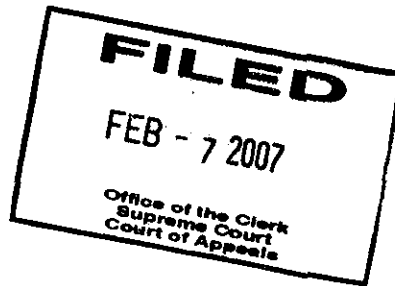


**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**BOBBY HEIDELBERG**

**APPELLANT**

**V.**



**NO. 2006-KA-1125-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

---

**BRIEF OF THE APPELLANT**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Bobby Heidelberg, #121149
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 7<sup>th</sup> day of February, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE CASE**

During the January 2003 Term of the Grand Jury, for the Circuit Court for the Second Judicial District of Jones County, Mississippi, Bobby Heidelberg was indicted for unlawfully, wilfully, and feloniously driving or operating a vehicle within the State of Mississippi on Highway 84 East, in the Second Judicial District, Jones County, Mississippi, while under the influence of an intoxicating liquor or other substance which impaired his ability to operate said vehicle, in violation of Miss. Code Ann. Sec. 63-11-30 (1972). After a jury trial, Mr. Heidelberg was convicted and sentenced to serve a term of 3 years in the state penitentiary.

**STATEMENT OF THE FACTS**

At approximately 1:41 a.m. while patrolling on Highway 84 east near Highway 184 at the city limits, Officer Larry Hayes of the Laurel Police Department, saw Bobby Heidelberg driving a vehicle which had a busted taillight. Officer Hayes conducted a traffic stop to advise Mr. Heidelberg

of the traffic violation. Once he approached the vehicle, he asked Mr. Heidelberg for his driver's license. Mr. Heidelberg informed him that his driver's license was suspended. At that point, Officer Hayes could smell an odor of intoxicating beverage coming from his vehicle. He noticed that Mr. Heidelberg's eyes were bloodshot and his speech was slurred. Mr. Heidelberg was confused and could not answer the questions as to where he was going and where he was coming from. Once Mr. Heidelberg exited the vehicle upon request by Officer Hayes, Officer Hayes noticed that he was unsteady on his feet. Officer Hayes offered Mr. Heidelberg the portable breath test, which he says Mr. Heidelberg refused. He also offered him the Intoxilyzer 5000, a test used to determine blood alcohol level and he says Mr. Heidelberg refused that test also. Because Mr. Heidelberg had been convicted of DUI 1<sup>st</sup> offense and DUI 2<sup>nd</sup> offense, he was charged with Felony DUI .

## **SUMMARY OF THE ARGUMENT**

### **I.**

#### **WHETHER THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE ELEMENTS OF FELONY DUI.**

Mr. Heidelberg was indicted and found guilty of Felony DUI as provided in Miss. Code Ann.

Sec. 63-11-30 (1)(a)(b)(1972)

(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;(b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle.

Mr. Heidelberg argues that the trial court committed fundamental error in omitting the element "**which impaired his ability to operate said vehicle**" from the instruction on Felony DUI.

Jury Instruction S-1 reads as follows:

*Bobby Heidelberg has been charged by Grand Jury indictment with the offense of Felony DUI.*

*If you find from the evidence in this case beyond a reasonable doubt that:*

- 1. The incident in this case occurred on or about the 18<sup>th</sup> day of August, 2002, in the Second Judicial District of Jones County, Mississippi;*
- 2. Bobby Heidelberg was driving or operating a motor vehicle;*
- 3. At the time Bobby Heidelberg was driving or operating said vehicle, the defendant was under the influence of intoxicating liquor; and*
- 4. Bobby Heidelberg had been previously convicted of driving under the influence on at least two other occasions within the previous five (5) years;*

*then you shall find the defendant, Bobby Heidelberg, guilty as charged.*

*If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Bobby Heidelberg not guilty of Felony DUI.*

In support of his argument, Mr. Heidelberg cites Shaffer v. Mississippi, 740 So. 2d 273 (Miss 1998), where the Supreme Court held that eliminating an element of the instruction constituted reversible error. In Shaffer, the defendant was convicted of depraved heart murder. However, the jury was given an instruction that failed to include the element of “evincing a depraved heart, regardless of human life.” The state argued that Mr. Shaffer should be procedurally barred from raising that issue on appeal because he objected upon different grounds at trial. The Supreme Court disagreed and stated that “instructing the jury on every element of the charged crime is so basic to our system of justice that it should be enforced by reversal in every case where inadequate instructions are given, regardless of a failure to object or making a different objection at trial.” Id. at 282.

“Just as the State must prove each element of the offense, the jury must be correctly and fully instructed regarding each element of the offense charged.” Failure to submit to the jury the essential

elements of the crime is “fundamental” error....Indeed, “[i]t is axiomatic that a jury’ verdict may not stand upon uncontradicted fact alone. The fact must be found via jury instructions correctly identifying the elements of the offense under the proper standards.” “Where the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required.” Id. at 274.

“It is rudimentary that the jury must be instructed regarding the elements of the crime with which the defendant is charged....Reversal on this issue is warranted.” Id.

The Court in Shaffer cited its ruling in Hunter v. State, 684 So. 2d 625, 636 (Miss. 1996). In Hunter, the defendant offered a confusing instruction, which the trial court refused. The State did not offer any instruction on the elements of the underlying offense of robbery. The Supreme Court held the State had a duty to ensure that the jury was properly instructed on the elements of the underlying crime. The Court found reversible error because even though the defendant did not submit a suitable instruction, it found that the State was obligated to do so. The Court in Hunter further stated, “It is horn book criminal law that before a conviction may stand the State must prove each element of the offense. Not only is this a requirement of the law of this State, due process requires that the State prove each element of the offense beyond a reasonable doubt.” Id.

The Court in Shaffer went on to cite Davis v. State, 586 So. 2d 817, 819 (Miss. 1991), where the Court stated that “a conviction is not valid where the prosecution does not prove each element of the charged offense beyond a reasonable doubt.” The Court further reasoned that, “a conviction is unenforceable where the jury does not find each element of the offense beyond a reasonable doubt. Where the jury is not even instructed on one of the vital elements of the offense, the conviction must not survive the scrutiny of this court.” See Shaffer, 740 So. 2d at 282.

In Ballenger v. State, 761 So. 2d 214 (Miss. 2000), the Supreme Court granted post



conviction relief and the conviction of capital murder and death sentence by lethal injection of Mrs. Ballenger was vacated and remanded for a new trial pursuant to the decisions in Hunter and Shaffer.

In Ballenger, the State did not offer an instruction on the elements of the underlying offense of robbery. The defendant offered a confusing instruction, which the trial judge refused. The Supreme Court held that the State had a duty to ensure that the jury was properly instructed on the elements of the underlying crime.

Along with relying on the Hunter and Shaffer decisions, the Court in Ballenger also cited Neal v. State, 451 So. 2d 743, 757 (Miss. 1984), “because the State has to prove each element of the crime beyond a reasonable doubt, then the State also has to ensure that the jury is properly instructed with regard to the elements of the crime.”

The Court in Ballenger went further and cited Screws v. United States, 325 U.S. 91,107 (1945), where Petitioner Screws, the sheriff of Baker County, Georgia, a policeman and a special deputy arrested Robert Hall and while Mr. Hall was handcuffed, the three petitioners began beating him with their fists and with a solid-bar blackjack. Even after they had knocked Mr. Hall to the ground, the petitioners continued to beat him from fifteen to thirty minutes until he was unconscious. He was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. The petitioners claimed Mr. Hall had reached for a gun and had used insulting language as he alighted from the police car. Mr. Hall died within the hour after having been taken to a hospital. The petitioners were charged with willfully depriving the deceased of federal rights and of a conspiracy to do so. The lower court instructed the jury that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner’s alleged assault. The United States Supreme Court in Screws reversed the lower court finding fundamental error because the jury was not instructed on the essential elements of the

offense. The Court stated that to convict it was necessary for the jury to be instructed that they had to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g., the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstance-the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

In the present case, because Mr. Heidelberg is over the age of 21, he submits that drinking alcoholic beverages is a legal right of his. He also submits that his defense was that his ability to drive was not impaired. He testified that he had drank some beers before 12 o'clock noon that day and hadn't had anything else to drink all day. T. 51. He was arrested after 1:41 a.m. T. 30. Also, Officer Hayes observed Mr. Heidelberg driving a vehicle which had a busted taillight. When he saw the busted taillight at that point he made a traffic stop. T. 30. When asked on cross examination whether he observed Mr. Heidelberg weaving in and out of the road, Officer Hayes answered "No. I wasn't behind him long enough to observe how he was driving." T. 37. Also, Officer Hayes testified that Mr. Heidelberg was unsteady on his feet, but had not placed this information in his report. T. 36. Even though counsel for Mr. Heidelberg failed to object during trial, pursuant to all of the above cited authority, it was "fundamental error" to fail to instruct the jury that in order to find Mr. Heidelberg guilty, they had to find that his ability to drive was impaired.

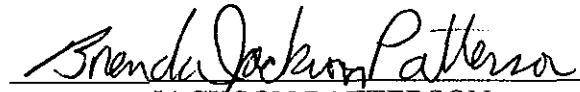
## CONCLUSION

Given that the State failed to instruct the jury on one of the elements of the charged offense, the State failed to prove Mr. Heidelberg guilty beyond a reasonable doubt. Therefore, this Court should vacate Mr. Heidelberg's conviction and sentence and remand this case to the circuit court for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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## CERTIFICATE OF SERVICE


I, Brenda Jackson Patterson, Counsel for Bobby Heidelberg, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Billy Joe Landrum  
Circuit Court Judge  
Post Office Box 685  
Laurel, MS 39441-0685

Honorable Anthony J. Buckley  
District Attorney  
Post Office Box 313  
Laurel, MS 39441-0313

Honorable Jim Hood  
Attorney General  
Post Office Box 220  
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This the 7<sup>th</sup> day of February, 2007.

  
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