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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED

NO. 2006-KA-01706-SCT

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SUPREME COURT
COURT OF APPEALS**

CHARISE FORD

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

Appellant Seeks Oral Argument

**OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI**

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REQUEST FOR ORAL ARGUMENT

Charise Ford, the Appellant herein, requests oral argument on the errors assigned in the *Brief on the Merits of the Appellant* and this *Reply by Appellant*.

In particular, the issue of sentencing and the correct standards for evaluation of jury instructions require clarification and elucidation by this Court for the benefit of the bench and bar in future cases.

Respectfully,

A handwritten signature in black ink, appearing to read "Virginia L. Watkins", with a long horizontal flourish extending to the right.

Virginia L. Watkins,
Assistant Public Defender

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REPLY OF APPELLANT

Comes now Charise Ford, Appellant herein, and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, her *Reply to Brief of the Appellee* on selected issues, I and III. In so doing, Ms. Ford reiterates all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*.

ARGUMENT

I. The Court violated the fundamental rights of equal protection and due process of law secured under both federal and state constitutions to Ms. Ford, a young mother of three with no prior criminal history, when it gave her an excessive sentence of seventeen (17) years;

A. The sentence significantly exceeds other sentences this Court gave to similarly situated defendants during the October 2004 term of court;

B. The sentence significantly exceeds other sentences handed down against similarly situated defendants in two other Mississippi jurisdictions, and

C. The Court abused its discretion, as it failed to make sufficient on-the-record findings to support the severe sentence it handed down against Ms. Ford, particularly when considered with sentences handed down against similarly situated defendants at the same time;

With all due respect for counsel opposite, Ms. Ford takes issue with the State's apparent position that the cited portion of the transcript constitutes adequate findings for imposition of the harsh seventeen (17) year sentence handed down against Ms. Ford. (*Brief of the Appellee*, pgs. 7-9). The Court called it "one of the worst aggravated assaults this Court has presided over." *Id.*, at 8-9.

Ms. Ford would humbly suggest that the soliloquy by the trial court is hardly sufficient to meet the requirements of *Towner v. State*, 837 So.2d 221, 227, (Miss.Ct.App. 2003), applying the requirements of *Solem v. Helm*, 463 U.S. 277 (1983).

“A court’s proportionality analysis [of a sentence] under the Eighth Amendment should be guided by *objective* criteria, including (i) the *gravity of the offense* and the *harshness* of the penalty; (ii) the sentences imposed on other criminals in the *same* jurisdiction; and (iii) the sentences imposed for commission of the same crime in *other* jurisdictions.” *Id.* [emphasis added]

Again, Ms. Ford does not here downplay the fact that Misti Gaddy will live with the results of this incident for the rest of her life. Nevertheless, there are at least two facts to keep in mind. First, Misti Gaddy enticed the confrontation by physically attacking Ms. Ford and the record establishes that Ms. Ford struck only once in order to free herself from the attack. T. 319-320. Second, Ford did not deliberately arm herself in advance; she used a knife already in her pocket, kept there for use in her work as a breakfast bar hostess. T. 321-322.

Contrast the facts of the case at bar with the case of Cedric Stewart, and the certified sentencing orders contained with the Motion by Ms. Ford for Judgment *Non Obstante Verdicto* or, alternatively, a New Trial. CP 66-95. Stewart and his brother entered *open* pleas of guilty, without a sentencing recommendation of any kind from prosecutors, after being charged with aggravated assault. As this honorable Court can see, Stewart armed himself with a nine millimeter handgun before going to lie in wait to ambush Calvin Buchanan and presumably, kill him. Cedric Stewart’s shooting of Buchanan, in a street filled with small children and other adults, resulted in irreparable, horrific mutilating injury to the male genitalia of Buchanan. CP. 81; 88. Buchanan was unarmed and had in no way provoked the confrontation with Cedric and his brother. For his crime, Stewart received a sentence of only (14) fourteen years from this *same* trial judge during the *same* term of court.

In contrast, Ms. Ford did not deliberately arm herself in advance, Ms. Ford did not go in search of Misti Gaddy and instigate the confrontation. T. 319-320. It was Misti Gaddy who

began physical confrontation. Ms. Ford struck with the knife only once, just to free herself from Gaddy, a larger and heavier opponent. Furthermore, Ms. Ford did not wield her weapon against anyone else; indeed, she thrust the weapon beneath the kitchen sink as she left quickly for her waiting ride. T. 322.

Also in stark contrast with the Cedric Stewart case, the trial court denied the requests of counsel for Ms. Ford for a pre-sentence report, yet did so for Stewart. CP 56; T. 446.

Ms. Ford submits that the showing for gross disproportionality has been shown by lack of findings in the record to justify the sentence and the state's own concession that she had no criminal background.

The certified sentencing orders for others similarly situated in Hinds County show the disparity in treatment, as do the records on sentencing for the same crime from Harrison and Washington counties. *Brief on the Merits by Appellant*, pgs. 10-11. These facts demonstrate the "invidious discrimination" with which the trial court treated Ms. Ford, in violation of her right to equal protection of laws under the 14th Amendment to the U.S. Constitution. Ms. Ford would again urge the Court to apply the reasoning of *Rinaldi v. Yeager*, 384 U.S. 305 (1966), in which the United States Supreme Court struck down a law requiring only those sentenced to prison to reimburse the state for the cost of their criminal defense.

Alternatively, Ms. Ford was deprived of her constitutional right to due process of law under the Sixth and Fourteenth amendments to the U.S. Constitution. As the state's statute on aggravated assault permitted at the time of trial sentencing from as little as one year to a maximum of twenty years, Ms. Ford posits that the Court abused its discretion by imposing a near-maximum sentence in the absence of a pre-sentencing report and particularized findings of fact to justify the trial court's actions in violation of principle of *Apprendi v. New Jersey*, 540 U.S. 466 (2000). *Apprendi*, as this Court well knows, holds that every fact used in sentence

enhancement must be proved beyond a reasonable doubt to a jury. Ms. Ford concedes the obvious fact that the Mississippi aggravated assault sentencing scheme does not specifically provide for enhancements. Given such a broad range of sentencing, however, Ms. Ford would urge the Court to consider the sentence is inherently enhanced with the gravity of the assault, all subjective factors weighed by the trial court in its discretion. Therefore, Ms. Ford would argue that the trial court abused its discretion in failing to support its enhanced sentence with particularized, concrete facts sufficient to justify such a lengthy sentence to one with no previous criminal involvement.

III. The Court erred in denying Ms. Ford's request for a jury instruction on the lesser offense of simple assault and further erred in its failure to use the appropriate standard in evaluation of Ms. Ford's request for a jury instruction on simple assault;

With all due regard for honored counsel opposite, the State would have this Court bar consideration of this error merely because the actual instruction is not included in the Clerk's Papers. The problem here is not so much the actual instruction as the continuing failure of this trial judge to use the long-established standard for evaluation of jury instructions submitted by a criminal defendant. Ms. Ford requested a lesser offense instruction on simple assault. Not only did the trial court deny the request for the instruction, he failed to do use the appropriate legal standard in evaluating the request. T. 352-353; 367; RE 28-30.

The appropriate standard to use in the grant or denial of jury instructions begins with the principle that in this state, our law requires that defendants be permitted to have the jury instructed on their theory of defense, particularly when the defense is self-defense. *Anderson*, 571 So.2d 961, at 964 (Miss. 1990).

The record must contain an evidentiary basis for the requested instruction and may be denied only when "taking the evidence in the light *most favorable to the accused*, and

considering all reasonable inferences that may be drawn from the evidence *in favor of the accused*, that no hypothetical reasonable jury could find the fact as the accused suggests.” *Id.* “[emphasis added] [When] there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused.” *Wadford v. State*, 385 So.2d 951, 955 (Miss. 1980) (Reversible error in aggravated assault case to deny jury instruction on self-defense). Finally, trial courts should also consider the sentencing disparity between the lesser offense and the charged offense. “Where [sic] the defendant requests a lesser-included offense instruction, one factor to be considered is the disparity in maximum punishments between the offenses. A great disparity is a factor in favor of giving the lesser included offense instruction.” *Taylor v. State*, 577 So.2d 381 (Miss. 1991) quoting *Boyd v. State*, 557 So.2d 1178, 1181 (Miss. 1989).

Applying these standards to the case at bar, Ms. Ford testified she did not intend to stab Gaddy and that her only desire was to free herself from Gaddy’s chokehold around her neck. Ms. Ford groped in her pocket with one hand while trying to pry Gaddy’s hands from around her neck; her hand met the knife she carried in work as breakfast bar hostess and she used it once to free herself. T. 320.

Therefore, an adequate evidentiary basis existed for the giving of a simple assault instruction under MISS. CODE ANN. § 97-3-7(1) (1972), as Ms. Ford testified she had no willful, deliberate intent to harm Gaddy. Ms. Ford’s only intent was to free herself from Gaddy’s physical attack. The trial judge, however, failed to view the adduced evidence in the light most favorable to the requesting party. Furthermore, the trial court failed to consider the disparity in sentencing. Under Miss. Code Ann. § 97-3-7(1) (1972), Ms. Ford faced a maximum six months’ incarceration, \$500 fine or both. The maximum sentence under Miss. Code Ann. § 97-3-7 (1972) was twenty (20) years at the time of trial.

Instead of a maximum six months incarceration and \$500 fine, Ms. Ford is now serving a sentence of seventeen (17) years, a disparity of tremendous significance, which the trial court failed to take into account.

For these reasons, the conviction should be vacated and the cause remanded for a new trial consistent with the guarantees our state and federal constitutions give all citizens, including those accused of crimes.

CONCLUSION

With all due respect, Ms. Ford contends that this cause should be remanded for a new trial, based on the errors and authority cited here and in *Brief of Appellant on the Merits*.

Ms. Ford was the victim of invidious discrimination, prohibited under both state and federal constitutions, as the trial court failed to make the necessary findings of fact to sustain his harsh sentence of her. Furthermore, the trial court treated her more harshly than others similarly situated, in the jurisdiction of Hinds County. The sentence is also more harsh than those handed down in Harrison and Washington counties.

In addition, the court continues to employ the incorrect legal standard in the grant of jury instructions. In this case, the trial court's denial of a simple assault instruction, as well as the granting of a constitutionally flawed self-defense instruction (Issue II), essentially operated to deprive Ms. Ford of her fundamental right and opportunity to mount a meaningful defense.

Therefore, for all the issues and errors cited herein and *Brief of Appellant on the Merits*, Ms. Ford asks this honorable Court to vacate this conviction and reverse and remand for a new trial.

Respectfully submitted,


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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing *REPLY BRIEF OF APPELLANT* to the following:

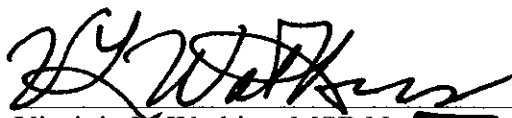
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So certified, this the 10th day of September, 2007.



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