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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHRISTOPHER ARCHER

APPELLANT

VS.

FILED

NO. 2007-KA-0072

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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ISSUES

- I. Archer's trial counsel is presumed to have presented an effective defense, since an attorney's decision whether or not to file certain motions is presumed to be trial strategy and Archer is unable to show any prejudice, since the record reflects that the motions, had they been made, would have been overruled by the trial court, and the trial court had the opportunity to consider the issue in the post-trial motion.
- II. Archer received a trial by a fair and impartial jury since both jurors he alleges should have been stricken did not meet the standard for a challenge for cause since each affirmed that she could be fair and impartial.

STATEMENT OF THE CASE

On December 12, 2002, a Holmes County Grand Jury indicted Christopher Archer for, on or about July 27, 2002, unlawfully, willfully and feloniously robbing John Winston, Jr., of his personal property from his presence and against his will, by putting him in fear of immediate injury by exhibition of a deadly weapon. (C.P. 5) Archer was tried on February 20, 2004 and was convicted of the armed robbery of John Winston, Jr. He was sentenced to ten years in the custody of the Mississippi Department of Corrections with two years suspended. On March 4, 2004, Archer filed his Motion for New trial or in the Alternative for a Judgment Notwithstanding the Verdict.

Defendant's Motion for New Trial was heard on November 22, 2004. The trial court entered its judgment denying the Motion for New Trial on or about May 20, 2005. Archer filed a Motion for an Extension of Time to Appeal due to the difficulties finding the court report and having the tapes transcribed. The trial court granted the motion and gave Archer an additional 60 days to file his appeal. Defendant Archer filed a new Motion for New Trial asserting that the court report still had not been able to transcribe the tapes. The court appointed a new court reporter to produce the transcription. Archer's Notice of Appeal was filed January 11, 2007.

STATEMENT OF THE FACTS

On or about July 21, 2002, at around 4:00 or 5:00 p.m., John Winston, Jr. went into the Auto Zone store in Lexington, Mississippi to purchase some oil. While he was in the store, he asked James Carthan, "Do you know where I can find some heads on an old Mustang." Christopher Archer, the defendant, interjected into the conversation that he knew where some were and said that he would take Winston there. Winston got into his car and Archer got in on the passenger side. When Archer got into the car, he pulled out a pistol and stuck it in Winston's right side. While they were still in the Auto Zone parking lot, Archer told Winston "Give me you mother-fucking money." Winston gave Archer sixty dollars and Archer then told him to give him his gold chain as well. Winston took off the gold herringbone chain and gave it to Archer. Archer then told Winston to drive out of the parking lot and to go towards Saints Academy. Archer then told Winston to turn around in the Highway. Winston did as he was instructed and turned. As he turned around, James Carthan, the Auto Zone employee drove by. Archer asked where Carthan was going. Archer then told Winston to turn on the street next to the bridge and stop. Archer got out of the car and told Winston "I should shoot your ass and throw you in the creek." Archer told Winston to leave and then jumped out of the car and ran. Winston went back to the Auto Zone and told them he had been

robbed.

When Winston returned to the Auto Zone, Officer Kenny Wilson was across the street at the Junior Food Mart helping a woman with her gas. He spoke with Winston and became involved in the investigation. He went inside to talk to witnesses and he developed a suspect by the name of Christopher Archer. Wilson went to look for Archer that day but could not find him. On the 28th, he asked Winston to come by and look at a photo lineup of three people all of a heavy set build. Winston immediately identified Archer as the man who had robbed him at gunpoint.

When Archer was arrested, he had in his possession a gun which matched the description Winston had given of the gun used in the armed robbery.

SUMMARY OF THE ARGUMENT

Archer's trial counsel is presumed to have presented an effective defense, since an attorney's decision whether or not to file certain motions is presumed to be trial strategy and Archer is unable to show any prejudice, since the record reflects that the motions, had they been made, would have been overruled by the trial court. Further, the trial court had the opportunity to consider the issue of whether or not the defendant was entitled to a new trial in the post-trial motion filed by Archer's current counsel and, after consideration, the trial court denied that motion. Therefore, any error as the result of the omission of the motions at the close of the state's case or at the close of the defense's case is harmless error. Archer's trial counsel's omission of a motion to suppress introduction of the gun in Archer's possession at the time of his arrest was not ineffective assistance of counsel where such a motion would have been fruitless. The state had the right to tell the full story and the victim of the armed robbery described the gun Archer used, which was then found in his possession when he was arrested. Trial Counsel's decision not to use a peremptory challenge on juror number 21 is presumed to be strategic and was not ineffective assistance of counsel. The juror affirmed that she

could be impartial and did not meet the standard for a strike for cause. Further, Archer received a trial by a fair and impartial jury since both jurors he alleges should have been stricken did not meet the standard for a challenge for cause since each affirmed that she could be fair and impartial.

ARGUMENT

I. Archer's trial counsel is presumed to have presented an effective defense, since an attorney's decision whether or not to file certain motions is presumed to be trial strategy and Archer is unable to show any prejudice, since the record reflects that the motions, had they been made, would have been overruled by the trial court, and the trial court had the opportunity to consider the issue in the post-trial motion.

A. Omission of Motion to Dismiss at Close of State's Case was Presumed to be Strategic and was not Ineffective Assistance of Counsel; and

B. Omission of Motion to Dismiss at Close of Defendant's Case was Presumed to be Strategic and was not Ineffective Assistance of Counsel.

Archer argues that his trial counsel was ineffective, argues that his counsel's omission of a motion to dismiss the case at the close of the state's case and at when the defense rested constituted ineffective assistance of counsel. Archer is unable to show that he was prejudiced in any way by these omissions. The test to determine whether a criminal defendant's right to assistance of counsel has been satisfied is one of reasonableness, that is, whether counsel provided "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*

The burden to prevail on a claim of ineffective assistance of counsel is two-fold. A defendant must show not only that his counsel's performance was deficient, but also that he was prejudiced by the deficient representation. This second burden requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. There is a strong presumption of competence in favor of the

attorney. *Havard v. State*, 928 So.2d 771, 780-81 (Miss.2006) (citing *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991)). No detailed rules are set forth to regulate counsel's conduct, for "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Wilcher v. State*, 863 So.2d 776, 803 (Miss.2003) (quoting *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052.)

The Sixth Amendment provides a right to effective assistance of counsel, not errorless counsel. *Hall v. State*, 735 So.2d 1124, 1127 (Miss. Ct. App. 1999). There is a strong presumption than an attorney's conduct is a result of trial strategy. *Donerson v. State*, 812 So.2d 1081, 1087 (Miss. Ct. App. 2001). Trial strategy generally includes an attorney's decision whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections. *Foreman v. State*, 830 So.2d 1278, 1281 (Miss. Ct. App. 2002)

Archer argues that his counsel's omission of a motion for acquittal of the charges against him at the close of the State's case or after the Defense rested was ineffective assistance of counsel. Archer cites no authority for this alleged deficiency and cannot show that he was prejudiced by this omission. The testimony of John C. Winston, Jr. Regarding the armed robbery that Archer committed against him, clearly stated all the elements of armed robbery. Winston testified that while he was purchasing some oil at the Auto Zone store, Archer told him he knew where some parts were for an '89 Mustang. He allowed Archer to get into the car with him so that they could go and get the parts. However, Archer pulled a gun and stuck it in Winston's side. He robbed Winston of \$60.00 and a gold chain. Winston testified that he was scared that no one had ever pulled a gun on him before. Archer had Winston let him out of the car behind a school. Archer told Winston, "I ought to kill your mother-fucking ass." He exited the car and told Winston to leave. Winston

testified that he then went back to Auto Zone and told the manager he had just gotten robbed. (Tr. 102) The doors were then locked at Auto Zone. Officer Kenny Wilson came over and spoke with Wilson. On July 28th, Wilson went to the police station and looked a photo line-up. He immediately identified the photo of Christopher Archer as the person who had robbed him at gunpoint. (Tr. 105.) Wilson also identified Archer in the courtroom.

Based on Winston's strong testimony and certain identification of Archer, a motion to for acquittal would have certainly failed. Thus, Archer cannot show that he was prejudiced in any way by this omission.

Archer argues that he received ineffective assistance of counsel when his defense rested. Archer presented testimony from Antonio Bailey, Officer Kenny Wilson, Katrina Stroud, Stanley Brown and Christopher Jordan during the presentation of his defense. Archer's friend, Antonio Bailey, testified that Archer was at a barbeque on July 21st. He testified that the barbeque began "around about" 10:30 or 11:00 in the morning until about 10:00 at night, but he could not say exactly. He testified that people were playing cards and video games. According to Bailey, at the party, they played Spades, two against two, but Bailey could not remember who his partners were at cards that day. Bailey testified that there were people coming and going the day of the party. People stopped by and did not stay all day. While he could not say who else stayed and who left that day, he testified that the people on the witness list all stayed throughout the day and did not leave the party during the time the robbery occurred.

Officer Kenny Wilson testified that he was in the parking lot of the Junior Food Mart helping a woman get some gas for her car when, the victim in this case, John Winston, motioned to Wilson and told him he had been robbed. Officer Wilson told Winston to go to the police station and then

brought him back down to the Auto Zone. Officer Wilson testified that during his investigation of the crime Christopher Archer's name came up. Archer is heavysset and matched the description of the build of the robber given by John Winston. When putting together the photo lineup, Wilson asked for a picture of Archer and pictures of other black males with a similar build. He testified that Winston picked Archer out of the photo lineup as the person who robbed him at gunpoint.

Katrina Stroud, the mother of Antonio Bailey's child, testified that Christopher Archer was at the barbeque at Bailey's house. She testified that the barbeque began in the morning and lasted until about 7:00 than night. She testified that Christopher Archer was there the entire time she was there and that she played three rounds of cards with him. This contradicted her previous statements that she played two rounds of cards with him. She testified that he played video games the rest of the day. She could not remember whether Anthony Bailey, her child's father, played video game or not. (Tr. 166)

Stanley Brown, another friend, was also a witness for Archer's defense. Brown testified that he was present at the barbeque the entire day, as was Christopher Archer. He testified that the barbeque was on the grill outside and that they remained inside playing cards and that someone would go out occasionally and check the food. He testified that he played against Chris Archer for three games and lost all three. He could not recall whether Katrina Stroud won or not. Brown named about eight people who are at the barbeque, but stated that about 10 or 12 actually came. Brown testified that he played a football video game against Antonio Bailey, but that he was aware of Archer's presence during the entire game. Brown testified that only 7 or 8 people played cards that day. Brown could not remember if he had previously testified that about 12 people played that day and that it was like a tournament. (Tr. 179.) Brown testified that Archer was at the barbeque

the whole day and that he never saw Archer leave. (Tr. 180).

Christopher Jordan, Antonio Bailey's brother, was the final witness for Archer's defense. Jordan testified that Archer got the gun which was recovered from him from Jordan's friend, a man named Jeffrey Wheat, on August 17, 2002, the day before he was arrested. He testified that Archer and Wheat were arguing, that Wheat pulled a gun and Archer took it from him and fired all the bullets out of it.

Jordan testified that he was at the barbeque and that he cooked from 10:30 to 1:30. He was not able to say whether Katrina Stroud played cards with Archer that morning, since he was outside doing the cooking. Jordan testified that he had been talking to his brother and the other witnesses in the courthouse on the day of the trial. Jordan testified that Archer did not file any charges against Wheat for pulling a gun on him and that Archer did not leave the house after that incident occurred. (Tr. 189.)

At the close of Jordan's testimony, the Archer rested his defense and after closing arguments, the case went to the jury. While Archer's counsel did not move for an acquittal, challenging the weight and sufficiency of the evidence against Archer, before case was sent to the jury, Archer cannot show that he was prejudiced by this omission. Archer cannot show that the Court would have granted such a motion, since the testimony Archer elicited from his friends during his defense was less than credible. The record on appeal supports the trial court's submission of the case to the jury, regardless of any omissions by Archer's defense attorney. Further, Archer obtained new counsel who filed a Motion for JNOV or in the alternative for New Trial based on trial counsel's omission. The court therefore had the opportunity to consider the weight and sufficiency of the evidence against Archer. Upon that consideration, the trial court denied the Motion for New Trial. Any error

is therefore harmless, since the Court had the opportunity to consider and rule on the omitted objections and Archer cannot show that the outcome would have been any different had his trial counsel made those objections at trial. Archer was not entitled to effective assistance of counsel, not errorless counsel. *Hall v. State*, 735 So.2d 1124, 1127 (Miss. Ct. App. 1999). Archer's counsel put on a vigorous defense, and clearly did the most he could with what he had.

C. Omission of a Motion to Suppress Weapon was not Ineffective Assistance of Counsel

There is a strong but rebuttable presumption that an attorney's performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic. *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995). Application of the Strickland test is applied with deference to counsel's performance, considering the totality of the circumstances to determine whether counsel's actions were both deficient and prejudicial. *Conner v. State*, 684 So.2d 608, 610 (Miss.1996). The test is to be applied to the overall performance of the attorney. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy." *Scott v. State*, 742 So.2d 1190 (Miss. Ct. App.1999); *Cole v. State*, 666 So.2d 767, 777 (Miss.1995); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir.1984).

In *Bell v. State*, 733 So.2d 372 (Miss. Ct. App.1999), the Mississippi Court of Appeals held that the attorney's failure to attempt to suppress the introduction weapons into evidence was not ineffective assistance of counsel, opining:

Specifically, Bell says that his attorney failed to attempt to suppress introduction of those weapons retrieved from the vehicle besides the

one he admitted owning. Such a motion to suppress would, beyond question, have been fruitless. In relating the facts of this incident to the jury, the State was entitled to inform the jury of the full story of what transpired. *Hubbard v. State*, 437 So.2d 430, 436 (Miss.1983). The State's theory, supported by the evidence, was that Bell and his companions were pursuing a common purpose in their activities. Proof that others acting in conjunction with Bell were also armed was, undoubtedly, relevant to the jury's understanding of exactly what transpired on the evening in question. We see no arguable basis to suggest that evidence tending to establish that there were multiple armed defendants, including the introduction of the firearms themselves, would have been inadmissible. The right to a vigorous defense does not include the right to insist that defense counsel pursue facially-invalid objections or file motions having no arguable chance for success. To the contrary, such overzealous defense tactics can have the real possibility of working against the defendant's best interests by antagonizing the trial court and alienating members of the jury.

Bell v. State, 733 So.2d 372 (Miss. Ct. App.1999)

As in *Bell*, the State in the case sub judice was entitled to tell the whole story. The victim was able to describe the gun Archer used to rob him. Archer was found in possession of just such a gun when he was arrested. There was no arguable legal basis for a motion to suppress introduction of Archer's gun into evidence. This issue is without merit.

D. Trial Counsel's Decision not to use a Peremptory Challenge on Juror Number 21 is Presumed to be Strategic and was not Ineffective Assistance of Counsel.

Archer alleges that it was ineffective assistance of counsel not to use a peremptory challenge on juror number 21. During voir dire, Juror Watson stated that she knew the victim and that she had been the victim of a robbery, but the record does not reflect that it was an armed robbery. When asked if she could be impartial even though she had been robbed before, Watson answered affirmatively. While the record is not completely clear, it appears that Watson also answered

affirmatively when she was asked by defense counsel whether she could be fair and impartial despite knowing the victim personally. In the course of making strikes for cause, the trial court consistently denied strikes for cause where the juror indicated they would be fair and impartial. Counsel is presumed of have made his decisions about whom to strike an why as a part of trial strategy. The questioning during voir dire and the striking of jurors “for cause” is left to the sound discretion of the trial judge. *Caston v. State*, 823 So.2d 473, 499-500 (Miss.2002). Further, the juror in question indicated that she be fair and impartial during the trial. Thus, she does not meet the standard required to dismiss her for “for cause.” When each side was exercising peremptory challenges to members of the venire, Archer’s trial counsel chose not to strike her peremptorily. The decision not to use a peremptory strike on each of these jurors is a strategic one The fact that Watson was ultimately seated without being peremptorily struck indicates that she was satisfactory to Archer’s trial counsel from a strategic standpoint.

In *Wilcher v. State*, 863 So.2d 719, 755 (Miss.2003), the appellant asserted ineffective assistance of counsel on the basis that his trial counsel did not use peremptory challenges on various members of the venire who were involved in law enforcement. The Mississippi Supreme Court found that Wilcher had failed to prove ineffective assistance of counsel, noting: “ ‘there is no reason why an officer or an officer's relative should not serve on a jury if otherwise qualified to follow the law and the evidence.’ There is nothing in the record that indicates that those jurors could not have been, or in fact were not, fair and impartial.” *Id.* at 755 (citations omitted). Likewise, the jurors in Archer’s case indicated that they could be fair and impartial. No evidence has been presented to indicate that any jurors with connections to the victim were anything other than fair and impartial. In the face of the jurors' statements that they would be fair and impartial, Archer's attorney did not

err in not challenging the jurors for cause or in not using peremptory strikes against them. Furthermore, there is no evidence that any deficiency in counsel's conduct had any impact on Archer's defense or the outcome of his trial. Therefore, this contention is also without merit.

Archer's counsel was not required to make a fruitless motion to strike, where the juror had affirmed that she could be fair and impartial and did not meet the standard for a strike for cause. Archer's counsel is presumed to have used his peremptory strikes strategically.

II. Archer received a trial by a fair and impartial jury.

Archer complains that he was denied a trial by a fair and impartial jury because jurors 11 and 21 remained on the jury after stating that they knew the victim Mr. Winston. Blanche Watson also indicated that she was the victim of a robbery, though it was unclear whether it was an armed robbery. However, both of those jurors stated that they could be fair and impartial despite knowing the victim. Juror Watson further indicated that she could be fair and impartial despite having been robbed. The questioning during voir dire and the striking of jurors "for cause" is left to the sound discretion of the trial judge. *Caston v. State*, 823 So.2d 473, 499-500 (Miss.2002). Further, the jurors in question affirmed that they could be fair and impartial during the trial. Thus, they did not meet the standard required to dismiss a juror for "for cause."

CERTIFICATE OF SERVICE

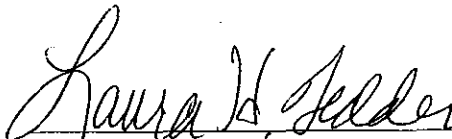
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 19th day of December, 2007.



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