

2007-KA-00970-SCT

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Reply

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00970-SCT

SCOTT CALDWELL

APPELLANT

vs.

STATE OF MISSISSIPPI

APPELLEE

TABLE OF CASES AND AUTHORITIES

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STATUTES, CODE SECTIONS, RULES OF COURT, AND CONSTITUTIONS

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*M.R.E. 404(b)*

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**REPLY BRIEF OF THE APPELLANT**

COMES NOW, the Appellant herein, Scott Caldwell, by and through counsels of record, and files this Reply Brief in response to the Appellee's Brief heretofore filed in this honorable Court by the State of Mississippi, and, without waiving any issue contained in the Brief of the Appellant in this matter, would respectfully state and bring to this Court's attention the following facts, statutory interpretation, and case law in support of the Appellant's assertions of error in his conviction and sentence in the lower court:

The Appellant would respectfully submit that State of Mississippi's argument in the section of the Appellee's Brief numbered "1.," beginning on page 6, alleging the trial court "DID NOT ERR IN REFUSING TO DISMISS BOTH COUNTS OF THE INDICTMENT ON THE GROUND THAT ONE OF THE COUNTS OF THE INDICTMENT RELATED TO EVENTS THAT OCCURRED IN ITAWAMBA COUNTY," fails because of the misapprehension by the Appellee of the crucial nature of the "refusal" of the trial court to immediately dismiss Count II of the Lee County Grand Jury indictment of the Appellant after it became clear that the acts alleged in Count II actually occurred in Itawamba County. The

the *M.R.E. 404(b)* evidentiary argument made in support of the State's untenable position at trial, it was, and is, inapplicable here. The case law that controls in the primary claim of error in this case of the prosecution bringing a criminal case in the wrong venue, admitting the error to the court during trial, and then implausibly arguing to the trial judge "since the highly prejudicial factual basis for the erroneous count is admissible anyway, immediate dismissal is not necessary" does not implicate the evidentiary cases cited by the Appellee.

The statute concerning venue and the jurisdiction of a circuit court to hear criminal matters, *Miss. Code Ann. § 99-11-3* (Rev. 2006), states in full text:

**§ 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury**

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

(2) The provisions of subsection (1) of this section shall not apply to indictments returned by a state grand jury. The venue of trials for indictments returned by a state grand jury shall be as provided by the State Grand Jury Act. This subsection shall stand repealed from and after July 1, 2011.

(Emphasis added)

It is undisputed from the record that the prosecution admitted, during its case-in-chief, that Count II had indeed been brought in the wrong venue. Since there was no "such doubt" in which of the two counties this charge occurred, namely Itawamba County, the qualifying language of subsection (1) is inapplicable here since the line of cases that interpret this the clause express a policy ground that "[t]he statute applies when evidence demonstrates that

it is quite difficult to know where the crime occurred.” *McGowan v. State*, 742 So. 2d 1183 (Miss. Ct App. 1999) (emphasis added). Such is not the situation here, as it was admitted in open court on the record by the prosecutor that venue was improper in Lee County as to Count II, and the trial judge clearly erred in not dismissing the said count immediately, which, given the utter confusion in the State’s proof in its case-in-chief, would have certainly lead to a question of the Appellant’s right to due process in continuing the trial as to Count I. The Appellee’s contention that the prosecution’s proof was crystal “clear” as to where these incidents supposedly occurred (*See* Appellee’s Brief, pp. 8-9) is unconvincing since the prosecution itself did not know itself until the middle of its case-in-chief that the allegations were to have happened in different counties. Only then did they attempt to differentiate, unsuccessfully as seen from the confused record, what happened when and where in the two separate charges.

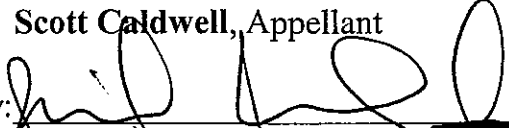

The Appellant contends that Issue One is completely dispositive of this matter and would stand on the Brief of the Appellant as to the remaining two claims of error raised in this appeal.

WHEREFORE, PREMISES CONSIDERED, The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant’s conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits, with proper instructions to the lower court.

Respectfully submitted,

**Scott Caldwell**, Appellant

by:

  
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**CERTIFICATE OF SERVICE**

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Reply Brief of Appellant to the following interested persons:

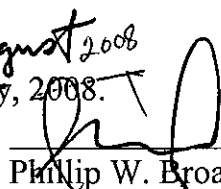
**Honorable Sharion Aycock**, Circuit Court Judge  
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**Mr. Scott Caldwell**, Appellant  
MISSISSIPPI DEPARTMENT OF CORRECTIONS  
Parchman, Mississippi

This the 8<sup>th</sup> day of <sup>August 2008</sup> ~~July~~, 2008.

  
Phillip W. Broadhead, MSB  
Certifying Attorney