

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDALL M. POWELL

APPELLANT

VS.

Case No. 2009-KA-00675-COA

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF COPIAH COUNTY

BRIEF OF THE APPELLANT RANDALL M. POWELL

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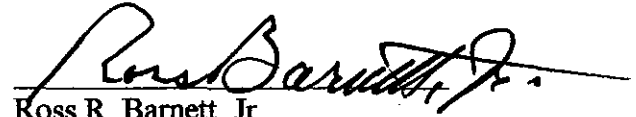
APPELLEE

I. 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. Randall M. Powell, Appellant
2. Honorable Jim Hood (Appeals Counsel for Appellee)
Attorney General
Jackson, Mississippi
3. Honorable Alexander Martin, District Attorney
Honorable Lamar R. Arrington (Trial Counsel for Appellee)
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6. Honorable Lamar Pickard (trial judge)
Circuit Judge
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NOTE: Copies of the above statutes and constitutional provisions are appended to this brief.

IV. STATEMENT OF THE ISSUES

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

THE JURY WAS NOT INSTRUCTED ON ELEMENTS OF THE CRIME CHARGED.

RANDALL POWELL RECEIVED INEFFECTIVE REPRESENTATION OF COUNSEL.

THE SENTENCE WAS IMPOSED UNCONSTITUTIONALLY

THE SENTENCE WAS DISPROPORTIONATE.

V. STATEMENT OF THE CASE.

A. Proceedings in Court Below.

Randall M. Powell was indicted July 22, 2008, by a grand jury of Copiah County, Mississippi, for the statutory rape of his daughter, Rashica Powell, in violation of Miss. Code Ann. § 97-3-65. CP 7. He was convicted following a jury trial on March 3, 2009. T 137, CP 38. He was sentenced to 30 years in the custody of the Mississippi Department of Corrections, with time served credited to the sentence. T 143, CP 38, RE 7, 13-14.

B. Facts.

Randall Powell was married to Sequoia Powell. T 12. The couple divorced in February 2004. Rashica Powell was born of their union. Rashica was 11 at the time of trial, T 12. When the couple divorced, Randall was granted custody of Rashica. T 20. Rashica spent much of her life alternating between her mother's home and her father's. T 13. For most of the last two to three years, however, Rashica lived with her father, Randall. T 13. During that time, though, she frequently visited her mother for extended periods of time.

On May 26, 2008, Rashica called her mother and complained of a burning pain when she urinated. The next day Sequoia picked Rashica up from school and took her to the emergency room at Central Mississippi Hospital. T 14, 31. There, nurse practitioner Michael Williams performed a non-invasive, exterior examination of Rashica. T32-33. He determined that she had trichomoniasis, a sexually transmitted disease. T 32. She had no genital warts or other STDs. T 33. Because of Rashica's age, Williams notified the Department of Human Services. Rashica subsequently told a social worker from the Department of Human Services that she had engaged in sex with her father at his instigation on more than one occasion. T 49.

VI. SUMMARY OF THE ARGUMENT

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The verdict in this matter was against the weight of the evidence. While Rashica testified that she had sexual relations with her father, there was no physical evidence of penetration. There was no testimony concerning a ruptured hymen or any harm to Rashica's private parts. The undisputed testimony of both Randall and his wife, Melody Powell, was that he was impotent due to blood pressure medicine. The only evidence offered other than the testimony of the prosecutrix was that both Randall Powell and the prosecutrix had had the disease, trichomoniasis. Yet, the state offered no physical evidence that Mr. Powell had the disease. Moreover, the state's own witness proved that penetration is not necessary for a male to infect a female with trichomoniasis. Since there was no physical evidence of penetration, the case should be reversed as against the overwhelming weight of the evidence.

THE JURY WAS NOT INSTRUCTED ON ELEMENTS OF THE CRIME CHARGED.

Just as the state must prove each element of the offense, the jury must be correctly and fully instructed regarding each element of the crime charged, and failure to do so is reversible error. Penetration is the *sine qua non* of rape. *Lang v. State*, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956). Case law indicates that jurors are easily confused on this issue, especially in a statutory rape context. The trial court's failure to properly instruct the jury as described above requires reversal.

**RANDALL POWELL RECEIVED INEFFECTIVE REPRESENTATION
OF COUNSEL.**

Randall Powell's trial counsel failed to (1) provide the court with a peremptory instruction within the time required by the rules; (2) request an instruction defining intercourse as including penetration; and (3) to renew the defense motion for directed verdict. Under the circumstances of this case, those errors amounted to ineffective assistance of counsel requiring reversal.

THE SENTENCE WAS IMPOSED UNCONSTITUTIONALLY

Prior to imposing a sentence, the Court asked appellant Powell if he planned to appeal. This Court long has held that a sentencing court may consider only legitimate factors and cannot base the sentence, either in whole or in part, upon the defendant's exercise of his constitutional rights. Any doubt as to whether or not the exercise of such constitutional rights was considered by the lower court in determining the sentence must be resolved in favor of the defendant. Accordingly, this case should be remanded for reconsideration of sentence.

THE SENTENCE WAS DISPROPORTIONATE.

This Court long has held that unduly harsh sentences may not meet constitutional muster. A thirty year sentence in this case for a first offender is unduly harsh. That is especially true since there was no physical evidence of penetration. The sentence should be reversed and this case remanded for resentencing.

VII. ARGUMENT

A. STANDARD OF REVIEW.

It is an ancient principle of law in Mississippi jurisprudence that while a verdict of a jury should not be lightly set aside, a conviction cannot be permitted to stand where the verdict is clearly not supported by evidence. *Allen v. State*, 1 Miss. Dec. 126 (1885); *Conner v. State*, 632 So. 2d 1239 (Miss.), cert. denied, 115 S. Ct. 314, 130 L. Ed. 276 (1993). Moreover, the state must make its case to a moral certainty. An accused need only to raise reasonable doubt of guilt to entitle him to acquittal. *Cumberland v. State*, 110 Miss. 521, 531, 70 So. 695, 696 (1915). Where the evidence is such that on one or more elements of the offense charged no reasonable hypothetical juror could have resolved the issue against the defendant beyond a reasonable doubt, the Supreme Court has no authority to affirm and must order the defendant discharged. *Bullock v. State*, 447 So. 2d 1284, 1287 (Miss. 1984).

A reasonable jury could not have concluded beyond a reasonable doubt that the appellant, Randall Powell, raped his own little girl.

B. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The verdict in this matter was against the weight of the evidence. While Rashica testified that she had sexual relations with her father, there was no physical evidence of penetration. There was no testimony concerning a ruptured hymen or any harm to Rashica's private parts. T 78-79. Moreover, the undisputed testimony of both Randall and Melody Powell was that he was impotent due to blood pressure medicine. T 94.

Melody Powell testified that at all times relevant to the allegations she was present in the home. T The walls in the trailer where the family lived were so thin that it would have been

clear had any sexual activity been occurring in another part of the trailer. Besides Mrs. Melody Powell, seven children besides Rashica lived in the house. T 65.

Melody Powell testified that she had once had trichomoniasis, but that her husband had not. She had not passed it to him because they had not had sexual relations due to his impotence. T 94-95.

Even if Mr. Powell had had trichomoniasis, it would not prove penetration. The state's own witness testified that penetration is not necessary for a male to infect a female with trichomoniasis. T 37. There need only be contact with bodily fluids. Transfer of fluids can occur even if the male is impotent (and, accordingly, incapable of penetration). T 39.

There are many other places Rashica could have contracted trichomoniasis, as well. She was frequently at her mother's home. She lived there for a summer around the time she was diagnosed with trichomoniasis. T 48. Her mother was dating a musician named Juan who had a 13 year-old son. T 60. While she was living with her grandparents, her uncle had tried to pull her pants down. T 52.

Though the uncorroborated testimony of the prosecutrix may be sufficient where it is neither contradicted nor discredited, it is not sufficient where it contains numerous and serious contradictions. *Allen v. State*, 45 So. 833 (Miss. 1908). Under the circumstances, Rashica's testimony was insufficient to prove penetration, a necessary element of the crime of rape. *Lang v. State*, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956). Moreover, there were plainly many opportunities for Rashica to have been infected by males other than her father.

Given the testimony concerning Mr. Powell's impotence, and given the lack of physical evidence of penetration, the verdict of statutory rape was against the overwhelming weight of the evidence. The verdict, judgment, and sentence should be reversed and judgment rendered in favor

of Appellant. Accordingly, all the elements of rape were not proved against Randall Powell beyond a reasonable doubt. The lower court erred in failing to grant the "Motion to Set Aside Verdict or For a New Trial." This case must be reversed.

C. THE JURY WAS NOT INSTRUCTED ON ELEMENTS OF THE CRIME CHARGED.

Just as the state must prove each element of the offense, the jury must be correctly and fully instructed regarding each element of the crime charged, and failure to do so is reversible error. *U. S. v. Williams*, 985 F. 2d 749, 755, *reh. den.*, 990 F. 2d 1254, *cert. denied*, ____ U. S. ____, 114 S. Ct. 148, 126 L. Ed. 2d 110 (5th Cir. 1993); *Neal v. State*, 451 So. 2d 743, 757 n. 9, *cert. denied*, 469 U. S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (Miss. 1984). Not only must the jury be instructed as to the elements of the crime, but as to the nature of each element. *Mabry v. State*, 248 Miss. 149, 151, 158 So. 2d 688, 689 (1963). Penetration is the *sine qua non* of rape. *Lang v. State*, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956). Moreover, jurors are easily confused on this issue, especially in a statutory rape context. Without a proper understanding of what is legally described by the term "penetration" in a rape context, how can a jury possibly reach a correct verdict?

While certainly counsel should request all appropriate instructions, it remains the Court's duty, even in absence of such a request, to insure that the jury is properly instructed on all relevant aspects of the case. *See, Manuel v. State*, 667 So. 2d 590 (Miss. 1995). The trial court's failure to properly instruct the jury as described above requires reversal.

D. RANDALL POWELL RECEIVED INEFFECTIVE REPRESENTATION OF COUNSEL.

This Court has held that trial counsel can be deemed to have been ineffective where (1) "counsel's performance was deficient and (2) that the defendant was prejudiced by

counsel's mistakes." *Sanders v. State*, 801 So. 2d 694, 702 (Miss. 2001); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

While that is a difficult standard to meet, that standard is satisfied in this case.¹ Randall Powell's trial counsel failed to (1) provide the court with a peremptory instruction within the time required by the rules; (2) request an instruction defining intercourse as including penetration; and (3) to renew the defense motion for directed verdict.

Counsel's failures, especially her failures regarding jury instructions, were of such a magnitude that "the trial cannot be relied on as having produced a just result." *Ross v. State*, 954 So. 2d 968, 1003 (¶77) (Miss. 2007). It is plain from precedent in this Court that a jury may be readily confused as to the necessity and meaning of the term "penetration" in statutory rape context." *See Pittman v. State*, Court of Appeals of Mississippi, No. 2000-KA-01409-COA, ¶ 31. Given that fact, there is certainly a reasonable probability that, but for the failure of trial counsel to request the proper instructions, the outcome of the trial would have been different.

Accordingly, given the lack of adequate and effective representation of counsel, this case should be reversed and remanded.

E. THE SENTENCE WAS IMPOSED UNCONSTITUTIONALLY.

At the sentencing hearing, and prior to imposing a sentence, the Court asked appellant Powell if he planned to appeal. T 140; RE 11. Advising appellant of his right to appeal is an entirely appropriate thing to do. Asking if he *plans* to appeal, however, suggests that the answer could somehow be a factor in the sentence. This Court long has held that a "sentencing court

¹It is not appeals counsel's intention to denigrate trial counsel in any way. Appeals counsel is well-aware of the tremendous work loads carried by most trial counsel and very much appreciates the difficult tasks they perform.

may consider only legitimate factors and cannot base the sentence, either in whole or in part, upon the defendant's exercising his constitutional rights" *Fermo v. State*, 370 So. 2d 930, 932 (Miss. 1979). While the Court's statements in *Fermo* concerned the defendant's request for a jury trial, the principle is the same. "[A]ny doubt, as to whether or not the exercise of such constitutional rights was considered by the lower court in determining the sentence, must be resolved in favor of the defendant." *Id.* at 932. This is in line with the holdings of other courts. *See, e. g., Hess v. United States*, 496 F.2d 936, 938 (8th Cir. 1974) (when "the tenor" of the trial court's comments are unclear, "fairness dictates that these proceedings be remanded to the district court for the purpose of permitting [the trial court] to determine whether the sentences were enhanced for that reason").

Certainly the tenor of the court's comments in this case was unclear. The case should be remanded for resentencing.

E. THE SENTENCE WAS DISPROPORTIONATE.

Appellant recognizes that the general rule in this state is that a sentence should not be disturbed on appeal so long as it does not exceed the maximum term allowed by statute, *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992). This Court, though, has also held that unduly harsh sentences may not meet constitutional muster. *Clowers v. State*, 522 So. 2d 762, 764 (Miss. 1988). Moreover, this Court has stated unequivocally in *White v. State of Mississippi*, Supreme Court of Mississippi No. 97-KA-01239-SCT, that, where the legislature has allowed discretion in sentencing, a trial court is obligated to exercise discretion. Where it fails to exercise discretion, or where it has abused that discretion, this Court has indicated that it will reverse the trial judge's sentence and remand the case for further consideration. *Id.*, ¶¶ 45-48. Appellant respectfully suggests that a thirty year sentence in this case for a first offender [T 142-43, CP 8, RE 7, 13-14]

was unduly harsh and was an abuse of the trial court's discretion. At minimum, the sentence should be reversed and this case remanded for resentencing.²

VIII. CONCLUSION

The foregoing considered, appellant Randall Powell prays that this Court will reverse the judgment of the court below and render judgment acquitting him of the charge of statutory rape herein. In the alternative, appellant prays that this Court will reverse this case and remand it for a new trial or re-sentencing.

Respectfully submitted,



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IX. PROOF OF SERVICE

I, the undersigned counsel of record for the Appellant, certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of the foregoing to the following persons:

²All claims regarding the sentence are raised under Mississippi law, including § 14 and § 28 of the Mississippi Constitution, and the Fifth, Eighth, Fourteenth Amendmentx to the United States Constitution. Appellant specifically reserves all constitutional claims and does not waive any.

1. Honorable Jim Hood (Appeals Counsel for Appellee)
Attorney General
Jackson, Mississippi
2. Honorable Alexander Martin, District Attorney
Honorable Lamar R. Arrington (Trial Counsel for Appellee)
Honorable Terry Wallace (Trial Counsel for Appellee)
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22nd Circuit Court District
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3. Faye Peterson, Esquire (Trial Counsel for Appellant)
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This the 10 day of November, 2009.



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X. APPENDIX

Miss. Code Ann. § 97-3-65	2
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United States Constitution, Eighth Amendment	4
United States Constitution, Fourteenth Amendment	4

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at

imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

Sources: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; 1906, § 1358; Hemingway's 1917, § 1092; 1930, § 1122; 1942, § 2358; Laws, 1908, ch. 171; Laws, 1974, ch. 576, § 8; Laws, 1977, ch. 458, § 7; Laws, 1985, ch. 389, § 3; Laws, 1993, ch. 497, § 1; Laws, 1998, ch. 549, § 2; Laws, 2007, ch. 335, § 1, eff from and after passage (approved Mar. 14, 2007.)

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CONSTITUTION OF THE STATE OF MISSISSIPPI

Article 3, Section 14. Due process.

No person shall be deprived of life, liberty, or property except by due process of law.

Article 3, Section 28. Cruel or unusual punishment prohibited. Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

UNITED STATES CONSTITUTION

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.