

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT LEE ROBINSON

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

NUMBER 2010-TS-01120-COA

REBUTTAL

BRIEF OF APPELLANT

APPEAL

CIRCUIT COURT, BOLIVAR COUNTY, FIRST DISTRICT

JAMES D. MINOR, SR.

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ATTORNEY FOR APPELLANT

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## **SUPPLEMENTAL STATEMENT OF FACTS**

The facts of the case as related by the State at page 3 of its Brief suggests that the Appellant was stopped for speeding but there is no evidence that he was issued a citation other than the statement of the officer, (Suppression hearing, Transcript page 15, lines 11-15). At the suppression hearing the arresting officer conceded that Mr. Robinson was not under arrest when he called for backup and requesting a drug-sniffing canine, (Transcript, 16, lines 11-14). Though there is reference to the identification tag of the vehicle there was never any evidence adduced at trial to suggest that the vehicle was stolen. Evidence at the trial did indicate that the car did not belong to Appellant (Transcript 106, lines 17-19).

The facts as related by the State are misleading in that the canine hit upon the doors of the vehicle, (Transcript 6, lines 17-20) and not the trunk. There was no testimony elicited indicating that the vehicle was a hatchback. The Marijuana found was in a trunk within a closed container contained in yet another container, plastic bags (Transcript 116, lines 15-25). There was no testimony as to any burned marijuana in the vehicle.

## **SUMMARY OF THE ARGUMENT**

### **I The sufficiency of the citation of a Code section number to properly charge a crime in the indictment.**

The citation of the Mississippi Code reference does not charge every material fact and essential ingredient of the offense with precision and certainty. The charge of that count of the indictment was fatally flawed.

### **II. Whether the Appellant's trial counsel was ineffective in not objecting to the sentence handed down by the Court.**

The Appellant asserts that his trial counsel should have attempted to show the disproportionality of his sentence.

### **III. Whether appellant counsel is ineffective when he fails to raise issues directed by the defendant**

There is no constitutional right to an appeal but there is a statutory right. Failure to raise an issue directed by a client, not frivolous in nature, is not a trial strategy in an appellate case.

### **IV. Right to present argument as condition precedent to Federal Habeas Corpus requirements**

The Appellant had a statutory right to appeal to fulfill any requirements for Federal habeas corpus. Whether this Court grants relief or not, he is entitled to exhaust all possible remedies.

## ARGUMENT

**I     The sufficiency of the citation of a Code section number to properly charge a crime in the indictment.**

The challenge to the indictment in this case is not barred and was insufficient to charge "every fact which is an element in a prima facie case of guilt". (*Copeland* at 423 So. 2d 1336. citing *Love v. State*, 211 Miss. at 611, 52 So 2d at 472 (Miss. 1951), *Brewer v. State*, 351 So. 2d at 536 (Miss. 1977).

The State cites *Perkins v. State*, 863 So, 3d 47, 54 (Miss. 2003) and specifically ¶21 which states:

The indictment, while not repeating the statute verbatim, was sufficient to inform Perkins of the crimes with which he was accused. Although Counts VI, VII and VIII of the indictment did not repeat the statute verbatim, each count contains the number of the statute (97-3-53), which gave Perkins ample notice of the crimes with which he was charged.

*Perkins* at 863 So. 2d 54 (¶21).

In the *Perkins* case the two defendants were charged with kidnapping under *Miss Code Ann* § 97-3-53. A total of six persons were apparently tied up, two adults, at least one child 14 and three other children one of whom was three months old. Perkins argued that a portion of the statute relating to the kidnapping of children was absent from Counts VI, VII, and VIII. The indictment

was not reproduced in the Perkins opinion but impliedly the remaining portion of § 97-3-53 was included in the charging portion of the indictment. The Court there did find that Perkins had sufficient notice, however the statute there could charged kidnapping alternatively.

The Statute as cited in Perkins read in part:

Any person who shall without lawful authority forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be secretly confined or imprisoned against his or her will, or shall without lawful authority forcibly seize, inveigle or kidnap any child under the age of ten (10) years and secretly confine such child against the will of the parents or guardian or person having the lawful custody of such child, shall, upon conviction, ...  
(Emphasis added by Appellant)

*Perkins v. State*, 863 So. 2d at 54 (¶18). Clearly the custody of the children there was not being withheld from a parent. The facts in that case showed that the children were kidnapped with their mother. Therefore the allegation relating to secreting children from the mother was not necessary and was not supported by the evidence in that case. The prima facie case of kidnapping could be pled and shown under the first two clauses of §97-3-53 which are connected with the word "or".

Appellant takes exception to the suggestion that a statutory citation suffices to charge a crime. A lay

person would have no knowledge as to what crime *Miss.*

*Code Ann § 41-29-113(c)(4)* applied.

Appellant reiterates his request that the Court would reverse his conviction for the possession of Methylenedioxymethamphetamine (MDMA) on the basis that the crime alleged was not a crime under the laws of the State of Mississippi at the time of his arrest and conviction.

**II. Whether the Appellant's trial counsel was ineffective in not objecting to the sentence handed down by the Court.**

The Appellant does not contest the line of cases which suggest that a failed trial strategy does not necessarily lead to a claim of ineffective assistance, *Parker v. State*, 30 So. 3d 1222 (Miss. 2010). Nevertheless, Appellant would assert that the trial of a criminal case is for the purpose of justice and not mere ceremony. The failure to argue for proportionality is a part of the advocacy process. This is especially so here where the defendant is found guilty primarily on the theory of constructive possession while he was driving a car not titled to him (Transcript page 106, vehicle titled to Howard Covington) and the drugs discovered were not under his immediate control.

Whether the failure to object to the sentence was improper or not Appellant concedes that unless this court



finds that the sentence was improper or other prejudicial error the argument of Appellant would fail, *Parker V. State* at 1233 (¶41).

**III. Whether appellant counsel is ineffective when he fails to raise issues directed by the defendant**

Appellant relies upon his initial brief to establish the fact that the search of the vehicle he was driving was without probable cause. There was never any evidence produced to show that Appellant was stopped and detained for any valid cause. In addition there was no cause to search the trunk of his vehicle for the above stated reason and also because the canine called to the scene did no hit on the trunk but the doors to the vehicle.

**IV. Right to present argument as condition precedent to Federal Habeas Corpus requirements**

The Appellant had a statutory right to appeal to fulfill any requirements for Federal habeas corpus, *Miss. Code Ann §99-35-101*. Whether this Court grants relief are not, he is entitled to exhaust all possible remedies.

### CONCLUSION

Because of the failure of the State to properly charge Appellant in Count One of the indictment and the other allegations of Appellant Petition for Post Conviction Collateral Relief the prayer of his petition should be granted and his convictions should be reversed. Should any of the convictions other than Count One be upheld this case should be remanded for re-sentencing pursuant to *Ellis v. State*, 520 So. 2d 595 (Miss. 1988). The State "has being given one fair opportunity to offer whatever proof it could assemble", *DeBussi v. State*, 453 So. 2d 1030, 1033 (Miss. 1984) citing *Burks v. United States*, 437 U. S. 1, 15-16, 985 S. Ct. 2141, 2149, 57 L. Ed 2d 1 (1978). Furthermore, the State should therefore be prohibited from introducing any new evidence to support conviction for the crime, if any, attempted to be alleged in Count One of the indictment. Furthermore, the State should therefore be prohibited from introducing any new evidence to establish Appellants status as a habitual offender, to do otherwise would be a violation of the Mississippi Constitution of 1890, Article 3, Section 22 and United States Constitution Amendment Five.

  
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**CERTIFICATE OF SERVICE**

I, James D. Minor, Sr., certify that on March \_\_\_\_ 2011, I mailed a true and correct copy of Appellant's Rebuttal Brief to the following persons at the following addresses by United States Mail postage prepaid.

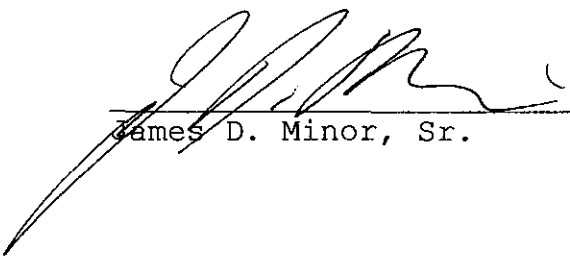
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