

Serial: 205693

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-DP-01159-SCT

***ABDUR RAHIM AMBROSE A/K/A
ABDUR AMBROSE***

Appellant

v.

STATE OF MISSISSIPPI

Appellee

EN BANC ORDER

Now before the Court, *en banc*, comes the Motion for Access to and Copies of Sealed Documents and to Supplement the Record, filed by counsel for Abdur Rahim Ambrose. Ambrose makes two requests: access to sealed documents and supplementation of the record. By order entered April 8, 2016, the Court called for responses from counsel for the State of Mississippi and the Honorable Roger T. Clark, Circuit Judge, as to why these sealed documents should not be unsealed. Those responses have been filed.

First, pursuant to M.R.A.P. 48A(d), Ambrose requests access to certain sealed documents, one of which is Exhibit D-1, Ambrose's psychological evaluation. He also seeks access to the juror cards for all venire members appearing at the trial of this cause. In addition to access, Ambrose seeks to be provided a copy of these sealed documents if his counsel so requests. The State has no objection to Ambrose's request for access and copies of the sealed documents, but agrees that they should remain sealed thereafter. Judge Clark is not opposed to allowing access to the sealed documents but is opposed to unsealing the juror cards thereafter. Judge Clark is not opposed to unsealing Ambrose's psychological evaluation.

The second request by Ambrose is to have the record in his appeal supplemented with the guilty plea transcript of his co-indictee, Orlander Dedeaux, II. Both the State and Judge Clark are opposed to this request because it was not a part of the trial-court record.

Having duly considered Ambrose's motion and the responses thereto, the Court finds, and IT IS HEREBY ORDERED, that the Motion for Access to and Copies of Sealed Documents and to Supplement the Record is granted in part and denied in part as follows:

1) In accordance with M.R.A.P. 48A(d), the juror cards will be temporarily unsealed to allow access by counsel for the parties. Further, a copy of the juror cards may be permitted to counsel for the parties if requested. This information shall remain confidential except for what is required by counsel to assert specific errors in briefs or like documents.

2) Because Ambrose's psychological evaluation was conducted in furtherance of his criminal proceedings, the report will be unsealed.

3) Ambrose's request to supplement the record with the transcript of Dedeaux's plea colloquy, which was not offered or admitted at trial, is denied.

SO ORDERED, this the 28th day of June, 2016.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR.,
CHIEF JUSTICE

**AGREE WITH ORDER: WALLER, C.J., RANDOLPH, P.J., LAMAR, COLEMAN,
MAXWELL, AND BEAM, JJ.**

**KITCHENS, J., OBJECTS IN PART WITH SEPARATE WRITTEN STATEMENT
JOINED BY DICKINSON, P.J., AND KING, J.**

**KING, J., OBJECTS IN PART WITH SEPARATE WRITTEN STATEMENT
JOINED BY DICKINSON, P.J., AND KITCHENS, J.**

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-DP-01159-SCT

*Abdur Rahim Ambrose a/k/a Abdur
Ambrose*

v.

State of Mississippi

**KITCHENS, JUSTICE, OBJECTING IN PART WITH SEPARATE WRITTEN
STATEMENT:**

¶1. I would grant Ambrose’s motion to supplement the record. Although styled a motion to supplement the record, Ambrose in fact requests that the appellate record be corrected to include a plea hearing transcript that inadvertently was omitted from the record. The majority finds that, because the missing information was a plea hearing transcript of Ambrose’s co-indictee, Orlander Dedeaux II, it was irrelevant to Ambrose’s death penalty appeal and properly was omitted from the appellate record. But, because the plea hearing occurred before Dedeaux’s case was severed from Ambrose’s, Dedeaux’s plea hearing transcript bears the same trial court cause number as Ambrose’s case.

¶2. Mississippi Rule of Appellate Procedure 10(a) defines the content of the record. “[T]he record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.” M.R.A.P. 10(a). Thus, the record consists of what was filed in the trial court, transcripts, and a certified copy of the docket entries. Dedeaux’s plea hearing transcript falls within this definition.

¶3. Rule 10(b)(2) provides that, “[i]n cases where the defendant has received the death sentence, the entire record shall be designated.” M.R.A.P. 10(b)(2). Accordingly, Ambrose’s counsel designated the entire record, which included Dedeaux’s plea hearing transcript. But the plea hearing transcript was omitted. Nonetheless, other papers from the trial court record pertaining to Dedeaux were included in the appellate record, such as Dedeaux’s petition to enter a guilty plea, an order amending his indictment, a sentencing and probation order, and a mittimus to the Sheriff of Stone County. It is unknown why the transcript was omitted, except, possibly, through inadvertence.

¶4. The Rules of Appellate Procedure, not actions or omissions of court personnel, must determine the content of the appellate record. Notably, this Court does not order that the parts of the appellate record pertaining to Dedeaux be removed from the record. Thus, the content of the record in this death penalty appeal has been determined by something other than the Mississippi Rules of Appellate Procedure – something arbitrary that does not comport with due process. *See Flowers v. State*, 842 So. 2d 531, 539 (Miss. 2003) (quoting *Mackbee v. State*, 575 So. 2d 16, 24 (Miss. 1990) (stating that “[i]n criminal procedures, due process requires, among other things, that a criminal prosecution be conducted according to established criminal procedures”). At this stage in the appellate process, by rule, the entire record of this death penalty appeal was designated and it must be transmitted to this Court. M.R.A.P. 10(b)(2), M.R.A.P. 11. If the Court finds that a particular item included in the record is irrelevant to Ambrose’s appellate arguments, the appropriate place to address that issue is in this Court’s ruling on the appeal.

¶5. The appellant's attorney is best situated to decide what materials she may need to brief and argue this serious case on appeal. We should not undertake to second-guess Ambrose's counsel or our own established rules. I would order that the record be corrected to include Dedeaux's plea hearing transcript. M.R.A.P. 10(e). I join Justice King's separate statement that the juror cards should be unsealed.

DICKINSON, P.J., AND KING, J., JOIN THIS SEPARATE WRITTEN STATEMENT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-DP-01159-SCT

*Abdur Rahim Ambrose a/k/a Abdur
Ambrose*

v.

State of Mississippi

KING, OBJECTING IN PART WITH SEPARATE WRITTEN STATEMENT:

¶6. While I agree in part with the order, I disagree that the juror cards should be sealed.

¶7. The trial court ruled on Ambrose's Certification of Compliance with Mississippi Rule of Appellate Procedure 10(b)(5), which contained proposed corrections to the appellate record in the case. In doing so, the trial court sua sponte ordered that the juror cards for all venire members be included in the record under seal. No reasoning was given for this decision to seal the juror cards. This Court requested responses from the parties and the trial judge as to why the juror cards should *not* be *unsealed*. The parties did not squarely answer this query. The trial judge responded, reasoning that

[T]he juror cards contain not only names and addresses but also information concerning their spouses, employment, number of children, religious affiliation, and prior contacts with the judicial system. . . . It is the position of the Court that the jurors, having performed their civic duty, are entitled to protection from disclosure of this information, as are their families, until good cause and relevancy are established. Neither was established before this court. Jurors and their families should not be subject to potential retaliation or any threatening behavior for having performed their duty. The sealed cards were placed in the record in an effort to provide easy access to the information when and if the Mississippi Supreme Court determined that good cause had been

established for making the names, addresses, and personal data of the jurors and their families a part of the **record** and, therefore, public.

The trial judge appears to find that the juror cards should automatically be sealed and that they should be unsealed only upon a showing of good cause and relevance. Yet, this is not how public records operate. Public records are unsealed records, until a showing is made that they should be sealed. See *Estate of Cole v. Ferrell*, 163 So. 3d 921 (Miss. 2012).

¶8. It is axiomatic that, absent compelling reasons, judicial proceedings are open to the public. See *Gannet River States Publ'g Co. v. Hand*, 571 So. 2d 941, 942 (Miss. 1990) (quoting *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). Moreover, the courts are subject to the Public Records Act. See *id.*; see also Miss. Code Ann. §§ 25-61-1 to 25-61-17 (Rev. 2010). “And in determining whether to seal a record, the court must balance the public’s right to access against interests favoring nondisclosure.” *Estate of Cole*, 163 So. 3d at 927. No such balancing was performed in this case. Indeed, the trial judge made no mention whatsoever of the public’s right to access. Because these are public records and no proper showing has been made that they should be sealed, I would unseal the juror cards. The majority’s order seems to adopt a blanket policy making all juror cards susceptible to automatic seal, and with this I disagree.

¶9. I also join in Justice Kitchens’s separate statement regarding Ambrose’s motion to supplement the record. Where an item has been properly designated for inclusion in the appellate record, it is not the role of this Court to selectively exclude it. Instead, the proper

role of this Court is to consider the entire record before it, and determine the impact which the questioned item has upon the issues presented to the Court.

DICKINSON, P.J., AND KITCHENS, J., JOIN THIS SEPARATE WRITTEN STATEMENT.