

**IN THE COURT OF APPEALS 02/25/97**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00876 COA**

**IDA FAYE LEE**

**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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: FELONY D.U.I.

TRIAL COURT DISPOSITION: GUILTY OF FELONY D.U.I. SENTENCED TO SERVE  
THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF  
CORRECTIONS WITH TWO YEARS SUSPENDED

BEFORE BRIDGES, C.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Ida Faye Lee (Lee) was convicted of felony driving under the influence (third offense) in the Circuit Court of Hancock County. On appeal, Lee argues that the indictment was defective because it failed to properly recite the elements of the charged offense. Finding no error, we affirm.

### FACTS

Officer Gene Boswell (Boswell) of the Waveland Police Department was patrolling Waveland Avenue during the evening hours of July 6, 1993. At approximately 10:30 P.M., Boswell observed a car weaving from side to side on the road in front of him. Boswell stopped the vehicle. Upon approaching the driver, Boswell detected a strong alcohol smell coming from the vehicle. The driver, Lee, staggered from the vehicle and the officer asked her to walk to the back of her car. Lee told the officer that she had consumed two drinks. Burton requested that Lee take an intoxilyzer test to determine her alcohol level, but she refused. Lee was then asked to take the standard field sobriety tests, but refused. Burton then placed Lee under arrest and transported her to the Police Department. Lee was again asked to take an intoxilyzer test, but refused again. Due to her refusal to take the test, she was charged with D.U.I.

Following a jury trial, Lee was found guilty of operating a motor vehicle while under the influence of intoxicating beverages in violation of Mississippi's Implied Consent Law, section 63-11-30 of the Mississippi Code of 1972. Due to two prior D.U.I. convictions within five years, Lee was found guilty of felony driving under the influence and sentenced to serve a term of three years in the custody of the Mississippi Department of Corrections with two years suspended.

### DISCUSSION

The record shows that the State indicted Lee pursuant to section 63-11-30(1) of Mississippi's Implied Consent Law. This section prohibits operating a vehicle while under the influence of alcohol. Additionally, sections 63-11-30(2)(a)-(c) indicate increased punishments for each successive offense. Miss. Code Ann. § 63-11-30(2)(a)-(c) (Supp. 1992). The provision under which the State attempted to proceed against Lee reads:

For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars (\$2,000.00) nor more than Five Thousand Dollars (\$5,000.00) and shall be imprisoned not less than one (1) year nor more than five (5) years. . . .

Miss. Code Ann. § 63-11-30(2)(c) (Supp. 1992).

The indictment at issue reads as follows:

. . . IDA FAYE LEE in Hancock County, Mississippi, on or about July 6, 1993, did unlawfully, wilfully, and feloniously, drive or operate a motor vehicle within this state while under the influence of intoxicating liquor as a third offender, having been convicted previously of a first offense violation of Section 63-11-30(1), Miss. Code of 1972, as amended, as provided in Section 63-11-30(2)(a), Miss. Code of 1972, as amended, to-wit:

(1) In the Municipal Court of Waveland, Mississippi, the said Ida Faye Lee, was convicted of Driving Under Influence - First Offense, as evidenced by Docket Book #9, Page #14, on November 10, 1988,

and, thereafter of a second offense violation under Section 63-11-30(1), Miss. Code of 1972, as amended, after having been convicted for a first offense as provided in Section 63-11-30(2)(b), Miss Code of 1972, as amended, to-wit:

(2) In the Municipal Court of Waveland, Mississippi, the said Ida Faye Lee, was convicted of Driving Under Influence - Second Offense, as evidenced by Docket Book #9, Page #33, on February 2, 1989,

contrary to the form of the statute in such cases and made and provided, and against the peace and dignity of the State of Mississippi.

On appeal, the Appellant contends that the indictment was insufficient because it failed to give her adequate notice. Specifically, she alleges that the indictment was defective because it did not set out the dates that the prior D.U.I. offenses were committed. We disagree.

The indictment shall be a plain, concise and definite written statement of the essential facts constituting the charged offense, fully notifying the defendant of the nature and charge of the accusation against him. The indictment shall also include: (1) the name of the accused; (2) the date on which the indictment was filed in each court; (3) a statement that the prosecution is brought in the name and by the authority of the State of Mississippi; (4) the county and district where brought; (5) the date and time, if applicable, which the offense was committed; (6) the signature of the foreman of the grand jury issuing the indictment, and (7) the words "against the peace and dignity of the state." Rule 2.05 Unif.Crim.R.Cir.Ct.Prac. (Repealed). The Mississippi Supreme Court has held that "[i]f an indictment reasonably provides the accused with actual notice and it complies with Rule 2.05 of the Unif.Crim.R.Cir.Ct.Prac., it is sufficient to charge the defendant with the crime." *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992).

The record reveals that, prior to trial, the defendant was provided with a copy of her driver's abstract which listed the dates each previous offense was committed. The abstract showed that the defendant committed a first offense D.U.I. on October 18, 1988 and a second offense on December 21, 1988. The Appellant received adequate notice that the State intended to seek sentencing as a third offender by using her prior D.U.I. offenses. The indictment's failure to list the date each prior offense was committed did not impair Lee's preparation of her defense since she was given a copy of the court abstract prior to trial. Thus, this assignment of error is without merit.

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

**OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TWO YEARS SUSPENDED IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.**

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

**THOMAS, P.J., AND HERRING, J., NOT PARTICIPATING.**