

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00891 COA

PRENTISS BYRD A/K/A, PRENTISS W. BYRD

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

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

TRIAL JUDGE: HON. BILL JONES

COURT FROM WHICH APPEALED: GEORGE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MARCUS PITTMAN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: DEIDRE MCCRORY

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: FELONY DRIVING UNDER THE INFLUENCE

TRIAL COURT DISPOSITION: 3RD OFFENSE DUI CONVICTION, SENTENCED TO 4 YRS.,

2 ½ SUSPENDED

BEFORE FRAISER, C.J., DIAZ, AND KING, JJ.

PER CURIAM:

Prentiss Byrd (Byrd) was convicted of felony driving under the influence (third offense) by the Circuit Court of George County. On appeal he argues that the State's attorney made improper closing arguments which resulted in the jury returning a verdict of guilty. Finding this assignment of error procedurally barred, we affirm.

FACTS

On July 23, 1994, Officer John Keel of the George County Sheriff's Department was patrolling the Benndale area when he observed a vehicle swerving and crossing the centerline of the highway. Keel put on his lights and stopped the wayward vehicle. Upon approaching the driver, Keel detected a strong alcohol smell coming from the vehicle. The driver, Prentiss Byrd, appeared confused and offered an identification card to Keel when asked for his driver's license. Byrd then told the officer, "I drank five beers, but I'm right home." After failing several field sobriety tests, the officer administered a portable breathalyzer test. Byrd did not register above the legal limit. However, based on Byrd's mannerisms, Keel placed Byrd under arrest and transported him to the Lucedale Police Department for another intoxilyzer test. This time, Byrd's blood alcohol count registered .228, well over the legal limit. Appellant was subsequently charged with felony D.U.I.

On July 20, 1995, Byrd was found guilty of felony driving under the influence (third offense) in violation of Mississippi's Implied Consent Law. Byrd was sentenced to serve a term of five years in the custody of the Mississippi Department of Corrections with two and one half years suspended.

DISCUSSION

Byrd testified that while riding in the back of the sheriff's vehicle, he used a portable Dristan inhaler because of a sinus problem. According to Byrd, this medication contained a significant amount of alcohol which caused him to register above the legal limit when his blood alcohol level was re-tested at the police station. The Appellant argues that the State made improper closing statements concerning the alcohol content of this nasal spray. The State contends that this issue is procedurally barred due to the Appellant's failure to object at the trial level.

We find this issue procedurally barred. The record does not reveal any objection to this statement by the defense during trial. Thus, it will not be considered for the first time on appeal. See *Monk v. State*, 532 So. 2d 592, 600-01 (Miss. 1988) (citations omitted).

THE JUDGMENT OF THE GEORGE COUNTY CIRCUIT COURT OF CONVICTION OF FELONY DRIVING UNDER THE INFLUENCE THIRD OFFENSE AND SENTENCE OF

FOUR YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TWO AND ONE-HALF YEARS SUSPENDED ON CONDITION THAT APPELLANT COMPLETE THREE YEARS PROBATION IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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