

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01722-COA

KIRK VINCENT MAYERS

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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STATUTES

none

OTHER AUTHORITIES

none

REPLY ARGUMENT

ISSUE NO. 1: DID THE INDICTMENT CHARGE AGGRAVATED OR SIMPLE ASSAULTS IN COUNTS 1 AND 2?

The state's position is that the indictment is sufficient because it basically alleges that the defendant shot an officer in the leg with a gun, and that from this assertion it could be deduced that the "gun" referred to was a firearm or deadly weapon. The flaw in the state's argument is that it could just as easily be concluded that any of the other kinds of guns listed in the appellant's initial brief were also used. The state's argument is unpersuasive.

The circuit court only had jurisdiction of a simple assault charge. *Neal v. State*, 936 So.2d 463 (Miss. Ct. App.2006). *Torrey v. State*, 816 So.2d 452, 454(¶ 4) (Miss. Ct. App. 2002).

ISSUE NO. 2: WHETHER THE STATE PROVED "KNOWING ASSAULT" OF LAW ENFORCEMENT OFFICERS UNDER COUNTS 1 AND 2 ?

Mayers relies on his original arguments and authorities under this issue.

The state suggests that scienter is established from the allegation that the .22 pistol at issue was swapped for crack cocaine. To accept this argument, the court would have to make a factual finding that all guns which are traded for drugs are stolen.

The state also suggests that Myers should have known that the gun was stolen because Shelly wanted to sell it quickly. There is not a seller in the world who wants his or her goods to be sold slowly. To accept the state's argument, the court would have to find as a matter of law that everything purchased quickly must have been stolen.

The state suggests that Shelly, the burglar, testified that Mayers knew the gun was stolen. Actually, the record shows that Shelly never identified Mayers as someone who knew the .22 was stolen, he mentions everyone but Mayers. [T.254, 257].

The state suggest that the fact that the gun was being sold at an apartment complex, would lead one to think that it was stolen. Therefore, according to the state all guns traded at apartment complexes are stolen.

The simple fact is that the state failed to prove scienter on Mayer's part. *In Interest of W.B.*, 515 So.2d 1175 (Miss.1987), *Thompson v. State*, 457 So.2d 953 (Miss. 1984).

ISSUE NO. 4: DID THE TRIAL COURT ERRONEOUSLY REFUSE A SELF-DEFENSE INSTRUCTION?

The state did not attempt the impossible under this issue, namely, distinguish Mayers case from *Lenard v. State*, 828 So.2d 232, 237 (¶¶ 24-25) (Miss. Ct. App. 2002) and *Hatten v. State*, 938 So.2d 365, 369 (Miss. Ct. App. 2006). They control this issue.

ISSUE NO. 5: WAS MAYERS ENTITLED TO A CAUTIONARY INSTRUCTION CONCERNING HIS PRIOR CONVICTIONS?

The state offers no suggestion as to why the principle of *Brown v. State*, 890 So.2d 901, 913 (¶36) (Miss., 2004) should not be followed in this case, namely, “[w]hen evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” See also, *Williams v. State*, 991 So.2d 593 (Miss. 2008).

ISSUE NO. 6: WHETHER JUROR 18 SHOULD HAVE BEEN STRICKEN FOR CAUSE?

Nothing in the state’s argument establishes that the juror in question would have been attentive and competent to fairly receive the evidence and deliberate Mayers’ case. Therefore, the trial court had no discretion here, the incompetent juror had to be stricken. *Berry v. State*, 703 So.2d 269, 292-93 (¶85-86) (Miss. 1997).

ISSUE NO. 7: SHOULD THE STATE HAVE BEEN REQUIRED TO
STIPULATE TO MAYER'S PRIOR CONVICTIONS UNDER THE
FELON IN POSSESSION COUNT?

There is no way around the fact that *Sawyer v. State*, 2 So.3d 655, 660-61 (Miss.
Ct. App. 2008) and *Williams v. State*, 991 So.2d 593, 602-606 (Miss. 2008) control this
issue. These two cases are not even mentioned in the state's brief.

ISSUE NO. 8: WHETHER THE TRIAL COURT ALLOWED IMPROPER
OPINION EVIDENCE?

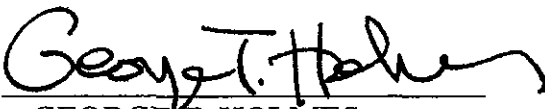
Mayers will rely on the arguments and authorities already presented in the initial
brief under this issue.

ISSUE NO. 9: WHETHER MAYER'S SENTENCE WAS ILLEGAL?

Mayers will rely on the five arguments, and authorities under each, already
presented in the initial brief under this issue.

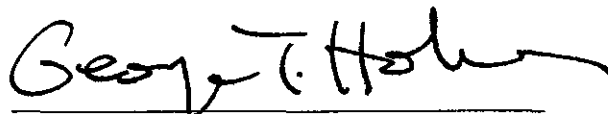
Respectfully submitted,

KIRK MAYERS

BY: 
GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 26th day of June 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Michael M. Taylor, Circuit Judge, P. O. Box 1350, Brookhaven MS 39602, and to Hon. Rodney Tidwell, Dist. Atty., 284 E. Bay St., Magnolia MS 39652, and to Hon. La Donna C. Holland, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.



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