

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

**CASE NOS. 2009-TS-00238-COA
and 2009-TS-00237-COA**

CHRISTOPHER FLUKER

APPELLANT

VS.

CASE NO. 2009-TS-00238-COA

STATE OF MISSISSIPPI

APPELLEE

Consolidated With

CHRISTOPHER FLUKER

APPELLANT

VS.

CASE NO. 2009-TS-00237-COA

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

**REPLY BRIEF OF APPELLANT
CHRISTOPHER FLUKER**

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I.

**COUNSEL'S FAILURE TO CHALLENGE THE
CONSTITUTIONALITY OF *MISSISSIPPI CODE
ANNOTATED* § 63-3-617 FURTHER POINTS TO
INEFFECTIVE ASSISTANCE.**

In the Appellant's principal brief, Appellant stated, both in arguments over lack of probable cause/reasonable suspicion and the elements called for conviction under 63-3-617, called attention to the proper interpretation of *Mississippi Code Annotated* §63-3-617. Alternatively, *Mississippi Code Annotated* §63-3-617 itself, while unambiguous to the undersigned, could be ambiguous to individuals of common intelligence and therefore would be necessarily subject to a challenge on the grounds of vagueness and constitutionality.

The ineffective assistance rendered Mr. Fluker at trial was no where better exemplified than in Mr. Arnold's failure to attack §63-3-617 for that unconstitutional vagueness. (Trial Trans. at 8-10). The statute makes the crime the driving too close to the center line. *Miss. Code Ann.* §63-3-617. Nowhere is the concept of "too close" addressed, and inexplicably, it would appear to criminalize driving a vehicle on the correct side of the road, never crossing the center line, but somehow (in the mind of the arresting officer) getting too close to the divider. This is a concept too vague for the criminal law, and the statute can arguably be struck for vagueness.

In Mississippi, statute can be attacked on grounds of vagueness and rendered void if "individuals of common intelligence must necessarily guess at the meaning and differ as to its application." *Smith v. City of Picayune*, 701 So. 2d 1101 (Miss. 1997). As generally stated in Mississippi law:

[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people

can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement for the legislature to establish minimal guidelines to govern law enforcement. If the legislature fails to provide such minimal guidelines, a criminal statute may permit a standard sweep that allows policemen, prosecutors and juries to pursue their personal predilections.

Smith, 701 So. 2d at 1103 (quoting *Nichols v. City of Gulfport*, 589 So. 2d 1281, 1282 (Miss. 1991)).

Despite this, trial counsel never attacked the constitutionality of the statute or otherwise argued for any other interpretation of the statute. (Trial Trans. at 8-10). Indeed, trial counsel's attack on the statute was limited to questioning the existence of such a statute, asking the prosecution witness, Trooper Williams, if there was a statute that said something so inane. (Trial Trans. at 8-10). In other words, counsel did not research the statute before trial, preferring to believe instead that such a statute could not exist.

There can be no better proof of ineffective assistance. Counsel Arnold did not only challenge the statute; he did not read it.

For the following reasons, defendant Christopher Fluker hereby asserts that at his conviction for violation of *Mississippi Code Annotated* §63-3-617 and DUI First Offense should be reversed and this case remanded to the Circuit Court of Grenada County, Mississippi, for a new trial.

RESPECTFULLY SUBMITTED,

CHRISTOPHER FLUKER, Plaintiff

BY: 

T. Philip Huskey
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, T. Philip Huskey, attorney for defendant, do hereby certify that I have this day mailed, via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to the following:

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THIS the 26th day of August, 2009.



T. PHILIP HUSKEY, Attorney of Record
for Christopher Fluker