

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY TREVILLION

APPELLANT

VS.

NO. 2008-KA-1056

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

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STATEMENT OF FACTS¹

The Appellant, Anthony Trevillion, was tried and convicted of the following: Count I - murder, Count II - shooting into an occupied dwelling, Count III - aggravated assault, Count IV - aggravated assault, and Count V - felon in possession of a firearm. He was sentenced to serve as follows: Count I - life, Count II - ten years, Count III - twenty years, Count IV twenty years, and Count V - three years. The sentences for Counts II - V are to run consecutively to the sentence for Count I.

¹ The State did not set forth the facts regarding the crime itself as the issue presented to the Court is procedural.

SUMMARY OF ARGUMENT

Trevillion is procedurally barred from arguing that the trial court erred in dismissing two jurors because he had served on a jury within the two years prior to his trial as he did not raise an objection during trial nor did he raise the issue in his motion for new trial. Procedural bar notwithstanding, the trial court did not err in dismissing these two jurors as each of the jurors exercised their statutory right to be exempt from jury duty. Moreover, Trevillion failed to establish that his case was in any way prejudiced by the trial judge's decision.

ARGUMENT

THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THIS ISSUE ON APPEAL AS IT WAS NOT RAISED BEFORE THE TRIAL COURT; HOWEVER, PROCEDURAL BAR NOTWITHSTANDING, THE TRIAL COURT DID NOT ERR IN DISMISSING TWO JURORS BECAUSE THEY HAD SERVED ON A JURY WITHIN THE TWO YEARS PRIOR TO THIS TRIAL.

Trevillion argues on appeal that “the trial court erred when, in determining which members of the venire were competent to serve on a jury, excused two potential jurors on the basis that the jurors had previously served on a jury in the last two years.” (Appellant’s Brief p. 5). However, Trevillion is procedurally barred from raising this issue on appeal as there was no contemporaneous objection made and as the issue was not raised in his motion for new trial. It is well-established law that “[a] trial judge will not be found in error on a matter not presented to him for decision.” *Smith v. State*, 724 So.2d 280, 319 (Miss.1998). *See also Myers v. State*, 565 So.2d 554, 557 (Miss. 1990) (holding that “a party who fails to object to the jury’s composition before it is empaneled waives any right to complain thereafter”); *Foster v. State*, 639 So.2d 1263, 1301 (Miss.1994) (holding that an Appellant cannot raise an argument for the first time on appeal); *Alonso v. State*, 838 So.2d 309, 313 (Miss. Ct. App. 2002) (holding that the issue in question was procedurally barred even though an objection was raised at trial because the matter was not raised in the motion for new trial); and

Beckum v. State, 917 So.2d 808, 813 (Miss. Ct. App. 2005) (holding that the issue in question was procedurally barred as it was not specifically raised in defendant's motion for J.N.O.V. or motion for new trial).

Without waiving said procedural bar, the State asserts that the trial court did not err in dismissing these two jurors. Mississippi Code Annotated §13-5-1 sets forth the requirements of competent jurors and reads in part as follows:

Every citizen not under the age of twenty-one years, who is either a qualified elector, or a resident freeholder of the county for more than one year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard is a competent juror. No person who is or has been within twelve months the overseer of a public road or road contractor shall, however, be competent to serve as a grand juror. The lack of any such qualification on the part of one or more jurors shall not, however, vitiate an indictment or verdict. Moreover, no talesman or tales juror shall be qualified who has served as such talesman or tales juror in the last preceding two years, and no juror shall serve on any jury who has served as such for the last preceding two years. No juror shall serve who has a case of his won pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

* * *

(*emphasis added*). The trial judge instructed the potential jurors regarding these requirements.

(Transcript p. 21 - 24). Mississippi Code Annotated §13-5-25 sets forth some exemptions from jury service and reads in pertinent part as follows:

Every citizen over sixty-five (65) years of age, and everyone who has served on the regular panel as a juror in the actual trial of one or more litigated cases within two (2) years, shall be exempt from service if he claims the privilege; but the latter class shall serve as talesmen, and on special venire and on the regular panel, if there be a deficiency of jurors. . . .

(*emphasis added*). The trial judge instructed the potential jurors regarding these exemptions as well.

(Transcript p. 24 - 26). Afterwards the trial judge stated as follows:

Now, anyone wishing to point out either a disqualification or to raise a statutory excuse, I'm going to have you have a seat on the first few rows on the other side of

the courtroom right here.

(Transcript p. 26). The jurors complied and the trial judge questioned them individually about their qualifications and/or statutory excuses. Mr. James Jefferson, the first potential juror Trevillion takes issue with, addressed the trial court and the following exchange took place:

* * *

THE COURT: Okay. What's your reason, Mr. Jefferson?

MR. JEFFERSON: I sat on a jury on the Ronald Vaughn case the other year.

THE COURT: Okay.

MR. JEFFERSON: Deputy Hollingsworth

THE COURT: That's been within two years?

MR. JEFFERSON: I believe so. Ronald Vaughn, what that more than two years ago?

COUNSEL FOR THE STATE: I think it has been within the last two years, hasn't it?

* * *

COUNSEL FOR THE STATE: I believe it has because the opinion was just handed down a couple weeks ago.

THE COURT: So it's been more than two years, huh?

COUNSEL FOR THE STATE: I don't think it has. I think it was tried late 2006, early 2006. Like I said, the opinion came down about a month ago from the Court of Appeals.

COUNSEL FOR THE STATE: Your Honor, the jury list does have a last jury date on it of November 28, 2005, but I'm not sure how accurate that is.

MR. JEFFERSON: That's fine. I don't mind serving.

THE COURT: Okay. Okay. I'm going to go ahead and excuse you then.

MR. JEFFERSON: Thank you.

(Transcript p. 28 - 29). Later, from that same group, Ms. Thomas, the second potential juror Trevillion takes issue with, addressed the trial court and the following exchange took place:

THE COURT: Ms. Thomas.

MS. THOMAS: Yes. I served as a juror two years ago.

THE COURT: You remember what case it was?

MS. THOMAS: Dr. Lewinski and Ms. Brown's case.

* * *

THE COURT: Okay. That has been within the last two years, I think. Okay. You're free to go.

MS. THOMAS: Thank you.

(Transcript p. 55).

Trevillion argues that these two potential jurors were wrongfully excused from duty. However, after acknowledging that the argument is procedurally barred, he further acknowledges Mississippi Code Annotated §13-5-87 which states as follows:

All the provisions of law in relation to the listing, drawing, summoning, and impaneling juries are directory merely, and a jury listed, drawn, summoned or impaneled, though in an informal or irregular manner, shall be deemed a legal jury after it shall have been impaneled and sworn, and it shall have the power to perform all duties devolving on the jury.

(*emphasis added*). Nonetheless, Trevillion argues that there was “a radical departure from the requirements outlined in the statutes” and asserts that “it is every juror’s right to exercise his or her own exemption” and that “by placing that right in the hands of the trial court is to run afoul of the rights of Mississippi citizens.” (Appellant’s Brief p. 8 and 9). First, there was no radical departure from requirements set forth in the statutes. Section 13-5-1 states that “no juror shall serve on any jury who has served as such for the last preceding two years” and Section 13-5-25 “everyone who has served on the regular panel as a juror in the actual trial of one or more litigated cases within two (2) years, shall be exempt from service if he claims the privilege.” With regard to both potential jurors, they claimed the privilege by sitting in the area the judge suggested and raising the issue at the appropriate time. Thus, not only was there no radical departure, the potential jurors were allowed to exercise their own exemption.

Trevillion cites to *Page v. Siemens Energy and Automation, Inc.*, 728 So.2d 1075, 1082 (Miss. 1998) and *Adams v. State*, 537 So.2d 891 (Miss. 1989) in further support of his argument. However, these cases are distinguishable from the case at hand. In both cases the circuit clerk directed the computer to systematically exclude potential jurors from the jury list who met the exceptions, thereby not allowing the jurors to exercise their own exemptions. As noted above in the

case at hand, the trial judge gave the potential jurors an opportunity to exercise their exemptions and the two jurors at issue both did so.

Furthermore, even if the matter were not procedurally barred and even if the trial judge would have erred in dismissing the jurors, no prejudice was shown. The Mississippi Supreme Court as early as 1914 held that "since there is no evidence that appellant was not tried by a fair and impartial jury, error cannot be predicated of an irregularity in the drawing or impaneling thereof, since the statutes on the subject are declared . . . to be directory merely." *Ferguson v. State*, 65 So. 584, 585 (Miss. 1914). See also *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007) (holding that "an error is only grounds for reversal if it affects the final result of the case"). As such, not only is the matter procedurally barred and the trial court's decision not error, but even if were error, it would not be reversible error as no prejudice was shown.

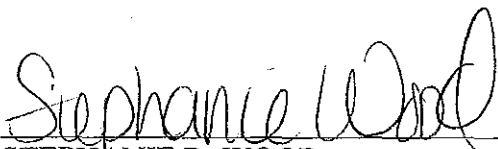
CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Anthony Trevillion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, 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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