IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KM-00443-COA

MARY REED EVANS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	2/20/2007
TRIAL JUDGE:	HON. THOMAS J. GARDNER III
COURT FROM WHICH APPEALED:	MONROE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOSEPH JOSHUA STEVENS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
DISTRICT ATTORNEY:	ROBERT DON BAKER
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
TRIAL COURT DISPOSITION:	CONVICTED OF DUI (FIRST OFFENSE) AND SENTENCED TO FORTY-EIGHT HOURS IN THE CUSTODY OF THE SHERIFF OF MONROE COUNTY, SUCH SENTENCE SUSPENDED IF DEFENDANT DOES NOT VIOLATE ANY FEDERAL OR STATE LAWS FOR SIX MONTHS; FINE OF $1,000
DISPOSITION:	REVERSED AND REMANDED - 10/28/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., BARNES AND ISHEE, JJ.

BARNES, J., FOR THE COURT:

¶1. The Justice Court of Monroe County convicted Mary Reed Evans of driving under the influence (DUI), first offense. Evans appealed to the Circuit Court of Monroe County. After a trial de novo without a jury, the circuit court came to the same result. Evans now

appeals to this Court. We reverse and remand to the circuit court for a new trial.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶2. Late in the afternoon of July 19, 2006, Evans, who lives in Prairie, Mississippi, drove to pick up her friend, Julann Callender, who lives in Aberdeen, Mississippi. The two women traveled to Tupelo to shop at Sam's Club. Once they finished shopping, they went to Woody's, a restaurant and lounge in Tupelo. Between the hours of approximately 6:00 p.m. and 11:00 p.m., they had dinner. Evans said she drank four Bud Lights. Both women claim the only alcohol they consumed that evening was at Woody's. They left the restaurant and drove back to Aberdeen. At approximately midnight, Evans dropped Callender off at her home. Callender testified that she offered Evans a beer as she was leaving, which Evans accepted. Callender claimed that Evans did not appear to be intoxicated.

¶3. Evans then proceeded home to Prairie along Highway 382. There had been a severe storm that evening; so trees and power lines were down in the area. Approximately two miles from Evans's home, Mississippi Highway Patrolman Andrew Sisk had the eastbound lane of Highway 382 partially blocked as emergency vehicles were cleaning the debris from the highway. Officer Sisk was inside his patrol car with his headlights and blue lights on. He testified he was attempting to redirect traffic to a county road. When Evans came upon this area in the westbound lane, she proceeded slowly, but she did not stop her vehicle. Officer Sisk, wanting her to stop, tried to get Evans's attention by cutting his spotlight on and shining it in her car, but to no avail. Feeling she should have known to stop, Officer Sisk pulled Evans over approximately one-half mile from the area. When he approached her vehicle, he noticed the smell of alcohol emanating from Evans's vehicle. He saw an open

beer can on the console (the one Callender had given Evans); however, Evans testified she had not consumed any of it. Officer Sisk also saw three or four unopened beers in Evans's backseat. When queried about whether she had had any alcohol to drink that evening, Evans admitted to Officer Sisk she had been drinking beer at Woody's that evening. He proceeded to administer an alcohol test with a portable Intoxilyzer device, which detected the presence of alcohol on her breath, but he did not conduct any field sobriety tests. Evans was then arrested and taken to the Monroe County Sheriff's Office, where she agreed to have a blood alcohol concentration (BAC) test on the Intoxilyzer 8000 machine.

¶4. However, before Evans and Officer Sisk departed for the sheriff's office, they had to wait for a wrecker from Aberdeen to tow Evans's car, as this was standard operating procedure. Evans's DUI ticket shows the time of the stop as 12:50 a.m. By the time Evans completed the paperwork at the sheriff's office and the BAC test was administered, it was 1:58 a.m. After a delay of one hour and eight minutes from the time she was driving and pulled over to the time of the test, Evans's BAC was determined to be .09%, or .01% over the legal limit of .08%, pursuant to Mississippi Code Annotated section 63-11-30(1)(c) (Supp. 2008). Therefore, she was charged with DUI, first offense.

¶5. The Justice Court of Monroe County convicted Evans of DUI. She appealed the conviction to the Circuit Court of Monroe County, which held a trial de novo without a jury, finding Evans guilty. Prior to the trial, the State moved in limine to exclude the testimony of the defense's expert witness, Dr. A.K. Rosenhan, who was to testify regarding the

absorption rate of alcohol. The State argued that since this case is a DUI per se violation,[1] the defense is prohibited from introducing evidence of alcohol consumption. The State continued that in order for the expert to formulate an opinion about Evans's absorption rate, evidence would have to be introduced about her consumption of alcohol, which the State claimed is prohibited by *Porter v. State*, 749 So. 2d 250 (Miss. Ct. App. 1999). Therefore, the State moved to prohibit the introduction of any evidence from either expert or lay witnesses who would testify as to the manner or timing of her consumption of alcohol. After the defense argued *Porter* was inapplicable to the present case, the circuit court judge granted the State's motion. However, Dr. Rosenhan was allowed to proffer his testimony for the sole purpose of creating a record. Evans now appeals to this Court.

ANALYSIS

¶6. Evans raises two issues: (1) whether the trial court erred in excluding the expert testimony of Dr. Rosenhan, and (2) whether *Porter* precludes testimony relating to the amount and timing of the consumption of alcohol that would provide the necessary basis for the expert's opinion on the possible BAC of Evans at the time she was operating her vehicle. We shall discuss these issues together as they are interlinked – *Porter* was cited as the basis for the trial court's exclusion of the consumption of alcohol evidence and Dr. Rosenhan's expert testimony.

---

[1] A "DUI per se" violation means a violation that should be charged as an offense under section 63-11-30(1)(c), "when test results are available and are sufficient to give the officer probable cause" to believe that the person is operating a vehicle with a BAC of .08% or more. *Leuer v. City of Flowood*, 744 So. 2d 266, 268 (¶7) (Miss. 1999) (quoting *Young v. City of Brookhaven*, 693 So. 2d 1355, 1363-64 (Miss. 1997) (citation omitted)).

¶7. Evans argues that the circuit court's grant of the State's motion in limine based on *Porter* was in error; thus, the circuit court and the State misinterpreted *Porter*. The State contends that the evidence was properly excluded under *Porter*. The State also argues that even if the circuit court misapplied *Porter*, the evidence and testimony were properly excluded because Dr. Rosenhan was not qualified as an expert under Mississippi Rule of Evidence 702.

¶8. The standard of review for the admission or exclusion of evidence is an abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (¶4) (Miss. 2003). Further, "the admission of expert testimony is within the sound discretion of the trial judge. Therefore, the decision of a trial judge will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" *Id.* (internal citations omitted).

¶9. The central issue in this case is whether Evans was illegally intoxicated at the time she was operating her vehicle when driving home from Tupelo. Officer Sisk pulled her over at 12:50 a.m., but Evans's BAC was not tested on the Intoxilyzer 8000 until 1:58 a.m., resulting in an approximate one-hour delay since the time she was pulled over. The machine determined Evans's BAC to be .09%, or .01% over the legal limit. Dr. Rosenhan proffered testimony on retrograde extrapolation, which has been explained as a scientific method of making a determination of the BAC at a particular point in time by "predicting an earlier unknown value by calculating a known later value with a series of generally used average values, and projecting that result back in time." *Smith v. State*, 942 So. 2d 308, 312 (¶8) (Miss. Ct. App. 2006). Dr. Rosenhan described it as a "mathematical relationship" related

to whether Evans was in the absorption or metabolism phase of ethanol ingestion. The defense sought to establish, through Dr. Rosenhan's testimony, that from the time she was stopped by Officer Sisk until the time of the test, Evans's BAC was rising, as she was in the absorption phase of ethanol ingestion. He based this opinion that Evans was in the absorption phase on her body weight, the time frame of ethanol ingestion, and the amount of ethanol consumed – four twelve-ounce Bud Lights. Evans was within a few minutes from her house when she was pulled over; so Dr. Rosenhan opined her BAC would not have risen over the legal limit of .08% BAC before she arrived home. During cross-examination, the State pointed out the fact that Evans first blew a BAC of .104 and two minutes later blew a .099, indicating her BAC was decreasing at the time of the test. On redirect, however, Dr. Rosenhan countered that it is not unusual for small variations in the test results such as these, and one could not draw any conclusions concerning retrograde extrapolation from them.

¶10. We find the circuit court judge erred in excluding evidence of Evans's alcohol consumption and the expert testimony of Dr. Rosenhan. His testimony was relevant as he would have offered his expert opinion regarding Evans's BAC at the time she was pulled over by Officer Sisk. This evidence is especially relevant here, where there was approximately a one-hour delay between the time she was pulled over and the time she was tested, and her BAC level was only .01% over the legal limit.

¶11. Furthermore, we find the circuit court misapplied *Porter* as the basis for excluding the evidence. The circuit court judge accepted the argument by the State that the defense is prohibited from introducing evidence from either expert or lay witnesses regarding alcohol consumption because this is a "DUI per se case" under *Porter*, and there was an admissible

Intoxilyzer test result that showed Evans's BAC to be over the legal limit. The State explained, and the circuit court agreed, that if this evidence on alcohol consumption is inadmissible, Dr. Rosenhan's expert testimony then becomes irrelevant, because in order for the expert to formulate his opinion about Evans's BAC at the time she was pulled over, evidence on consumption would have to be admitted to apply his retrograde-extrapolation formula to the facts of the case.

¶12. We agree with Evans that *Porter* is not controlling in the instant case. In *Porter*, after being arrested, the defendant submitted to an Intoxilyzer analysis of his BAC at the police station. His BAC was determined to be .164%. *Porter*, 749 So. 2d at 253 (¶5). There was no issue regarding a lapse of time between his arrest and the test. Procedurally, at trial the circuit court granted the State's motion in limine, and this Court found no error. *Id.* at 255 (¶15). Porter sought to present evidence that would rebut what he termed "the 'presumption' that his blood alcohol content of .164% impaired his ability to operate his vehicle." *Id.* at 254-55 (¶13).

¶13. In order to understand *Porter*'s holding in light of our current DUI laws, we must analyze the DUI statute's legislative history. As the *Porter* court explained, since an amendment to the DUI statutes in 1983, it is a "per se" violation to operate a vehicle when the defendant's BAC, as shown through a chemical analysis, is over the legal limit, which at that time was .10%.[2] *Id.* at 255 (¶14) (citing *Fisher v. City of Europa*, 587 So. 2d 878, 888

[2] In 2002, this standard was lowered to .08%. *See* Miss. Code Ann. § 63-11-30 (1)(c) (Supp. 2003).

(Miss. 1991)). Therefore, this Court stated that the supreme court explained in *Fisher* that since 1983, there is no longer a statutory "presumption" that a person is intoxicated if he is over the legal limit for BAC, but instead it is a "per se" violation under section 63-11-30. *Id.* This is the "presumption" that Porter was attempting to rebut. Further, in 1991, section 63-11-39(2) (1972), a statute allowing the introduction of evidence on whether or not a person was under the influence of intoxicating liquor which impaired a person's ability to operate a motor vehicle, was repealed. *Id.* at 255 (¶15). Because of this repeal, this Court found Porter's argument nullified, as he could not enter evidence that he was not impaired because he was prosecuted for a DUI per se violation, and not impairment. *Id.*

¶14. Currently, the pertinent Mississippi DUI statute provides in part that it is unlawful for any person to drive or operate a vehicle in Mississippi if he is: (a) under the influence of intoxicating liquor; (b) under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons at or above the legal age to purchase alcoholic beverages in Mississippi. Miss. Code Ann. § 63-11-30(1)(a)-(c). Section 63-11-30(1)(a) is referred to as "common law DUI," and it is distinguishable from section 63-11-30(1)(c), which is referred to as "per se DUI." "Common law DUI" is often used to prosecute defendants when BAC test results are unavailable, or the defendant's BAC tests are under the legal limit, but there is sufficient evidence to prove the defendant's ability to operate a vehicle was impaired by the consumption of alcohol. *Leuer*, 744 So. 2d at 268 (¶¶6-7). This evidence of impairment may include slurred speech, bloodshot eyes, or erratic driving. However, in Evans's case, we do not have any such "impairment" evidence, only

her BAC level. Thus, Evans was not prosecuted under the common law DUI statute, but for a per se violation under section 63-11-30(1)(c). We read *Porter* to stand for the proposition that in a DUI per se case, the defendant cannot offer evidence regarding whether or not he was under the influence which would impair his ability to drive a vehicle.[3] We do not read *Porter* as holding that in a DUI per se case, evidence regarding the consumption of alcohol cannot be introduced to prove whether or not the defendant was at a certain BAC when he was driving a motor vehicle. In the instant case, Evans was not offering evidence of her consumption of alcohol and Dr. Rosenhan's testimony on retrograde extrapolation for the purpose of proving she was not impaired when she was pulled over. Instead, she offered it for the purpose of proving that she did not have a BAC of .08% or over when she was pulled over; thus, she did not violate section 63-11-30(1)(c). We find this distinction dispositive.

¶15. The State interprets Evans's argument to be that although her BAC was over the legal limit when she was tested, she was not impaired an hour earlier when she was driving; thus, Evans is really trying to prove, through Dr. Rosenhan's testimony and other evidence, that her alcohol consumption did not impair her ability to drive. We find the State misinterprets Evans's argument and her purpose for introducing the evidence. Evans could not introduce evidence to prove that, even though her BAC test result was .09%, she was not impaired at the time she was driving, because this would conflict with the holding of *Porter*. However, we do not find this was the reason Evans offered the evidence; instead, it was offered to

[3] However, this type of evidence would be properly offered for a violation of section 63-11-30(1)(a).

prove her BAC was not above the legal limit when she was pulled over.

¶16. Moreover, regarding testimony on retrograde extrapolation, as Evans points out, Mississippi courts have allowed this type of expert testimony in DUI per se cases where there has been a time lapse between the time the defendant was last driving and the time of the BAC test. However, in most cases, the State is offering the testimony in order to prove the defendant's BAC at the time of the accident or arrest was actually higher at this time than at the time of the test. In *Cowart v. State*, 910 So. 2d 726 (Miss. Ct. App. 2005), an expert witness was allowed to testify for the State on "rates of absorption and metabolism of alcohol" in order to prove that the defendant's BAC, which measured .16% three hours after the accident, was roughly .20% at the time of the accident, and thus the defendant's claim that he was not intoxicated at the time of the accident was untrue. *Id.* at 729 (¶13).

¶17. Additionally, in *Smith*, both the State and the defense were allowed to offer expert testimony on retrograde extrapolation. *Smith*, 942 So. 2d at 316-17 (¶21). In *Smith*, the defendant's BAC was taken four hours after the accident and found to be .13%. *Id.* at 311 (¶5). Both experts came to different results: the State's expert was allowed to testify that Smith's BAC would have been higher at the time of the accident. *Id.* The defense's expert testified that in this case, retrograde extrapolation was an unreliable method of estimating Smith's BAC at the time of the accident because there was only one known value for the calculations, and two known values were needed. *Id.* at 317 (¶22). Further, the defense's expert argued retrograde extrapolation was only accurate up to a maximum of two hours, and Smith argued the four-hour delay precluded the BAC test's admissibility. *Id.* The trial court allowed the State's expert to give her opinion to the jury that Smith's BAC would have been

higher at the time of the accident than when his blood was tested, but she was precluded from quantifying what Smith's BAC would have been at the time of the accident. *Id.* at 317 (¶24). This Court affirmed, finding the trial court properly exercised its gatekeeping role in determining that the testimony of both experts would aid the jury.[4] *Id.* at 318 (¶26). Also, the defense's expert was allowed to testify to counter the State's expert. *Id.* We find no distinction between these cases and the instant case, where the defendant is trying to use retrograde extrapolation to prove her BAC was rising, not decreasing, in the time period before her BAC test.[5]

¶18. Finally, the State argues that if this Court finds Dr. Rosenhan's testimony was improperly excluded under *Porter*, Dr. Rosenhan's testimony is still inadmissible because he did not qualify as an expert. Evans, however, maintains that Dr. Rosenhan's expertise was not challenged at trial. The State disagrees, contending that the prosecutor actually did challenge Dr. Rosenhan's qualifications by stating that he was "not aware of any expertise"

---

[4] There was no issue on appeal as to whether the trial court should have allowed the State's expert to quantify the BAC at the time of the accident.

[5] We are not persuaded by the attempt of the dissent to distinguish *Cowart* and *Smith*. While these cases do concern section 63-11-30(5), DUI manslaughter, rather than section 63-11-30(1) alone, by definition, in order to violate subsection (5), there has to be a violation of subsection (1). The opinions did not specify what portion of subsection (1) was involved; however, we have reviewed the records of those cases and have confirmed that each defendant was indicted for causing the accident while having ten one-hundredths percent (.10%) or more by weight volume of alcohol in his blood. Further, the jury instructions and closing arguments of both cases do not reflect that there was any issue of intoxication other than by exceeding the BAC. We have reviewed the entire trial transcript of *Cowart*, and there was no evidence presented of any impairment at the time of the accident, other than Cowart's BAC. The testimony cited by the dissent regarding Cowart's evidence of intoxication and statements to law enforcement officers were after his return to the scene two hours later. Accordingly, we find these DUI per se cases analogous to the one before us.

in the field of "ethanol ingestion in the body."

¶19. We are not persuaded by the State's argument. The following colloquy occurred at trial among defense counsel Joshua Stevens, and prosecutor Robert Baker, after Dr. Rosenhan was examined about his qualifications:

> Mr. Stevens: Specifically have you been tendered as an expert witness and served as an expert witness in DUI case type studies, blood alcohol content?
>
> Dr. Rosenhan: Yes, sir. In that list of courts for blood alcohol calculations and discussion of the methods that they are determined.
>
> Mr. Stevens: Are you familiar with what we mean by the absorption phase and the metabolism phase of one who has ingested alcohol?
>
> Dr. Rosenhan: Yes, sir. This has been reduced to mathematical equations, and that's what I utilized.
>
> Mr. Stevens: [H]ave you had occasion to testify about a process called retrograde extrapolation?
>
> Dr. Rosenhan: Yes, sir. . . . it is a mathematical relationship.
>
> Mr. Stevens: Your Honor, I tender Mr. Rosenhan as an expert in the field of ethanol ingestion in the body.
>
> The Court: Mr. Baker, do you have questions of voir dire of his qualifications?
>
> Mr. Baker: My first question was for counsel opposite, exactly what this witness is being offered as an expert in.
>
> Mr. Stevens: To testify based on the history of this particular case, what her blood alcohol content would have been at the time she was operating the motor vehicle based on proof.
>
> Mr. Baker: Well, Your Honor, I'm not aware of any expertise in that particular area. If he's got a particular area that he is

	offering [him] for, such as retrograde extrapolation . . . that is something we would be able to respond to.
The Court:	I assume that's what he is going to testify to, Counsel.
Mr. Baker.	Okay. Well, Your Honor, upon the issue of whether Mr. Rosenhan is going to be offered . . . for the purpose of retrograde extrapolation, it's an irrelevant issue to this case . . . .

We find that on appeal the State takes the prosecutor's comment out of context. According to the above colloquy, Mr. Baker was not objecting to Dr. Rosenhan's qualifications, but the precise name of his expertise. We do not find a significant difference between the two phrases used to describe Dr. Rosenhan's expertise. "Retrograde extrapolation" is the mathematical formula used to determine the rate of "ethanol ingestion in the body." Obviously, the trial judge and defense counsel were under the impression Dr. Rosenhan was going to testify about "retrograde extrapolation," and this is the line of questioning which preceded the State's objection. Once this point was clarified, the prosecutor moved on to discuss the merits of Dr. Rosenhan's testimony. He made no attempt to challenge Dr. Rosenhan's qualifications as an expert in either "ethanol ingestion in the body" or "retrograde extrapolation." The State is not allowed to litigate a new issue on appeal; it is well established that failure to raise an issue in the trial court procedurally bars the issue on appeal. *Daniels v. Bains*, 967 So. 2d 77, 81 (¶13) (Miss. Ct. App. 2007).

¶20. Procedural bar notwithstanding, we find Dr. Rosenhan sufficiently qualified as an expert in "retrograde extrapolation" or "ethanol ingestion in the body." Discussing Mississippi's *Daubert* standard and Mississippi Rule of Evidence 702 regarding the qualifications of an expert witness, our supreme court has stated:

> First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. In addition, Rule 702 "does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge."

McLemore, 863 So. 2d at 35 (¶7) (internal citations omitted). Dr. Rosenhan is a registered mechanical engineer with a bachelors and masters of science in mechanical engineering, and he has done all but his dissertation for a Ph.D. He has taught courses in internal combustion engines and statistics at Mississippi State University for approximately forty-four years. He testified that the Intoxilyzer 8000 is essentially an engineering instrument – an infrared spectrometer. He has engaged in scientific studies of the effect of ethanol on the body, and while he is not a toxicologist, he has studied "the various relationships between ethanol ingestion, absorption, elimination, and blood alcohol content in humans." Additionally, Dr. Rosenhan stated he has served as an expert witness in DUI cases on blood alcohol content methods and calculations. Accordingly, we find that the State's argument that Dr. Rosenhan is not qualified as an expert in retrograde extrapolation is without merit.

CONCLUSION

¶21. For the foregoing reasons, we find the circuit court abused its discretion in excluding the evidence of Evans's consumption of alcohol and the expert testimony of Dr. Rosenhan. Additionally, we reject the State's argument that Dr. Rosenhan is not qualified as an expert in retrograde extrapolation. Accordingly, we reverse and remand for a new trial in accordance with this opinion.

¶22. **THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY IS REVERSED AND REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS**

OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO MONROE COUNTY.

KING, C.J., LEE, P.J., IRVING, ISHEE AND ROBERTS, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MYERS, P.J., AND GRIFFIS, J. CHANDLER, J., NOT PARTICIPATING.

CARLTON, J., DISSENTING:

¶23. The majority opinion states that it reads *Porter v. State*, 749 So. 2d 250 (Miss. Ct. App. 1999), to stand for the proposition that in a DUI per se case, the defendant cannot offer evidence regarding whether or not she was under the influence, impairing her ability to drive a vehicle. I agree with that portion of the majority's reading of *Porter*. However, the majority further explains that it does not read *Porter* as holding that in a DUI per se case,[6] evidence regarding the consumption of alcohol cannot be introduced to prove whether or not the defendant's blood alcohol content (BAC) was below the legal limit when she was operating a motor vehicle. I disagree with this portion of the majority's reading of *Porter*, and I respectfully dissent.

¶24. This Court examines a trial judge's admission or exclusion of evidence for abuse of discretion. *Smith v. State*, 942 So. 2d 308, 313 (¶11) (Miss. Ct. App. 2006). "Even if this Court finds an erroneous admission or exclusion of evidence, we will not reverse unless the error adversely affects a substantial right of a party." *Id.*

¶25. In *Porter*, this Court found no merit to Porter's argument that the trial court erred when it denied Porter the opportunity to offer evidence that his ingestion of alcohol had not

[6] The use of the term DUI per se in this opinion refers to a violation of section 63-11-30(1)(c), which under the applicable version of that statute is driving with a blood alcohol content over the legal limit of .08%. *See* Miss. Code Ann. § 63-11-30(1)(c) (Supp. 2008).

impaired his ability to operate his truck. *Porter*, 749 So. 2d at 254-55 (¶13). In the case before us, Evans is similarly trying to introduce evidence of ingestion in order to argue that she was not over the legal limit, even though this is a DUI per se case. Evans was shown to be over the legal limit through a chemical analysis, and her attempt to bring in evidence of consumption of alcohol is simply a subterfuge to escape the limitations of the DUI per se statute and of our holding in *Porter.*

¶26. The Court in *Porter* explained that there was no evidence to weigh against the reliability of the Intoxilyzer machine's analysis of his BAC. *Porter*, 749 So. 2d at 257 (¶24). Similarly, Evans offers no evidence that the Intoxilyzer was not working properly, was not calibrated properly, or that the chemical analysis reading was otherwise unreliable. Instead, Evans sought to introduce evidence of her consumption of alcohol, her particular absorption rate, her gender, and her weight to argue that she would have tested at a lower BAC had she been tested at the time she was stopped. This evidence was inadmissible under our ruling in *Porter*, and the trial judge did not err in refusing to allow it.

¶27. Evans emphasizes the fact that her BAC was not tested until more than one hour after her arrest. I find that to be a reasonable delay, and I respectfully submit that such a finding would be supported by legislative intent based upon my review of the statutory guidelines and case law. Even in DUI cases involving a death, the Legislature requires only that the defendant's BAC be tested within two hours, *if possible*. Miss. Code Ann. § 63-11-8(1) (Rev. 2004). In *Wash v. State*, 790 So. 2d 856, 859 (¶10) (Miss. Ct. App. 2001), this Court upheld admission of a BAC test which had not been obtained within the two-hour time frame suggested by the Legislature, stating:

> The statute provides that the test is to be administered within two hours of the accident "when possible." Miss. Code Ann. § 63-11-8 (Rev. 2000). The words "when possible" are relevant here. Were this two[-]hour time frame necessary to ensure the integrity of the test results, it is doubtful that the [L]egislature would have included such language in the statute. The trial judge found that although the blood test was administered more than two hours after the accident, there was no evidence of deliberate delay on the part of the officers. We agree, and we see no reason to find that the time lapse between the accident and the administration of the blood test was prejudicial to Wash in any way.

There is no evidence of any deliberate delay on the part of the officers in Evans's case. The delay was attributed to waiting on a tow truck to tow Evans's car and the drive back to the Monroe County Sheriff's Office.

¶28. I further disagree with the majority's reliance on *Cowart v. State*, 910 So. 2d 726 (Miss. Ct. App. 2005) and *Smith v. State*, 942 So. 2d 308 (Miss. Ct. App. 2006). The majority contends those cases allowed expert testimony – similar to the testimony Evans sought to introduce – in DUI per se cases which involved a time lapse between when the defendant was driving and when the BAC test was administered. However, Cowart and Smith were both charged under Mississippi Code Annotated section 63-11-30(5) (Rev. 2004) and not under the DUI per se statute. The applicable portion of section 63-11-30(5), which was at issue in *Cowart* and *Smith,* states:

> Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a separate felony for each such death, mutilation, disfigurement or other injury and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years for each such death, mutilation, disfigurement or other injury . . . .

Miss. Code Ann. § 63-11-30(5). James Cowart was charged with an offense commonly referred to as DUI manslaughter, under section 63-11-30(5), for causing the death of another driver in a car accident.[7] *Cowart*, 910 So. 2d at 727 (¶1). James Smith was charged with aggravated DUI, also under section 63-11-30(5) for causing serious injury to another driver in an accident.[8] *Smith*, 942 So. 2d at 310 (¶1). Section 63-11-30(5) requires not only a violation of any subsection of Mississippi Code Annotated section 63-11-30(1)[9] but also, proof that the defendant acted negligently and that his negligence was the cause of the death or serious injury to the victim. Because negligence and causation must be proven, in addition to the violation of one of the subsections of section 63-11-30(1), in order to convict a defendant under section 63-11-30(5), evidence of impairment, and therefore consumption, would be relevant and admissible in those cases. The facts in Evans's case are not at all similar to the facts of *Smith* and *Cowart*. Evans's case is a straight DUI per se case, and evidence of consumption was inadmissible. Evans was not charged with driving while under the influence of an intoxicating liquor pursuant to section 63-11-30(1)(a) or charged with

---

[7] The underlying violation of section 63-11-30(1) in Cowart's case charged a violation of driving under the influence of alcohol under subsection (1)(a) *and* under section (1)(c), the per se portion of the statute. *Cowart*, 910 So. 2d at 727 (¶1).

[8] The underlying violation of section 63-11-30(1) in Smith's case charged a violation of subsections (1)(a) and (1)(c), driving under the influence of alcohol. *Smith*, 942 So. 2d at 310 (¶1). However, only the per se violation was submitted to the jury.

[9] Section 63-11-30(1)(a)-(e) includes: (a) driving while under the influence of intoxicating liquor; (b) driving while under the influence of any other substance which impairs one's ability to operate a motor vehicle; (c) driving with a blood alcohol content of .08% or higher for those above the legal age to buy alcoholic beverages, or .02% for those below the legal age to buy alcoholic beverages; (d) driving while under the influence of a controlled substance, the possession of which is unlawful; or (e) driving with a blood alcohol content of .04% for persons operating a commercial motor vehicle.

driving under the influence of another substance under section 63-11-30(1)(b). She was charged only with DUI per se under section 63-11-30(1)(c). The *Smith* and *Cowart* cases are section 63-11-30(5) cases, not DUI per se cases; and their holdings are inapplicable here.

¶29. A review of the records in *Cowart* and *Smith* show further factual distinctions between those cases and Evans's case. The majority states that the indictment in *Cowart* does not specify which subsection of section 63-11-30(1) was charged, but that the language clearly indicates that the defendant was accused of driving with a BAC greater than .10%. I agree that the indictment is perhaps lacking with respect to subsection numbers and letters. However, the language of the indictment reflects that the elements of both subsections 63-11-30(1)(a) and (1)(c) were charged in stating that Cowart did "willfully, unlawfully, and feloniously operate a motor vehicle while under the influence of intoxicating liquor, having ten one-hundredths percent (.10%) or more by weight volume of alcohol in his blood."

¶30. The jury instructions submitted by both the defense and the State, which were given by the court in *Cowart*, both carried forth that same language from the indictment setting forth elements of subsections (1)(a) and (1)(c). The portion of the indictment charging a violation of operating a motor vehicle while under the influence of intoxicating liquor constitutes a violation of subsection (1)(a), thereby allowing evidence of impairment and consumption into evidence. Moreover, such evidence of intoxication and consumption was indeed presented to the jury. The jury heard evidence of beer cans in Cowart's truck at the scene of the wreck, with some of the beers still cold at the time of the wreck. Officers found beer cans inside and outside the truck, including a beer on the front seat and a bag of beer cans on the floorboard. Cowart left the scene of the accident. He claimed at trial that he

drank three or four beers after leaving the scene, despite statements to law enforcement at the scene that he bought the beer before the wreck in two different towns and had been to a bar before the wreck. Cowart's BAC registered a .16% on the Intoxilyzer. An officer testified that Cowart told him that he and his boss purchased a twelve-pack of beer after work and drove back to Forest where his vehicle was parked to drink the twelve-pack of beer. The officer stated that Cowart told him that he purchased another six-pack of beer, stopped at a fast-food restaurant to get something to eat, and then traveled home on Highway 21 where the wreck occurred. The officer also testified that the odor of alcohol permeated out of the vehicle, off both Cowart's breath and body. Furthermore, the officer testified that Cowart spontaneously approached him upon his return to the scene of the wreck and said he was drunk. The officer further testified that, coupled with his admission that he had been drinking, Cowart's mannerisms were unsteady, his speech was slurred, and his eyes were red. The officer testified that, in his opinion, Cowart was intoxicated prior to leaving the scene of the wreck.

¶31. Testimony by the toxicologist was offered to refute Cowart's claim that the three or four beers he had consumed following the wreck caused his BAC to register .13% on the Intoxilyzer. The gap in time between the wreck and Cowart's claim of consumption of three to four beers after the wreck render the *Cowart* case factually distinguishable from the case at bar.

¶32. Likewise, the indictment in *Smith* does not specify the subsection of section 63-11-30(1) the defendant was charged with violating by delineating a subsection letter. However, the language in the indictment reflects that both subsections (1)(a) and (1)(c) were charged

in the indictment with language stating that Smith did "willfully, unlawfully, feloniously drive or operate a vehicle in the County of Pearl River, State of Mississippi, at a time when he was under the influence of intoxicating liquor *and* at a time in which he had ten one-hundredths percent (.10%) or more in his blood . . . to wit: .13%." The indictment in *Smith* contains the word "and" between the language charging violations of subsections (1)(a) and (1)(c), making it clear that both subsections were contained in the indictment. At trial, evidence of intoxication was presented through testimony that Smith had the odor of alcohol on his breath, slurred speech, and bloodshot eyes. A witness also said Smith was drunk and loud, acted crazy, and cursed at the police. However, at the close of the case, the jury instructions reflect that only the per se violation was submitted to the jury.

¶33. There is no explanation in the record as to why both violations were not submitted to the jury. However, the prosecution may have set forth both violations in the indictment as alternative theories in the event the BAC results were suppressed or otherwise not admitted into evidence. The record does reflect that there was a pretrial motion to exclude the BAC results or suppress the testimony asserting that the defendant's blood alcohol content would have been higher at the time of the wreck. However, we do not know why only one theory was submitted to the jury. Nonetheless, since both subsections were charged by the plain language of the indictment and evidence relevant to the elements charged therein was admissible, I find *Smith* factually distinguishable from the case at bar.

¶34. Furthermore, while the State's objections to the defense expert's qualifications on the subject of retrograde extrapolation and the human absorption rate of alcohol were, perhaps, inartful and lacking, I would find that the issue of admissibility of the testimony *has* been

preserved for this Court's review.[10] The admission or exclusion of expert testimony is within the discretion of the trial judge. *Smith*, 942 So. 2d at 315 (¶18). We do not reverse the decision of the trial judge unless his decision "was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Id.* at 316 (¶18). I see no abuse of discretion in the trial judge's exclusion of Mr. Rosenhan's testimony.

¶35. Mississippi courts apply a modified *Daubert* standard when ruling on the admission or exclusion of expert testimony. *Id.* at 316 (¶20). The Mississippi Supreme Court has explained the standard as follows:

> Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. *Kansas City S. Ry. v. Johnson*, 798 So. 2d 374, 382 (Miss. 2001). First, the witness must be qualified by virtue of his or her knowledge, skill experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.

Id. (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (¶7) (Miss. 2003)). Mr. Rosenhan was an unqualified witness under the first prong of the modified *Daubert* standard. The record reflects that Mr. Rosenhan retired from engineering and was teaching statistics and internal combustion engines at the college level. He indicated that he had studied and utilized the various relationships between ethanol ingestion, absorption, elimination, and blood alcohol content in humans. However, he had received no formal medical training.

---

[10] The State made a motion in limine to exclude any evidence from the defense's proposed expert. The State noted in its argument that it learned of the proposed expert at docket call and implied that he had not been provided prior notice of the proposed expert's testimony through discovery. The State then moved orally to exclude the testimony of the expert as irrelevant and inadmissible under *Porter*. He argued that any such testimony would be based upon inadmissible facts. He further objected to any expert or lay witness who would testify as to Evans's consumption of alcohol. *See* M.R.E. 701.

Mr. Rosenhan received formal training in mechanical engineering, not in the biological sciences or toxicology. The trial judge has a duty as gatekeeper to make sure that only reliable scientific information is presented to the court. Mr. Rosenhan was not qualified to testify regarding toxicology, including the absorption and metabolism of alcohol in the human body.

¶36. Moreover, in both *Cowart* and *Smith*, the two cases relied upon by the majority as allowing retrograde-extrapolation testimony in DUI per se cases, the judges in those cases allowed toxicologists to testify regarding human absorption rates and metabolism of alcohol. Mr. Rosenhan was not qualified as an expert in toxicology. Moreover, as explained above, neither *Cowart* nor *Smith* was a DUI per se case under section 63-11-30(1)(c).

¶37. I find Evans's attempt to enter evidence of her consumption of alcohol in order to show that her BAC was lower than .08% in the hour before being given the Intoxilyzer test is actually an effort to circumvent our holding in *Porter*. The decision whether to admit or refuse evidence is within the discretion of the trial judge. I find no abuse of discretion or error of law in the trial judge's application of *Porter* to this case or in the judge's exclusion of Mr. Rosenhan's testimony. I respectfully dissent and would affirm the conviction and sentence.

MYERS, P.J., AND GRIFFIS, J., JOIN THIS OPINION.