IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALBERT ABRAHAM, JR. — APPELLANT

VS. — NO. 2009-CP-1759

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALBERT ABRAHAM, JR. **APPELLANT**

vs. **CAUSE No. 2009-CP-01759**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against an Order of the Circuit Court of DeSoto County, Mississippi in which relief was denied on the Appellant's petition for a writ of certiorari.

STATEMENT OF FACTS

The Appellant, an attorney licensed to practice in the State of Mississippi, filed a "Petition for Writ of Certiorari with Petitioner's Supporting Affidavit" on 7 July 2009 in the Circuit Court of DeSoto County. In his petition, he alleged that he had been found guilty after a trial *in absentia* of driving ninety - one miles an hour in a seventy-mile speed zone and for "following too closely." He further alleged that the DeSoto County prosecutor told him that he, the prosecutor, was the prosecutor when the Appellant's ticket or tickets were called for trial and that the prosecutor had no recollection generally of having put on evidence of guilt in cases in which the accused in a traffic

offense case failed to appear for trial. The Appellant further represented that he was not present when his case or cases were called for trial.

The Appellant further alleged that, while trial *in absentia* for traffic offenses in Justice Court is permitted in this State's practice, it is nonetheless incumbent upon the prosecution to produce evidence of guilt. The Appellant attached a number of opinions of the Attorney General to this effect. Claiming that there had been no evidence adduced concerning the speeding and following too closely offenses, the Appellant prayed for a trial *de novo* on the charges. (R. Vol. 1, pp. 4 - 16). There was no affidavit by the county prosecutor; the Appellant based his claim for relief on information and belief.

The Circuit Court denied relief on the Appellant's petition because the Appellant failed to include in his petition the Justice Court file and judgment. The court further held that any review of a Justice Court judgment via certiorari as provided for by Miss. Code Ann. Section 11-51-93 is limited to questions of law arising from or appearing on the face of the record and proceedings. Because no record had been provided, there was nothing for the court to review. As for the allegation concerning what the county prosecutor allegedly told the Appellant, the court were merely alleged on information and belief. (R. Vol. 1, pp. 21 - 22).

STATEMENT OF ISSUES

1. DID THE CIRCUIT COURT ERR IN ITS FINDING THAT THE APPELLANT WAS NOT ENTITLED TO REVIEW OF THE JUSTICE COURT CASES

SUMMARY OF ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DECLINING REVIEW OF THE APPELLANT'S JUSTICE COURT CONVICTIONS

ARGUMENT

THAT THE CIRCUIT COURT DID NOT ERR IN DECLINING REVIEW OF THE APPELLANT'S JUSTICE COURT CONVICTIONS

The Appellant asserts that the Circuit Court was in error for having held that there was no record from the Justice Court for it to review and for that reason denying relief on the petition. The Appellant asserts two reasons why this was so. The first reason, according to the Appellant, is that the Circuit Court was not being asked to re-weigh evidence, but simply to hold that the Justice Court had erred by hearing no evidence. The second reason, according to the Appellant, was because it was the Justice Court clerk's duty to provide the record.

It does not appear that any record from the Justice Court was produced by the Appellant. While the Appellant claims that it was the duty of the clerk of the Justice Court to provide the record, there is nothing to show that the clerk of that court was noticed to provide the record or even noticed that a petition for certiorari had been filed.

It may be that it is the duty of the clerk to transmit a certified copy of a record, upon proper notice to do so. *Fassman v. Town of Centreville*, 184 Miss. 520, 186 So. 641 (1939). But, notwithstanding the duty of an inferior tribunal to provide a reviewing court with the record, it is an appellant's duty to ensure that a proper record is provided to a reviewing court. *Smith v. State*, 572 So.2d 847, 849 (Miss. 1990). Where an inferior tribunal fails or neglects to provide the record, then it is an appellant's duty to seek corrective action, as *Fassman* demonstrates. In *Merritt v. State*, 497 So.2d 811 (Miss. 1986), the Court affirmed the circuit court's denial of relief on a petition for the writ of certiorari because the record before the circuit court and the supreme court was insufficient to support that appellant's claims of error. The Court clearly laid the burden of the production of a proper, sufficient record upon the petitioner. 497 So.2d at 814 ("Merritt's problem here is that he

simply did not present a sufficient record from which we might rationally conclude that the circuit court abused its discretion in denying the Petition for Writ of Certiorari.").

The Appellant would have this Court find that the Circuit Court's reliance on *Merritt* was misplaced. He says that the appellant in *Merritt* sought review of the evidence of his guilt, whereas here the Appellant seeks to show that he was convicted without evidence of guilt. The Appellant's attempted distinction misses the point. *Merritt* is instructive on the issue of what a petitioner must present in support of his petition for certiorari, whatever the reason or reasons alleged for such relief.

As for the claim made by the Appellant that the county prosecutor told him that evidence of guilt was not produced in instances in which an accused failed to appear for trial, that statement by the Appellant was hearsay. That the Appellant offered his affidavit as to that alleged statement does nothing to change the hearsay character of the statement. Hearsay is incompetent evidence, *Murphy v. State*, 453 So.2d 1290, 1294 (Miss. 1984), and it is inconceivable that the Circuit Court in the case at bar could be thought to have abused its discretion by declining to give the statement notice. This statement was utterly insufficient to demonstrate that there was no evidence of guilt produced.

The Appellant then attempts to cure these problems with his pleadings. He says, first of all, that he could have no first - hand knowledge of what transpired in the Justice Court because he was not present. To this we can only say that this is a risk one runs when one elects to be tried *in absentia*. If the Appellant chose not to be present in Justice Court, he may not be later heard to whine that he has no first - hand knowledge of what transpired there.

Then the Appellant tells the Court that M.R.E. 406 somehow or another made his statement of what he claims the prosecutor said relevant. Evidence of habit or routine practice may be relevant under this State's practice, but there is nothing in the rule to suggest that evidence of such may be made by hearsay. One might reasonably wonder why the Appellant did not get an affidavit from the

county prosecutor or by some other person having personal knowledge, if he wished to attempt to establish a routine practice by that prosecutor.

The Appellant then notes that the hearsay statement was "uncontradicted." He would have this Court (and the Circuit Court) conclude that because nothing was filed in response to the petition, the lack of a response constitutes an admission.

There was no response required. Beyond this, the Appellant does not appear to understand that it was his burden to set out the cause or causes for removal in his petition. *Merritt, supra*, at 813 - 814. The hearsay tendered by the Appellant simply did not constitute a good cause to remove the case. Whether the hearsay statement was contradicted was irrelevant.

The Appellant presented the Circuit Court with a petition for writ of certiorari that alleged nothing more than that the Appellant had been told by the county prosecutor that he did not recall introducing evidence in traffic offense cases tried *in absentia*. Nothing of the record in Justice Court was produced. In other words, all the Appellant has done has been to run off to the Circuit Court, and now to this Court, with a claim that he had been convicted at a trial he chose not to attend and that he had later "heard tell" that the prosecutor had no recollection of introducing evidence of guilt. It is hardly surprising that the Circuit Court made short shrift of such a claim.

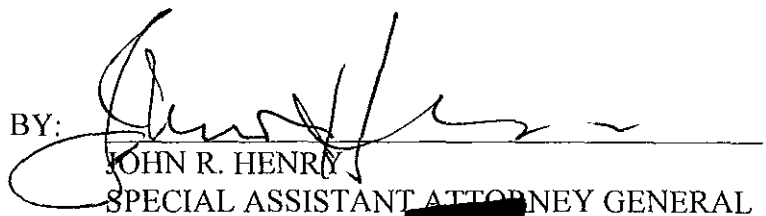
Even taking what the Appellant claimed that the prosecutor said as being competent evidence and true, a lack of recollection is hardly the same as a definite statement that no evidence was produced. For this reason as well, the Circuit Court was correct in finding that the Appellant failed to demonstrate good cause. The Appellant fell far short of his burden to establish good cause. The Circuit Court committed no abuse of its discretion in so finding. One may imagine the sort of judicial mayhem that would result if mere hearsay would be sufficient to require a circuit court to grant certiorari. This Court should affirm the Circuit Court's decision.

CONCLUSION

The Order of the Circuit Court denying relief on the petition for writ of certiorari should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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This the 18th day of March, 2010.

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