

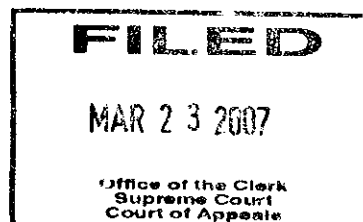
COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROCHESTER EUGENE PRESLEY

APPELLANT

V.



NO. 2006-KA-1195-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

Brenda Jackson Patterson, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROCHESTER EUGENE PRESLEY

APPELLANT

V.

NO. 2006-KA-1195-COA

STATE OF MISSISSIPPI

APPELLEE

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.

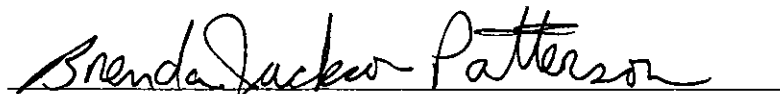
1. State of Mississippi
2. Rochester Presley, Appellant
3. Honorable Jon Mark Weathers, District Attorney
4. Honorable Robert B. Helfrich, Circuit Court Judge

This the 23rd day of March, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



BRENDA JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	
I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT MR. PRESLEY'S MOTION FOR DIRECTED VERDICT	3
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES

<u>James v. State</u> , 26 So. 929 (1900)	8
<u>Leflore v. State</u> , 535 So. 2d 68, 69 (Miss. 1988)	8
<u>McLain v. State</u> , 24 So. 2d 15 (Miss. 1945)	10
<u>Minor v. State</u> , 106 So. 2d 41 (Miss. 1958)	10
<u>Murphy v. State</u> , 566 So. 2d 1201,(Miss.1990)	7, 8

STATUTES

Miss. Code Ann. Sec. 97-17-33 (1972)	1
Miss. Code Ann. Sec. 97-17-42 (1972)	1
Miss. Code Ann. Sec. 99-19-81 (1972)	1

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROCHESTER EUGENE PRESLEY

APPELLANT

V.

NO. 2006-KA-1195-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

During the July 2005 Term and Recalled August 2005 Term of the Grand Jury, for the Circuit Court for the Twelfth Judicial District of Forest County, Mississippi, Rochester Eugene Presley, aka Ronald Starks, aka Zee Zee Zelazurra, aka Zee Zee Zela Zuro was indicted in Count I for Burglary in violation of Miss. Code Ann. Sec. 97-17-33 (1972), Count II for Grand Larceny - Auto Theft in violation of Miss. Code Ann. Sec. 97-17-42 (1972) and as an Habitual Offender under Miss. Code Ann. Sec. 99-19-81 (1972). After a jury trial, Mr. Presley was convicted and sentenced in Count I to serve seven years as an habitual offender in the Mississippi Department of Corrections and in Count II to ten years as an habitual offender. These sentences were to run consecutively.

STATEMENT OF THE FACTS

On November 12, 2004, between the hours of 8:30 and 8:45 p.m., Derick Minor took Rochester Presley to the Greyhound Bus Station in Hattiesburg Mississippi. However, once Mr. Minor dropped Mr. Presley off he did not wait until he boarded the bus, he dropped him off and he left. The Greyhound Bus Station is approximately 500 yards from Grayco Systems, which places the bus station in direct line of site of Grayco Systems.

On November 13, 2004, Officer Scott Kubiak was dispatched to a burglary at Grayco Systems at 201 Campbell Street. Once he arrived, he spoke to a female and the owner of the business John Gray, who informed him that when they left on Friday, November 12, 2004, around 5:00 p.m., the building was fine. When the female employee came to work on Saturday around 5:00 p.m., she found the business burglarized and called Mr. Gray. Mr. Gray found that the wires were cut disabling the security and the time clock. Because there were no eyewitnesses to the burglary, the date and time of the burglary was estimated to be around 2:14 a.m. on November 13, 2004, by using the stopped time shown on the time clock. Two servers, three computers, a couple of printers, about six monitors, some keyboards, a vacuum cleaner, CD player, radio, tapes and a number of other things were taken and never recovered. Mr. Gray usually would leave his F-150 pickup truck at the back of his business and the keys to that truck were always left in a wooden desk in the back room of the office building. On November 19, 2004, the F-150 pickup truck was found in Orangeburg, South Carolina with Mr. Rochester Presley having the keys to the truck in his pocket. Officer Richard I. Murphy, Deputy Sheriff, Orangeburg, South Carolina, testified that he had gotten a call from dispatch concerning a suspicious vehicle. When he arrived he ran the license plate on NCIC and it registered stolen and did not belong to the F-150 pickup truck. T. 126. He also ran the VIN # on the F-150 and the truck came back as one that was stolen from a business in

Hattiesburg, Mississippi. T. 128.

The only evidence connecting Mr. Presley to the burglary was his possession of the F-150 pickup truck and the keys to the F-150 pickup truck. There were no eyewitnesses, nor physical or forensic evidence to tie him to the burglary. T. 97.

Mr. Presley was arrested in Orangeburg, South Carolina, and charged with larceny, receiving stolen property and possession of a stolen vehicle. He later pled guilty to receiving stolen property and possession of a stolen vehicle. The grand larceny charge was dismissed. T. 5 and RE. 6-9.

SUMMARY OF THE ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT MR. PRESLEY'S MOTION FOR DIRECTED VERDICT.

At the close of the State's case, Mr. Presley moved for a directed verdict on the insufficiency of the evidence as to the charge of grand larceny and burglary. Mr. Presley had previously been convicted in South Carolina of possession of a stolen vehicle and possession of stolen property of the F-150 pickup truck which is the basis for the grand larceny conviction. He argues the State put on evidence to support his conviction for possession of a stolen vehicle and possession of stolen property through the testimony of Officer Richard I. Murphy, Deputy sheriff Orangeburg, South Carolina, however, the evidence was insufficient to support his conviction for burglary and grand larceny.

The pertinent testimony of Officer Murphy is as follows:

Q. If you would, tell the jury whether or not you were on duty and performing as a police officer on November 19, 2004?

A. On that day I was on the day shift on patrol in the west region for the Orangeburg County sheriff's Office.

Q. All right. And I'll ask you whether or not on that date you received a call pertaining to the defendant in this case, Rochester Presley, even though you might not have known him by that name?

A. Yes, Sir.

Q. All right. Do you see the man you came into contact with that day – the man I'll refer to as Rochester Presley in this courtroom today?

A. Yes, sir, I do.

Skip to page 126.

Q. Now, did you come into physical contact with the defendant you've identified that day?

A. Yes, sir, I did on two different occasions.

Q. All right. On the second occasion, if you would, explain to the jury what – why you responded and how you came into contact with him?

A. Sir, on that day in question we had – on the second call that pertained with this individual, we had got a call through the Orangeburg County dispatcher that we had a suspicious vehicle that was over parked on the street that was out located in the west region off of Neeses Highway and Highway 400.

Q. All right. And in response to that dispatch, what action did you take?

A. At that time when I arrived on the scene I had run the license plate of that vehicle, and it had came back to a Hercules Butler and at that time that that tag had been stolen. It had been reported stolen from an earlier incident that day.

Q. Did the name Hercules Butler ring a bell with you?

A. Yes, sir. At the time it did from the previous incident earlier that day, from 820 Neeses Highway in Orangeburg, South Carolina from a previous call, which had been involved with the defendant.

Skip further down page.

Q. I'll repeat the question. Were you able to make a determination in your investigation as to whether Hercules Butler was alive or deceased?

A. Through the investigation through the other individuals that I had talked to during that day and that time frame, it was discovered that Mr. Hercules Butler was

deceased.

Skip further down page.

Q. Now, let's get back up to speed on this second episode. When you arrived at the scene, tell the jury exactly what you did in your response to a suspicious vehicle on Jefferson.

A. Okay. When I arrived on the scene, I notified dispatch, our dispatcher, that I arrived. We went ahead. We ran the license number at that time because of earlier that day our NCIC was unavailable. And it came back with determination of what they call a hit because the license was stolen and didn't belong to that vehicle. And another deputy and myself had gone ahead and proceeded. We had gotten the VIN number off of the truck, which we had also ran that through NCIC through our dispatcher, and it came back as being one that was stolen out of Hattiesburg, Mississippi from a business that's located here in this city.

Skip further down page.

Q. And I'm going to show you another photograph which is State's Exhibit Number 17 and ask you if you can identify that truck and whether or not it was the truck or similar to the truck that you found at the scene?

A. Yes, sir, it was a 1990 Ford F - 150 with the last four of the VIN number 4-8-2-1.

Q. Would that be a '95 Ford truck, 150?

A. Yes, sir, 1995 Ford F - 150.

Skip down further.

Q. Now, having run that and found the truck to be stolen from Hattiesburg, Mississippi, what further investigation did you do in reference to this defendant here?

A. At that time myself and Deputy Thomas started to canvas the area and we had talked to some of the neighbors that had seen an individual that fit Mr. Presley's description, and we had found him cross Highway 400 approximately 300 yards away from the said vehicle. Myself and Deputy Thomas at that time had gone over and talked to him. And, of course, he had already known who I was from the earlier incident that day, and we had asked him - at the time we'd only detained him until we had a positive confirmation back about the said vehicle in question, which was a 1995 Ford F- 150. And when we did get the actual confirmation back, I then placed Mr. Presley under arrest. I mirandised him, advised him of his rights, and took him back to the scene of where the truck was at, and at that time also when I did place

him under arrest, we did pat the subject down, and we did find the said vehicle keys that did belong to that vehicle that fit right into the ignition because we had to start the car up in order to move the vehicle at that time to get it on to the roll back, which was transported to our impound yard.

Skip one question and answer.

Q. Now, you've already identified this individual here in court as the defendant. Tell the jury whether you had any difficulty identifying him when you arrested him.

A. At the time we had arrested him and from the previous incident, he had given various names of Ronald Starks, Rochester Presley, and a Zee Zee Zelazorro, and at that time on the second incident after I had placed the subject under arrest and advised him of his rights and everything, and I asked him if any of those were his real name, and he gave me one of the other names. So at that time when I transported him down to the Orangeburg County Detention Center, I just placed him under as what we call John Doe until positive investigation through the AFIS system through fingerprints if he'd had any type of record could be verified to what his actual identity could be.

The above testimony of Officer Murphy proved Mr. Presley had possession of the F-150 truck in that he had the keys to the truck and had driven the truck to that location. Mr. Presley gave several different names, which would imply to a reasonable person that he had knowledge the vehicle was stolen and was trying to avoid prosecution. Also, there was a stolen tag belonging to another vehicle placed on the truck. Mr. Presley argues that this was sufficient evidence to establish the elements of receiving stolen good and possession of a stolen vehicle.

Insufficiency of the evidence for burglary.

In order to establish that Mr. Presley committed the crime of burglary the state was required to prove: (1) a breaking and entering in the day or night, (2) any building in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, (3) with intent to steal therein, or to commit any felony.

Because this case is based wholly on circumstantial evidence, the state must prove defendant's guilt beyond reasonable doubt and to the exclusion of every reasonable hypothesis

consistent with innocence; burden of proof is heavier than when direct evidence is offered Murphy v. State, 566 So.2d 1201,(Miss.1990).

In Murphy, the foreman of M & H Company locked up the mill shed at approximately 3:30 p.m. on Friday, October 16, 1987. In this shed, there were two power saws belonging to the business. When Mr. King returned the following Monday, he discovered that a plywood covering for a broken window of the mill shed was lying on the floor, however, the door was still locked. The two power saws were gone. During trial, Mr. King identified the two saws recovered by law enforcement personnel as those that were in the shed.

The state called a witness who testified that Mr. Murphy came by his house on that Friday and asked him to go to the store with him. He stated that they stopped at a store approximately 150 yards from M & H Manufacturing. This witness testified, that Mr. Murphy told him to get out of the car because he had something to do and did not want him involved. This witness further testified, that when Mr. Murphy returned an hour later he had two power saws in the car. He also testified, that Mr. Murphy took the power saws to his girlfriend's house.

Mr. Murphy's girlfriend testified, that she discovered a chain saw in her storage room on that Saturday, October 17, 1987. She stated that Mr. Murphy told her the chain saw was his, but did not offer an explanation as to where it came from.

There was further testimony that Mr. Murphy used the saws on Saturday to cut firewood and on that Sunday he approached Charles Pender about selling the saws and told Mr. Pender he got the saws from a cousin.

The second saw Mr. Murphy sold to James Fair for \$100.00 and told Mr. Fair he got the saw from his cousin.

Mr. Murphy testified, that he and Thomas went to the store to get beer and at Thomas' request he dropped him off at a friends house and Mr. Murphy continued to the store. While returning from the store, Mr. Murphy says he stopped at a dumpster looking for cans to sell and found two chainsaws in two plastic sacks located behind the dumpster. He testified that he figured this was his lucky day.

The Mississippi Supreme Court reversed the trial court holding that the evidence was insufficient and only established a probability of guilt. The Court stated that the evidence only shows that on a Friday afternoon, the building containing two chainsaws was locked at the close of business. Several hours later Murphy was in the area and came into possession of the chainsaws. During the weekend, he sold the chainsaws. Mere possession of stolen articles, by itself, is not enough to convict a person for the crime of burglary. *Id.* at 1206. The Court provided that since there was no evidence-eyewitnesses, fingerprints, footprints, etc.-linking Murphy to the breaking and entering of the building, some other hypothesis may still be true. Citing Leflore v. State, 535 So.2d 68, 69 (Miss. 1988) (fingerprints and button taken from scene linked to defendant); James v. State, 26 So. 929 (Miss. 1900), where the only evidence against the appellant was that he had stood within ten feet of the car being burglarized, and departed immediately after his employer had discovered the burglary; therefore, the evidence did not warrant a verdict convicting the defendant of participating in the burglary of the car).

The Court in Murphy reasoned that someone else may have broken into the shed, stole the chainsaws, and took them to the dump with the intent to return later to retrieve them. Later could mean that same evening, during the weekend, the near future or sometime down the road, before the individual or individuals returned for the saws, however, Murphy was "lucky" enough to find the saws. See Murphy, 566 So. 2d at 1206.

In the present case, the only evidence the state offered on the burglary was that Mr. Presley

was in the truck and had the keys to the truck. Mr. Gray testified that the keys to his F - 150 pickup truck were always kept in a wooden desk in the back room of his office at Grayco Systems at 201 Campbell Loop in Forrest County, Mississippi. T. 113. The evidence offered at trial through Mr. Gray clearly showed evidence that Grayco Systems had been burglarized. He testified that the rear window had been broken out. The horn for the alarm system was on the outside of the building and most of the wiring in the sever room had been pulled out. The items taken were two servers, three computers, a couple of printers, about six monitors, some keyboards, a vacuum cleaner, a CD player, radio, some tapes, CDs and a number of other things which non of which were ever recovered. T. 117.

Derrick Minor was called by the state and testified that he dropped Mr. Presley off at the Greyhound Bus Station. T. 102 . There was also testimony that the Greyhound Bus Station was within 500 yards of Grayco Systems.

Officer Jeff Byrd, who was employed with the Hattiesburg Police Department as a crime scene technician for fifteen years, testified that his job is to go to the crime scene and photograph, document, collect any evidence, process any evidence. T. 89-90. Officer Byrd further testified, that he found no evidence to indicate who broke into Grayco Sytems. There was no forensic evidence nor physical evidence found. The fingerprints found did not match Mr. Presley. T. 97.

Mr. Presley argues that vehicles are regularly stolen and pawned by drug addicts within the hour of being stolen. The date he was found with the vehicle was on the 19th of November which was seven days after Grayco Sytems was burglarized on November 13th. In this time frame the F-150 could have changed hands via pawn several times. Even though Mr. Presley gave several different names when he was arrested, this only goes to the fact he had reason to believe the F-150 was stolen. There were no computers, printers, monitors, keyboards, nor any of the other items taken from Grayco Systems found in the possession of Mr. Presley. As the Court provided in Murphy, the state's proof

is not enough. It established nothing more than a probability of guilt. This probability was not enough in light of the fact that it did not exclude every other hypothesis. Mere possession of stolen articles, by itself, is not enough to convict a person for the crime of burglary. Id.

Insufficiency of the evidence for grand larceny.

In order to establish that Mr. Presley committed the crime of grand larceny the state was required to prove: (1) a felonious taking, stealing and carry away, (2) personal property of another and without the owner's consent, (3) the value of the property \$500.00 or more, (4) with the intent to permanently deprive the owner of the property.

Mr. Presley argues that the state did not meet the burden of proof which the state was obligated to meet in a circumstantial evidence case: beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. *Minor v. State*, 106 So.2d 41 (Miss. 1958). Minor v. State, 106 So. 2d 41 (Miss. 1958).

The evidence presented during trial was that Mr. Presley was in the stolen F-150 and had the keys to this truck that the owner, Mr. Gray testified he always kept in a wooden desk in his business. Also, Mr. Presley had been dropped off at the Greyhound Bus Station which is approximately 500 yards from Grayco Systems and gave the police several different names when arrested.

In McLain v. State, 24 So. 2d 15 (Miss. 1945), the owner of an automobile parked it outside of a café, leaving the keys in it. He went into the café and when he looked for his automobile thirty minutes later the car was gone. The only evidence to link the defendant to stealing the vehicle was his thumb print found in the rearview mirror. The Supreme Court reversed the trial court holding that the defendant's thumb print found in the rearview mirror, which was conclusive evidence of his identity, and that he had been in the car for some purpose, was sufficient for the crime of trespass or receiving stolen property, however, was not sufficient to establish the specific and definite crime of

grand larceny.

In the present case, no witness testified to seeing Mr. Presley burglarize Grayco Systems where the key was located, nor did the state offer a witness to testify to seeing Mr. Presley leave the area in the F-150. As argued previously under insufficiency of the evidence for burglary, Mr. Presley states that vehicles are regularly stolen and pawned by drug addicts within the hour of being stolen. The date he was found with the vehicle was on the 19th of November which was seven days after Grayco Systems was burglarized on November 13th. In this time frame, the F-150 could have changed hands via pawn several times. Even though Mr. Presley gave several different names when arrested, this only goes to the fact he had reason to believe the F-150 was stolen. There was no computers, printers, monitors, keyboards, nor any of the other items taken from Grayco Systems in the possession of Mr. Presley. Mr. Presley would argue that his case is synonymous with McLain because receiving stolen property is a reasonable hypothesis consistent with the innocence of Mr. Presley.

CONCLUSION

It should therefore be the judgment of this Court that the evidence is insufficient for burglary and grand larceny because the state failed to prove Mr. Presley guilty beyond a reasonable doubt because the evidence does not exclude every other hypothesis consistent with innocence. The judgment of the trial court should therefore be reversed and the defendant discharged.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson
BRENDA PATTERSON, STAFF ATTORNEY
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Rochester Presley, 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 Robert B. Helfrich
Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403-0309

Honorable Jon Mark Weathers
District Attorney
Post Office Box 166
Hattiesburg, MS 39403-0166

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 23rd day of March, 2007.


BREND A JACKSON PATTERSON
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200