IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GROVER VANDURAN HAIRSTON — APPELLANT

VS. — NO. 2007-KA-1964-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2007-KA-1964-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for the crime of Aggravated Assault and Possession of Firearm by a Convicted Felon.

FACTS

According to testimony at trial, on August 7, 2006, Grover Hairston (hereinafter "Hairston"), went to the home of his ex-girlfriend, Joyce Myuse. (T. 161). When Hairston tried to enter the home a verbal altercation between Hairston and Ms. Myuse followed. (T 163-178). Ms. Myuse's nephew, Alonzo Myuse, was in the home, went to investigate the encounter and was shot by Hairston. (T. 164).

Hairston was indicted by the Lauderdale County Grand Jury on November 10, 2006, for violating Miss. Code Ann. § 97-3-7, Aggravated Assault; and Miss. Code Ann. §97-37-5, Possession of a Firearm by a Convicted Felon. (R 2).

The record reflects that on August 29, 2007, Marcus Evans, Hairston's court appointed

counsel, represented Hairston at a bond reduction hearing. (T 6-21). On September 25, 2007, Evans represented Hairston at a speedy trial hearing. (T 22-29). Hairston proceeded to trial by jury on October 1, 2007, with the Honorable Lester F. Williamson, Jr. presiding.

Even though court-appointed counsel represented Hairston in several pretrial hearings, on the first day of his trial, the defendant announced to the court that he wanted to represent himself at trial. After an off-the- record, in-chambers meeting, between the judge, the assistant district attorney, Hairston and his defense counsel, Marcus Evans, the judge went on the record for the final questions and answers regarding Hairston's *pro se* representation. (T 44-54). The circuit judge made sure that Hairston's rights were protected during trial by instructing Mr. Evans, Public Defender, to remain at counsel table as standby counsel ready to assist Hairston, if necessary, in an advisory capacity. Hairston conducted *voir dire*, cross-examined each witness, moved for a directed verdict at the appropriate time and made closing argument.

The jury found Hairston guilty; the court sentenced him as a habitual offender to 20 years for aggravated assault and three years for possession of a firearm by a felon, for a total of 23 years in the custody of the Mississippi Department of Corrections. (R at 57; 60). Hairston appealed contending the trial court erred in allowing him to proceed pro se.

SUMMARY OF THE ARGUMENT

Despite his foolish decision to proceed to trial *pro se*, Grover Hairston received a fair trial. The record as a whole adequately reflects that Hairston knowingly, intelligently, and voluntarily waived his right to counsel. Hairston argues he was not competent to make the decision to represent himself. Judge Williamson found otherwise and ruled accordingly. The trial judge had multiple opportunities on different dates to observe Hairston's demeanor and behavior and to communicate freely with him.

The trial court's decision to allow *pro se* representation will be disturbed only upon a showing of abuse of discretion." *Metcalf v. State*, 629 So.2d 558, 566 (Miss. 1993) citing *Curlee v. State*, 437 So.2d at 2. The State submits that Judge Williamson did not abuse his broad judicial discretion in allowing self-representation.

ARGUMENT

I.

THE RECORD, VIEWED AS A WHOLE, AFFIRMATIVELY REFLECTS THAT HAIRSTON WAS FULLY AWARE OF HIS RIGHTS WITH RESPECT TO SELF-REPRESENTATION, THAT HE VOLUNTARILY AND INTELLIGENTLY WAIVED COUNSEL, AND HE KNOWINGLY AND VOLUNTARILY DESIRED TO ACT AS HIS OWN ATTORNEY.

i. Standard of Review

The trial court's decision to allow pro se representation will be disturbed only upon a showing of abuse of discretion. *Curlee*, 437 So.2d at 2.

No abuse of judicial discretion has been demonstrated here because the quality of Grover Hairston's *pro se* representation during his trial for aggravated assault and possession of a firearm by a convicted felon, while not to the standard of a licensed attorney, passed constitutional muster and complied with the requirements found in our rules, statutes, and case law. The facts appearing on the record, when viewed as an entirety and objectively considered, fail to reasonably raise the question of Hairston's competence to stand trial or to represent himself

In *Gordon v. State*, 149 So.2d 475, 477 (Miss. 1963), cert. denied 374 U.S. 852, 83 S.Ct. 1918, 10 L.Ed.2d 1072 (1963), this Court opined:

> In reviewing a conviction of a crime, doubt[s] should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and state's attorney. This is the law as announced by this Court in the case of *Miller v. State,* 207 Miss. 156, 41 So.2d 375, and that statement in the Miller case is quoted from a decision of the Supreme Court of the United States in *Bute v. Illinois,* 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986.
> Furthermore, this Court must give effect to all reasonable presumptions in favor of [the] ruling of the court below. *Ogden v. State*, 174 Miss. 119, 164 So.6.

As a general rule, this Court presumes that the decisions of the lower courts are correct. *Robinson v. State*, 345 So.2d 1044, 1045 (Miss. 1977). It is the duty of the appellant to overcome the presumption

of the correctness of the trial court's judgment by demonstrating some reversible error. *Edlin v. State*, 533 So.2d 403, 410 (Miss. 1988).

Hairston has failed to do so here.

II.

THERE WAS INSUFFICIENT EVIDENCE TO RAISE A DOUBT ABOUT HAIRSTON'S COMPETENCE TO STAND TRIAL SO NO COMPETENCY HEARING WAS NECESSARY.

A review of the record, shows no basis to support Hairston's argument that Judge Williamson erred in foregoing a competency hearing.

The Sixth Amendment to the United States Constitution provides that every defendant has the right to conduct his or her own defense. *Howard v. State,* 697 So.2d 415, 420 (Miss. 1997). In order for a defendant to knowingly and intelligently waive the right to counsel, the defendant must meet a test for competency to stand trial. *Brooks v. State*, 763 So.2d 859, 865 (Miss.2000); *Howard* at 280.

The test for competency to stand trial mandates that a defendant be one "(1) who is able to perceive and understand the nature of the proceeding; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity and complexity of the case" *Brooks*, 763 So.2d at 865 (quoting *Conner v. State*, 632 So.2d 1239, 1248 (Miss.1993)).

"The test for competency to stand trial is certainly a standard which must be met before a defendant can be said to be capable of intelligently and knowingly waiving the right to counsel." *Howard*, 701 So.2d at 280. However, there is no requirement that a trial judge order a competency hearing before a defendant may represent himself. Rather, our supreme court has adopted a test from the Fifth Circuit Court of Appeals that an appellate court is to employ in reviewing the decision of a trial judge to forego a competency hearing. When an appellate court reviews a trial judge's decision to dispense with a competency hearing, the appellate court must determine "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about [a] defendant's

competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?" *Wallace v. State*, 957 So.2d 1047 citing *Howard v. State*, 701 So.2d at 281

If a trial judge has a "reasonable ground" to believe that a defendant is incompetent to stand trial, then the court must order a hearing to determine competency. "The determination of what is 'reasonable,' of course, rests largely within the discretion of the trial judge [who] sees the evidence first hand [and] observes the demeanor and behavior of the defendant." *Howard,* at 281.

Hairston, relying upon *Howard v. State*, 701 So.2d 274 (Miss. 1997), contends the trial judge, in allowing Hairston to represent himself, "should have *sua sponte* ordered a competency hearing for Hairston" to determine if he was capable of knowingly and intelligently waiving his constitutional right to an attorney. Hairston claims that he did not understand the nature of the proceedings against him.

As an example of his failure to grasp our judicial system, Hairston cites to the beginning of his jury *voir dire*. Hairston introduced himself to the jury then told them he had the task to prove himself innocent. (T 84). A full reading of the record indicates Hairston clearly understood our judicial system and that the burden of proof was on the State. In his opening statement Hairston tells the jury:

> And the State must prove beyond a reasonable doubt of all the elements of the charge; not one, not two, not three, but all. What must the State prove? All three elements of on or about August 7 in Lauderdale County, Mississippi, I, myself purposely and knowingly caused serious bodily injury to Alonzo Tyuse with a deadly weapon by shooting him. (T 100).

Hairston further contends that his comment to the jury during *voir dire* " I've had major brain surgery..." provided the trial judge with reasonable grounds to question whether he was incompetent to stand trial. (T 84). Brain surgery does not constitute incompentency.

Hairston argues that given the facts and circumstances known to Judge Williamson, Hairston's failure to grasp the judicial system and his brain surgery, should have put the judge on alert that Hairston

might not be competent to represent himself and hence not competent to make a voluntary and knowing decision to waive counsel.

The trial judge interacted with Hairston at a bond reduction hearing on August 29, 2007, and again on September 25, 2007 at a motion for dismissal hearing. (T 6-21; 26-41). Although defense counsel Marcus Evans still represented Hairston at both hearings, Hairston interacted extensively with the judge, even arguing a violation of his constitutional right to a speedy trial. Therefore, Judge Williamson had several opportunities to observe Hairston's demeanor and behavior, but did not find a reasonable ground to determine that Hairston was incompetent to stand trial.

Lack of good judgment is not a reason to find a defendant incompetent to represent himself or to stand trial. The totality of the circumstances in the entire record, including the quality of Hairston's self-representation, fails to give rise to reasonable grounds for belief that Hairston was incompetent to stand trial. Considering all this information objectively, it failed, within reason, to raise a doubt in Judge Williamson's mind concerning Hairston's competency.

For the purpose of appellate review, the question targeting any decision by Judge Williamson to forego a competency hearing passes the test found in the *Howard* case. (701 So.2d at 281).

III.

THE TRIAL COURT'S RULE 8.03 EXAMINATION WAS ADEQUATE IN VIEW OF THE TOTALITY OF THE CIRCUMSTANCES IN THE ENTIRE RECORD.

Hairston complains that his waiver of counsel was not knowing and voluntary and in strict compliance with Rule 8.05 of the Uniform Circuit and County Court Rules. According to Hairston, the judge failed to place his findings on the record. The presumption the circuit judge properly performed his duty prevails in the absence of affirmative evidence to the contrary.

Our supreme court requires that when a trial court is faced with a criminal defendant's waiver of counsel, when the defendant is charged with a felony, the court must make an on-the-record determination that the waiver is intelligently and competently made, and state the facts upon which that determination is made. *Conn v. State*, 251 Miss. 488, 495, 170 So.2d 20, 23 (1964).

In light of these jurisprudential requirements, our legislature embodied a set of rules, in Uniform Circuit and County Rule 8.05, outlining the procedural mandates that a trial court must follow when it becomes aware that a defendant wishes to proceed to trial acting as his own attorney. Rule 8.05 provides:

> When the trial judge is advised that an individual intends to represent himself, the judge shall on the record conduct an examination of the individual to determine the defendant is making a knowing and voluntary decision to represent himself. The court shall inform the defendant that:
>
> 1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, the state will appoint one free of charge to the defendant to defend or assist the defendant in his/her defense.
> 2. The defendant has the right to conduct the defense and that the defendant may elect to conduct the defense and allow whatever role (s)he desires to his/her attorney.
> 3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice

> his/her ability to defend himself/herself will be hampered.
> 4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.
> 5. Other matters as the court deems appropriate.
>
> After the trial judge advises the defendant and determines he understands the repercussions of representing himself, the judge should ascertain whether the defendant wants to go forward with his case *pro se* or whether he wants an attorney.
>
> If the defendant opts to proceed *pro se*, the court should determine if the defendant has exercised this right knowingly and voluntarily, and, if so, make the finding a matter of record. The court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney, but all disputes between the defendant and such attorney shall be resolved in favor of the defendant.

Hairston asserted that he wanted to represent himself on the first day of his trial. The matter was first discussed between the judge, Hairston and defense counsel Evans in chambers and off the record; then the court went on the record:

> **Court:** Now, in this case, you've indicated that you are considering representing yourself, is that correct?
>
> **Hairston:** Yes, sir.
>
> **Court:** And you have consulted with Marcus and you understand that you have a right to represent yourself, but as I told you off the record earlier when you were making that decision, that in the opinion of this court, that is the wrong thing for you to do. I told you that, right?
>
> **Hairston:** Yes, sir. (T 46).

Judge Williamson ensured Hairston understood that if the jury convicted him he was facing as much as 23 years, day for day, plus court costs and fees. (T 49). The judge advised Hairston that when a State witness was testifying he should write down any questions he wanted to ask and go over the questions with Mr. Evans. (T 46).

> **Court:** Nevertheless, the Court has rules that I've got to enforce. I mean, there are rules of procedure that anyone who is an advocate in the courtroom has got to abide by. Those same rules apply whether you have

an attorney or whether you are an attorney or whether you are an individual. In other words, as an individual, you have got to follow the same rules that an attorney would be expected to follow if he were representing that case. Are you clear about that?

Hairston: Yes, sir.

Court: And you understand that there are legal things that an experienced lawyer knows when to ask for what relief and that it would be an unusual case, in my opinion, where you would know what to do and how to properly defend yourself. I know you are an exceptionally smart individual, but it is, you know, a situation where being smart is not as valuable as being experienced many times. It may be that it is in this case the right thing for you to do; it would be an unusual case. Your are aware of that?

Hairston: Yes, sir.

Court: And you understand the risk, you understand that you are going to be expected to abide by the same rules that a lawyer would under the circumstances?

Hairston: Yes, sir, he's going to advise me of that.

Court: Huh?

Hairston: The rules – the rules, Marcus is going to tell me the rules in court:

Court: I'm going to allow Marcus to sit in with you. If you want to consult with Marcus, fine. I'm not going to be instructing you in any –

Hairston: Okay. I'm talking about my lawyer Marcus, that's what I was referring to, him, here. He's going to be able to instruct me on the rules as I go along.

Court: I suppose that he will do that. You know, that is between you and him.

Hairston: Yes, sir.

Court: But I'm not going to be doing that.

Hairston: I know you're not. I know you're not. (T 45-9).

...

Hairston: I have a right to appeal, though, if I lose.

Court: Oh, yeah. If you lose, you would have the right to appeal.

State: And, Judge, I really just want to put on the record for the State, that his is a very serious case involving habitual time and the State understands that and we feel like it is a big mistake that Mr. Hairston is making, but we don't want the Supreme Court in their wisdom to look back on this case and decide because it is such an important case and the years are going to be so plentiful that he should get a new trial just because he made that decision to represent himself. The State wants the Supreme Court to understand that he had a very competent lawyer sitting right beside him that wanted to help him with his case and he made the decision not the do that. Just so the record is clear, that that is a decision he is voluntarily making.

Court: Okay. And also for the record, Marcus, have you counseled with Mr. Hairston about his decision to represent himself in the courtroom?

Evans: I have, Your Honor, and I adamantly requested that he allow me to represent him at trial today, but he has decided to take it into his own hands and wants to proceed pro se. (T 50-51).

Hairston complains that the record does not reflect that Rule 8.05 of the rules of circuit and county court practice was fully followed. Specifically, Hairston says the record fails to reflect (1) that the court made a finding that Hairston had exercised his right of self representation knowingly or voluntarily and the facts which it based its opinion on and (2) that without legal advice his ability to defend himself would be hampered and the likelihood of an unfavorable outcome would likely increase.

In other words, Hairston claims his conviction should be reversed because the trial judge failed to make an on-the-record finding that he knowingly and voluntarily exercised his right to act as his own lawyer.

The State contends that the record, in its entirety, reflects the circuit judge was in substantial compliance with Rule 8.05 and that this defendant was well aware he would be bound by the rules of evidence and that without legal advice his ability to defend himself would be hampered.

In this case, the circuit judge, obviously pursuant to Hairston's request, if not his demand, made

a decision allowing Hairston to represent himself. The record clearly reflects the morning of trial, but prior thereto, the circuit judge discussed with Hairston some things concerning his self-representation . The record also reflects that even though the defendant had declined legal representation, the circuit judge instructed Mr. Evans, Public Defender, to remain as standby counsel ready to assist Hairston if requested. Mr. Evans, likewise, had counseled Hairston prior to the day of trial. (T44-54.)

It would appear, therefore, the requirements contained in Rule 8.05 were discussed with Hairston and well known to Hairston who, as an habitual offender, was certainly no newcomer to the courts of criminal justice.

In *Banks v. State*, 816 So.2d 457, the trial court's error in failing to comply with the procedural rules to determine whether the defendant knowingly and intelligently waived his right to assistance of counsel was found to be harmless. Banks stated he wanted to represent himself so the trial court provided counsel at trial to assist defendant in an advisory capacity. The judge in *Banks* made no finding on the record that the defendant's decision to represent himself was knowing and voluntary. The trial judge in *Banks* questioned the defendant far less than Judge Williamson questioned Hairston in the case at hand.

Given the posture of the official record which reflects repeated discussions with the defendant concerning self-representation, it must be presumed that Hairston made an intelligent and informed waiver of counsel and that he knowingly and voluntarily desired to act as his own attorney. In accordance with Rule 8.05 the circuit judge instructed Mr. Evans, a public defender, to sit with the defendant as stand-by counsel and assist him on procedure and protocol. Accordingly, Hairston was not without legal advice since Mr. Evans was present in an advisory capacity to assist Hairston in his defense if Hairston so desired.

In evaluating the validity of Hairston's appellate complaint, we invite this Court to look at the fairness of the overall trial and not whether or not the circuit judge, on the record and in strict compliance

with 8.05 of the Uniform Rules of Circuit and County Court Practice, dotted every single "i" and crossed every single "t" as required by 8.05. The present record reflects substantial compliance with the rule which the State contends passes muster in the wake of appellate review.

CONCLUSION

Given a review of the entire record, Hairston failed to demonstrate an abuse of judicial discretion. Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, 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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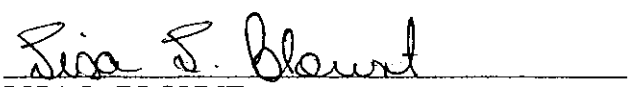
This the 16th day of June, 2008.



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