITHSTANDING HIS REFUSAL TO DO SO?

In his next assignment of error, Holloway relies upon Miss. Code Ann. § 63-11-21 (Rev. 1989) for the proposition that when " a person refuses upon the request of a law enforcement officer to submit to a chemical test of his breath . . . none shall be given." He maintains that his refusal to take the intoxilyzer test precluded the police officers from forcibly obtaining a sample of his blood. However,

the supreme court has held that "blood searches which are based on probable cause are not illegal." *Longstreet v. State*, 592 So. 2d 16, 21 (Miss. 1991). Rather, the extraction of blood for testing is a highly effective tool by which a person's level of intoxication may be determined. *Schmerber v. California*, 384 U.S. 757, 771 (1966). Since we have previously determined that the police officers in the present case had sufficient probable cause to arrest Holloway, we must therefore conclude that the officers acted reasonably in obtaining a sample of Holloway's blood pursuant to a valid search warrant.

III. DID THE POLICE OFFICERS DISREGARD MISS. CODE ANN. § 63-11-7 BY FORCIBLY TAKING A BLOOD SAMPLE WHEN HOLLOWAY WAS NEITHER DEAD NOR UNCONSCIOUS?

Holloway next cites Miss. Code Ann. § 63-11-7 (Rev. 1989) in support of his theory that the police officers were unauthorized to forcibly take a sample of his blood when he was neither dead nor unconscious. The relevant portion of that statute provides as follows:

If any person be unconscious or dead as a result of an accident, or unconscious at the time of arrest or apprehension or when the test is to be administered, or is otherwise in a condition rendering him incapable of refusal, such person shall be subjected to a blood test for the purpose of determining the alcoholic content of his blood as provided in this chapter, if the arresting officer has reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor.

Miss. Code Ann. § 63-11-7 (Rev. 1989). Holloway interprets this provision of the statute as permitting police officers to obtain a sample of a person's blood only if that person is dead or unconscious. However, just as in his previous assignment of error, Holloway continues to ignore the Mississippi case law which provides that blood searches based upon probable cause are legal. *Longstreet*, 592 So. 2d at 21. Therefore, because Holloway raises no additional issue for our consideration, we decline to re-address his concerns, finding again that the trial court committed no error.

IV. DID THE FAILURE OF THE MISSISSIPPI STATE CRIME LABORATORY TO ADOPT TESTING PROCEDURES PRECLUDE THE USE OF BLOOD TEST RESULTS AT TRIAL?

Holloway next argues that the Mississippi State Crime Laboratory's failure to adopt certain testing procedures as required by Miss. Code Ann. § 63-11-19 (Rev. 1989) should have precluded the State from using his blood test results at trial. The relevant portion of that statute provides:

A chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis. The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits

which shall be subject to termination or revocation at the discretion of the State Crime Laboratory.

Miss. Code Ann. § 63-11-19 (Rev. 1989). In his objection at trial, Holloway interpreted this statute as requiring that mandatory testing procedures be filed with the Secretary of State's Office before the Mississippi State Crime Laboratory may render blood test results which are admissible at trial. Clearly, Holloway is mistaken in his interpretation. Rather, a proper reading of the statute reveals that the State Crime Laboratory is vested with discretionary authority by which to approve the methods to be used in the testing of blood. In the present case, the blood was drawn by a licensed phlebotomist, then placed in a temporary storage refrigerator, then subsequently transported to the State Crime Laboratory for testing. The blood was tested at the Crime Laboratory by Michael Weaver, a forensic scientist employed by the Crime Laboratory. Finding no evidence of improper procedures used in the withdrawal, transport, or testing of Holloway's blood, we conclude that the blood test results were properly admitted, and that therefore, his fourth assignment of error is without merit.

V. DID THE STATE FAIL TO PROVE HOLLOWAY'S BLOOD ALCOHOL IN TERMS OF "WEIGHT VOLUME OF ALCOHOL"?

Holloway argues that although the State's expert witness testified as to Holloway's blood alcohol level, the expert failed to express his blood alcohol level in terms of "weight volume of alcohol" as required by Miss. Code Ann. § 63-11-30 (Rev. 1989). A careful review of the statute, however, reveals no requirement that the State use the precise wording of the statute in presenting testimony to the jury by way of expert witness. In the present case, the State's expert, Michael Weaver, testified that Holloway's blood contained .19% ethyl alcohol at the time it was drawn. The jury was then instructed that if they found that Holloway was driving a motor vehicle with .10% or more of alcohol by weight volume in his blood, then they should find him guilty as charged. The jury was then left with the obligation to either accept or reject Weaver's testimony. *Tyler v. State*, 478 So. 2d 315, 317 (Miss. 1985). Clearly, the jurors chose to accept Weaver's testimony in reaching their decision as to Holloway's guilt. Because we refuse to invade the province of the jury, we find no merit in Holloway's fifth assignment of error.

VI. DID THE STATE'S EXPERT FAIL TO MEET THE ADMISSIBILITY REQUIREMENTS OF THE MISSISSIPPI RULES OF EVIDENCE?

Holloway next argues that the State's expert, Michael Weaver, did not meet the requirements of the Mississippi Rules of Evidence for the admissibility of expert testimony. Pursuant to Rule 702, if specialized testimony will assist the trier of fact in understanding the evidence or determining a fact in issue, then a qualified expert may testify. **M.R.E. 702.** An expert opinion is admissible if it is based on facts and data reasonably relied upon by other experts in the field. **M.R.E. 703.** Furthermore, the techniques and practices upon which the opinion is based must have gained general acceptance within the requisite field. *House v. State*, 445 So. 2d 815, 822 (Miss. 1984).

The State's expert witness, Michael Weaver, is a forensic scientist employed with the Mississippi State Crime Laboratory. In the course of his profession, he has performed numerous tests on blood samples to determine alcohol concentration. He is also qualified to testify concerning the concept of retrograde extrapolation--a generally accepted methodology which involves estimating blood alcohol

concentration rates several hours before the blood was actually drawn. Clearly, Mr. Weaver qualifies as an expert within the requirements of the Mississippi Rules of Evidence. However, Holloway argues that the trial judge should have excluded Weaver's testimony under Rule 403 even if the testimony was rightfully allowed under Rules 702 and 703. Rule 403 provides that even relevant evidence may be inadmissible when its probative value is substantially outweighed by its tendency to mislead, confuse, or prejudice the jury. **M.R.E. 403**. Holloway claims that Weaver admitted that Holloway would have died if his retrograde extrapolation theory was correct; therefore, Rule 403 should have operated to exclude Weaver's confusing testimony. However, a careful review of the record reveals no such admission by Weaver. "Rulings as to the admissibility of evidence should be reversed only if the judge is found to have abused his discretion." *Butler v. State*, 702 So. 2d 125, 128 (Miss. 1997) (citing *Parker v. State*, 606 So. 2d 1132, 1136 (Miss. 1992)). We find no such abuse of discretion in this case; thus, Holloway's sixth assignment of error is lacking in merit.

VII. DID THE POLICE OFFICERS DEPRIVE HOLLOWAY OF HIS RIGHT TO ACCESS TO A TELEPHONE FOR THE PURPOSE OF OBTAINING LEGAL OR MEDICAL ASSISTANCE?

Holloway argues that the police officers disregarded Miss. Code Ann. § 63-11-5 (Rev. 1989) by failing to inform him of his right to use the telephone for legal or medical purposes. While Holloway is certainly correct in his interpretation of the statute, there are often errors which are so insignificant as to be deemed harmless when viewed in conjunction with the other evidence at trial. *Taylor v. State*, 672 So. 2d 1246, 1267 (Miss. 1996). Even assuming that the police officers did fail to inform Holloway of his right to use the telephone, this Court is doubtful that the error played any significant role in the outcome of the trial. Therefore, we conclude that if Holloway was not informed of his right to telephone access, any error that resulted was harmless.

VIII. DID THE COURT FAIL TO PROPERLY INSTRUCT THE JURY ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE?

Holloway next argues that the court failed to properly instruct the jury to consider the excessive speed at which the victim was traveling at the time of the accident. However, the supreme court has stated that the negligence of the deceased is not a defense to a prosecution for a homicide resulting from the operation of a motor vehicle. *Hewlett v. State*, 607 So. 2d 1097, 1101 (Miss. 1992). In the present case, the court instructed the jury that "contributory negligence is not a defense to the crime charged unless you are convinced beyond a reasonable doubt that the decedent's death resulted solely from his own conduct." Because the court properly instructed the jury on the applicable law, we decline Holloway's invitation to hold the court in error on this issue.

IX. DID THE PASSAGE OF THE LAW REQUIRING SERVICE OF AT LEAST 85% OF A CRIMINAL SENTENCE OPERATE AS AN EX POST FACTO LAW?

Finally, Holloway argues that the new "85% Rule" is unconstitutional as applied to him because his crime was committed before the new law went into effect. The statute of which Holloway complains states: "No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995." *Miss. Code Ann. § 47-7-3(1)(g)* (Supp. 1997). The supreme court previously dealt with this same situation in *Puckett v. Abels*, 684 So. 2d 671 (Miss. 1996). In that case, the court held that the 85% Rule eliminated opportunities for parole which had previously

existed and was thus an ex post facto law as applied to those who had been charged with crimes before the effective date of the statute. *Id.* at 678. Because the new statute increased Holloway's punishment beyond what was prescribed when his crime was committed, we find that the 85% Rule would operate as an unconstitutional ex post facto law. Therefore, we reverse on this issue only and remand for a sentencing hearing in accordance with this opinion.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF NEGLIGENTLY CAUSING THE DEATH OF ANOTHER WHILE DRIVING WITH A BLOOD ALCOHOL CONTENT OF .10% OR GREATER IS AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR SENTENCING CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J. AND McMILLIN, P.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.