IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00909 COA

STATE OF MISSISSIPPI, EX REL. DEPARTMENT OF PUBLIC SAFETY — **APPELLANT**

v.

CHARLES R. MCRAE — **APPELLEE**

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

DATE OF JUDGMENT:	08/24/95
TRIAL JUDGE:	HON. JAMES E. GRAVES, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF THE ATTORNEY GENERAL BY: ALAN M. PURDIE DEWITT T. ALLRED III
ATTORNEY FOR APPELLEE:	WILLIAM B. KIRKSEY
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	CIRCUIT COURT ORDERED REINSTATEMENT OF McRAE'S DRIVER'S LICENSE.
DISPOSITION:	REVERSED AND RENDERED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

PAYNE, J., FOR THE COURT:

This case arises from a finding by the Hinds County Circuit Court that the Department of Public Safety could not suspend a driver's license for refusal to submit to the intoxilyzer test if the police officer placed the driver under arrest before the driver refused to submit to the test according to section 63-11-23 of the Mississippi Code of 1972 as it was then written. Feeling aggrieved by this judgment, the Department of Public Safety filed this appeal. Finding that the circuit court erred in its decision, this case is reversed and rendered.

STATEMENT OF THE FACTS

This is a case where Charles R. McRae refused to take a breath test at the scene of an accident after he had been arrested and advised of his right to remain silent. As a result of that refusal, he had his driver's license suspended administratively by the Mississippi Department of Public Safety. This action by the Department of Public Safety took place prior to McRae's plea of *nolo contendre* and conviction for DUI. McRae appealed to the county court for reinstatement of his driver's license, and the county court agreed with him and ordered the return of his driver's license. The Department of Public Safety appealed to the circuit court from that ruling. In ruling on this issue, the circuit court stated in its opinion that: "This in no way affects the pending criminal D.U.I. hearing to be held in Rankin County. If petitioner is found guilty, forfeiture of his license for a time may be part of the punishment." The circuit court affirmed the opinion of the county court that the State could not suspend a driver's license for refusal to submit to the intoxilyzer test if the officer had already placed the driver under arrest before the driver had refused to submit to the test. The Department of Public Safety appealed to the Supreme Court which assigned the case to the Court of Appeals.

ANALYSIS

Two actions occurred subsequently to the incident that began this process. First, the legislature amended Sections 63-11-21 and 63-11-23 of the Mississippi Code (Rev. 1996) so that *in the future* the time for arrest or refusal of the test could not affect the consequences for refusing to take the intoxilyzer test--a test that a driver impliedly consents to take when he uses the public roads of the state. **Miss. Code Ann. § 63-11-5 (Rev. 1996).** Obviously, that amendment could have no relevance in the present case.

Second, in 1997 the Mississippi Supreme Court faced an issue on all fours with the present case, and we are duty bound to follow the rulings of that court. That case, which is dispositive of this one, is ***Sheppard v. Mississippi State Highway Patrol,* 693 So. 2d 1326 (Miss. 1997).** In *Sheppard*the arrest was made at 4:22 P.M., and the test time was 4:57 P.M. ***Id.* at 1329.** Sheppard claimed that the procedures were improper because Section 63-11-23 then (as in the case *sub judice*) stated: "(b) that the person was placed under *arrest after refusal* to take the test." ***Id.*** (emphasis added). The questions on appeal in *Sheppard* relevant to the case before us were:

> **II. WHETHER THE EVIDENCE SHOWED IMPROPER PROCEDURES WERE FOLLOWED IN SUSPENDING SHEPPARD'S DRIVER LICENSE AS REQUIRED BY STATUTE.**
>
> Sheppard contends the evidence at the suspension hearing showed that improper procedures were followed in suspending his driver's license. The charging officer's sworn statement revealed that the officer arrested Sheppard prior to the request that he submit to an official breath test in direct contradiction of precedent and statutory requirements.
>
> A simple review of the ticket reveals that the arrest time was 16:22, and the test time was 16:57. Sheppard argues that the arrest prior to his refusal to submit to the official breath test should not pass muster under review as required by § 63-11-23 Miss.Code Ann. (1972). Specifically, he argues that it fails to meet the finding "(b) that the person was placed under

arrest after refusal to take the test." **§ 63-11-23 Miss.Code Ann. (1972)** (emphasis added).

There is never an arrest for refusal because there is no criminal offense of refusal. Refusal only results in a civil penalty of forfeiture of one's license for ninety days and enhanced punishment if one is convicted of D.U.I. **Miss.Code Ann. § § § 63-11-21, -23, -30**. It follows that the arrest referred to in the statute does not refer to an arrest for refusal but an arrest for D.U.I. based upon probable cause other than a failed field test. **Miss.Code Ann. § 63-11-5**. (Probable cause required before officer may request the test.) As a practical matter a driver has been stopped and usually brought to the jail, or other testing has occurred, before he is asked to submit to a sobriety test. Probable cause to believe that the person is impaired by a substance is required before the test may be requested. It follows that there is probable cause to arrest the person at that time.

The requirement that a person be arrested is a check on the statutory probable cause requirement for the administration of the chemical test. As a matter of statutory interpretation the word "after" is surplusage in the statute. We must read statutes sensibly "even if it means correcting the statute's literal language." ***Ryals v. Pigott*, 580 So.2d 1140, 1148 n. 15 (Miss.1990), *O'Quinn v. Ryals*, 502 U.S. 940, 112 S.Ct. 377, 116 L.Ed.2d 328 (1991); *Gandy v. Pub. Serv. Corp. of Miss.*, 163 Miss. 187, 197, 140 So. 687, 689 (1932).** The requirement that arrest occur only after a refusal to take a chemical test is unworkable and inconsistent with the intent of the statute. We thus find no merit with this issue.

III. WHETHER SHEPPARD REFUSED TO SUBMIT TO THE OFFICIAL BREATH TEST OFFERED BY THE ARRESTING OFFICER?

Whether an individual who is stopped for driving under the influence, read his *Miranda* rights, and subsequently asked to submit to chemical testing can effectively refuse testing under the implied consent statute based on his confusion (the "confusion doctrine") as to the applicability of his *Miranda* rights to the chemical testing procedures is one of first impression before this Court. "In a case of first impression Mississippi Courts look to other jurisdictions in determining the matter." ***Glover v. Daniels*, 310 F.Supp. 750, 753 (N.D.Miss.1970)** (*citing Olin Mathieson Chem. Corp. v. Gibson's Pharmacy of Vicksburg, Inc.*, 251 Miss. 294, 169 So. 2d 779 (1964)).

Sheppard argues the "confusion doctrine has been addressed in a number of states. ***See Graham v. State*, 633 P.2d 211 (Alaska 1981); *Jamail v. State*, 731 S.W.2d 708 (Tex.Ct.App.1987), aff'd, 787 S.W.2d 380 (Tex.Crim.App.), cert. denied, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 115 (1990); Commonwealth *Dept. of Transp. v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989); *Ehrlich v. Backes*, 477 N.W.2d 211 (N.D.1991).** Under the confusion doctrine, "it is improper to suspend a person's driver's license under the implied-consent law for refusing to submit to an alcohol test if the refusal stems from the person's misunderstanding that the *Miranda* rights are applicable to the request for the alcohol test." ***People v. Mucha*, 140 Ill.App.3d 788, 95 Ill.Dec. 42, 45, 488 N.E.2d 1385, 1388 (2 Dist.1986).**

Our first decision is whether the "confusion doctrine" is part of our implied consent law. Not all states have embraced this concept. ***Id.*, 95 Ill.Dec. at 45, 488 N.E.2d at 1388.** Instead, other

courts have held that as long as the defendant was advised that refusal would result in driver's license suspension, confusion resulting from the *Miranda* warning was not a defense. ***Id.* at 46, 488 N.E.2d at 1389.**

In *Mucha*, the Illinois Supreme Court reasoned that: "[Our] law simply requires the State to prove that the defendant "refused to submit" to the test, not that the refusal was made with full knowledge of the defendant's rights and the possible consequences." ***Id.* at 46, 488 N.E.2d at 1389.** In turning to our statute, we find no requirement that such a refusal be made with full knowledge of the defendant's rights and consequences. Rather our statute **§ 63-11-25 Miss. Code Ann. (1972)** provides the following:

If upon such review the Commissioner of Public Safety, or his authorized agent finds (a) that the law enforcement officer had reasonable grounds and probable cause to believe the person had been driving a motor vehicle upon the public highways . . . while under the influence of intoxicating liquor; (b) that the person was placed under arrest after a refusal to take the test; (c) that he refused to submit to the test upon request of the officer; and (d) that the person was informed that his license to drive would be suspended or denied if he refused to submit to the test, then the Commissioner of Public Safety . . . shall give notice to the licensee that his license or permit to drive . . . shall be suspended . . . . **§ 63-11-25 Miss. Code Ann. (1972)** (emphasis added).

Noticeably lacking is any mention in this statute of a knowing refusal.

Turning to the testimony, the record shows that Officer Stringer had reasonable grounds and probable cause to give Sheppard the intoxilyzer test. Stringer informed Sheppard of his right to refuse the test and that if he refused the test, his license would be suspended for ninety (90) days. Sheppard failed to take the test after Stringer requested he do so. Thus, we conclude that Sheppard refused the test under the implied consent law and that any confusion resulting from the reading of *Miranda* was immaterial as to Sheppard's rights under the implied consent law. For the foregoing reasons, we affirm the lower court.

***Sheppard,* 693 So. 2d at 1329-30.**

In short, the fact that the arrest preceded the refusal of the breath test did not affect the validity of the suspension of the driver's license. In this State, one who obtains a driver's license and thereafter takes to the roads of this State invariably consents to take the intoxilyzer test should he be stopped under the suspicion that he is driving while intoxicated. Furthermore, Mississippi does not follow the "confusion doctrine."

While the argument that the literal wording of the statute should be strictly construed in regard to timing may appear to be somewhat cogent, the issue has been addressed by the Mississippi Supreme Court. Therefore, in light of *Sheppard v. Mississippi State Highway Patrol,* the opinion of the Circuit Court of Hinds County which affirmed the decision of the County Court of Hinds County is reversed and rendered.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. ALL COSTS ARE TAXED TO THE APPELLEE.

HERRING, HINKEBEIN, JJ., CONCUR. DIAZ AND KING, JJ., CONCUR IN RESULT ONLY. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., McMILLIN, P.J., AND COLEMAN, J. THOMAS, P.J., NOT PARTICIPATING.

SOUTHWICK, J., CONCURRING:

The opinion for the court properly resolves the ultimate issue. I agree that we must reverse. However, I believe that there are additional questions that must also be addressed.

On February 23, 1995, an officer of the Flowood Police Department responded to a report of an automobile wreck. Upon arrival, that officer observed that an automobile had run off the road and struck a tree. In addition, the officer smelled alcohol on the breath of the driver, Justice Charles R. McRae. A field sobriety test was administered. As a result of the officer's observations during the field test, an arrest was made and warnings of applicable constitutional rights were given.

A short time later at the Flowood police station the officer for the first time requested consent for an intoxilyzer test. Consent was refused. As a result of that refusal, on March 1 the Department of Public Safety by letter notified Judge McRae that his driver's license would be suspended on April 9. Judge McRae filed a petition in Hinds County Court to review the suspension of his license. On April 20, 1995, the county court ordered reinstatement of the license. After appeal, the circuit court affirmed. Both courts determined that the events on the night of the arrest did not comply with Mississippi's informed consent statute and the license could not be suspended. The Department of Public Safety appealed and the case was deflected to this court.

The place to start with understanding this case is the statute. That understanding need not be followed by commitment of all the principles to memory, because the statute has in a few respects been changed since 1995. However, on the date of this offense the operative statute required that if a suspect rejected an officer's request to submit to a "chemical test of his breath" because of possible intoxication, the officer was to take the suspect's license. **Miss. Code Ann. §63-11-21 (Supp. 1995)**. The officer then was to inform the suspect that he was subject to arrest and punishment in the same manner as someone who submitted to the test. ***Id.*** This must refer to the fact that the driver is subject to being prosecuted with proof other than a breath test for driving under the influence. The officer then was to give the driver a receipt for the license and forward the license to the Department of Public Safety. Along with the license, the officer was to give a sworn report that he had "probable cause to believe the person had been driving" under the influence on a public roadway. ***Id.*** At that point the driving privileges have not been suspended.

The next section of the Code stated that upon receipt of that information, the Commissioner of Public Safety upon proper findings was to give notice to the driver that his license would be suspended within thirty days of the notice; for a first offense the suspension would last ninety days. **Miss. Code Ann. § 63-11-23 (Supp. 1995).** After receipt of this notice a driver had ten days to petition a county or circuit court for review. **Miss. Code Ann. § 63-11-25 (Rev. 1996).** It was the Commissioner's providing of the notice and the driver's initiation of court review procedures that has led us to today's

issues.

The issues raised with this Court are the effect of two events that occurred prior to this driver's being asked to submit to a breath test: 1) an explicit arrest, and 2) the giving of the warnings of a right to request an attorney and to remain silent. We have an advantage not enjoyed by the two trial courts -- since the date of the lower court decisions (the circuit court's ruling was on August 24, 1995), the Mississippi Supreme Court has resolved these issues. ***Sheppard v. Mississippi State Hwy. Patrol,* 693 So. 2d 1326 (Miss. 1997)** (handed down May 15, 1997).

The first alleged defect in the procedures arises because this arrest occurred due to probable cause to believe that an offense had occurred, namely, driving under the influence. It is undisputed that the arrest occurred at the roadside and no request to submit to a breath test was made until arrival at the police station. Though the then-literal language of the statute invited an argument that the arrest must have occurred "after" the refusal to submit to the test, the supreme court held that the word "after" was surplusage. ***Sheppard,* 693 So. 2d at 1329**.

The lower courts also found that the officer's giving notice of the right to counsel and to remain silent allowed the invocation of those rights and blocked operation of the informed consent rules. A request for an attorney was made here. The supreme court also dispensed with that issue in *Sheppard*, finding that the giving of the rights warning and the subsequent request to submit to a chemical test were separate matters that were not confusing to a driver. ***Id.* at 1330.**

Another argument is injected on appeal, i.e., that there never was a literal refusal because Judge McRae's answer was not "no," but "I want an attorney." Regardless of the precise response, there was definitely not an agreement to take the test. That is an adequate refusal. A person cannot make his answer unusable under the implied consent law by refusing to give an answer, so long as the request and the failure to consent are clear.

In addition, there is a question of whether this case is moot. Mootness is jurisdictional, since if there is no longer a case or controversy there is no longer a right to a court decision. That is true even if there was an actual controversy at the time of trial that subsequently became moot. ***Allred v. Webb,* 641 So. 2d 1218, 1220 (Miss. 1994).**

The parties acknowledge that Judge McRae has since been convicted under the statute. When a driver is convicted for driving under the influence, the Department of Public Safety *must* suspend the license for not less than ninety days. **Miss. Code Ann. 63-11-30(2)(a) (Supp. 1995).** Does the statute allow a second suspension? The suspension following conviction is because the driver was intoxicated. The suspension being sought here is different. A person receiving a license assumes the obligation to make a choice at some stage: submit to a test for intoxication or have the license suspended for refusing. **Miss. Code Ann. § 63-11-5 & 23 (Supp. 1995).** If a person refuses to submit to the test, he is not entitled on appeal of a license suspension to submit proof that he was in fact not intoxicated, e.g., proof of what he had been doing for the last twelve hours, or proof of a privately-administered breath test taken soon after his release from custody. That evidence would be irrelevant because the suspension is not for being intoxicated. It is for making one of the two choices a driver when acquiring a license impliedly agrees will apply in the situation. The choice requires a license suspension.

There is not a mootness problem. The right to suspend remains alive even if there has already been a suspension in a criminal conviction.

BRIDGES, C.J., MCMILLIN, P.J., AND COLEMAN, J., JOIN THIS SEPARATE OPINION.