IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00001 COA

JASON A. WALTERS

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. BILLY J. LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TRAVIS BUCKLEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: GRAY BURDICK

NATURE OF THE CASE: FELONY -- DRIVING UNDER THE INFLUENCE, THIRD OFFENSE

TRIAL COURT DISPOSITION: TRIAL JUDGE FOUND APPELLANT GUILTY AND SENTENCED HIM TO SERVE FIVE YEARS IN THE STATE PENITENTIARY, WITH FOUR YEARS SUSPENDED, LEAVING ONE YEAR TO SERVE, AND THE PAYMENT OF A FINE OF $2,000 AND ALL COURT COSTS UPON RELEASE FROM CUSTODY OF THE

MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., MCMILLIN, P.J., AND COLEMAN, J.

COLEMAN, J., FOR THE COURT:

A grand jury in the First Judicial District of Jones County indicted the Appellant, Jason A. Walters, for the felony of driving under the influence of alcohol for the third time. After the State rested its case, Walters waived his right to a trial by jury, which, of course, had previously been empaneled. The trial judge found Walters guilty and sentenced him to serve five years in the state penitentiary, with four years suspended, leaving one year to serve, and to pay a fine of $2,000 and all court costs upon his release from custody of the Mississippi Department of Corrections. Walters has appealed, but we affirm the trial court's judgment of his guilt of the felony of driving under the influence of alcohol for the third time and its sentence which we previously recited.

I. Facts

At around 11:00 p.m. on April 25, 1993, Milton Ray Smith, a patrolman with the Ellisville Police Department since 1982, was on patrol when he saw Walters driving east on Hill Street inside the corporate limits of Ellisville. Patrolman Smith observed that Walters's vehicle had no tail lights, and he also observed Walters cross a yellow line. Smith stopped Walters because of the absence of tail lights on the vehicle which he was driving. When Walters stepped out of the car, Smith smelled alcohol on him and requested that Walters take a field sobriety test, which Walters refused because, according to Patrolman Smith, he "would fail it." Smith arrested Walters and took him to the police station in Ellisville, where another police officer, Wyonie Patterson, administered a breath test on that city's intoxilizer. The results of that test were .221 grams of alcohol per one hundred (100) milliliters of blood. A result above .10 grams of alcohol per one hundred (100) milliliters of blood renders driving a vehicle unlawful under Mississippi's Implied Consent law.

II. Trial

The grand jury indicted Walters for "felony DUI" pursuant to Section 63-11-30(2)(d) of the Mississippi Code of 1972. The charging part of the indictment read as follows:

> That Jason A. Walters late of the County aforesaid, did on or about the 23rd day of April in the year of our Lord, 1993, in the County and State aforesaid, unlawfully, wilfully and feloniously drive or operate a vehicle within the State of Mississippi in Ellisville, Jones County, Mississippi on Hill Street while under the influence of an intoxicating liquor which impaired his ability to operate a motor vehicle while having ten one-hundredths percent (.10%) or more by weight volume of alcohol in his blood based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood as shown by a chemical analysis of his breath. The said Jason A. Walters has two or more convictions for violation of Section 63-11-30 of the Mississippi Code of 1972, annotated as amended. Said offenses all have occurred within a five year period of this offense. The previous convictions were as follows:

(1) In the Municipal Court of Ellisville, Mississippi, on the 25th day of February, 1991, of the crime of DUI 1st offense, wherein he was ordered to pay a fine of $410.00, assessments of $90.00 and attend MASEP. (A COPY OF SAID ABSTRACT IS ATTACHED HERETO AS EXHIBIT NO. 1 AND MADE A PART HEREOF.)

(2) In the Jones County Justice Court, of the crime of DUI 2nd offense, on the 13th day of June, 1991, wherein he was ordered to pay a fine of $700.00 and assessments of $145.00. (A COPY OF SAID ABSTRACT IS ATTACHED HERETO AS EXHIBIT NO. 2 AND MADE A PART HEREOF.)

against the peace and dignity of the State of Mississippi.

After the trial judge had qualified and seated the members of the venire but before he began his voir dire of them for the case *sub judice*, Walters' trial counsel suggested that his client and the State could stipulate the facts in the case and allow the trial judge to determine Walters' innocence or guilt of "felony DUI." The trial judge responded, "I feel like that's for a jury." After the jury had been selected and sworn, both the State and Walters announced that they were ready for trial. As its first witness, the State called patrolman Smith, who testified about his stopping Walters and taking him to the Ellisville police station where officer Wyonie Patterson tested Walters on the city's intoxilizer. The State next called officer Patterson, who served as patrolman supervisor of the night shift, to testify that the result of Walters' test on the intoxilizer was .221. After Walters' counsel cross-examined Patterson, the State rested.

After the State rested, Walters moved that the trial court "enter a judgment of not guilty as to the third offense. Of interest to this Court is Walters' counsel's statement in the record while he argued this motion that he thought that "there [was] enough evidence before the Court to reach a judgment of guilty of driving under the influence." The judge overruled Walters' motion for judgment of not guilty as to the third offense.

Walters then testified outside the presence of the jury that he had not been represented by counsel when he was convicted for "DUI -- second offense" in the Justice Court of Jones County. According to the abstract of the record of this second conviction, which the State introduced into evidence without objection from Walters, the Justice Court sentenced Walters to pay a fine of $700 plus court costs of $145.00 for a total of $845.00. The abstract of the record of Walters' first conviction of DUI in the Ellisville Municipal Court indicates that the public defender represented him on that charge. Following Walters' testimony and additional argument and colloquy among his counsel, the prosecutor, and the trial judge, Walters' counsel moved the trial judge to "rule that the convictions were invalid, and also the failure of the State to prove venue."

The record contains the following exchange between the State and Walters' counsel after the motion to rule that the convictions were invalid:

WALTERS' COUNSEL: Why can't you just find him guilty or not guilty?

ASSISTANT DISTRICT ATTORNEY: Why don't you waive the jury?

WALTERS' COUNSEL: I've already tried it-- I'll waive it again if you want me to.

ASSISTANT DISTRICT ATTORNEY: But the trial is over with. Go ahead and waive it, and let's get on with it.

THE COURT: Well, if I do that I've got to make a finding of fact on all this stuff. It's easier for the jury to make a decision than it is for me to go through and write an opinion.

WALTERS' COUNSEL: I don't have any problem with you doing that, Judge, at all. I really don't. I'm sincere.

THE COURT: You would waive the jury at this point?

WALTERS' COUNSEL: Yes.

The trial judge then examined Walters under oath to determine whether he understood that his attorney proposed to waive Walters' trial by jury, even after the State had rested and whether Walters agreed to waive his trial by a jury. Walters' counsel also questioned him about whether he wished to waive his right to a jury trial after the State had rested. The record clearly establishes that Walters consented to waiving the jury's deciding his guilt or innocence so that the trial court might do so instead; and he makes no issue of his waiver of his right to a jury trial in this appeal.

The trial judge then made the following findings of fact:

> The Court in this case has listened to the evidence that has been presented this morning. It is my understanding that Mr. Buckley has conferred with his client and the client has announced to the Court that Mr. Buckley has talked to his client, and Mr. Buckley has announced to the Court that he wishes to put on no evidence, and that he at this time wishes to waive the jury, further deliberations of the jury or further presentation to the jury of any facts or any statement to the jury by the Court as to what the law of the case is; that they are well satisfied with the Court from this point on deciding the issues of fact and law, and also entering the final decision as to sentence in this matter. The Court accepts that responsibility and the Court will, shortly, after that is done, dismiss the jury. The Court at this time will proceed to make a finding of fact, that is, that the Court has listened to the facts in this case and that the Court feels that the facts have been proven by the State of Mississippi to the extent that the prima facie case has been made of guilt on this particular charge of third offense and that he is guilty on that, and that the Court has taken into consideration all of the presentations, arguments, motions and everything that has been presented before the jury and outside the presence of the jury, before the trial of the case and during the trial of the case.

When the prosecutor inquired of the trial judge whether he found Walters guilty beyond a reasonable doubt, the trial judge replied: "The Court finds him guilty beyond a reasonable doubt based on the evidence that the Court has heard." The trial judge sentenced Walters to serve five years in the state penitentiary, with four years suspended, leaving one year to serve, and the payment of a fine of $2, 000 and all court costs upon release from custody of the Mississippi Department of Corrections.

The trial court denied Walters' motion for new trial or alternatively, JNOV, from which he has

appealed.

III. Issues

Walters presents three issues for this Court's review, analysis, and resolution. We state them as he did in the Statement of Issues contained in his brief:

> I. The trial court erred in limiting the issues to be decided by the jury.
>
> II. The trial court erred in overruling the motion for directed verdict of not guilty.
>
> III. The trial court erred by not granting a verdict of not guilty on the felony charge.

IV. Review and resolution of the issues

A. I. The trial court erred in limiting the issues to be decided by the jury.

Walters offers the following argument to support his position on this issue:

> The Court in this case, on motion of the State . . ., ruled that the matter of whether or not the defendant suffered two prior convictions of DUI, under the same statute, was solely a matter left to the discretion of the trial court and had nothing to do with the issues to be submitted to the jury . . . . That was a ruling that the defendant had no opportunity to challenge further because it was a clear, and straight forward ruling of the Court, that counsel is bound to abide by. For that reason, the defendant did not feel that there were any issues remaining to be tried to a jury and consequently *waived the jury and permitted the Court to enter judgment without intervention of the jury* . . . . In other words, the Court had taken away the only issue that the defendant had and that issue was the matter of whether or not there had been two prior convictions. The defendant submits that the ruling of the Court in that respect was in error and mandates a reversal of this case. (emphasis added).

The State counters Walters' argument by asserting that when he waived his right to be tried by the jury, this issue became moot. We quote from the State's brief: "[Walters' decision to waive his right to trial by jury] . . . effectively mooted the issue which Walters now seeks to raise. This Court, of course, does not sit to resolve issues which have become moot."

As this Court views the record in this case, Walters' defense was predicated upon the fact, which the State does not contest, that he was not represented by counsel when he was convicted of DUI -- second offense -- in the Justice Court of Jones Court. Thus, Walters attempted to persuade the trial judge that with only one valid previous DUI conviction, which was in the Ellisville Municipal Court, it was impossible to convict him of "felony DUI" because "felony DUI" requires two previous DUI convictions. Walters' strategy seems to have been to make a fact issue for the jury's determination of

whether his conviction of "DUI - second offense" was invalid because he was not represented by counsel. For instance, in his opening statement to the jury, Walters' counsel argued:

> Our position is that the State cannot prove that [Walters] has been twice previously convicted of driving under the influence of intoxicating liquors under the statute under which he is charged this time -- twice previously.

Moreover, we have previously noted that Walters' counsel seemed to concede that the evidence of his operation of the motor vehicle while intoxicated was sufficient to sustain his conviction of the misdemeanor of "DUI -- first offense."

Nonetheless, this Court holds that Walters' waiver of his right to the jury's determination of his innocence or guilt of "felony DUI," required the trial judge to make all necessary findings of fact in his determination of Walters' guilt or innocence of this crime. Nothing remained for the jury to do. Thus, this first issue became moot when Walters waived his right to a trial by jury. In the case of *Insured Savings & Loan Ass'n v. State*, 242 Miss. 547, 135 So. 2d 703, 706 (1961), the Mississippi Supreme Court wrote that "[w]here the cause on appeal relates to questions involved in rights which have ceased to exist, the appeal will be dismissed." The supreme court emphasized that it did not resolve questions which had become moot by writing:

> It is also a well-established rule that review proceedings are not allowed for the purpose of settling abstract or academic questions, and an appeal will be dismissed if the questions or issues presented have become moot.

Id. (citations omitted). Walters' removal of his case from the jury, which necessitated the trial judge's determination of his innocence or guilt, render this first issue moot, and thus we resolve it against Walters.

A second, unrelated reason to decide this issue against Walters is the principle that an appellate court will not permit the appellant to invite the trial court to commit error and then complain of the error which he invited on appeal. Walters' waiver of a trial by jury invited the trial judge to resolve all issues of fact; thus Walters invited the error of which he now complains. *See Booker v. State*, 511 So. 2d 1329, 1331 (Miss. 1987) (prosecutor's comments during closing argument, if error at all, constituted invited error and did not deprive defendant of fair trial).

> **B.** II. The trial court erred in overruling the motion for directed verdict of not guilty.

Walters' argument on this issue contains what appears to this Court to be the heart of his appeal. In his brief, Walters argues:

> Under the current holdings of the Mississippi Supreme Court it is apparent, that in order

> for a person to be validly convicted of second offense DUI, he must first be afforded the right to counsel which he may waive. There was no showing [that the] second conviction in this case can stand that test. This Court held in *Sheffield v. City of Pass Christian*, 556 So. 2d 1052 (Miss. 1993), that there is a presumption of regularity to a court's judgment, and that the burden is on the defendant to show that the prior convictions were uncounselled. In [the case *sub judice*] the defendant met that burden; and there was no rebuttal of that testimony nor contrary evidence by the State; and there was no attempt to offer any. There is no issue as to whether or not an individual has the right to counsel and that he may not be convicted of a misdemeanor which may result in his imprisonment if he has not been afforded counsel not intelligently and knowingly waived counsel in open court.

Walters then relies on his unrebutted testimony that he was not represented by counsel when he was convicted of DUI -- second offense -- in the Justice Court of Jones County to support his position on his second issue that he could not be convicted of "felony DUI" because he had been properly convicted only of DUI --first offense -- in the Ellisville Municipal Court, where the public defender represented him.

Walters filed his brief in this case on April 29, 1994. Nearly six months later, on November 17, 1994, the Mississippi Supreme Court rendered its opinion in *Ghoston v. State*, 645 So. 2d 936 (Miss. 1994) , in which that court affirmed the conviction of the appellant, Kelvin Ghoston, of felony DUI. *Id.* at 940. Ghoston, like Walters, testified that he had not been represented by counsel when he had been convicted of previous charges of DUI on which the charge of felony DUI rested. *Id.* at 938. Thus, as Walters does in the case *sub judice,* Ghoston argued that his previous convictions of DUI could not support a charge of felony DUI. *Id.* The Mississippi Supreme Court disagreed and affirmed Ghoston's conviction.

That court cited the then recent United States Supreme Court decision in *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L.Ed.2d 745 (1994), in which the Supreme Court held that "previous uncounselled misdemeanor convictions may be considered in sentencing a defendant for a subsequent offense so long as the previous uncounselled misdemeanor conviction did not result in a sentence of imprisonment." *Ghoston*, 645 So. 2d at 938. The Mississippi Supreme Court then concluded: "Assertion of a lack of counsel is insufficient to rebut the presumption of validity accorded prior DUI convictions." *Id.* at 939. *Ghoston* requires that we resolve Walters' second issue adversely to him by holding that the trial court did not err when it overruled his motion for a directed verdict of not guilty.

> **C.** III. The trial court erred by not granting a verdict of not guilty on the felony charge.

In his argument on this third issue, Walters mounts an attack on the competence and credibility of patrolman supervisor Patterson, who administered the intoxilizer test to the Appellant. On direct examination, Patterson testified that the State of Mississippi had certified him to operate the intoxilizer and that he had conducted such tests for "somewhere in the neighborhood of ten years." He further testified that he completed an "operational check list" for models 4011A and 4011AS

intoxilizers. Walters's counsel responded as follows to Patterson's testimony about his completion of this sheet: "Why don't you just introduce his check sheet? That will be fine with us." The State responded, "Your Honor, we introduce the check sheet by stipulation." Patterson then testified that he followed the procedure for operating the intoxilizer. The Court notes that this operational check list contains eighteen steps, all of which Patterson checked as he conducted this test. Patterson concluded his direct testimony by stating the result of the test, which was 221.

The record contains the following cross-examination of Patterson by Walters' counsel:

Q. That's not really what I am asking you. What I am asking you is, when it reads .22 or 22 -- whatever, what does that mean?

A. That means he's intoxicated.

Q. I know it means he's intoxicated, but in relation to the percentage of blood alcohol, as to what the statute requires that say -- for it to tell -- that the machine tell ? Do you know what it means in relation to that -- if it's so many deciliters per milliliter or so many centimeters per millimeter -- I'm sorry, per liter?

A. I don't believe I'm qualified to answer, because I'm not an expert. The only thing I was taught was to calibrate the machine and whether, you know, it was functioning right.

Q. I'm not trying to make you an expert. That's mathematics. You don't know which one that means?

A No.

Q Pardon me?

A No.

Q You don't?

A No, sir.

Q. Okay. Well, the statute requires that it be a certain percentage of the blood . . . composed of alcohol in proportion to the individual body weight. You can't look at that and say what that was?

A No, sir.

Q Thank you.

Based on the foregoing cross-examination of Patterson, Walters argues as follows:

> [O]n cross-examination [Patterson] admitted that he had no idea or concept as to what those figures meant and consequently he could not know whether or not the machine was working properly not whether or not it was properly calibrated.

Walters also reminds us that it is the State's burden to establish that he was properly tested.

In *Fisher v. City of Eupora*, 587 So. 2d 878, 888 (Miss. 1991), the Mississippi Supreme Court established that "[e]ffective July 1, 1983, the Legislature . . . made it unlawful for a person to operate a vehicle who has ten one-hundredths percent (.10%) or more by weight volume of alcohol in the blood as shown by a chemical analysis." Thus, "The Legislature . . . mandated that a showing of .10% or more by weight volume of alcohol in the blood is a per se violation." *Id.* In the case *sub judice*, officer Patterson testified that Walters had .221% weight volume of alcohol in his blood. Pursuant to *Fisher*, officer Patterson's testimony was sufficient to establish a prima facie case of Walters' guilt of Felony DUI. Moreover, there was the testimony of the arresting officer, patrolman Milton Ray Smith, that he observed Walters cross the yellow line while he was driving and that he smelled an odor of alcohol when Walters emerged from the car. According to Smith, Walters admitted that he would fail a field sobriety test.

"In passing upon a motion for a directed verdict, all evidence introduced by the state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled." *Smallwood v. State*, 584 So.2d 733, 740 (Miss. 1991). In *Holloman v. State*, 656 So.2d 1134, 1142 (Miss. 1995), a case in which the appellant had been convicted of maiming while driving under the influence , the Mississippi Supreme Court reiterated the frequently repeated standard of review for determining whether the evidence was sufficient to withstand a motion for a directed verdict:

> The evidence is viewed in the light most favorable to the State. All credible evidence supporting the conviction is taken as true; the State receives the benefit of all favorable inferences reasonably drawn from the evidence. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). . . . Only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded juror could only find the accused not guilty will this Court reverse.

Unless officer Patterson's testimony was wholly incredible, the State's evidence clearly established a prima facie case of Walters's guilt of felony DUI. The State's evidence established that: (1) Walters had been convicted of both DUI -- first offense -- and DUI -- second offense and (2) Walters' blood alcohol content was .221%, an amount more than double the statutorily established minimum of .10%, after patrolman Smith had first observed him driving a vehicle with a missing tail light across a yellow line. Patterson's testimony was in the nature of "expert opinion" that Walters blood alcohol content was .221%. In *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1166 (Miss. 1992), the Mississippi Supreme Court explained:

> Expert opinions, of course, are not obligatory or binding on triers of fact but are advisory in nature. The jury may credit them or not as they appear entitled, weighing and judging the expert's opinion in the context of all of the evidence in the case and "the jury's own general knowledge of affairs . . . ."

The trial judge found Patterson's testimony sufficiently persuasive, regardless of Walters' perceived weaknesses, to find "beyond a reasonable doubt" that Walters was guilty of felony DUI. Thus, we

conclude that the State met its burden of proof in establishing that Walters had indeed operated a motor vehicle while under the influence of an intoxicating liquor and that the trial judge did not err when he denied Walters' motion for a verdict of not guilty of the felony charge. We thus resolve this third issue adversely to Walters.

V. Summary

The heart of Walters' appeal is the issue of whether his lack of representation by counsel when he was convicted of DUI -- second offense -- vitiated the State's use of that second conviction to establish his guilt of felony DUI. Clearly, it did not. The State's evidence established a prima facie case of Walters' guilt of Felony DUI; and we defer to the trial judge's specific finding beyond a reasonable doubt of his guilt of this crime. Thus, this Court affirms the trial court's judgment of Walters' guilt of felony DUI and sentence which it imposed upon him.

THE JONES COUNTY CIRCUIT COURT'S JUDGMENT OF APPELLANT'S GUILT OF FELONY DUI AND ITS SENTENCE OF APPELLANT TO SERVE FIVE YEARS IN THE STATE PENITENTIARY, WITH FOUR YEARS SUSPENDED, LEAVING ONE YEAR TO SERVE, AND THE PAYMENT OF A FINE OF $2,000 AND ALL COURT COSTS UPON RELEASE FROM CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

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