IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00682 COA

DEMETRICE WARNSLEY, A/K/A

DEMETRICE LAWAYNE WARNSLEY, A/K/A

DEMETRICE LAYWANE WARNSLEY

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

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANTHONY J. BUCKLEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: FELONY DRIVING UNDER THE INFLUENCE (THIRD OFFENSE)

TRIAL COURT DISPOSITION: FELONY DUI: SENTENCED TO A TERM OF 3 YEARS,

WITH 2 YEARS SUSPENDED, FINED $2000.00

BEFORE FRAISER, C.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

Demetrice Warnsley (Warnsley) was convicted of felony driving under the influence (third offense) in the Circuit Court of Jones County. On appeal Warnsley raises two issues: (1) the court erred in overruling the defendant's motion to dismiss the indictment, and (2) it was error to charge and convict the defendant with a third offense D.U.I. when the two underlying D.U.I.'s were both first offense misdemeanors which occurred prior to July, 1994.

FACTS

On January 9, 1995, Officer Robby McLaurin (McLaurin), a Laurel police officer, stopped the Appellant for crossing the centerline. McLaurin detected a strong alcohol smell coming from the vehicle and noticed that Warnsley had red eyes and slurred speech. The officer then had Warnsley perform several field sobriety tests which he failed. Warnsley was transported to the Laurel police station where an intoxilyzer test was administered. McLaurin's blood alcohol count registered .254. McLaurin was subsequently charged with third offense felony D.U.I.

On June 27, 1995, Judge Billy Landrum found Warnsley guilty of felony driving under the influence (third offense) in violation of Mississippi's Implied Consent Law. Warnsley was sentenced to serve a term of three years in the custody of the Mississippi Department of Corrections with two years suspended, fined $2,000.00 and be allowed to participate in the regimented inmate discipline program.

DISCUSSION

Because of the similarities in the Appellant's two propositions, we will address the Appellant's arguments simultaneously. Warnsley maintains on appeal that the indictment is fatally flawed because it failed to specifically charge that, within five years of the present charge, he had been convicted of anything other than two "first offense" misdemeanor violations. In support of his position, he cites *Page v. State*, 607 So. 2d 1163 (Miss. 1992). Additionally, he argues that it was error to charge and convict him of D.U.I. "third offense" because he had never been charged and convicted of D.U.I. "second offense."

The State contends that the addition of subsection (6) and (7) to section 63-11-30 cured any alleged defects in the charging instrument and *Page* is no longer applicable to the situation at bar.

Furthermore, the State argues that the 1994 amendment plainly states that it is not necessary to be convicted of "first" and "second" offense D.U.I. to be convicted of "third offense" D.U.I.

Section 63-11-30(1) of our Implied Consent Law prohibits operating a vehicle while under the influence of alcohol. Additionally, sections 63-11-30(2)(a)-(c) indicate increased punishments for each successive offense. Miss. Code Ann. § 63-11-30(2)(a)-(c) (Supp. 1992). The provision under which the State attempted to proceed against Warnsley reads:

> For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars ($2,000.00) nor more than Five Thousand Dollars ($5,000.00) and shall be imprisoned not less than one (1) year nor more than five (5) years. . . .

Miss. Code Ann. § 63-11-30(2)(c) (Supp. 1992).

The indictment attempting to charge Warnsley with felony D.U.I. reads as follows:

... DEMETRICE WARNSLEY, late of the County aforesaid, did on or about the 9th day of January in the year of our Lord, 1995, in the County and State aforesaid, unlawfully, wilfully and feloniously drive or operate a vehicle within the State of Mississippi on Meridian Avenue and Kingston Street, Laurel, Jones County, Mississippi, while under the influence of an intoxicating liquor which impaired his ability to operate a motor vehicle while having a ten-hundredths percent (.10%) or more by weight volume of alcohol in his blood based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood as shown by a chemical analysis of his breath. The said Demetrice Warnsley, has two or more convictions for violation of Section 63-11-30(1) of the Mississippi Code of 1972. Said offenses all have occurred within a five year period of this offense. Evidence of which is attached hereto by court abstracts as Exhibits 1 and 2.

The court abstracts attached to the indictment show that Warnsley had been previously convicted of D.U.I. "first offense" on February 17, 1993 and again of "first offense" on June 29, 1993.

In 1994 the legislature revised Mississippi Code section 63-11-30 and added subsection (7) which reads as follows:

> For the purposes of determining how to impose the sentence for a second, third or subsequent conviction under this section, the indictment shall not be required to enumerate previous convictions. It shall only be necessary that the indictment state the number of times that the defendant has been convicted and sentenced within the past five (5) years under this section to determine if an enhanced penalty shall be imposed.

Miss. Code Ann. § 63-11-30(7) (Supp.1995).

This new amendment governs the Warnsley indictment and conviction. The amendment allows

punishment of successive D.U.I. offenders regardless of the language used in the charging instrument. If the indictment particularly alleges the number of previous convictions, it will be sufficient to impose an enhanced penalty regardless of whether the prior convictions are titled as a "first offense" or "second offense." The indictment in the present case was sufficient to charge Warnsley with "third offense" D.U.I. and to sentence him as such.

As an additional argument, Warnsley contends that by allowing him to be charged under

the new graduated penalty system, whereby each offense is no longer a separate crime, his constitutional protection against ex post facto laws is violated. Warnsley argues that when he was convicted of his first two D.U.I.s the law as discussed in *Page* controlled. Thus, to retroactively nullify the protection provided in *Page* is unconstitutional.

The State counters that the amended law does not violate the Appellant's protection from ex post facto laws because Warnsley was not being re-tried for his prior D.U.I.s, but only punished him in the event of any future violations.

We find that the application of amended section 63-11-30 did not violate Warnsley's constitutional right to protection from ex post facto laws. The Appellant's January 9, 1995, charge for D.U.I. was committed after the 1994 amendment. The use of prior convictions as elements of the new charge does not change or enhance his punishment for the prior offenses.

We therefore find Warnsley's assignments of error without merit and affirm his conviction and sentence.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT OF CONVICTION OF FELONY DRIVING UNDER THE INFLUENCE THIRD OFFENSE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TWO YEARS SUSPENDED AND FINE OF $2,000.00 IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO JONES COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.