

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00335 COA

KEITH LAMONT ANDERSON 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

TRIAL JUDGE: HON. JOHN H. WHITFIELD

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JAMES F. THOMPSON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTED ON THREE COUNTS OF AGGRAVATED ASSAULT AND SENTENCED TO 15 YRS IN EACH COUNT TO RUN CONSECUTIVELY FOR A TOTAL OF 45 YRS TO SERVE IN THE CUSTODY OF THE MDOC

MANDATE ISSUED: 9/30/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT:

Keith Lamont Anderson was convicted in the Harrison County Circuit Court of three counts of aggravated assault. The court sentenced Anderson to serve three consecutive terms of fifteen years in the custody of the Mississippi Department of Corrections. Aggrieved with the trial court's judgment, Anderson assigns the following errors: (1) the court erred in refusing to continue the trial for three days after granting an omnibus hearing as required by Rule 4.09 of the Uniform Criminal Rules of Circuit Court Practice; (2) the court erred in failing to suppress Anderson's statement to the police; (3) the court erred when it accepted the State's untimely jury instruction on aiding and abetting; and (4) the court erred in failing to consider the sentencing alternatives available under the Youth Court Act as it existed at the time of the offense. We affirm the conviction and the sentence.

#### FACTS

On November 4, 1993, Keith Anderson, Roy G. Moody, and Johnny R. Stewart armed with a nine millimeter pistol, a double-barrel sawed-off twelve gauge shotgun, a Winchester pump sawed-off twelve gauge, and a Colt forty-five semiautomatic, opened fire on another group of males at a housing project in Harrison County. Two persons were injured in this assault. The three assailants jumped into Eugene Dedeaux's car and fled the scene. As the assailants and their wheel man attempted to get away, they collided with another automobile. The three gunmen jumped from the car, threw their guns in some nearby bushes, and ran away. Dedeaux remained at the accident scene and was arrested by a security guard employed at an adjacent motel. The police were called, and the guns were found in the bushes. After discovering the weapons, based on evidence gathered from the crime scene, the police determined that Dedeaux was involved in the earlier shooting. Subsequently, the three assailants were arrested and charged with three counts of aggravated assault.

Upon his arrest, Keith Anderson, sixteen years old at the time of the shooting, gave a taped confession. The investigator advised Anderson of his rights, and Anderson signed a waiver of those rights. He did not have a lawyer present, nor was either of his parents present. The investigator testified that he attempted to contact Anderson's mother at home, at work, and at Anderson's grandmother's. All attempts were unsuccessful. In his confession, Anderson admitted to having participated in the shooting. He admitted to firing a double-barrel sawed-off shotgun one time.

However, he stated that he shot over the heads of the group and did not intend to shoot anyone.

Anderson, Moody, and Stewart were indicted as co-defendants, but Anderson moved the court for a severance. The court granted his motion. During the trial, the State introduced Anderson's confession, and Dedeaux testified that Anderson was one of the three assailants on the night of the shooting. The jury convicted Anderson of three counts of aggravated assault, and he was sentenced to serve three consecutive fifteen year sentences. Anderson moved the court for a judgment notwithstanding the verdict, or in the alternative, a new trial. The court denied the motion, and Anderson now appeals to this Court.

## I.

THE TRIAL COURT ERRED IN REFUSING TO CONTINUE THE CASE AFTER GRANTING AN OMNIBUS HEARING AS REQUIRED BY RULE 4.09 OF THE UNIFORM CRIMINAL RULES OF CIRCUIT COURT PRACTICE.

Anderson moved the court for an omnibus hearing on October 10, 1994. No action was taken on this motion by either Anderson or the court. On January 23, 1995, the day before Anderson's trial was scheduled to begin, his counsel renewed his motion for an omnibus hearing and requested a continuance pursuant to Rule 4.09 of the Uniform Criminal Rules of Circuit Court Practice.<sup>(1)</sup> Rule 4.09 provided that the court shall hold the hearing at least three days prior to trial and allow counsel sufficient time to conduct further investigations, discovery and plea discussions. U.C.R.C.C.P. 4.09. The trial judge granted the omnibus hearing but denied Anderson a continuance. Anderson now complains that the trial court erred by not granting a continuance pursuant to Rule 4.09. Anderson claims that he needed the continuance in order to obtain and review the transcript from the trials of Moody and Stewart, in which Dedeaux identified them as two of the three assailants.

On the record, the trial judge determined that defense counsel indicated the week before the trial was set to begin that he was prepared to go forward with the trial. As was within his discretion, the judge denied the continuance. The court's denial was based upon defense counsel's announcement of readiness for trial and lack of diligence in pursuit of the motion for an omnibus hearing. *Gates v. State*, 484 So. 2d 1002, 1006 (Miss. 1986); *see also* Uniform Circuit Court Rules 2.06<sup>(2)</sup> (the movant has the duty to pursue said motion to hearing). Notwithstanding the trial judge's denial of the continuance, Anderson was given a copy of the trial transcript containing Eugene Dedeaux's testimony identifying the three shooters. Defense counsel accepted the transcript and made no argument to any testimony contained therein that would possibly prejudice his client or impair his ability to defend himself. *Greene v. State*, 406 So. 2d 805, 807 (Miss. 1981). We find no merit in this assignment of error.

## II.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT OF KEITH ANDERSON.

Anderson was sixteen years old when he was arrested for this crime. The Family Court of Harrison County certified him for prosecution as an adult in December of 1993. On October 10, 1994, counsel for Anderson filed a document headed "Motions." This document contained ten separately enumerated motions. Included in these ten motions were two motions, numbers V and VI, to suppress statements made by Anderson. Motion number V read:

To suppress all inculpatory statements or confessions, if any, whether written or oral, which were obtained from Keith Lamont Anderson in violation of the rights afforded Keith Lamont Anderson by the 5th, 6th and 14th Amendments of the United States Constitution, because all of such statements were made without counsel present, without adequate warning of those rights, were the product of coercion and duress, and were a result of a lack of understanding by Keith Lamont Anderson of those rights.

Motion number VI read:

To suppress any out of court statements made by Keith Lamont Anderson to any law enforcement agent, or anyone else in connection with claims against the Defendant herein in connection with the pending criminal charges because such statements are hearsay, not the best evidence, and in violation of the Defendant's 6th Amendment right to confront and cross-examine witnesses against him, and the statements of any law enforcement agent may not be products of their own but products of the people interrogating him when the statements were made.

The trial court conducted an evidentiary hearing on these motions on January 23, 1995.

Anderson predicated his request to suppress statements upon the 5th, 6th and 14th Amendments to the United States Constitution. Anderson has now requested that this Court find as error the action of the trial court in not suppressing a statement not taken in conformity with state law regarding the interrogation of juveniles. Specifically, Anderson now contends that law enforcement officers violated section 43-21-303(3) of the Mississippi Code Annotated (Rev. 1993). Section 43-21-303(3) provides:

(3) Unless the child is immediately released, the person taking the child into custody shall immediately notify the judge or his designee. A person taking a child into custody shall also make continuing reasonable efforts to notify the child's parent, guardian or custodian and invite the parent, guardian or custodian to be present during any questioning.

A review of the record indicates that during the suppression hearing, defense counsel inquired about efforts made to contact Anderson's parents and the family court judge prior to interrogation. However, the record does not indicate that defense counsel went so far as to allege a violation of section 43-21-303(3). We do not find such an allegation in either the written motions or in defense counsel's oral argument to suppress Anderson's statements. The record does indicate that defense

counsel raised the absence of Anderson's mother as an issue in his oral argument, but not in the context of section 43-21-303(3). However, the record does indicate that during the course of its argument in favor of admissibility, the State directed the trial court's attention to section 43-21-303(3).

Anderson did not claim a right under state statute, but rather the Federal Constitution. Having failed to raise a state claim, he cannot now be heard to raise it for the first time on appeal. *Crawford v. State*, 515 So. 2d 936, 938 (Miss. 1987). While the trial court in its bench ruling indicated a consideration of the statute raised by the State, its decision was consistent with the predicate of Anderson's motions. Because Anderson's motions were not predicated upon state statutory rights and because the trial court's ruling was not predicated upon state statutory rights, we decline Anderson's invitation to now hold that failure to suppress, based upon section 43-21-303(3), was in error.

### III.

#### THE COURT ERRED WHEN IT ACCEPTED THE STATE'S UNTIMELY JURY INSTRUCTION ON AIDING AND ABETTING.

In his brief, Anderson contends that the State submitted jury instruction S-4 on the second day of trial in violation of Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice.<sup>(3)</sup> Rule 5.03 required the parties to submit jury instructions to the court at least twenty-four hours prior to the first day of trial. U.C.R.C.C.P. 5.03. Anderson contends that the court erred by submitting this untimely instruction to the jury, because it presented him as an aider and abettor, not just a principal as he was indicted.

The record indicates that Anderson's objection was to the untimeliness of jury instruction S-5, which defined an aider and abettor. The similar but more expansive instruction S-4 defined an accomplice as an aider and abettor, and it instructed the jury that it could find that Anderson acted as such if the evidence and testimony allowed. Anderson did not complain on the record that the State filed S-4 untimely. As such, this Court could decline to address the merits of the issue since Anderson does not assert the same issue as found in the record. *Crawford v. State*, 515 So. 2d 936, 938 (Miss. 1987).

However, whether Anderson complains of S-4 or S-5 we find no prejudice in the court's submission of the instructions to the jury. If he intended to complain of the untimeliness of S-5, there was no prejudice because the State filed S-4 prior to the trial. Therefore, Anderson was placed on notice of the State's intention to present the aider and abettor theory to the jury. If Anderson complains of S-4, it is without merit because Anderson confessed that he acted in concert with Moody and Stewart. Even though Anderson contends that he fired his weapon in the air and not at a specific individual, where one is present, aiding and abetting another in the commission of a crime, he is equally guilty as a principal. *Sayles v. State*, 552 So. 2d 1383, 1389 (Miss. 1989). Finding no prejudice to Anderson's defense, we cannot find that the trial court erred by submitting either S-4 or S-5 to the jury.

### IV.

#### THE COURT ERRED IN FAILING TO CONSIDER THE SENTENCING ALTERNATIVES

AVAILABLE UNDER THE YOUTH COURT ACT AS IT EXISTED AT THE TIME OF THE OFFENSE.

Finally, Anderson contends that the trial court erred because it failed to consider and make an on the record determination of the discretionary sentencing alternatives available to him as a juvenile under section 43-21-159(3) of the Mississippi Code of 1972. Because Anderson raises this issue for the first time on appeal, it is procedurally barred. *Copeland v. State*, 423 So. 2d 1333, 1334-35 (Miss. 1982). Finding each of the other arguments without merit, we affirm Anderson's conviction and sentence.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF THREE COUNTS OF AGGRAVATED ASSAULT AND SENTENCE TO SERVE FIFTEEN YEARS FOR EACH COUNT IN THE CUSTODY OF THE**

**MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCES SHALL RUN CONSECUTIVELY FOR A TOTAL OF FORTY-FIVE YEARS. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.**

**BRIDGES, C.J., McMILLIN P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**

1. In May 1995, the U.C.R.C.C.P. were superceded by the Uniform Circuit and County Court Rules, and the former Rule 4.09 was not adopted.
2. U.C.C.R. 2.06 was replaced by Uniform Circuit and County Court Rule 2.04 in May 1995.
3. Superceded by Uniform Circuit and County Court Rule 3.07.