

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00829 COA

BOBBY KEITH BARNETT 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. MIKE SMITH

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: WILLIAM E. GOODWIN

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: PAT S. FLYNN

DISTRICT ATTORNEY: DUNN LAMPTON

NATURE OF THE CASE: MURDER

TRIAL COURT DISPOSITION: CT I MURDER: CT III POSSESSION OF FIREARM BY CONVICTED FELON: CT I SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT; CT III SENTENCED TO 5 YEARS I N THE MDOC; CT I & CT III TO RUN CONSECUTIVELY TO EACH OTHER

MANDATE ISSUED: 6/24/97

BEFORE BRIDGES, C.J., HERRING AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

Bobby Keith Barnett was convicted of murder, as well as possession of a firearm at a time when he had previously been convicted of a felony under the laws of the State of Mississippi. As a result of

these convictions, Barnett was sentenced *inter alia* by the Circuit Court of Pike County, Mississippi, to life imprisonment on the murder charge and to serve five years in the custody of the Mississippi Department of Corrections on the possession of a firearm charge. The two sentences were ordered to run consecutively. Barnett now appeals to this Court and assigns the following errors:

I. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A SELF-DEFENSE INSTRUCTION?

II. DID THE TRIAL COURT ERR WHEN IT PERMITTED A WITNESS TO GIVE HIS INTERPRETATION OF A CONVERSATION?

After careful consideration of the issues in this case, we affirm the judgment of the lower court.

#### A. THE FACTS

On May 8, 1994, Bobby Keith Barnett was working as a bartender at the Playhouse Lounge in Magnolia, Mississippi. At approximately 6:00 p.m. on that date, Thomas "Turk" Wells, a convicted felon who had recently been released from confinement at Parchman, Mississippi, entered the lounge with two friends, Kelvin Ashley and his brother, Bobby Ashley. Wells and Barnett knew each other and were inmates together at Parchman, where they were members of the same prison gang. At some point, Wells approached Barnett and informed him that the Ashley brothers were "gunning for him." During this encounter, Wells further taunted Barnett by using hand signals of some sort, which were used as a method of communication between fellow gang members. Shortly thereafter, Wells left the premises with Kelvin and Bobby Ashley.

After Turk Wells left the Playhouse Lounge, Barnett telephoned Roosevelt Washington in McComb, Mississippi, and requested Washington to bring him a gun, stating that "Turk was not a true brother, was not true, because he was riding with some guys who were supposed to do me harm." At this point, Barnett, following some unexplained ritual, donned a bandana and a cap and went outside the lounge to wait for Washington. A few minutes later, Washington did in fact bring a handgun as requested. Barnett took the gun and left the lounge with Washington in Washington's

automobile. They soon returned to the Playhouse, however, because Wells and Kelvin Ashley had also returned and were sitting outside the lounge in Ashley's vehicle.

Wells then got out of Ashley's vehicle, and Barnett approached Wells. After a few words were exchanged between the two men, Barnett said "death before dishonor" and shot Wells in the back of his head. Barnett then informed Kelvin Ashley that he meant Ashley no harm, stating simply that "I did what I had to do." In other words, Barnett had performed a gang-style execution in accordance with a code of honor adopted by group members.

After the shooting, with Wells lying on the ground, Barnett and Washington once again drove away in Washington's automobile. Barnett threw the handgun out the window of the vehicle and requested Washington to drive him to the county sheriff's office where Barnett turned himself in, promptly admitted to the shooting, and ultimately made a full confession. In his confession to law enforcement officials, Barnett stated that he wanted to "go home" to Parchman. Wells died as a result of the

gunshot wound. An autopsy was subsequently performed indicating that the cause of death was the gunshot wound to the back of the decedent's head.

At trial, the facts as to how Wells was killed were uncontested. Wells was unarmed at the time of the shooting, and there was no evidence that Wells was carrying a weapon of any sort, either prior to the shooting when Barnett and Wells spoke inside the lounge, or later, when Barnett shot Wells in the back of his head. Additionally, there was no evidence that Wells made any threatening statements or gestures toward Barnett immediately prior to the shooting. In his statement to the law enforcement officers, Barnett never indicated that he felt threatened in any way by Wells and never claimed that Wells possessed a weapon of any kind. Barnett's explanation for shooting Wells was simply that Wells had violated gang rules and should have been protecting Barnett from those that wished to do him harm rather than consorting with them.

The witnesses who testified for Barnett stated that he suffered from severe mental illness and had been confined in a state mental hospital on several occasions. Dr. William Lott, a clinical psychologist, stated that while Barnett was not legally insane, he was a chronic schizophrenic. Dr. Lott also testified that when he evaluated Barnett on April 20, 1995, Barnett was capable of standing trial and understood the nature and consequences of his actions. It is noteworthy that Barnett did not request any instructions from the trial court raising an insanity defense and did not object to admission of Barnett's written confession which was dictated by Barnett to a law enforcement officer and then signed by Barnett. After the jury returned a guilty verdict on both the murder charge and the charge of possession of a firearm by a convicted felon, Barnett appealed, citing two errors: (1) that the trial court should have granted an instruction allowing Barnett to raise the issue of self-defense; and (2) that the trial court should not have permitted a law enforcement officer to give his interpretation of what Barnett meant when he characterized either Wells or Washington as his "brother."

## B. ANALYSIS

### I. DID THE TRIAL COURT ERR IN REFUSING DEFENDANT'S REQUESTED SELF-DEFENSE INSTRUCTION?

At trial, Barnett requested jury instruction number D-5 which read:

The Court instructs the jury that not every taking of a human life is a violation of law, because some forms of homicide are justified. In the case now being submitted for your decision, Bobby Keith Barnett cannot be convicted of homicide if at the time he had reasonable grounds to believe, and did believe, that he was in danger of death or serious bodily harm at the hands of the deceased. You are further instructed in this regard that Bobby Keith Barnett is entitled to the benefit of any and all reasonable doubt, either from the evidence or from the lack of evidence presented at trial.

The trial court refused this instruction and all self-defense instructions on the ground that there was no evidence to support such instructions. Barnett timely objected to this refusal.

The record reflects, and Barnett agrees, that the only evidence supporting a possible self-defense instruction consisted of "gang signs" made by Wells at the Playhouse Lounge prior to the shooting,

as shown by the following exchange between the State's witness, Kelvin Ashley, and Barnett's attorney:

Q. Mr. Ashley, it was your testimony on direct examination that Turk Wells was flashing gang signs at Mr. Barnett that night?

A. Yeah.

Q. And you told him to quit?

A. Uh-huh.

Q. Why did you tell him to quit?

A. Because I knew he had no business doing what he was doing.

Q. Why not?

A. Because that man was older than he is, and I told him not to be playing with him because he know Bobby Keith didn't play like that.

Q. You think this could be construed as a threat toward Bobby Keith?

A. Possibly.

Q. And that is why you told him to quit, isn't it?

A. (No audible response)

Q. Is that right?

A. Yeah.

Q. Because he was threatening Bobby Keith Barnett, wasn't he?

A. I didn't know if he was threatening him or not. I really didn't pay him much attention, but I knew what he was doing wasn't right.

Q. But as you just said, Bobby Keith Barnett certainly could have construed it as a threat, couldn't he?

A. Yep, yep.

This was the only testimony presented at trial raising any possibility of a threat made by Wells to Barnett prior to the shooting. Moreover, Barnett did not claim that Wells was carrying a weapon or that Wells made any threatening gestures prior to the shooting.

As stated in *Anderson v. State*, 571 So. 2d 961, 964 (Miss. 1990), a defendant in a criminal case is ordinarily "entitled to have the jury instructed on his theory of the case." This is especially true when the defendant claims that he acted in self-defense. *Anderson*, 571 So. 2d at 964. Furthermore,

The instruction may be denied only if the trial court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn from the evidence in favor of the accused, that no hypothetical reasonable jury could find the fact as the accused suggests.

*Id.* See also *King v. State*, 530 So. 2d 1356, 1359 (Miss. 1988). Moreover, our supreme court has clearly informed the bench and bar that an accused should not be estopped from asserting self-defense "except in the few rare cases where all the elements of estoppel are clearly present." *Thompson v. State*, 602 So. 2d 1185, 1190 (Miss. 1992). This is true even though a self-defense theory is based upon "meager" or "highly unlikely" evidence. *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992).

On the other hand, it is clear that the right to claim self-defense is not a fundamental constitutional right within the due process clause of the U. S. Constitution, Amendment XIV. *Rowe v. DeBruyn*, 17 F.3d 1047, 1052 (7th Cir. 1994). Additionally, there are cases where an accused is not entitled to a self-defense instruction. *Osborne v. State*, 404 So. 2d 545, 547 (Miss. 1981).

In *Hart v. State*, 637 So. 2d 1329, 1337 (Miss. 1994), the Mississippi Supreme Court reaffirmed the principle that an accused is not entitled to assert self-defense where, as here, the defendant arms himself in advance, when not in any physical danger, and goes forth to "provoke a confrontation or difficulty with another, shoot the other, and then hide behind a smoke screen of self-defense." In the case *sub judice*, Barnett was in no danger when he armed himself, clothed himself according to gang rituals, and executed Wells by shooting him in the back of his head at a time when Wells was weaponless and made no threatening gestures toward Barnett. Moreover, Barnett did not claim that he acted in self-defense when he shot Wells. Thus, we hold that this is unquestionably one of those rare cases where a self-defense instruction is not appropriate, taking into account all of the evidence in the light most favorable to the accused, and considering all reasonably favorable inferences that may be drawn from the evidence in favor of the accused. *Anderson*, 571 So. 2d at 964. This assignment of error has no merit.

## II. DID THE TRIAL COURT ERR WHEN IT PERMITTED A WITNESS TO GIVE HIS INTERPRETATION OF A CONVERSATION?

In his second assignment of error, Barnett contends that it was reversible error for the following testimony by Investigator Fred Gardner of the Magnolia, Mississippi, Police Department to be presented to the jury:

Q. Did he explain to you in the statement, in the statement that he gave you, what he meant by his brother, or can you tell us, based on what he told you, what he meant by his brother?

A. Apparently he meant by his brother that was in the organization --

BY MR. STRONG: Objection, Your Honor. Apparently he meant I mean, the question was asked did he know.

BY THE COURT: Sustained, Just tell what you know.

A. No, I don't know if that's a paternal brother or not.

Q. Can you tell me, based on your conversations, what you perceived the defendant to mean --

A. The way I perceived it --

BY MR. STRONG: Objection, Your Honor, that's the same question.

BY MR. SMITH: It is not the same question, Your Honor. This witness --

BY THE COURT: Overruled. Go ahead and answer the question.

A. The way I perceived it as him being a brother in an organization that apparently the three had joined while they were incarcerated at the Mississippi Department of Corrections.

Barnett further claims that this testimony was highly prejudicial to his case because (1) it made him look as if he were in a prison gang and (2) that the killing was gang-related. Finally, in support of his position Barnett cites *McDavid v. State*, 594 So. 2d 12 (Miss. 1992), which held that a police officer who listened to a short wave radio transmission of an undercover officer's drug transaction should not be allowed to "characterize" what he heard but should have been required to restrict his testimony to the words he heard. This assignment of error has no merit since Officer Gardner, prior to the testimony in dispute, had known Barnett for twenty years, had been allowed to testify *without objection* that Barnett admitted in his written statement that he and Wells were in the same organization at Parchman and had a "strong brotherhood" that was supposed to protect each other. In addition, Kelvin Ashley had already described the "gang signs" communicated from Wells to Barnett prior to Gardner's testimony. Thus, the jury was fully aware that Barnett and Ashley were in a prison gang together and that Barnett's reason for shooting Wells was a violation of the gang's code of honor. According to Mississippi Rule of Evidence 103(a):

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .

The error, if any, in allowing Officer Gardner to characterize what Barnett meant when he referred to Wells or Roosevelt Washington as his "brother" was certainly not substantial and, in our opinion, was not prejudicial especially since similar testimony had already been presented to the jury without an objection. *See Stokes v. State*, 548 So. 2d 118, 124 (Miss. 1989); *Holland v. State*, 587 So. 2d 848, 873 (Miss. 1991).

**THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY OF CONVICTION ON COUNT I OF MURDER AND SENTENCE TO LIFE IMPRISONMENT; AND COUNT III OF POSSESSION OF A FIREARM BY A CONVICTED FELON AND SENTENCE TO FIVE YEARS, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCES IN COUNTS I AND III TO RUN CONSECUTIVELY TO EACH OTHER AND TO PAY RESTITUTION TO THE VICTIM'S FAMILY, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO PIKE COUNTY.**

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

