IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00994 COA

RICKEY LYNN DOYLE JR. **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:	04/20/95
TRIAL JUDGE:	HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES G. TUCKER III
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	CONO CARANNA
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SENTENCED TO SERVE A TERM OF 10 YRS IN THE MDOC; SENTENCE IS SUSPENDED & THE DEFENDANT IS PLACED ON EARNED PROBATION TO PARTICIPATE IN THE RID PROGRAM; DEFENDANT PAY RESTITUTION OF $12, 863 & PLACED ON 5 YRS PROBATION
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

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

DIAZ, J, FOR THE COURT:

Rickey Lynn Doyle was convicted of aggravated assault for the shooting of John Leddy and sentenced to ten years imprisonment, suspended upon successful completion of the Regimented Inmate Discipline Program. Doyle was also ordered to pay restitution in the amount of $12, 863.

Aggrieved, Doyle filed this appeal to the Court.

FACTS

Rickey Doyle and John Leddy had conflicts previous to the actual incident in question. Leddy actively pursued Doyle to try and settle the dispute. Although Leddy knew that Doyle carried a weapon, he testified that he did not believe that Doyle would shoot him. Leddy tracked Doyle down in the parking lot of a local restaurant. Doyle tried to return to the restaurant, but Leddy blocked his path and stopped Doyle's retreat. Doyle then pulled his gun and cocked the trigger. Leddy charged Doyle, and Doyle ran across the highway into the Wal-Mart parking lot with Leddy following. When Doyle was about twenty to twenty-five feet from the entrance to Wal-Mart, he turned and fired striking Leddy in the arm. Leddy continued to charge Doyle until Doyle fired a second shot which struck Leddy in the neck and stopped the chase.

Doyle was charged and convicted of aggravated assault and now appeals on two issues. Doyle argues:

I. The evidence showed that the shooting occurred in self-defense; and

II. The circuit judge committed error when he denied Doyle's instruction D-8.

ISSUES

I. DID THE EVIDENCE SHOW THAT THE SHOOTING OCCURRED IN SELF-DEFENSE?

Doyle is basically arguing that the verdict was against the overwhelming weight of the evidence in this issue. Yet, Doyle failed to make any type of motion to correct the supposed error. In order to preserve an error, a party must object or make a motion to bring the error to the judge's attention because a judge can not be put in error if the matter was not presented to him. ***Ponder v. State,* 335 So. 2d 885, 886 (Miss. 1976).** Here, we can find no record of a motion for a new trial or a JNOV. Doyle completely failed to preserve the error for appeal. Therefore, we will not address the merits of this issue.

II. DID THE TRIAL JUDGE ERR WHEN HE REFUSED DOYLE'S JURY INSTRUCTION D-8?

When the trial judge refused Doyle's jury instruction, Doyle made no objection of any kind. A failure to make a contemporaneous objection to a refusal of a jury instruction waives the issue on appeal. ***Nicholson, on Behalf of Gollott v. State,* 672 So. 2d 744, 752 (Miss. 1996)**. This Court is therefore not bound to address the issue, and as such, we will not.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SUSPENDED UPON SUCCESSFUL COMPLETION OF THE RID PROGRAM, TO PAY RESTITUTION OF $12, 863, AND FIVE YEARS PROBATION IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HANCOCK COUNTY.

BRIDGES, C.J., COLEMAN, HERRING, HINKEBEIN AND PAYNE, JJ., CONCUR.

SOUTHWICK, J., CONCURS IN RESULT ONLY.

KING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY MCMILLIN, P.J. AND HERRING, J.

THOMAS, P.J., NOT PARTICIPATING.

KING, J., CONCURRING IN PART, DISSENTING IN PART:

I concur with the majority as to issue I, and respectfully dissent as to issue II.

The majority holds that Doyle is procedurally barred from appealing the denial of his requested instruction D-8, for failure to make a contemporaneous objection. As authority for this position, the majority cites ***Nicholson, on behalf of Gollott v. State,* 672 So.2d. 744 (Miss. 1996)**. While it is true that *Nicholson* does indeed make such a finding, a careful reading of the case authority cited as mandating that finding indicates it to be syllogistically faulty. If the supporting premise of *Nicholson*is faulty, then of necessity the end result must also be faulty.

The principle case relied upon in *Nicholson* is ***Lockett v. State,* 517 So .2d. 1317 (Miss. 1987)**. In *Lockett*, the Defendant (1) failed to object to the State's requested instruction, and (2) f ailed to offer an instruction of his own. It was the combination of these two failures, which the court held to be a procedural bar. This fact is made clear by the court, wherein it states, "This Court noted that Gray failed to object to the instructions offered by the State and more importantly, failed to submit an instruction to the court . . . **This combined failure to object and request an appropriate instruction operated to waive Gray's assigned error on appeal.**" ***Lockett,* 517 So.2d at 1333. *(emphasis added).***

While there is no specific criminal case in which our supreme court has addressed this particular issue, It has done so in a civil case, ***Carmichael v. Agur Realty Co.,* 574 So.2d 603, 613 (Miss.1990)**, saying, "The point is procedurally preserved by the mere tendering of the instructions, suggesting that they are correct and asking the Court to submit them to the jury. This in and of itself affords counsel opposite fair notice of the party's position and the Court an opportunity to pass upon the matter. **When the instructions are refused, there is no reason why we should require an objection to the refusal unless we are to place a value upon redundancy and nonsense.**"

I would hold that this matter is not procedurally barred and dispose of it on its merits. In doing so, I would also invite our supreme court to take up and address this inconsistency.

MCMILLIN, P.J., AND HERRING J., JOIN THIS SEPARATE OPINION.