

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00598 COA**

**MICHAEL O. ZWEIFEL, SR. A/K/A MICHAEL
SERPAS**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	05/30/96
TRIAL JUDGE:	HON. KOSTA N. VLAHOS
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CHESTER D. NICHOLSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH VAUGHAN
DISTRICT ATTORNEY:	LARRY BOURGEOIS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER: SENTENCED TO SERVE 25 YRS IN THE CUSTODY OF THE MDOC; THE COURT SUSPENDS 5 YRS OF SENTENCE MAKING A TOTAL OF 20 YRS TO SERVE IN THE CUSTODY OF MDOC
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE BRIDGES, C.J., DIAZ, AND COLEMAN, JJ.

DIAZ, J., FOR THE COURT:

Michael Zweifel was convicted of aggravated assault on a law enforcement officer. On appeal, he argues that the trial judge erred in refusing his proposed jury instruction which would have defined the limits of a police officer's right to use deadly force. Finding this issue without merit, we affirm.

FACTS

On December 6, 1992, Officer Travis Foreman responded to a complaint concerning an argument and possible gunshots coming from an area near Michael Zweifel's home. Shortly after Officer

Foreman arrived at the Zweifel's residence, Michael Zweifel drove up in his van. Zweifel cursed Foreman and refused to answer the officer's questions about the gunshots. Foreman then ordered Zweifel out of the van. Instead of complying with the officer's command, Zweifel put the van in reverse and began backing down the street. Foreman then ran to his patrol car in order to pursue Zweifel. Just as Foreman was unlocking the driver's door of his patrol unit, Zweifel put the van in forward gear and started driving toward Officer Foreman. Foreman jumped over the hood of his patrol car in order to avoid being hit by the van. Zweifel then jumped out of the van, while continuing to scream obscenities at the officer. Zweifel reached back into his van, retrieved a gun, and then fired at Officer Foreman. Foreman then drew his weapon and returned fire. Zweifel fired again and hit Officer Foreman in the chest. Zweifel then ran back to his van and fled the scene. Because he was wearing a protective vest, Officer Foreman was not seriously injured by the bullet. Nevertheless, Zweifel was later arrested, indicted, and convicted of aggravated assault on a peace officer. Zweifel then appealed his conviction to this Court. Finding that the trial court erred in granting a flight instruction, we reversed and remanded for a new trial. Zweifel was then re-tried and convicted once again for aggravated assault on a law enforcement officer. He now makes the following appeal.

DISCUSSION

I. DID THE TRIAL JUDGE ERR IN REFUSING ZWEIFEL'S PROPOSED JURY INSTRUCTION?

In his present appeal to this Court, Zweifel assigns as error the trial court's failure to grant his jury instruction which would have defined the limits of a police officer's right to use deadly force. It is important to note that Zweifel raised this same issue in his first appeal to this Court, to which we replied that "[t]he trial court correctly refused this defense instruction in that it misstates the law." *Zweifel v. State*, No. 93-KA-01045 COA, slip op. at 6 (Miss. Aug. 15, 1995). The supreme court has limited the right of an accused to resist arrest. *Watkins v. State*, 350 So. 2d 1384, 1386 (Miss. 1977). In determining the scope of the limitation, we measure:

- (1) The nature and location of the premises where the attempted arrest occurred;
- (2) Inquiry as to whether the arrest was made with apparent legal authority as opposed to no claim of authority;
- (3) The potential for violence and physical harm under the circumstances of the particular confrontation;
- (4) Whether the force used in resistance was reasonable considering the above factors.

Id. Applying these guidelines to the present case, it is clear that Zweifel's limited right to resist arrest did not support his violent behavior.

Having been alerted by a neighbor to an argument and possible gunshots coming from the Zweifel's residence, Officer Foreman had reason to be on the property. His identity as a law enforcement officer was unquestionable because he was dressed in full uniform and was driving a clearly marked

patrol car. Moreover, when he arrived at the scene, he found Zweifel's wife in a school bus on the premises, and she reported to Officer Foreman that she and Zweifel had indeed argued. When Foreman confronted Zweifel about the reported disturbance, Zweifel became boisterous, cursing Foreman and refusing to answer his questions. When Foreman ordered Zweifel to step out of the van, Zweifel instead placed the van in reverse as if to leave the scene. Zweifel then put the van in forward gear and began driving toward Foreman. Zweifel then drew his gun and began firing at the officer. Officer Foreman's actions were not unreasonable under these circumstances. To the contrary, Zweifel's resistance, accompanied by his overt use of deadly force, was totally unwarranted. Therefore, we refuse to find that Zweifel's actions were in any way privileged or condoned.

The supreme court has held that a trial judge cannot be placed in error for refusing to instruct the jury with an incorrect statement of the law. *Allman v. State*, 571 So. 2d 244, 251 (Miss. 1990). Therefore, the trial judge in the case at bar cannot be held in error for his refusal to give an instruction which limits an officer's right to use deadly force when that instruction is a misstatement of the law. Accordingly, we find that Zweifel's assignment of error is without merit and that the conviction and judgment of the trial court should be affirmed.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT OF AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER AND SENTENCE OF TWENTY-FIVE YEARS WITH FIVE YEARS SUSPENDED MAKING A TOTAL OF TWENTY YEARS TO SERVE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.