IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REGINALD DESHAWN BRADLEY — APPELLANT

VS. — NO. 2009-KA-1948

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

REGINALD DESHAWN BRADLEY — APPELLANT

vs. — CAUSE No. 2009-KA-01948-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Lowndes County, Mississippi in which the Appellant was convicted and sentenced for his felony of **SHOPLIFTING**.

STATEMENT OF FACTS

The Appellant brings no challenge against the sufficiency of the evidence demonstrating his guilt for shoplifting; neither does he assert that the verdict is contrary to the great weight of the evidence. In view of this and in view of the claim of error that he does raise on this appeal, we believe it is unnecessary to set out the evidence concerning his guilt.

STATEMENT OF ISSUES

DID THE TRIAL COURT ERR IN PERMITTING THE APPELLANT TO REPRESENT HIMSELF IN THE TRIAL OF THE CASE AT BAR WITHOUT HAVING ADEQUATELY INFORMED THE APPELLANT OF HIS RIGHT TO COUNSEL AND WITHOUT HAVING OBTAINED A KNOWING AND VOLUNTARY WAIVER OF THE RIGHT TO COUNSEL?

SUMMARY OF ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE APPELLANT TO REPRESENT HIMSELF IN THE CASE AT BAR

ARGUMENT

THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE APPELLANT TO REPRESENT HIMSELF IN THE CASE AT BAR

FACTS RELEVANT TO THE CLAIM OF ERROR

After *voir* dire and the selection of the jury, during which counsel for the Appellant participated, counsel for the Appellant informed the trial court that he had had difficulty in working with the Appellant and that the Appellant had decided that he wished to represent himself. Counsel for the Appellant further informed the court that the Appellant had filed a number of motions *pro se*, and that those motions were, in his view, without merit. One of those motions, it seems, was a motion for summary judgment. Counsel for the Appellant requested the trial court to clarify the Appellant's wishes with respect to whether the Appellant wanted to represent himself.

The Appellant, in response, told the trial court that he wished to cross - examine the witnesses in the case. He allowed that he did not object if counsel remained present as "stand - by counsel." He did wish to have his motions heard, however. When the trial court asked the Appellant whether he wished to represent himself, the Appellant told the court that he did desire to do so, it being the Appellant's view that his attorney and he had not discussed a trial strategy. The trial court gave it for its opinion that the Appellant's attorney was an excellent trial lawyer, a view not shared by the Appellant. It was the Appellant's opinion that the attorney had not studied the case and had only been interested in perhaps securing a plea bargain.

The trial court then told the Appellant that it had never seen an instance in which an accused had represented himself successfully. The Appellant, in response, indicated that that made no matter to him. The Appellant represented that he knew he had stolen nothing. He thought he would represent himself better than his attorney would.

The trial court then asked the Appellant how much education the Appellant had. The Appellant responded that he had attended school up to the tenth grade, dropping out of school at that time. The Appellant thought he could read and write very well.

The trial court asked the Appellant what he knew of the rules of evidence and other rules of court. The Appellant responded that, though he did not know the rules "100 percent," he "[knew] enough where [he was] speaking" and that he wanted his motions to be heard and to speak about his motions. But, so far as evidence was concerned, the Appellant told the trial court that he was not going to put on any evidence. It was the Appellant's view that the State's case was based upon circumstantial evidence.

The trial court then asked the Appellant about his motions. The Appellant then brought them up. First was a motion for a "fast and speedy trial." Relief on that motion was granted.

The Appellant then brought on a motion to charge conspiracy. In this motion, the Appellant apparently wanted two persons charged with conspiracy for having accused the Appellant of shoplifting. According to the Appellant, since he, the Appellant, had not stolen anything, those persons had committed conspiracy in saying otherwise. Relief on that motion was denied, after it was explained to the Appellant that he could not interrupt or speak over the judge of the trial court.

The next motion the Appellant brought up was a motion to dismiss on the basis of an alleged violation of the right to confront witnesses. Relief on that motion was denied at the time because, at that point in time, there had been no testimony against the Appellant. The trial court then attempted a brief explanation of the ambit of the confrontation clause, an effort which seems to have failed of its purpose.

The trial court, observing that it did not think the Appellant stupid, then told the Appellant that he might be better off letting his attorney represent him. Nonetheless, the court also told the

Appellant that he could represent himself if he wished. The court then explained that it would hold the Appellant to the same rules as it would hold an attorney, if the Appellant decided to represent himself. To this the Appellant requested "some fine point rules." The court refused to advise the Appellant, but the Appellant indicated that it would make no difference, that he still wished to represent himself. The Appellant then told the trial court that, "I ain't stole shit"; as to that comment, the trial court indicated that it would try the case if the Appellant used another word like that. The Appellant said he was sorry.

The trial court then went on to explain that it could not favor one side or another in the case, and that the attorney for the Appellant would be present to assist the Appellant. The court repeated its view that it would be a mistake for the Appellant to represent himself. The court then informed the Appellant that if he, the Appellant, misbehaved as he had just done he would be removed from the courtroom. The Appellant asked the court whether he would be able to present his case in the event he was removed from the courtroom, to which the court responded affirmatively.

The Appellant then indicated that he wished to represent himself, with his attorney acting as "stand - by" counsel. The Appellant then indicated that he did not know what he wanted to do. The court granted a recess to permit the Appellant to make his decision. (R. Vol. 2, pp. 79 - 96).

After the recess, the Appellant told the trial court that he wished to represent himself. He indicated that he understood the difficulty in doing so and that the trial court had previously pointed out that difficulty. The Appellant also stated that he freely made the decision to represent himself. The Appellant's attorney stated that he had discussed the difficulty in self - representation to the Appellant. That attorney further stated that he would inform the Appellant when to object in the course of the trial and the grounds for any such objections. The trial court found that the Appellant, though argumentative, was not incompetent and found no reason not to permit the Appellant to

represent himself. The Appellant then decided to reserve his opening statement. (R. Vol. 2, pp. 98 - 100).

In the course of the trial, the Appellant made various objections (R. Vol. 2, pp. 106; 110 - 113; 126; 132; Vol. 3, pp. 153; 156). The Appellant also moved for a directed verdict at the conclusion of the State's case - in - chief. (R. Vol. 3, pg. 173). The Appellant, after having been advised of his right to testify or to decline to testify, elected not to testify. (R. Vol. 3, pg. 174). The Appellant's attorney requested an instruction to the jury concerning the Appellant's decision not to testify. (R. Vol. 3, pg. 175). The Appellant presented no case - in - chief.

The Appellant's attorney represented the Appellant in the jury instruction conference. The Appellant presented his summation to the jury. In the course of doing so, he stated that he had been stealing all of his life but denied having stolen any of the items involved in the case at bar.

ARGUMENT

The Appellant claims that the trial court failed to comply with URCCC 8.05 and failed to make an adequate determination that the Appellant made a knowingly and voluntarily waiver of counsel. Preliminarily, we note, as to this latter complaint, that the Appellant was at no time without the assistance of counsel, that in fact counsel was present and assisting him throughout the trial. The objections made by the Appellant, which no doubt were suggested to him by counsel, clearly show that counsel was not merely sitting idly by during the course of the trial. There was at most, then, something in the nature of a partial waiver of counsel.

After an accused informs a trial court of his desire to represent himself, the trial court, under Rule 8.05, is to inform the accused that: (1) he has the right to an attorney and that one will be appointed to defend or assist the accused if the accused is unable to afford an attorney; (2) that the accused has the right to conduct the defense and may elect to conduct the defense and allow

whatever role he wishes to assign the attorney; (3) that the rules of evidence and procedure and courtroom protocol will not be relaxed on account of the fact that the accused is representing himself, that such rules are complicated, and that, without legal advice his ability to defend himself will likely be hampered; (4) that the right to proceed *pro se* carries with it a higher likelihood of an unfavorable outcome; (5) and such other matters as the court deems appropriate. After giving such advice, the trial court is to determine whether the accused still wishes to represent himself. If so, the trial court is to determine whether the accused's decision is a knowing and voluntary one.

The Appellant first claims that the trial court failed to comply with Rule 8.05 in that it failed to advise the Appellant of his right to an attorney. We have not found that the trial court directly advised the Appellant that he had the right to an attorney and that one would be appointed for him in the event he was unable to afford to retain one. Yet, since the Appellant was represented by an attorney prior to and at the time he indicated that he wished to partially or completely represent himself and in view of the facts that the attorney was present before and during trial and that he participated in the trial of the case, it seems to us a matter of exalting form over substance to maintain that the apparent failure to directly advise the Appellant of his right to an attorney was fatal error.

This is not a case for which it may be said that the Appellant was possibly unaware of his right to the assistance of counsel. Indeed, that the Appellant was aware of the right was inherent in the fact that he wished to at least partially forego the right. There is not the first indication in this record that the Appellant was unaware of the right to assistance of counsel. It is clear, on the other hand, that he had the assistance of counsel to the extent he wished such assistance.

There was thus no prejudice to the Appellant. To find error in the fact that the trial court possibly did not formally advise the Appellant of this right under these circumstances would be to

find error for purely academic reasons. A party alleging error must show error and that prejudice occurred in consequence of that error. *Carle v. State*, 864 So.2d 993, 997 (Miss. Ct. App. 2004)(citing *Catholic Diocese of Natchez - Jackson v. Jaquith*, 224 So.2d 216 (Miss. 1969). Here there was no such prejudice. While the Appellant may not have been advised of the right to counsel in formal terms, his comments clearly show that he was quite aware of that right and that he in fact was represented by counsel and that he in fact relied upon and utilized counsel.

The Appellant then claims that the trial court did not inform him of the fact that he would be held to the same rules that an attorney would be held to. However, the trial court did so inform the Appellant. (R. Vol. 2, pg. 92). The Appellant, though, says he did not understand this advice by the trial court because he asked the trial court to inform him of "fine point rules." This comment by the Appellant does not support the claim that he did not understand what he had been told. Indeed, it would seem more sensible to believe that he understood well what he had been told in light of the fact that he wanted to be informed of "fine point rules" – a person would not likely ask for such information if he did not understand that he would be held to knowing rules, "fine point" or otherwise. It is merely the Appellant's present speculation that he did not understand. There is nothing in the record to give color to this bit of self - serving speculation.

The Court is then told that the trial court failed to inform the Appellant that the exercise of the right to represent oneself carries with it an increased likelihood of an unfavorable outcome. The trial court did inform the Appellant of the risk of self - representation, though not in the prim words of the rule. (R. Vol. 2, pg. 82). According to the Appellant, though, this admonition was insufficient because it did not use the words of the rule and was merely a subjective statement.

Once again, we have found no authority to the effect a trial court is required to hew to the words of the rule. The trial court did sufficiently inform that Appellant that self-representation is

at best a hazardous business, and it further informed the Appellant that he would be held to the same standards as an attorney. This was sufficient. *Taylor v. State*, 812 So.2d 1056 (Miss. Ct. App. 2001).

The Appellant, though, asserts that the trial court was required to strictly observe the provisions of Rule 8.05, he emphasizing the use of the word "shall" in the rule. While it may be true that a trial court would commit no foul where it follows the precise wording of the rule, we are unaware of any decision, and the Appellant cites no decision, in which the failure to strictly follow the words of the rule works error. It seems to us that it would be both unreasonable and unnecessary to have such a strict rule of observance. Where the substance of the rule is adhered to, as it was in the case at bar, this should be sufficient. A "substantial compliance," to use the Appellant's phrase, is sufficient.

The Appellant then claims that he "never maid (*sic*) a knowing and involuntary waiver" of his right to counsel. First of all, we will point out again that it does not appear that the Appellant wished to dispense entirely with the assistance of counsel and that counsel was not only present but also actively participated in the trial.

In any event, it is true that at one point the Appellant appeared to second - guess his decision to represent himself. Upon hearing that, the trial court told him that it would take the matter up again after the noon recess. (R. Vol. 2, pp. 95 - 96). After the recess, the trial court asked the Appellant whether he had decided to represent himself, at least in part. The court again advised the Appellant of the difficulty of self - representation. The Appellant made the unequivocal decision to represent himself. (R. Vol. 2, pp. 98 - 99). Prior to that point, though, as we have set out above, the trial court extensively questioned the Appellant about the decision to proceed *pro se* in the attempt to ensure that the Appellant's decision was knowing and voluntary.

Once the Appellant made such an unequivocal decision, the trial court was bound to honor his decision. While the Appellant would have this Court believe that the Appellant's complaints about his attorney and other such comments evinced doubt on the part of the Appellant, the fact remains that the Appellant did firmly state that he wished to represent himself. The circuit court saw and heard the Appellant and was in best position to determine what the Appellant wanted to do. This Court should give deference to the circuit court's decision in this regard. *Metcalf v. State*, 629 So.2d 558, 566 (Miss. 1993).

The Appellant then claims that the trial court did not make an on - the - record determination that his decision to partially represent himself was a knowing and voluntary one. The Appellant clearly stated that his decision was a voluntary one on his part. (R. Vol. 2, pg. 99). The entire colloquy between the trial court and the Appellant demonstrates that the Appellant was made aware of the potential consequences of proceeding *pro se*.

The concluding paragraph of the rule states that "If the defendant desires to proceed pro se, the court *should* determine if the defendant has exercised the right knowingly and voluntarily, and, if so, make the finding a matter of record." (Emphasis ours). The rule, in this respect, does not use the word "shall," but "should." While it does not appear that the circuit court here made a formal finding that the Appellant had knowingly and voluntarily waived or partially waived his right to counsel, no other reasonable conclusion can be drawn from the court's comments and ruling but that it found that the Appellant knowingly and voluntarily wished to represent himself, at least in part.

The Appellant would have this Court hold that the determination of whether an accused may be permitted to represent himself must be made in strict observance of the provisions of Rule 8.05. We do not doubt that a circuit court would commit no error by such an observance. Yet, this has not been required. *Williams v. State*, 20 So.3rd 722, 729 (Miss. Ct. App. 2009)(Failure to follow the

exact procedure set out by Rule 8.05 is not a fatal error where the substance of the rule has been respected). Nor should it. Where the record is sufficient as it is here to clearly show that an accused wished to defend himself and knowingly and voluntarily elected to do so, that should be the end of the matter. It is, after all, his case and his decision to make. Buyer's remorse is no ground to complain of the choice made.

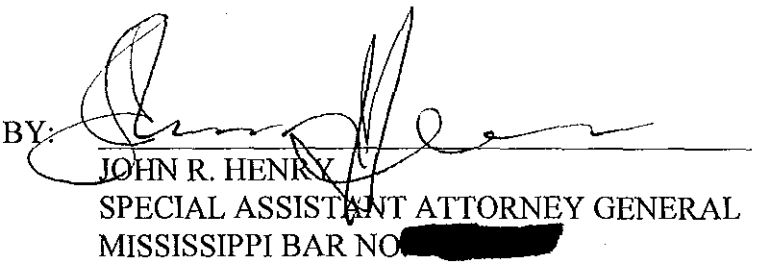
Finally, we submit that any error committed by the trial court in this matter was harmless. The Appellant was never without the assistance of counsel, and the record clearly shows that counsel was active in assisting and representing the Appellant. Counsel handled *voir dire* and the selection of the jury; he clearly advised the Appellant as to objections and grounds therefor; he was the one who participated in the jury instruction conference, among other things. In fact, the Appellant, from the beginning, indicated that he wanted "standby counsel" (R. Vol. 2, pg. 80). The case at bar is clearly an instance of "hybrid representation," rather than an instance of a complete waiver of counsel. *Metcalf v. State*, 629 So.2d 558, 564 (Miss. 1993)(argument that trial court failed to conduct a proper waiver - of - counsel enquiry misguided since defendant did not truly represent himself. He had counsel throughout trial, and counsel actively participated in the defense).

CONCLUSION

The Appellant's conviction and sentence 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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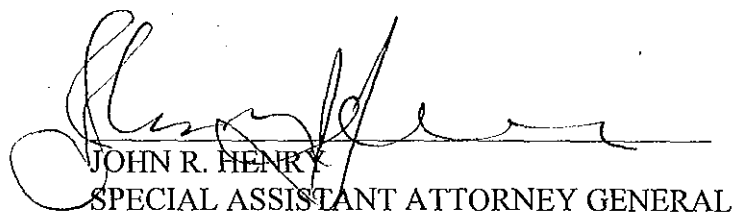
This the 27th day of August, 2010.



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