IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01099 COA

JAMES R. BOYD A/K/A JIMMY ROBERT BOYD A/K/A "JIMBO" **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

DATE OF JUDGMENT:	10/05/95
TRIAL JUDGE:	HON. BILLY JOE LANDRUM
COURT FROM WHICH APPEALED:	JONES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PAUL G. SWARTZFAGER, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	JEANNENE T. PACIFIC
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	FELONY DUI: SENTENCED TO SERVE 5 YRS WITH 3 YRS SUSPENDED, LEAVING 2 YRS TO SERVE; PAY A FINE OF $2000
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

James R. Boyd appeals to this Court from his conviction on September 18, 1995, in the Circuit Court of Jones County, Mississippi, of operating a vehicle under the influence of intoxicating liquor, in violation of Section 63-11-30(1) of the Mississippi Code of 1972, as revised in 1994. Since this conviction was Boyd's third offense pursuant to the provisions of Section 63-11-30(1) within a period of five years, he was adjudged to be guilty of a felony in accordance with the provisions of Section 63-11-30(2)(c); sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections, with three years suspended; fined the sum of $2,000; and assessed with court costs in the sum of $213.50. On appeal, Boyd contends that the indictment rendered in this action was legally insufficient and that he violated no laws by driving a vehicle on private property. Furthermore, he claims that he was improperly and involuntarily required to take a test to determine

alcohol concentration and that the verdict of the jury was against the overwhelming weight of the evidence. Finding no reversible error, we affirm.

I. THE FACTS

James R. Boyd, Jeff Thames, and Betty Rose Keyes spent most of the day on September 7, l994, drinking alcoholic beverages at the home of Keyes's uncle in Laurel, Mississippi. According to Boyd, he had two previous DUI convictions and was prohibited from driving at the time. The driver's license of Jeff Thames was also suspended at the time, by virtue of his prior conviction of driving while intoxicated. Nevertheless, Boyd, Thames, and Keyes all traveled to a nearby truck stop to buy more beer at approximately 7:00 P.M.

According to Boyd, he and his friends traveled to the truck stop in Boyd's pick-up truck, with Thames driving, in a heavy rainstorm. All three were in a drunken condition at the time.

When Boyd, Thames, and Keyes arrived at the American Food truck stop, Keyes went inside to buy the beer, leaving Thames, who was shirtless, and Boyd in the vehicle. Keyes was confronted inside the building by the owner of the truck stop, Michael Wilson. He informed Keyes that she could not purchase any beer because the electric power was off due to the rainstorm. Wilson also suggested that Keyes go to the Shell station across the street to make her purchase. When Keyes asked to use the bathroom, Wilson also refused this request, on the grounds that since the electricity inside the building was not working and Keyes appeared to be intoxicated, he was afraid that she would fall and injure herself on the premises, resulting in a personal injury claim against his business establishment. Keyes became upset and claimed Wilson had stolen money from her. Wilson had previously noticed that a city police patrol vehicle was parked across the road at Hardee's fast food restaurant and suggested to Keyes that they get the policeman across the road to come and settle the dispute. When Keyes agreed, Wilson ran outside into the rain, and across the road to Hardee's where he located J.R. Rivas, a patrolmen with the Laurel Police Department. In making his way to Hardee's, Wilson noticed James R. Boyd, whom he had known previously, and Thames in the pickup truck. He also noticed that Thames was not wearing a shirt of any kind.

According to Rivas, Wilson advised him that Keyes was creating a major disturbance at his store and that she was with two men in a pickup truck. He was further advised by Wilson that all three appeared to be intoxicated.

Rivas sped across the street to the truck stop in his vehicle and observed Boyd's vehicle, a Chevrolet C-10 pickup truck, begin to pull away with Thames driving and with Keyes and Boyd as passengers. Boyd later testified that he and Thames decided to drive behind the building of the truck stop to get rid of the beer cans and other debris in the truck. Rivas followed the pickup truck around the back of the building and lost sight of Boyd's vehicle for a few seconds. When he saw Boyd's vehicle again, Thames was no longer driving and Boyd was operating the vehicle. At this time, Officer Rivas turned on his siren, spoke over his vehicle public address system to the passengers of the pickup truck, and ordered them to get out of the vehicle. According to Rivas, Boyd, Thames, and Keyes all appeared to be intoxicated, and inside the vehicle he found seven empty beer cans that were still cold.

Boyd, Thames, and Keyes were all placed in Rivas's patrol vehicle and taken to the Laurel Police Department building. At police headquarters, Boyd was offered an intoxilyzer test to determine his

blood alcoholic content. He was advised that he could refuse the test but agreed to take it. According to Rivas, the test results showed that Boyd had a 0.217 percent blood alcohol content at the time. However, during the processing and subsequent paperwork performed by Rivas, he misplaced the test results and decided to administer a second test to Boyd five to ten minutes later at approximately 8:40 P.M. Boyd agreed to take the second test and this time scored 0.199 percent.

When Rivas checked Boyd's previous driving record, he found that he had two previous DUI convictions. Thus, he charged Boyd with felony DUI and transported him to the Jones County Sheriff's Office for incarceration. Thames refused to take the intoxilyzer test and ultimately pleaded guilty to his second DUI offense. Keyes was charged and ultimately pleaded guilty to being drunk in a public place.

It is noteworthy that Boyd testified at his trial that he never drove his vehicle on the day in question, until ordered to do so by Officer Rivas. According to Boyd, Rivas ordered him to drive his vehicle under the canopy in front of the American Food truck stop building to get it out of the rain, after the parties had been stopped by Rivas and commanded to get out of the vehicle. Nevertheless, as stated above, the jury convicted Boyd of illegally operating his vehicle while intoxicated in violation of Section 63-11-30(1) of the Mississippi Code of l972.

II. THE ISSUES

Boyd assigns the following errors on appeal:

> A. WHETHER THE INDICTMENT IS LEGALLY SUFFICIENT TO CHARGE BOYD WITH A FELONY OFFENSE PURSUANT TO MISS. CODE ANN. SECTION 63-11- 30(2)(C) (REV. 1994).[(1)]
>
> B. WHETHER MISS. CODE ANN. SECTION 63-11-5(1) (REV. 1994) APPLIES TO ANY PERSON WHO OPERATES A MOTOR VEHICLE UPON PRIVATE PROPERTY WITHIN THE STATE OF MISSISSIPPI?
>
> C. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?
>
> III. ANALYSIS
>
> A. WAS THE INDICTMENT LEGALLY SUFFICIENT TO CHARGE BOYD WITH A FELONY OFFENSE PURSUANT TO MISS. CODE ANN. SECTION 63-11-30(2)(C) (REV. 1994)?

Boyd claims that the indictment against him was insufficient in that it did not specify as a condition precedent to a third offense felony charge, that Boyd had been charged and convicted specifically of a "first offense" and a "second offense" pursuant to Section 63-11-30(2). To support this contention, the Appellant relies on *Page v. State*, 607 So.2d 1163,1168 (Miss. l992), and *Ashcraft v. City of Richland*, 620 So.2d 1210, 1211 (Miss. l993). A review of the record indicates that Boyd's indictment merely stated:

> [T] he said James R. Boyd, has two or more convictions for violation of section 63-11-30(l) of

> the Mississippi Code of l972. Said offenses all have occurred within a five year period of this offense. Evidence of which is attached hereto by court abstracts as Exhibits l and 2.

Boyd is correct as to what was stated by the Mississippi Supreme Court in the *Page* and *Ashcraft* cases. However Mississippi Code Annotated Section 63-11-30(7) became effective on June 6, l994, prior to the date of the charge filed against Boyd and now only requires:

> 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. . . .

The indictment in the case *sub judice* clearly stated that Boyd had been convicted of at least two previous DUI offenses within a five year period of the third charge. That is all that is required under the current statute.

It is also noteworthy that the *Page* and *Ashcraft* cases were specifically overruled in the recent case of *McIlwain v. State*, No. 95-KA-00146 SCT, 1997 WL 441925 (Sup. Ct. Miss. Aug. 7, 1997), in which our supreme court abolished the requirement of listing each previous offense specifically in the indictment. In *McIlwain*, the court stated that the indictment must still supply enough information to the defendant to identify with certainty the prior convictions relied upon by the State for enhanced punishment. *Id.* at *3 (citing *Benson v. State*, 551 So. 2d 188, l96 (Miss. l989)).

In the case *sub judice*, the indictment issued against Boyd was accompanied by the court abstracts of his two prior DUI convictions. These abstracts describe in detail the date and disposition of each case, as well as his blood alcohol level at the time of each arrest. We find that the indictment rendered against Boyd was legally sufficient and identified with certainty the prior convictions relied upon by the State for enhanced punishment pursuant to Section 63-11-30 (2).

This assignment of error has no merit.

> B. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT IN FAVOR OF BOYD, ON THE BASIS THAT SECTION 63-11-5(1) OF THE MISSISSIPPI CODE OF 1972 DOES NOT APPLY TO PERSONS OPERATING MOTOR VEHICLES ON PRIVATE PROPERTY?

Boyd contends that pursuant to Mississippi Code Annotated Section 63-11-5(l) (Rev. l993), Officer Rivas had no authority to stop him or to administer any test to determine blood alcohol content, since he was driving on private property and not upon a public highway, road, or street as required by the statute. Section 63-11-5(l) states a follows:

> Any person who operates a motor vehicle upon the public highways, public roads and streets of this state shall be deemed to have given his consent, subject to the provisions of this chapter, to a chemical test or tests of his breath, blood or urine for the purpose of determining the presence

> in his body of any other substance which would impair a person's ability to operate a motor vehicle . . . .

In support of his position Boyd points out that pursuant to Mississippi's Uniform Highway Traffic Regulation Law - Rules of the Road, Miss. Code Ann.§ 63-3-125 (l972),

> (a) "Street or highway" means the entire width between property lines of every way or place of whatever nature when any part there of is open to the use of the public, as a matter of right, for purposes of vehicular traffic.
>
> (c) "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel.
>
> (e) "Private road or driveway" means every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

Moreover, Boyd asserts that while Section 63-11-30, the statute under which the Appellant was charged, does not require a defendant to be traveling upon a public street, roadway ,or highway in order to be guilty of operating a vehicle while intoxicated, this fact has no relevance in the case *sub judice* since Section 63-11-30(1) also requires a blood alcohol level of 0.10 percent in order for the statute to be violated. Thus, Boyd contends that since this information can only be obtained by strict adherence to the provisions of Section 63-11-5, which states that persons traveling upon public streets, roadways, or highways impliedly give their consent to an intoxilyzer test, then Boyd's conviction as a result of an illegal intoxilyzer test is fatally flawed since Boyd was only seen driving in a parking lot on private property. He apparently contends that the operator of a motor vehicle must give his consent before an intoxilyzer test can be administered.

It is true that Section 63-11-30 states:

> [i]t is unlawful for any person to drive or otherwise *operate a vehicle within this state* who . . . (c) has ten one-hundredths percent (.10%) or more . . . in the person's blood based upon grams of alcohol per one hundred (100) millimeters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's health, blood or urine as authorized by this chapter; . . . .

(emphasis added). Noticeably missing from this statute is any distinction between operating such a vehicle upon a public highway, roadway, or street and operating such a vehicle on private property. Thus, in addressing the assignment of error before us, we must first determine whether Section 63-11-30(1) prohibits an intoxicated person from driving upon private property in addition to the obvious prohibition from driving in an intoxicated condition upon a public thoroughfare. As shown in 7A AmJur 2d, *Automobile and Highway Traffic*, § 301 (1980), the various states in the United States have adopted four variations of statutes prescribing the operation of a vehicle while under the influence of intoxicants:

> 1. Some statutes prohibit drunken driving anywhere within the jurisdiction without reference to public roads or any other specified place.

2. Other statutes prohibit drunken operation of motor vehicles only on public thoroughfares.

3. A third type of legislation prohibits such operation of vehicles on public thoroughfares and elsewhere. This type has been held to apply to offenses committed upon private property.

4. A fourth type of statute prohibits drunken driving on public ways or other places where the public has the right of access.

Mississippi appears to have apparently adopted the first type of legislation over the years. In *Farley v. State*, 251 Miss. 497, 170 So. 2d 625 (Miss. 1965), our supreme court affirmed a defendant's conviction of driving while under the influence of intoxicating liquor, where there was evidence that Farley drove his vehicle on a private driveway and onto the right of way of a highway. In dealing with Section 8174 of the Mississippi Code of 1942, which prohibited such driving anywhere "within this state," the supreme court stated:

> It will be seen that, from a consideration of these statutes, no vehicle . . . can lawfully be driven within this state in any place, be it public or private, if the driver is under the influence of intoxicating liquor. . . .

Farley, 251 Miss. at 501, 170 So. 2d at 627.

The court's rationale was that such a statute was a prohibition against an intoxicated person operating an automobile, and was not a road regulation. *Farley*, 251 Miss. at 501, 170 So. 2d at 627. *See also* 29 ALR 3d 938, 942 (1970). Section 63-11-30(1) of the Mississippi Code of 1972 also prohibits the drunken operation of a vehicle "within this state," which is language identical to the language of its predecessor, Miss. Code Ann. of 1942, § 8174. Thus, we hold that Section 63-11-30(1) was clearly worded to prohibit the drunken operation of a vehicle on private property.

The next question is whether the results of intoxilyzer tests administered to Boyd were admissible at his trial, notwithstanding the fact that Section 63-11-5(1) clearly states that a driver on a public thoroughfare only impliedly gives his consent to such a test if he is operating his vehicle on a public thoroughfare. We hold that the results of the intoxilyzer tests were admissible in the case *sub judice* as a valid search incident to arrest regardless of whether a valid consent was given. In *Schmerber v. State of California*, 384 U.S. 757, 771 (1966). The United States Supreme Court held that law enforcement officers may secure evidence of a suspect's blood alcohol content as an appropriate incident to his arrest without regard to the issue of consent. The *Schmerber* court allowed the admission of a warrantless blood test, reasoning that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber*, 384 U.S. at 770. The Mississippi Supreme Court cited *Schmerber* with approval in *Longstreet v. State*, 592 So. 2d 16, 21 (Miss. 1991) where the court validated warrantless blood alcohol testing of persons based on probable cause and stated "[h]owever, blood searches which are based upon probable cause are not illegal." *See also Ashley v. State*, 423 So. 2d 1311, 1313 (Miss. 1983), which established that a non-custodial search for a blood sample based upon probable cause meets federal and state constitutional standards, regardless of whether a defendant consents to the search.

Although we have found no Mississippi cases dealing specifically with the issue before us, we have

located a recent decision of the Illinois Court of Appeals for the Third District which is similar to the case *sub judice*. In *People v. Ayres*, 591 N.E. 2d 931 (Ill. App. Ct. 1992), the court of appeals upheld the DUI convictions of several persons who were not subject to the Illinois implied consent law because they were not driving on public property. In reaching its decision, the court in *Ayres* held:

> Voluntary consent is not a prerequisite to the admissibility of breathalyzer results in a DUI prosecution. A reviewing court need only determine whether the administration of a breath test without the defendant's informed consent ran afoul of constitutional safeguards. A warrantless and involuntary test of an individual's bodily substances does not violate any constitutional right so long as the search was supported by probable cause, the evidence was of an evanescent nature, and the means and procedures employed in taking the substance were reasonable.

Ayres, 591 N.E. 2d at 932. Based on this reasoning, the *Ayres* court held that the blood alcohol tests were admissible even though the defendants were not informed that they were not being tested pursuant to the Illinois implied consent statute. The Illinois Court of Appeals for the Fourth District has since cited *Ayres*, holding that the Illinois implied consent statute is separate and distinct from the Illinois statute which prohibits driving while under the influence of intoxicating liquor. *See People v. Diestelhorst*, 625 N.E. 2d 1145 (Ill. App. Ct. 1993). In *Diestelhorst* the court stated that consent to the breathalyzer test, which is required by the implied consent statute, is irrelevant to a prosecution under the DUI statute. *Diestelhorst*, 625 N.E. 2d at 1149. Considering all of the cases mentioned above, and particularly considering the rulings of our supreme court that blood tests to determine alcoholic content incident to arrest or upon probable cause meets state and federal search and seizure standards, we conclude that the results of the intoxilyzer tests were admissible against Boyd. *In fine*, Section 63-11-5 is inapplicable to this case since Boyd was driving on private property. This merely means that he had not impliedly consented to an intoxilyzer test. However, this fact has no bearing on his guilt or innocence pursuant to Section 63-11-30, or the admissibility of the intoxilyzer tests on other grounds. A review of the record in the case *sub judice* reveals that Boyd's arrest was based upon probable cause and that Section 63-11-19 of the Mississippi Code of 1972, setting forth the procedural safeguards for intoxilyzer tests, was complied with.

We hold that under the facts of this case, the intoxilyzer tests administered by Officer Rivas were valid incidents to Boyd's arrest and were supported by probable cause. Thus, the results of the tests were properly admitted against him.

C. WAS THE JURY'S VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

We begin comment on this issue by stating our longstanding standard of review applied to challenges to the weight of the evidence. This standard of review has most recently been explained by the Mississippi Supreme Court in *Herrington v. Spell*, 692 So. 2d 93 (Miss. 1997), wherein the court stated:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this

> Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.

Herrington, 692 So. 2d at 103-04 (citations omitted). Although *Herrington* was a civil case, the standard of review is the same in criminal cases. *See Thornhill v. State*, 561 So. 2d 1025, 1030 (Miss. 1989); *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989) (citing *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987)).

In his brief, Boyd also challenges the legal sufficiency of the evidence. The standard of review for this challenge is slightly different than the standard for a challenge to the weight of the evidence. In reviewing the sufficiency of the evidence, "the evidence and all reasonable inferences therefrom should be viewed in the light most favorable to the State and evidence favorable to the defendant disregarded. If sufficient evidence to support a guilty verdict exists, the motion for a directed verdict should be denied." *Clark v. State,* 693 So.2d 927, 931 (Miss. 1997) (citations omitted). With this standard in mind, we may reverse only when the evidence presented was such that reasonable and fair-minded jurors could only have found the accused not guilty. *Wetzv. State,* 503 So. 2d, 803, 808 (Miss. 1987).

In the case before us, the facts are heavily disputed by the parties. Boyd testified that Officer Rivas ordered him to drive the truck. Officer Rivas denied this allegation. The jury's verdict reflects the fact that it chose to accept Officer Rivas's version of the events. However, Boyd claims that the verdict was against the overwhelming weight of the evidence based upon the following: (1) Boyd points out that Officer Rivas related two different versions of his initial contact with the truck in which Boyd was riding. In his direct testimony, Rivas stated that he "shot" across the street in his patrol car and pulled behind the truck. However, on cross examination, Rivas testified that as he crossed the street he saw the truck drive around to the rear of the truck stop and that he stopped the truck as it came back around to the front of the truck stop. (2) Boyd claims that the testimony of Officer Rivas in regard to the swap of drivers was conflicting. On direct examination, Rivas testified that Thames was the original driver but that "the passenger took position right behind the wheel and began driving around the building again." However, Rivas later stated that he only learned that Thames was the original driver through the statements made by Wilson relying on the fact that Thames was shirtless. Boyd now claims that this testimony was confusing, vague, ambiguous and contradictory.

Although there may be some confusion found in the testimony of Officer Rivas, and although Boyd's version of the events was corroborated by his friend Jeff Thames, we are unable to overturn the jury's verdict. Under our judicial system, the jury is normally the final judge of the weight and credibility to be given to a witness's testimony. *Holloman v. State,* 656 So.2d 1134, 1142 (Miss. 1995). A review of the record in the light most favorable to the State reveals that there was sufficient evidence to support Officer Rivas's version of the events. It is uncontested that Boyd was drunk on the evening of September 7, 1994, and that he was driving a motor vehicle owned by him on that occasion, while in a drunken condition. We further find that the trial judge did not abuse his discretion in refusing to grant a new trial and that no unconscionable injustice will occur by allowing the jury's verdict to stand. This issue has no merit.

THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY OF CONVICTION OF FELONY DUI AND SENTENCE OF FIVE YEARS, WITH THREE YEARS SUSPENDED, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $2,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TO BE TAXED TO JONES COUNTY.

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

1. In his brief, Boyd erroneously refers to Section 63-11-30(2)(d). It is obvious that he meant to refer to 63-11-30(2)(c).