

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00128 COA

EARL LUTER

APPELLANT

v.

CITY OF COLUMBIA

APPELLEE

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

TRIAL JUDGE: HON. MICHAEL EUBANKS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF MARION COUNTY

ATTORNEY FOR APPELLANT:

A. RANDALL HARRIS

ATTORNEY FOR APPELLEE:

SCOTT PHILLIPS

DISTRICT ATTORNEY: SCOTT PHILLIPS, CITY PROSECUTOR

NATURE OF THE CASE: CRIMINAL - SECOND OFFENSE MISDEMEANOR DRUNK
DRIVING

TRIAL COURT DISPOSITION: PAYMENT OF A FINE, COSTS AND ASSESSMENTS
TOTALING \$1220.00 WITHIN ONE YEAR FROM DATE OF JUDGMENT

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Earl Luter appeals from his conviction in the Circuit Court of Marion County for second offense misdemeanor drunk driving. Finding no merit to this appeal, we affirm.

I. FACTS

Joe Van Parkman was the Assistant Chief of Police for the City of Columbia. On March 13, 1993, at approximately 11:45 A.M., Parkman received a call over his police radio. He was alerted that a small white Toyota bearing the license plate number NCB 960 was proceeding toward Columbia on Highway 13. Parkman was advised that this vehicle had run several cars off the road.

As Parkman patrolled Highway 13, he observed a white Toyota bearing the same tag number at the drive-through teller's window of the local Trustmark National Bank. The Toyota fit the description of the offending vehicle. Parkman drove up to the Toyota, exited his car, and then walked up to the window of the Toyota. The Toyota's motor was running. Parkman observed the male driver sitting "under the wheel" of the vehicle. The driver was Luter.

Parkman detected the heavy odor of alcohol, and he observed that Luter's eyes were dilated and that his speech was slurred. Parkman opened the door of the Toyota, switched off the ignition and told Luter to exit the vehicle. Luter could not do so without help from Parkman. Luter then failed the field sobriety test that Parkman administered to him. At that point, Parkman advised Luter that he was going to take him into custody and that he would be transported to the Marion County Sheriff's Department for a breath intoxylizer examination. Luter then offered to give Parkman his payroll check in exchange for not taking him to jail.

After Parkman had handcuffed Luter and placed him in his police car, Officer Greg Elkins of the Columbia Police Department arrived at the scene. Parkman secured the Toyota and then transported Luter to the jail. At the jail, Elkins offered Luter the opportunity to take a breath intoxylizer examination. Luter refused. At that point, Elkins charged Luter with refusal to submit to a chemical intoxication examination and with driving while intoxicated.

In view of a previous conviction for drunk driving, Luter was tried before a municipal court judge for the misdemeanor of second offense drunk driving. After being found guilty, Luter took advantage of his right to a *de novo* trial before the Circuit Court of Marion County. At the conclusion of his circuit court jury trial, Luter was again found guilty. The circuit judge imposed fines and assessments upon Luter totaling \$1,220.00. Luter filed a motion for a new trial, which was subsequently denied. Luter now appeals.

II. DISCUSSION

a) Was Luter Subjected to An Illegal Arrest?

Luter argues that the trial court erred in not granting him a directed verdict at the conclusion of the prosecution's case because his initial arrest, which was conducted without a warrant, was conducted in violation of section 99-3-7(1) of the Mississippi Code. We disagree.

Section 99-3-7(1) of the Mississippi Code states in pertinent part:

(1) *An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. . . .*

Miss. Code Ann. § 99-3-7(1) (1972) (emphasis added). Citing this provision, Luter argues that since his offense qualified as a misdemeanor and not a felony, the only way that he could be properly arrested without a warrant would be if an "indictable offense" was committed in Parkman's presence. Luter further argues that because Parkman did not witness Luter operating his Toyota on a public road or highway but instead came upon Luter's Toyota as it was idling in the private parking lot of a bank, there was no evidence showing that Luter committed the misdemeanor offense of drunk driving in Parkman's presence.

We have examined section 63-11-30 of the Mississippi Code, the provision under which Luter was charged and convicted. It states in pertinent part that "It is unlawful for any person to drive or otherwise *operate a vehicle within this state* who (a) is under the influence of intoxicating liquor" *Id.* § 63-11-30(1)(a) (1972) (emphasis added). As we read the provision, the requirements of the offense are that the person (1) operate (2) a vehicle within the State of Mississippi (3) while under the influence of alcohol. The provision does not require that such operation occur on a public road or highway. Moreover, we are of the opinion that when Parkman observed Luter sitting behind the wheel of his Toyota while it was idling in the parking lot of the bank, this constituted operation of a vehicle. There is no dispute that Luter was intoxicated at the time that Parkman came upon him. Thus, all three requirements of subsection (a) of the statute were satisfied in Parkman's presence. An indictable offense was therefore being committed in Parkman's presence when he first encountered Luter. Accordingly, Parkman's arrest of Luter met the requirements of section 99-3-7(1). Luter's contention that his arrest was illegal therefore fails.

b) Was the Charging Affidavit Legally Insufficient to Support a Conviction for Second Offense Drunk Driving?

The charging affidavit in this case was the "Uniform Traffic Ticket" issued by Elkins. On the face of this citation, Elkins had indicated that Luter was being charged under section 63-11-3(1)(a) of the Mississippi Code for driving a motor vehicle while being intoxicated. Elkins's citation also indicated that Luter had previously been convicted of a violation of section 63-11-30(1)(a) and that he was therefore being charged as a second time offender under the same statute. Citing *Ashcraft v. City of Richland*, 620 So. 2d 1210 (Miss. 1993), Luter contends that, in view of the citation's omission of the details of his first drunk driving conviction, the citation was legally insufficient to support his conviction as a two-time offender. We disagree.

In *Ashcraft*, the defendant had been charged and convicted under section 63-11-30 for a third offense drunk driving misdemeanor. As in the present case, the charging affidavit was the "Uniform Traffic Ticket" issued by the arresting officer. That citation, however, while stating that the defendant had been previously convicted two times under the statute, failed to specify that the second of those

previous convictions entailed a conviction *as a second time offender*. Quoting one of its previous decisions in which the defendant had been prosecuted under section 63-11-30 as a four-time offender, *Page v. State*, 607 So. 2d 1163 (Miss. 1992), the Mississippi Supreme Court discussed the structure of section 63-11-30 and why such a specification was necessary:

[Section 63-11-30] increases the penalty of each succeeding violation of the statute to the point where a fourth or subsequent violation may be punished as a felony. Each subparagraph of § 63-11-30(2) represents a separate crime with separate penalties. Section 63-11-30(2)(a) establishes an offense and penalty for the first conviction under subsection (1). Section 63-11-30(2)(b) establishes a second offense with its attendant, graduated penalty. Section 63-11-30(2)(c) establishes a third offense and graduated penalty, and Section 63-11-30(2)(d) establishes a fourth or felony offense and graduated penalty. *Thus, each prior conviction is an element of the felony offense, and each must be specifically charged.* Here, the indictment tells Page nothing more than that he has been convicted five times previously for violating § 63-11-30(1). *For all we know, Page was convicted and punished as a first offender under § 63-11-30(2)(a) each and every time.* The indictment fails to allege requisite elements of the felony offense, i.e., that Page has been convicted previously of a first offense violation of § 63-11-30(1) as provided in § 63-11-30(2)(a), and thereafter of a second offense violation under § 63-11-30(1), after having been convicted for a first offense, as provided in § 63-11-30(2)(b), and thereafter of a third offense violation of § 63-11-30(1), after having been convicted of a second offense, as provided in § 63-11-30(2)(c) of conviction of first, second and third offense. . . .

Ashcraft, 620 So. 2d at 1212(emphasis added) (quoting *Page*, 607 So. 2d at 1168).

As we read both *Ashcraft* and *Page*, the details of the previous convictions do not exist as ends in and of themselves. Rather, they are important only insofar as they make it clear that the requisite elements of each graduated offense under section 63-11-30(2) have been charged and proved and that the previous convictions did not entail convictions for repeat first time offenses.

The present case is factually distinguishable from the situations involved in both *Ashcraft* and *Page*. The fact that Luter was only prosecuted as a second time offender makes any failure to specify the exact status of his first conviction irrelevant. There can be no doubt that the first time that Luter was convicted under section 63-11-30 he was prosecuted and convicted as a first time offender. Such a status is all that subsection (2)(b) requires in order that a conviction as a second time offender be valid. Luter's present conviction as a second time offender was adequately charged in the citation, even though the details of his previous conviction may have been omitted. Luter's argument that the citation was legally inadequate as a charging document therefore fails.

THE JUDGMENT OF THE CIRCUIT COURT OF MARION COUNTY FINDING LUTER GUILTY OF DRIVING UNDER THE INFLUENCE AND SENTENCING HIM TO PAY \$1220.00 IN FINES, COSTS AND ASSESSMENTS IS AFFIRMED. COSTS ARE ASSESSED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN,

PAYNE, AND SOUTHWICK, JJ., CONCUR.