

August 17, 1990

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

RONALD PATRICK SWINEY,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

*
*
*
*
*
*
*
*
*

CASE NO. CC-88-077

DATE OF JUDGMENT: 6/13/89

DATE OF DENIAL OF POST-

JUDGMENT MOTION: 10/11/89

BRIEF IN SUPPORT OF APPELLANT'S APPLICATION

FOR RE-HEARING



Richard W. Bell
Attorney for the Plaintiff
P.O. Box 427
Pelham, Alabama 35124
(205) 663-9000
State Bar No. 003

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

RONALD PATRICK SWINEY,

*

*

APPELLANT,

*

*

VS.

*

CASE NO. CC-88-077

*

DATE OF JUDGMENT: 6/13/89

STATE OF ALABAMA,

*

DATE OF DENIAL OF POST-

*

JUDGMENT MOTION: 10/11/89

APPELLEE.

*

BRIEF IN SUPPORT OF APPELLANT'S APPLICATION

FOR RE-HEARING

APPELLANT does not desire to have the first issue raised by Appellant's original brief re-heard.

Issue 2: Did the Trial Court err to reversal in denying the Defendant's Motion for Judgment of Acquittal at the close of the State's evidence against the Defendant?

Appellant reiterates that the State relies solely on circumstantial evidence to prove a *prima facie* case. It is only by inference that the state is able to establish that the bullets which struck Pate were fired from the .22 Caliber Rifle identified at trial as the murder weapon. It is only by inference that this murder weapon can be placed in the possession of the Defendant at the time of this killing. And it is only by speculation and conjecture that the jury could conclude from the evidence that the

Defendant fired any weapon on the day in question. As was pointed out in *ex parte Mauricio*, 523 So2d 87 (Alabama, 1987):

A finding of guilt of circumstantial evidence is based on the "inference of a fact in issue which follows as a natural consequence according to reason and common experience from known collateral facts." (emphasis added) (p. 94)

As was pointed out, a meaningful distinction lies between that which can be inferentially drawn and that which falls within the category of supposition. As the Court stated in this regard:

This is to be distinguished from a supposition, which is "a conjecture based on the possibility or probability that a thing could have or may have occurred without proof that it did occur." (p. 94)

Appellant relies on the conclusion reached by the *Mauricio* Court after finding such a distinction, " Mere possibility, suspicion, or guess work, no matter how strong, will not overturn the presumption of innocence." (p. 94)

Issue 3: Did the Trial Court err to reversal in denying the Defendant's Motion for Mistrial after the mother of the deceased, Betty Swiney, testified that the Defendant murdered her daughter?

Appellant argues that the serious breach of decorum which occurred in this matter was not, and can not, be corrected to the point where impartiality can be restored simply by limiting instruction. It should be noted that in the instant case the deceased's mother, on three separate occasions, not only referred to the crime as being murder, but also referred to the Defendant as being the perpetrator. Even in its limiting instruction, the Court cautioned the Jury that this was an "improper characterization by this witness..." and further that they were "not to consider the statements that had been made using the term "murder". (RT 646-647)

While Appellant argues that the witness' characterization of the crime as murder would, in and of itself, be sufficient grounds for declaring a mistrial, Appellant argues further that for the mother of the Deceased victim to state on each occasion that it was the Defendant that committed the murder is equally devastating to the Defendant's right to a trial by an impartial jury, particularly when the witness making such an assertion was not an eye witness to any offense. Even in its limiting instruction the Court did nothing to eradicate this prejudicial effect. Even if, arguendo, such a prejudicial injection from the witness stand could be cured by a limiting instruction, no such instruction was given. Therefore, the Defendant was denied due

process and should be granted a new trial before a fair and impartial jury.

CONCLUSION

This case is due to be reversed and rendered on the failure of the State to prove a *prima facie* case against the Defendant.

This case is due to be reversed and remanded for failure of the Defendant to be given a trial by fair and impartial jury as required by the laws of the State of Alabama and by the Constitutions of the State of Alabama and of the United States.


Respectfully submitted,



Richard W. Bell
Attorney for the Appellant
P.O. Box 427
Pelham, Alabama 35124
(205) 663-9000
State Bar No. 003

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the Appellant's Application Brief in Support of Re-Hearing on the Honorable Don E. Siegelman, Attorney General for the State of Alabama, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama 36130 by placing said copy in the United States Mail, postage prepaid on the 17th day of August, 1990.


Richard W. Bell