

IN THE COUNTY COURT OF JONES COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT

PETER M. EYRE

APPELLANT

VS.

CAUSE NO.: 10,276

STATE OF MISSISSIPPI  
JONES COUNTY

APPELLEE

MOTION TO DISMISS AFFIDAVIT

Comes now Defendant Peter M. Eyre, by his counsel, and moves to dismiss the State's affidavit charging him with the misdemeanor of having "willfully and unlawfully . . . in his possession or under his control a quantity of beer outside the City of Laurel" in violation of Miss. Code Ann. § 67-3-13, because (1) the affidavit fails properly to allege an offense within the scope of the statute; and (2) the statute is unconstitutional on its face and as sought to be applied in this instance.

Specifically:

1. The affidavit fails to charge all the necessary elements of the alleged offense as defined in Miss. Code Ann. § 67-3-13. Mere possession by an adult of beer or of any other lawfully produced and sold alcoholic substance is not an offense in Mississippi except in certain local jurisdictions where statutorily prescribed election procedures have been followed and duly recorded. The elements of unlawful possession under the statute are:

- (1) [I]n any county which has
- (2) at any time since February 26, 1934
- (3) elected to

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- (4) prohibit the transportation, storage, sale, distribution, receipt and/or manufacture, of
- (5) wine and beer of an alcoholic content of not more than four percent (4 %) in such county
- (6) it is hereby declared to be unlawful to possess such beverages therein

**[OR]**

- (7) In any county which after, July 1, 1998,
- (8) elects to
- (9) prohibit the transportation, storage, sale, distribution, receipt and/or manufacture of
- (10) wine and beer of an alcoholic content of not more than five percent (5 %) by weight in such county
- (11) it is hereby declared unlawful to possess such beer therein.

Violation of these provisions may result in imprisonment of not more than ninety (90) days and a fine of not more than Five Hundred Dollars (\$500.00), or both.

2. The affidavit fails to allege the necessary elements requiring proof of a proper election having been held in the county either after February 26, 1934, or July 1, 1998, the result of which made the possession of beer having a specified alcoholic content a criminal offense. Our Supreme Court has recognized that to be valid an affidavit must contain allegations that an election had been held in the local county by which it was determined that the possession of alcoholic beer was thereafter to be prohibited. *Kelly v. State*, 237 Miss. 112, 113 So.2d 540 (1959); *Hays v. State*, 219 Miss. 808, 69 So.2d 845 (1954); *Hoyle v. State*, 216 Miss. 330, 62 So.2d 380 (1953). See generally, *Gilmer v. State*, 955 So.2d 829, 836 (Miss. 2007) (“An [affidavit] must contain (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform the defendant of the

charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense.”); Uniform Circuit and County Court Rule 7.06 (requiring a “plain, concise and definite written statement of the essential facts constituting the offense charged and [the affidavit] shall fully notify the defendant of the nature and cause of the accusation.”). An affidavit that fails to allege an essential element cannot be corrected through judicial notice. *See Washington v. State*, 645 So.2d 915, 919 (Miss. 1994); *accord, Beem v. McKune*, 317 F.3d 1175, 1189 (10th Cir. 2003); *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2000).

3. The affidavit fails to allege that the defendant was aware, or had reason to be aware, that possession of beer in some (but not all) areas of Jones County would subject him to criminal prosecution and punishment. As a matter of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 3, Section 14 of the Mississippi Constitution, this is an instance where, even though not expressly contained in the statute, an additional element of a person’s knowledge of a legal obligation not to possess a substance that is generally legal must be supplied judicially. *Lambert v. California*, 355 U.S. 225 (1957); *Staples v. United States*, 511 U.S. 600 (1994). Otherwise, the statute would be unconstitutional as applied to interstate travelers. Such persons would have no notice that what they have lawfully purchased or acquired would subject them to arrest, criminal prosecution, fine and imprisonment in certain counties (or only discrete areas inside a county such as Jones) within the State of Mississippi. Like the situations presented in *Lambert* and *Staples, supra*, the law would require interstate travelers lawfully carrying as innocuous an item

as an unopened container of low alcohol beer either to attempt to plan a trip across the state as to avoid any area covered by § 67-3-13, or to rid themselves of possession. Without a requirement of actual knowledge of this extraordinary affirmative duty, the mere physical possession of an otherwise lawful item would not, as recognized by *Lambert* and *Staples, supra*, alert a traveler to potential criminal liability.

4. The law unduly burdens interstate travelers (especially those traversing the state on federally funded interstate highways). Miss. Code Ann. § 67-3-13 places unfair restraint upon interstate travel and commerce in violation of the Fourteenth Amendment and Article 1, Section 8, cl. 3 of the Constitution of the United States and is, therefore, overly broad and unconstitutional on its face. Even with actual notice of the law's restraint of possession of alcoholic beverages in some but not all areas of the State (i.e., pockets of prohibition) an interstate traveler wishing to avoid arrest and prosecution for possession of a single bottle of low alcohol beer would have to either (1) plan a trip through the state so as to avoid any county or an area within a county, covered by § 67-3-13; or (2) take affirmative action to divest himself or herself of possession of the substance before entering any pocket of prohibition within the State. *See United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981). *United States v. Gudger*, 249 U.S. 373 (1919). Our Supreme Court did not address these issues in *Dantzler v. State*, 542 So.2d 906 (Miss. 1989), and dealt only with an equal protection claim.

5. While it is true that the Twenty-first Amendment to the United States Constitution recognizes states' rights to regulate and even ban the manufacture, sale, transportation or possession of alcohol it is not as the Mississippi Court's dictum in

*Dantzler* suggests wholly “unfettered.” 542 So.2d at 911. “[S]tate laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment . . . the Establishment Clause . . . the Equal Protection Clause . . . the Due Process Clause . . . and the Import-Export Clause. . . . [citations omitted].” *Granholm v. Heald*, 544 U.S. 460, 487 (2005). As set forth in the preceding Paragraph 4, the “constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.” *United States v. Guest, supra*, 383 U.S. at 757-58. For the reasons stated in the preceding paragraphs of this motion, Miss. Code § 67-3-13 infringes unfairly upon that fundamental right.

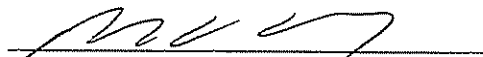
WHEREFORE, for the reasons stated in this Motion to Dismiss, Defendant Peter Eyre requests this Honorable Court to schedule a hearing on his motion and, thereafter, being advised on applicable constitutional, statutory and case law, to DISMISS the affidavit filed by the State in this cause because (1) it fails to allege an offense cognizable under the laws of the State of Mississippi; and (2) for the reasons stated in Paragraphs 3,

4 and 5 is premised upon a statute that, under the Fourteenth Amendment and the Commerce Clause of the United States Constitutional, is unconstitutional on its face and as sought to be applied in this instance.

WITNESS MY SIGNATURE on this the 1<sup>st</sup> day of November, 2009.

RESPECTFULLY SUBMITTED,

BY:   
F. THOMAS SCHORNHORST

  
MICHAEL V. CORY, JR.

OF COUNSEL:

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MICHAEL V. CORY, JR. (MSB#9868)  
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**CERTIFICATE OF SERVICE**

I, F. Thomas Schornhorst, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document, via United States Mail, postage pre-paid, to the following:

M. Wayne Thompson, Esq.  
Post Office Box 6509  
Laurel, MS 39441

Donna Avila, Clerk  
Jones County Justice Court Clerk's Office  
Post Office Box 1997  
Laurel, MS 39441

THIS the ~~17<sup>th</sup>~~ day of November, 2009.

  
\_\_\_\_\_  
F. Thomas Schornhorst

IN THE COUNTY COURT OF JONES COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT

JASON D. TALLEY

APPELLANT

VS.

CAUSE NO.: 10,278

STATE OF MISSISSIPPI  
JONES COUNTY

APPELLEE

MOTION TO DISMISS AFFIDAVIT

Comes now Defendant Jason Talley, by his counsel, and moves to dismiss the State's affidavit charging him with the misdemeanor of Disorderly Conduct pursuant to Miss. Code Section 97-35-7(1) because the affidavit fails to allege an offense encompassed within the scope of the statute:

Specifically:

1. The affidavit fails to charge all the necessary elements of the offense. It does not specify which, if any, of the nine (9) subparagraphs of the statute (Miss. Code § 97-35-7(1)(a)-(i)) the Defendant is alleged to have violated. This deficiency deprives this Defendant of the fair notice of the charge(s) against him in violation of the Due Process Clause of the Fourteenth Amendment to the Constitutions of the United States and Article 3, Section 14 of the Mississippi Constitution. *Burchfield v State*, 277 So.2d 623, 625 (Miss. 1973).

2. The affidavit alleges that Defendant Talley committed an offense "by arguing with the officer, refusing to put his hands behind his back, and by taking an aggressive stance toward the officer." This conduct is not encompassed within the language any of the aforementioned sub-paragraphs (1) (a)-(i), that limits the range of conduct that may be criminalized as "disorderly" under the statute.

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3. As applied to the alleged conduct of the defendant of “arguing with the officer” the affidavit violates the First and Fourteenth Amendments to the Constitution of the United States and Article 3, Sections 11 and 13 of the Mississippi Constitution, in that it purports to criminalize speech which does not involve a circumstance in which a person’s right of free speech and petitioning a government authority can be inhibited or impaired. *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987 (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”); *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Jones v. State*, 798 So.2d 1241, 1248 (Miss. 2001); *Odem v. State*, 881 So.2d 940, 945-949 (Miss. Ct. App. 2004).

4. The charged offense requires proof of “circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace.” The affidavit fails to allege the nature of the “circumstances” and how the alleged conduct of the accused might have led to a “breach of the peace” or may have risked a “breach of the peace” under such circumstances. The ambiguous statutory language must, in accordance with the principles of fair notice and due process of law set forth in the preceding Paragraph 1, be supplemented in the State’s pleading with allegations demonstrating that circumstances were such that a “breach of the peace” was either intended or unlawfully risked by the defendant’s conduct. *Gilmer v. State*, 955 So.2d 829, 833-834 (Miss. 2007); *see also, Brooks v. State*, \_\_\_ So.3d \_\_\_ (Miss. 2009) (2009 WL 3208682, Oct. 8, 2009) (language must be “specific enough to give notice of the act made unlawful, and exclusive enough to prevent its application to any acts other than those made unlawful.”);

Uniform Circuit and County Court Rule 7.06 (requiring a “plain, concise and definite written statement of the essential facts constituting the offense charged and [the affidavit] shall fully notify the defendant of the nature and cause of the accusation.”).

5. In addition to the matters stated in the preceding paragraphs 1-4, the charged offense requires proof that an accused “refuse[d] to *promptly* comply with or obey a request, command, or order of a law enforcement officer, having the authority to *then and there arrest any person for a violation of the law . . .*” [emphasis supplied]. The affidavit herein is deficient in that:

a. The affidavit contains no allegation that the defendant did not respond “promptly” to a lawful command [see paragraph 5 b. *infra*] of a law enforcement officer. The use of the term “promptly” as an element of the offense implies a temporal element requiring an accused to be given sufficient opportunity to comply with a lawful command.

b. The affidavit contains no allegation of the grounds upon which an officer possessed “authority to *then and there arrest any person for a violation of the law . . .*” [emphasis supplied].” The statute requires pleading and proof that as a condition to any command or order of compliance, either the defendant or another person have been engaged in conduct that gave the officer probable cause to arrest the defendant or another person for a preceding or on-going law violation. The general authority of a police officer to arrest law violators is not enough. The statute requires authority to exist “then and there.” In other words, the officer must have some lawful reason to issue a command or order before any refusal to “promptly” obey can be a basis for a criminal charge. The language of the affidavit fails to disclose whether the assertion of police authority to

compel the defendant's compliance with an order (1) fell outside the protection of the constitutional guarantees of free speech as set forth in paragraph 3, *supra*; or (2) fell outside the protections of the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 3, Section 23 of the Mississippi Constitution, guaranteeing to citizens freedom from unreasonable searches and seizures. *See Jacobucci v Boulter*, 193 F.3d 14, 25 (1st Cir. 1999): "A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it." *See also Jones v. State*, 798 So.2d 1241, 1247-48 (Miss. 2001), relying on *Terry v. State*, 252 Miss. 479, 173 So.2d 889, 891 (1965) ("The sheriff had no right to arrest defendant unless it was evident to him at the time that some breach of the peace was committed in his presence.").

WHEREFORE, for the reasons stated in this Motion to Dismiss, Defendant Jason Talley requests this Honorable Court to schedule a hearing on his motion and, thereafter, being advised on applicable constitutional, statutory and case law, to DISMISS the affidavit filed by the state in this cause because it fails to allege an offense cognizable under the laws of the State of Mississippi.

WITNESS MY SIGNATURE on this the 10<sup>th</sup> day of November, 2009.

RESPECTFULLY SUBMITTED,

BY:   
DALE DANKS, JR.

OF COUNSEL:

MICHAEL V. CORY, JR. (MSB#9868)  
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Indiana Attorney No. 202-53  
*Admitted Pro Hac Vice*


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I, Dale Danks, Jr., do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document, via United States Mail, postage pre-paid, to the following:

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Laurel, MS 39441

Donna Avila, Clerk  
Jones County Justice Court Clerk's Office  
Post Office Box 1997  
Laurel, MS 39441

THIS the 10<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Dale Danks, Jr.

IN THE COUNTY COURT OF JONES COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT

ADAM M. MUELLER

APPELLANT

VS.

CAUSE NO.: 10,277

STATE OF MISSISSIPPI  
JONES COUNTY

APPELLEE

MOTION TO DISMISS AFFIDAVIT

Comes now Defendant Adam M. Mueller, by his counsel, and moves to dismiss the State's affidavit charging him with the misdemeanor of Disorderly Conduct pursuant to Miss. Code Section 97-35-7(1) because the affidavit fails to allege an offense encompassed within the scope of the statute:

Specifically:

1. The affidavit fails to charge all the necessary elements of the offense. It does not specify which, if any, of the nine (9) subparagraphs of the statute (Miss. Code § 97-35-7(1)(a)-(i)) the defendant is alleged to have violated. This deficiency deprives the defendant of the fair notice of the charge(s) against him in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article 3, Section 14 of the Mississippi Constitution. Each subparagraph specifies alternative ways to charge the offense and adds elements that must be pleaded and proved in a prosecution pursuant to the statute. The challenged affidavit does not include in its allegations any of the additional elements. Hence, the defendant is charged with a non-existent crime. *Burchfield v. State*, 277 So.2d 623, 625 (Miss. 1973) (the state's pleading "must set forth the constituent elements a criminal offense. Each and every material fact and essential ingredient of the offense must be with precision and certainty set forth.")

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2. The affidavit alleges that Defendant Mueller committed an offense “by not putting up the video camera when told to do so.” This conduct is not encompassed within the language of any of the aforementioned subparagraphs (1) (a)-(i) that limit the range of conduct that may be criminalized as “disorderly” under the statute. *Burchfield v State, supra*.

3. As applied to the alleged conduct of the defendant “not putting up the video camera when told to do so” the affidavit violates the First and Fourteenth Amendments to the Constitution of the United States and Article 3, Sections 11 and 13 of the Mississippi Constitution, in that it purports to criminalize speech activity that does not involve a circumstance in which a person’s right of free speech and petitioning a government authority can be inhibited or impaired. *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987 (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”); *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Jones v. State*, 798 So.2d 1241, 1248 (Miss. 2001); *Odem v. State*, 881 So.2d 940, 945-949 (Miss. Ct. App. 2004).

4. The charge premised upon Defendant Mueller’s attempt to make a video recording of police activity in a public place, independent of his illegal arrest for such protected conduct, violates his rights under the First and Fourteenth Amendments and Article 3, Sections 11 and 13 of the Mississippi Constitution. “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (citations omitted). *See also Gilmer v. State, supra*,

955 So.2d at 838 (recognizing a citizen's right to record police activities in public places).

5. Arresting and charging Defendant Mueller with disorderly conduct for attempting to preserve evidence critical to his defense, and that of his co-defendants, by recording illegal police conduct deprived him of his rights to due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States and Article 3, Section 14 of the Mississippi Constitution.

6. The charged offense requires proof of "circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace." The affidavit fails to allege the nature of the "circumstances" and how the alleged conduct of the accused might have led to a "breach of the peace" or may have risked a "breach of the peace" under such circumstances. The ambiguous statutory language must, in accordance with the principles of fair notice and due process of law set forth in the preceding Paragraph 1, be supplemented in the state's pleading with allegations demonstrating that circumstances were such that a "breach of the peace" was either intended or unlawfully risked by the defendant's conduct. *Gilmer v. State*, 955 So.2d 829, 833-834 (Miss. 2007); *see also*, *Brooks v State*, \_\_\_ So.3d \_\_\_ (Miss. 2009) (2009 WL 3208682, Oct. 8, 2009) (language must be "specific enough to give notice of the act made unlawful, and exclusive enough to prevent its application to any acts other than those made unlawful"); Uniform Circuit and County Court Rule 7.06 (requiring a "plain, concise and definite written statement of the essential facts constituting the offense charged and [the affidavit] shall fully notify the defendant of the nature and cause of the accusation.").



7. In addition to the matters stated in the preceding paragraphs 1-6, the charged offense requires proof that an accused “refuse[d] to *promptly* comply with or obey a request, command, or order of a law enforcement officer, having the authority to *then and there arrest any person for a violation of the law . . .*” [emphasis supplied]. The affidavit herein is deficient in that:

a. The affidavit contains no allegation that the defendant did not respond “promptly” to a lawful command [see paragraph 7 b. *infra*] of a law enforcement officer. The use of the term “promptly” implies a temporal element requiring an accused to be given sufficient opportunity to comply with a lawful command.

b. The affidavit contains no allegation of the grounds upon which an officer possessed “authority to *then and there* to arrest any person for a violation of the law . . .” [emphasis supplied].” The statute requires pleading and proof that as a condition to any command or order of compliance, either the defendant or another person have been engaged in conduct that gave the officer probable cause to arrest the defendant or another person for a preceding or on-going law violation. The general authority of a police officer to arrest law violators is not enough. The statute requires authority to exist “then and there.” In other words, the officer must have some lawful reason to issue a command or order before any refusal to “promptly” obey can be a basis for a criminal charge. The affidavit fails to disclose whether the assertion of police authority to compel the defendant’s compliance with an order (1) fell outside the protection of the constitutional guarantees of free speech as set forth in paragraphs 3 and 4, *supra*; or (2) fell outside the protections of the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 3, Section 23 of the Mississippi Constitution, guaranteeing to citizens

freedom from unreasonable searches and seizures. *See Iacobucci v Boulter*, 193 F.3d 14, 25 (1st Cir. 1999): “A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it.” *See also Jones v. State*, 798 So.2d 1241, 1247-48 (Miss. 2001), relying on *Terry v State*, 252 Miss. 479, 173 So.2d 889, 891 (1965) (“The sheriff had no right to arrest defendant unless it was evident to him at the time that some breach of the peace was committed in his presence.”).

8. Criminal statutes must be strictly construed against the State and liberally in favor of the accused. *Coleman v. State*, 947 So.2d 878, 881 (Miss. 2006). The basic doctrines of statutory construction are set forth and fully supported in *Gilmer v State*, *supra*, 955 So.2d at 841: “Judicial constructions not construing statutes in favor of the offender violate fundamental principles of due process [citations omitted]. Finally, any [a]mbiguities concerning the ambit of criminal statutes should be resolved in favor of lenity. [citations omitted].” (Diaz, J. dissenting).

WHEREFORE, for the reasons stated in this Motion to Dismiss, Defendant Adam Mueller requests this Honorable Court to schedule a hearing on his motion and, thereafter, being advised on applicable constitutional, statutory and case law, to DISMISS the affidavit filed by the state in this cause because it fails to allege an offense cognizable under the laws of the State of Mississippi.

WITNESS MY SIGNATURE on this the 5<sup>th</sup> day of November, 2009.

RESPECTFULLY SUBMITTED,

BY:   
MICHAEL V. CORY, JR.

OF COUNSEL:

MICHAEL V. CORY, JR. (MSB#9868)  
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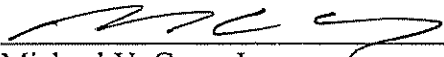
**CERTIFICATE OF SERVICE**

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M. Wayne Thompson, Esq.  
Post Office Box 6509  
Laurel, MS 39441

Donna Avila, Clerk  
Jones County Justice Court Clerk's Office  
Post Office Box 1997  
Laurel, MS 39441

THIS the 5<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Michael V. Cory, Jr.