IN THE COURT OF APPEALS 02/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00897 COA

EDWARD YOUNG A/K/A/ EDWARD YOUNG JR.

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. ROBERT W. BAILEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LAUDERDALE COUNTY

ATTORNEY FOR APPELLANT:

LESLIE GATES

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: DAN ANGERO

NATURE OF THE CASE: CRIMINAL: FELONY DUI

TRIAL COURT DISPOSITION: SENTENCED TO 4 YEARS IN MDOC AND TO PAY A FINE $2000, WITH SAID FINE BEING SUSPENDED

BEFORE THOMAS, P.J., PAYNE AND SOUTHWICK, JJ.

PAYNE, J., FOR THE COURT:

Edward Young, Jr. was convicted in the Circuit Court of Lauderdale County of felony DUI third offense. He was sentenced to a four (4) year term to be served in the custody of the Mississippi Department of Corrections and ordered to pay a fine in the amount of $2,000.00, with said find being suspended. Feeling aggrieved by this judgment, Young appeals, raising the following issues: (1) the court erred by failing to grant a circumstantial evidence instruction, (2) the evidence was insufficient to support the jury's verdict, and (3) the court erred in failing to grant Young's pre-trial motion and amended motion to dismiss. We find Young's arguments to have no merit and therefore affirm the judgment of the trial court.

FACTS

On January 1, 1994, Officer Harper was dispatched to the scene of an automobile accident. Upon arrival, Officer Harper discovered a vehicle with its front-end facing downward in a ditch. Officer Harper stated that there were twenty to forty people standing in the area when he arrived. Harper testified that, after determining that no one was in the vehicle, he inquired as to the ownership of the car and asked who had been driving the car. Officer Harper testified, somewhat ambiguously, that the Appellant, Young, stepped forward and stated that he had been driving the car. Officer Harper testified further that he smelled intoxicating beverages coming from Young's person at which time he called Officer Swink who was certified in giving field sobriety tests. Officer Harper stated that after turning Young over to Officer Swink he overheard Young stating, "I've been drinking but I'm not drunk." Officer Swink testified that Young could not complete the sobriety tests, and that he registered .219 percent on the intoxilyzer test. The State also introduced evidence that Young had two previous convictions of driving under the influence.

The defense chose to rest without presenting any evidence to the jury. The jury returned a verdict of guilty of felony DUI, and Young was ordered to pay a fine of $2,000.00 and serve four (4) years in the custody of the Mississippi Department of Corrections.

On appeal, Young initially raises five issues but withdraws two of these issues in his reply brief. Thus, there are only three issues properly before this Court. Young raises a number of other issues for the first time in his reply brief including one issue in which he asserts plain error. We will address the three issues properly before this Court and bar all others on procedural grounds.

ANALYSIS

I. DID THE TRIAL COURT ERR BY FAILING TO GRANT A CIRCUMSTANTIAL EVIDENCE INSTRUCTION?

Young contends that the trial court erred in its denial of his circumstantial evidence instruction. Young argues that the State presented no direct evidence that he was intoxicated at the time that the car was wrecked. Young contends that the testimony presented by Officer Harper regarding Young's alleged admission that he had been driving the car was inconsistent and ambiguous. Young argues

that Officer Harper's testimony was ambiguous as to whether Young had admitted driving the car at the time of the accident, or whether Young was merely responding to Officer Harper's inquiry as to the ownership of the car. Young asserts that the jury should have been instructed that, before they could convict him, they must find that each element of the offense had been established beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. Young contends that the jury, if properly instructed, could have reasonably found that Young was not intoxicated at the time of the accident.

The State contends that Young was not entitled to a circumstantial evidence instruction because the State presented direct evidence of Young's intoxication and testimony from Officer Harper that Young had admitted that he had been driving the car.

The Mississippi Supreme Court has held that a circumstantial evidence instruction "must be given only where the prosecution is without a confession and only without eyewitnesses to the gravamen of the offense charged." *Mack v. State*, 481 So. 2d 793, 795 (Miss. 1985) (citing *Keys v. State*, 478 So. 2d 266, 267 (Miss. 1985)); *see also Boches v. State*, 506 So. 2d 254, 260 (Miss. 1987); *Clark v. State*, 503 So. 2d 277, 278-79 (Miss. 1987) (holding that a conviction based upon both direct and circumstantial evidence would not be reversed for lack of a circumstantial evidence instruction). In *Mack v. State* the court stated further that "[t]here is no reason on principle why an admission by the defendant on a significant element of the offense should not also operate to render unnecessary the circumstantial evidence instruction. *See also Sudduth v. State*, 562 So. 2d 67, 72 (Miss. 1990) (holding that defendant's out-of-court admissions to witnesses, although not a confession per se, was sufficient to constitute direct evidence of the crime such that the giving of a circumstantial evidence instruction was not required).

In the present case, we find that the State's case was not wholly circumstantial, therefore negating the need for a circumstantial evidence instruction. A review of the record indicates that the State produced direct evidence in the form of Officer Harper's testimony that Young admitted driving the car. Furthermore, the State presented direct evidence of Young's intoxication in the form of testimony by Officer Swink that Young admitted he had been drinking, and that Young was incapable of performing the sobriety tests. The State also provided the court with the results from Young's intoxilyzer test which produced a reading of .219, a result clearly above this state's legal limit of .10%. Miss. Code Ann. § 63-11-30 (Supp. 1994). We find Young's arguments to be without merit and therefore affirm the decision of the lower court.

II. WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN THE VERDICT?

Young argues that the evidence was "insufficient to establish to a reasonable juror beyond a reasonable doubt that Edward Young, Jr. was operating the vehicle while he was over the legal limit for blood alcohol." Here, Young's argument hinges on the premise that his preceding argument in the first issue has some merit. We have already found that this case was not wholly circumstantial, and we find further that the evidence was sufficient to sustain the verdict of guilty of felony DUI.

The standard for reviewing the sufficiency of the evidence is well established:

> [T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Young's] guilt must be

> accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted). In the present case, Young was apprehended at the scene of the collision. According to the testimony, he was visibly intoxicated, and he admitted that he had been driving the car, and that he had been drinking. The intoxilyzer test revealed that Young had a blood alcohol level of .219 %, more than twice the legal limit. The evidence in this case was clearly sufficient to sustain the guilty verdict. We find that the trial court did not err in denying Young's motion for a directed verdict.

III. DID THE TRIAL COURT ERR IN DENYING YOUNG'S PRE-TRIAL MOTION TO DISMISS AND AMENDED MOTION TO DISMISS?

The court denied the motions to dismiss on the ground that Young made no timely appeal nor any timely pursuit of post-conviction and/or collateral relief. The pre-trial motion to dismiss is based on an alleged error in the prosecution of the underlying first DUI offense. Young contends that the person who acted as clerk of the Municipal Court of the City of Meridian for the purpose of accepting an affidavit was not authorized to act as a clerk of the Municipal Court pursuant to Miss. Code Section 21-23-11; therefore, the City of Meridian was without jurisdiction to enter a judgment of conviction on the first DUI thus nullifying the conviction. Young states that he is entitled to attack a legal nullity either directly or collaterally.

The State disagrees and argues that the order of indictment which was signed by all parties stated that "all motions are to be filed, noticed and heard on or before ten days prior to trial date . . . ." The motion to dismiss was filed one day before trial. The State contends, that for this reason alone, the court was correct in denying the motions. The State argues further that Young's attack on a prior conviction which is valid on its face was improperly raised in the proceeding below. The State contends that a trial court cannot be placed in the position of retrying a prior case just because the Appellant has suddenly decided to challenge a prior conviction that was rendered more than three years ago. We agree.

Although we have no case law directly on point, the Mississippi Supreme Court has addressed this issue in the context of sentence enhancement. In *Phillips v. State*, 421 So. 2d 476, 479 (Miss. 1982), the court was presented with the issue of whether a defendant may attack the constitutional validity of a prior conviction which is being used for the enhancement of punishment under the habitual offender statute. In deciding that the defendant could not collaterally attack a prior conviction, the court stated:

> In fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of "retrying" the prior case. Certainly any such frontal assault upon the

> constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

Id. at 481-82. The court goes on to state that a constitutionally defective prior conviction is *voidable* as opposed to *void. Id.* at 482. "The mere fact that the defendant has chosen to collaterally attack a prior conviction has no effect upon the status of that conviction until such time as the conviction is vacated." *Id.* at 483. In other words, a prior conviction is valid and can be used for the purpose of sentence enhancement until such time as the prior conviction is overturned. *Id.* In the event that the conviction is overturned, the defendant can then seek relief by petition for writ of error coram nobis. *Id.* at 482.

In the present case, while we are not faced with this issue in the context of sentence enhancement, we are satisfied that the same logic that the Mississippi Supreme Court used in *Phillips* is analogous to the case before us. We find, without deciding the merits of Young's collateral attack, that the proceeding below was not the proper forum in which a challenge to the validity of a prior conviction should be made. Therefore, the trial court was not in error in its dismissal of Young's pretrial motion to dismiss.

Young also contends that his amended motion to dismiss was erroneously denied. The amended motion alleged that the indictment failed to state on its face that the two previous DUI convictions were entered within five years before the date of the alleged offense. Although Young acknowledges that abstracts of the court's judgments were attached to the indictment, he argues that the absence of language incorporating the attachments by reference resulted in the aforementioned error. Regarding this issue, Young cites no authority and merely makes a cursory argument in his brief.

As the State correctly points out, the prosecutor effectively rebutted Young's argument at trial regarding the sufficiency of an indictment for felony DUI. The Mississippi Supreme Court has held that an indictment for felony DUI must charge the prior offenses in a progressive fashion, inasmuch as "each prior conviction is an element of the felony offense, and each must be specifically charged." *Ashcraft v. City of Richland*, 620 So. 2d 1210, 1212 (Miss. 1993) (citing *Page v. State*, 607 So. 2d 1163, 1168 (Miss. 1992)). In the present case, the indictment charged that the defendant had committed the offense of felony DUI, having been "convicted of DUI first and DUI second, making this a third or subsequent offense (SEE EXHIBIT A FOR PRIOR CONVICTIONS) . . . ." The attached exhibits contained abstracts of both prior convictions indicating the date of each offense as well as the date of each conviction. We find that the indictment was in conformity with the standard established by previous Supreme Court decisions and sufficiently set forth the crime charged. We find Young's argument to be without merit and therefore affirm the decision of the lower court.

IV. ISSUES IMPROPERLY RAISED FOR REVIEW.

Young asserts a number of issues for the first time in his reply brief. We decline to address these issues on procedural grounds. The Mississippi Supreme Court has stated "[w]e will not consider issues raised for the first time in an appellant's reply brief." *Sanders v. State*, 678 So. 2d 663, 669-70 (Miss. 1996) (quoting *United States v. Anderson*, 5 F.3d 795 (5th Cir. 1993)). The court stated

further that "[a]ppellants cannot be allowed to ambush appellees in their rebuttal briefs, thereby denying the appellee an opportunity to respond to the appellant's arguments." *Sanders*, 678 So. 2d at 670.

In one of the issues Young raises in his reply brief, he asks this Court to find plain error. Young contends that Jury Instruction S-3 deviates from the requirements of Mississippi Code Section 63-11-30 which states that the offenses of DUI first and DUI second have been *committed* within five years before the alleged felony. Young argues that Jury Instruction S-3 erroneously required the jury to find that the convictions, not the offenses, occurred within five years before the alleged felony offense on January 1, 1994. Young submits that the jury was not properly instructed as to the elements of the crime and thus resulted in plain error.

"As a rule, the Supreme Court only addresses issues on plain error review when the error of the trial court has impacted upon a fundamental right of the defendant." *Sanders*, 678 So. 2d at 670. "It has been established that where fundamental rights are violated, procedural rules give way to prevent a miscarriage of justice." *Id.* (quoting *Gray v. State*, 549 So. 2d 1316, 1321 (Miss. 1989)). We are hard pressed to find that the Appellant's fundamental rights have been violated. Nevertheless, we are satisfied that no miscarriage of justice has resulted in the case at bar as the *offenses* clearly occurred within five years of the third DUI offense.

THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY OF CONVICTION OF FELONY DUI THIRD OR GREATER OFFENSE AND SENTENCE OF FOUR (4) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $2,000.00, WITH SAID FINE BEING SUSPENDED, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

BRIDGES, C.J., MCMILLIN AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.