

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2009-2010

1081306

Ex parte Mario Dewayne Acoff

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS**

(In re: Mario Dewayne Acoff

v.

State of Alabama)

**(Jefferson Circuit Court, Bessemer Division, CC-03-828.60;
Court of Criminal Appeals, CR-08-0873)**

LYONS, Justice.

Mario Dewayne Acoff was convicted in September 2004 of first-degree robbery; he was sentenced to 22 years in prison.

1081306

On direct appeal, the Court of Criminal Appeals affirmed his conviction and sentence, without an opinion. Acoff v. State, 926 So. 2d 1085 (Ala. Crim. App. 2005) (table). This Court denied his petition for a writ of certiorari, without an opinion. Ex parte Acoff, 946 So. 2d 547 (Ala. 2005) (table).

On December 10, 2008, Acoff filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., alleging that the trial court was without jurisdiction to render the judgment or to impose the sentence in his case because, he said, it had failed to swear in the members of the jury venire or the petit jury. After the State filed a response, the trial court dismissed Acoff's petition. The Court of Criminal Appeals affirmed the order dismissing Acoff's Rule 32 petition, without an opinion. Acoff v. State (No. CR-08-0873, May 22, 2009), ___ So. 3d ___ (Ala. Crim. App. 2009) (table). Acoff then petitioned this Court for certiorari review. We granted his petition, and we affirm.

In its unpublished memorandum, the Court of Criminal Appeals stated: "A portion of the record provided by Acoff refutes his contention" that the trial court exceeded its discretion in dismissing his petition, noting that an entry on

1081306

the case-action summary dated August 30, 2004, states: "'...[j]ury duly selected and sworn.'" (Quoting case action summary.) The Court of Criminal Appeals concluded: "Here, Acoff's allegation is clearly refuted by the record; therefore, summary dismissal was appropriate."

Acoff presented the following facts in his petition for certiorari:

"[Acoff] submits that the Case Action Summary Sheet, [Petitioner's Exhibit-A, (C. 25)], tends to reflect that the petit jury was duly selected and sworn [on] August 30, 2004; however, the Court Reporter's Transcript, (C. 29-30), of those proceedings affirmatively reflect that [on] that day (August 30, 2004), at 1:45PM, the jury venire entered the courtroom and voir dire examination of the venire was conducted and the jury was selected and seated. (C. 28-29)

"In fact, the Reporter's Transcript, [Petitioner's Exhibit-B, (C. 29-30)], reflects that on that day, August 30, 2004, the Trial Court addressed the [petit] jury in the following:

"'Your [sic] are the jury that's going to be hearing this case; all right? I appreciate your patience and attentiveness, your willingness to serve. I am going to give you sort of a thumbnail sketch of how we are going to proceed tomorrow, and then I am going to excuse you for the day as well. So, first thing in [t]he [morning], I will swear you all in as jurors; okay? After that, both sides will have an opportunity to make what we call opening statements.'" (R. 10-11)

1081306

"Moreover, the Reporter's Transcript, [Petitioner's Exhibit-B, (C. 32-33)], reflects that on the following morning, August 31, 2004, the Trial Court, again, failed to administer the oath she commented on the previous evening: instead, at 10:41AM, the Trial Court informed the jury that the proceedings would begin with opening statements. The Trial Court addressed the jury in the following:

"'As I explained to yesterday, procedurally, the first thing that we would do this morning is have opening statements. The State goes first, and then the defendant goes; okay?' [R. 55-56]"

Acoff's Verified Statement of Facts, pp. 1-2 (emphasis Acoff's).

Acoff contended in his petition for certiorari review that the quoted portion of the Court of Criminal Appeals' unpublished memorandum conflicts with authority holding that where there is a conflict between an entry on the case-action summary ("a minute entry") and the court reporter's transcript, the action must be remanded for the trial court to resolve the discrepancy in the record. He argues that because the transcript from August 30 recites that the jurors will be sworn on the next day and because the transcript from August 31 shows the first proceeding as the opening statements, then the transcript is in conflict with the minute entry of August 30 reciting the fact that the jurors were sworn. Because of

1081306

that conflict, he argues, the trial court should have conducted an evidentiary hearing.

Acoff's argument assumes that the transcript must reflect that the jury was sworn in order to establish that that has taken place. But in Gardner v. State, 48 Ala. 263 (1872), this Court held that a minute entry stating that the jury was sworn is sufficient to allow this Court to presume that the jury was properly sworn. See also Vaughn v. State, 236 Ala. 442, 445, 183 So. 428, 430 (1938), relying on Gardner ("The record discloses that the jury was 'sworn according to law,' and suffices in this respect (Gardner v. State, 48 Ala. 263); and it also appears the witnesses were likewise duly sworn.").

The Court of Criminal Appeals summarized the law in this area in Dyson v. State, 722 So. 2d 782, 785 n.3 (Ala. Crim. App. 1997):

"This Court has carefully reviewed both the trial transcript and the clerk's record, including the minute entries on the case action summary sheets and the jury verdict forms, and there is no indication that the jury was sworn. See Tarver v. State, 500 So. 2d 1232, 1242 (Ala. Cr. App.), aff'd, 500 So. 2d 1256 (Ala. 1986), cert. denied, 482 U.S. 920, 107 S. Ct. 3197, 96 L. Ed. 2d 685 (1987) ('[a] minute entry is deemed to be a sufficient showing that the oath was administered'); Porter v. State, 520 So. 2d 235, 237 (Ala. Cr. App. 1987) ('statements in the record such as "upon their

oaths" are sufficient to show that a jury was sworn'); McGruder v. State, 560 So. 2d 1137, 1142 (Ala. Cr. App. 1989) ('[a]lthough the trial transcript does not indicate that the jury was sworn after the selection process, both the judgment entry and the case action summary state that the jury was "duly empaneled, sworn and charged by the Court according to law"'). (Emphasis in original.)"

We conclude that the silence of the transcript as to the swearing of the jury is immaterial in light of the specific minute entry on August 30 indicating that the jury was sworn. Moreover, the minute entry is presumed correct in the absence of a timely postjudgment motion raising that issue. See Armstead v. State, 57 Ala. App. 459, 462, 329 So. 2d 150, 152 (Ala. Crim. App. 1976):

"While the failure to properly empanel the jury as required by law may be raised by motion for new trial, Fowler v. State, 261 Ala. 262, 74 So. 2d 512 [(1954)], unless there is such challenge made and ruling invoked in the trial court, then the minute entry in this respect will be deemed to be correct. Gardner v. State, 48 Ala. 263 [(1872)]; Vaughn v. State, 236 Ala. 442, 183 So. 428 [(1938)]."

(Emphasis added.) Acoff did not file a postjudgment motion; therefore, the minute entry is presumed correct.

Because there is no conflict between the transcript and the case-action summary, we affirm the judgment of the Court of Criminal Appeals.

1081306

AFFIRMED.

Cobb, C.J., and Stuart, Bolin, and Murdock, JJ., concur.