

THE STATE OF ALABAMA

VS.

BERNICE MALONE,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

AT LAW.

NUMBER 469.

DEMURRER.

Now comes the Defendant in the above entitled cause, by his attorney, and demurs to the indictment filed against him in this cause and as grounds therefor sets down and assigns, separately and severally, the following:

1. It charges no offense known to the law.
2. It affirmatively appears from the indictment that it includes offenses not prohibited by the law under which the indictment is drawn.
3. The averments of the indictment are so comprehensive that it covers acts not denounced as a crime by the statute under which the indictment is drawn.
4. The averments of the indictment are so vague, indefinite and uncertain that it will not support a judgment.
5. The averments of the indictment are so vague, indefinite and uncertain that it does not inform the defendant of the nature and cause of the accusation against him.
6. It affirmatively appears from the indictment that it does not charge the offense in the language of the statute under which it is drawn or specifically set forth the acts constituting the alleged offense.

J. T. Stackburn
Attorney for Defendant.

I, Ralph L. Jones, Solicitor of the 21st Judicial Circuit of Alabama, hereby accept service of the within Citation of Appeal.

This 25 day of April, 1940.

RALPH L. JONES,
Solicitor.

CIRCUIT COURT
BALDWIN COUNTY, ALA.

THE STATE OF ALABAMA,
Plaintiff,

vs. { Citation in Appeal

BERNICE MALONE,
Defendant.

Issued day of 193

Moore Ptg. Co., Bay Minette

The State of Alabama }
 Baldwin County---Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA--GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the 24th day of
April, 1940, Monday in 193

in a certain cause in said Court wherein THE STATE OF ALABAMA

is Plaintiff, and BERNICE MALONE

is Defendant, a verdict judgment was rendered against said

BERNICE MALONE

to reverse which verdict the said BERNICE MALONE

has on this day applied for and obtained from this office an APPEAL, returnable to the
Fall, 1941 Term of our COURT OF APPEALS Court of the State of Alabama, to

be held at Montgomery, on the day of , 1941 next,

and the necessary bond having been given by the said

BERNICE MALONE, principal, with L. G. Crosby and

W. D. White,

 sureties,

Now, You Are Hereby Commanded, without delay, to cite the said

RALPH L. JONES, Solicitor of the 21st Judicial Circuit of Alabama,

on attorney, to appear at the
Fall, 1941, Court of Appeals
Term of our said Supreme Court, to defend against the said
 Appeal, if he thinks proper.

R. S. Duck

WITNESS, F. W. Richerson, Clerk of the Circuit Court of said County, this 24th

day of April, , A. D., 1940.

Attest:

R. S. Duck

Clerk.

Charge A.

The Court charges the jury that if you believe the evidence in this case beyond a reasonable doubt, you will find the defendant guilty as charged in the indictment.

J. W. Hare

Judge

Given

Received in office

4/12

1934

Executed this

4/12

1934

By

Serving

R. A. Yarn

4/12/40 P

R. A. Hail Jr

" Yarn - P

W. B. Kennedy mailed

35
ORIGINAL

For

No. 469

Page

THE STATE OF ALABAMA
BALDWIN COUNTY

Circuit Court

THE STATE

Vs.

BERNACE MALONE

STATE SUBPOENA

Issued this _____ day of

_____, 193____.

W. B. Stewart
Sheriff.

Clerk.

THE STATE OF ALABAMA

Baldwin County.

CIRCUIT COURT

SUB. No. _____

Case No. 469Term, Spring, 1940, 193__

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You are Hereby Commanded to Summon R. A. York, W. S. Kennedy, and
R. A. Hail, Jr.

personally to be and appear before the Circuit Court, to be holden for Baldwin County, at the Court House thereof, in Bay Minette, on the 22nd day of April, 1940, 193__, at 8:30 a.m., and from day to day of said term and from term to term thereafter until discharged, to give evidence and the truth to speak in behalf of THE STATE in a prosecution now pending in said Court, wherein the

State of Alabama is Plaintiff and Bernace Malone

_____ Defendant, and have you then and there this Writ, with your endorsement thereon.

Witness my hand this 12th day of April, 1940 A. D., 193__.

R. S. DUCK, Clerk.

Appeal Bond.

No.

469

THE STATE OF ALABAMA,
BALDWIN COUNTY

Court

SHERIFF'S OFFICE

THE STATE

VS.

Sheriff's Appearance Bond

Amount of Bond, \$

Filed

193

Clerk.

Moore Printing Co.

THE STATE OF ALABAMA, }
BALDWIN COUNTYWe, T.B. Malone, as

principal, and undersigned as sureties, agree to pay THE STATE OF ALABAMA, the sum of

One Hundred Fifty DOLLARSunless the said T.B. Malone appear at theApril Term, 1940 of the Circuit Court of Baldwin County, Alabama

and from term to term thereafter until discharged by law, to answer a criminal prosecution for the offense

of Violating Highway Law.

We hereby waive as to all amount that may become due hereunder the benefit of all laws exempting personal property from levy and sale under execution or other process for the collection of debt, by constitution or laws of the State of Alabama, and we hereby severally certify that we have property over and above all debts, liabilities and exemption to the amount of the above bond.

B. Malone (Seal)
Ch. Smith (Seal)
J. H. Hester (Seal)
(Seal)

Taken and approved this the 10 day of Feb 1940
W.R. Stuart Sheriff

By _____ Deputy Sheriff.

No. _____

THE STATE OF ALABAMA,
BALDWIN COUNTY

_____ Court

SHERIFF'S OFFICE

THE STATE

VS.

Sheriff's Appearance Bond

Amount of Bond, \$ _____

Filed _____ 193_____

Clerk.

Moore Printing Co.

SHERIFF'S APPEARANCE BOND

Moore Ptg. Co., Bay Minette

THE STATE OF ALABAMA, }
BALDWIN COUNTY

We, Bernard Malone, as
principal, and undersigned as sureties, agree to pay THE STATE OF ALABAMA, the sum of
Fifty DOLLARS

unless the said Bernard Malone appear at the

April Term, 1940 of the Circuit Court of Baldwin County, Alabama
and from term to term thereafter until discharged by law, to answer a criminal prosecution for the offense

of Operating Motor Vehicle without proper tag

We hereby waive as to all amount that may become due hereunder the benefit of all laws ex-
empting personal property from levy and sale under execution or other process for the collection of debt,
by constitution or laws of the State of Alabama, and we hereby severally certify that we have property over
and above all debts, liabilities and exemption to the amount of the above bond.

Bernard Malone (Seal)

[Signature] (Seal)

____ (Seal)

Taken and approved this the

19

day of

Apr

1940

W R Bunt Sheriff

By _____ Deputy Sheriff.

Recorded

No. _____

THE STATE OF ALABAMA
Baldwin County

CIRCUIT COURT

APRIL Term, 1940

THE STATE

vs.

Bernice Malone

INDICTMENT

Operating Motor Vehicle without License
Tag. No Prosecutor

WITNESSES:

R. A. York

W. S. Kennedy

R. A. Hail, Jr.

GRAND JURY NO. 35

A TRUE BILL.

William A. Bryant
Foreman Grand Jury.

Filed in open Court and in the presence of
the Grand Jury on the 13 day of

April, 1940.
Resdick, Clerk.

Presented in open Court to the presiding
Judge by the Foreman of the Grand Jury, in
the presence of 12 other Grand Jurors.

Resdick, Clerk.

We the Jury find the defendant Bernice
Malone guilty as charged with operating
a motor vehicle without license tag
and fix her ~~at~~ fine at one cent
and cost

Signed

W. A. Bryant
Foreman

THE STATE OF ALABAMA } CIRCUIT COURT, APRIL TERM, 1940
Baldwin County

The Grand Jury of said County charge that before the finding of this indictment Bernace Malone, alias Fernice Malone, did operate a motor vehicle upon a public highway in Baldwin County, Alabama, without having attached thereto and plainly visible on both the front and rear end of such motor vehicle a lawful license tag or license plate, as required by law;

against the peace and dignity of the State of Alabama.

Ralph L. Jones

Solicitor of the Twenty-first Judicial Circuit.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
AT LAW. NUMBER 489.

STATE OF ALABAMA
vs.
BERNICE MALONE,
Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF
MOTION FOR A NEW TRIAL.

This is a case commenced by indictment which reads as

follows:

"THE STATE OF ALABAMA)
BALDWIN COUNTY)
The Grand Jury of said County charge that before the
finding of this indictment Bernice Malone, alias Bernice
Malone, did operate a motor vehicle upon a public high-
way in Baldwin County, Alabama, without having attached
thereto and plainly visible on both the front and rear
end of such motor vehicle a lawful license tag or license
plate, as required by law; against the peace and dignity
of the State of Alabama.

Ralph L. Jones
Solicitor of the Twenty-first
Judicial Circuit."

Defendant demurred to the indictment by Demurrer which

reads as follows:

"THE STATE OF ALABAMA
vs.
BERNICE MALONE,
Defendant.

DEMURRER.
Now comes the Defendant in the above entitled cause,
by his attorney, and demurs to the indictment filed
against him in this cause and as grounds therefor sets
down and assigns, separately and severally, the follow-
ing.

1. It charges no offense known to the law.
2. It affirmatively appears from the indictment
that it includes offenses not prohibited by the law

under which the indictment is drawn.

3. The averments of the indictment are so comprehensive that it covers acts not denounced as a crime by the statute under which the indictment is drawn.

4. The averments of the indictment are so vague, indefinite and uncertain that it will not support a judgment.

5. The averments of the indictment are so vague, indefinite and uncertain that it does not inform the defendant of the nature and cause of the accusation against him.

6. It affirmatively appears from the indictment that it does not charge the offense in the language of the statute under which it is drawn or specifically set forth the acts constituting the alleged offense.

J. B. Blackburn
Attorney for Defendant.

The Defendant's Demurrer was overruled by the Court, the case tried and the general charge was given at the request of the State but the general charge requested by the Defendant was refused. No witnesses testified for the Defendant.

The Defendant, within the time prescribed by law, filed a motion for a new trial which reads as follows:

"STATE OF ALABAMA
V.
BENJAMIN MALONE,
Defendant.
AT LAW. NUMBER _____
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

MOTION FOR NEW TRIAL.

Now comes the Defendant in the above entitled cause and moves the Court to set aside the jury's verdict in said cause and grant him a new trial, and as grounds therefor sets down and assigns, separately and severally the following:

1. The jury's verdict was contrary to law.
2. The jury's verdict was contrary to the evidence.
3. The Court erred in overruling defendant's demurrer to the indictment.
4. The Court erred in giving the general affirmative charge requested by the State.
5. The Court erred in refusing the general affirmative charge requested by the Defendant.

6. The Court erred in refusing to allow the Defendant to cross examine the State's witnesses about the date of the offense as shown in the original affidavit filed in the said cause charging that the offense was committed on a different date from that to which they testified.

7. The Court erred in sustaining the State's objection to a question asked by the Defendant of each of the witnesses for the State of Alabama, which was in substance as follows: "Did the truck that the Defendant was operating have attached thereto and plainly visible on both the front and rear end thereof, a license tag or license plate as prescribed and furnished by the State Tax Commission at the time the owner or operator purchased his license?"

T. B. Blackburn
Attorney for Defendant.

POINTS AND AUTHORITIES.

1. In all criminal prosecutions the accused has a right to demand the nature and cause of the accusation. Section 6, Constitution 1901.

2. An indictment or affidavit charging one with the violation of the prohibition law does not designate any distinct or specific offense by name, or as known in common, and is void. *State vs. State*, 230 Ala. 320, 182 So. 130.

3. When the averments of an indictment charging an offense under a statute are such as to be comprehensive enough to cover and not denounced as a crime by the statute, an element of uncertainty is injected into the indictment and a demurrer raising this question should be sustained. *Mastors vs. State*, 180 So. 113.

4. Where a statute provides no form of indictment the indictment must follow the language or substantially the language of the statute that defines the offense and the indictment to support a judgment on conviction must aver every fact necessary to an affirmation of guilt and held conclusions will not suffice. *Mastors vs. State*, *supra*, *Holt vs. State*, 18 Ala. App. 399, 78 So. 315.

5. An indictment must state the facts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the Court, on conviction, to pronounce the proper judgment. *Likos vs. State*, 182 So. 81, *Jackson vs. State*, 182 So. 83.

ARGUMENT.

The Court will possibly recall that when the Defendant's Demurrer in this case was argued, that it was done in open court after the case had been called for trial, therefore, we respectfully submit that because of the necessity for a hurried argument the Court did not have an opportunity to carefully consider and understand the seriousness of the question presented by the Defendant's Demurrer and due to the limited time did not have an opportunity to fully study the Act under which the indictment is drawn, the allegations of the indictment and the grounds of the Defendant's Demurrer pointing out the defects in the indictment and was therefore filed into error in overruling Defendant's Demurrer when this demurrer should have been sustained.

We insist with all the power we have that the indictment is defective, that these defects were pointed out by the Defendant's Demurrer, that the Demurrer should have been sustained, that because it was not sustained but was overruled the Defendant is entitled to a new trial.

The indictment appears to have been drawn under Section 1 of an Act of the Legislature approved September 14, 1935, Acts 1935, pages 1100-1101, which said Section reads as follows:

"Section 1. That each and every motor vehicle operator who or which after Nov. 15, 1935, operates a motor vehicle upon any city street or other public highway or in this State shall at all times keep attached and plainly visible on both the front and rear end of such motor vehicle a license tag or license plate as prescribed and furnished by the State Tax Commission at the time the owner or operator purchases his license."

There is no statutory form for an indictment in such

cases, therefore the allegations of the indictment, if the same is to be valid, must follow the wording of the statute. This was not done.

The last part of Section 1 of the Act cited above

reads as follows:

" - - - on both the front and rear end of such motor vehicle a license tag or license plate as prescribed by the State Tax Commission at the time the owner or operator purchases his license."

The indictment does not charge the violation of this

statute and ends as follows:

" - - - on both the front and rear end of such vehicle a lawful license tag or license plate as required by law." (emphasis ours)

Under the indictment as drawn every misdemeanor con-

tained in our statutes applicable to the use of unlawful or improper tags is included. In the case of *Sister vs. State*,

supra, the Court said:

"We are impelled to hold that a blanket charge of violation of the prohibition law of Alabama as it now exists does not designate any distinct or specific offense by name or as known in common parlance. It is equally applicable to any one of numerous distinct offenses, some misdemeanors, some felonies, each depending on its own state of facts. A charge of violating the law of the road, or the public health laws, would be equally specific. We must, therefore, hold the affidavit void."

There is no difference in charging that the defendant

violated the prohibition laws, that he violated the rules of the road, that he violated the public health laws or that he operated a motor vehicle without a lawful tag. An affidavit or indictment charging the offense in such a loose or general way does not meet the requirements of law and is void. These

defects were pointed out by Defendant's Demurrer and it should be sustained.

There are many statutes in Alabama making it a misdemeanor to use improper tags, and for the sake of brevity, we will only call the Court's attention to a few of them.

1. If a party does not take out a license for operating a motor vehicle, it is the duty of the license inspector to cite him. If he fails to take out a tag criminal prosecution may then be commenced and the inspector shall be paid 15% of the fine or penalty imposed, which fine shall not exceed \$100.00 but the defendant may also be sentenced to hard labor for the county for not more than six months. Revenue Code 1935, pages 303, 304, 305.
2. It is a violation of the law to mutilate a tag for the purpose of deception and should a party use such tag he should be fined twice the amount of the license required for the motor vehicle on which the tag is used and be required to purchase a proper tag. Revenue Code 1935, page 275.
3. It is a violation of the law to transfer a tag issued for one automobile to another and use it thereafter, in which case the fine is not less than \$20.00 or more than \$100.00 for each offense. Revenue Code 1935 pages 270-71.
4. It is a misdemeanor to display a tag on a truck or semi-trailer except in the place provided by law and fine in such cases shall not exceed \$25.00 for each offense. Revenue Code 1935, page 269.

We think it will be unnecessary to cite other offenses but if in a proper case the Court gave the general charge for the State or if the Defendant entered a plea of guilty in a case based on an indictment such as we have here, how would the jury be charged or what penalty would be inflicted?

In the case of *Mastoras vs. State*, supra, the Court

held:

"The statute provides no form for an indictment under this section, and in such cases it is the rule that the indictment must follow the language or substantially the language of the statute that defines the offense, and the indictment to support a judgment of conviction must aver every fact necessary to an affirmation of guilt, and the statement of said divisions will not suffice. *Holt v. State*, 18 Ala. App. 399, 78 So. 315."

"Wherever the averments of the indictment are such as to be comprehensive enough to cover an act not denounced as a crime by the statute, injecting into the indictment such uncertainty as to render it defective, and insufficient to support the judgment, a demurrer raising this question should be sustained. *Bell v. State*, 18 Ala. App. 100, 75 So. 848."

"It is declared to be a general rule as laid down in 21 C. J. p. 703 (257) c, and supported by unanimous authority, that an indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting same. The general rule is that the charge must be so laid in the indictment or information as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. And nothing is to be left to implication or intendment, or to conclusion. And an indictment charging the offense in the alternative which includes one alternative not denounced by statute does not meet this requirement."

In the *Mastoras* case the defendant was charged with operating a gambling device contrary to law but the indictment did not describe the device so operated. The Supreme Court in considering the matter on certiorari prescribed a form of indictment to use in such cases and this form set out the type of gambling device so operated. This rule should have been

followed by the State in drawing the indictment in the present case and instead of charging the Defendant with operating a motor vehicle without a lawful tag as required by law, he should have been specifically charged with some distinct violation of the law and the exact violation should have been set out in the indictment. Without such allegations the indictment is defective and Defendant's Demurrer raising these questions should have been sustained.

For reasons stated above the Court erred in allowing the State to prove over Defendant's objection that Defendant operated a motor vehicle in the year 1940 with a 1939 tag thereon and the Court also erred in giving the general charge at the State's request. It further erred in refusing to give the general charge at the Defendant's request and erred in not allowing the Defendant to prove by cross examination of the State's witnesses that he had complied with the provisions of the act under which the indictment was drawn and that he was so complying at the time of his arrest.

We earnestly request the Court to carefully read the authorities cited in this brief and when the Court has read these authorities we confidently believe that it will grant Defendant's Motion for a New Trial on one or more of the grounds contained therein and we respectfully submit that all of these grounds are well taken. Any other ruling in this case except one granting Defendant's Motion for a New Trial would deprive the Defendant of his just rights and force him to pay the fine and costs in this case or incur the expense of an appeal.

Respectfully submitted,

J. T. Johnson

Attorney for Defendant.

I hereby certify that I mailed a copy of this Brief
by United States Mail, postage prepaid, to Honorable R. L.
Jones, Circuit Solicitor, Monroeville, Alabama, on September

18, 1940.

J. T. Johnson

Attorney for Defendant.

DEMAND FOR JURY TRIAL.

THE STATE OF ALABAMA

VS.

BERNICE MALONE,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

AT LAW.

NUMBER 469.

THE STATE OF ALABAMA

VS.

BERNICE MALONE,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

AT LAW. NUMBER 469.

DEMAND FOR JURY TRIAL.

Now comes the Defendant in the above entitled cause,
by his attorney, and demands a trial of said cause by jury.

J. T. T. Blashum
Attorney for Defendant.

4
DEMURRER.

THE STATE OF ALABAMA

VS.

BERNICE MALONE,

Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW.

NUMBER 469.

Filed April 24/1946
Induct
Clark