

CIRCUIT COURT THOMPSON COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MARSHALL,)
Plaintiff,)
v.) Cause No. 08 CR 929
CHRIS DUNKIRK,)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

January 5, 2009

Before the Honorable Edward Arnold (Judge, Kennedy County, State of Marshall, by special appointment of the State of Marshall Supreme Court)

THE COURT: Very well. We are on the motion to quash the arrest of the accused, and to suppress evidence seized in connection with that arrest in the case No. 08 CR 929, People of the State of Marshall versus Chris Dunkirk. Counsel, are you ready?

Mr. Wilson: Yes, your Honor. For the record, I am Charles Wilson, representing the defendant, Judge Chris Dunkirk.

The Court: For the record, because of the position that the defendant holds in this county, I have been assigned by the State of Marshall Supreme Court to hear this matter. I am Judge Edward Arnold from Kennedy County, State of Marshall, and I have no personal knowledge of either the defendant or the prosecutor in this matter. I understand that neither party objects to our proceeding with this matter at this time?

Prosecutor, Ellen Carlone: No objections, Your Honor.

Mr. Wilson: No objections. We move to exclude witnesses.

The Court: Motion to exclude witnesses is granted. Anyone who is to be called as a witness must leave the courtroom and not come into the courtroom until he or she has finished testifying. If a witness fails to comply with this ruling, that witness will not be permitted to testify. Counsel for both parties, please keep an eye on those entering the courtroom so that I do not have to exclude a witness who even inadvertently violates this order. Very well, proceed.

Mr. Wilson: Your Honor, movant calls Judge Chris Dunkirk.

[The witness is sworn]

Q: Please state your name.

A: Chris Dunkirk.

Q: What is your occupation?

A: I am a judge of the Circuit Court of Thompson County, State of Marshall.

Q: And, Judge Dunkirk, you are also a member of the bar, you are an attorney, here in the State of Marshall, are you not?

A: Yes, I passed the bar and was admitted to practice in 2001. November 2001.

Q: Judge Dunkirk, how long have you been a judge?

A: I was elected on November 7, 2006, and I was sworn in as a judge on December 5, 2006. I was the youngest judge ever elected or appointed in the State of Marshall. The State of Marshall's Constitution of 1970 says that a lawyer has to be admitted to the bar for at least five years before being elected or appointed to the bench.

Ms. Calrone: Object to the narrative.

Court: I advise the witness to just answer the questions posed. No speeches, please.

Q: Your Honor, Judge Dunkirk

Ms. Carlone: Objection. I ask that counsel not preface every question by addressing the witness as "Your Honor." Judge Dunkirk is on the witness stand here as a witness, not as a public official, and counsel's constant use of the defendant's title may subvert the prosecution's case here.

The Court: Oh, I am not that easily subverted. Mr. Wilson, please try not to subvert me. I think we can do without the witness' title being used at the beginning of each of your questions.

Q: Well, I apologize for the perceived effort at subversion, and I will be more careful.

Were you arrested by a member of the Marshall City Police Department at 4540 N. Dover, Marshall City, State of Marshall, around 9 PM on the night of October 31? 2008?

Witness: I was.

Q: And, at that time and place did the police take anything from you that might be used in evidence in a criminal case against you?

A: Yes.

Q: Did the police require you to take tests at that time and place, tests you believe the prosecution might use against you?

A: Yes.

Q: When the police arrested you and seized your property, did they show you a warrant for your arrest?

A: No.

Q: Did they show you a warrant authorizing them to seize you or anything that belonged to you?

A: No.

Q: And, for what it is worth, did you give consent to the police to seize anything that belonged to you?

A: No.

Q: For what it is worth, were you at that time and place violating any federal, state, or local criminal law?

A: No. Nothing.

Q: No further questions.

Ms. Carlone: You were inebriated at that time and place, were you not?

A: You could say that; I had a couple of drinks. Two or three beers.

Q: A moment ago you stated you were not committing any federal, state, or local criminal law, right.

A: That's right.

Q: You were intoxicated on the public way, were you not?

A: I don't think I was intoxicated.

Q: If a person is intoxicated and on the public way, that's a violation of Thompson County law, isn't it?

A: That's news to me.

Q: You are aware of Thompson County Ordinance 52-17, which makes it an offense punishable by up to 10 days in jail or a \$500 fine, or both, to be on the public way and be intoxicated.

A: Well, if you say so

Q: And the sidewalk and the street outside your home are quote on the public way unquote, right?

A: Yes, those are the public way.

Q: And you were in your vehicle at that time, weren't you?

A: No.

Q: You are the owner of a grey 2005 Honda Civic, license plate number 9638035, right?

A: Right. I think it is more silver than grey.

Q: That vehicle was in the street in front of your home at 11 PM that night?

A: Yes.

Q: It was not parked in your driveway?

A: Not at that exact time.

A: Your answer is no?

A: Right.

Q: The car was in the street, wasn't it?

A: Yes.

Q: In fact it was not parked next to the curb, was it?

A: No.

Q: It was parked in the middle of the street, right?

A: Not exactly in the middle, it was double-parked, but there was plenty of room for other cars to get by my car.

A: O.K. And you left the engine running. Right?

A: No.

A: Well, the officer who arrested you says that the lights of your car . . . excuse me, the engine of your car was running, so wasn't the engine running?

A: At some point the engine was running, but I did not leave it running.

Q: And the blinker lights were on and blinking, right?

A: I believe so, yes.

Q: You were in that vehicle at the time that the engine was running, right?

A: No.

Q: Well, you were sitting in the vehicle, whether the engine was running or not, true?

A: I do not believe I was in my car at any time between, say 8 AM that morning and the time I was arrested.

Q: You were next to your car during that time period, around 9 PM, right?

A: Yes. When I went out to protest the officer's writing a parking ticket. The car had been there for a short while, and was about to be moved.

Q: So you were next to your car at about 9 PM?

A: Yes, but not in it.

Q: The officer asked you to perform certain sobriety tests at that time, right?

A: That's right.

Q: Put your finger to your nose test?

A: Yes. I had no problem.

Q: Well, you tried to pass the test, right?

A: I passed the test. I had a couple of beers, but I was not drunk.

Q: The officer asked you to count from 10 backwards to 1, right?

A: Right. Again, I had no problem.

Q: You skipped two numbers.

A: No. I might have slurred one of the numbers because I was cold and I do not ordinarily count backwards like that, but I counted correctly.

Q: Then the officer stepped back a few feet from you, and asked you to walk a straight line to the officer?

A: Yes, ma'am.

Q: You staggered when you tried to walk the straight line.

A: Not as far as I could tell. I walked a straight line.

Q: You almost fell down, right?

A: Not at all. I walked just fine.

Q: Finally, you took a breathalyzer test?

A: Yes. I told the officer that I was not driving, and that I would protest having to take the test, but then I realized that I was not driving, so what difference did it make. So I took the test, and I knew it would show that I had a couple of drinks.

Q: The test showed that you had a 0.098 blood alcohol level, right?

A: That's what the officer said.

Q: And that is over the allowable 0.08 amount per the Vehicle Code.

A: That's what our vehicle code says.

Q: Thereafter the officer placed you under arrest, right?

A: Not right away. A friend of mine, Robbie Hughes, came out and told the officer that I had never been in the car.

Q: This Hughes friend was in the house, your house, before coming out?

A: Yes.

Q: You did not know at that time whether Hughes, your friend, had been watching the entire time, do you?

A: Well, I assume Robbie saw something going on, and came out.

Q: My question is, you did not actually know whether your friend was watching you and the officer the entire time the officer was writing the ticket, talking to you, testing you, and arresting you. Right?

A: O.K. Right.

Q: That's because you were not watching your friend at the same time you were talking to the officer and taking these tests, right?

A: I suppose so. Right.

Q: Robbie Hughes was and is a very good friend of yours, right?

A: We have known each other for a number of years – since high school.

Q: Since college, too?

A: Robbie did not go to college.

Q: Robbie Hughes is not a judge?

A: That's right.

Q: Not a lawyer?

A: Right.

Q: Not being a judge, your friend could not be referred to the State of Marshall Judicial Inquiry Board for disciplinary action, right?

Mr. Wilson: Objection. Irrelevant.

Court: The Court will take judicial notice that someone who is not a judge cannot be properly referred to the judicial inquiry board, much less the courts commission, for disciplinary action. Next question.

Q: Not being a lawyer, your friend could not be properly disciplined by the Attorney Registration and Disciplinary Committee, right?

Court: Same objection, same ruling. Move on, Counsel.

Q: As a judge, you can be reported to the Judicial Inquiry Board, and be sanctioned by the Courts Commission if you commit an offense, even for DUI, right?

A: Yes, hypothetically.

Q: And, hypothetically, as a lawyer you can be disciplined by the Attorney Registration and Disciplinary Committee, right?

A: Theoretically, yes. It does not take much in this State for the ARDC to investigate and sanction an attorney. You can be disciplined for having two unpaid parking tickets.

Q: And a DUI conviction is surely more serious than failing to pay a couple of parking tickets, right?

Mr. Wilson: Objection.

Court: Sustained.

Q: Robbie Hughes, your friend, was also drinking that night, right?

A: Yes.

Q: Well, how often does Robbie Hughes come over to your house?

A: It depends. Maybe three, four times a week?

Q: You drink together when Robbie comes over?

A: Yes. Well, on weekends, not much during the week.

Q: This all happened on a Friday night? Is that a weekend night in your view?

A: Yes.

Mr. Wilson: Objection. This is getting 'way beyond the scope

Court: Perhaps we can move on, unless you have a relevant point, counsel.

Q: What does Robbie do for a living?

Mr. Wilson: Objection

The Court: Sustained. Do you have anything else, counsel?

Q: No, Your Honor. The State has no further questions at this time.

The Court: Redirect?

Mr. Wilson: No, Your Honor.

Court: Judge Dunkirk, you may step down.

Mr. Wilson: Your Honor, we have one other witness, Robbie Hughes.

THE COURT: Call your witness.

ROBBIE HUGHES

Called as a witness on behalf of the People, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

S Mr. arlone. State your full name please?

A. Robbie Hughes.

Q. What is your relationship to the Defendant, Chris Dunkirk?

A. We are good friends. I have known Judge Dunkirk since high school. We go back 17, 18 years.

Q. Where were you in the evening of October 31, 2008?

A. Well, after I got off work, I went over to Judge Dunkirk's home . . .

Ms. Carlone: Objection to the use of the title "Judge." Same objection as before.

The Court: Oh, well. I will instruct the witness not to refer to Judge Dunkirk as "Judge" or "The Honorable" or any other such title. There is a great fear in the land that I may be subverted.

A: But

The Court: Just leave the "judge" part out. Just answer the questions without referring to the defendant, as "judge." Understand?

A: Yes, Judge. Yes, Sir. I'm lost. What was the question?

Q: Where were you in the evening of October 31, 2008?

A: What time?

Q: Let's start over. Did you go to Judge Dunkirk's . . . oh, did you go to Chris Dunkirk's home on the evening of October 31, 2008?

A: Yes. I went there to like catch the football game between North Marshall and South Marshall. Oh yeah, and to return Chris's car. I had to borrow Chris's car that morning to go to work, you know, because my car was in the shop.

Q. Around what time did you arrive at Chris Dunkirk's house?

A. Not sure. Maybe 7 or 7:30 or 8 PM. It was dark out. The game had started.

Q. What did you do when you arrived?

A. Well first, you know, I parked in front of the driveway and left the car running because I thought I would run in and out in case Chris wanted me to, like, go to the store to go get some beer. I left the parking lights blinking because I thought I would be right back out to park or, you know, go for food or something. My cell phone was not working, you know, so I had to go inside to find out. Then I went into the house, and Chris was already having a beer, and there was an O.K. supply of beer, so, Chris, like, offered me a beer, and I -- it was something on the game that was really good, so, like, I sat down and started watching, and I forget, see, the car. I just forgot.

Q. When did you remember you had left the car in the street with the engine running?

A. Oh man, it was like four beers later.

Q. Well, how much time had elapsed from the time you left the car outside with the engine running and the lights blinking, and the time you remembered that you had left the car out there?

A. I don't know. Enough time to drink four beers. Like a while. So Chris goes out to check on the car, and comes back in.

Q: What happens when Chris came back in?

A: Chris says, "Robbie, we have to move the car. We cannot violate the law. We must get someone who has not been drinking to move the car. I will go back out and shut off the car. Maybe the neighbor will move the car for us."

Q: And then?

A: I go to the window and see that the cop that hates Chris writing a ticket. And I tell Chris I forgot to park the car and the car is getting a ticket. So I say, like, don't worry about it. It's my fault. I'll pay for the parking ticket. But Chris looks up and see which cop it is, and goes running outside in only a t-shirt and pajama pants and just flip-flop shoes, and starts telling the cop, saying that the car is O.K., the ticket is unnecessary, see, since the car is double parked in front of my own driveway.

Q. Then what happened?

A. The cop says it's too late, the ticket was already started and you cannot stop once you start writing a ticket.

Q. Where were you when this was happening?

A. I was like standing at the front door of the house, watching the whole thing.

Q. How far away were Chris and Officer Davis?

A. Like 20 feet away. I could hear everything.

Q. What happened next?

A. Officer Davis handed Chris the ticket, and then got in Chris's car and pulled out, turned off the car, and handed Chris the keys.

Q. Then what happened?

A. Nothing. Officer Davis told Chris to walk a straight line, and Chris said the police no right to get into Chris' car. Chris was getting upset with the police officer.

Q. Then what happened?

A. The officer asked Chris, "How much have you had to drink?" Chris says . . . like, did not answer. Then this Davis said, well I think you drove this car. I did not drive the car, you did. And the next thing I know, Chris is in handcuffs and being driven away.

Q: Did the officer ever see Chris in the car?

Ms. Carlone: Objection.

Court: Sustained.

Q: Did you see Chris Dunkirk in the car?

A: I watched the game, because it went into overtime, did not leave the room the whole time I was there, and I never saw Chris get up and move the car. The only one who got in the car was this officer Davis.

Q: Did you see the officer ask Dunkirk to conduct the finger to nose sobriety test?

A: Yes. Chris had no problem. So, the officer also asked Chris to count backwards from 10, and Chris nailed it. Got it perfect.

Q: And the officer asked Chris to do the . . . to walk a straight line of about ten feet?

A: Yes. Again, no problem.

Q: Even so, the officer administered a breathalyzer test right there at the scene?

A: Yes, something like that. The officer had a small gizmo that Chris breathed into. Chris said it didn't make any difference since only the officer had driven the car.

Q: Was there the smell of alcohol on Chris's breath?

A: How do I know? I had my own beer breath to worry about.

Q: Was there anyone else there watching? Were there any other witnesses?

A: Yes. There was this next door neighbor, the one with the dog problem. The one who does not like Chris because of the dog.

Q: There was another person watching. Where was this other person?

A: In front, near the sidewalk, in front of the house next to Chris's.

Q: To the north or the south?

A: Well, it was the house closer to Wilson Avenue.

Q: That would be north of Chris's house?

A: I guess so.

Q: Did this person say anything?

A: Yes. That the judge was finally getting what was coming.

Ms. Carlone: Objection. Ask that the question and the response be stricken.

The Court: Oh, I suppose counsel will find to get that in anyway. I will accept it for what it is worth.

Q: Do you know what the dog problem was between these

Ms. Carlone: Objection. Objection. Objection.

The Court: Sustained.

Mr. Wilson: No further questions.

THE COURT: Cross.

CROSS EXAMINATION

Mr. Wilson: You've known the Defendant since high school, right?

A. Yes.

Q. You are good friends, right?

A. Yes.

Q. You don't want your good friend to go to jail, right?

A. No I don't, but I would not lie.

Q. And, you had drank more than six beers when this all occurred?

A. Yes, that's correct.

Q. In like two hours?

A. Yes.

Q. So you were impaired by the alcohol.

A. Oh, I was like a little buzzed.

Q. So you really cannot remember what happened that day.

A. No I remember.

Q. You really cannot remember who said what.

A. No I remember.

Q. You really cannot remember who did what.

A. No I remember.

Q: Do you remember what Chris Dunkirk said to you about your leaving the car in the street?

A: Yes.

Q: And what was that?

A: Chris said, "Robbie, we have to move the car. We cannot violate the law. We must get someone who has not been drinking to move the car. I will go back out and shut off the car. Maybe the neighbor will move the car for us."

Q. You said just now that you were a little buzzed. You were so buzzed that you did not go check on the status of the car, right?

A. That's true.

Q: You stayed on the couch the whole two hours?

A: We never moved.

Q. You were willing to just pay the \$50 ticket instead of getting off the couch.

A. Yep. Well, wait. I did not remember that I had like left the car in the street. I did not sit there drinking beer and enjoying TV, you know, and thinking all the while that I had to, like, go turn off the car.

Q. But you claim that you got off the couch to watch and listen to Officer Davis and the Defendant.

Mr. Wilson: objection, your honor, compound and argumentative.

The Court: Sustained.

Q. You went outside and told the officer that Chris Dunkirk had not driven the car, right?

A: That's right.

Q: You were watching out the window?

A: After a couple of seconds, like maybe a minute or two.

Q: You did not go out until you saw the officer directing Chris Dunkirk to walk a straight line, right?

A: No, it was a little before that. Chris was doing the finger to nose test. That's when I went out.

Q: By the time you got near the car, Chris Dunkirk was trying to walk a straight line, right?

A: No, Chris was counting backward from 10 to 1.

Q: You could hear that?

A: Yes.

Q: And Chris Dunkirk missed a couple of numbers, right?

A: Not true. Chris was going from 10 to 1 without missing a beat. Did not miss a number.

Q: Chris had some trouble with walking a straight line?

A: Not true. Chris walked a perfect straight line.

Q: You do not know whether Chris got into the car or not, right?

A: Chris did not get into that car.

Q: You left the engine running, right?

A: Yep.

Q: The engine was not running when you got out there, right?

A: Right. And the lights were turned off.

Q: For all you know, Chris got into the car to move it?

A: Not true, the car had not been moved.

Q: Well, for all you know, Chris got into the car when the engine was running, right?

A: No, I was looking out the window, the front window. Chris never got into the car. The officer was already there. The police car pulled up, then pulled over to get behind Chris's car. The officer went over to the car, opened the door, and turned off the car. I thought Chris had asked the officer to turn off the car and turn off the lights. Chris had told me, "We must get someone who has not been drinking to move the car." I thought at first that Chris had asked the officer to turn off the car, but when I got outside I could see that the officer was giving Chris sobriety tests.

Q: So you told the officer that you had driven the car, not Chris?

A: That's right. I was the one that drove the car there.

Q: Had you been drinking when you drove the car there?

A: I told you earlier that I had a couple of beers when I got to the house.

Q: When you got to the house in that car, you had already had a couple of beers?

A: Yes.

Q: So, by the time you got to Chris's house you had two or three beers?

A: Yeah. I could have.

Q: Then you had six more beers?

A: Well, like maybe four more.

Q: In the space of an hour?

A: I think it was more like two hours.

Q: So, you leave the car running, out on the street, go into the house, you see the game on TV, you forget about the car, you sit down you have four more beers, and the whole time you and Judge Dunkirk, Chris, sit on the couch, and you see Chris there the whole time until the police car arrives and starts ticketing the car out on the street?

A: Yes. And then you watch Chris Dunkirk the whole time after the police officer leaves and you see that Chris Dunkirk never gets into that car for even one second?

A: That's the truth.

Q: No further questions, Your Honor.

The Court: Redirect?

Ms. Carlone: No judge.

The Court: State?

Ms. Carlone: Your honor we call Officer Pat Davis.

PAT DAVIS

Q. State your name.

A. Officer Pat Davis, star #335; I am an officer in the Marshall City Police Department.

Q: How long have you been an officer in the Marshall City Police Department?

A: Seven years.

Q: Before joining the MCPD, did you have any special training?

A: Well, yes. I have a bachelor's degree in general studies from Thompson University, and I majored in police science.

Q: Have you been trained to conduct DUI investigations and DUI arrests?

A: Yes. I took 20 hours of classes at the police academy, and then I took additional traffic enforcement classes at the State Police in my first year as an officer. I also became a certified breath technician for blood alcohol testing in my second year. And, because I spend half of my time on the traffic enforcement unit, I take a regular DUI enforcement refresher course every year.

Q: In the course of your career, how many DUI arrests have you made?

A: Oh, at this point it is in the hundreds.

Q: In fact, for each of the last five years, you have been awarded the honor of Top DUI Cop by the Marshall Alliance Against Drunk Driving, for issuing the most DUI tickets, right?

Mr. Wilson: Objection, Your Honor. It's a leading question on direct, it's bolstering, and it is in part hearsay.

The Court: Well, we are still in the preliminary stages here of the officer's direct. I will allow it, but counsel you should move on real soon.

Ms. Carlone: Answer the question.

A: Yes, that's right. I just received the fifth award a couple of days ago.

Q: All right, on October 31, 2008, what was your assignment?

A: I was assigned to traffic enforcement in the 19th District, as well as general patrol duties in the precincts along Wilson Avenue.

Q: Did you have a specific area where you conducted traffic enforcement?

A: Yes, along Volini Road from 4000 to 6800 north, and over as far as Clark Street to the west. The 19th District is located at Wilson just west of Broadway.

Q: What shift were you working on October 31?

A: The 4 PM to midnight shift.

Q: What were your primary duties that evening?

A: To patrol the thoroughfares to investigate possible illegal activity, traffic offenses, and to help citizens who might be in some kind of distress. I also responded to police calls.

Q: Was there anything unusual about that shift on October 31?

A: Yes. It was Halloween, so everyone was keeping an eye out to make sure that parents and children were safe, to look for possible pranksters and vandals, and particularly to monitor for possible irresponsible drivers.

Q: What do you mean by "possible irresponsible drivers"?

A: Drunken drivers, because it was a Friday night and it was Halloween, a party night, a likely time for people to have a few drinks then get in their car and go drive on the street, the highway. There are also drivers who drive too fast because they think it is some kind of holiday and they celebrate by driving recklessly. Or maybe they make too much noise in a quiet neighborhood and we get a complaint.

Q: Directing your attention to 9 pm that evening, what were you doing at that time?

A: Patrolling, as I said in a squad car.

Q: Tell the Court what, if anything, you observed in the vicinity of Wilson and Dover.

A: Yes. At about 9 PM I was in the patrol car proceeding westbound on Wilson from Volini Drive when my partner asked to be dropped off at the 19th District station because he was not feeling well. I dropped him off shortly after 8:30 and proceeded along Wilson westbound. As I passed Dover I noticed that there was a car double parked a few houses south of Wilson, and the blinker lights were flashing. I did not think much of it at the moment. About fifteen minutes later I came back on Wilson, eastbound, and noticed that that car was still double parked and the lights were still blinking. I circled the block, and came up Dover from the south. I could see that the parked car had no driver or passengers, and I also saw that the engine was running. I pulled the patrol car up immediately to the north of this car, exited the patrol car, and began writing a parking ticket for the car being double parked in the street, in violation of Marshall City ordinances. It is also a violation of the Marshall State Vehicle Code to leave unattended a motor vehicle with the motor running. At this time a person came out of the house immediately to the west of the car. Even though it was fairly chilly out, this person was dressed in basically a T shirt, light pants, and flip-flop shoes with no sox. I did not recognize this person at first because it was sort of dark there, but I was immediately informed, "I am judge Dunkirk. It's OK, Officer." I responded that the car had been in the street for maybe fifteen minutes, and was parked illegally. Moreover, the engine was left running without a driver behind the wheel, also in violation of Marshall Vehicle Code. Judge Dunkirk again informed me, "I am a judge. It's OK. I will take care of it." I said that I had already filled out most of the ticket, and I was not free to unwrite a ticket. I said that I would only write the one ticket for being double parked, but that someone had to move the car right away. I thought there was the smell of alcohol on the judge's breath. The judge was also talking with a slur and, you know, bloodshot eyes. So I said, "You should not get in the car because you have been drinking." I reached in the car and gave the judge the keys to the car. I also gave the judge the ticket for double parking. At that point the judge said to me, "I know you. You are the cop who writes all those DUI tickets. I think you have been in my courtroom."

I said, "Judge, I respectfully advise you to get someone to move this car so that it does not get ticketed again. And be careful, please, not to get into this car because, as you know, that would be enough for you to be convicted of DUI." The law is that a person who is under the influence of alcohol or drugs is driving under the influence even if sitting behind the wheel of a parked car. There's a presumption. They can be cited for DUI.

I then returned to my patrol car and proceed north to Wilson Avenue, and turned east to return to the 19th district station.

Q: What happened after that?

A: I drove around the block, and again came up Dover from the south. I saw the judge getting out of the car as soon as my patrol car came into sight. The car had been moved a few feet back, apparently to get driven into the driveway. Again, I pulled up to the north of the car, and got out. I could see that the person who was in the car was judge Dunkirk. I went over to the judge and said, "I believe you were driving this automobile just now. I am authorized to ask you to perform a couple of tests. Please place your right index finger to the tip of your nose. The driver—the judge – touched the index finger to the mouth, then tried again, and touched the right cheek. I then asked the judge to count backwards from ten to one, and the judge said, "10, 9, 7, 6, 5, 4, 2, 1.: The judge missed two numbers, and slurred the 7 and the 6. The judge said "sheven" and "shicks." I then stepped back a couple paces...

Mr. Wilson: Objection. Narrative.

The Court: Okay, Counsel, ask another question.

Ms. Carlone: Then what happened?

A: I then stepped back a couple paces and asked the judge to walk towards me in a straight line. The judge stepped forward one pace, then veered off to the right when trying to take the second pace. Next the judge came towards me, and veered off to the right again before walking ten feet, or five paces. I thereupon advised the judge that I was going to administer a breathalyzer to test for the presence of alcohol in the judge's system. The judge was cooperative here, and blew. The breathalyzer indicated a reading of 0.098, indicating that this was in excess of the state law making it an offense to drive a motor vehicle if there was more than 0.08 blood alcohol, or alternately, driving under the influence of alcohol. I then gave Miranda warnings and arrested the judge. I confiscated the keys, and took the title from the glove compartment and ordered a tow truck to remove the automobile from the street. I then placed handcuffs on the judge and placed the judge in the back seat of the patrol car. I then returned to the 19th District station and booked the judge and prepared appropriate reports. I charged the judge with violating State of Marshall Vehicle Code 5/1105-1, Driving under the influence of alcohol and/or drugs.

A: Anything else?

A: Yes. One of the people observing all this came forward as I was cuffing the judge and told me that the judge was not driving the car. I said, "Well, I saw the judge in the car and saw the car move." This person

told me, "Officer, I am the one who moved the car. The judge never got into the car. I noticed that this person smelled of alcohol and was having trouble speaking clearly. I advised this person not to interfere, and also that it was an arrestable offense to be intoxicated on the public way, and to please go back inside. There was another person watching, in front of the house just to the north. This person claimed to have seen the whole thing, and was willing to be a witness, was not afraid to be a witness against the judge. I took the name and address of that person and put it into the arrest report.

Q: Did all of this take place in Marshall City, Thompson County, State of Marshall, on October 31, 2008?

A: Yes.

Q: No further questions.

The Court: Cross:

Mr. Wilson: Yes, Your Honor.

Q. Officer, you state that you saw judge Dunkirk getting out of the car. I assume you saw this right after you turned north onto Dover?

A: Pretty much right away.

Q: The lights were not on in the car, were they?

A: No, I had turned them off earlier.

Q: No blinking lights?

A: No blinking lights.

Q: No headlights or parking lights either?

A: That's right.

Q. And there were other people nearby?

A: Well, there was someone near the judge's house, in front, and somebody else out in front just to the north.

Q: You put their names in the police report?

A: Just the one person.

Q: Now, the Defendant's eyes were blood shot?

A: That's correct.

Q: Had you ever seen the judge's eyes before?

A: Well actually yes, I have been in the judge's courtroom a couple of times.

Q: So, you don't know whether the judge's eyes are naturally blood shot.

A: I don't think so.

Q: But you don't know for sure.

A: No.

Q: Now, Mr. Davis, have you...

A: That's "officer" Davis, Counselor.

Q: Okay, Officer Davis, had you ever smelled the Judge's breath prior to this night.

A: No.

Q: So when you say you smelled alcohol, you don't know if that is how the judge's breath normally smells, do you?

A: No. But I know what alcohol smells like.

Q: Well, isn't it true that certain medicines and certain foods create a smell of alcohol.

A: I don't know about that.

Q: Well you did not ask what the judge had eaten that night did you?

A: No.

Q: Now, it was cold on that night, and in fact there was even a little ice on the ground, isn't that true?

A: Yes, it was almost freezing out.

Defense: May I have a moment, your honor?

The Court: Yes.

Q: Okay, Officer, the truth is that you never actually saw the Defendant driving, isn't that true.

A: No, that is not true.

Q: And, in fact, Judge Dunkirk has ruled that some of your arrests were illegal?

A: Yes.

Q: Under the Fourth Amendment?

A: Yes. I did not agree, but the judge is the judge. I am not personally invested in any of my arrests. I just do my job, make the arrests, fill out the paper work and show up to court. The rest is up to the lawyers and the judge.

Mr. Wilson: No more questions your honor.

The Court: Any re-direct?

Ms. Carlone: No, Your honor. At this time we rest.

BOTH SIDES WAIVE ARGUMENT

The Court: The Court, having heard all the evidence, finds that the officer did not have an arrest warrant or a search warrant at the time the defendant was arrested and items were seized from the defendant. Moreover, the defendant did not give consent to a search or seizure. The burden, therefore, is on the State to show that this arrest and accompanying seizure were nevertheless lawful. This court, having heard the witnesses and determining their credibility, finds that there is a preponderance of evidence in the record to show that the officer's actions come within the exceptions to the rule that a warrantless arrest or search and seizure are unlawful. The officer had more than probable cause to believe that the defendant was operating a motor vehicle while intoxicated; the officer did not have to believe the friend's story that the defendant never got into the car. Accordingly, the defendant's motion to quash the arrest and suppress the evidence is DENIED.

[After a brief discussion off the record, the Court ordered that both parties provide pretrial discover in accordance with Marshall Statutes and Supreme Court Rules; the Court ordered the trial set for April 2, 2009.]