

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY TREVILLION

APPELLANT

V.

NO. 2008-KA-1056-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

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 this court may evaluate possible disqualifications or recusal.


1. State of Mississippi
2. Anthony Trevillion, Appellant
3. Honorable Richard Smith, District Attorney
4. Honorable Frank G. Vollor, Circuit Court Judge

This the 20th day of Jan, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED WHEN IT DISMISSED TWO (2) JURORS BECAUSE THEY HAD PREVIOUSLY SERVED ON A JURY IN THE LAST TWO (2) YEARS.

STATEMENT OF INCARCERATION

Anthony Trevillion, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101**.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi, and a judgment of conviction on one (1) count of murder, two (2) counts of aggravated assault, one (1) count of shooting into an occupied dwelling, and one (1) count of being a felon in possession of a firearm

against Anthony Trevillion, following a trial on April 14, 2008 to April 16, 2008 Honorable Frank G. Vollor, Circuit Judge, presiding. Trevillion was subsequently sentenced to life imprisonment for the murder count, twenty years for each count of aggravated assault, ten years for shooting into an occupied dwelling, and three years for being a felon in possession a firearm, all to run consecutively.

FACTS

The facts of the case *sub judice* involve multiple parties in multiple altercations, ultimately resulting in the shooting death of Maurice Harris.¹ Four were indicted in Harris' death. (C.P. 4-5, R.E. 3-4). For reasons unclear in the record, the defendants were all severed. Anthony Trevillion, the Appellant in this case, was tried on five counts; Harris' murder, the aggravated assault of two other individuals, shooting into an occupied dwelling, and being a felon in possession of a firearm. The Appellant was brought to trial on April 14, 2008.

According to the testimony presented at trial, Jarvis Bowman (Bowman) testified that the Appellant hit his (Bowman's) brother, Maurice Harris, at a night club, resulting in all parties being thrown out. (T. 182-83). Bowman and Maurice Harris returned home where the two and Garrod Bunch (Bunch) hung out on the porch. (T. 184). Bowman testified that Matthew Nash came up to the porch, and told Maurice Harris that there was no problem, but, soon after, two men came from across the street with guns. (T. 184-87). Bowman testified that he ran, shots were fired, and he found his brother laying on the floor. (T. 187).

Bowman testified that he told police who the men were, and where they lived. (T. 188). Bowman went with police to identify the men. (T. 188). At trial, Bowman identified the Appellant, Anthony Trevillion, as one of the shooters. (T. 189).

1. Throughout the record, the Harris is referred to as both "Justin" and "Maurice." For consistency and clarity, the Appellant will refer to Harris as "Maurice."

On cross-examination, Bowman admitted to having about a cup of vodka at the club. (T. 190). Bowman further testified that he only saw one gun, an assault rifle. (T. 201). On cross, Bowman admitted that he could not positively say that the Appellant was the person that was armed. (T. 202-03).

Riley Nelson, a crime scene investigator for the Vicksburg Police department testified that on the night in question he found numerous shell casings on the front porch and bullet holes in an arching pattern across the front of the house. (T. 215). The shell casings were identified as shell casings which are used in AK-47's. (T. 219). Nelson testified that he also found a twelve (12) gauge shotgun shell. (T. 220-221). In total, nineteen (19) AK-47 cartridges and one shotgun shell were found at the scene. (T. 223).

Garrod Bunch testified that he was with Harris on the night in question. (T. 237-38). Bunch testified that he saw three people approach the house, and identified the Appellant as one of them. (T. 239). Bunch saw guns and went into the house to hide behind the refrigerator. (T. 239). Bunch testified that he knew who the Appellant was that night, but did not say so in his statement because he was scared. (T. 249).

Claudia Hester (Hester) testified that she lived directly across the street from the scene of the incident. (T. 259). Hester called 911 that morning when she was woken up by a neighbor. (T. 260). Hester testified that she saw four (4) people walking up the street, and two of them were armed. (T. 260). Hester indicated that she was reluctant to be a witness, but ultimately testified that she saw part of the shooting; She identified the Appellant. (T. 261-62).

Linda Miller (Miller) testified that on the night in question, Matthew Nash came to her and asked her to show him where Maurice Harris lived, to which she agreed. (T. 264).

Dr. Steven Hayne, the State's forensic pathologist, testified that Harris died of massive

internal bleeding, caused by a gunshot wound. (T. 278). The gunshot wound was not consistent with a shotgun blast. (T. 279). Dr. Hayne ultimately concluded that the cause of Harris' death was homicide. (T. 283).

Billy Brown (Brown), a detective with the Vicksburg Police Department testified that he reported to the scene and went with Jarvis Bowman to find the suspect's home. (T. 284). Brown testified that he obtained a search warrant, searched the residences, and found a .32 caliber semi-automatic pistol. (T. 285).

Sandra Williams, the lead investigator, testified to a statement she obtained from the Appellant. Williams testified that the Appellant confessed to striking the victim, Maurice Harris, at the night club that night, because he saw Harris pushing his (the Appellant's) girlfriend. (T. 296). The Appellant admitted to seeing the victim at the Smoke Break, a convenience store, later in the evening. (T. 297). Williams testified that the Appellant told her that he and his friends set out to learn where Harris lived. (T. 297). The Appellant admitted to following Linda Miller to Harris' home. (T. 298). During his statement, the Appellant told Williams that two or three people were shooting, and that he was one of them. (T. 301). The Appellant admitted to throwing a gun in the Mississippi River, but claimed he shot a .38 revolver. (T. 301). Williams testified that there was no evidence that a .38 was fired.

The Appellant took the stand in his own defense. Trevillion testified that when he and his brothers went to the night club, he saw his girlfriend falling, and he caught her. (T. 320). Trevillion testified that she told him that Harris had pushed her. (T. 320). Trevillion admitted to confronting Harris at the night club. (T. 321). Trevillion then left, took his girlfriend home, and went to a convenience store where he ran into Harris again. (T. 321-24). Trevillion testified that when he arrived at the store, he heard Harris yelling and threatening to kill him. (T. 325). This, according

to his testimony, enraged Trevillion. (T. 326).

Trevillion then testified he met up with “Little Head” and “Killer C,” two men he knew from being previously incarcerated. (T. 327). Trevillion testified that Armond Trevillion, Matthew Nash, Little Head, Killer C, and Rufus Armstrong went to the Harris’ house. (T. 328). Trevillion testified that Matthew Nash went to talk to Harris and he, Killer C, and Little Head walked up the street. (T. 328). The Appellant admitted to having the shotgun, and further testified that it was Killer C had the assault rifle. (T. 328). The Appellant heard one shot, and, according to his testimony, fired the shotgun and ran. (T. 329). After the Appellant’s testimony, the defense rested.

After deliberation, the jury returned a guilty verdict against the Appellant on all charges. (C.P. 76, R.E. 5). After a pre-sentence investigation, the Appellant was sentenced to life imprisonment for the murder count, twenty years for each count of aggravated assault, ten years for shooting into an occupied dwelling and three years for being a felon in possession a firearm, all to run consecutively. (C.P. 107-08, R.E. 6-7)

On April 23, 2008, the Appellant filed a Motion for Judgment Not Withstanding the Verdict or in the Alternative New Trial. (C.P. 109-10, R.E. 7-8). The motion was denied by the trial court on May 22, 2008. (C.P. 122, R.E. 10). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 126, R.E. 11).

SUMMARY OF THE ARGUMENT

The trial court erred when, in determining which members of the venire were competent to serve on a jury, excused two (2) potential jurors on the basis that the jurors had previously served on a jury in the last two (2) years. The trial court’s conclusion was contrary to the laws of the State of Mississippi.

ARGUMENT

ISSUE:

WHETHER THE TRIAL COURT ERRED WHEN IT DISMISSED TWO (2) JURORS BECAUSE THEY HAD PREVIOUSLY SERVED ON A JURY IN THE LAST TWO (2) YEARS.

During the voir dire, the trial court told venirepersons the following, regarding the disqualifications for jury service; “If you’ve served as a juror within the last two years, you must be excused. That means not just called like you are right now but actually put in the box. If you’ve been put in the box to try a case within the last two years, you must be excused.” (T. 24).

After outlining more of the statutory disqualifications, the trial court went into the statutory excuses that individuals are entitled to. (T. 24). However, during the course of listing those excuses, the trial court said the following; “I’ve mentioned if you’ve served within the last two years as a juror, you *must* be excused. (T. 25)(emphasis added).

One potential juror mentioned that he had served on a jury in the last two years. After some discussion as to whether the trial in which the potential juror sat was in the last two years, the trial court ultimately excused the potential juror. (T. 29).

After more venirepersons attempted to be excused from jury duty, another potential juror came forth saying she had served on a jury two years ago. (T. 55). The trial court excused that juror also (T. 55). For the reasons explained below, the trial court erred in excusing the two jurors based on their previously sitting on a jury.

Mississippi Code Annotated § 13-5-1 sets forth the standards for who are competent to serve as jurors in Mississippi. It provides;

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 qualifications 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 talesjuror 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.

Miss. Code Ann. § 13-5-1.

Mississippi Code Annotated § 13-5-25 provides what individuals are exempt from jury service as a personal privilege. It says;

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 cases shall serve as talesmen, and on special venire, and on the regular panel, if there be a deficiency of jurors. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim.

Miss. Code Ann. § 13-5-25.

Taking into consideration the statutes noted above, the Mississippi Supreme Court has interpreted;

Miss. Code Ann. § 13-5-1 states the requirements to judge the competency of potential jurors. Competent jurors must be over the age of 21, able to read and write, and either a qualified elector or a landowner for more than a year. They must not have been convicted of an infamous crime and must not be a habitual drunkard or common gambler. **Miss. Code Ann. § 13-5-25** provides for two exemptions from jury service. One exemption is for persons over the age of 65, and the other is for person who have served on a jury during the past two years. These exemptions are not mandatory and must be asserted by the individual.

Davis v. State, 767 So. 2d 986, 1000 (Miss. 2000)(internal citations omitted).

The Appellant concedes that “[a] party who fails to object to the jury’s composition before it is empaneled waives any right to complain thereafter.” ***Myers v. State***, 564 So. 2d 554, 557 (Miss. 1990).

However, in certain limited circumstances, the appellate court may set aside the procedural bar and reverse when it is clear that a juror who would be disqualified under **Miss. Code Ann. § 13-5-67** was not removed before the jury retired to consider its verdict. *See Caldwell v. State*, 381 So. 2d 591, 594 (Miss. 1980). In the instant case, a juror who was qualified under § 13-5-67 was prohibited to sit on a jury. The Appellant would respectfully contend that this error is sufficiently analogous to the error in *Caldwell* and warrants the lifting of the procedural bar.

The Appellant further concedes, that the jury laws outlined in Section 13 of Title 15 are directional in nature. *See Posey v. State*, 38 So. 324, 326 (1905). *See also Miss. Code Ann. § 13-5-87* (stating that the provisions for listing, drawing summoning and empaneling jurors are merely directional). However, in the instant case there is a radical departure from the requirements outlined in the statutes that warrants reversal.

The Mississippi Supreme Court has reversed civil judgments because of the failure of the circuit clerk to follow the rules outlined in the code concerning jury service in the last two years. In *Page v. Siemens Energy and Automation, Inc.*, the court reversed a civil judgment when the circuit clerk admitted to directing the computer programmer to exclude from jury lists all those on the wheel who had been summoned to jury duty in either circuit or county courts within the preceding two years. *Page v. Siemens Energy and Automation, Inc.*, 728 So. 2d 1075, 1082 (Miss. 1998). The *Page* Court held;

“Even if the clerk’s office claims expediency as a purpose, this does nothing to change the fact that citizens who were entitled, and who may want, to serve on juries have been intentionally excluded.”²

Id. at 1080.

2. In the case *sub judice*, there is nothing in the record to indicate any reason behind the trial court’s determination.

In *Adams v. State*, the deputy clerk unilaterally struck from the jury list all persons over sixty-five years in age as well as those who had served on a jury in the preceding two years. *Adams v. State*, 537 So. 2d 891 (Miss. 1989). The Mississippi Supreme Court recognized that it had “never condoned a venire selection process completely contrary to [the statutes] wherein the clerk did that which the law expressly prohibits.” *Id.* at 895.

The effect of the clerk’s actions in *Page* and *Adams* is identical to the practical effect of the trial court’s actions in the instant case. If the clerk were to not allow those who could claim exemptions on the venire panels, they would never be afforded the opportunity to be seated on a jury. If the trial court, during the course of qualifying the jury, excluded those who, absent any other valid reason or their own personal exemption, could serve on a jury, they would never be afforded the opportunity to be seated on a jury.

The Appellant respectfully contends that the trial court’s actions in the case *sub judice* are completely contrary to the statutes outlined in the Mississippi Code and are exactly what the law expressly prohibits. The trial court was without authority to excuse the potential jurors from serving on the jury. It is every juror’s right to exercise his or her own exemption. By placing that right in the hands of the trial court is to run afoul of the rights of Mississippi citizens.

CONCLUSION

The Appellant herein submits that, based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant’s conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on one (1) count of murder, two (2) counts of aggravated assault, one (1) count of shooting into an occupied dwelling, and one (1) count of being a felon in possession of a firearm,

with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the error cited above fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Anthony Trevillion, 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 **BRIEF OF THE APPELLANT** to the following:

Honorable Frank G. Vollar
Circuit Court Judge
1117 Openwood Street
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Honorable Richard Smith
District Attorney, District 9
Post Office Box 648
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Honorable Jim Hood
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This the 20th day of Jan, 2009.


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