



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED

DONOVAN FOREMAN

APPELLANT

JUL 29 2010

VS.

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

NO. 2009-KA-01785-SCT

STATE OF MISSISSIPPI

RESPONDENT

APPELLANT'S REPLY BRIEF

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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 disqualification or refusal.

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2. Alexander C. Martin, Esq.
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3. Myron L. Arrington, Jr., Esq.
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4. Honorable Judge Lamar Pickard
P.O. Box 310
Hazlehurst, MS 39083

Respectfully submitted,

DONOVAN FOREMAN

BY: 
OF COUNSEL

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ARGUMENT

I. Contrary to the Appellees' Contention, the Court Abused Its Discretion by Improperly Denying Defendant Donovan Foreman's Motion to Dismiss the Indictment.

The trial court committed reversible error by denying Defendant's *Motion to Dismiss* the indictment. The Appellee's Brief relies upon cases that are specifically discussing the issue of the limitation of the State's use of lesser included felonies when pursuing a felony-murder case. *Faraga v. State*, 514 So.2d 295, 302-303 (Miss. 1987), *Smith v. State*, 499 So.2d 750 (Miss. 1986). Neither of these cases are on point as a rebuttal to Appellant's argument.

First and foremost, in *Smith* the jury found that Grady Smith forcibly entered a home, committing burglary, where he shot William Carter. Smith was convicted of capital murder based on the underlying felony of burglary. This Court, through Justice Walker, stated:

"We decline to adopt the merger doctrine and hold that under our felony-murder statute, the underlying felony does not merge into the murder. Our statutory provisions dealing with murder in the particular felony in this case, burglary, are intended to protect different societal interests."
Smith, 499 So.2d at 754.

Faraga followed one year after *Smith*, and through the exact same reasoning, this Court declined to adopt the merger doctrine where a defendant was convicted of felony-murder and felonious child abuse. This Court stated through Justice Hawkins:

"We likewise find the societal interests are also different regarding our capital murder statute and our felonious child abuse statute. While the latter statute is intended to protect the child, the former statute is designed to punish and act as a deterrent to such crimes should death result."
Faraga, 514 So.2d at 303.

This Court, when reviewing felony-murder cases, has been adamantly opposed to applying the merger doctrine based on the different societal interests at stake. This is the exact reason why the merger doctrine should be applied to the instant case. The societal interest for criminalizing the offense for shooting into a motor vehicle is the same societal interest that exists for criminalizing the act of aggravated assault, and it is undoubtedly the exact same societal interest that exists for criminalizing the act of depraved heart murder – to protect individuals from a crime committed against them through reckless behavior.

The record is clear that Donovan Foreman committed one action – he shot into a motor vehicle one time. (Tr. 38, 65, 74, and 88) An indictment for the offense of depraved heart murder would have been sufficient but the District Attorney's office, in an attempt to charge Donovan Foreman with as many crimes as possible, indicted him for the offenses of depraved heart murder, four counts of aggravated assault, and one count of shooting into a motor vehicle.

Smith and *Faraga* are cases dealing with a defendant who committed multiple actions against a single person, and are not analogous to the instant case since more than one act was committed in both cases. The instant case concerns one action by the Defendant.

This Court has also not applied the merger doctrine where the evidence shows the defendant was charged with crimes perpetrated against one victim. *Smith* and *Faraga* are cases where the defendant was found to have committed one crime against an individual, and then further committed another crime through some other action. In *Smith*, the defendant burglarized a home, and then killed someone in the home. In *Faraga*, the

defendant committed multiple atrocities against a two-month old baby. Neither case discussed the issue of whether the defendant could transfer his intent to frighten or harm another victim, which is the issue in this case.

Under the Appellee's rationale, since four other people were in the vehicle and "were placed in fear for their lives" (*Appellee's Brief*, 10), it was proper for the defendant to be charged with four counts of aggravated assault along with one count of depraved heart murder against another individual. Each crime requires its own element of intent. The argument that Donovan Foreman possessed the requisite intent to commit aggravated assault against four different people while at the same time murder another – all while only shooting a gun one time – is without merit. This reasoning is the primary basis for Defendant filing his *Motion to Dismiss* prior to trial and remains his reasoning in filing this appeal.

Appellee argues that because this Court affirmed *Graves v. State* 969 So.2d 845 (Miss. 2007) then the position made for the Appellant in this case is without merit. The Appellant respectfully disagree. *Graves* discusses the rationale when viewing only the charges of shooting into a motor vehicle and aggravated assault – against the same victim. In *Graves*, the defendant was not charged with multiple offenses, including depraved heart murder against a separate victim, from shooting into a motor vehicle one time as Donovan Foreman was in this case.

Appellee further argues that because the Mississippi Court of Appeals affirmed the trial court's decision in *Readus v. State* 997 So.2d 941 (Miss. App. 2008.), then this Court should, in turn, follow that decision. Again, the Appellant respectfully disagrees. *Readus* simply is not applicable to the case at hand because the defendant in that case

fired a gun multiple times into an apartment. The opinion of the Court even states Mr. Readus gave a statement that said, "I pulled the pistol and shot Marlow Jackson *and* Sherry Readus." *Readus*, 997 So.2d at 945. Nothing in the record of the case of *State of Mississippi v. Donovan Foreman* suggests that multiple victims were shot in the events occurring on May 10, 2009.



II. Appellees Agree with Appellant that Sentencing for Shooting Into an Automobile Can Not Exceed Five (5) Years.

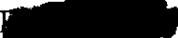
Donovan Foreman was indicted under *Miss. Code Ann.* §97-25-47, convicted of violating *Miss. Code Ann.* §97-25-47, and sentenced to serve ten (10) years under *Miss. Code Ann.* §97-25-47 of shooting into an automobile. The only appropriate remedy to this error would be for a remand of sentencing.

CONCLUSION

Donovan Foreman requests the Court enter reverse the trial Court's verdict and remand the case to be tried after dismissal of the multiple charges of aggravated assault and shooting into a motor vehicle, leaving only the depraved heart murder charge in the above referenced cause number. Donovan Foreman, in the alternative, further requests the Court to remand this case to the Claiborne County Circuit Court so that sentencing under *Miss. Code Ann.* § 97-25-47 does not exceed the statutorily allowable maximum penalties.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Eric Brown, attorney for appellant, Donovan Foreman., certify that I have this day filed this Appellant's Reply Brief with the clerk of this Court, and have served a copy of this Appellant's Brief by United States mail with postage prepaid on the following persons at these addresses:

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