IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID MARK HAVARD — APPELLANT

VS. — NO. 2006-KA-0603



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

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VERSUS — NO. 2006-KA-0603-COA

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# BRIEF FOR APPELLEE

## STATEMENT OF THE CASE

David Mark Havard was convicted in the Circuit Court of Wilkinson County on a charge of felony driving under the influence and was sentenced to a term of 10 years in the custody of the Mississippi Department of Corrections with five years suspended. (C.P.201) Aggrieved by the judgment rendered against him, Havard has perfected an appeal to this Court.

## SUMMARY OF THE ARGUMENT

Havard has failed to show an abuse of judicial discretion in the drawing of the jury.

Furthermore, the trial court did not abuse its discretion in refusing to allow Havard to strike William Jefferson for cause.

Finally, Havard's fourth proposition has no basis in the record. It is not properly before the Court at this juncture.

## ARGUMENT

## PROPOSITION ONE:

## HAVARD HAS FAILED TO SHOW AN ABUSE OF DISCRETION IN THE DRAWING OF THE JURY

Under this Propositions A. and B., Havard argues that the manner of drawing and summoning the jury violated the statutory requirements for jury selection and denied him his right to be tried by a fair and impartial jury.

At the conclusion of voir dire, the defense moved to quash the panel. Thereafter, the following was taken:

> BY MR. WHITTINGTON: ... Your Honor, a significant number of jurors on this panel, I believe, a number greater than eight or ten of the now panel of thirty-three was on the panel in October when we were here on this case. We respectfully submit that with that many jurors again being selected for jury service that for a percentage of thirty percent or more of the jurors on this panel appearing after having been on the October panel, that that fact on its face demonstrates that this panel was not randomly drawn as required by statute, specifically, 13-5-26. And it is simply a statistical impossibility, Your Honor, that that many jurors could again appear on this panel after having been on the panel in October.
>
> In addition, Your Honor, as the Court noted, when the Court began the voir dire in seating the jury, Jurors 39 through 43 were not even on the panel. We don't know where these jurors came from or how they came to be in Court today. And, Your Honor, that too demonstrates the prima fascia [sic] evidence that the statutory scheme of selecting jurors from a jury wheel into a jury box and then randomly drawn from that jury box that that procedure has simply not been followed in this case. And we have not other standing [sic] or idea whatsoever as to where these Jurors 39 through 43 came from or how they came to be summoned for jury duty today. They were on none of our panels at any time, but appeared here today and were qualified.

> BY THE COURT: It's the Court's understanding that these jurors were summoned with the February 13th, I believe. That jury was not used and I asked Mr. Allen to have those persons to come back. And that's where those names came from. But I instructed him to put them at the end of the docket, because we had not used them, but they appeared to insure that we had enough jurors. The Court is going to overrule your motion.
>
> (T.293-94)

Havard contends this ruling constitutes reversible error. The state counters that "[t]he jury laws of this state are directory and the selection of the jury in an irregular manner does not render it illegal." *Rhone v. State*, 254 So.2d 750, 752 (Miss.1971), quoted in *De La Beckwith v. State*, 707 So.2d 547, 598 (Miss.1997). "Unless the defendant shows that the method used was fraudulent or a radical departure from the method prescribed by statute as to be unfair or the prevent due process of law, the appellate court will not reverse." *Pratt v. State*, 870 So.2d 1241, 1245 (Miss. App. 2004). Finally, when there is no evidence to show that the defendant was not in fact tried by a fair and impartial jury, "error may not be predicated for an irregularity in drawing or impaneling the jury."[1] *Davis v. State*, 660 So.2d 1228, 1261 (Miss.1995), quoted in *Gates v. State*, 829 So.2d 1283, 1287 (Miss. App. 2002). Accord, *King v. State*, 857 So.2d 702, 725 (Miss.2003); *Darden v. State*, 798 So.2d 632, 633-34 (Miss.2001); *Adams v. State*, 537 So.2d 891, 894 (Miss.1989).

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[1]It is noteworthy that the court asked the panel during voir dire, "of those of you who were here, you say, in October on this same case, is there anything about that that would cause you to form– have already formed some kind of an opinion or would affect you in the deliberations of this case?" The jurors answered, "No." The court continued, "If so, please raise your number– or something." There was no response. (T.283)

Havard has not shown that the method used to draw the jury in this case was fraudulent or a departure so radical as to be unfair or prevent due process of law. Nor has he shown that the jury that was impaneled was not fair and impartial. In light of the authorities cited above, the state submits Havard's Propositions A. and B. should be denied.

## PROPOSITION TWO:

## THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW HAVARD TO STRIKE WILLIAM JEFFERSON FOR CAUSE

Havard contends additionally that the trial court committed reversible error in refusing to allow him to strike venireman William Jefferson for cause. Mr. Jefferson acknowledged that he had been involved in an automobile collision in which alcohol was involved. The court then inquired whether he could disregard that fact and decide the case on the basis of the evidence. Mr. Jefferson replied unequivocally, "Yes, ma'am." (T.276-77)

When the defense attempted to strike Mr. Jefferson for cause, the court ruled as follows:

> The Court specifically asked Mr. Jefferson if he could lay aside all of that and decide the case based upon the evidence presented in Court today; and he said that he could. With that the Court's going to overrule that.
>
> (T.291)

The trial court enjoys broad discretion to determine whether a prospective juror can be impartial. *Duncan v. State*, 939 So.2d 772, 778 (Miss.2006). The Supreme Court in *Duncan* elaborated that

> [t]o the extent that any juror, because of his relationship to one of the parties, his occupation, his past experience, or whatever, would normally lean in favor of one of the parties, or be biased against the other, or one's claim or the other's defense in the lawsuit, to this extent, of course, his ability to be fair and impartial is impaired. It should also be borne in mind that jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference. Harding v. Estate of Harding, 185 So.2d 452, 456 (Miss.1966); Howell v. State, 107 Miss. 568, 573, 65 So. 641, 642 (1914).
>
> 939 So.2d at 779, quoting *Scott v. Ball*, 595 So.2d 848, 850 (Miss.1992).

The state submits the trial court was in the best position to determine whether Mr. Jefferson could try the case fairly, solely on the basis of the evidence, despite his past experience. No abuse of discretion has been shown in the court's denial of the challenge for cause. Havard's third proposition should be denied.

**PROPOSITION THREE:**

**HAVARD'S FINAL PROPOSITION HAS NO BASIS IN THE RECORD; IT IS NOT PROPERLY BEFORE THE COURT AT THIS JUNCTURE**

Citing *Hood v. State*, 523 So.2d 302 (Miss.1988), Havard argues finally that his conviction and sentence should be reversed because one of the petit jurors, Kelisha Renay Andrews, served on the grand jury which returned the indictment against him.

The appellant is charged with Attempting to sustain this burden, Havard cites only the Record Excerpts. (R.E.21) (Brief for Appellant 12) This document purports to be a copy of the list of grand jurors who served on the grand jury which returned the indictment against Havard. However, it does *not* appear in the official record before this Court on direct appeal. Apparently, this document was appended to the Motion for

Post-Conviction Relief filed in the Circuit Court after the perfection of this appeal, at which time the circuit court had no jurisdiction over this matter. In any case, while the record does contain a list of the petit jurors, it is absolutely silent as to the members of the grand jury. (C.P.204)

Issues raised on appeal must have some basis in the record, and it is the duty of the appellant to make citations thereto. *Conley v. State*, 790 So.2d 773, 784 (Miss.2001), citing M.R.A.P. 28(a)(6). Attempting to sustain this burden, Havard has cited only a page of the "Record Excerpts" which has no basis in the appellate record.

In *Mason v. State*, 440 So.2d 318, 391 (Miss.1983), the Supreme Court stated the following:

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them. Phillips v. State, 421 So.2d 476 (Miss.1982); *Branch v. State*, 347 So.2d 957 (Miss.1977); *Robinson v. State*, 345 So.2d 1044 (Miss.1977); *Shelton v. Kindred*, 279 So.2d 642 (Miss.1973); and *Alexander v. Hancock,* 174 Miss. 482, 164 So. 772 (1935).

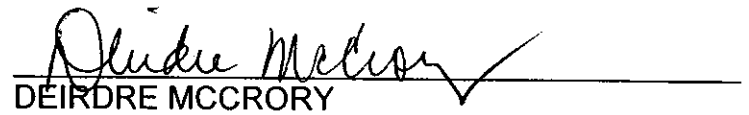
The state does not address the merits of Havard's allegation, or contend that he is forever barred from raising it. Rather, the issue must be decided upon a proper record. This would be a proper matter for a motion for post-conviction collateral relief. Because it has no basis in the certified direct appeal record, Havard's fourth proposition should be rejected at this juncture.

## CONCLUSION

The state respectfully submits the arguments presented by Havard are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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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This the 29th day of January, 2007.

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