IN THE SUPREME COURT OF MISSISSIPPI

LAPRIEST CORTEEZES MCMILLAN

v.

STATE OF MISSISSIPPI

NO. 2007-KA-01999-COA

Appeal from Circuit Court of Scott County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument Not Requested.

CERTIFICATE OF INTERESTED PERSON

LAPRIEST CORTEEZES MCMILLAN

v.

STATE OF MISSISSIPPI

NO. 2007-KA-01999-COA

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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

LAPRIEST CORTEEZES MCMILLAN
Appellant

Hon. Jim Hood
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

Hon. Mark Duncan
District Attorney
P.O. Box 603
Philadelphia, MS 39350

Hon. Marcus D. Gordon
Circuit Judge
P.O. Box 220
Decatur, MS 39327

Edmund J. Phillips, Jr.
Attorney of Record for LaPriest Cortezees McMillan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

CORRECTED STATEMENT OF THE CASE

LaPriest Cortezees McMillan appeals his conviction from the Circuit Court of Scott County, Mississippi of burglary of a storage building as a habitual offender and sentence of 7 years confinement in the custody of the Mississippi Department of Corrections without benefit of parole or suspension of reduction of sentence, per section 99-19-81, Mississippi code of 1972, Appellant having been given an enhanced sentence as a habitual offender.

Pertinent facts will be referred to in the argument.

STATEMENT OF THE ISSUES

1. The Court erred in sentencing Appellant as an Habitual Offender.

2. The Court erred in denying the motion for a directed verdict, the request for preempratory instruction and the motion for a new trial.

STATEMENT OF THE CASE

LaPriest Cortezees McMillan appeals his conviction from the Circuit Court of Scott County, Mississippi of burglary of a storage building as a habitual offender.

Pertinent facts will be referred to in the argument.

SUMMARY OF THE ARGUMENT

1. An accused not indicted as a habitual criminal may not be sentenced as a habitual criminal.

2. Failure of the prosecution to prove every element of the crime charged beyond a reasonable doubt entitles an accused to acquittal and on appeal to reversal.

ARGUMENT

I.

THE COURT ERRED IN SENTENCING APPELLANT AS AN HABITUAL OFFENDER

Appellant was sentenced as a habitual offender, after a separate hearing (T-80-84)

under the provisions of Section 99-19-81, Miss. Code of 1972.

U.R.CCC 11.03 (1) reads as follows:

> **In cases involving enhanced punishment for subsequent offenses under state statutes:**
>
> **1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.**

Despite the fact that the indictment in the case before the Court had the words "Habitual Offender" in the heading and there was attached to the indictment a copy of the arrest warrant which recites that Appellant is an habitual offender, there was nothing in the body of that indictment that recited that Appellant faced enhanced punishment, that Appellant was charged as an habitual offender, or that Appellant was charged under Section 99-19-81, Mississippi Code of 1972, and no part of the indictment specifies or particularizes the prior convictions constituting the basis for enhancement. Such an indictment does not effectively notify an accused of habitual offender enhancement: Bell v. State, 388 So. 2d 1106 (Miss. 1978); Smith v. State, 477 So. 2d 191 (Miss. 1985): and thus does not justify sentence enhancement even if the predicate proof is presented.

The sentence should be vacated and Appellant should be resentenced without enhancement.

II.

THE COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT, THE REQUEST FOR PREEMPRATORY INSTRUCTION AND THE MOTION FOR A NEW TRIAL.

Appellant was convicted of burglarizing a storage shed at Weems Mental health Center, Forest, Mississippi on the night of April 10, 2006.

Teont Boyd, a prosecution witness, was the only employee of Weems Mental Health Center to testify during the trial.

On cross examination, he testified (T-46):

> Q. And that night, did you lock the door back before you left?
> A. That night?
> Q. That night?
> A. No. I did not.
> Q. April 10th? You did not. You left it open?
> A. Yes, sir.

He also gave conflicting testimony about this.

At the close of the State's case, Appellant's motion for a directed verdict was denied (T-60).

Appellant, the only defense witness, testified as follows (T-62):

> Wasn't nobody there. And I had noticed a BBQ grill and two fans sitting on the outside of the shed, so I got out my truck, and I had went around there and I looked. The door was open to the shed, but I didn't go in the shed. And right from it, on the corner, was the two fans and the BBQ grill, so I got the two fans and the BBQ grill on the outside of the shed and put them on my truck

Appellant's request for a peremptory instruction was later refused (T-66; C.P.-6).

Proof of burglary requires proof of breaking and entering. Section 97-17-33, Mississippi Code of 1972. Entry of a building without breaking does not constitute burglary, because breaking is an essential element of burglary. George v. State; 183 Mississippi 327, 184 So. 67 (1938).

The United States Supreme Court held in In Re Winship, 397 U.S. 358, 364 90 S. Ct. 1068 (1970) "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".

In the case before the Court the only witness employed by Weems Mental health Center or connected with Weems Mental Health Center was Teont Boyd who gave contradictory testimony about whether the door to the shed Appellant was accused of burglarizing had been left open or closed. If the door had been left open there could not have been a burglary because there could have been no breaking. Therefore, proof of breaking could not have been beyond a reasonable doubt.

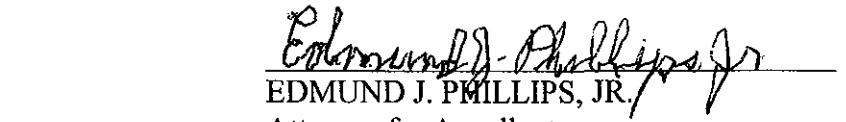
An Appellant is entitled to reversal of his conviction if the record fails to show proof beyond a reasonable doubt of every element of the crime for which he or she has been convicted. Love vs. State 208 So. 2d 755 (Miss. 1968).

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.

RESPECTFULLY SUBMITTED,

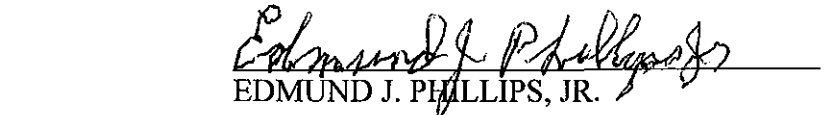


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: July 3, 2008.



EDMUND J. PHILLIPS, JR.
Attorney for Appellant