

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-00876 COA**

**DWAYNE LEATHERBERRY A/K/A DEWAYNE  
LEATHERBERRY**

**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:	7/20/96
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	CLAIBORNE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	SIM C. DULANEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEWITT ALLRED III
DISTRICT ATTORNEY:	ALEXANDER MARTIN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF THE CRIME OF POSSESSION OF A DEADLY WEAPON BY A CONVICTED FELON..
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

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

PER CURIAM.

Dwayne Leatherberry was convicted of possession of a deadly weapon by a convicted felon and sentenced to three years imprisonment. The issue on appeal is whether self-defense can be raised as a defense to the crime of possession of a weapon by a convicted felon under Miss. Code Ann. § 7-37-5.

The proof at trial was that Leatherberry had previously been convicted of grand larceny, a felony and that on July 15, 1994, Leatherberry was found in possession of a shotgun. The defense was prevented from putting on testimony in support of a claim that Leatherberry had acted in self-defense. The

proffer was that Leatherberry was attacked on July 14, 1995, by Jason Baker and others and threatened with bodily harm, that Leatherberry went to the police department and filed a complaint, and that Leatherberry armed himself in anticipation of another attack and shot Baker in the foot after being provoked. In a separate trial, Leatherberry was found not guilty of charges of aggravated assault in the shooting of Baker. The specifics of Leatherberry's second encounter with Baker were not provided in the record in the present case.

Miss. Code Ann. § 97-37-5, enacted in 1993, provides:

It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess a firearm, or any Bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon of such felony, has received relief from disability pursuant to § 925(c) of Title 18 of the U. S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section . . . .

Neither this statute nor any accompanying statute provides for a defense to the crime of possession of a firearm or other named weapons by a convicted felon. The statutory scheme does provide a defense to a violation of the law against carrying a concealed weapon (Miss. Code Ann. § 97-37-1) where the person "was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend . . .," Miss. Code Ann. § 97-37-9(a), but this defense was not made applicable to Miss. Code Ann. § 97-37-5. We must presume that the legislature did not intend for ex-felons to resort to the use of deadly weapons for self-defense.

As the State points out, Leatherberry is more appropriately relying on the common law defense of necessity, rather than self-defense. "Necessity" applies where one violates a statute because it is impossible for him to comply with it under the circumstances. In the cases cited by Leatherberry, *United States v. Panter*, 688 F2d 268 (5th Cir. 1982) and *People v. King*, 148 Cal.Rptr. 40, 582 P2d 1000 (1978), the defendants found themselves in an emergency in which a weapon came into their "temporary possession" for the purpose of defending themselves where no other alternative means of avoiding the danger was available. The courts found no violation of the applicable statute under those circumstances.

In the present case, Leatherberry made the decision to arm himself with a shotgun in violation of the statute at a time when he was not in imminent danger. Leatherberry had other alternatives available, such as staying out of Baker's way, which would not have put him in violation of the law. As stated in *King*, discussing an earlier case:

[T]he theory of self-defense was irrelevant inasmuch as the defendant had armed himself prior to the shooting incident . . . . [W]hat occurred in that case was "the very thing the Legislature was seeking to prevent . . . 'to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence.'"

582 P2d at 1008, quoting *People v. Evans*, 40 Cal.App. 3d 582, 586, 115 Cal.Rptr. 304, 306 (1974).

We find no error in decision of the lower court and affirm the conviction and sentence.

**THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY OF  
CONVICTION OF UNLAWFUL POSSESSION OF A WEAPON BY A CONVICTED FELON  
AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI  
DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF APPEAL ASSESSED  
TO CLAIBORNE COUNTY.**

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