

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT PATRICK TERRELL

APPELLANT

VS.

NO. 2014-CA-00157

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: LA DONNA HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 101888**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. TERRELL’S INTERLOCUTORY APPEAL IS NOT PROPERLY BEFORE THE COURT. 3

II. TERRELL’S CLAIM THAT THE TRIAL COURT ERRED BY NOT STAYING THE TRIAL PENDING THE PRESENT APPEAL IS MOOT. 5

III. PROSECUTION FOR MULTIPLE COUNTS OF MAIL FRAUD COMMITTED IN FURTHERANCE OF A SINGLE SCHEME TO DEFRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE 6

IV. PROSECUTION FOR MAIL FRAUD AND CONSPIRACY TO COMMIT MAIL FRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE 7

V. THE STATE DOES NOT CONTEST TERRELL’S DOUBLE JEOPARDY CLAIMS PERTAINING TO THE TWO COUNTS OF FALSE PRETENSE AND ONE COUNT OF FRAUDULENT USE OF IDENTITY. 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Blankenship, 746 F.2d 233, 236 (5th Cir. 1984) 7

United States v. Shaid, 730 F.2d 225, 230 (5th Cir. 1984) 7

STATE CASES

Beckwith v. State, 615 So. 2d 1134, 1145-46 (Miss. 1992) 3-5

Cox v. State, 134 So. 3d 712, 714-15 (Miss. 2014) 3

Estes v. State, 782 So. 2d 1244, 1248 (Miss. Ct. App. 2000) 4

Foreman v. State, 51 So. 3d 957, 961 (Miss. 2011) 8

Gatlin v. State, 724 So.2d 359, 361-362 (Miss. 1998) 7

Greenwood v. State, 744 So. 2d 767, 771 (Miss. 1999) 9

Jones v. State, 740 So.2d 904, 911 (Miss. 1999) 6

Kelly v. State, 80 So. 3d 802, 804 (Miss. 2012) 3

Martin v. State, 732 So.2d 847, 851 (Miss. 1998) 4

State v. Thomas, 645 So.2d 931, 933 (Miss. 1994) 8, 9

FEDERAL STATUTES

U.S.C.A. § 1341 6, 7

STATE STATUTES

Miss. Code Ann. §97-1-1 8

Miss. Code Ann. § 97-19-83 6

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT PATRICK TERRELL

APPELLANT

VS.

NO. 2014-CA-00157

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

- I. TERRELL'S INTERLOCUTORY APPEAL IS NOT PROPERLY BEFORE THE COURT.**
- II. TERRELL'S CLAIM THAT THE TRIAL COURT ERRED BY NOT STAYING THE TRIAL PENDING THE PRESENT APPEAL IS MOOT.**
- III. PROSECUTION FOR MULTIPLE COUNTS OF MAIL FRAUD COMMITTED IN FURTHERANCE OF A SINGLE SCHEME TO DEFRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.**
- IV. PROSECUTION FOR MAIL FRAUD AND CONSPIRACY TO COMMIT MAIL FRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.**
- V. THE STATE DOES NOT CONTEST TERRELL'S DOUBLE JEOPARDY CLAIMS PERTAINING TO THE TWO COUNTS OF FALSE PRETENSE AND ONE COUNT OF FRAUDULENT USE OF IDENTITY.**

STATEMENT OF FACTS

Because of the procedural posture of this case, the limited facts are gathered primarily from the indictment and hearing on Terrell's motions challenging his twenty count indictment. The allegations are that Robert Patrick Terrell and two coindictes conspired together to and did in fact

defraud John McLendon out of real property and the timber upon it. More specifically, it is alleged that Terrell and his coindictes conspired to and did in fact execute fraudulent warranty deeds and affidavits of heirship and transmitted the documents across multiple county lines. The end result of the scheme was that the timber on McLendon's land was harvested and sold to Bushy Creek Timber Company for \$20,300. Terrell and his coindictes were indicted for six counts of mail fraud, two counts of false pretense, one count of fraudulent use of identity, one count of timber theft, and ten corresponding counts of conspiracy.

Terrell subsequently filed numerous motions, supplemental motions, and amended supplemental motions to quash, dismiss, and/or consolidate numerous counts in the indictment on double jeopardy grounds. C.P. 62-64, 69-71, 73-76, 97-106, 109-118. On February 3, 2014, a hearing was held on Terrell's motions challenging the indictment on double jeopardy grounds. After hearing argument from both parties, the trial court judge denied Terrell's motions and stated that trial would commence on February 9, 2014. T. 28. Defense counsel then stated his intention to appeal the trial court's ruling. T. 28.

Terrell filed both a notice of appeal and an Emergency Motion to Stay Trial Pending Resolution by the Appellate Court of Defendant's Colorable Double Jeopardy Defenses. This Court denied Terrell's motion to stay. By order dated September 3, 2014, the trial court granted Terrell's motion for continuance pending this Court's disposition of Terrell's appeal of the trial court's order denying Terrell's challenge of the indictment. See attached.

SUMMARY OF ARGUMENT

Terrell's claim that the trial court erred by not staying the proceedings is moot. The trial court has in fact entered an order staying proceedings pending the outcome of the present appeal.

Prosecution for multiple counts of mail fraud committed in furtherance of a single scheme

to defraud does not violate the Double Jeopardy Clause. Nothing in the mail fraud statute suggests that multiple mailings result in a single punishable offense simply because the multiple mailings were employed in a single scheme to defraud. Further, controlling case law establishes that each mailing constitutes a separate offense.

Prosecution for mail fraud and conspiracy to commit mail fraud does not violate the Double Jeopardy Clause because a comparison of the two applicable statutes passes the *Blockburger* same elements test. Mail fraud and conspiracy have no single element in common. Additionally, precedent from this Court establishes that conspiracy is a complete offense, separate and distinct from the crime contemplated by the conspiracy.

The State does not challenge Terrell's claim that prosecution for two counts of false pretense where the taking in each count pertains to the same sum of money would violate his right to be free from double jeopardy. Nor does the State challenge Terrell's claim that the fraudulent use of identity count merges with the false pretense counts.

ARGUMENT

I. TERRELL'S INTERLOCUTORY APPEAL IS NOT PROPERLY BEFORE THE COURT.

At the conclusion of the hearing on Terrell's motion to dismiss the indictment, defense counsel correctly noted that the trial court's order was a final judgment and appealable under the authority of *Beckwith v. State*, 615 So. 2d 1134, 1145-46 (Miss. 1992). See also, *Cox v. State*, 134 So. 3d 712, 714-15 (Miss. 2014); *Kelly v. State*, 80 So. 3d 802, 804 (Miss. 2012). Although the trial court's order is a final order and appealable, Terrell failed to comply with M.R.A.P. 5. Specifically, he failed to obtain permission from this Court to file an interlocutory appeal within 21 days of the

trial court's order denying his motion to dismiss. M.R.A.P. 5(a). As such, Terrell's appeal is not properly before the Court.

Additionally, the filing of a petition for interlocutory appeal does not stay the trial court proceedings; rather, a stay must be ordered by either the trial court or this Court. M.R.A.P. 5(f). This Court actually denied Terrell's Emergency Motion to Stay Trial Pending Resolution by the Appellate Court of Defendant's Colorable Double Jeopardy Defenses. However, as previously stated, the trial was effectively stayed, and the trial court ultimately entered an order of continuance months after Terrell's appellate brief was filed.

It appears that defense counsel read *Beckwith* to stand for the proposition that because the order denying the motion to dismiss the indictment based on double jeopardy grounds is a final order, the present appeal is like any other, and Rules 3 and 4, rather than 5, apply. Of course appeals taken as of right simply require the timely filing of a notice of appeal to divest the trial court of jurisdiction. M.R.A.P. 3, M.R.A.P. 4; *Estes v. State*, 782 So. 2d 1244, 1248 (Miss. Ct. App. 2000) (citing *Martin v. State*, 732 So.2d 847, 851 (Miss. 1998)). If traveling under Rules 3 and 4, it would be unnecessary to request that the trial court stay the proceedings and unnecessary to obtain permission from this Court to file the present appeal.

However, the present appeal is certainly interlocutory in nature since this is an appeal from a pretrial order denying Terrell's numerous motions to quash, dismiss, and/or consolidate numerous counts in the indictment. Rule 5 governs interlocutory appeals. Nothing in *Beckwith* suggests that Rule 5 does not apply. In fact, *Beckwith* obtained permission to file his interlocutory appeal pursuant to Rule 5 of the Mississippi Supreme Court Rules, which governed interlocutory appeals at that time. *Beckwith*, 615 So. 2d at 1135. The *Beckwith* court dismissed *Beckwith's* interlocutory appeal as to his speedy trial and due process claims because the rights upon which those claims were

based could be “fully vindicated upon appeal from a final judgment of conviction” *Id.* at 1144-1145.

The court went on to determine that it did have jurisdiction to address Beckwith’s double jeopardy claim, “because of the unique nature of the denial by a circuit court of a colorable double jeopardy claim, involving as it does the Constitutional right not to be prosecuted for the offense” *Id.* at 1146. The Court then stated that an order denying a defendant’s motion to dismiss the indictment based on a colorable double jeopardy claim is a final order. *Id.*

It is perhaps this “final order” language which led Terrell to believe that it was unnecessary to comply with Rule 5. The State’s reading of *Beckwith* is that Rule 5 must still be complied with. *Beckwith* simply held that this Court has jurisdiction to hear an interlocutory appeal in a criminal case where a defendant’s motion to dismiss his indictment based on a colorable double jeopardy claim has been denied.

Although the State suggests that Terrell’s appeal is not properly before the Court due to his failure to comply with Rule 5, the State addresses the merits of Terrell’s claims in the event that this Court finds that Terrell’s appeal is properly before the Court.

II. TERRELL’S CLAIM THAT THE TRIAL COURT ERRED BY NOT STAYING THE TRIAL PENDING THE PRESENT APPEAL IS MOOT.

Terrell’s claim that the trial court erred in failing to continue his trial in light of his interlocutory appeal is moot, as the trial court has in fact entered an order of continuance. See attached exhibit.¹ Even if the trial court had no jurisdiction at the time the order was entered, the

¹The State has filed a motion asking this Court to order the Circuit Clerk of Jefferson Davis County to supplement the appellate record with a certified copy of the trial court’s order of continuance. The State attaches a copy of the order merely for convenience.

case has still been effectively continued, thereby mooting Terrell's assignment of error.

III. PROSECUTION FOR MULTIPLE COUNTS OF MAIL FRAUD COMMITTED IN FURTHERANCE OF A SINGLE SCHEME TO DEFRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

Terrell argues that if he is prosecuted for multiple counts of mail fraud, where the multiple fraudulent documents were transmitted across county lines in furtherance of a single scheme to defraud, his right to be free from double jeopardy will have been violated. Controlling case law shows otherwise.

Terrell fails to cite any authority to support his position that to be tried for multiple counts of mail fraud where there is but a single scheme to defraud violates the Double Jeopardy Clause. Ordinarily, the failure to cite legal authority to support one's position eliminates this Court's obligation to review the appellant's claim. *Jones v. State*, 740 So.2d 904, 911 (¶22) (Miss. 1999).

Additionally, Terrell's claim is without merit. Under Mississippi law, "whoever, having devised . . . any scheme . . . to defraud, . . . transmits or causes to be transmitted by mail, telephone . . . or other means of communication or by person, any writings, . . . across county or state jurisdictional lines . . ." is guilty of mail fraud. Miss. Code Ann. §97-19-83. It is alleged that Terrell and his coindictes transmitted several fraudulent documents across county lines for the purpose of defrauding John McLendon out of \$20,300 worth of timber. Nothing in the language of the statute suggests that where there is a single scheme to defraud but numerous writings are transmitted across county lines in furtherance of the scheme that a defendant may only be prosecuted for one count of mail fraud. While there are only two reported Mississippi cases involving our state's mail fraud statute, the statute appears to be patterned after the federal statute. Compare Miss. Code Ann. §97-19-83 to 18 U.S.C.A. § 1341. Under federal law, it is clear that each mailing in furtherance of

a single scheme to defraud constitutes a separate mail fraud offense. *United States v. Shaid*, 730 F.2d 225, 230 (5th Cir. 1984) ; *United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984).

Further, authority from this Court supports the State's contention that each mailing in furtherance of a single scheme to defraud may properly serve as the basis for separate counts of mail fraud. In the case of *Gatlin v. State*, Phyllis Wilson had \$19,000 in cash seized at the New Orleans airport by the DEA upon suspicion that the money was proceeds from drug trafficking. 724 So.2d 359, 361-362 (¶¶5-9) (Miss. 1998). Gatlin, who was the uncle of Wilson's boyfriend, decided that he would claim the money. *Id.* at (¶11). He ultimately sent six communications to the DEA agent in charge of the case in an attempt to prove his claim to the money. *Id.* at 362-363 (¶¶12-16). This Court held that the evidence was legally sufficient to support convictions for six counts of mail fraud, even though the six fraudulent representations were made and transmitted to support a single scheme to obtain a single sum of money. *Id.* at 365, 370 at (¶¶25, 53). Although the issue in *Gatlin* was one of legal sufficiency, the case still stands for the proposition that numerous fraudulent representations transmitted across county or state jurisdictional lines for the purpose of advancing a single scheme to defraud may properly result in the prosecution of a defendant for numerous counts of mail fraud. As such, Terrell's double jeopardy claim regarding prosecution for separate counts of mail fraud necessarily fails.

IV. PROSECUTION FOR MAIL FRAUD AND CONSPIRACY TO COMMIT MAIL FRAUD DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

Terrell also claims that prosecution for both mail fraud and conspiracy to commit mail fraud violates his right to be free from double jeopardy. Specifically, Terrell claims that the charge of conspiracy merges with the charge of mail fraud because "one of that crime's essential elements is that the several defendants devised a scheme or artifice to defraud, which is itself a conspiracy."

Appellant's brief at 12. He further claims that conspiracy to commit mail fraud "has no element that is separate and distinct from the elements of mail fraud." Appellant's brief at 12. Terrell's *Blockburger* analysis is incorrect, and he overlooks controlling law regarding conspiracy and the separate and distinct crime contemplated by the conspiracy.

Two independent crimes merge into one when the greater crime includes by necessity all the elements of the lesser crime. *Foreman v. State*, 51 So. 3d 957, 961 (Miss. 2011). Where two crimes do in fact merge into one, prosecution for each could not pass the *Blockburger* "same elements" test. *Id.* As previously stated, the elements of mail fraud are (1) a scheme to defraud and (2) transmitting communications across county or state jurisdictional lines in furtherance of the scheme. The crime of conspiracy occurs where "two or more persons conspire . . . to commit a crime . . ." Miss. Code Ann. §97-1-1. "The crime of conspiracy is completed once the agreement is formed. *State v. Thomas*, 645 So.2d 931, 933 (Miss. 1994). Terrell suggests that the two crimes merge by equating the scheme to defraud element in mail fraud with the definition of conspiracy, then arguing that conspiracy has no additional element. However, the two are not the same. A scheme is merely "a systemic plan," whereas an agreement is "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances." Black's Law Dictionary 67, 1346 (7th ed. 1999). Obviously, one person can concoct a scheme whereas two or more persons are necessary to form an agreement. Further, even where two people are involved in a scheme to defraud, such a scheme could be concocted by two people without an actual agreement to further the unlawful purpose. Simply put, scheme to defraud and conspiracy or agreement are different statutory elements. As such, prosecution for mail fraud and conspiracy to commit mail fraud easily passes the *Blockburger* "same elements" test as the two crimes have no element in common.

"Even though there may be a substantial overlap in the proof supporting the convictions of

the different crimes, the *Blockburger* test is met where each offense requires proof of an element not necessary to the other.” *Greenwood v. State*, 744 So. 2d 767, 771 (Miss. 1999). Although there will most likely be a substantial overlap in the evidence presented to support many of the charges, there is no double jeopardy violation in prosecuting Terrell for mail fraud and conspiracy to commit mail fraud, since the charges pass the *Blockburger* “same elements” test. Further, this Court has repeatedly held that a conspiracy is a complete offense and separate and distinct from the crime contemplated by the conspiracy; it does not merge with the crime contemplated by the conspiracy. *State v. Thomas*, 645 So. 2d 931, 933-34 (Miss. 1994).

For the foregoing reasons, Terrell’s claim that a prosecution for mail fraud and conspiracy to commit mail fraud violates the Double Jeopardy Clause is without merit.

V. THE STATE DOES NOT CONTEST TERRELL’S DOUBLE JEOPARDY CLAIMS PERTAINING TO THE TWO COUNTS OF FALSE PRETENSE AND ONE COUNT OF FRAUDULENT USE OF IDENTITY.

Terrell claims that his right to be free from double jeopardy would be violated if he were prosecuted for two counts of false pretense where the taking in each count pertained to the same sum of money. He also claims that the fraudulent use of identity count merges with the false pretense counts. The State does not contest these two claims. The State intends to move forward on only one of the false pretense counts.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the trial court's order denying Terrell's motions challenging the indictment on double jeopardy grounds, except as to the concession made by the State on appeal, and to remand the case back to the Circuit Court for trial on all counts charged in the indictment except for the charge of fraudulent use of identity and one count of false pretense.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: /s/ La Donna C. Holland
LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 101888

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, LA DONNA HOLLAND, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Honorable Anthony A. Mozingo
Circuit Court Judge
P.O. Drawer 269
Purvis, MS 39475

Honorable Hal Kittrell
District Attorney
500 Courthouse Square, Suite 3
Columbia, MS 39429

J.M. Ritchey, Esq.
P.O. Box 286
Canton, MS 39046

This the 3rd day of November, 2014.

/s/ La Donna C. Holland
LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE NO. 602-359-3680
FAX NO. 601-576-2420
Email:

IN THE CIRCUIT COURT OF JEFFERSON DAVIS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

CRIMINAL CASE NO: K13-0002-M-H

ROBERT PATRICK TERRELL;

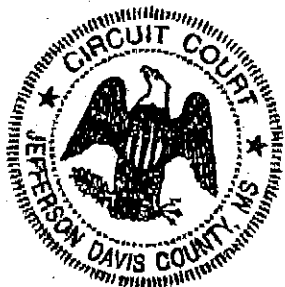
ORDER OF CONTINUANCE

BEFORE THE COURT came motion of defendant, through counsel, for continuance of the trial of this matter pending a final ruling by the Mississippi Supreme Court of the defendant's appeal of a trial court motion denying his double jeopardy claim, and the court finding that judicial economy would be better served to await a decision by the supreme court before proceeding to trial on a 20+-count indictment, and finding that a delay of trial will not cause undue harm or prejudice to the State or to the defendant, it is, therefore,

ORDERED, that the trial of this matter be generally continued from term to term until a ruling is issued by the Mississippi Supreme on defendant's appeal of his double jeopardy claim.

IT IS FURTHER, ORDERED, that the defendant shall appear at all docket calls of his case in Jefferson Davis County in the interim.

SO ORDERED on this 03 day of September, A.D., 2014.



Priscilla Harrell
CIRCUIT JUDGE

FILED
SEP 04 2014

Clint W. Langley, Circuit Clerk
By: 17