

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00655 COA**

CARL WATTS A/K/A CARL WAYNE WATTS

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:	04/25/1995
TRIAL JUDGE:	HON. LARRY E. ROBERTS
COURT FROM WHICH APPEALED:	CLARKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID A. STEPHENSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	LISA HOWELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ROBBERY: SENTENCED TO SERVE A TERM OF LIFE IMPRISONMENT, AND SUCH SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR SHALL DEFENDANT BE ELIGIBLE FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Carl Wayne Watts was convicted in the Clarke County Circuit Court of robbery. For his offense, Watts was sentenced as an habitual offender to serve a term of life imprisonment without the benefit of probation or parole. Aggrieved by his conviction, Watts appeals to this Court on the following grounds:

**I. DID THE TRIAL COURT DEPRIVE CARL WAYNE WATTS OF HIS RIGHT TO
DUE PROCESS OF LAW IN VIOLATION OF THE 14TH AMENDMENT OF THE**

UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 14 OF THE MISSISSIPPI CONSTITUTION BY DENYING HIM 12 PEREMPTORY CHALLENGES IN A CAPITAL CASE.

II. DID THE TRIAL COURT ERR IN SENTENCING APPELLANT TO LIFE IMPRISONMENT UNDER SECTION 99-19-83 ABSENT PROOF BEYOND A REASONABLE DOUBT THAT APPELLANT HAD SERVED SEPARATE TERMS OF ONE YEAR.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On September 9, 1994 Watts and another individual robbed an elderly man along a rural Clarke County highway. The victim was collecting aluminum cans from the roadside when the two men emerged from a nearby wooded area. One grabbed the gentleman from behind while the other removed the victim's wallet from his pocket. They then shoved him to the ground and disappeared into the forest from which they had come.

After collecting himself, the victim drove to the closest community and reported the incident. Sheriff's Deputies, knowing both that Watts resided approximately 500 yards through those woods from the scene and that he had a criminal record, placed his likeness in a photographic line-up presented to the victim. The victim's prompt identification of Watts as the thief who had rifled through his pockets in combination with a similar in-trial confirmation resulted in a robbery conviction. After a sentencing hearing revealed this to be his third robbery conviction, the trial court adjudicated Watts to be an habitual offender and imposed the enhanced punishment required by **Mississippi Code Annotated § 99-19-83 (Rev. 1994)**.

ANALYSIS

In Mississippi, each person having been twice convicted of felonies, one of which is of a violent nature, and having been sentenced to and served separate terms of at least one year for each, faces life imprisonment without the possibility of parole or probation upon his or her third unrelated felony conviction. **Miss. Code Ann. § 99-19-83 (Rev. 1994)**. This both made Watts' lengthy sentence possible and provides the basis for his contentions on appeal.

I. DID THE TRIAL COURT DEPRIVE CARL WAYNE WATTS OF HIS RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 14 OF THE MISSISSIPPI CONSTITUTION BY DENYING HIM 12 PEREMPTORY CHALLENGES IN A CAPITAL CASE.

In his first assignment of error, Watts contends that because the habitual offender statute subjected him to life imprisonment, he was charged with a capital offense and thus, was entitled under **Uniform**

Criminal Rule of Circuit Court Practice 5.06 (now Uniform Circuit and County Court Rule 10.01) to twelve peremptory challenges to the jury. In response, the State contends that our supreme court has previously addressed this issue, holding contrary to Watts' assertions. We agree with the State.

The Mississippi Supreme Court indeed addressed this precise question in the case of *Osborne v. State*, 404 So. 2d 545 (Miss. 1981). There, the court held that the correct inquiry is whether the principal offense is considered capital and therefore falls in the category of offenses for which one is entitled to a special venire or additional peremptory challenges. *Id.* at 547 (citing *Yates v. State*, 396 So.2d 629 (Miss.1981)). Where it is not, the special challenges to the jury allowed a defendant charged with a capital crime are not necessitated because the jury only determines the guilt of the accused on the principal offense. *Id.* In a non-capital case, the trial judge, in a separate hearing, considers the prior convictions which lead to the life sentence under the habitual offenders statute. *Id.*

In Watts' case, the principal robbery charge, considered alone as it was by the jury, presents no possibility of life imprisonment. Because robbery is not a capital crime, Watts was entitled to and employed six peremptory challenges. Thus, this assignment is without merit.

II. DID THE TRIAL COURT ERR IN SENTENCING APPELLANT TO LIFE IMPRISONMENT UNDER SECTION 99-19-83 ABSENT PROOF BEYOND A REASONABLE DOUBT THAT APPELLANT HAD SERVED SEPARATE TERMS OF ONE YEAR.

Next, Watts argues that the prosecution failed to establish the applicability of enhanced punishment under Section 99-19-83. Specifically, he contends that the State failed to prove "beyond a reasonable doubt that [he] actually served separate terms of one year or more on each of his two [prior] felony convictions" as necessary under the statute. In essence, he claims that the two years he served of the concurrent sentences imposed for his previous robberies do not equate with serving more than one year on each sentence. In response, the State again contends that our supreme court has previously addressed this issue, holding contrary to Watts' assertions. Once again, we agree with the State.

In *Magee v. State*, 542 So. 2d 228, 236 (Miss. 1989), our supreme court examined just such an allegation and rejected Watts' argument. Initially, Magee, during a consolidated hearing, entered a plea of guilty as to a burglary charge and a separate similar plea to an unrelated robbery charge. During the sentencing hearing for the two convictions, the State recommend and the judge imposed a sentence of seven years for each charge with the sentences to be served concurrently. At Magee's subsequent trial for yet another robbery, the trial court found that Magee's total amount of time served for his prior felony violations amounted to nearly three years and proceeded with sentencing him to life-long incarceration. Thereafter on appeal, Magee questioned his habitual offender status, and the supreme court answered, holding that a felony conviction retains its separate identity despite being made to run concurrently with a another. *Magee*, 542 So. 2d at 236 (citing *King v. State*, 527 So.2d 641, 645 (Miss.1988); *Jackson v. State*, 518 So.2d 1219, 1220 (Miss.1988)).

For Watts' initial felony, the Circuit Court of Clarke County sentenced him to serve a term of five years with the Mississippi Department of Corrections, commencing on March 4, 1991. On June 15, 1992, while he was already imprisoned in the state penitentiary, the Wayne County Circuit Court convicted Watts on a second and unrelated robbery charge, sentencing him to an additional five year

term, with credit for the 15 months served and the remainder to run concurrently with the previously imposed punishment. Watts then remained incarcerated until his March 3, 1993. In sum, Watts was legally, if not practically, imprisoned for two years on each of the separate felonies. After Watts' participation in a third violent crime only a year and a half later, the State successfully sought a sentence of life-imprisonment pursuant to Section 99-19-83. Because this issue has previously been decided directly contradictory to Watts' position, this Court holds that there is no merit to this claim.

THE JUDGMENT OF THE CLARKE COUNTY CIRCUIT COURT OF CONVICTION OF ROBBERY AND ACCOMPANYING LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE, PROBATION, REDUCTION OR SUSPENSION IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO CLARKE COUNTY.

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