

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00161 COA

LESLIE ALAN GRANT a/k/a "BUTCH"

APPELLANT

v.

CITY OF HORN LAKE, 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. GEORGE C. CARLSON

COURT FROM WHICH APPEALED: CIRCUIT COURT OF DESOTO COUNTY

ATTORNEY FOR APPELLANT:

JAMES D. FRANKS

ATTORNEY FOR APPELLEE:

ROBERT P. CHAMBERLIN

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO: COUNT I, DUI-FIRST,
SENTENCED TO \$500.00 FINE, 24 HOURS IN DESOTO COUNTY JAIL; COUNT II,
SPEEDING, SENTENCED TO \$100.00 FINE; COUNT III, DRIVING ON THE WRONG SIDE
OF THE ROAD, SENTENCED TO 10 DAYS IN THE DESOTO COUNTY JAIL.

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

THOMAS, P.J. FOR THE COURT:

Leslie Grant was convicted in the Municipal Court of the City of Horn Lake, Mississippi, of the charges of speeding, driving on the wrong side of the road, failure to yield to blue lights, and driving under the influence. Grant appealed to the County Court of DeSoto County, Mississippi, wherein a six person jury convicted him of the same four charges. Through post-trial motions, the County Court of DeSoto County dismissed the charge of failure to yield to blue lights. Grant then appealed the remaining three convictions to the Circuit Court of DeSoto County. The circuit court entered a written order affirming the county court's judgment.

Feeling aggrieved, Grant appeals to this Court, assigning two alleged errors. Finding no error, we affirm.

FACTS

Sgt. Dominic Bianchi, a Horn Lake City Police Officer, observed Grant speeding on Highway 302, in the city limits of Horn Lake, DeSoto County, Mississippi. Bianchi operated his radar gun and clocked Grant's vehicle at a speed of 56 miles per hour which exceeded the 45 mile per hour zone.

Bianchi turned around and began to pursue Grant with his blue lights and siren in operation. Grant did not stop. Bianchi observed that Grant's vehicle was weaving back and forth into the other lane. Bianchi and another police officer pursued Grant to Grant's home, at which time Grant was arrested and taken into custody. Bianchi stated that upon arrest Grant exhibited a strong odor of alcohol and that he had to assist Grant in walking.

Grant was charged with four offenses: (1) speeding; (2) driving on the wrong side of the road;(3) failure to yield to blue lights; and (4) DUI, refusal. Grant was convicted on all charges in the County Court of DeSoto County. However, on post trial motions the county court dismissed the charge of failing to yield to a blue light. Grant appealed the remaining three convictions to the DeSoto County Circuit Court which affirmed the convictions by a written order. Grant subsequently appealed to this Court.

DISCUSSION

Grant first argues that under the theory of Fruit of the Poisonous Tree, all evidence obtained should have been excluded because Sgt. Bianchi was illegally pursuing Grant. Grant argues that: "The initial Radar Gun use being illegal, the initial arrest was illegal. That arrest being illegal, all charges resulting therefrom, being all of the charges herein, were illegal."

Grant argues that Bianchi testified that Grant's vehicle was within the city limits of Horn Lake when he was clocked on the radar gun as exceeding the posted speed limit; however, there was no evidence presented that Bianchi *himself* was within the city limits. He argues that Mississippi Code Section 63-3-519, limits the circumstances in which a radar gun may be used, and that under these circumstances, Bianchi acted illegally.

Section 63-3-519 allows a radar gun to be used by a "municipal law enforcement officer *within a*

municipality having a population in excess of two thousand (2,000) or more upon public streets of the municipality." Miss. Code Ann. §63-3-519 (1972). Grant would have this Court reverse this case for the sole reason that the prosecution did not elicit from Bianchi the "magic words" that not only was Grant within the city limits, but Bianchi himself was as well. We refuse to do this. The facts clearly show, even though it was not specifically stated, that Bianchi was within the city limits when he clocked Grant speeding. Bianchi testified that not only did he clock Grant's vehicle while Grant was within the city limits, he stated that, at the time Grant was clocked through the time Grant was arrested, Grant was at all times within the city limits Horn Lake. We find this issue to be completely without merit.

Grant's next argument is equally without merit. On appeal from county court to circuit court, Grant raised for the first time on appeal the issue of whether the charging affidavit was void as having been "issued" by a person not legally authorized to do so. The circuit court ruled that issue had not been preserved because it was not raised in the lower court. We must agree with the circuit court. A lower court will not be held to be in error on issues not presented before it. *Jones v. State*, 606 So. 2d 1051, 1058 (Miss. 1992); *Crenshaw v. State*, 520 So. 2d 131, 134-35 (Miss. 1988); *Moawad v. State*, 531 So. 2d 632, 635 (Miss. 1988); *Billiot v. State*, 454 So. 2d 445, 462 (Miss. 1984).

Assuming arguendo that this issue was properly before this Court, we would still find it to be without merit. Grant argues that pursuant to Mississippi Code, Section 21-23-11, only a duly appointed deputy clerk will be empowered to administer oaths and take affidavits. To be duly appointed the deputy clerk's appointment must be entered into the minutes of the municipality.

Grant argues that at the time the affidavits in this case were issued on August 30, 1991, the Deputy Clerk's name, Patricia L. Hart, had not been entered into the minutes of the municipality as required by the statute. He argues that the affidavit which was illegally issued was void, therefore, the convictions were also void.

According to the Exhibits presented to this Court of the minutes of the city of Horn Lake, Patricia L. Hart was appointed as a communication dispatcher, effective June 5, 1991. Subsequently, on August 15, 1991, through the minutes of the City of Horn Lake, all communication dispatchers, Patricia Hart being one, were appointed as deputy court clerks. This sufficiently placed Hart's name within the city minutes to satisfy the requirements of section 21-23-11.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT OF CONVICTION AND SENTENCE OF: COUNT I, DUI-FIRST, SENTENCED TO 24 HOURS IN DESOTO COUNTY JAIL, SUPENDED; AND \$500.00 FINE ; COUNT II, SPEEDING, \$100.00 FINE; COUNT III, DRIVING ON THE WRONG SIDE OF THE ROAD, SENTENCED TO 10 DAYS IN THE DESOTO COUNTY JAIL SUSPENDED, IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

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

