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**FILED**

MAY 5 1967

BESSIE BUFFALOE, Clerk

ROBERT L. KERNES

v.

STATE OF TENNESSEE

For Plaintiff in Error:

Harry U. Scruggs, Jr.  
J. E. Madden  
M. A. Hinds  
Memphis, Tennessee

For the State:

Edgar P. Calhoun  
Assistant Attorney General  
Phil M. Canale, Jr.  
District Attorney General

SEELBY CRIMINAL

Hon. W. Preston Battle, Judge.

OPINION

Kernes was convicted of carrying a pistol and fined \$50.00 and sentenced to eleven (11) months and twenty-nine (29) days in the Shelby County Workhouse in one case, and sentenced to serve two years in the State penitentiary in another case for the possession of burglary tools. From these two convictions he has seasonably appealed, briefs have been filed, arguments heard, and, after reading this record and considering the matter, we think the record is in such a garbled condition that it is impossible to tell heads or tails about the situation so that it would be fair to either the defendant or the State to render a decision thereon. For this reason the judgments below are reversed and the cause is remanded for a new trial.

Briefly, these two cases were tried together, the defendant, Kernes, being indicted in Case No. 4724 for carrying a pistol, and Kernes and a man named James W. Tutor were jointly indicted in Case No. 4725 for possessing burglary tools. In the record there is also a copy of another indictment which charges a man named Thelma Roy Tutor with possessing burglary tools. This indictment is No. 4836. The minutes of the court indicate that cases 4724 and 4725 were tried jointly in the present proceedings. The bill of exceptions shows that Kernes entered pleas to both 4724 and 4725. The bill of exceptions does not show that the co-defendant entered a plea to the indictment in 4725, but the technical record does show that both defendants were on trial.

This statement is relevant because the entire record shows that Thelma Roy Tutor was on trial in Case No. 4725, when as a matter of fact James W. Tutor was named in the indictment. After the State had presented its case both Thelma Roy Tutor and James W. Tutor testified for the defense. A clerk of the court testified that it was James W. Tutor who was actually named in the indictment. Upon motion of the defendant for a directed verdict as to Thelma Roy Tutor, the trial judge granted a mistrial as to Thelma Roy Tutor but did not direct a verdict.

The bill of exceptions is styled a "narrative bill of exceptions" on the cover page, although as a matter of fact it is

in question and answer form. There are places in the record where it appears that the court reporter experienced difficulty with his recording equipment. This information is stated because, as we have said before, the record is in such a garbled condition one reading it can't tell anything about it.

For these reasons we do not deem it advisable or necessary to comment on the various assignments made in this record. In looking at it in one way, clearly, there was no justification for a search wherein a pistol was found, nor is there any evidence to show that this defendant was guilty of possessing these burglary tools, but the record might be looked at from a different standpoint and there might be other evidence which is left out which caused the trial judge to rule as he did. It is shown that the jury was out when most of the evidence along different lines was given. There is nothing in this record to show any incidents when the jury was in whether there was sufficient evidence to convict this man. It is for this reason that the case is reversed and remanded for a new trial.

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Hamilton S. Burnett, Chief Justice.