

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BART UDE

FILED

APPELLANT

OCT 22 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

VS.

NO. 2007-KM-0268-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Defendant was charged in the Justice Court of Oktibehha County of Stalking by phone harassment in violation of *Miss. Code Ann.* § 97-3-107. On April 15, 2005 defendant was found guilty at trial before Justice Court Judge Crump. Sentence was imposed of \$500 fine, court costs, restitution and 6 months, suspended, pending 2 years good behavior.

It is from that decision that defendant appealed to the Circuit Court of Oktibbeha County. On January 22, 2007 defendant appeared for trial *de novo* before Hon. Judge James T. Kitchens, Jr. After a bench trial defendant was sentenced to \$500 fine, six months in jail, suspended for two years pending good behavior.

Additionally defendant was banished from Oktibbeha County for two years.

It is from that final order that defendant timely noticed this instant appeal.

STATEMENT OF FACTS

Defendant made phone calls and contact with a fellow student. His actions were unsolicited and unwelcome. Additionally, defendant called a fellow student at home, on her cell and at her office. The female student felt threatened and filed charges.

SUMMARY OF THE ARGUMENT

I.

DEFENDANT WAS DENIED HIS RIGHT TO A JURY TRIAL.

Issues II. - VII.

THE REMAINING ISSUES RAISED ARE, COLLECTIVELY,
PROCEDURALLY BARRED.

ARGUMENT

I.

DEFENDANT WAS DENIED HIS RIGHT TO A JURY TRIAL.

In this first allegation of error defendant asserts he was denied his right to a jury trial.

~~On his appeal to Circuit Court defendant asked for a jury trial. After a brief~~
discussion the conclusion reached was that since the judge was not going to consider any sentence of greater than six months defendant was not entitled to a jury trial. Tr. 3-4.

The reviewing court's of Mississippi have held:

¶3. The Constitution of the United States guarantee's a jury trial to all persons charged with a "serious offense." A serious offense is one for which the defendant could be sentenced to more than six months in jail for committing. *Blanton v. North Las Vegas*, 489 U.S. 538, 542-43, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989). In Mississippi, a defendant charged with a second offense DUI is entitled a jury trial, since the maximum sentence is one year's imprisonment. *Harkins v. State*, 735 So.2d 317, 317-19 (¶ 2-3) (Miss.1999). But Frazier's assignment of error must fail because he does not preserve his request for a jury trial in the record. It is the appellant's responsibility to assemble a complete record of proceedings, and failure to provide a record will invalidate an appeal.

Frazier v. State, 817 So.2d 663 (Miss.App. 2002).

The maximum sentence for the crime charged, *Miss. Code Ann.* § 97-3-107(1), (as a first offender), is one year. Accordingly, with the statutory maximum being up to one year, defendant was entitled to a jury trial on appeal from justice court.

Consequently, the State must confess, reversible error occurred in the court below. See also, *Harkins v. State*, 735 So.2d 317, 318 (Miss.1999)(on State confession of error), and *Skinner v. State*, 809 So.2d 782 (Miss. App. 2002).

Therefore the State asks this court to remand to the Circuit Court.

Issues II. - VII.

THE REMAINING ISSUES RAISED ARE, COLLECTIVELY,
PROCEDURALLY BARRED.

Defendant, having prevailed on the first issues raised, the remaining issues need not be addressed by this reviewing Court.

After the verdict there does not appear to be any additional filings save the notice of appeal.

¶ 10. The failure to preserve a matter by motion for new trial or JNOV may also serve as a procedural bar to its consideration by an appellate court. *Seals v. State*, 767 So.2d 261(¶ 6) (Miss.Ct.App.2000). While Alonso objected to the testimony of Dr. Moore, he did not include in his motion for a new trial or JNOV, that this testimony was admitted in error. He is therefore procedurally barred from raising this issue for the first time on appeal.

Alonso v. State, 838 So.2d 309, *313 (Miss.App.,2002)

Consequently, the State would argue these issues were not preserved for appeal or sufficiently presented to the trial court for a ruling and are procedurally barred.

The State would ask that no relief be granted on the remaining issues raised.

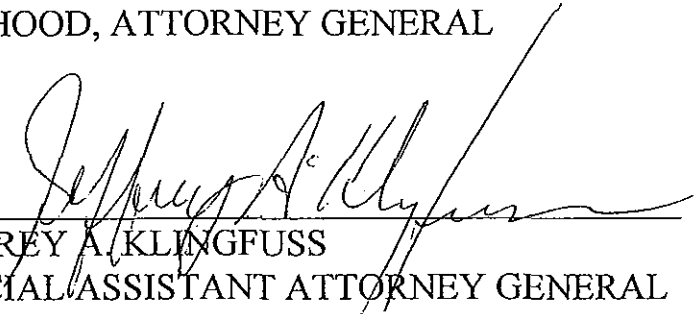
CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to remand this cause to the Circuit Court of Oktibehha County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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 James T. Kitchens, Jr.
Circuit Court Judge
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Columbus, MS 39703

Honorable Forrest Allgood
District Attorney
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This the 22nd day of October, 2007.



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