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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN

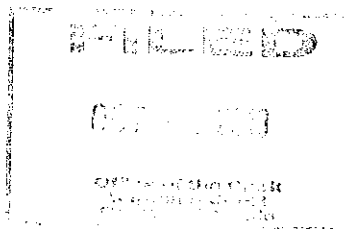
APPELLANT

V.

NO. 2008-KA-1684-COA

STATE OF MISSISSIPPI

APPELLEE



SUPPLEMENTAL BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH SPEARMAN

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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.

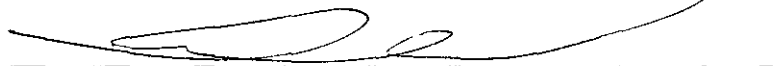
1. State of Mississippi
2. Keith Spearman, Appellant
3. Honorable Brenda F. Mitchell, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 4th day of October, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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TABLE OF AUTHORITIES

STATE CASES

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SUPPLEMENTAL BRIEF OF THE APPELLANT

STATEMENT OF THE FACTS FROM RULE 10(E) HEARING

Upon order of this Court, this case was remanded to the trial court for an evidentiary hearing to determine whether the record accurately reflects Spearman's decision to testify. At the hearing, prosecutors Leslie Flint and Brenda Mitchell, trial counsel Boyd Atkinson, and court reporter Brenda Blackburn testified.

Leslie Flint was the lead prosecutor at Spearman's trial. (Supp. Tr. 7). Regarding Spearman's decision to testify, Flint testified: "First, I'm not going to say that the transcript is incorrect. Listening to the audio, don't hear anything different than what was recorded as record." (Supp. Tr. 7). However, she stated that the State would not have proceeded without "some indication that [Spearman] had changed his mind from what is last indicated on the record to some indication he did no longer want to take the stand." (Supp. Tr. 7).

Brenda Mitchell was also a prosecutor at Spearman's trial. Similarly, Mitchell testified: "I

cannot say, and will not say, that the written transcript as prepared by the court reporter is not correct.” (Supp. Tr. 10). She also stated that “[the State] would not have gone forward without there having been some indication from him that he did not want to testify.” (Supp. Tr. 10). Mitchell acknowledged that Spearman’s alleged decision not to testify was not reflected in the record, and she indicated that it might have been in the trial judge’s chambers. (Supp. Tr. 10-12).

Boyd Atkinson, Spearman’s trial attorney, testified similarly. He acknowledged that the transcript indicates that Spearman’s last statement (before the afternoon break) regarding his right to testify was that he wished to do so. (Supp. Tr. 16, 20). Atkinson admitted that he had no independent recollection of it, but he essentially claimed that he would not have rested the defense’s case without calling Spearman as a witness if Spearman did not indicate that he wanted to testify. (Supp. Tr. 14-21).

Brenda Blackburn, the court reporter at Spearman’s trial, testified that the record was correct. (Supp. Tr. 22). She testified that she had gone back and listened to the audio recording of trial, and “it seems pretty clear to me.” (Supp. Tr. 23). Blackburn testified that she could find no statement by Spearman that he did not want to testify, although, Mr. Atkinson made an on-the-record indication that Spearman did not want to testify. (Supp. Tr. 23-24).

Ultimately, the trial court concluded that trial would not have proceeded had Spearman indicated that he wanted to testify. (Supp. Tr. 38-39). The trial court stated: “I don’t know what happened, which is the exact words of Madame Court Reporter, but I did find at trial and find now that Mr. Spearman indicated that he did not wanna testify. . . .” (Supp. Tr. 39).

ARGUMENT

The trial court’s finding was manifestly wrong, clearly erroneous, and/or against the

overwhelming weight of the evidence,¹ and, in any event, does not satisfy *Culberson v. State*, as the record remains unclear as to whether Spearman waived his right to testify. No witness testified that the record was incorrect. To the contrary, each witness testified that the record was correct. (Supp. Tr. 7,10, 20-21, 22-24). The prosecutors, trial counsel and, ultimately, the trial court concluded that Spearman must have indicated he did not want to testify or the case would not have proceeded. (Supp. Tr. 7, 10-12, 14-21, 39). From the parties' testimony, it appears that Spearman and Atkinson may have discussed his decision in the court's chambers, off of the record. (Supp. Tr. 12, 23-24).

Spearman submits that the trial court's finding is not based on fact, but, instead, is based on supposition and/or conjecture. The trial court's finding is essentially that the trial court, prosecution and defense attorney would not have allowed a violation of Spearman's right to testify, ergo no violation occurred. No one identified specifically where, when or how Spearman waived his right to testify; the witnesses could only claim that he must have or trial would not have continued.

Simply put, the results of the evidentiary hearing added no clarity to the situation. The parties essentially testified that the record was correct, but Spearman must have waived his right to testify somehow because trial continued. Spearman respectfully contends that the dictates of *Culberson* remain unsatisfied.

In *Culberson v. State*, the Mississippi Supreme Court instructed that "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." *Culberson v. State*, 412 So. 2d 1184, 1186 (Miss. 1982) (emphasis added). In this case,

¹ The trial court's order is presumably a finding of fact, and, as such, is subject to the "clearly erroneous," "manifest error," and or "weight of the evidence" standard of review. *See, e.g., Booker v. State*, 5 So. 3d 356, 357-58 (¶3) (Miss. 2008) (citation omitted); *Davis v. State*, 551 So. 2d 165, 169 (Miss. 1989) (citation omitted).

the record indicates that Spearman wished to testify. (Tr. 49-51). Although, the trial court found that Spearman indicated at trial that he did not want to testify, the record does not indicate as much. From the testimony adduced at the hearing, it appears that Spearman and Atkinson may have discussed his decision in the court's chambers, off of the record. (Supp. Tr. 12, 23-24). If, for argument's sake, Spearman waived his right to testify during these discussions in chambers and indicated as much to the trial court, the instant case still fails to satisfy *Culberson*. The record leaves a question as to whether Spearman waived his right to testify. Accordingly, Spearman submits that he is entitled to a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Spearman respectfully requests that this honorable Court reverse the conviction, sentence, and fines entered against him in the trial court and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Keith Spearman, 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 OF THE APPELLANT** to the following:

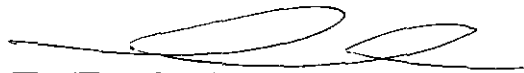
Honorable Albert B. Smith, III
Circuit Court Judge
202 N. Pearman Avenue
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Honorable Laurence Y. Mellen
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Mr. Keith Spearman, MDOC#140470
Walnut Grove Correctional Facility
Walnut Grove, Mississippi 39189

This the 9th day of October, 2010.



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