

IN THE COURT OF APPEALS OF MISSISSIPPI

COPY

CHRISTOPHER O'NEIL MCCUNE

APPELLANT

VS.

COA NO. 2007-TB-00923

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

JAMES E. SMITH III
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ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PARTIES

THE UNDERSIGNED counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court may evaluate possible disqualifications or recusal.

1. Christopher O'Neil McCune, Appellant herein;
2. Hon. Marc Duncan, District Attorney for 8th Judicial District
3. Hon. Marcus D. Gordon, Senior Circuit Judge 8th Judicial District
4. James E. Smith III, Attorney for Appellant
5. Ross Barnett, Attorney for Appellant
6. Jim Hood, Attorney General, State of Mississippi

James E. Smith III

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TABLE OF CASES

Agnew v. State, 783 So.2d 699, 702;

Johnson v. State, 476 So.2d 1195 (1985);

Chambers V. State, 800 So.2d 1178 (2001);

Gavin V. State, 785 So.2d 1088 (2001).Miss. 2001).

I.

STATEMENT OF THE ISSUES

The Appellant, Christopher O'Neil McCune, was convicted of the murder of James Antwan Bolton pursuant to Mississippi Code Ann. § 97-3-19(1) and also of committing aggravated assault on Cathy Hardy pursuant to Mississippi Code Ann. § 97-37-7(2)(b) on the 11th day of April 2007. There are two issues in which the Trial Court committed error.

1. The Trail Court erred by denying the Motion for Change of Venue filed by the Appellant. (R. 9)

2. The Trial Court also erred in refusing to grant the Defense's theory of the case instructions D-1 (R.31), D-5 (R.32), D-8 (R.33) and D-11 (R.34), which would have allowed the jury to consider the lesser-included offense of manslaughter instead of only murder.

II.

STATEMENT OF THE CASE

A.

NATURE OF THE CASE AND DISPOSITION IN THE COURT BELOW

This case originated on the 13th day of August in the City of Newton, Newton County, Mississippi. Around 2:45 a.m. a confrontation occurred between the Appellant, Christopher O'Neil McCune (hereinafter referred to as McCune) and James Antwan Bolton (hereinafter referred to as Bolton). Bolton was shot by a handgun while sitting in his vehicle and as a result died from the wounds. The evidence was uncontroverted that McCune shot Bolton, but McCune did testify that he thought Bolton was reaching for a gun when he fired on Bolton. This testimony was supported by a statement given by Cathy Hardy to the police during their investigation. Also, McCune testified that Bolton had previously made threats to McCune. Cathy Hardy (hereinafter referred to as Hardy) was in the vehicle being operated by Bolton when the shooting happened. McCune was charged with murder and aggravated assault (on Hardy). He was subsequently indicted in a two-count indictment on the 29th day of January 2007.

Prior to trial, on the 15th day of February 2007, McCune filed a Motion for Change of Venue through his attorney, Ross Barnett, Jr. A hearing was held on the 16th day of March 2007 on McCune's Motion for Change of Venue and trial judge, Hon. Marcus D. Gordon, overruled the motion and ordered the trial occur in Newton County.

On the 11th day of April 2007, McCune was convicted of the murder of Bolton and of aggravated assault on Hardy. McCune was sentenced to life in prison for the murder of

Bolton and 20 (twenty) years to run consecutive to the life sentence for the aggravated assault charge.

B.

**STATEMENT OF FACTS RELATIVE TO THE
ISSUES PRESENTED FOR REVIEW**

The facts that support reversing the Trial Court for erring on its decision to deny the Appellant's pretrial Motion for change of venue are as follows:

McCune filed a Motion for Change of Venue on the 15th day of February 2007. The motion essentially asked for a change in venue due to inflammatory pretrial publicity. Accompanying the Motion were six affidavits signed by citizens of Newton County, Mississippi. These affidavits stated that they had not only had lived in Newton County, Mississippi for at least 5 years, but they believed that McCune could not get a fair trial in said county. The affiant's beliefs come not only from statements made by the local newspaper and local television news channels, but also from talking to other citizens of said county.

The point about the pretrial publicity is very important, since the decedent and his family had a large presence in Newton County. Bolton owned a local convenience store and his father owned a local body shop. The notoriety of this case, due to the families involved, is highlighted by the fact that the Trial Judge initiated security measures not common to Newton County. During the trial, there was a significant number of law enforcement in the Court room as well as standing guard in and around the Newton County Courthouse. Additionally, the Trial Judge used metal detectors, which is highly abnormal, and only one entrance to the Newton County Courthouse was unlocked during the duration

of the trial. Despite all of this inflammatory pretrial publicity, of which the Trial Judge was acutely aware, he erred and denied the Motion to Transfer Venue filed by McCune. The denial of McCune's Motion violated his right to a fair and impartial trial.

The facts that support reversing the Trial Court for erring on its decision to deny the Appellant's proposed jury instructions D-1, D-5, D-8 and D-11 which would have allowed the jury to consider McCune's theory of the case that his actions were the lesser included offense of manslaughter, not murder are as follows:

The uncontroverted evidence showed that the shooting occurred around 2:45 a.m. on the 13th day of August 2006. Bolton was inside of a Cadillac Escalade in the driver's seat. Bolton's vehicle had heavily tinted windows. McCune exited his vehicle after Bolton drove up behind McCune and started yelling at him. While outside of his vehicle McCune saw Bolton reach to touch Hardy's lap. McCune thought Bolton was reaching for a gun. While this was going on, Hardy testified that McCune and Bolton were yelling at each other. McCune's reaction to Bolton's provocation was exacerbated by the fact that Bolton had made threats about shooting into the house that McCune and his sister were currently residing.

III.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR CHANGE OF VENUE FILED BY THE APPELLANT

The Trial Court erred in denying the Motion for Change of Venue filed by McCune. (T.61) In doing so, the Court relied on a trio of cases, namely; Johnson v. State, 476 So.2d 1195 (1985); Chambers V. State, 800 So.2d 1178 (2001); and Gavin V. State, 785 So.2d 1088 (2001). The Trial Court stated that the *Johnson* case ruled that the Court must look at the “totality of the circumstances for a motion for a change of venue.” (T.57 at 10-11). Also when quoting *Chambers* the Trial Judge said that he “must make an informed decision based on the evidence presented at the venue hearing, coupled with his reasoned application of his sense of the community. Additionally, the judge must be aware of the impact of publicity on the attitudes of the community.” (*Id.* at 17-22). The Trial Judge use the *Gavin* case to set out the two factors that he would use to determine whether or not he would grant McCune’s motion. The first, “the level of adverse publicity, both in the extent of coverage and its inflammatory nature; and second is the extent and the effect of the publicity had upon the venired persons in this case.” (T.57 at 27-29 and T.58 at 1).

When the Trial Judge began applying the law that he had just quoted, he did not look at the totality of the circumstances, but stated: “(T)he only evidence that I have other than the testimony of various witnesses was that there was only one account. And, of course, this Court knows that there were more accounts published in the Newton Record than the one account. I know that. But as far as this hearing is concerned, I know of only

one; and reading that one report, there is no evidence to me that report would cause a fair and impartial juror to prejudge the guilt of the defendant.” (T.59 at 13-22). There were also six affidavits attached to the Motion stating that the affiants do not believe that McCune could get a fair trial in Newton County. These affidavits were signed by Stephanie Robinson (R.17), Betty Buckley (R.18), Annie Minners (R.19), Jennifer Irby (R.20), George Robinson (R.21) and George Coleman (R.22). Even though the Trial Judge knew of other factors that added to the totality of the circumstances, he ignored them for the purposes of the hearing on the 16th day of March 2007.

Yet the Trial Judge’s actions during say that he did not ignore the pretrial publicity. At McCune’s trial, the Trial Judge had an inordinate and unusually high amount of police and Mississippi Highway Patrolmen guarding the Newton County Court House and trial court room. In addition he ordered that the ingress and egress from the Courthouse be restricted to one guarded entrance with the use of a metal detector. For the other trials that took place during the same week of the court term, none of these extra precautions were present. It is plain from the Trial Judges actions that he knew that inflammatory pretrial publicity whether written, spoken, or out on the airwaves had infected the community to the point that he ordered the extra security measures.

The Trial Judge’s denial of McCune’s Motion denied him the right to a fair and impartial trial and deprived him of his constitutionally protected liberty without due process of law. The *Johnson* court eloquently stated why this is so important:

It is a great mistake to suppose that because an atrocious crime has been committed, for which one ought certainly to be convicted anywhere, therefore a change of venue should not be granted. It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom, when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial

trial accorded to the most innocent defendant. Those safeguards, crystallized into the constitution and laws of the land as the result of the wisdom of centuries of experience, must be, by the courts, sacredly upheld, as well in the case of the guiltiest as of the most innocent defendant answering at the bar of his country. Johnson at 1209.

Plainly stated, the Trail Courts unwillingness to take into account the totality of the circumstances when ruling against the motion filed by McCune prejudiced his ability to have a fair and impartial venire decide his fate at trial and this Court should reverse the guilty verdict handed down by this jury.

II. THE TRIAL COURT ALSO ERRED IN REFUSING TO GRANT THE DEFENSE'S THEORY OF THE CASE INSTRUCTIONS D-1, D-5, D-8 AND D-11, WHICH WOULD HAVE ALLOWED THE JURY TO CONSIDER THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER INSTEAD OF ONLY MURDER

The Trial Court also erred in refusing to grant the Defense's theory of the case instructions D-1 (R.31) and D-5 (R.32), which would have allowed the jury to consider the lesser-included offense of manslaughter instead of only murder. The standard of review for jury instructions was well stated in the *Agnew* case when the Supreme Court stated: "Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Agnew v. State*, 783 So.2d 699, 702 (Miss. 2001).

The Trial Judge rejected both of McCune's manslaughter instructions by stating: "Ross (Barnett), I agree (with Mr. Duncan) that the evidence does not support the granting

of a manslaughter instruction” (T.245 at 24-25). Both instructions related to heat of passion manslaughter. Jury Instruction D-1 stated in pertinent part:

If you find...McCune...killed J.J. Bolton without malice, in the heat of passion, by the use of a deadly weapon and further that Christopher McCune was not acting in self Defense, then you should find the Christopher McCune guilty of manslaughter. (R.31)

Jury Instruction D-5 defined manslaughter as:

(T)he killing of a human being, without malice, in the heat of passion, but in a cruel and unusual manner or by the use of a dangerous weapon, without the authority of law, and not necessarily in self defense.

The Trial Judge rejected McCune’s lesser included offense theory by stating that there was no evidence that supported that theory of the case. In fact the Prosecution’s main eyewitness stated that J.J. (Bolton) started the altercation by yelling at McCune first (T.137 at 14) after Bolton blocked the attempt of McCune to drive away. (T.222 at 17). Hardy also gave a statement entered into evidence that indicated the Bolton in fact was reaching for a gun even though there was none in Bolton’s vehicle. (T.140 at 22-25). This statement lends huge credibility that McCune had reason to believe that Bolton was carrying a gun. McCune had known Bolton for a long time and knew that he carried a gun. (T.224 at 14-19). Also Bolton had been making threats to McCune and his family. (T.222 at 27 through 223 at 1). McCune states that “as he was reaching for his gun, that’s when I pulled my gun.” (T.224 at 18-19). The totality of the circumstances indicates that McCune, even though he was outside of his vehicle, was acting in self defense. That theory coupled with the fact that he may have used excessive force implies that McCune was acting in the heat of passion, which is manslaughter not murder. A reasonable juror

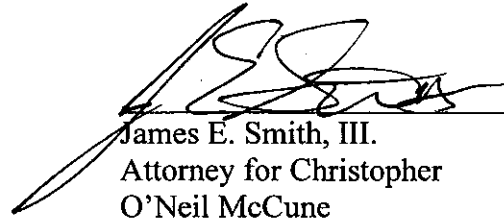
could have concluded that, yet they were denied the opportunity by the Trial Judge. This error deprived McCune of liberty as guaranteed by the Constitution.

IV.

CONCLUSION

For the reasons outlined above, the decisions of the Trial Judge by denying the change of venue motion and the defense theory of the case instructions for manslaughter have denied Christopher McCune of his rights to a fair and impartial trial and of his right to life and liberty. Therefore, this Honorable Court should reverse the decision of the Trial Court.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, JAMES E. SMITH, III, do hereby certify that I have this day mailed a true and correct copy, via United States Mail, of the above and foregoing to:

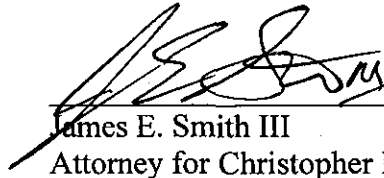
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This the 3d day of December, 2007.



James E. Smith III
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