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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI.

BART UDE
Appellant.

V Case No. 2007-KM-0268-COA..

STATE OF MISSISSIPPI.
Appellee.

REPLY BRIEF.

ORAL ARGUMENT NOT REQUESTED.

STATEMENT OF FACTS.

The defendant was not accused of making phone calls to the accuser's home or cell phone. See the accuser's affidavit, in the record. The accuser was asked during the trial whether the defendant called her home phone or cell phone and she answered, " ***I don't recall, Iam not sure.***"

See the transcript at page 29, line 17 to 21. Excerpt below.

Q It's your testimony that he called your cell phone after July?
A I don't recall. I recall him contacting me, but I'm not sure. It was either the office or the cell phone. I didn't have a home phone at that time.
Q By "the office," once again, there were these other students that he had contact with that worked in your office

STATEMENT OF ISSUES.

ISSUE I: The state having confessed that reversible error occurred in the lower court, the defendant respectfully and humbly request that the court of Appeals for the state of Mississippi Reverse the conviction verdicts entered in the lower court against the defendant. The court is further requested to follow the precedent set by the U.S. Supreme Court in **Baldwin v. New York 399 U.S. 66 (1970)** In that case, The U.S. Supreme Court **Reversed the verdict** entered against a defendant who was denied a jury trial by the lower court without remanding the other issues. See excerpt below.

U.S. Supreme Court

BALDWIN v. NEW YORK, 399 U.S. 66 (1970)

399 U.S. 66
BALDWIN v. NEW YORK
APPEAL FROM THE COURT OF APPEALS OF NEW YORK
No. 188.
Argued December 9, 1969
Decided June 22, 1970

Appellant was charged with a misdemeanor in the New York City Criminal Court. Under 40 of the New York City Criminal Court Act all trials in that court are without a jury. Appellant's motion for a jury trial was denied, he was convicted, and given the maximum sentence of a year's imprisonment. The highest state court affirmed, rejecting appellant's contention that 40 was unconstitutional. Held: The judgment is reversed. Pp. 67-76.

24 N. Y. 2d 207, 247 N. E. 2d 260, reversed.

Of necessity, the task of drawing a line "requires attaching different consequences to events which, when they lie near the line, actually differ very little." Duncan v. Louisiana, supra, at 161. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non jury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can similarly [399 U.S. 66, 74] justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment. 22 The conviction is

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

ISSUES III - VII.

The State has conceeded these issues.

THE STATE'S ARGUMENT THAT ISSUES III - VII IS PROCEDURALLY BARRED IS NOT VALID.

The state of Mississippi asked the Court not to review issues III - VII. Because

1. The defendant has prevailed on issue I.

II. That the remaining issues were procedurally barred, since they were not preserved in the lower court and thus, should be remanded to the lower court.

The state cited Seals v. State which was an appeal from a denial of motion for a new trial. Motions require specific issues relied upon in the request for relief to be presented to the judge.

STANDARD OF REVIEW FOR A MOTION FOR A NEW TRIAL IS DIFFERENT FROM THE PRESENT CASE IN WHICH THE DEFENDANT STATES THAT THE STATUTE 97 - 3- 107 WAS NOT VIOLATED AND THAT THE VERDICT IS NOT SUPPORTED BY THE EVIDENCE . See Crenshaw v. State 520 So. 2d 131.

Excerpt from Crenshaw v. State.

Ashford v. State, 583 So.2d 1279, 1281 (Miss. 1991).
¶18. A motion for a new trial carries a different standard of review. A motion for a new trial asks that the
jury's guilty verdict be vacated on grounds related to the weight, not sufficiency, of the evidence. May v.

THE DEFENDANT FILED A TIMELY MOTION TO DISMISS BASED MOSTLY ON ISSUES III - VII, FOLLOWED BY MOTIONS FOR A DIRECT JUDGEMENT IN THE LOWER COURT. See Exhibit "G".

Issues III - VII presented to the Court of Appeals were preserved in the lower court. The defendant filed a timely motion to dismiss the charges against him ***See the circuit court's record at page 70 and exhibit G in the defendant's excerpt. Copy enclosed.*** Amongst the issues raised by the defendant in that motion were:

III.. MOTION TO DISMISS FOR FAILURE TO MEET THE STATUTORY REQUIREMENTS.

The defendant stated the elements that must be established by way of valid and acceptable evidence. These elements were:

Malice, Knowledge and Criminal intent to harm the accuser, Substantial Emotional distress, That the course of activity is not constitutionally protected etc.

IV THE ALLEGED COURSE OF ACTIVITY IS CONSTITUTIONALLY PROTECTED.

This issue was preserved in the records. ***See page 74 of the circuit court's record.***

These motion to dismiss called up and the judge denied it. **See the record on page 9, line 13 - 18., excerpt presented below.** After the state completed their presentation the defendant's attorney Mr Farrow made an oral motion for direct judgement stating that the issues presented in the motion to dismiss were not met. His motion for a direct verdict was denied.

BY THE COURT: That might speed things up, because there's lots of things that have been filed. Okay.

All right. Your motion to dismiss for the reasons requested in the motion to dismiss at this time are denied.

Furthermore, Miss. Rule 22(b), clearly permits post-conviction issues to be raised on direct appeal if such issues are based on facts fully apparent from the record as in this case.

(b) Post-conviction issues raised on direct appeal. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Wherefore, the defendant states that the issues presented in this appeal were preserved in the lower court and that Court of Appeals for the state of Mississippi is not procedurally barred from reviewing them. The defendant hereby, respectfully and humbly requests that the Court of Appeals **Reverse** his conviction in lower courts without remanding.

Respectfully Submitted.

11/01/07

Brent Ude
-Appellant

APPENDIX.

OKTIBEHA CIRCUIT COURT.

EXHIBIT "G"

STATE OF MISSISSIPPI.
V.
BART UDE.
Defendant.

DEFENDANT'S MOTION TO DISMISS.

The defendant Bart Ude hereby respectfully and humbly files his motion to dismiss the above captioned matter. This is a de Novo trial and is an appeal from the Justice Court of Starkville, and is filed in accordance with State of Mississippi Rule of Criminal Procedure (MSR.C.P). See defendant's notice of appeal, **Exhibit "A"**.

The defendant seeks the dismissal of the above matter on the following grounds:

FACTS:

1. That the defendant and the accuser were graduate students at Mississippi state University in the same academic department. This is the same department that the accuser calls her place of employment. The accuser occupies a room in the buiding with several other graduate students and has no phone exclusively assigned to her. There is one phone in the room and all the graduate students can make and receive calls through it. When you call you direct your call to whom you want to call.

2. That on or around the date specified no calls were directed to the accuser by the defendant . The accuser did not, does not, and will not truthfully claim that calls were directed to her, as a matter during the hearing in Justice she responded on direct that no calls were directed

to her.

3. That the defendant was not prohibited from making calls to the telephone in the accuser's place of employment or any other accessible phone in his academi8c department. That the defendant had the right to call other graduate students that use the phone.

4. That as a graduate student (Doctoral) the defendant had the right to come to his department, which happened to be the accuser's place of employment, to attend classes, conferences and seminars, meet with members of faculty and staff, use facilities open to students, and most important meet his classmates, colleagues and friends.

5. That the rights enumerated above are rights and privilledges granted to him as an enrolled student of the University and the department, and are enjoyed by all MSU students and thus, are constitutionally protected under the thirteenth amendment (prohibiting slavery in US), Fourteenth amendment (Due process and equal protection of law) and the civil rights act of 1991 (Prohiting discrimination).

I.

DEFENDANT'S MOTION TO DISMISS ON GROUNDS OF PERJURY.

1. That on April 12, 2005 a hearing was held in the Justice Court of Starkville, infront of Judge Crump in which the accuser Lakeisha Claude and Officer Massey (both of Mississippi State University) testified falsely. The false testimony are as follows:

Question: Direct to Officer Massey by Mr Faver.

How did you find out that this Phone number belongs to the defendant Bart Ude ?

Answer: Officer Massey.

From Whitepages.com.

TRUTH: Whitepages.com did not list the phone number, See defendant's **Exhibit "B"**. The telephone number in question is not listed under Bart Ude anywhere as far as the defendant is aware of.

This testimony is important and pertinent because this was the State's attempt to link the defendant to the telephone number which was alleged to have made the calls and was used to obtain a conviction.

Wherefore, the defendant respectfully requests that the court dismiss the case.

II.

FAILURE TO INVESTIGATE OR SUPPRESSION OF EXCULPATORY INFORMATION.

Officer Massey was informed by the defendant that he the defendant did not call or make contacts with the accuser on September 21, 2004. He notified officer Massey that he called another student who has a desk in the same room and uses the same departmental telephone. He gave Officer Massey the name of the student as Yufeng Ge. Yufeng Ge had exculpatory

III

MOTION TO DISMISS FOR FAILURE TO MEET THE STATUTORY REQUIREMENTS.

97-3-107 states that "Any person who wilfully, maliciously and repeatedly follows or harrasses another person, or who makes a credible threat, with the intent to place that person with reasonable fear of death or great body injury is guilty of the crime of stalking." From this it is clear that the following elements must be established by way of acceptable and valid evidence in order for a trial to be held.

1. Malice and forethought.
2. Knowledge and criminal intent to harm the accuser.
3. The course of activity must be repetitive and must demonstrate a continuity of purpose to harm.
4. The course of activity must be directed at a specific person, and would cause any reasonable person to suffer a substantial emotional distress.
5. The Cause of activity must cause substantial emotional distress.
6. That the course of activity is not constitutionally protected.

A review of the records shows that the state did not and cannot produce any truthful evidence to establish any of the above elements let alone all of them.

IV.

THE ALLEGED COURSE OF ACTIVITY IS CONSTITUTIONALLY PROTECTED

The cause of activity alleged in this matter is as follows:

" By making telephone calls and coming to Lakeisha Claude's place of employment."

The defendant had the right to call and come to his academic department to meet with his classmates as in this case, attend classes, hold meetings, use facilities open to students, meet with faculty and staff and study.

The rest of the allegation was taken from the statute 97-3-107, and not a part of the course of activity but, mere conclusion of law.

Wherefore, the defendant request that the court dismiss the charges since the state of Mississippi is precluded from prosecuting this case.

Respectfully submitted.

Bart Ude

01/10/05

Date.

Bart Ude.

EXHIBIT

RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

(a) Filing of Applications. Applications for post-conviction collateral relief in criminal cases may be governed by Miss. Code Ann. § 99-39-1, et seq. (Suppl. 1994) as supplemented and modified by this Rule 22. If any application fails to comply substantially with the statute, the clerk of the Supreme Court shall give written notice of the default, appraising the party of the nature of the deficiency. If the deficiencies are not corrected within thirty days, the application may be dismissed. Successive applications for post-conviction relief which do not clearly demonstrate an exception to the successive writ bar of Miss. Code Ann. § 99-39-27(9) may subject the filer to sanctions.

(b) Post-conviction issues raised on direct appeal. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

(c) Post-conviction Proceedings Filed by Persons Under Sentence of Death. Proceedings on post-conviction applications and motions filed by persons under sentence of death shall be governed by this rule. This sub-part (c) shall apply only to such proceedings filed by persons under sentence of death.

(1) Representation by counsel.

(i) The petitioner shall be represented by qualified counsel unless the petitioner has elected to proceed pro se, and the convicting court finds, after a hearing on the record, that the petitioner's election is informed and voluntary.

(ii) Where a petitioner is sentenced to death the Supreme Court shall, immediately after the announcement of the decision on direct appeal, order that the convicting court determine whether the petitioner is indigent and, if so, whether the petitioner desires appointment of counsel for the purpose of post-conviction proceedings. Such order shall be forwarded to the convicting court and the Office of Capital Post-Conviction Counsel upon entry. The Office of Capital Post-Conviction Counsel shall advise the convicting court of the attorney selected to represent the petitioner pursuant to Section 99-39-23 and these rules.

(iii) Should it be determined upon hearing in the convicting court that the petitioner has retained qualified private counsel, the attorney selected by the Office of Capital Post-Conviction Counsel shall take no further action and shall be discharged. Should it be determined

EXHIBITS

U.S. Supreme Court

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399 U.S. 66

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Appellant was charged with a misdemeanor in the New York City Criminal Court. Under 40 of the New York City Criminal Court Act all trials in that court are without a jury. Appellant's motion for a jury trial was denied, he was convicted, and given the maximum sentence of a year's imprisonment. The highest state court affirmed, rejecting appellant's contention that 40 was unconstitutional. Held: The judgment is reversed. Pp. 67-76.

24 N. Y. 2d 207, 247 N. E. 2d 260, reversed.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, concluded that defendants accused of serious crimes must, under the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, be afforded the right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 , and though "petty crimes" may be tried without a jury, no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized. Pp. 68-74.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, concluded that the constitutional guarantee of the right to trial by jury applies to "all crimes" and not just to those crimes deemed to be "serious." Pp. 74-76.

William E. Hellerstein argued the cause for appellant. With him on the brief were Leon B. Polsky and Alice Daniel.

Michael R. Juviler argued the cause for appellee. With him on the brief were Frank S. Hogan, Lewis R. Friedman, and David Otis Fuller, Jr.

Louis J. Lefkowitz, Attorney General, pro se, Samuel A. Hirshowitz, First Assistant Attorney General, and Maria L. Marcus, Assistant Attorney General, filed a brief for the Attorney General of New York as amicus curiae urging affirmance. [399 U.S. 66, 67]

MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join.

Appellant was arrested and charged with "jostling" - a Class A misdemeanor in New York, punishable

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MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join.

Appellant was arrested and charged with "jostling" - a Class A misdemeanor in New York, punishable by a maximum term of imprisonment of one year. 1 He was brought to trial in the New York City Criminal Court. Section 40 of the New York City Criminal Court Act declares that all trials in that court shall be without a jury. 2 Appellant's pretrial motion for jury trial was accordingly denied. He was convicted and sentenced to imprisonment for the maximum term. The New York [399 U.S. 66, 68] Court of Appeals affirmed the conviction, rejecting appellant's argument that 40 was unconstitutional insofar as it denied him an opportunity for jury trial. 3 We noted probable jurisdiction. 4 We reverse.

In Duncan v. Louisiana, 391 U.S. 145 (1968), we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so-called "petty offenses" may be tried without a jury. 5 Thus the task before us in this case is the essential if not wholly satisfactory one, see Duncan, at 161, of determining the line between "petty" and "serious" for purposes of the Sixth Amendment right to jury trial.

Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this issue. In deciding whether an offense is "petty," we have sought objective criteria reflecting the seriousness with which society

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regards the offense, District of Columbia v. Clawans, 300 U.S. 617, 628 (1937), and we have found the most relevant such criteria in the severity of the maximum authorized penalty. Frank v. United States, 395 U.S. 147, 148 (1969); Duncan v. Louisiana, supra, at 159-161; District of Columbia v. Clawans, supra, at 628. Applying these guidelines, we have held [399 U.S. 66, 69] that a possible six-month penalty is short enough to permit classification of the offense as "petty," Dyke v. Taylor Implement Co., 391 U.S. 216, 220 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966), but that a two-year maximum is sufficiently "serious" to require an opportunity for jury trial, Duncan v. Louisiana, supra. The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized. 6

New York has urged us to draw the line between "petty" and "serious" to coincide with the line between misdemeanor and felony. As in most States, the maximum sentence of imprisonment for a misdemeanor in New York is one year, for a felony considerably longer. 7 It is also true that the collateral consequences attaching to a felony conviction are more severe than those attaching to a conviction for a misdemeanor. 8 And, like other [399 U.S. 66, 70] States, New York distinguishes between misdemeanors and felonies in determining such things as whether confinement shall be in country or regional jails, rather than state prison, 9 and whether prosecution may proceed by information or complaint, rather than by grand jury indictment. 10 But while these considerations reflect what may readily be admitted - that a felony conviction is more serious than a misdemeanor conviction - they in no way detract from appellant's contention that some misdemeanors are also "serious" offenses. Indeed we long ago declared that the Sixth Amendment right to jury trial "is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen." Callan v. Wilson, 127 U.S. 540, 549 (1888). 11

A better guide "[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial" is disclosed by "the existing laws and practices in the Nation." Duncan v. Louisiana, supra, at 161. In the federal system, as we noted in Duncan, petty offenses [399 U.S. 66, 71] have been defined as those punishable by no more than six months in prison and a $500 fine. 12 And, with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term. 13 Indeed, when Duncan was decided two Terms ago, we could discover only three instances in which a State denied jury trial for a crime punishable by imprisonment for longer than six months: the Louisiana scheme at issue in Duncan, a New Jersey statute punishing disorderly conduct, and the New York City statute at issue in this case. 14 These three instances have since been reduced to one. In response to the decision in Duncan, Louisiana has lowered the penalty for certain misdemeanors to six months, and has provided for a jury trial where the penalty still exceeds six months. 15 New Jersey has amended its disorderly persons statute by reducing the maximum penalty to six months' imprisonment and a $500 fine. 16 Even New York State would have provided appellant with a six-man-jury trial for this offense if he had been tried outside the City of New York. 17 In the entire Nation, New York City alone [399 U.S. 66, 72] denies an accused the right to interpose between himself and a possible prison term of over six months, the commonsense judgment of a jury of his peers. 18

It is true that in a number of these States the jury provided consists of less than the 12-man, unanimous-verdict jury available in federal cases. 19 But the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him. 20 Except for the criminal courts of New York City, every other court in the Nation proceeds under jury trial provisions that reflect this "fundamental decision about the exercise of official power," Duncan v. Louisiana, supra, at 156, when what is at stake is the deprivation of individual liberty for a period exceeding six months. This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn - on the basis of the possible penalty alone - between [399 U.S. 66, 73] offenses that are and that are not regarded as "serious" for purposes of trial by jury. 21

Of necessity, the task of drawing a line "requires attaching different consequences to events which, when they lie near the line, actually differ very little." Duncan v. Louisiana, supra, at 161. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non jury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can similarly [399 U.S. 66, 74] justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment. 22 The conviction is

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

[For dissenting opinion of MR. JUSTICE HARLAN, see post, p. 117.]

[For dissenting opinion of MR. JUSTICE STEWART, see post, p. 143.]

Footnotes

[Footnote 1] "Jostling" is one of the ways in which legislatures have attempted to deal with pickpocketing. See Denzer & McQuillan, Practice Commentary, N. Y. Penal Law, following 165.25; Note, Pickpocketing: A Survey of the Crime and Its Control, 104 U. Pa. L. Rev. 408, 419 (1955). The New York law provides:

"A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:

"1. Places his hand in the proximity of a person's pocket or handbag; or

"2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag." N. Y. Penal Law 165.25.

Appellant was convicted on the testimony of the arresting officer. The officer stated that he had observed appellant,

CERTIFICATE OF SERVICE.

The defendant Bart Ude hereby states that he served a copy of the reply brief to the Appelle by first class mail to:

Hon. Jeffery Klingfuss Esq.
Office of the attorney General
P.O. Box 220.
Jackson MS 39205 - 0220.

11/1/07
Date

Bart Ude
Defendant.