IN THE COURT OF APPEALS 11/14/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00504 COA

KENNETH R. BARDWELL A/K/A KENNETH RAY BARDWELL

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. MICHAEL EUBANKS

COURT FROM WHICH APPEALED: MARION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GARLAND D. UPTON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS

DISTRICT ATTORNEY: RICHARD DAVIS, JR.

NATURE OF THE CASE: CRIMINAL/ DRIVING UNDER THE INFLUENCE: SECOND OFFENSE

TRIAL COURT DISPOSITION: SENTENCED TO A TERM OF 180 DAYS IN THE MARION COUNTY JAIL WITH 150 DAYS TO BE SUSPENDED UPON PAYMENT OF $1500.00 AND ALL COST OF JUSTICE COURT AND ALL LEGAL ASSESSMENTS

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

BARBER, J., FOR THE COURT:

Kenneth Bardwell was tried and convicted in the Circuit Court of Marion County for Driving Under the Influence in violation of section 63-11-30 of the Mississippi Code. Bardwell had once been previously convicted within the past five years of a charge of drunk driving. Therefore, he was sentenced pursuant to section 63-11-30(2)(b) to serve 180 days in the Marion County Jail with 150 days of the sentence to be suspended upon payment of a $1500.00 fine and all court costs and legal fees. Bardwell raises the following issues on appeal:

> I. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE?
>
> II. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Bardwell motioned the Court to restrict and exclude any testimony with reference to "the refusal to take the breath test" on the grounds that the refusal to take the test is not an element of the offense of driving under the influence. Furthermore, the admission of this evidence resulted in prejudice to Bardwell and was not probative as to whether Bardwell was driving under the influence. Although we agree that evidence of refusal is not an element of the crime charged, such evidence is nonetheless relevant and admissible pursuant to Section 63-11-41 of the Mississippi Code which states:

> If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible in any criminal action under this chapter.

Miss. Code Ann. § 63-11-41 (1972).

Additionally, the Mississippi Supreme Court in *Ricks v. State*, 611 So. 2d 212 (Miss. 1992), held the admission into evidence under section 63-11-41 of the defendant's refusal to take a breathalyser test did not violate the Fifth Amendment of the U.S. Constitution, nor Article 3, section 26 of the Mississippi Constitution. The penalty of introducing a refusal serves an important state interest in encouraging defendants to submit to a chemical test. The Court found that because the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26 of the Mississippi Constitution. *Ricks*, 611 So. 2d at 214-16. The *Ricks* Court held that the refusal to submit to the test would likewise be admissible under Rule 402 of the Mississippi Rules of Evidence, which states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence

which is not relevant is not admissible.

M.R.E. 402. Therefore, we find Bardwell's first assignment of error is without merit.

Next, Bardwell claims that the jury verdict was against the weight and sufficiency of the evidence. Bardwell filed a motion for new trial on May 5, 1994 in which he did not raise the claim that the verdict of the jury was against the overwhelming weight of the evidence. Because this issue was raised for the first time on appeal, it is procedurally barred. *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987). In order to preserve the claim that the verdict of the jury is against the overwhelming weight of the evidence for appellate review, the defendant must include the claim in a motion for a new trial. *Id.* "A trial judge cannot be put in error on a matter which was not presented to him for decision." *Id.*

We note, however, that setting all procedural defects aside, Bardwell would still not prevail on his claim that the verdict was against the overwhelming weight of the evidence and thus was entitled to a new trial. Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). The test for reviewing a denied motion for a new trial is as follows: "New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. [The Mississippi Supreme Court will] reverse only for abuse of discretion, and on review [the Court will] accept as true all evidence favorable to the state." *Id.* (citing *Wetz v. State*, 503 So. 2d 803, 807-09 (Miss. 1987)). Bardwell argues that because the arresting officer did not perform any field sobriety tests, there was insufficient evidence upon which to base a conviction. The appellant, however, fails to either address or recognize the evidence which was presented to the

jury in this case and the reasonable inferences which may be drawn therefrom. Noteworthy is the fact that Bardwell admitted that he had consumed several beers. The arresting officer testified that his breath smelled of alcohol and a large quantity of beer was found in the vehicle he was driving. Moreover, the arresting officer testified that when he stopped Bardwell, he observed that his pupils were dilated and that his coordination was impaired. Trial testimony revealed that the officer had received special training in recognizing persons under the influence of alcohol and had substantial field experience in this regard as well. Given such testimony, we find that a reasonable juror could conclude that the prosecution proved beyond a reasonable doubt that Bardwell was guilty of driving under the influence in violation of section 63-11-30.. We accordingly find no merit in this assignment of error. The jury is free to consider all evidence placed before it. Likewise, in its exercise of independent judgment, it is unfettered in considering the lack of evidence presented. It is not improper for a jury to attribute more weight to the evidence presented than to the evidence not presented.

THE JUDGMENT OF THE MARION COUNTY CIRCUIT COURT OF CONVICTION OF DRIVING UNDER THE INFLUENCE AND SENTENCE OF 180 DAYS IN THE MARION COUNTY JAIL WITH 150 DAYS SUSPENDED UPON THE PAYMENT OF $1500.00 IN FINES AND ALL LEGAL FEES AND COURT COSTS IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANT.

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