

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

DONALD ANDREW HOLBROOK

APPELLANT

FILED

VS.

FEB 11 2008

NO. 2007-KA-1257

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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In *Dunigan v. State*, 915 So.2d 1063 (Miss. Ct. App. 2005), the Mississippi Court of

Appeals held as follows:

Dunigan asserts that the trial court failed to properly swear in the jury members, and therefore, the verdict is null and void. Dunigan maintains that there is nothing in the transcript, the jury verdict or the sentencing order that makes any reference to the jury being properly sworn.

The State responds that it is true that the transcript does not include the actual giving of the juror oath, but that there is ample evidence that the oath was given. The State points out that while the judgment did not use the phrase “duly sworn,” it did state the jury had been duly selected as provided by law. The State contends that the phrase in the judgment is the functional equivalent of “duly sworn.”

The supreme court of this state has found that it was not reversible error where the record did not reflect that the jury was specially sworn. *Bell v. State*, 360 So.2d 1206, 1215 (Miss.1978). The *Bell* court held that there is a rebuttable presumption that the trial judge properly performed his duties. *Id.* The sentencing order in this case stated that “a jury of twelve citizens was duly selected as provided by law.” The jury oath is a part of selecting a jury as provided by law, and it can be presumed that the jury was sworn in from the previously mentioned statement in the sentencing order. Thus, the rebuttable presumption that trial court properly performed its duties has not been overcome. Therefore, this assignment of error is without merit.

Dunigan v. State, 915 So.2d 1063 (Miss. Ct. App. 2005).

In *Acreman v. State*, 907 So.2d 1005 (Miss. Ct. App. 2005), Acreman argued that the trial court failed to administer the petit juror’s oath to the jury in accordance with Mississippi Code Annotated section 13-5-71. He contended that the court’s failure to swear the jury was a violation of his fundamental rights urged the reviewing court to take notice under the plain error doctrine. The Mississippi Court of Appeals held that:

Acreman cites the case of *Gaskin v. State*, 873 So.2d 965 (Miss.2004) in support of his argument that the “duly sworn”

CERTIFICATE OF SERVICE

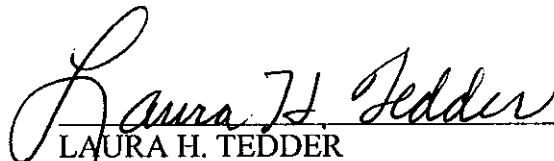
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Roger T. Clark
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Honorable Cono Caranna
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This the 11th day of February, 2008.



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