

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-01047 COA**

**DANNY MALONE, A/K/A DANNY DEWAYNE  
MALONE, A/K/A DANNY DUKES**

**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:	08/17/95
TRIAL JUDGE:	HON. BETTY W. SANDERS
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE T. KELLY, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	WIN PITTMAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF FIREARM BY CONVICTED FELON: SENTENCED TO A TERM OF 5 YEARS AS HABITUAL OFFENDER AND ORDERED TO PAY \$1000.00 & COURT COSTS, \$192.50. DEFENDANT RECOMMENDED FOR DRUG/ALCOHOL PROGRAM
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

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

COLEMAN, J., FOR THE COURT:

In the Circuit Court of Washington County, a jury found the appellant, Danny Dewayne Malone, guilty of possession of a firearm as a convicted felon in violation of Section 97-37-5 of the

Mississippi Code.<sup>(1)</sup> The trial judge sentenced Malone as a habitual offender to pay a fine of \$1000 and to serve a term of five years in the custody of the Mississippi Department of Corrections. The order by which the trial judge sentenced Malone did not specify whether his five year sentence for the possession of a firearm as a convicted felon was to run consecutively or concurrently with his earlier sentences to serve five years for receiving stolen property and three years for possession of marijuana. Malone argues that the trial judge's revocation of his probationary status because he had been charged with the possession of a firearm as a convicted felon and his subsequent conviction of that same charge placed him twice in jeopardy and thus violated both the Fifth Amendment to the Constitution of the United States and Art. 3, § 22 of the Constitution of the State of Mississippi. As we will explain, *Lightsey v. State*, 493 So. 2d 375 (Miss. 1986), requires that we affirm the trial court's judgment and sentence of Malone.

## I. FACTS

### A. Malone's previous indictments and probationary status

The State of Mississippi filed a bill of information dated August 12, 1992, against Malone in which it charged him with the possession of marijuana on February 26, 1992. Pursuant to this bill of information, the Washington County Circuit Court placed Malone in its diversion program. During the April 1993 term of the Washington County Circuit Court, the grand jury indicted Malone for the felony of receiving stolen property. Pursuant to the indictment for receiving stolen property, the State revived the previously diverted charge of possession of marijuana, and on June 23, 1993, Malone pleaded guilty to both felony charges. The trial judge sentenced Malone to serve three years in the custody of the Mississippi Department of Corrections for possession of marijuana and five years in the custody of the Mississippi Department of Corrections for receiving stolen property. The trial judge placed Malone on probation which he conditioned on Malone's successful completion of a stint in the Restitution Center in Leflore County.

On September 20, 1993, the trial judge conducted a hearing on whether to revoke Malone's probationary status because of five violations of the rules for the conduct of residents of the Restitution Center. He revoked Malone's probation, but instead of placing him in the general population of the state penitentiary, the trial judge modified Malone's original sentence by ordering that Malone be "required to complete the R.I.D. [Regimented Inmate Discipline] program and then return to the Restitution Center, Leflore County, for completion of program as previously ordered." Malone completed both the R.I.D. and the Restitution Center programs and was again released from custody and returned to probationary status on April 28, 1994.

### B. The case *sub judice*

On March 3, 1995, Christine Kimble heard the sound of gunfire while she, her daughter, and her daughter's children were in Ms. Kimble's home in Greenville. She grabbed her daughter and her grandchildren and pushed them into the hallway of her home for their protection. Ms. Kimble looked out the window and saw Malone running down the street with a rifle or a shotgun in his hands. Her daughter, Sharisa Kimble, looked out the back window of her mother's house and saw Malone firing a "long gun" while he ran down the street.

On March 14, 1995, the circuit court revoked Malone's probation to which he had returned on his

completion of the R.I.D. and restitution center programs. The court's order of revocation of probation recited that Malone's probation had been revoked because he had been "arrested on March 3, 1995 . . . and charged with possession of a firearm by a convicted felon and malicious mischief." The grand jury indicted Malone for the possession of "a deadly and dangerous weapon, to-wit: a shotgun" as a convict of the felonies of possession of marijuana and possession of stolen property. As we recited, the jury found Malone "Guilty as charged.," and the trial judge sentenced him as a habitual offender to serve the maximum sentence of five years and to pay a fine of \$1,000. During the sentencing hearing, Malone's counsel argued that Malone's conviction of the possession of a firearm as a convicted felon place him twice in jeopardy because his probation had been revoked for that same reason. In his motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, Malone again asserted that he "was twice put in jeopardy for the same offense." Malone thus preserved this issue for our review and resolution.

## II. REVIEW AND RESOLUTION OF THE APPELLANT'S ISSUE

We quote verbatim from Danny Malone's brief his one issue:

**Should double jeopardy prevent a defendant from being tried when the facts of that trial have been previously used to revoke the defendant's probation and impose time?**

### A. The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States of America

Malone cites *North Carolina v. Pearce*, 395 U.S. 711 (1969), to support his argument that the prohibition against double jeopardy contained in the Fifth Amendment provides "three separate constitutional protections." The third of those protections he identifies as protection "against multiple punishment for the same offense." *See also Stewart v. State*, 662 So. 2d 552, 561 (Miss. 1995) (holding that "[t]he double jeopardy clause prohibits multiple punishments for the same offense" and citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). Malone then asserts his belief that the revocation of his probation because he had been charged with the possession of a firearm as a convicted felon and his subsequent conviction of the same crime violated the third protection afforded by the Fifth Amendment, *i. e.*, "multiple punishment for the same offense."

Malone urges this Court to consider *United States v. Dixon*, 509 U.S. 688 (1993), which he argues supports his position on this issue. In *Dixon*, the United States Supreme Court actually reviewed two separate cases, which the United States Court of Appeals had consolidated because both cases involved the same issue. 509 U.S. at 693-94. Because Malone restricts his discussion to the facts in Dixon's case, we review only the facts in that case. However, the issue was the same in both cases. In its petition for certiorari in *Dixon*, the United States of America (the Government) presented the sole question as follows: "[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court." *Id.* at 694. The facts which begot this issue in *Dixon* were as follows: Alvin Dixon was arrested for second-degree murder and was released on bond in the District of Columbia. *Id.* at 691. Consistent with the District of Columbia's bail law, a condition of Dixon's release on bail was that he not commit "any criminal offense." *Id.* Before he was tried on the charge of second degree murder, Dixon was arrested and indicted for the possession of cocaine with intent to distribute. *Id.* The court which had granted Dixon bail on the second-degree murder charge

conducted a hearing so that Dixon might show-cause why he ought not be held in contempt or have the terms of his pretrial release modified. *Id.* After the conclusion of the show-cause hearing, at which the Government called four police officers to testify to facts which surrounded the cocaine charge, the court concluded that the Government had established beyond a reasonable doubt that Dixon was guilty of the cocaine-related charge and that therefore he was guilty of contempt of court for having violated the terms of his release on bail, specifically, not to commit "any criminal offense." *Id.* at 691-92. The court then sentenced Dixon to serve 180 days in jail pursuant to applicable District of Columbia statutes. *Id.* at 692. Dixon later moved to dismiss the cocaine indictment on double jeopardy grounds, and the trial court granted his motion. *Id.* The United States Supreme Court held: "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause." *Dixon*, 509 U.S. at 700.

*Dixon* presents this Court with a majority opinion and four concurring in part and dissenting in part opinions written by Chief Justice Rehnquist and Justices White, Blackmun, and Seuter. The majority opinion holds that the trial court dismissed Dixon's indictment for possession of cocaine with intent to deliver, not because Dixon would be twice punished for the same offense by serving both 180 days for contempt of court and an additional sentence for the crime itself, but because the indictment "did not include any element not contained in his previous contempt offense."

Malone's argument that *Dixon* is relevant rests on his assertion that the application of the "fundamental fairness" doctrine, which he maintains is found in *Benton v. Maryland*, 395 U.S. 784 (1969), "dictate[s] that the trial of Malone, which was based on the same evidence as presented at the probation/preliminary hearing, should be declared a nullity since jeopardy had attached at the preliminary/probation revocation hearing."<sup>(2)</sup> However, Malone offers no authority for his assertion that "jeopardy had attached at the preliminary/probation revocation hearing." To the contrary, in *McLendon v. State*, 387 So. 2d 112, 114 (Miss. 1980), the Mississippi Supreme Court reaffirmed that in a criminal prosecution, jeopardy does not attach to the accused until the jury has been sworn and empaneled when it opined:

[T]he time when jeopardy attaches in a jury trial "serves as the lynchpin for all double jeopardy jurisprudence." In *Illinois v. Somerville*, *supra*, (410 U.S. 458) at 467, . . . a case involving the application of the Double Jeopardy Clause through the Fourteenth Amendment, the Court said that "jeopardy 'attached' when the first jury was selected and sworn." Today we explicitly hold what *Somerville* assumed: The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

(citations omitted).

Based upon its review of *Dixon* and Malone's argument that it supports his position on this issue, we reject the proposition that the trial court's revocation of Malone's probation because he had been charged with the possession of a firearm as a convicted felon and the trial court's subsequent conviction of the same offense violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States of America.

### **B. Art. 3, § 22 of the Mississippi Constitution**

Like the United States Constitution, the Mississippi Constitution also contains a Double Jeopardy Clause. It is worded similarly to the one in the United States Constitution except that it has the following words added: "but there must be an actual acquittal or conviction on the merits to bar another prosecution." **Miss. Const. Art. 3, § 22; *Bennett v. State*, 528 So. 2d 815, 817 (Miss. 1988)**. In other words, "[a] plea of former jeopardy cannot succeed unless it is shown that defendant was actually acquitted or convicted in a former trial on the merits of the crime for which he is again sought to be convicted." ***State v. Thomas*, 645 So. 2d 931, 934 (Miss. 1994)**. In the case *sub judice*, Section 22 can be of no avail to Malone simply because he was not "actually acquitted or convicted in a former trial on the merits of the crime [of the possession of a firearm as a convict of felony]."

**C. *Lightsey v. State*, 493 So. 2d 375 (Miss. 1986)**

Finally, Malone recognizes that were this court to agree with his stance on this issue, it must "reverse its position in ***Lightsey v. State*, 493 So. 2d 375 (Miss. 1986)**." In *Lightsey*, the defendant, like the appellant in the case *sub judice*, attacked his conviction on the grounds of double jeopardy under a similar fact situation. ***Id.* at 376-77**. Lightsey pled guilty to an embezzlement charge and was subsequently given a suspended sentence. ***Id.* at 376**. During the period of his suspended sentence, Lightsey was arrested and charged with burglary. ***Id.*** Thereafter, during a revocation hearing, his parole on the embezzlement charge was revoked. ***Id.* at 377**.

Lightsey successfully challenged the revocation of his parole via habeas corpus and was released from prison. ***Id.*** He then attempted to defeat his burglary conviction by claiming double jeopardy. ***Id.*** He alleged that his trial for burglary after the supervised probation revocation hearing, based upon the burglary charges, had the effect of putting him twice in jeopardy for the same offense. ***Id.*** The Mississippi Supreme Court rejected this argument. ***Id.* at 378**.<sup>(3)</sup> The Court's rationale was that the revocation hearing did not result in a conviction, and consequently, there could be no double jeopardy since he was not convicted twice for the same offense. ***Id.*** "He was simply found to have violated the terms of . . . the probation resulting from his embezzlement conviction." ***Id.***

Other state appellate courts have similarly resolved this issue. For example, in ***People v. Burks*, 559 N.W.2d 357, 359 (Mich. Ct. App. 1996)**, the court opined:

A probation violation hearing . . . is not a criminal prosecution. [A] determination by a trial court that a probationer has violated the terms of the probation order does not burden the probationer with a new conviction or expose the probationer to punishment other than that to which the probationer was already exposed as a result of the previous conviction for which the probationer was placed on probation.

Furthermore, in ***United States v. Whitney*, 649 F.2d 296, 298 (5th Cir. 1981)**, the United States Court of Appeals for the Fifth Circuit declined "to extend the double jeopardy clause to parole and probation revocation hearings."

One facet of Malone's invitation to reverse *Lightsey* is the matter of the propriety of this Court's reversing an established precedent decided by the highest court in the State of Mississippi. Because the Mississippi Supreme Court assigned the case *sub judice* to this Court pursuant to Section 9-4-3 of the Mississippi Code, perhaps it can be argued that this same section empowers this Court to resolve this issue as this Court may find appropriate.<sup>(4)</sup> However that may be, we decline Malone's

invitation to reverse *Lightsey*, and affirm the judgment and sentence of the trial court pursuant to that same case.

**THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF THE APPELLANT'S CONVICTION OF THE POSSESSION OF FIREARM BY A CONVICTED FELON AND ITS SENTENCE OF APPELLANT TO SERVE FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER AND TO PAY A FINE OF \$1,000.00 ARE AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WASHINGTON COUNTY.**

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

1. Section 97-37-5(1) 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 any 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 for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the U.S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

**Miss. Code Ann. § 97-37-5(1) (Rev. 1994).**

2. Malone explains the term "preliminary/probation hearing" by writing:

It is the policy of the circuit judges of the Fourth District [in which Washington County is located] that if a person is on probation and is charged with a subsequent felony, a circuit judge holds the preliminary hearing and, at the same time, holds a probation revocation hearing. This procedure was followed in this case.

3. It should be noted that while the Mississippi Supreme Court affirmed his conviction on the issue of double jeopardy, ultimately, *Lightsey's* conviction was overturned on other grounds not relevant to the case *sub judice*. ***Lightsey*, 493 So. 2d 375 at 378, 380.**

4. This section reads:

The Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court.

**Miss. Code Ann. § 9-4-3 (Supp. 1997).**