

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00578 COA**

**TAMMY BRASHEARS A/K/A TAMMY BRASHEARS  
HILBURN**

**APPELLANT**

**v.**

**CITY OF COLUMBIA, MISSISSIPPI**

**APPELLEE**

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

DATE OF JUDGMENT:	10/23/95
TRIAL JUDGE:	HON. MICHAEL RAY EUBANKS
COURT FROM WHICH APPEALED:	MARION COUNTY CIRCUIT COURT
APPELLANT FOR APPELLANT:	JAMES COLEMAN RHODEN
ATTORNEY FOR APPELLEE:	NO RESPONSE FROM APPELLEE
DISTRICT ATTORNEY:	RICHARD DOUGLASS
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
TRIAL COURT DISPOSITION:	DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR FIRST OFFENSE: SENTENCED TO SERVE A TERM OF 48 YRS IN THE MARION COUNTY JAIL, BUT THAT THE SERVING OF 48 HOUR SENTENCE IS HEREBY SUSPENDED WITH TERMS
DISPOSITION:	REVERSED AND RENDERED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

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

BRIDGES, C.J., FOR THE COURT:

Tammy Brashears was arrested on October 12, 1994 and charged with driving under the influence of a drug or controlled substance. On December 14, 1994, she was convicted under Mississippi Code section 63-11-30(2)(a) of driving under the influence of "any other substance which has impaired

such person's ability to operate a motor vehicle," first offense, in the Columbia, Mississippi Municipal Court. Brashears appealed to the Marion County Circuit Court. The circuit court convicted her of driving under the influence of intoxicating liquor, a crime for which She was not charged. On appeal, Brashears presents the following issue:

I. CAN A TRIAL JUDGE, ALSO SITTING AS TRIER OF FACT, AMEND AN AFFIDAVIT CHARGING THE CRIME AFTER THE TRIAL IS CONCLUDED, WITHOUT APPLICATION OF THE STATE OR PARTY PROSECUTING?

It should be noted that the appellee, the City of Columbia, did not file a brief in this appeal. We find that the trial court erred and therefore, reverse and render.

### FACTS

Brashears was pulled over for erratic driving by an officer of the Columbia Police Department in the early morning hours of September 25, 1994. She was driving a friend's car who was too intoxicated to drive. The officer administered a field sobriety test to Brashears, although the officer admitted at trial that he had not been trained how to do so. Nonetheless, the officer concluded that Brashears was under the influence of something because her eyes seemed slow and unfocused. Brashears also took a portable Breathalyzer test. She registered a .06, under the .10 legal limit for driving in Mississippi. The other occupants of the vehicle were searched, and a substance suspected to be marijuana was found on one of them. Additionally, two singed rolling papers were found in the floorboard of the car and sent to the crime lab in Jackson for testing. The crime lab tests revealed that trace amounts of marijuana were found on the papers.

The municipal court convicted Brashears of driving under the influence of another intoxicating substance, but not intoxicating liquor. Brashears appealed to the circuit court. A bench trial was held. Evidence presented at the trial in circuit court revealed that Brashears was on medication for asthma the night of her arrest. However, no evidence was ever presented that she was under the influence of marijuana or that she was past the legal limit for driving under the influence of alcohol.

Nonetheless, the trial court took it upon itself to amend the indictment at the conclusion of the trial and convict Brashears of driving under the influence of intoxicating liquor. The following statute controls:

When an appeal is presented to the circuit court in any criminal case from the judgment or sentence of a justice of the peace or municipal court, it shall be permissible, *on application of the state or party prosecuting*, to amend the affidavit, pleading, or proceedings at any time before a verdict so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amendment to be made on such terms as the court may consider proper.

Miss. Code Ann. § 99-35-11 (Rev. 1994)(emphasis added). There is no evidence whatsoever in the record to indicate that the State at any time amended the affidavit to charge Brashears with any other crime than driving under the influence of another substance. In fact, when questioned by the trial

court as to what the exact charges were, the prosecuting attorney stated, "just DUI other substance."

Under the statute, it is permissible for the prosecuting party to request an amendment of the affidavit. The prosecuting attorney in this case failed to do so. The trial court erred in convicting Brashears of a crime for which she was never charged and of which evidence was not produced. Accordingly, we reverse and render.

**THE JUDGMENT OF THE MARION COUNTY CIRCUIT COURT IS REVERSED AND THE CAUSE RENDERED. COSTS OF THIS APPEAL ARE TAXED TO MARION COUNTY.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**