IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JASON C. JOHNSON — APPELLANT



V. — NO. 2008-KA-0576-COA

STATE OF MISSISSIPPI — APPELLEE

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# SUPPLEMENTAL BRIEF FOR THE APPELLANT

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## APPELLANT'S SUPPLEMENTAL BRIEF

Pursuant to Order of this Court dated July 31, 2009, Appellant respectfully submits this Supplemental brief.

**SUPPLEMENTAL ISSUE NO. 1: THE APPLICATION OF BOYD V. STATE, 977 So. 2d 329 (MISS. 2008) ON THE PROCEDURAL BAR ASSERTED BY APPELLEE.**

The recent Mississippi Supreme Court case of *Boyd v. State*, 977 So. 2d 329, 335-336 (Miss. 2008) supports Appellant's assertion that the crime of shooting into a dwelling is indeed a specific intent crime. While not using the precise terminology of "specific intent", the Court set out the test of what the State's evidence must show:

> Boyd next argues that, in prosecuting him under Section 97-37-29, the state failed to prove an essential element of the crime, that is, that he "willfully" discharged a pistol into a dwelling house. An act "willfully" done is an act "knowingly" and "intentionally" done. Moore v. State, 676 So.2d 244, 246 (Miss.1996); Ousley v. State, 154 Miss. 451, 122 So. 731, 732 (1929). Thus, the question is whether the state offered sufficient proof that Boyd had an intent to shoot into O'Neal's house on the night of May 1, 2004.

*Boyd*, *Id. at* 335 . From this case, the law becomes trenchant that the State is required to show a specific intention, the intention to shoot into a dwelling, and to do so knowingly. As Appellant argued in its brief, the need of showing a specific intent in the crime of shooting into a dwelling is a matter of first impression,

The question then arises, how does this later decided case affect the procedural bar affect the procedural bar as asserted by the State in it's brief. While it would seem elementary that a party should not be barred from raising an issue on appeal that was not decided until after the trial, law precisely on point is scarce. However, the Mississippi Court of Appeals has recently examined the consequence of the "fail[ure] to assert an issue of first impression" and, in a decision bearing directly on the issue, has found that there is no duty to anticipate what the law may become. In the case of

*Ross v. State*, ___So. 2d___, 2009 WL 2436714 (Miss. App. Aug 11, 2009) the Appellant argued that her trial counsel had been ineffective for failing to raise a *Batson* challenge to a "combined race-gender group[]." The Court of Appeals observed that the Mississippi Courts had yet to have dealt with that specific issue, although some other states had found "race-gender" groups to be a protected group. The case was one of first impression for Mississippi, and thus a "failure" to raise the issue could not constitute ineffective assistance of counsel. In that case the Court of Appeals, agreed with the Wisconsin Court of Appeals that an attorney cannot be required to argue an issue of law that is not settled or decided at that time. *State of Wisconsin v. McMahon*, 519 N.W. 2d 621, 628 (Wis. Ct. App. 1994) The Court of Appeals "reject[ed]"any notion that a rule of law must be raised prior to its establishment. It would seem to be the most fundamental element of fairness that a party cannot be required to assert an argument prior to its existence as a decided principle. To require otherwise is to deprive an individual of his liberty for a crime in one of the requisite elements had not been decided or considered by a jury.

**SUPPLEMENTAL ISSUE NO. 2: WHETHER THE DOCTRINE OF TRANSFERRED INTENT APPLIES TO A SPECIFIC INTENT CRIME.**

Mississippi has long recognized the doctrine of transferred intent, and it has always been defined as transferring a defined intent from the person, at whom the intent was directed, unto another person who suffered the effects of that very limited and prescribed intent. In other words, the intent could only transfer from one person to another person. This is clearly manifest in the definitions of transferred intent declared by the Mississippi Supreme Court:

> [T]he doctrine of transferred intent. Where there is an express intent to kill or do grievous bodily harm directed toward one person and another is killed unintentionally by the act, it is murder at common law. It is said that the reason for this result is the law transfers the express intent to kill from the intended victim to the third person who is slain. There is some difficulty in rationalizing this rule, since there

> is no actual intent to kill the third person. **However, the slayer had an express intent to kill a human being, and the result of his intention is of the same class and severity as he intended.** Moreland, The Law of Homicide (1952), pp. 19-20, 256-257. The transferred intent doctrine is well-established in the common law and in Mississippi. 26 Am.Jur., Homicide, Sec. 35; 40 C.J.S. Homicide § 18; Annotation, 1922, 18 A.L.R. 917; Ross v. State, 1930, 180 Miss. 827, 131 So. 367; Morgan v. State, Miss.1946, 24 So.2d 744.

*Dykes v. State* 232 Miss. 379, 386-387, 99 So.2d 602, 605 - 606 (Miss.1957) As *Dykes* clearly establishes, the intent transferred is categorically restricted to the same class (human beings) as the intended class. Thus intent cannot, under Mississippi law, transfer between different classes of crimes, nor from human beings to inanimate objects.

The Mississippi Court of Appeals has recently examined the doctrine of transferred intent and re-iterated its common law meaning, that the intent that can transfer is only "malicious intent ...directed toward one person is transferred to the other person." *Hitt v. State*, 988 So. 2d 939, 942 (Miss. App. 2008), citing *Dobbins v. State*, 766 So. 2d 29, 33 (Miss. App. 2000) More recently the Court of Appeals has affirmed that the intent transferred must be "an express malice and an intent to kill." *Walden v. State*, ___So. 2d ___, 2008 WL 2894486 (Miss. App.July 29, 2008), quoting *Ross v. State,* 158 Miss. 827, 832, 131 So. 367 (Miss. 1930)

Thus, Mississippi cannot adopt the curious Kansas case of *State v. Walker*, 20 P. 3d 1269 (Kan. Ct. App. 2001) Kansas, it would seem, has by way of legally alchemy, reconstructed the doctrine of transferred intent into the "doctrine of transformed intent." In that case Kansas transmuted a specific intent to harm a human being into a generic mens rea, where the intent to do harm to a human being becomes an intent to harm an inanimate object. Fortunately, it appears that only Kansas has conjured up such a doctrine. Conversely, the State of New York has specifically found that intent to injure a person can not transfer to property. *People v. Washington,* 18 N.Y. 2d

366, 222 N.E. 2d 378 (Ct. App. N.Y. 1966), *People v. Roberts*, 140 A.D. 2d 961, 529 N.Y.S. 2d 636 (N.Y. S. Ct., App Div, 1988) Idaho similarly refused to transfer intent from a human being to property, finding transferred intent to only operate "within the limits of the same crime." *State v. Doe*, 172 P 3d 1094 (Idaho 2007) An exhaustive search has not revealed any other instances of attempts to transform transferred intent.

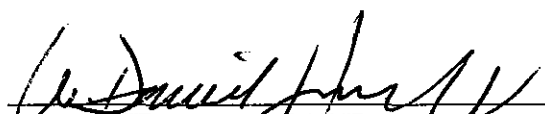
Appellant Jason Johnson was acquitted of the crime of aggravated assault, the crime from which any intent must necessarily transfer. Under the principles enunciated in *Dykes, supra*, and in *Rogers v. State*, 994 So. 2d 792 (Miss. App. 2008), an acquittal of the crime from which intent is derived acts as a bar to any conviction for the crime to which intent is to be transferred. Hence, the doctrine of transferred intent is inapplicable in the case at bar unless it also bars any conviction for the crime of shooting into a dwelling.

## CONCLUSION

Appellant Johnson lacked any requisite intent to shoot into a dwelling and is accordingly not guilty of the crime charged. As the case of *Boyd v. State*, *supra* indicates, the issue of specific intent; i.e. "willfully", had not heretofore been specifically examined, and thus, Johnson's trial attorney could not be required to make his motion for J.N.O.V. specific as to that point. Accordingly, Johnson's appeal as to the sufficiency of evidence of his intent to shoot into a dwelling should not be procedurally barred. Hence this judgement of the lower court should be reversed and rendered.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

## CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jason C. Johnson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF FOR THE APPELLANT** to the following:

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This the 31ST day of August, 2009.

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