IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REGINALD DESHAWN BRADLEY — APPELLANT

V. — NO. 2009-KA-1948-SCT

STATE OF MISSISSIPPI — APPELLEE



# BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**REGINALD DESHAWN BRADLEY** **APPELLANT**

**V.** **NO. 2009-KA-1948-SCT**

**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. Reginald Deshawn Bradley, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 26th day of May, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

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BRIEF OF THE APPELLANT

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## STATEMENT OF THE ISSUE

**WHETHER BRADLEY'S FUNDAMENTAL SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED HIM TO PROCEED *PRO SE* ABSENT BEING ADEQUATELY INFORMED OF THE FUNDAMENTAL NATURE OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO UNIFORM RULE OF CIRCUIT AND COUNTY COURT PRACTICE 8.05 AND WITHOUT BOTH OBTAINING A KNOWING AND VOLUNTARY WAIVER AND/OR MAKING AN ON THE RECORD DETERMINATION THAT BRADLEY WAS MAKING A KNOWING AND VOLUNTARY WAIVER.**

## STATEMENT OF INCARCERATION

Reginald Deshawn Bradley, 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 Lowdnes County, Mississippi, and a judgment of conviction on one count of felony shoplifting against Reginald Deshawn Bradley, following a trial on November 12-13, 2009, the honorable James T. Kitchens, Jr., Circuit Judge, presiding. Bradley was subsequently sentenced to five years in the custody of the Mississippi Department of Corrections to run consecutive to any revocation.

## FACTS [1]

According to the testimony presented at trial, on November 8, 2008, between seven and eight at night, Walter Little, an employee of Kroger Grocery Store in Columbus, Mississippi was working when customers approached him and notified him that they saw an individual taking items from the shelves and putting them in his pockets. (T. 106-07). This individual would later be identified as Reginald Bradley, the Appellant.

The customers described the individual as a tall male with an afro and a brown coat. (T. 107). Little subsequently went to the manager's office and notified his manager of what he was told. (T. 107). On his way to the manager's office he saw Bradley taking items out of his pockets and putting

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1. The following evidence was brought out at trial, in which Bradley represented himself. Because the sole issue in this appeal is whether Bradley should have been allowed to represent himself, the facts below are brief and to illustrate only the proceedings against Bradley.

them back behind the shelves. (T. 107). Little notified his manager, Jimmy Woodruff and the two eventually met with Ricky Nevin, another employee. (T. 114). Little and Nevin walked around the store together, looking for Bradley, eventually locating him on aisle six. (T. 115). There the two saw Bradley "dumping stuff" out of his coat pocket behind the shelves. (T. 115).

Eventually, Little went to the location he saw Bradley return the items and found the following: an empty box of Motrin, infant drops, an empty box of children's Tylenol and an XT power charger package. (T. 109). Nevin then asked Bradley what was going on, to which Bradley responded, "When you catch me taking something out of the store, that's when you say something to me." (T. 116).

According to Little, Bradley admitted to taking the items. (T. 116). Little eventually left the group and went to continue his job. (T. 117). Little then saw Bradley walk past the registers and talk to two girls. (T. 117). He overheard them telling Bradley, "If you were stealing something, you can't ride with us." (T. 117). Little testified that these were the two girls that Bradley had entered the store with earlier. (T. 117). Bradley then left the store. (T. 117).

Ricky Nevin testified similarly to Little. Nevin saw Bradley on aisle six. (T. 123). Nevin testified that when he confronted Bradley, Bradley told him, "Yeah, I took it. What you going to do about it? There's nothing you can do about it. I haven't left the store, haven't went past the check stand, there's nothing you can do about it. And if you put your hands on me or try to stop me or anything, I'll sue." (T. 127). As Nevin followed Bradley, Bradley continued to say similar things. (T. 129).

Nevin continued to follow Bradley throughout the store, and Bradley eventually exited the store. (T. 129-30). Bradley walked off the parking lot towards a city street. (T. 132). Nevin entered

his personal vehicle and tried to follow Bradley. (T. 132). Nevin drove across a city street, turned on another, and eventually turned to where Bradley was walking back from a gas station. (T. 133). Bradley was "tracked down" to another parking lot. (T. 134). Nevin returned to the store and told the store manager where he had seen him. (T. 134). Eventually, a police car brought Bradley back to the store, where he was identified by Nevin. (T. 134).

Jimmy Woodruff testified similarly to Little and Nevin. (T. 137- 166). Officer Kenneth Brewer of the Colombus Police Department testified that he encountered Bradley on the day in question. (T. 167). Officer Brewer located Bradley, arrested him for shoplifting, and brought him back to Kroger where he was subsequently identified. (T. 168).

The State also admitted into evidence certified copies of both indictments and sentencing orders for two previous shoplifting convictions against Bradley, all occurring within seven years of the charge in the instant case. (T. 170, Ex. 9-10).

Bradley was subsequently found guilty and sentenced to five years to run consecutive to any revocation on prior charges. (C.P. 76-77, R.E. 11-12). On November 13, 2009, Bradley filed a Motion for judgement notwithstanding the verdict of the jury, or in the alternative, for a new trial (C.P. 55, R.E. 7). The motion was denied by the trial court on the same day. (C.P. 56, R.E. 8). On December 7, 2009, feeling aggrieved by the verdict of the jury and the sentence of the trial court, Bradley filed a notice of appeal. (C.P. 79, R.E. 13).

## SUMMARY OF THE ARGUMENT

The Sixth Amendment of the United States Constitution gives all criminal defendants the right to counsel. Implicit in that right is the right for criminal defendants to represent themselves.

However, in order to do so, there must be a knowing and voluntary waiver of the right to counsel. This Court promulgated Uniform Rule of Circuit and County Court Practice 8.05 in order to make sure trial courts adequately informed defendants of the right, and, in turn, obtained valid waivers.

In the instant case, the trial court failed to adequately follow the requirements of Rule 8.05. Furthermore, Bradley never made a knowing and voluntary waiver. Lastly, any purported waiver was not supported by any on-the-record determination of the trial court. Accordingly, reversal is required.

## ARGUMENT

**ISSUE: WHETHER BRADLEY'S FUNDAMENTAL SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED HIM TO PROCEED *PRO SE* ABSENT BEING ADEQUATELY INFORMED OF THE FUNDAMENTAL NATURE OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO UNIFORM RULE OF CIRCUIT AND COUNTY COURT PRACTICE 8.05 AND WITHOUT BOTH OBTAINING A KNOWING AND VOLUNTARY WAIVER AND/OR MAKING AN ON THE RECORD DETERMINATION THAT BRADLEY WAS MAKING A KNOWING AND VOLUNTARY WAIVER.**

The Sixth Amendment to the United States Constitution grants every criminal defendant a right to assistance of counsel. **U.S. Const. Amend XI.** Implicit in this right is the right to waive counsel, thus insuring the right of a defendant to conduct his or her own defense. ***Evans. v. State***, 725 So. 2d 613, 702 (Miss. 1997).

In ***Faretta v. California***, 422 U.S. 806, (1975), the United States Supreme Court stated:

> [T]he integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to a defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom to go to jail under his own banner . . . ." The system of criminal justice should not be available as an instrument of self-destruction.

***Id.*** at 839-40 (*citing* ***United States ex rel. Maldonado v. Denno***, 348 F.2d 12, 15 (2d Cir. 1965).

This Court, nearly half a century ago, determined that a criminal defendant's waiver of counsel was insufficient unless, prior to accepting the waiver, the trial court determined that the waiver was knowingly and intelligently waived. ***Conn v. State***, 170 So. 2d. 20 (1964). Specifically,

> While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. In accordance with these mandatory decisions we hold that there must be an intelligent and competent waiver of counsel by the defendant and that the trial court should so determine, and further, that such determination, as well as the facts on which it is based, should appear on the record.

*Id.* at 23 (citing ***White v. Maryland***, 373 U.S. 59 (1963)).

As noted by the ***Faretta*** Court,

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intillgently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so the record will establish that he knows what he is doing and his choice is made with eyes open.

***Faretta,*** 422 U.S. at 835 (emphasis added)(internal citations omitted).

Pursuant to this Court's constitutional duty and authority to make rules governing the judicial, the Court promulgated **Uniform Rule of Circuit and County Court Practice 8.05.**

**Rule 8.05** Provides:

> When the court learns that a defendant desires to act as his/her own attorney, the court shall on the record conduct an examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:
>
> 1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, the state will appoint one free of charge to the defendant to defend

or assist the defendant in his/her defense.

2. The defendant has the right to conduct the defense and that the defendant may elect to conduct the defense and allow whatever role (s)he desires to his/her attorney.

3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.

4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.

5. Other matters as the court deems appropriate.

After instructing the defendant and ascertaining that the defendant understands these matters, the court will ascertain if the defendant still wishes to proceed *pro se* or if the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed *pro se*, the court should determine if the defendant has exercised this right knowingly and voluntarily, and, if so, make the finding a matter of record. The court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney, but all disputes between the defendant and such attorney shall be resolved in favor of the defendant

**URCCC 8.05.** (emphasis added).

URCCC 8.05 contains the word "shall." This Court has held that, "unlike the discretionary nature of "may," the word 'shall' is a mandatory directive . . . no discretion is afforded to the trial judge." ***Ivy v. Harrington***, 644 So. 2d 1218, 1221 (Miss. 1994)(emphasis in original). Accordingly, **URCCC 8.05** is a mandatory provision, and the trial judge in the instant case was required to advise Bradley, on the record, of his rights and the warnings set forth in the rule. Subsequently, the trial court should have ascertained if Bradley still wished to proceed *pro se*, or if he wanted an attorney to assist him in his defense. If, having been advised of his rights and warnings as required by the rule, Bradley still wished to proceed *pro se*, the trial court was required to determine whether Bradley's

waiver was knowingly and voluntarily made. This framework was supported by this Court's recent holding in ***Patton v. State***, 2008-KP-01699-SCT, ¶11 (09/05/2008).

**ii. The trial court never advised Bradley, on the record of his rights and the warnings as set forth in URCCC 8.05.**

When looking at the totality of the record, it becomes clear that Bradley was not fully informed of the requirements of **URCCC 8.05.**

Specifically, the trial court never informed Bradley that he had a right to an attorney. Furthermore, it's clear that Bradley did not understand that he would be held to the same standards as a licensed attorney:

> BY THE COURT: If you want to try this case, I'm going to have to hold you – you need to understand, I've got to hold you to the same rules as if you're an attorney. And if you're doing something ––
>
> BY THE DEFENDANT: Could you give me some – some – some rules – or – you know, just some fine point rules that I can –
>
> BY THE COURT: No sir, I can't.
>
> BY THE DEFENDANT: – easily know what right – I'm saying what you going to tell me not to do.
>
> BY THE COURT: No, sir, I can't do that because I couldn't do that for the State and I couldn't do that if Mr. Goodwin was trying the case.

(T. 92).

After the above dialogue, Bradley did say he wished to proceed *pro se*; however, the above portion of the transcript indicates that Bradley did not fully understand what he was being advised of at the time.

Rule 8.05 also requires that the trial court inform defendants that "the right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant. **URCCC 8.05.** The

record contains no such comment from the trial court to Bradley. The trial court did, however, say the following to Bradley:

> BY THE COURT: Okay. Now, let me tell you this, just so you'll know: I've been involved in a lot of trials in my lifetime. I was an assistant district attorney, and then since I've been a judge. I have never seen anybody represent themself and win.

(T. 82).

Simply put, this statement was not in sufficient compliance with Rule 8.05. The trial court's "warning" is merely a subjective one, in which the court stated that it had never personally seen successful pro se representation. URCCC 8.05 states, in no uncertain terms, an objective fact that self-representation usually results in an unfavorable result. Bradley contends that he was not sufficiently warned of the perils of his self-representation.

The State might attempt to argue that rule URCCC 8.05 was "substantially" complied with. Because Rule 8.05 concerns fundamental constitutional rights, Bradley would submit that substantial compliance is impossible. Rule 8.05 requires total and complete compliance. Substantial compliance is nothing short of failure to fully inform.

**iii. Bradley never maid a knowing and involuntary waiver.**

The record indicates that there was never a clear an unequivocal waiver of right to counsel by Bradley. Instead, Bradley's self-representation seems less an indication of his desire to do so, and more an indication of his desire not to be represented by appointed trial-counsel.

> BY THE COURT: Now, do you want to represent yourself? Is that what you're telling me? And have [original trial counsel] as standby counsel?
>
> BY THE DEFENDANT: I mean I can. I don't – I don't –

BY THE COURT: No, no, I –

BY THE DEFENDANT: I can – I will – yeah, I prefer to. I think I'll help myself better, because he ain't – he ain't – we ain't talked about no trial strategy at all, period.

(T. 81).

Bradley maintains that the above statement is not an indication of a clear and unequivocal waiver. In fact, the statement above indicates that Bradley's waiver was not done so voluntarily, but, rather, out of a sense of desperation based upon his feelings that original trial counsel was unprepared for trial.

Later, while being "advised" by the Court, Bradley was asked whether he wanted the trial court to instruct the jury that he was representing himself. (T. 95). Bradley responded: "I guess. I don't know what to do. I really don't – I don't know what to do. I just – yeah." (T. 95-96). The above statement fully indicates that Bradley did not validly waive his Constitutional right to an attorney. Put more simply, Bradley was conflicted. Bradley contends that being conflicted about waiver does not create a valid waiver – the Constitution and Rule 8.05 demand more.

**iv. There was never an on-the-record determination that any purported waiver was knowing and voluntary.**

Regardless of whether there was a clear and unequivocal waiver by Bradley, there was never any on the record determination by the trial court that the purported waiver was knowingly and voluntarily made. As Stated above, this is required under the United States Constitution and under URCCC Rule 8.05, the mechanism by which this particular constitutional right of defendants is protected. The trial court did ask Bradley whether he was "freely" making his decision. (T. 99). However, that is not enough. The rule requires an on-the-record determination. No such determination was done. Reversal is required.

**v. The error above cannot be deemed harmless.**

The failure for the trial court to make sure that any waiver was knowing and intelligent cannot be deemed harmless. While some constitutional violations are subject to harmless-error analysis, "violations of rights essential to a fair trial (structural violations) clearly are not, nor should they be." ***Patton v. State***, 2008-KP-01699-SCT, ¶17 (09/05/2008).

**vi. Conclusion.**

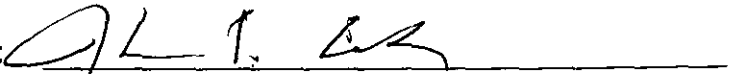
The trial court erred when it failed to properly inform Bradley pursuant to Rule 8.05. Further, the trial court erred in failing to obtain a knowing and intelligent waiver of counsel. Failure to do so warrants reversal.

## 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 conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on charges of felony shoplifting. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the error as cited hereinabove is fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Reginald Deshawn Bradley, Appellant

BY: 

JUSTIN T. COOK
MISSISSIPPI BAR NO [redacted]

## CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Reginald Deshawn Bradley, 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:

Honorable James T. Kitchens, Jr.
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Honorable Forrest Allgood
District Attorney, District 16
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This the 26th day of May, 2010.

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