IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01356 COA

OTHA LEE SPRUILL A/K/A OTHA LEE SPRUELL **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

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

DATE OF JUDGMENT:	12/12/95
TRIAL JUDGE:	HON. GRAY EVANS
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROGER MATHES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	FRANK CARLTON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF ARMED ROBBERY AND AGGRAVATED ASSAULT.
DISPOSITION:	AFFIRMED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

PER CURIAM:

Otha Lee Spruill was found guilty by a Leflore County Circuit Court jury of aggravated assault and armed robbery. Spruill has one issue on appeal, that his trial counsel was ineffective for failure to object to the State's use of a peremptory strike. We find no ineffectiveness and affirm.

Ineffectiveness of counsel is measured under the two part test set out in ***Strickland v. Washington,* 466 U.S. 668 (1984).** That test requires both a finding of ineffectiveness and a finding that but for the

attorney's shortcomings the outcome of the case likely would have been different.

The factual basis for this issue arose when the State used its first peremptory strike against a black member of the venire. The trial judge asked the State for a non-racially motivated reason for that challenge. The State responded by stating that it would give a reason, but pointed out a then-recent clarification of the procedures to be followed for measuring peremptory challenges under ***Batson v. Kentucky*, 476 U.S. 79 (1986).** The Mississippi Supreme Court had just ruled that a trial judge must await a party's objection to the use of a challenge, as opposed to on its own initiative obligating each side to justify peremptory challenges. ***Stewart v. State.* 662 So. 2d 552, 559-560 (Miss. 1995).** After the State raised *Stewart*, defense counsel agreed by stating, "I am afraid to say it is, Judge, it was my case, it was the *Stewart* case." Defense counsel was aware of his right to contest peremptory challenges and determined not to do so. According to Spruill's appellate brief, the other three challenges used by the State were also against black members of the venire. The record, however, does not show the race of the other individuals who were challenged.

Since this record on direct appeal supports neither that Spruill's attorney was deficient nor that his case was prejudiced by his attorney's actions, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF COUNT I ARMED ROBBERY AND SENTENCE TO LIFE WITHOUT PAROLE AND OF COUNT II AGGRAVATED ASSAULT AND SENTENCE TO TWENTY YEARS WITHOUT PAROLE, TO RUN CONSECUTIVELY TO COUNT I, IN THE

CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.

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