

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROGER HEIDELBERG

APPELLANT

V.

NO. 2009-KA-0917-COA

STATE OF MISSISSIPPI

APPELLEE

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. Roger Heidelberg, Appellant
3. Honorable Anthony J. Buckley, District Attorney
4. Honorable Billy Joe Landrum, Circuit Court Judge

This the 23rd day of December, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
Justin T Cook
COUNSEL FOR APPELLANT

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUE

THE SENTENCE IMPOSED PURSUANT TO 99-19-81 IS NOT SUPPORTED BY ANY EVIDENCE ADMITTED DURING THE SENTENCING PROCEEDING.

STATEMENT OF INCARCERATION

Roger Heidelberg, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101**.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jones County, Mississippi, and a judgment of conviction on one count of sexual battery against Roger Heidelberg, following a trial on April 7, 2009, the Honorable Billy Joe Landrum, Circuit Judge, presiding. Heidelberg was subsequently sentenced to life without the possibility of parole in the custody of the Mississippi Department of Corrections pursuant to **Mississippi Code Annotated § 99-19-81**.

FACTS

According to the testimony presented at trial, Laurel police officer Brian Lilly responded to a residence after a report of a sexual assault on Saturday, November 17, 2007. (T. 38-39). Officer Lilly found the complainant, twelve year old K.E.¹, on the porch crying and upset, along with two other young males. (T. 39, 65). After hearing from K.E., he called for an ambulance and requested investigative assistance. (T. 39).

Detective Kevin Flynn was assigned to the case the following Monday. (T. 44). After reading the statements from the witnesses present, Detective Flynn located and arrested K.E.'s father, the appellant, Roger Heidelberg² on November 25, 2007. Officer Lilly transported Heidelberg to a hospital after he consented to a rape kit. (T. 40, 45, 51). A rape kit was also performed on K.E. and both kits were sent to the Mississippi Crime Lab. (T. 46, 58-59). At the request of the prosecution, the rape kits were forwarded to Orchid Cellmark, a DNA testing facility in Dallas, Texas. (Ex. 1-2, T. 63, 92).

¹ Since the complainant is a minor, her initials will be used to protect her identity.

² Detective Flynn testified Heidelberg's arrest report indicated he was 38 years old. (T. 75).

K.E., who was fourteen at the time of trial, testified that she lived with her step-mother and the man she knew as her father, Roger Heidelberg. (T. 66). On the day of the incident, she asked Heidelberg for two dollars (\$2.00). Instead, Heidelberg gave her a some vodka to drink. She later went inside to take a bath. Her brother knocked on the bathroom door to tell her Heidelberg wanted to see her. (T. 67). She went outside to sit in the car and remembered very little after that. She woke up in her mother's bedroom laying face down on the bed crying. She testified she did remember Heidelberg "going in and out of me." She specified Heidelberg's penis was going in and out of her vagina. (T. 68).

K.E. testified that she passed out several times and was vomiting and crying. She remembered her brother telling her to call the police, but she did not remember who actually called. She did recall being on the porch when police arrived. (T. 69). She admitted to being intoxicated from the vodka. (T. 69-70). Despite being intoxicated and passing out several times, as well as being sick repeatedly, K.E. was sure it was Heidelberg who assaulted her. (T. 70, 72-73).

Darius Barfield was also present in the house on the day of this incident. Barfield was the nineteen-year-old son of Gloria Rogers, Roger Heidelberg's wife (T. 76-77, 82, 87). His step-brother "John,"³ Heidelberg's biological son, asked Barfield to go look in

³ "John" is a fictitious name for Heidelberg's son substituted to protect K.E.'s identity. The step-brother's age was never mentioned in the record. He was living in Texas at the time of trial. (T. 89, 91).

the bedroom because he did not want to be the only person who saw this. (T. 77-78).

Barfield then looked through a crack and the bedroom door and testified he saw Heidelberg having sex with K.E. He then left with "John" and Rodriguez Jones, a twenty-year-old friend, to go tell his mother what had happened. (T. 78, 85).

Rodriguez corroborated Barfield's account, testifying that he also looked through the crack in the door and saw Heidelberg "humping" K.E. from behind. (T. 86). After Barfield's mother told them to call police, they returned to the house and had K.E. call police. (T. 87). He testified that the only people present at the house that day were, Barfield, "John," K.E., Heidelberg and himself. (T. 88-89).

Gina Pineda, a DNA expert from Orchid Cellmark, testified regarding the DNA analysis of Exhibit 2. Orchid Cellmark was able to get a full profile on all 13 genetic markers from the sperm fraction found in K.E.'s vagina. (T. 105, 110). It was Ms. Pineda's opinion, to a reasonable degree of scientific certainty, that the DNA belonged to Heidelberg. (T. 109). Orchid Cellmark also conducted a paternity test with the samples and determined that Heidelberg was not the biological father of K.E. (T. 106). She also determined the statistical analysis on the frequency of this mixture profile and found that one in 505.6 million unrelated African-American individuals would fit this profile. (T. 107, 109). Ms. Pineda admitted she could not work up a frequency for related individuals, and the company tested no other individuals in the case. (T. 109, 111). Without testing Heidelberg's biological son, he could not be ruled out with 100%

certainty. (T. 114).

Finally, Heidelberg took the stand in his own defense. He testified K.E. asked him for \$2.00, but he told her he would have to get change. He also stated there were several other individuals present at the house, including Joseph Heidelberg, Eric Young, Gerald Young, "and a bunch of other guys." After purchasing some vodka and getting change from the liquor store, Heidelberg returned to the house. (T. 119, 123). When he later went into the house, he found K.E. on the bed on her knees with her head on the bed. She had thrown-up and had no pants on, but a top only. He kneeled down and picked her up, putting a cover on her. (T. 119).

K.E. finally got up about 10 minutes later. (T. 119-120). She found her pants and went to the living room and got on the couch. After his brother Mark came over, Heidelberg left to go see his wife. He denied having sex with K.E. After she had asked for money, the next time he saw K.E. was several hours later in the bedroom. (T. 120). Heidelberg had no knowledge of the accusations against him until he read about it in the newspaper. He was in Hebron, where his father lived, going to and from work. (T. 128).

Heidelberg was subsequently found guilty and sentenced to life without parole pursuant to **Mississippi Code Annotated § 99-19-81**. (C.P. 65-67). On April 16, 2009, the Appellant filed a Motion for New Trial. (C.P. 69-70, R.E.12-13). The motion was denied by the trial court on June 3, 2009. (C.P. 73, R.E. 14). On June 3, 2009, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 74,

R.E. 15).

SUMMARY OF THE ARGUMENT

The State was required, during the sentencing proceeding, to prove Heidelberg's habitual status beyond a reasonable doubt. No evidence was ever submitted during the sentencing proceeding. Therefore, there was not sufficient evidence for Heidelberg to be sentenced to life in the custody of the Mississippi Department of Corrections without the eligibility of parole pursuant to **Mississippi Code Annotated § 99-19-81**.

ARGUMENT

ISSUE: THE SENTENCE IMPOSED PURSUANT TO 99-19-81 IS NOT SUPPORTED BY ANY EVIDENCE ADMITTED DURING THE SENTENCING PROCEEDING.

During sentencing, the State sought to prove that Heidelberg was a habitual offender under Section 99-19-81. (Tr. 126). However, the State never attempted to submit into evidence a certified copy of Heidelberg's prior offenses: rather, this was the hastily undergone sentencing proceeding:

[BY THE PROSECUTOR]: Excuse me. But this man has been charged by indictment as an habitual offender. He has two prior convictions. And the maximum sentence in this case would be life without parole.

THE COURT: All right. I still have to sentence him regardless of what it is.

[BY DEFENSE COUNSEL]: Yes, I understand.

THE COURT: Are y'all ready?

[BY DEFENSE COUNSEL]: Yes.

THE COURT: Based on the fact that this man has been convicted of this crime, the Court will follow the law, that is that he be sentenced to serve life in the custody of the Mississippi Department of Corrections, wherever they decide that

will be best for him, and that sentence will be life in the state penitentiary.

Is that without parole?

[BY THE PROSECUTOR]: Yes, Your Honor. The Court sustained the motion. It should be in the file where he's charged as an habitual offender. He's already been convicted of two prior felonies.

THE COURT: Does that mean the Court is required to without parole?

[BY THE PROSECUTOR]: The maximum punishment is life, and as a habitual offender it will be without parole.

THE COURT: All right. The Court will follow the law as stated to the Court, and that will be the sentence of the Court.

(T. 146-47)(emphasis added).

Although no challenge or objection was made by Heidelberg's trial counsel, this Court reviews issues as plain error where a fundamental right of the defendant has been impacted. *Jefferson v. State*, 958 So. 2d 1276, 1281 (¶15) (Miss. Ct. App. 2007) (citing *Moore v. State*, 755 So. 2d 1276, 1279 (¶ 9) (Miss. Ct. App. 2000)). It is well settled that a defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (¶9) (Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So.2d 1255, 1257 (¶11) (Miss. 1998)).

In order to sentence a defendant as a habitual offender under section 99-19-81, the State bears the burden of proving all of the section's elements beyond a reasonable doubt. *Vince v. State*, 844 So. 2d 510, 517 (¶22) (Miss. Ct. App. 2003). Two of the essential elements the State must prove under Section 99-19-81 are that the defendant "shall have been convicted twice previously of any felony" for which the defendant "shall have been sentenced to separate terms of one (1) year or more." Miss. Code Ann. § 99-19-81.

In the instant case, the State presented insufficient evidence to prove that Heidelberg was

convicted of two prior felonies and, also, that he was sentenced to one (1) year or more on each one if he was, in fact, convicted of those charges.

This Court's opinion in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), is controlling of this issue. In *Vince*, the State sought to prove that the defendant therein was a habitual offender under Section 99-19-81 by producing "an NCIC compilation of a defendant's criminal history" at the sentencing hearing. *Vince*, 844 So. 2d. at 517 (¶¶21-22). This Court, in *Vince*, did not reach the issue of whether the NCIC document was sufficient to establish the defendant's status a habitual offender; instead, this Court held that the State failed to prove the defendant's habitual status beyond a reasonable doubt because the NCIC document was not a part of the record, did not appear as an exhibit, and was not listed as such in the court reporter's official transcript. *Id.* at 517 (¶22). Accordingly, this Court vacated *Vince*'s sentence, reversed and rendered the judgment finding him a habitual offender, and remanded the case for the sole purpose of re-sentencing. *Id.* at 517 (¶22), 519 (¶30).

The *Vince* Court further observed the long-standing admonition of the supreme court warning against the "tendency to routinely allow the state to produce some documentation of prior offenses and for the trial court to perfunctorily find the defendant an habitual offender...." *Id.* (citing *Seely v. State*, 451 So.2d 213, 215 (Miss.1984)).

The instant case is indistinguishable in any material particular from *Vince*. In case *sub judice*, there was absolutely no evidence admitted at trial to support the sentencing enhancement under Miss. Code Ann. § 99-19-81. While it is true that the State was allowed to amend Heidelberg's indictment to charge him as an habitual offender, the amendment, just as any indictment, simply charged Heidelberg as an habitual offender. Just as any charge in any

indictment, the State must prove the charges of an indictment beyond a reasonable doubt.

That there exists copies attached to the motion to amend the indictment contained in the clerk's papers is not enough. They simply charge. The State still must prove beyond a reasonable doubt that Heidelberg was convicted twice previously of felonies and that we was sentenced to one year or more on each. However, as can clearly be deduced from the sentencing proceeding, nothing was ever admitted as an exhibit to the sentencing proceeding.

Furthermore, it cannot be reasonably argued that the failure for trial counsel to challenge the sentencing was somehow an acquiescence to the State's charging Heidelberg as an habitual offender. As noted above, the State must prove beyond a reasonable doubt that a defendant should be sentenced as an habitual offender. To shift the burden to defense because of trial counsel's inadequacies is to run afoul of the most fundamental axioms of our criminal law - the burden of proof.

Furthermore, the State should not be allowed to rest on any assertion that because the trial court concluded in its sentencing order "beyond a reasonable doubt" that Heidelberg had previously been convicted of two felonies, that his sentencing under **99-19-81** is lawful. The record is abundantly clear that sentencing happened immediately after trial; furthermore, there was never an on the record determination of Heidelberg's habitual status being determined beyond a reasonable doubt. It is Heidelberg's contention that the language included in the sentencing order is merely form language and is not supported by the record nor the complete lack of evidence presented during sentencing proceeding.

Heidelberg's habitual status must have been proven beyond a reasonable doubt during the sentencing proceeding. Failure to do so resulted in an unlawful sentence. The trial court's

conclusion in the sentencing order is akin to finding a defendant guilty of a crime, via Court order, despite the State not proving guilt beyond a reasonable doubt during the guilt phase. Put differently, evidence of prior convictions must be admitted: there was no proof submitted during the sentencing proceeding, only an assertion erroneously and summarily adopted by the trial court.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for re-sentencing as a non-habitual offender. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS,

BY:


Justin T Cook

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

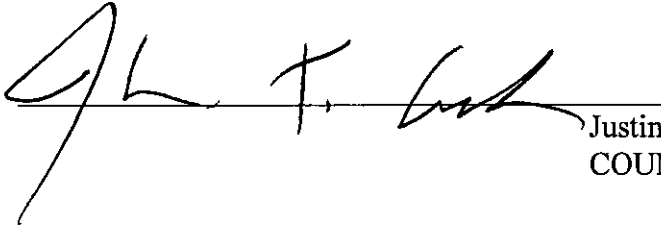
I, Justin T Cook, Counsel for Roger Heidelberg, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 23rd day of December, 2009.



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