

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00119 COA**

**GATLIN GILDER A/K/A GATLIN GLADNEY  
GILDER, JR. A/K/A GATLIN GLADNEY GILDER**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**CONSOLIDATED WITH  
NO. 96-KA-00131 COA**

**1983 FORD PICK-UP TRUCK  
VIN#1FTCF10Y3DLA05575; REAL PROPERTY  
LOCATED AT 7653 CHERRY VALLEY, LOT 2671,  
SOUTHAVEN WEST SUBDIVISION, SOUTHAVEN,  
MISSISSIPPI; KROGER RETIREMENT FUND AND  
THE KROGER 401K FUNDS; THE NATIONAL  
GUARD RETIREMENT ACCOUNT; AND 1992  
CHEVROLET SILVERADO**

**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:	01/26/96
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT G. GILDER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	ROBERT KELLY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION	CTS 1 THRU 12 SEXUAL BATTERY: CTS I & 2 30 YRS EACH COUNT; CTS 3 THRU 12 10 YRS EACH COUNT WITH 10 YRS SUSPENDED; ALL COUNTS RUN CONSECUTIVELY; NOT ELIGIBLE FOR RELEASE UNTIL HIS 73RD BIRTHDAY

DISPOSITION: AFFIRMED--11/4/97  
MOTION FOR REHEARING FILED: 11/17/97  
CERTIORARI FILED: 2/11/98  
MANDATE ISSUED: 4/30/98

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

Gatlin Gilder was convicted of twelve counts of sexual battery for having a long-term sexual relationship with his teen-age stepdaughter. He makes the following arguments on appeal: (1) that Miss. Code Ann. § 97-3-95 is unconstitutionally vague, (2) that his prosecution should have been barred by double jeopardy, and (3) that his sentencing violated his federal and state constitutional rights to due process and equal protection as well as his right to be free from cruel and unusual punishment. Finding his arguments without merit, we affirm.

#### FACTS

Gatlin Gilder admitted to having a long-term sexual relationship with his stepdaughter, who was seventeen years of age at the time of trial. By clerical error, he was initially indicted under Miss. Code Ann. § 97-5-23 (the gratification of lust statute which carries a maximum penalty of one thousand dollars (\$1,000) and ten (10) years in prison), instead of Miss. Code Ann. § 97-3-95 (the sexual battery statute which carries a maximum penalty of thirty (30) years in prison). Gilder was in the process of entering a plea of guilty to four of the initial twelve counts when the error was discovered. Prior to any plea being taken, the State moved the trial court to dismiss the indictment so that Gilder could be re-indicted under the correct statute. The trial court agreed to terminate the proceedings in order to give the State an opportunity to make the appropriate changes. After being re-indicted under § 97-3-95, Gilder decided not to enter a guilty plea. Instead, he asked for a bench trial with stipulated facts in order to leave open the avenue of direct appeal.

#### DISCUSSION

##### *1. Is Miss. Code Ann. § 97-3-95 unconstitutionally vague?*

Mississippi's sexual battery statute provides in part: "A person is guilty of sexual battery if he or she engages in sexual penetration with a child of fourteen (14) but less than eighteen (18) years if the person is *in a position of trust or authority* over the child including without limitation the child's . . . *stepparent*." Miss. Code Ann. § 97-3-95 (2) (Rev. 1994) (emphasis added). Gilder argues that the phrase "in a position of trust or authority" is unconstitutionally vague. He maintains that the statute does not define what constitutes "a position of trust or authority" but rather attempts to set out certain examples without limitation. A criminal statute is unconstitutionally vague if it fails to inform those subject to it what acts the statute prohibits. *Cassibry v. State*, 404 So. 2d 1360, 1367-68 (Miss. 1981). The test, according to the United States Supreme Court, is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding

and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951). "Although a statute imposing criminal penalties must be strictly construed in favor of the accused, it should not be so strict as to override common sense or statutory purpose." *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992). Mississippi's sexual battery statute specifically prohibits sexual penetration of a person seventeen (17) years old by a stepparent. Miss. Code Ann. § 97-3-95(2) (Rev. 1994). In the present case, there is little doubt that the applicable statute provides adequate warning as to the type of conduct which it prohibits.

Gilder further maintains that § 97-3-95 treats people differently based upon their relationship to the parent of the minor, which he claims is in direct violation of his right to equal protection. He argues that the statute, by allowing children between the ages of fourteen (14) and eighteen (18) to consent to sexual relations with a person not in a position of trust or authority under § 97-3-95 (1) while prohibiting sexual relations between the child and a person in a "position of trust or authority" under § 97-3-95 (2), takes away the defense of consent from one class of defendants when it is allowed for another class for the same offense. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). Clearly, the added protection for minors from adults who are in a "position of trust or authority" is a necessary distinction which bears a rational relation to a legitimate end. Accordingly, we find that Gilder's first assignment of error is without merit.

## *2. Should Gilder's prosecution have been barred by double jeopardy?*

Gilder next argues that his constitutional right to be free from double jeopardy was violated when the trial court allowed the State to dismiss the first set of charges against him after the plea hearing had begun and re-indict him under another statute. Gilder acknowledges that Article 3, Section 22 of the Mississippi Constitution requires either an acquittal or conviction of an offense before a prosecution for the same offense at a second proceeding constitutes double jeopardy. However, he argues that the double jeopardy provision of the Mississippi Constitution is more restrictive than that of the United States Constitution, and under such circumstances, the United States Constitution controls through the authority of the Fourteenth Amendment. Gilder's argument fails for two reasons.

First, the crime was not the same. The double jeopardy provision of both the Mississippi and United States Constitutions forbids multiple punishments for the *same* offense. *Stewart v. State*, 662 So. 2d 552, 561 (Miss. 1995). Clearly, the two statutes under which Gilder was charged do not constitute the same offense. The crime of gratification of lust under § 97-5-23 does not require proof of penetration, whereas the crime of sexual battery under § 97-3-95 explicitly includes sexual penetration as an element of the crime. These are not the same crimes; therefore, there is no double jeopardy issue here. Second, Gilder's double jeopardy argument fails because although the plea hearing had begun, no plea had been taken when the mistake in the indictment was discovered and the State moved to dismiss. "Jeopardy attaches with the acceptance of a guilty plea." *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980). Accordingly, we find that the trial judge acted within the bounds of his discretion in terminating the proceedings. There is simply no double jeopardy problem here.

## *3. Did Gilder's sentencing violate his federal and state constitutional rights to due process and*

*equal protection as well as his right to be free from cruel and unusual punishment?*

Gilder argues that since the trial judge was one of the main authors of § 97-3-95, that he should have disqualified himself when he became aware that Gilder was being charged under that statute. He claims that the sentence he was given exceeded most sentences imposed for rape, armed robbery, and murder, and that therefore his constitutional rights to due process and equal protection as well as his right to be free from cruel and unusual punishment were violated. Canon 3C (1) of the Code of Judicial Conduct mandates that a judge "should disqualify himself from a proceeding in which his impartiality might reasonably be questioned . . . ." This Court presumes that a judge is "qualified and unbiased." *Banana v. State*, 635 So. 2d 851, 853 (Miss. 1994). In order to overcome the presumption, the evidence must show that a "reasonable person, knowing all the circumstances, would harbor doubts about [the judge's] impartiality." *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986). In the present case, the evidence fails to overcome the presumption that the trial judge was both qualified and unbiased.

Gilder further argues that the sentence imposed by the trial judge was so disproportionate to the penalty imposed in similar cases, that his constitutional right to be free from cruel and unusual punishment, as guaranteed by the Eighth Amendment to the United States Constitution and by Article 3, Section 28 of the Mississippi Constitution, was violated. The supreme court has stated that "[s]entencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Hoops v. State*, 681 So. 2d 521, 537 (Miss. 1996). Gilder was indicted and found guilty on twelve separate counts of sexual battery. The maximum sentence for each of the counts, under § 97-3-101--the penalty statute for a § 97-3-95 sexual battery offense--is thirty years. The trial court gave Gilder the maximum thirty year sentence on two counts and a ten year sentence on each of the remaining ten counts. This was within the statutory limits and should not be disturbed on appeal. Accordingly, we find that the trial judge was well within his discretion and that Gilder's constitutional rights were not violated.

**THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF SEXUAL BATTERY AND SENTENCE TO THIRTY YEARS EACH ON COUNTS I AND II AND TEN YEARS EACH ON COUNTS III THROUGH XII WITH TEN YEARS SUSPENDED ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCES IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. THE FORFEITURE OF PROPERTY OF GILDER IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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