IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY RODERICK RILEY, JR. — APPELLANT



V. — NO. 2007-KA-0953-COA

STATE OF MISSISSIPPI — APPELLEE

# BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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**ROY RODERICK RILEY, JR.** **APPELLANT**

**V.** **NO. 2007-KA-0953-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. Roy Roderick Riley, Jr., Appellant
3. Honorable Jon Mark Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 1st day of October, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES



STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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# BRIEF OF THE APPELLANT

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## STATEMENT OF THE ISSUES

**ISSUE NO. 1 : WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING RILEY'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR J.N.O.V. WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE TWO OF THE ELEMENTS OF BURGLARY OF AN AUTOMOBILE BEYOND A REASONABLE DOUBT.**

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgement of conviction for the crime of burglary of an automobile against Roy Roderick Riley, Jr., a/k/a Roy Rogers Riley ["Riley"] and a resulting mandatory seven year sentence as an habitual offender. The trial was commenced on January 18, 2007 with the Honorable Robert B. Helfrich, Circuit Court Judge, presiding. Roy Roderick Riley, Jr., is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

## FACTS

The State commenced proofs with the testimony of Jerry Boyte. Boyte was at home with his wife watching television on the evening of March 26, 2006. (T. 51-52) His dog began barking so Boyte went outside to investigate and saw someone leaning inside the passenger door of his wife's vehicle. (T. 53) He went back inside and got his pistol. When Boyte went back outside he saw the person sitting in the driver's seat. Boyte ordered the man out of the car, but he refused, saying "no, he was taking the car." (T. 54) On cross examination, Boyte acknowledged that he did not observe that the man he identified as Riley had riffled through the glove box, nor anything else like that (T. 59) Nothing was missing from the car. (T. 60) No testimony was derived that the vehicle contained anything of value.

Boyte's wife Pamela related that the dog was barking around 9:30 p.m. and that Boyte went out to see why. She claimed to have observed someone go from the passenger side of her vehicle to the drivers side. (T. 61-63) She indicated that she owned the car.

She acknowledged during cross examination that nothing was missing from the car, nor was anything found on Riley. (T. 68) She did not testify, even by inference or implication, that the car contained anything of value.

Deputy Tim Eubanks responded to the scene upon being "advised [on his radio] that it was an auto burglary."(T. 71) This presumptive bit of hearsay was not objected to. Again, cross examination revealed no evidence of any theft from the vehicle. (T. 76) The investigator on the case affirmed the lack of anything being taken. (T. 78) He specifically did not recall "if the glove box had been touched or anything that may have been a containment item in the car." (T. 83-84)

The State rested having put on no evidence that the vehicle contained anything of any value, nor any evidence (other than speculation) that Riley had intended to steal anything from the vehicle.

The motion for a directed verdict argued that the State failed "wholly failed to meet its burden of proof, failing to show any form of intent ..." (T. 87)

The trial court permitted the State to amend the indictment, changing the name of the owner of the vehicle to Pamela Boyte instead of Jerry Boyte. (T. 88) A motion in limine asking that Riley's prior convictions not be allowed into evidence was agreed to by the parties.

After having been advised on his right to not testify, Riley chose to testify on his own behalf. (T. 93) Riley had been staying at the home of Jeff Argue and working for him. On the evening of March 21, 2006 Riley became drunk and "upset" and was told to leave Argue's residence.T. 95) Riley was walking towards the Kangaroo station to call a friend when he saw a vehicle he thought "resembled" the vehicle of a friend . (T. 96-97) In his inebriated state, he entered the vehicle, fearing being out on the road at night in his drunken condition. (T. 98-100) He denied trying to steal anything.

He was asked on cross examination why none of the people he had mentioned in his testimony were there to testify without objection. There was no showing that these witnesses were more available to Riley or unknown to the State. Riley disputed that the car was parked 1,000 to 3,000 feet from the road. (T. 101-102)

The defense rested and the State called David Jones with the Sheriff's Department. He introduced a map of the area showing there were eight houses between Boyte's house and Argue's house. He testified it was three or four miles to the kangaroo station. Upon cross examination he agreed that to walk to the Kangaroo station would have taken Riley right past the Boyte residence.

The State finally rested. In the State's closing argument, the following statement was made: "There might not have been any stuff in that car."

## SUMMARY OF THE ARGUMENT

The State failed to prove two elements of the crime; namely that the vehicle contained anything of value, or that Riley had any intent to steal As set forth in the indictment and clearly stated in the statute[1] the vehicle burglarized must contain "valuable thing[s]" and there must be some intent to steal them. The evidence adduced to the jury contained not an iota of proof as to the car containing anything of value being kept for use, sale, deposit or transportation. No tampering, burglar tools, nor even an attempt to flee was shown. The only proof of an intent to steal came from improper opinions of lay witnesses. Accordingly, the trial court erred in failing to grant the motion for directed verdict and the motion for a judgement notwithstanding the verdict.

## ARGUMENT

**ISSUE NO. 1 : WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING RILEY'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR J.N.O.V. WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE TWO OF THE ELEMENTS OF BURGLARY OF AN AUTOMOBILE BEYOND A REASONABLE DOUBT.**

Accepting all the State's evidence as true, two essential elements of the crime of burglary of an automobile are absent. The statute under which Riley was convicted consist of three elements:

1. "[B]reaking and entering...any...automobile,"

2. "[I]n which any goods, merchandise, equipment, or valuable thing shall be kept for use, sale, deposit , or transportation,"

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[1] **§ 97-17-33. Burglary; other buildings, motor vehicles and vessels**

(1) Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

3. "[W]ith the intent to steal, or commit any felony..."

Miss. Code Ann. § 97-17-33(1). At no point in the State's case was there any proof whatsoever put before the jury that the automobile contained anything which could be construed as satisfying the second element. Furthermore, the facts adduced at trial should not be said to allow a reasonable juror to infer an intent to steal. Only rank speculation could lead to a jury finding the presence of either element.

The legislature distinguished the two different crimes of burglary of a dwelling verus burglary of an automobile by adding an element not present in the burglary. The crime of burglary of a dwelling consist of the following:

> the elements of the crime of burglary of a dwelling are "(1) the unlawful breaking and entering; and (2) the intent to commit some crime when entry is attained."

*Parker v. State*, 962 So.2d 25, 27 (Miss. 2007) The burglary of a dwelling statute, does not include any language denoting any requirement that anything of value be present within the dwelling. Conversely, such a requirement is recited and included in the burglary of an automobile statute. The clear and obviously intended meaning of the legislature must be given. "[T]he text of a statute is the best evidence of the legislative intent." *Jenkins v. State,* 913 So.2d 1044, 1049 (Miss.App. 2005) Thus the legislative intent here is unmistakable. Burglary of an automobile requires a showing of valuable items contained within the car.

The Mississippi Court of Appeals indicated that necessary elements must be proved by some form of tangible evidence and not mere speculation. In the case of *Mauldin v. State*, 750 So. 2d 564 (Miss. App. 1999), the Court found that the evidence of possession of methamphetamine needed some actual proof that Mauldin knew what he possessed; the mere fact that he possessed a cigarette case containing drugs, that he concealed his actions while he removed something from the case, and

when apprehended he apparently ate the item, was insufficient to prove knowing possession. Trial courts routinely instruct juries not to speculate on what the evidence showed. The burden remains with the State to prove each element. "The evidence must show 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" *Parker Id.*, at p.27 Though the state receives the benefits of reasonable inferences from the evidence, speculation and inference are not synonymous. Inference requires the use of logic based on existing facts. Speculation can be constructed of whole cloth. "Inference, as used in the statement of the question, means something wholly different from conjecture, speculation or surmise... Facts not directly proved but which juries legitimately may infer from other facts which have been proved, are limited to such as naturally follow as being logically connected or related, and which reasonably derive from such established facts." *Matula v. State*, 220 So.2d 833, 835 -836 (Miss.1969) No proof as to contents of the vehicle were adduced at trial.

It is equally important that the element of intention to steal was proved to the jury. Again there is no proof to support such a contention. The proofs in fact support a different conclusion. It is a long established maxim that intent is a "state of mind" and often must be proved by acts and conduct." *Harris v. State*, 642 So. 2d 1325, 1327 (Miss. 1994); but the inferences must be based on facts in evidence. No burglary tools were found. Riley was still sitting in the car when Boyte returned with his pistol. No property had been removed, displaced, or tampered with. (In fact no property was even mentioned during the course of the State's case.) Riley did not run. Instead he made the statement that he intended to take the car, not any (speculative) property therein. (T. 54) Therefore, the facts in evidence do not lead to the reasonable inference of an intended burglary, but instead support the defendant's theory of the case. The burden never shifts from the State to prove

all the elements of the crime charged beyond a reasonable doubt. *Brown v. State*, 556 So. 2d 338, 339 (Miss. 1990)

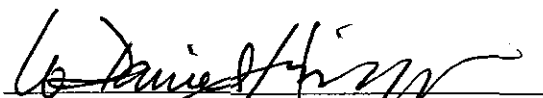
Riley requested a peremptory instruction and filed a motion for a j.n.o.v. The standard of review is settled. The evidence, including reasonable inferences, is viewed in a light favorable to the State. Where no reasonable juror should have been able to find the defendant guilty beyond a reasonable doubt, the conviction must be reversed and the case dismissed. *Crowley v. State,* 791 So. 2d 249, 253 ( Miss. App. 2001)

In the case at bar, reasonable and fair minded jurors could only have found Riley guilty of the charge of burglary of a vehicle by the use of rank speculation. Hence, this case must be reversed and rendered, with Riley being discharged.

## CONCLUSION

The State failed to prove each element of the crime. Accordingly, this matter should be reversed and rendered.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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## CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Roy Roderick Riley, Jr., 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:

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This the 1st day of October, 2007.

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