

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00802 COA

GARNER TED CLARK A/K/A GARNER TEDD CLARK

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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

HERMAN F. COX

ATTORNEYS FOR APPELLEE:

MIKE MOORE, ATTORNEY GENERAL

JOLENE M. LOWRY, SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: DEFENDANT GARNER TED CLARK CONVICTED OF
ARMED ROBBERY AND SENTENCED TO SERVE TWENTY-FIVE (25) YEARS IN THE
CUSTODY OF THE MDOC WITH TWENTY (20) YEARS TO SERVE AND FIVE (5) YEARS
SUSPENDED.

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

Garner Ted Clark was tried *in absentia* and convicted of the crime of armed robbery by a Harrison County Circuit Court jury. Clark was thereafter sentenced to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections with twenty years to serve and five years suspended. From that conviction and sentence, Clark brings this appeal asserting as error the following:

- (1) The trial court erred in refusing the peremptory instruction of not guilty and overruling the motion for JNOV and motion for new trial because the jury verdict was against the overwhelming weight of the evidence and the result of bias, prejudice and passion;
- (2) The trial court erred in refusing jury instructions D-1 (a peremptory of not guilty) and D-7;
- (3) The trial court erred in granting jury instruction S-1A based on a lack of proof of certain statements in the instruction;
- (4) The trial court erred in trying the defendant, Clark, *in absentia*;
- (5) The trial court erred in overruling Clark's motion to suppress certain evidence used by the State in its case;
- (6) The trial court erred in overruling Clark's motion in limine to suppress certain statements made at the scene of the arrest; and
- (7) The trial court erred in overruling Clark's motion to suppress out-of-court identification and prohibit in-court identification.

Finding merit to Clark's assertion that the lower court erred in proceeding with the trial in his absence, we reverse this case and remand to the Harrison County Circuit Court. Any of the remaining seven issues which might affect this case on retrial will also be addressed to the extent necessary.

I.

FACTS

On January 16, 1991, Officer Randy Cook of the Harrison County Sheriff's Department responded to a radio call alerting him to a suspect vehicle in the area of the Hardy Court Shopping Center. The suspect vehicle, a light blue 1978 Ford Thunderbird, which resembled a car that had been linked with a string of armed robberies in and around Harrison County, had been spotted by a store clerk passing slowly through the parking lot of the shopping center.

Cook, who was in an unmarked car, pulled to the side of the road near the Hardy Court Shopping Center to observe the traffic and suddenly noticed the suspect vehicle pulling into a nearby lift station. Cook immediately followed the Thunderbird into the parking lot with blue lights flashing and asked the driver of the car [later identified as Clark] to step out of the vehicle and place his hands on his head.

While Cook detained the suspect, law enforcement officers from around the county also responded to the radio call. Upon hearing sirens, Clark broke away from Officer Cook and ran to a nearby wooded area. Officer Cook chased Clark, cuffed him, and returned to the car where Officer Tim Moore of the Gulfport Police Department read him his rights. Officer Danny Holloway of the Gulfport Police Department, who was also present at the scene, personally advised Clark of his rights and obtained permission to search the vehicle via a consent form allowing the police to search the "premises under Clark's control." This search revealed a knife, as well as both a grey and a tan jacket, all of which resembled clothing and a weapon described by witnesses of the various robberies. Based on probable cause after the search, Clark was arrested for the robbery of Super Fashion and transported to the Harrison County jail. Prior to leaving the scene, Clark told officers not to tow the car belonging to his girlfriend, and stated, "I'm the one ya'll are looking for in these armed robberies."

Following his arrest, victims of the armed robberies in the area were contacted immediately to come to a lineup in an attempt to make a positive identification of Clark, connecting him to the robberies. That same day, Clark was identified in the lineup by Melissa Turan, a victim of the Shoe City robbery. The following day, Irene Ladner, manager of Shoe City and victim of the robbery, also identified Clark in a photographic lineup. Based on those identifications, Clark was arrested and charged with the robbery of Enstar Corporation, d/b/a Shoe City, which resulted in the conviction from which he now appeals.

II.

TRIAL IN ABSENTIA

Over defense counsel's objection, the trial of Garner Ted Clark proceeded in his absence. Clark, who was out on bond, was in contact with his attorney the morning of June 21, 1993, when the docket was called, and the defense announced ready for trial. Clark was informed that he needed to appear at his counsel's office the following day when the jury selection would begin; however, Clark did not appear for jury selection nor did he appear the next day for the beginning of the trial. Concerned

about Clark's absence, defense counsel made a motion for continuance, which was denied by the trial court. The trial judge informed counsel that the trial would proceed, stating:

Here we have behavior by a defendant that if rewarded by a continuance would further undermine and further paralyze the enforcement of the criminal justice system.

....

I will go with the *McMillan* and *Samuel* rule and I'll follow the procedure in the Arizona case. If he doesn't show up during the course of the trial, he may show up, if he doesn't show up during the course of the trial there will be a Judgment Nisi entered and an alias capias issued now. If after the jury comes in and the verdict is not guilty then there wouldn't be any further proceeding on this cause. If the jury comes in and says he's guilty, the Court will proceed to sentencing. And as set forth in the Arizona case if he's apprehended, once he's apprehended we'll have a hearing to make a determination as to the voluntariness of his absence at this time.

From the evidence presented at the trial conducted in his absence, Clark was convicted of armed robbery. Clark, who failed to appear before the court at any time prior to the jury verdict, was present at the sentencing hearing following his conviction. At that time, Clark gave no explanation for his absence during the trial but stated only that he was aware of the date on which his trial was to begin and ran because he was scared. Following the sentencing hearing, the trial judge conducted a hearing on post-trial motions, in which he concluded, *inter alia*, that "the court was correct in proceeding to trial in the absence of the defendant." Clark argues, on appeal, that the lower court's decision was in error, relying on the Mississippi Supreme Court's holding in *Sandoval v. State*, 631 So. 2d 159 (Miss. 1994).

The State, however, argues that because Clark announced ready at the docket call and was out on bond, he, in effect, surrendered himself into the custody of the court by his absence, relying on *Samuels v. State*, 567 So. 2d 843 (Miss. 1990) and *McMillian v. State*, 361 So. 2d 495 (Miss. 1978).

We agree with Clark that the outcome of this case is controlled by the Mississippi Supreme Court holding in *Sandoval*. In *Sandoval*, the defendant "appeared at a preliminary hearing and was in his attorney's office involved in trial preparation the day before the trial." *Sandoval*, 631 So. 2d at 160. When Sandoval failed to appear on the morning of the trial, defense counsel moved for a one-week continuance, which was denied by the lower court. The lower court, in reliance on *Samuels v. State*, 567 So. 2d 843 (Miss. 1990) proceeded with the trial in Sandoval's absence. *Id.* at 161.

In reversing the lower court, the Mississippi Supreme Court stated that "the trial court abused its discretion by trying Sandoval *in absentia* on the facts of this case." *Id.* at 164. "Sandoval had indeed appeared on the date his case was set for trial, and appeared in the courtroom thereafter, while awaiting the finish of the case that had preempted his own," *Banos v. State*, 632 So. 2d 1305, 1308 (Miss. 1994); however, this did not permit the lower court to try Sandoval *in absentia*.

Under pre-*Sandoval* cases such as *Samuels*, the law states that "an accused felon present at the commencement of his trial may thereafter waive his appearance by absenting himself from the trial. Under those facts, the trial may be continued in the court's discretion." *Sandoval*, 631 So. 2d at 164. Although counsel for Clark announced ready at the docket call, Clark did not appear at "the commencement of the trial," as required by *Samuels* and its progeny. In fact, the facts in the present case are, in all pertinent respects, similar to the facts in *Sandoval*. We conclude that the trial judge abused his discretion in trying Clark *in absentia*. Therefore, we reverse Clark's conviction for armed robbery and remand for a new trial in the Harrison County Circuit Court for proceedings not inconsistent with this opinion.

III.

FAILURE TO SUPPRESS STATEMENTS AND EVIDENCE

Clark argues that the lower court erred in failing to suppress certain statements, as well as certain evidence recovered from his car at the scene of his arrest. The specific facts surrounding both the statements and the evidence taken from Clark's vehicle will be discussed separately. However, at the outset, we must address Clark's assertions that the statements and evidence are inadmissible as "fruit of the poisonous tree" because the officers lacked probable cause to detain him at the time he was stopped.

Clark argues that on January 16, 1991, the date of his arrest, the police detained and arrested him without a warrant or probable cause. From that reasoning, Clark asserts that since his arrest was illegal, the statements made by him at the scene, as well as evidence gathered from a search of his vehicle, are inadmissible.

Police have the authority to make an investigative stop of a suspect without probable cause to make an arrest as long as they have "a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony." *McCray v. State*, 486 So. 2d 1247, 1249-50 (Miss. 1986) (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)). "[W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." *Hensley*, 469 U.S. at 229. "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain information." *Id.* at 232 (citations omitted).

However, when police exceed the scope of an investigative stop, this stop approaches a seizure; probable cause for arrest must be shown in order to justify a search and seizure without an arrest warrant. *Floyd v. State*, 500 So. 2d 989, 992 (Miss. 1986) (citing *McCray v. State*, 486 So. 2d 1247, 1250 (Miss. 1986)); see *Haddox v. State*, 636 So. 2d 1229, 1233 (Miss. 1994). The level of certainty for probable cause needed to sustain a warrantless arrest is not as high as that to sustain the guilt of a person charged with a crime. *Florence v. State*, 397 So. 2d 1105, 1106 (Miss. 1981). "It [the level of

certainty] must be stronger than mere suspicion or belief held by the officers, but various factors may be taken under consideration in order to establish probable cause." *Id.* Probable cause or reasonable grounds justifying arrest have been described as follows:

‘Probable cause’ or ‘reasonable grounds’ justifying an arrest without warrant exists where the facts and circumstances within the arresting officer’s knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a narcotics offense has been or is being committed. It is not required that probable cause be established solely by facts within the personal knowledge of the arresting officer. A combination of information and personal knowledge may raise the inference beyond opinion, suspicion, and conjecture to reasonable probability. All information in the agent’s possession, fair inferences therefrom, and observations made by him are pertinent.

Id. at 1107 (citations omitted); *see also Jones v. State*, 358 So. 2d 414, 416 (Miss. 1978). The Mississippi Supreme Court has held that "official information received by radio may form the basis of probable cause to arrest." *Covan v. State*, 374 So. 2d 833, 837 (Miss. 1979) (citations omitted); *see also Ellis v. State*, 667 So. 2d 599, 607 (Miss. 1995) (where the Mississippi Supreme Court stated that the "BOLO-be on lookout" on which the officer relied in stopping suspect provided sufficient probable cause for arrest).

In this case, Officer Cook responded to a radio dispatch that a suspect vehicle, matching the description of one which had been connected with a string of armed robberies throughout the county, was seen slowly driving through the parking lot of a local shopping center. Cook, who was given a description of the car, a 1977 or 1978 Ford Thunderbird that was primer gray in color, pulled in behind Clark’s light blue 1978 Thunderbird in the vicinity of the shopping center at a local lift station. Based on information that had been circulated among the various police departments, Cook determined that Clark closely resembled the sketch and description of the armed robbery suspect. In addition, when Clark exited the vehicle, he was wearing white Jordache tennis shoes fitting the description given by a store clerk of those worn by the suspect. Adding to Cook’s suspicion, Clark broke and ran upon hearing sirens in the area.

After he was apprehended, he made the statement that he was the one the police were looking for in the robberies. Clark, who was informed of his rights at the scene, signed a consent to search form, giving officers the right to search the vehicle which he was driving. From that search, items connecting Clark with the robbery of Super Fashions were discovered, and Clark was placed under formal arrest for the robbery of Super Fashions and taken into custody.

It is clear from the evidence that the officers had probable cause both to stop the suspect vehicle and to arrest Clark for the robberies. Although the car was described on the police flier and over the radio as primer gray, that description could be found sufficient to encompass a light blue car of the same make and model. *See, e.g., Ellis*, 667 So. 2d at 609 (where description given in BOLO was brown and beige truck and truck which defendant was driving was actually rust and beige, Miss. Supreme Court stated that description could be found to encompass rust and beige). After detaining Clark, officers were able to rely on the physical description of Clark, his mannerisms, and evidence retrieved from the search of his vehicle in order to establish probable cause for his arrest. Based on the

standard of certainty required as set out above, this was sufficient probable cause to arrest Clark for the robbery of at least one of the stores.

Accordingly, Clark's argument that his statement at the scene and the evidence retrieved from his vehicle are based on an illegal stop and arrest, *i.e.*, are "fruit of the poisonous tree," is without merit.

A.

Statements Made at Scene of Arrest

At the time of his arrest, Clark stated, "I am the one ya'll are looking for in these armed robberies." In addition to Clark's assertion that his confession was "fruit of the poisonous tree," Clark also argues that the statement involving other crimes given by him at the scene could not be used as evidence against him for various other reasons. First, Clark argues that this "blanket confession" implicated him for other crimes for which he had not been tried nor convicted and therefore, served no use other than to prejudice the jury against him. In addition, Clark points out that the statement is too vague and did not specifically refer to the robbery of Shoe City.

This case is analogous to the Mississippi Supreme Court decision in *Dedeaux v. State*, 519 So. 2d 886 (Miss. 1988). In *Dedeaux*, the defendant told Officer Sandefer, the arresting officer, that "there was no need to fight all of the drug-sale charges against him, because he and another person were the parties that sold the drugs to him (Sanderfer)." *Id.* at 889. Dedeaux argued, as does Clark, that "the statement was too vague to be considered as a valid confession in that it did not specifically refer to the sale of drugs" on the date which he was charged with the particular sale. *Id.* In upholding the lower court's decision not to suppress the statement, the Supreme Court stated:

Indeed, for a confession to be valid, it must be an acknowledgment in express terms of the crime charged. But, generally speaking, all voluntary statements or confessions of the defendant are admissible when offered by the State for what weight they may have in the case. . . . Further, by making a 'blanket' confession to all the drug sales to Sanderfer, Dedeaux did, in actuality, confess to the December 12, 1984 crime in question.

Id. (citations omitted).

Likewise, we determine that Clark's statement to the officers at the scene must be admitted, if offered, for what weight it might have in the case. This confession to armed robberies could be taken by the jury to include the armed robbery for Shoe City, the crime for which Clark is charged with in this case. Therefore, if proffered by the State on retrial, the trial judge may allow the statement to go to the jury, who will determine the weight and credibility of the "blanket confession" as it relates to the robbery of Shoe City.

B.

Evidence Retrieved from the Ford Thunderbird

Upon detaining Clark, officers requested him to sign a consent form which entitled them to search the premises under his [Clark's] control but left blank the specific area to be searched. This search revealed, among other things, a butcher knife and a gray jacket, both fitting the description given by one of the victims of the string of robberies. Based on that discovery, and, in combination with other factors, Clark was placed under arrest at the scene for the robbery of Super Fashions and transported to the police station. In addition to his argument that the investigative stop by Officer Cook was unreasonable and that any evidence seized was, therefore, tainted evidence, Clark argues that the consent form that he signed at the scene did not properly describe the vehicle.

The lower court determined that the consent form contained sufficient language to include the vehicle and that Clark's permission to search was given voluntarily, thereby allowing the items retrieved from the car to be admitted into evidence. Based on our limited standard of review, we cannot put the trial judge in error for his determination of voluntariness of consent unless that decision is clearly erroneous. *Woodward v. State*, 533 So. 2d 418, 426-27 (Miss. 1988) (citations omitted), *remanded on other grounds*, 635 So. 2d 805 (Miss. 1993). Therefore, we must affirm the lower court ruling that the language of the consent form was sufficient to describe the vehicle that Clark was driving since that vehicle was under Clark's control at the time of his arrest.

The Mississippi Supreme Court has held that "[i]f consent to search follows an investigative stop that does not exceed the prescribed limitations, the consent is valid." *McCray v. State*, 486 So. 2d 1247, 1250 (Miss. 1986). Clark was advised of his rights and thereafter consented to the search. Given that, the search of Clark's vehicle cannot be found illegal.

IV.

IDENTIFICATION OF CLARK

Clark also takes issue with the trial court's failure to suppress testimony of two victims of the Shoe City robbery concerning prior out-of-court identification of Clark. It is Clark's assertion that this testimony was error because Clark was not afforded counsel at the lineup nor was he given an initial appearance. In addition, Clark argues that the lineup was impermissibly suggestive.

A.

Right to Counsel and Initial Appearance

Clark contends that not only was he denied the right to counsel at the lineup shortly after his arrest but that he was denied an initial appearance pursuant to Rule 1.04 of the Uniform Criminal Rules of Circuit Court Practice. Clark argues that because he was not afforded his right to counsel and an initial appearance, the out-of-court identification by the robbery victims in the lineup and the photographic lineup should not have been allowed to go to the jury.

First, the State correctly argues that an initial appearance for the robbery of Shoe City was not necessary at the time of the original lineup. Rule 1.02 of the Uniform Criminal Rules of Circuit Court Practice "clearly contemplates a warrantless arrest and requires appearance before a neutral judicial officer 'upon completion of the arrest.'" *Coleman v. State*, 592 So. 2d 517, 520 (Miss. 1991) (citations omitted). This appearance is required after the accused is taken into custody, and the police have been given sufficient time to "complete the formal charging and booking procedures and reasonable security measures." *Id.* Because Clark had not been arrested, charged, nor booked for the armed robbery of Shoe City, and because there was no unnecessary delay in holding Clark to allow time for him to be identified and charged, Clark was not deprived of his right to an initial appearance at the time he was identified by the victims of the Shoe City robbery.

As noted, Clark also asserts that he was denied his right to counsel at the lineup. The facts of this case are analogous to those in *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987). In *Nixon*, the defendant, who was identified at a pre-trial lineup, filed a motion to suppress the identification, alleging that the lineup was unduly suggestive and conducted while he was not represented by counsel. *Id.* at 1086. On appeal, the Mississippi Supreme Court stated:

In the instant case, the record merely reflects Nixon was arrested as a result of being identified in the lineup. It does not reflect that Nixon was or reasonably ought to have been charged with a crime prior to that time Nixon's right to counsel had not attached at the time of the lineup.

Id. at 1088. The Court stated that the commencement of formal proceedings against a criminal defendant marks the point at which the right to counsel attaches. *Id.* at 1087. A participant in a lineup clearly has a right to counsel "if the lineup is held after adversarial proceedings had been initiated against him." *Magee v. State*, 542 So. 2d 228, 233 (Miss. 1989) (citations omitted). However, "[a]pplying *Kirby v. Illinois*, this Court has held that the right to counsel does not extend to pre-indictment lineups." *Nixon*, 533 So. 2d at 1087 (citations omitted).

Clark was arrested and taken into custody at the scene for the robbery of Super Fashions. Following his arrest, victims of the various robberies in the area were contacted to come to the station and make a positive identification of Clark in the lineup. Pursuant to this request, Melissa Turan reported to the police station and positively identified Clark from the lineup as the person who robbed Shoe City. At

that time, Clark was formally placed under arrest for the robbery of Shoe City and advised of his *Miranda* rights. Upon Clark's request for an attorney, no further interviews were conducted with respect to the charges against Clark for the robbery of Shoe City.

It is clear the Clark's right to counsel with regard to the robbery of Shoe City had not attached at the time of the lineup. Further, we also find that Clark's right to an initial appearance was not necessary nor appropriate until he was formally arrested and charged with the Shoe City robbery. Therefore, the State will not be in error if the out-of-court identification testimony is proffered on retrial.

B.

Impermissibly Suggestive Lineup

Finally, we briefly address Clark's assertion that he was conspicuously singled out of the lineup and that the procedure used by the police was impermissibly suggestive. Clark argues that he was the only person in the lineup wearing white Jordache tennis shoes, which Melissa Turan specifically noticed and described to the officers shortly after the robbery. Clark also asserts that he was the shortest person in the lineup and was clearly the only member of the lineup who fell within the 5'5"-5'7" range based on the description given by the various victims.

From a review of the photographs taken at the time of the lineup, it does not appear that Clark was singled out as a "short guy" as he complains on appeal. All of the participants in the lineup were of similar build and physical appearance. The difference in the heights of the lineup participants was that of one to two inches, which was not so highly visible as to prejudice Clark considering the likeness in physical appearance among the members of the lineup. In addition, one other member of the lineup was wearing white tennis shoes (although not "Jordache"). Melissa Turan testified that although she noticed the shoes at the time of the robbery, her identification of Clark from the lineup was based on his physical characteristics which she observed for some length of time on the day of the robbery.

Even if the lineup was considered impermissibly suggestive, this pre-trial identification will not preclude an in-court identification on retrial "unless from the totality of the circumstances the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Nixon*, 533 So. 2d at 1087. Guidelines for determining the admissibility of identification testimony were originally set out in *Neil v. Biggers*, 409 U.S. 188, 199 (1972) and reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In *Nixon*, the Mississippi Supreme Court, quoting *Manson*, stated:

[R]eliability is the linchpin in determining the admissibility of identification testimony for [alleged improperly suggestive] confrontations. The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Nixon, 533 So. 2d at 1087 (alteration in original) (citations omitted).

Within four days of the robbery, Melissa Turan positively identified Garner Ted Clark as the perpetrator of the Shoe City robbery. Prior to that identification, Turan had described in fairly accurate detail the robber's physical features, his clothing (down to the brand of his shoes), and the type of weapon he was carrying at the time of robbery. This description was based on the fact that Clark remained in the store for fifteen to twenty minutes prior to the robbery and was in close proximity to Turan when he demanded the money. Under the totality of the circumstances of these facts presented in the record, and if such facts are established on remand, the trial judge cannot be put in error for allowing this identification testimony to be presented to the jury. *See, e.g., Wilson v. State*, 574 So. 2d 1324, 1327-28 (Miss. 1990) (where the Court held that even if lineup identification was impermissibly suggestive, lineup identification was admissible where the witness had ample time to view the defendant during the perpetration of the crime, gave an accurate description after the crime, and positively identified defendant in a lineup held twelve days after the date of the crime).

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT FINDING GARNER TED CLARK GUILTY OF ARMED ROBBERY IS REVERSED AND THIS CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. THE COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, J.

THOMAS, P.J., NOT PARTICIPATING.

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00802 COA

GARNER TED CLARK A/K/A GARNER TEDD CLARK

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

PAYNE, J., DISSENTING:

This particular issue has come to this Court once before--that is, whether a criminal defendant who is lawfully out on bond can be tried *in absentia* after voluntarily absented himself. In the present case, Clark was in contact with his counsel the morning of docket call, at which his counsel announced ready for trial. He was told to be present at his counsel's office the next morning when his trial jury would be selected. Clark never appeared for jury selection or trial.

I dissented to the prior case dealt with by this Court, in which the majority took a much too broad view of the supreme court's rulings in *Banos v. State*, 632 So. 2d 1305 (Miss. 1994) and *Sandoval v. State*, 631 So. 2d 159 (Miss. 1994). I realize at this juncture that dissenting in this case may be fruitless. However, I write to whole-heartedly agree with the State's argument that this majority opinion gives complete control of the trial court's docket to any absconding defendant who can find a place to run and who uses any reason, or no reason at all, to run to that place so that he can avoid facing both his trial and his accusers. Clark conveniently decided to appear for his post-trial sentencing hearing and stated that he was aware of the trial date but ran because he was scared. Taken to its logical conclusion, a time could come where no defendant out on bond would ever have to come to trial. Are we to allow defendants who are out on bond to run from trial, and never appear, because they claim they were scared? I cannot conscientiously agree that that is or should be the law, nor that we are forced by prior caselaw to say that it is the law. Therefore, I respectfully dissent.

BARBER, J., JOINS THIS SEPARATE WRITTEN OPINION.