IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2003-KA-01816-COA

OMAR MOHAMED ALI A/K/A OMAR M. ALI — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	8/8/2003
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES D. FRANKS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	JOHN W. CHAMPION
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR (DUI 3RD): SENTENCED TO SERVE A TERM OF FIVE (5) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH FOUR (4) YEARS SUSPENDED AND ONE (1) YEAR TO SERVE.
DISPOSITION:	AFFIRMED - 12/07/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE BRIDGES, P.J., CHANDLER AND GRIFFIS, JJ.

BRIDGES, P.J., FOR THE COURT:

¶1. In a jury trial in the Circuit Court of Desoto County, Mississippi, Omar Mohamed Ali was found guilty of a third offense of felony DUI. Ali was tried in absentia. The trial judge sentenced Ali to five years in the custody of the Mississippi Department of Corrections with four years suspended. Ali now appeals on the following issues:

STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR IN ALLOWING THE TRIAL OF ALI IN ABSENTIA?

II. DID THE TRIAL COURT ERR IN ADMITTING IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE OF INTOXILYZER TEST RESULTS WHEN THE INDICTMENT ALLEGED A VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 63-11-30(1)(a) AND NOT SECTION 63-11-30(1)(c)?

III. DID THE TRIAL COURT ERR IN OVERRULING ALI'S MOTION FOR A DIRECTED VERDICT?

FACTS

¶2. A little past midnight on December 13, 2002, Chris Cline, a patrolman with the Horn Lake Police Department, observed a white GMC Yukon traveling on Highway 302 cross over into the center turn lane four times. Cline pulled the car over and noticed the odor of an intoxicating beverage and bloodshot eyes on the driver. The man driving was Omar Ali, and when asked to get out of the car the patrolman noticed that Ali was unsteady, having to keep his hand on the car to balance himself.

¶3. Ali told Cline he had only consumed a single beer, but Ali failed both field sobriety tests and was placed under arrest. At the police, station the officers administered a breath test on Ali using the Intoxilyzer 5000. This test was performed approximately a half hour after the arrest and the result was 0.090%. The legal limit for intoxication is 0.080%.

¶4. The indictment alleged Ali violated Mississippi Code Annotated section 63-11-301(a) by operating a motor vehicle while under the influence of intoxicating liquor. This was Ali's third offense under this statue after having twice been convicted in Shelby County, Tennessee for DUI. A jury trial was to be held on July 15, 2003. The morning of trial both Ali and his attorney were present at 8:30 a.m. However, there was a trial that was not completed and they were to return that afternoon to begin their trial. Ali did not return that afternoon and his attorney's motion for continuance was denied. Officer Cline was the sole

witness in the case since Ali did not have any witnesses testify for the defense and obviously did not testify on his own behalf. The motions for directed verdict and JNOV made by Ali's attorney were denied.

ANALYSIS

I. DID THE TRIAL COURT ERR IN ALLOWING THE TRIAL OF THE ALI IN ABSENTIA ?

¶5. The trial of Ali was set to begin at 8:30 a.m. on July 15, 2003. Ali was present at that time but the court requested the parties to come back at 1:00 p.m. because a trial was still under way and would be finished by the afternoon. At 1:30 p.m. Ali still was not present and the prosecutor wished to proceed without him. Ali's attorney made a motion for a continuance which was ultimately denied. In the debate over the issue, the parties established that a statement would be given to the jury in the form of a jury instruction regarding Ali's absence. However, at this time, Ali's attorney believed Ali was merely stuck in traffic on the interstate and would appear in court soon. Ali never reappeared in the courtroom.

¶6. There is a long history of precedent for the constitutionality of trial in absentia under Mississippi Code Annotated section 99-17-9. *See Thomas v. State*, 117 Miss. 532, 78 So. 147 (1918); *Williams v. State*, 103 Miss. 147, 60 So. 73 (1912). There is no support for the claim that Ali being tried in absentia violates the U.S. Constitution. The Mississippi Supreme Court in *Jefferson v. State*, 807 So. 2d 1222 (¶14) (Miss. 2002) carved out an exception, allowing a trial in absentia based on willful, voluntary and deliberate actions by a defendant in avoiding trial.

¶7. In the present case Ali was clearly aware of the date of his trial especially since he was present in the courtroom earlier that day. Ali was told the trial would begin at 1:00 p.m. and assured his attorney he would return. These actions show Ali's absence was willful, voluntary and deliberate. A jury instruction was given to the jury requesting them not to make any assumptions regarding Ali's absence when considering his guilt or innocence. Thus, we find no error in the trial court's decision to try Ali in absentia.

II. DID THE TRIAL COURT ERR IN ADMITTING IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE OF INTOXILYZER TEST RESULTS WHEN THE INDICTMENT ALLEGED A VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 63-11-30(1)(a) AND NOT SECTION 63-11-30(1)(c)?

¶8. It is well settled that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Parker v. State,* 606 So. 2d 1132, 1136 (Miss. 1992); *Johnston v. State*, 567 So. 2d 237, 238 (Miss.1990) (citing *Hentz v. State,* 542 So. 2d 914, 917 (1989)). "Unless the trial judge's discretion is so abused as to be prejudicial to the accused, this Court will not reverse his ruling." *Parker*, 606 So. 2d at 1136.

¶9. In Mississippi Code Annotated section 63-11-30: Operation under influence of alcohol or other impairing substance, the related sections read as follows:

> (1) 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; . . . (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter. . . .

¶10. The introduction of the Intoxilyzer result was just one of several pieces of evidence the prosecution used to prove Ali was "under the influence" as required in sub-part (1)(a). Officer Cline testified about the results of two field sobriety tests, the odor of an intoxicating beverage and the initial observation of Ali's driving. When considering the evidence of the Intoxilyzer result in conjunction with the overall proof presented against Ali, it is our opinion it was not an abuse of the trial court's discretion to admit the evidence.

III. DID THE TRIAL COURT ERR IN OVERRULING ALI'S MOTION FOR DIRECTED VERDICT?

¶11. Ali is procedurally barred from asserting this issue. In his brief Ali claims he should have been granted a directed verdict because the State failed to prove Ali had been convicted twice by the Tennessee courts of a violation of Mississippi law and the State failed to amend its indictment to conform with the proof. However, when the prosecution admitted certified abstracts of Ali's prior convictions Ali was given an opportunity to object to the evidence and said, "I have no objections. Those were provided to me in discovery. That's fine." Also, at tria,l Ali's grounds for directed verdict were that the State did not have an expert testify regarding the results of the Intoxilyzer.

> The indictment could have been amended had the variance been called to the attention of the trial court. Had the appellant mentioned the variance in her motion for a directed verdict, during the trial or in her motion for a new trial, the indictment could then have been amended. Since the variance between the indictment and the proof is not jurisdictional and is not fatal, failure to call the variance to the attention of the trial court is considered a waiver of any objection thereto.

Banks v. State, 394 So. 2d 875, 877 (Miss. 1981).

¶12. THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF CONVICTION OF THIRD OFFENSE FELONY DUI AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FOUR YEARS SUSPENDED IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

MYERS, CHANDLER, GRIFFIS AND ISHEE, JJ. CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., LEE, P.J. AND BARNES, J.

IRVING, J., DISSENTING:

¶13. The majority, relying upon *Jefferson v. State*, 807 So. 2d 1222 (Miss. 2002), finds that the trial court did not err in trying Mohamed in absentia. I believe that the majority has misread *Jefferson* as establishing a bright line rule that a criminal defendant may be tried in absentia if he has knowledge of his

trial setting and fails to appear for trial. I do not believe that *Jefferson* establishes such a bright line rule. Further, I believe the facts of our case are undeniably distinguishable from the facts in *Jefferson*. Consequently, I respectfully dissent. I would reverse and remand this case for a new trial.

¶14. In *Jefferson*, John Wayne Jefferson's trial date was March 20, 2000. Jefferson did not appear for trial on that date. His trial was rescheduled for March 22 and a warrant for his arrest was issued. Jefferson did not appear for trial on the new date. Consequently, he was tried in absentia. *Id*. at (¶¶1-3).

¶15. Before proceeding to try Jefferson in absentia, the *Jefferson* trial judge conducted a hearing in chambers. During the hearing, it was revealed (1) that Jefferson was present for his arraignment when the March 20 trial date was set, (2) that beginning on March 1, Jefferson's counsel had attempted, without success, to reach Jefferson via telephone, (3) that on March 13, defense counsel sent a letter to Jefferson advising him that his trial was set for March 20, (4) that Jefferson responded to the letter by calling his counsel on March 14 at which time Jefferson and his counsel discussed the case for approximately thirty minutes, (5) that during the telephone conversation, defense counsel advised Jefferson that the plea date had been changed to March 16 and that Jefferson needed to come to court on that date even if he was not going to plead guilty, (6) that Jefferson did not come to court on March 16 as instructed, (7) that on March 19, defense counsel tried unsuccessfully to reach Jefferson by telephone, using the same telephone number that he had used previously to reach Jefferson, (8) that on March 20, defense counsel tried again, to no avail, to reach Jefferson by telephone, (9) that although defense counsel did not speak to Jefferson on March 20, he did speak to Jefferson's cousin who advised defense counsel that she had telephoned Jefferson's mother to let her know that Jefferson's counsel was looking for him, and (10) that Jefferson's counsel called the same telephone number each day following the March 20 call and spoke with the same

woman who advised him that she had not seen nor spoken with Jefferson since the previous week. *Jefferson*, 807 So. 2d at (¶¶3-5).

¶16. During the hearing on Jefferson's motion for a new trial, a long-time acquaintance of Jefferson testified that Jefferson had told him that Jefferson was "going to run." The defense neither questioned the acquaintance nor offered any evidence to counter or contradict the testimony of the acquaintance. *Id*. at (¶5)

¶17. In affirming the trial judge's decision to try Jefferson in absentia, the *Jefferson* court stated, "By our ruling today, we do not overrule *Sandoval* [*v*. *State*, 631 So. 2d 159 (Miss. 1994)] and its progeny; rather *we carve out an exception based on willful, voluntary and deliberate actions by a defendant in avoiding trial, such as those presented here*." *Jefferson*, 807 So. 2d at 1127 (¶18). (emphasis added).

¶18. In *Sandoval*, Francisco Garza Sandoval was scheduled to go to trial on December 3, 1990. He attended pretrial motions on December 1 and was in his attorney's office on December 2 until 5:15 p.m. His attorney informed him to be back in the attorney's office no later than 8:00 a.m. on December 3, the day of the trial. Sandoval did not appear at his attorney's office as requested. When the court convened, Sandoval's counsel advised the court that, as of that moment, he had not been able to locate Sandoval. Counsel then advised the court that he was not ready for trial and moved for a one-week continuance which was promptly denied.

¶19. In denying the motion for a continuance, the trial court stated that Sandoval voluntarily absented himself from what he knew to be a trial date and therefore, had waived his presence at trial.

¶20. On appeal of the trial court's decision, the *Sandoval* court acknowledged well established law in Mississippi that an accused felon, present at the commencement of his trial, may thereafter waive his presence by absenting himself from the trial. However, the court held that the trial judge erred in concluding

that Sandoval, who did not appear for trial, had waived his right to be present. The *Sandoval* court clearly stated that section 99-17-9 of the Mississippi Code of 1972, "unchanged since 1857, expresses the legislative intent to limit waiver of trial presence of accused felons to those instances where the accused is in custody and consenting thereto."

¶21. Based on *Jefferson*, trying Mohamed in absentia was appropriate only if it can be said that he willfully, voluntarily, and deliberately avoided trial by engaging in actions at least as egregious as those in *Jefferson*. *Jefferson*, 807 So. 2d at 1227 (¶18). I do not think that to be the case.

¶22. In this case, Mohamed's trial was first set for July 8, 2003. He reported for trial on that date, but the State asked for and was granted a continuance because it did not have one of its witnesses present for trial. By agreement, the case was continued for one week until July 15. The court administrator, Jimmy Radford advised Mohamed to come back for trial on July 15 at 8:30 a.m. Mohamed showed up for trial as instructed at 8:30 a.m. on July 15, but the trial did not begin at that time because the State was trying another case. According to Mohamed's trial counsel, Mohamed told counsel that Mohamed would be back at 1:00 p.m. when Mohamed's trial was expected to begin. Mohamed's trial counsel also told the court that he instructed Mohamed to be back at 1:00 p.m. When Mohamed did not show up, Mohamed's trial counsel moved for a continuance which was denied, and the trial commenced.

¶23. Mohamed obtained new counsel and filed a motion for a new trial. During the hearing on the motion for a new trial, Mohamed, a native of Somalia with some language impediment, gave the following uncontradicted testimony:

> My lawyer, he never talked to me even two minutes. He tell me I'll call you when it's ready. The thing is ready. I didn't understand him. I said okay. Before that, they never send me any letter. He tell me you have a two. I call his secretary always. I never see him. So the next day they tell me you have eight, which was before that week. He called me around 7:45 morning on 8 morning at my house. So I drive down, and he tell me I'm

> going to get you another week, which is the 15th. I come 7:55. I was here. I meet him. He say they have another case. I'm going to call you. Go do what you do. I was doing my job. I'm not run. So that's what happened.

¶24. During the hearing on the motion for new trial, Mohamed's new counsel, who is also his appellate counsel, advised the court that on the morning of the trial, Mohamed appeared as instructed but that when the case could not go forward because another trial had not concluded, Mohamed left his cellular telephone number for his attorney to contact him. The attorney attempted to reach Mohamed but was not able to do so. While there is no way of knowing whether this representation was accurate, it is not disputed in this record. For whatever reason, Mohamed's trial counsel was not called as a witness, during the hearing on the motion for a new trial to rebut anything that was said by either Mohamed or his new counsel at the hearing.

¶25. Considering the uncontroverted facts as testified to during the hearing on the motion for a new trial, I do not believe that the trial judge acted properly in denying Mohamed's motion for a new trial, for it cannot be said that the facts here fall within that exception carved out in *Jefferson*. Therefore, for the reasons presented, I respectfully dissent. I would reverse and remand for a new trial.

KING, C.J., LEE, P.J., AND BARNES, J., JOIN THIS SEPARATE WRITTEN OPINION.