IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00617 COA

THOMAS ALEXANDER RAHAIM A/K/A TOMMY RAHAIM

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. JERRY TERRY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF STONE COUNTY

ATTORNEY FOR APPELLANT:

R. WAYNE WOODALL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CONO CARANA

NATURE OF THE CASE: CRIMINAL - FELONY DRIVING UNDER THE INFLUENCE - MAIMING

TRIAL COURT DISPOSITION: SENTENCED TO SERVE SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

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

BARBER, J., FOR THE COURT:

In the Circuit Court of Stone County, Thomas Rahaim was tried and convicted of driving under the influence-maiming, pursuant to Miss. Code Ann. § 63-11-30(4) (Rev. 1989), for which he was sentenced to seven years in the custody of the Mississippi Department of Corrections. Rahaim appeals his conviction on the following grounds:

> I. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE BLOOD TEST RESULTS REFLECTING THE LEVEL OF ALCOHOL IN BLOOD BASED UPON THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?
>
> II. WHETHER THE COURT ERRED IN ADMITTING THE BLOOD TEST RESULTS WHEN THE STATE FAILED TO FOLLOW STATUTORY REQUIREMENTS IN OBTAINING AND TESTING THE SAME?
>
> III. WHETHER THE COURT ERRED WHEN IT REFUSED TO ALLOW INTO EVIDENCE THE DECLARATION OF THE VICTIM OFFERED BY THE APPELLANT?
>
> IV. WHETHER THE COURT'S REFUSAL TO GRANT APPELLANT'S CONTRIBUTORY NEGLIGENCE INSTRUCTION IS REVERSIBLE ERROR?

Holding all of Rahaim's assignments of error to be without merit, we affirm the decision of the circuit court.

FACTS

On December 18, 1991, Thomas Rahaim had been consuming substantial quantities of alcoholic beverages for most of the day. Starting the day in New Orleans, Louisiana, Rahaim and a friend consumed beer while attending a car auction. After returning to Stone County, Mississippi, Rahaim and his friend stopped at a local tavern and consumed additional beer. Rahaim left the tavern at approximately 8:00 p.m. when he got into his car and began to drive home. While driving home, Rahaim struck the rear end of a vehicle being driven by Etta Rose Jackson. The impact of the collision threw Jackson from her vehicle and resulted in her being pinned under it when it came to rest on top of her. Rahaim survived the collision with a few scratches and an injury to his head. Jackson, however, was paralyzed and remained hospitalized for two weeks until she died of pneumonia, which had arisen as a complication from the injuries she received in the accident. Rahaim was subsequently arrested when a blood sample (which had been taken from him a few hours after the accident) was analyzed, revealing that Rahaim's blood alcohol level was at least .25 percent at the

time of the accident. According to Mississippi law, a person driving an automobile while having a blood alcohol level of .10 percent or greater is considered intoxicated.

ANALYSIS

I. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE BLOOD TEST RESULTS REFLECTING THE LEVEL OF ALCOHOL IN BLOOD BASED UPON THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Rahaim argues that his Fourth Amendment right against unreasonable search and seizure was violated by the removal of a blood sample from his body at the direction of an officer of the Mississippi Highway Safety Patrol. Rahaim asserts that the consent he gave for the sample to be taken was invalid as it was not a knowledgeable waiver of his right to refuse the search. Rahaim further contends that the officer who ordered the sample taken did not have probable cause to do so, and that since Rahaim did not make a valid waiver of his right not to be searched, the results of the test should have been excluded from evidence. The State counters Rahaim's argument by asserting that Rahaim validly consented to the blood sample, or in the alternative, that the search was based on probable cause sufficient to satisfy the protections afforded to him by the Fourth Amendment.

In his brief, Rahaim expends considerable effort in an attempt to demonstrate that his consent to the taking of the blood sample was not a valid waiver of his Fourth Amendment rights. *See Penick v. State*, 440 So. 2d 547, 551 (Miss. 1983) (holding that valid consent to otherwise illegal search must be accompanied by knowledgeable waiver of constitutional right not to be searched). However, this Court finds that under the facts of this case, the issue of whether Rahaim validly consented to the taking of the blood sample is not pertinent to the resolution of this assignment of error. Rather, it is the issue of whether the Mississippi Highway Safety Patrol officer had probable cause to compel Rahaim to provide the blood sample that is critical to this determination.

In *Longstreet v. State*, 592 So. 2d 16, 20 (Miss. 1991), our supreme court addressed a factual scenario virtually identical to that presented in this case. In *Longstreet*, the Mississippi Supreme Court made it clear that "a non-custodial search for a blood sample based upon probable cause meets federal and state search and seizure constitutional standards." *Longstreet*, 592 So. 2d at 20 (citing *Ashley v. State*, 423 So. 2d 1311, 1313 (Miss. 1983)). In *Longstreet*, the officer's observation that the defendant apparently was the driver who collided with the deceased victim's automobile, that the accident had occurred in good weather, and that the defendant's car had a beer can in it, were held sufficient to give the officer probable cause so that he could have arrested the defendant for manslaughter. *Longstreet*, 592 So. 2d at 21. The court, adhering to the precedent from *Ashley*, held that if the officer had probable cause so that he could have arrested the defendant, then the officer also had sufficient probable cause to require the defendant "to submit to the withdrawal of blood from his body to be tested." *Id.* at 20 (citing *Ashley*, 423 So. 2d at 1313-14)). The court concluded that "blood searches which are based upon probable cause are not illegal." *Longstreet*, 592 So. 2d at 21. The Mississippi Supreme Court's decisions in *Longstreet* and *Ashley* were derived from the Fourth Amendment analysis contained in the United States Supreme Court's holding in *Schmerber v. California*. *See Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (holding that taking blood samples from defendant who had been lawfully arrested did not violate his Fourth Amendment rights)

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In the case at bar, a review of the testimony presented at trial reveals that the Mississippi Highway Safety Patrol officer (who procured the blood sample) had probable cause to justify his actions. The officer testified that when he arrived at the accident scene he opened the door of Rahaim's automobile to check on his condition. The officer stated that "the first thing I observed was a smell of alcohol" and that "the smell of alcohol was extreme to say the least." The officer also stated that Rahaim appeared drunk. The officer further testified that he observed "a beer bottle down beside the driver's door of [Rahaim's] vehicle," and that the bottle was approximately half full of beer and cold to the touch. The officer then stated that the next occasion he had to observe Rahaim was when he visited Rahaim and the victim at the Stone County Hospital. The officer testified that when he approached Rahaim at the hospital, he again noticed the smell of alcohol emanating from Rahaim. The officer stated that it was at this point that he decided to ask Rahaim to consent to a blood sample. Rahaim read and then signed a consent form provided to him by the officer.

Based on the foregoing testimony, it is abundantly clear to this Court that the highway patrol officer had probable cause to arrest Rahaim for felony driving under the influence. Therefore, in accordance with the Mississippi Supreme Court's holding in *Longstreet*, the officer also had probable cause to require Rahaim to submit to the withdrawal of blood from his body to be tested for its alcohol content. Whether Rahaim actually consented to provide the blood sample is irrelevant to this analysis, as the officer could have compelled Rahaim to submit to the withdrawal of the sample, had such action been necessary. *See Penick*, 440 So. 2d at 551 (holding that Mississippi cases construing *Schmerber* acknowledge law enforcement officers' "lawful right to remove [a] defendant's blood whether he consented or not"). In accordance with clear precedent, this assignment of error is without merit.

II. WHETHER THE COURT ERRED IN ADMITTING THE BLOOD TEST RESULTS WHEN THE STATE FAILED TO FOLLOW STATUTORY REQUIREMENTS IN OBTAINING AND TESTING THE SAME?

Rahaim argues that the blood sample at issue in this case was not tested in accordance with the procedure outlined in Section 63-11-19 of the Mississippi Code rendering the results inadmissible. Rahaim premises his assignment of error on the requirement in Section 63-11-19 that in order for the chemical analysis of a blood sample to be considered valid under the provisions of the Mississippi Implied Consent Law (§ 63-11-1 et seq.), the laboratory analysis of the sample must have been performed by an individual possessing a valid permit issued by the State Crime Laboratory. *See* Miss. Code Ann. § 63-11-19 (stating that "[a] chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory . . . and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis"). Because the probable cause to support the taking of the blood sample was based on the officer's belief that Rahaim had committed driving under the influence-maiming (§ 63-11-30(4) of the Mississippi Implied Consent Law), Rahaim is correct in asserting that Section 63-11-19 applies to the blood test results at issue in this case.

The Mississippi Supreme Court has held that "substantial compliance" with Section 63-11-19 is sufficient to validate blood test results, despite the Mississippi Crime Lab's failure to precisely follow the tenets of the statute. *See Bearden v. State*, 662 So. 2d 620, 624-25 (Miss. 1995) (holding that substantial compliance with Section 63-11-19 is all that is required for test results to be considered valid); *Estes v. State*, 605 So. 2d 772, 775-76 (Miss. 1992) (holding that substantial compliance is sufficient to satisfy requirements of Section 63-11-19). In *Bearden*, as with the instant case, the defendant objected to the test results on the basis that the lab technician who performed the analysis at the Mississippi Crime Lab had not been issued a permit to do so by her employer. The *Bearden* court held that so long as the person performing the analysis was qualified to do so, and the analysis was conducted in accordance with the crime lab's standard operating procedures, the requirements of Section 63-11-19 were satisfied.

At trial, Rahaim accepted the laboratory technician who analyzed the blood sample, Sam Howell, as an expert in the field of forensic toxicology. Howell testified that he analyzed the sample of Rahaim's blood on a gas chromatograph that had been set up specifically to look for compounds such as ethyl alcohol. Howell also testified that he is the chief medical investigator for the state medical examiner's office and that he had worked at the crime lab for nine and one-half years. According to Howell's testimony, his analysis of the sample indicated to a reasonable scientific certainty that Rahaim's blood contained .25 percent ethyl alcohol at the time the sample was taken. Considering Howell's education, length of service, and expertise in this area, this Court is satisfied that the analysis of Rahaim's blood conducted by Howell was in substantial compliance with Section 63-11-19. This assignment of error must fail.

III. WHETHER THE COURT ERRED WHEN IT REFUSED TO ALLOW INTO EVIDENCE THE DECLARATION OF THE VICTIM OFFERED BY THE APPELLANT?

Rahaim claims that the trial court committed reversible error when it refused to allow his mother to testify as to post-accident statements allegedly made by the victim. Rahaim contends that the statements in question should have been allowed into evidence under the Mississippi Rule of Evidence 804(b)(3) exception to the hearsay exclusionary rule. In support of his argument, Rahaim characterizes the statements allegedly made by the victim as "statements against interest," asserting that they could have subjected her to both civil and criminal liability. The State counters Rahaim's assertions by indicating that the alleged statements of the victim were not against the victim's interest at the time they were made, therefore Rule 804(b)(3) was not applicable.

In considering Rahaim's assignment of error, this Court must first determine if the statements by the victim could have been accurately characterized as "against" her interests at the time they were allegedly made. The matter of precisely what type of statement is "against" a declarant's interests has not been addressed in Mississippi case law. However, a review of Rule 804(b)(3) indicates that in order to qualify as a statement against interest, the statement must be "*so far* contrary to the declarant's pecuniary or proprietary interest, or *so far* tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Miss. R. Evid. 804(b)(3) (emphasis added). To this Court, the language of the Rule indicates that the only statements admissible under the 804(b)(3) hearsay exception are those that, at the time they were made, would clearly and unequivocally subject the declarant to civil or

criminal liability if true. Statements that merely "might" or "could," particularly with the benefit of hindsight (as with those at issue in this case), subject the declarant to some form of liability are not statements against the declarant's interests for Rule 804(b)(3) purposes. This is not an unprecedented construction of the Rule, as the Fifth Circuit Court of Appeals has held that "[a]s reflected by the specific language used in Rule 804(b)(3), the statement against interest must be almost a direct, outright statement that the person was legally at fault." *United States v. Martino*, 648 F.2d 367, 391 (5th Cir. 1981). The federal rule is identical to its Mississippi counterpart.

On a motion in limine made by the defense counsel, Wilma Rahaim testified as to statements that the victim allegedly made in response to her questions regarding how the accident happened. Wilma Rahaim testified that when she visited her son and the victim at the hospital, the victim stated that she "backed out into the highway" and that she "didn't see anything coming." Wilma Rahaim further testified that the victim's husband was present when the statements were allegedly made. The victim's husband, Michael Jackson, also testified at the motion in limine, but denied that his wife made the statements as alleged by Wilma Rahaim. In reviewing this assignment of error, this Court will assume, *arguendo*, that the victim did make the statements as alleged by Wilma Rahaim. Even when the testimony is analyzed in the light most favorable to Rahaim, it is clear that the statements at issue did not rise to the level of a clear and unequivocal statement of fault or liability on the part of the victim. The only indication of fault or liability arising from these statements is that which Rahaim attempts to infer using the benefit of hindsight. Accordingly, the remarks allegedly made by the victim were not statements against interest for purposes of the Rule 804(b)(3) exception and the trial judge was correct in excluding the testimony from the jury. This assignment of error is without merit.

IV. WHETHER THE COURT'S REFUSAL TO GRANT APPELLANT'S CONTRIBUTORY NEGLIGENCE INSTRUCTION IS REVERSIBLE ERROR?

Rahaim's final assignment of error is that the trial court should have instructed the jury that if the victim contributed to the accident, then the jury should find Rahaim not guilty. The issue of a victim's negligence as negating a defendant's liability for the commission of a crime has been settled by the Mississippi Supreme Court. In *Hewlett v. State*, 607 So. 2d 1097, 1101 (Miss. 1992), the court held that the negligence of the victim was not a defense to a prosecution for manslaughter resulting from the defendant's operation of a motor vehicle while intoxicated. In *Hewlett*, the court stated:

> The negligence of the deceased or of a third person is not a defense to a prosecution for a homicide resulting from the operation of a motor vehicle, but it may be considered on the issue of whether the accused was criminally negligent or whether his conduct was the proximate cause of the homicide.

Hewlett, 607 So. 2d at 1107 (citing *Cogins v. State*, 75 So. 2d 258, 264 (Miss. 1954)). Since Rahaim's proposed instruction was an inaccurate statement of the law, the trial court was correct in refusing to grant it. *See West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 721 (Miss. 1995) (holding that only jury instructions that correctly reflect law should be granted). Accordingly, this issue is without merit.

THE JUDGMENT OF THE STONE COUNTY CIRCUIT COURT OF CONVICTION OF

FELONY DRIVING UNDER THE INFLUENCE AND SENTENCE OF SEVEN (7) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST APPELLANT.

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