

**COPY**

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

**KRISTOPHER R. PEACOCK**

**FILED**

**APPELLANT**

**MAR 26 2007**

**VS.**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**NO. 2005-KA-2190**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE COURT OF APPEALS OF MISSISSIPPI**

**KRISTOPHER PEACOCK**

**APPELLANT**

**VERSUS**

**NO. 2005-KA-2190-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR APPELLEE**

**STATEMENT OF THE CASE**

This appeal is taken from the Circuit Court of the First Judicial District of Hinds County. Kristopher R. Peacock stands convicted of murder and sentenced to a term of life imprisonment. (C.P.44) Aggrieved by the judgment rendered against him, Peacock has perfected an appeal to this Court.

**SUMMARY OF THE ARGUMENT**

The trial court did not abuse its discretion in setting aside Peacock's plea of guilty to Count Two prior to sentencing.

Peacock has no arguable claim of a violation of his protection against double jeopardy.

### **PROPOSITION ONE:**

The indictment returned against Peacock charged in pertinent part that he had murdered Robert Clifton Stubbs by shooting him (Count One) and that he had shot a firearm into a motor vehicle occupied by Jeremy Kimbrough (Count Two). (C.P.4) Immediately after this case was called for trial, the defendant indicated that he wished to enter an open plea of guilty to Count Two. (T.2) The court then conducted a plea colloquy to ensure that the defendant understood his rights and that he was entering this plea freely, knowingly and voluntarily, (T.2-6) Thereafter, the court asked the state to provide the factual basis for the plea. (T.6) The assistant district attorney responded as follows:

Your Honor, on or about August 16<sup>th</sup> of 2003, this defendant along with two other individuals was traveling down State Street towards High Street in the first judicial district of Hinds County. At that time they encountered a vehicle being occupied by Mr. Robert Clifton Stubbs and his passenger at the time, Jeremy Kimbrough.

Some kind of argument or discussion ensued at two or three different red lights, and at one point after the third or fourth red light Mr. Peacock, who was the passenger in the vehicle being occupied by Robert Edwards and Lowell Leach, turned around in the passenger seat and shot six times at the vehicle which was occupied by Mr. Jeremy Kimbrough who survived the shooting. Then and there he was charged with shooting into an occupied vehicle.

(T.6-7)

Under questioning by the court, the defendant admitted his guilt to this charge. The court then accepted the plea, but announced that it would "defer sentencing on this charge until there is a jury verdict in the case on the other charge." (T.7) Subsequently, the prosecutor was allowed to conduct this line of questioning of the defendant:

Q. Mr. Peacock, are you admitting that you alone were the only person that fired at the vehicle that was occupied by Robert Clifton Stubbs and Jeremy Kimbrough?

A. Yes, ma'am.

Q. You are not alleging that Robert Edwards or Lowell Leach in any way, shape or form ever had a gun that night or fired at that vehicle?

A. No, ma'am.

Q. And you are not disputing the fact that there were six shell casings found on the scene, that you fired at least six times?

A. I'm not exactly sure the amount of times.

BY MS. MANSELL: That's all the questions I have.

BY THE COURT: Thank you. Anything further at this time from the defendant?

BY THE DEFENDANT: Yes, sir. Your Honor, I did shoot at the vehicle. I was not shooting at the driver. I had no deliberate design to kill anyone. It was a mistake. I did not mean to kill anyone. I did it out of malice, and it was at the heat of the moment. And I'm very, very sorry for what happened. I understand the results of what happened. I understand. And it was— I just intended to scare the people in the car. I didn't mean to hurt anyone.

(T.7-9)

Near the end of the state's case in chief, the court conducted a bench conference, set out in pertinent part below:

BY THE COURT: Just before the start of this trial on Monday of this week the defendant, Kristopher R. Peacock, pled guilty to count two of the indictment which stated that ... he did willfully and unlawfully shoot a firearm into a motor vehicle...

During the plea, in the facts portion of the statement by the Assistant District Attorney it was stated that he had shot six

times at the vehicle in which Jeremy Kimbrough was the passenger and that Robert Clifton Stubbs was also a passenger— not a passenger, strike that, also in the vehicle. And that according to the Assistant District Attorney, then and there charged, he being Mr. Peacock, was charged with shooting into an occupied vehicle.

During the questioning at the plea by the Assistant District Attorney of Mr. Peacock, Mr. Peacock testified that he shot at the vehicle, that he had malice, that he fired in the heat of the moment, and that it was a mistake. At that time the Court accepted the plea but deferred sentencing until a verdict on count one.

It is, of course, discretionary in a trial court as to whether to accept a guilty plea. During the testimony at the trial of this case there was testimony that there were no spent bullets or projectiles found except one in the body of the victim, Mr. Stubbs; that there were six shell casings found on the scene.

The Court was under the impression at the time of the plea that there were multiple shots fired into the vehicle. And the Court should have made further inquiry at the time about the actual facts of this case. In hindsight the Court was not fully informed about the plea, the circumstances of the plea, and as stated, the Court should have made further inquiries of both counsel for the State and counsel for the defendant.

Although the relevant statute provides for shooting at or into a vehicle, the indictment states specifically that he failed; that is, Mr. Peacock willfully, unlawfully shot a firearm into a motor vehicle. Therefore, it's the Court's opinion that there is a defect between the indictment and the proof that was offered to the Court. Accordingly, the Court is going to set aside and hold for naught the earlier plea of guilty to count two of the indictment.

(T.508-10)

The state was allowed to remand Count Two to the files. (T.510)

Peacock now contends the trial court committed reversible error in setting aside his plea. The state counters first that because the court had not sentenced Peacock, there

was no final judgment as to this count. *Gonzales v. State*, 915 So.2d 1108, 1110 (Miss.App.2005). Because there was no final judgment, and in view of the fact that a defendant has no absolute right to have his guilty plea accepted, the state submits the trial court retained its sound judicial discretion to set the plea aside. *Bennett v. State*, 933 So.2d 930, 940 (Miss.App.2006), citing *Williamson v. State*, 388 So.2d 168, 170 (Miss.1980); *Santobello v. New York*, 404 U.S. 257, 262 (1971); and *North Carolina v. Alford*, 400 U.S. 25, 38 fn. 11 (1970).

Implicit in the court's ruling is a finding that the plea lacked a valid factual basis, i.e., that it failed to "manifest an unequivocal and knowledgeable admission of the offense charged." *Bennett*, 933 So.2d at 940. Indeed, as the court noted, Count Two of the indictment charged the defendant with shooting *into* a motor vehicle. During the plea colloquy, the defendant admitted only that he had shot *at* the vehicle. Under these circumstances, the court did not abuse its discretion in setting aside a plea which had not yet resulted in a final judgment.<sup>1</sup> Peacock's first proposition lacks merit.

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<sup>1</sup>Peacock obviously sought to use his "conviction" of shooting into a motor vehicle as a bar to the state's prosecuting him for murder. The fact remains that the acceptance of the plea, without imposition of sentence, was not a final judgment. Even if it had been a valid conviction, the state submits the Double Jeopardy Clause would not have barred Peacock's prosecution for murder. See argument under Proposition Two, *infra*.

**PROPOSITION TWO:**

**PEACOCK HAS NO ARGUABLE CLAIM OF A VIOLATION  
OF HIS PROTECTION AGAINST DOUBLE JEOPARDY**

After the jury was impaneled, the court heard the defendant's motion to dismiss Count One of the indictment on the ground that prosecution on this count was barred by the Double Jeopardy Clause. (T.170) The defense argued that Peacock's firing at or into the vehicle constituted a "single transaction" and that he could be tried for only one offense arising out of that transaction. (T.172-73) The state countered as follows, in pertinent part:

The law on double jeopardy is clear. And as I will quote from the Mississippi Supreme Court, Powell versus State of Mississippi, 806 So.2d 1069, the Court stated that double jeopardy consists of three separate constitutional protections. One, prosecution [protection] against a second prosecution for the same offense after acquittal. Two, that protection against a second prosecution for the same offense after conviction. And three, protection against multiple punishments for the same offense. In other words, the double jeopardy clause bars successive prosecutions for the same offense.

They then further stated that they apply the same elements test as articulated by the— United States Supreme Court. Blockburger versus the United States. The Blockburger test inquires whether each offense contains an element not contained in the other. If not, they are the same offense, and double jeopardy bars additional punishment and successive prosecution.

\* \* \* \* \*

The indictment states that Kristopher Peacock on count one did then and there willfully and unlawfully, without authority of law, kill and murder Robert Clifton Stubbs, a human being, with deliberate design to effect the death of Robert Clifton Stubbs, in violation of Section 97-3-19(1) by shooting the said Robert Clifton Stubbs. In count two it states that he did willfully and unlawfully shoot a firearm into a motor vehicle, a Pontiac Gran Prix, then occupied by Jeremy Kimbrough in violation of Section 97-25-47.

Your Honor, those elements are completely distinct and

separate. Nowhere in those are the elements the same, even the victims in each count are different. And as these lists plainly show, each of the offenses contains an element lacking in the other. Since each of these two offenses contains an element lacking in the other, they survive the Blockburger scrutiny, and his claim for double jeopardy is without merit.

(T.173-75)

Having taken the motion under advisement, the trial court ultimately overruled it, finding that "these two offenses are different offenses" within the meaning of *Blockburger v. United States*, 284 U.S. 299 (1932). (T.298)

The state submits first that Peacock clearly has not suffered a violation of any of the three rights guaranteed by the Double Jeopardy Clause.<sup>2</sup> After the court overruled the motion to dismiss the murder charge, it set aside the plea of guilty to the charge of shooting into a motor vehicle; that count was remanded to the files. Peacock stands convicted of one charge: murder. He simply does not have even a colorable claim of a double jeopardy violation at this juncture.

Solely for the sake of argument, the state submits that the assistant district attorney properly argued, and the court correctly found, that prosecution of both counts was permissible in light of the "same elements" test set out in *Blockburger*. Because each offense required proof of a fact that the other did not, they were not the same offense for

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<sup>2</sup>"Double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense." *Bennett v. State*, 806 So.2d 1069, 1074 (Miss.2001), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

double jeopardy purposes. See also *Shook v. State*, 552 So.2d 841, 848-49 (Miss. 1989).



For these reasons, Peacock's second proposition should be denied.

**CONCLUSION**

The state respectfully submits the arguments presented by Peacock are without merit. Accordingly, the judgment entered against him should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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