IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN — APPELLANT

VS. — NO. 2008-KA1684-COA

STATE OF MISSISSIPPI — APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN **APPELLANT**

VERSUS **NO. 2008-KA-01684-COA**

STATE OF MISSISSIPPI **APPELLEE**

SUPPLEMENTAL BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

KEITH SPEARMAN, a multiple misdemeanant, has been granted an evidentiary hearing for the purpose of resolving an unclear and ambiguous trial record with respect to whether or not Spearman was denied his constitutional right to testify in his own defense during his trial in 2008 for attempted burglary of a building. *See* appellee's exhibit A, attached.

In an order entered on July 28, 2010, the Court of Appeals stated the following:

> This matter came before the Court on its own motion and the Court finds that, pursuant to M.R.A.P. 10(e), the case should be remanded to the Circuit Court of Bolivar County for a period of thirty days for the purpose of conducting an evidentiary hearing to determine whether supplementation or modification of the record is appropriate. * * * The appellant claims on appeal and in his rehearing that the trial court denied him his constitutional right to testify in his own defense. The Court finds that the record is unclear and ambiguous as to whether the appellant sought or freely waived his right to testify. Pages 49-53 of the record, which are attached to this motion, clearly show such ambiguity. On remand, the Court shall conduct an evidentiary hearing and determine whether the record accurately reflects all that occurred as to the appellant's decision to

testify or not testify. * * * * * *

Boyd P. Atkinson, a public defender in Bolivar County, represented Spearman at trial.

Wilbert Levon Johnson a Clarksdale attorney, represented Spearman during the Rule 10(e) hearing.

A review of the trial record *as a whole* and the transcript generated during the recent evidentiary hearing lead to the conclusion that Judge Smith's finding of fact that Spearman did not want to testify was neither clearly erroneous nor manifestly wrong. There is nothing in the record of trial or the evidentiary hearing indicating that the final decision that Spearman would not testify at trial was made against his will.

ARGUMENT

SPEARMAN HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT EITHER THE TRIAL COURT OR TRIAL COUNSEL DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE.

THE FACT FINDING MADE BY THE CIRCUIT JUDGE DURING THE EVIDENTIARY HEARING WAS NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

The genesis of this claim and others similar to it is found in the case of **Culberson v. State,** 412 So.2d 1184, 1186-87 (Miss. 1982). In that case Alvin Culberson testified on his motion for a new trial filed in the wake of his conviction for capital murder that he desired to take the stand in his own defense but did not do so because the first time his lawyer told him it wasn't necessary " . . . and the second time he said 'well, just hold on,' and I never did get a chance to talk."

In **Culberson** we find the following language triggering post-conviction review of Spearman's appellate claim that "[t]he trial court and trial counsel deprived Spearman of his

constitutional right to testify."

> Section 26 [of the Mississippi Constitution of 1890] gives an accused the right to testify in his own behalf. The denial of the right of an accused to testify is a violation of his constitutional right regardless of whether the denial stems from the refusal of the court to let a defendant testify as in **Warren v. State,** 174 Miss. 63, 164 So. 234 (1935), or whether the denial stems from the failure of the accused's counsel to permit him to testify.
>
> The question remains unanswered in the record before us as to whether Culberson's attorney prevented him from testifying. Accordingly, we grant the petition for a writ of error coram nobis and remand the case for an evidentiary hearing to determine whether Culberson told his attorney he wanted to testify as a witness in his own behalf and whether the attorney disregarded the request and refused to permit Culberson to testify at either the guilt phase or the sentencing phase of his trial.
>
> We suggest to the trial judges of the state that, in any case where a defendant does not testify, before the case is submitted to the jury, the defendant should be called before the court out of the presence of the jury, and advised of his right to testify. If the defendant states he does not wish to testify, he may not be forced to take the stand; however, if he states that he wants to testify he should be permitted to do so. A record should be made of this so that no question about defendant's waiver of his right to testify should ever arise in the future.

The trial judges in this State are *not required* to follow **Culberson** in their proceeding because the Court was "merely suggest[ing]" that trial courts inquire whether defendants desire to testify. **Walker v. State,** 823 So.2d 557, 562 (Ct.App.Miss. 2002), citing **Shelton v. State,** 445 So.2d 844, 847 (Miss. 1984) and other cases found therein. "[A]lthough the preferred practice is for the trial court to inform the defendant on the record of the right to testify, no legitimate claim of reversible error can be predicated on the trial court's failure in this regard." *Id,* 823 So.2d at 562. *See also* **Scott v. State,** 965 So.2d 758, 768 (¶25) (Ct.App.Miss. 2007) [A trial court " . . . is not required to give the defendant the **Culberson** warning (that a defendant has a right to testify on his

own behalf)".]

Moreover, **Culberson** does not require definitive proof, on the record, that the defendant waived his right to testify. The critical inquiry is whether or not the defendant was denied his right to testify either by the court or by his lawyer. To this extent definitive proof, in the record, of a waiver would resolve the issue. Where, as here, a waiver is not prominent, the record as a whole should be examined in determining whether or not the defendant was denied his right to testify.

Accordingly, Spearman's claim he is entitled to a new trial because his case fails to satisfy **Culberson** is without appeal on appeal. (Supplemental Brief of Appellant at 3)

We do agree with Spearman the testimony proffered during Spearman's evidentiary hearing demonstrates the record accurately reflects all that took place with respect to Spearman's decision to testify or not to testify in his own behalf. Stated differently, we concede the official record in its present form is as clear as it's going to get.

The question now before this Court is whether or not Spearman is entitled to a new trial based upon his claim he was deprived of his constitutional right to testify.

We respectfully submit he is not.

This is a post-conviction, after-the-fact, matter. The burden of proof is on Spearman to prove by a preponderance of the evidence he was denied his right to testify either by the trial judge or by his lawyer. "It is the duty of the appellant to overcome the presumption of the correctness of the trial court's judgment by demonstrating some reversible error." **Edlin v. State,** 533 So.2d 403, 410 (Miss. 1988).

Viewing the totality of the evidence in the entire record, Spearman has failed to do so here.

First, Spearman, until now, has never complained, not a whimper. When the defense rested its case, Spearman never said one word to the Court about testifying or being denied his right to

testify. Alvin Culberson, we note, at least testified on a motion for new trial he desired to take the stand in his own defense but was denied his right to testify. Spearman has never done so, not at trial, or in a motion for a new trial, or at the post-conviction evidentiary hearing, or in an *ex parte* after-the-fact affidavit.

Second, Spearman personally declined to testify during the evidentiary hearing ordered by this Court. (R. 5) If he had wanted to testify at trial, all he had to do was swear, under the trustworthiness of the official oath, he was denied that right, either by the judge or by his lawyer. Spearman's silence on remand is deafening. Perhaps the fear of committing perjury compelled him to sit mute.

Third, Mr. Atkinson, Spearman's trial lawyer, testified ". . . there is no way Mr. Spearman would have allowed me to rest and this trial go forward without his testimony if he wanted to testify. * * * But I can assure the Court Mr. Spearman would have let his wishes be known if they were contrary to what I said to the Court. * * * And if there's any blame to be laid, I guess it would have to be where I was not plain enough or did not take the extra steps, obviously, to let the court know that Mr. Spearman had - - *had changed his mind.*" (R. 16-17) [emphasis ours]

> Q. [BY DEFENSE COUNSEL JOHNSON:] Could you have made a mistake?
>
> A. [BY LAWYER ATKINSON:] **No, sir.** And Mr. Spearman wouldn't have let me make that mistake. And Ms. Flint would not have let me make that mistake. And Your Honor wouldn't have let me and Ms. Flint and Ms. Mitchell make that mistake. (R. 18) [emphasis ours]

Fourth, lawyers for the State all stated on the record, under oath, that

> " . . . we would not have proceeded had there not been some representation that he [Spearman] no longer wanted to take the stand." (Lead Prosecutor Leslie Flint at R. 9)

> "None of us would have gone forward if he [Spearman] had indicated he did want to testify. And I'm certain Mr. Spearman would not have sat quietly if he wanted to testify and we didn't allow him to do so. Or shall I say the Court didn't allow him to do so." (Prosecutor, now district attorney, Brenda Mitchell at R. 11)

Fifth, Spearman was told in plain and ordinary English he had a right to testify in his own behalf. At least twice he conferred with counsel outside the presence of the jury. Spearman's original position as told to his lawyer was that he would not testify. Then Spearman said in open court he would take the stand. After another conference with his lawyer Spearman reverted to his original position that he did not wish to testify. (R. 53-55)

Although the trial record accurately indicates that Spearman last said he was going to testify, when the Court asked defense counsel to call its first witness, the defense rested. Not one whit of protest was heard from Spearman, not one word or syllable. This is the equivalent of a voluntary, knowing, and intelligent waiver of a right that Spearman was well aware that he had. It is a waiver either presumed or implied from all the circumstances. Spearman's silence at this point raised a presumption of a waiver that has yet to be rebutted. *Cf.* **Jordan v. Hargett,** 34 F.3d 310 (5th Cir. 1994).

Sixth, Spearman has yet to tell us by way of a profert or otherwise what he would have testified to. This observation simply detracts from the validity of his complaint.

The trial judge's finding of fact in the wake of remand is quoted as follows:

> THE COURT: * * * I agree with all the attorneys that indicated that this court would have - - not had proceeded had Mr. Spearman indicated that he wanted to testify and not allow him to do so. Someone would have pointed that out. And I was specifically tryin' to find that answer, as the record reflects.
>
> I found that all attorneys were confident that Mr. Spearman indicated that he did not wanna testify, and the Court so finds today and asks that the rep - - - record be supplemented accordingly.

> I don't know what happened, which is the exact words of Madam Court Reporter, but I did find at trial and find now that Mr. Spearman indicated that he did not wanna testify, and ask that this record be promptly forwarded to the Court of Appeals. They'd indicated 30 days from the date of their order for this to be done. And I would ask Madame Court Reporter if she could help me comply with that directive. (R. 38-39)

We agree with Spearman's observation in note 1 of his supplemental brief that this is a finding of fact subject to the "clearly erroneous," "manifestly wrong" standard of review.

An appellate court will not disturb the trial court's factual findings unless they are found to be "clearly erroneous" or "manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (¶31) (Miss. 2004); **Brown v. State,** 731 So.2d 595, 598 (¶6) (Miss. 1999); **Kambule v. State,** 19 So.3d 120, 122 (¶6) (Ct.App.Miss. 2009), reh denied, cert denied 19 So.3d 82 (2009).

Findings of fact must be reviewed by the Supreme Court with great deference. **Scott v. State,** 981 So.2d 964 (Miss. 2008). This is especially true where, as here, the circuit judge had the opportunity to observe first hand Spearman's capriciousness and lack of cooperation with his attorney, *e.g.*, during trial Spearman expressed his inability to meaningfully communicate with his lawyer, i.e., "zero talk." (R. 8)

In **Booker v. State,** 5 So.3d 356, 358, note 2, (Miss. 2008), reh denied, we find the following language *apropos* to this Court's scope of review:

> /2 As the United States Supreme Court has stated, under the "clearly erroneous" standard, it "will not reverse a lower court's finding of fact simply because we would have decided the case differently." [citation omitted] Instead, the reviewing court must ask "whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that [a] mistake has been committed.' " [citations omitted]

This Court has said that "[a] finding of fact is clearly erroneous when, although there is

evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." **Poss v. State,** 17 So.3d 167 (Ct.App.Miss. 2009).

Although there is no direct evidence flowing from the mouth of Spearman himself that he did not want to testify in his behalf, it is implicit from the record of the evidentiary hearing and the record of trial as a whole that Spearman impliedly waived that right. Spearman has never said otherwise.

In addition to all of the above, we re-adopt the argument we made on direct appeal which appears on pages 6-12 of our original brief filed on August 20, 2010.

It has been said, but we cannot remember by whom, that " . . . technical mechanisms or formalities under the law should not always triumph over substance."

CONCLUSION

"[N]o trial is free of error; however, to require reversal the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced." **Dizon v. State,** 749 So.2d 996, 999 (Miss. 1999) citing **Century 21 Deep South Properties, Ltd. v. Keys,** 652 So.2d 707, 716 (Miss. 1995) quoting **Davis v. Singing River Elec. Power Ass'n,** 501 So.2d 1128, 1131 (Miss. 1987).

The **Culberson** case has never required, on the record, an express waiver, if a waiver at all, from the mouth of the defendant with respect to the defendant's right to testify in his defense, and no reversal may be predicated on the trial court's failure to inform the defendant on the record of the right to testify. **Walker v. State,** *supra*, 823 So.2d at 562. It is good if the record as a whole reflects an awareness of a right to testify and supports an implied waiver of that right as it does here.

We concur with Spearman the results of the evidentiary hearing reflect the opinion of all parties, including the court reporter, that the record accurately reflects everything that took place in

the courtroom with respect to Spearman's awareness of his right to testify and whether or not he wanted to testify.

In the end, the evidence does not preponderate in favor of the conclusion that Spearman was denied his right to testify. He well knew he had that right but sat mute.

Viewing the totality of the record of trial and the transcript of the evidentiary hearing, we argue that Judge Smith's finding of fact, as gleaned from **all** the evidence, that Keith Spearman did not want to testify was neither clearly erroneous nor manifestly wrong.

Appellee respectfully submits that affirmation by this Court of Spearman's conviction for attempted burglary of a building will best serve the interests of justice because Spearman was caught red-handedly and was hopelessly guilty.

Spearman was given a fundamentally fair trial with a full awareness of his right to testify in his own behalf. He waived that right. Indeed, there can be no doubt about it.

Accordingly, a new trial is not required; rather, Spearman's conviction and five (5) year sentence with three (3) years suspended should be affirmed.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2008-KA-01684-COA

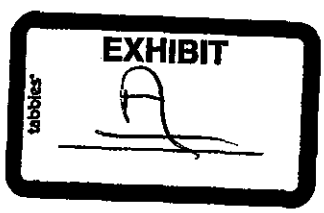
KEITH SPEARMAN *Appellant*

v.

STATE OF MISSISSIPPI *Appellee*

ORDER

This matter came before the Court on its own motion and the Court finds that, pursuant to M.R.A.P. 10(e), the case should be remanded to the Circuit Court of Bolivar County for a period of thirty days for the purpose of conducting an evidentiary hearing to determine whether supplementation or modification of the record is appropriate. This rule provides, in part: "If any differences arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." The appellant claims on appeal and in his rehearing that the trial court denied him his constitutional right to testify in his own defense. The Court finds that the record is unclear and ambiguous as to whether the appellant sought or freely waived his right to testify. Pages 49-53 of the record, which are attached to this motion, clearly show such ambiguity. On remand, the court shall conduct an evidentiary hearing and determine whether the record accurately reflects all that occurred as to the appellant's decision to testify or not testify. The results of that evidentiary hearing shall be transcribed and certified to this Court. If required, the record shall be supplemented to state the truth.



THEREFORE IT IS ORDERED on the Court's own motion this matter be, and hereby is, remanded to the Circuit Court of Bolivar County for a period of thirty days within which to conduct an evidentiary hearing to determine whether the record is accurate and certify the record of that hearing to this Court. Should that hearing establish that the record is inaccurate, the court shall promptly supplement or modify the record and file the same with this Court. In the event a supplement or modified record is filed with this Court, the appellant shall have thirty days thereafter the right to file a supplemental brief. Likewise, the appellee shall have fifteen days after the filing of any such appellant's supplemental brief to file its own supplemental brief.

SO ORDERED, this the 27th day of July, 2010.

LARRY E. ROBERTS, JUDGE

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **SUPPLEMENTAL BRIEF FOR THE APPELLEE** to the following:

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This the 19th day of October, 2010.

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