IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01635-COA

TIMOTHY DUPUIS **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

APPELLANT'S BRIEF

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Name:	Timothy Dupuis,
Connection to Case:	Petitioner-Appellant
Interest:	Claim for post-conviction collateral relief.
Name:	Dewitt Bates, Jr., District Attorney
Connection to Case:	Prosecuting Attorney
Interest:	State's interest.
Name:	Jim Hood, Mississippi Attorney General
Connection to Case:	Attorney General
Interest:	State's interest.

Attorney of Record for Petitioner-Appellant:

David Wade
Attorney at Law

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STATEMENT OF ISSUES

Did of an actual conflict of interest exist? If so, did it adversely affect the performance of Attorney Joseph Fernald?

STATEMENT OF THE CASE

On June 19, 2001, the Appellant, Timothy Dupuis, ("Dupuis"), was indicted on the charge of sexual battery involving a minor. [R. 19]. Dupuis was twice tried by a jury in the Circuit Court of Lincoln County, Mississippi, Cause No. 01-159 MS. Dupuis was represented in both trials by attorney, Joseph A. Fernald, Jr., ("Attorney Fernald"). The first trial ended in a hung jury and mistrial. The second trial resulted in Dupuis being convicted of molestation under Miss. Code Ann. § 97-5-23. On January 9, 2002, the trial court sentenced Dupuis to 15 years imprisonment. [R. 21].

Dupuis filed a direct appeal from his conviction and the Court of Appeals affirmed the conviction in an Opinion filed June 25, 2003, in the case of *Timothy Dupuis v. State of Mississippi*, Court of Appeals of the State of Mississippi, No. 2002-KA-00183-COA. [R. 23]. Dupuis filed a petition for rehearing which was denied by the Court of Appeals in an order filed on May 11th, 2004, in the case of *Timothy Dupuis v. State of Mississippi*, Court of Appeals of the State of Mississippi, No. 2002-KA-00183-COA. The Court of Appeals substituted its June 25, 2003, Opinion with the Opinion dated May 11, 2004. [R. 29].

Mr. Dupuis has been represented by Attorney Fernald throughout the criminal

proceedings, including trial and appeal. At all times relevant hereto, Attorney Fernald was employed as the City Attorney for the City of Brookhaven, Mississippi.

At trial, the prosecution called three (3) police officers employed by the City of Brookhaven to testify at trial. Specifically, the testifying police officers were (1) Lieutenant Thomas Christopher Case; (2) Captain Larry Warren; and (3) Assistant Chief of Police, Noland Jones. [R. 41-68].

Dupuis claims he was denied a fair trial because his attorney's performance was adversely affected by an actual conflict of interest when Attorney Fernald, while employed by the City of Brookhaven as City Attorney, simultaneously represented Dupuis as a criminal defendant in the Circuit Court of Lincoln County, Mississippi, in a case in which three City of Brookhaven police officers testified for the prosecution. [R.5-17].

On November 1, 2004, Mr. Dupuis filed an Application For Leave to File Motion For Post-Conviction Relief with the Mississippi Supreme Court, Case No. 2004-M-02177. In an Order entered February 10, 2005, the Mississippi Supreme Court granted Mr. Dupuis' Application For Leave to File Motion For Post-Conviction Relief and directed the trial court to conduct an evidentiary hearing. On March 21, 2005, Mr. Dupuis filed his Motion for Post-Conviction Relief. [R. 1; R.E. 1]

On July 24, 2006, the Circuit Court of Lincoln County, the Honorable Michael M. Taylor, presiding, held an evidentiary hearing on Dupuis' Motion for Post-Conviction Relief. After hearing the evidence and testimony, Judge Taylor rendered the Court's opinion on the record and denied Dupuis' Motion for Post-Conviction Relief. [R.E. 3, tr.

p. 133]. For the Court, Judge Taylor stated the following findings of fact and opinion of the Court, to wit:

> So all that to say the Motion for Post-Conviction Relief will be denied. The Court -- I want to make clear that my factual findings are that a conflict did exist, an actual conflict existed. But I do not find that Mr. Dupuis met his burden of proving prejudice. And I find that he in fact did waive his conflict of interest, based on the testimony of Ms. Jones, Judge Smith, and Mr. Fernald. So the motion will be denied and that will conclude this hearing.
>
> [R.E. 3, tr. p. 133].

On September 11, 2006, the Court entered its written Order Denying Motion For Post-Conviction Relief. [R.1; R.E.1]. On September 20, 2006, Dupuis filed his Notice of Appeal. [R. 2; R.E.1]. This appeal from the Order Denying Motion For Post-Conviction Relief follows.

Statement of Facts

An actual conflict of interest existed when Attorney Fernald, while employed by the City of Brookhaven as City Attorney, simultaneously represented Dupuis as a criminal defendant in the criminal trial. [R.E. 3, tr.133]. Dupuis denies that he made any knowing or intelligent waiver of his right to conflict-free counsel. [R.78].

Mississippi Bar Ethics Opinion No. 116 was rendered on June 5, 1986, and Mississippi Bar Ethics Opinion No. 224 was rendered on April 10, 1995. [R. 71-76]. As City Attorney, Attorney Fernald, was prohibited from representing Dupuis in the

criminal trials, in the absence of a knowing and intelligent waiver. [R. 71-76]. Attorney Fernald has been licensed to practice law in the State of Mississippi since 1987. [R.E. 3, tr. 5]. Attorney Fernald has served as the City Attorney for the City of Brookhaven since July of 1997. [R.E. 4]. Attorney Fernald testified that prior to the Motion for Post-Conviction Relief being filed, he had been unaware of Mississippi Bar Ethics Opinion No. 116 and Mississippi Bar Ethics Opinion No. 224. [R.E. 3, tr. 5-6].

Dupuis' First Criminal Trial

The first criminal trial was a 2-day trial which started on September 11, 2001, and ended the next day with a hung jury. [R.E. tr. 6]. There is apparently no record or transcript of any waiver of the conflict of interest made by Dupuis during the first trial or its pre-trial proceedings.

Dupuis' Second Criminal Trial

Dupuis' second criminal trial was held on January 3 and 4, 2002. At the second trial, Lt. Case testified that he and Cpt. Warren were dispatched to the King's Daughter Hospital in Brookhaven regarding a "sexual assault" and met with the parents of the alleged victim at the hospital. [R. 42]. Lt. Case stated that he is required to make an investigation report and that he, in fact, prepared the police report of investigation regarding the alleged incident directly from the hearsay statements purportedly made by

the alleged victim's mother, and indirectly from other hearsay statements purportedly made by the alleged victim to Cpt. Warren. [R. 42-44, 50]. The State moved to admit Lt. Case's police report into evidence. Attorney Fernald did not object. [R. 43]. The trial court admitted Lt. Case's police report into evidence. [R. 43].

Lt. Case went on to testify on direct examination that he and Cpt. Warren followed the alleged victim's father to the office of Mayfab, which was Dupuis' employer, to prevent a possible altercation between the alleged victim's father and Dupuis, at which time they encountered Dupuis in the office. The police asked Dupuis to leave the office. [R. 44-45]. Lt. Case stated that he had information that Dupuis had left Mayfab in a Camaro. [R. 47-48]. Lt. Case further testified that Asst. Chief Jones had instructed him that he wanted to talk to Dupuis, so Lt. Case and Cpt. Warren went to Dupuis' house where they met Dupuis' two sons. Lt. Case testified they did not find Dupuis at the house, but did find the Camaro. Lt. Case testified that Dupuis' son stated Dupuis may have left in a Bronco. [R. 46-48]. Lt. Case also testified that Dupuis' oldest son denied him entry into the house. [R. 47].

On cross-examination, Attorney Fernald opened the door and lead Lt. Case with a leading questions to the conclusion that when Lt. Case checked the Camaro's hood at Dupuis' house and it was still hot, it suggested to Lt. Case that Dupuis had driven the Camaro from Mayfab to his house. [R. 48]. The prosecutor did not bring up the fact that the Camaro's hood was hot during direct examination. The State did not conduct any re-direct examination of Lt. Case. R. 48]. By bringing up the fact on cross-examination for the first time that the Camaro's hood was still hot, Attorney Fernald unduly and unfairly

prejudiced Dupuis because it could have left the jury with the impression Dupuis was in the house and evading the police. Attorney Fernald's cross-examination of Lt. Case may have revealed an arguably culpable fact not otherwise noticed or known by the prosecutor.[1] Following Attorney Fernald's cross-examination of Lt. Case, the prosecutor did not have any re-direct questions for Lt. Case.

In the second trial the prosecution next called Cpt. Warren to the stand. On direct examination Capt. Warren testified that he too checked the hood on the Camaro and it was warm, and that he saw cigarettes in the Camaro, and from that Cpt. Warren concluded Dupuis was in the house. [R. 55-56]. Attorney Fernald's cross-examination of Cpt. Warren was very limited and of consisted again of only approximately nineteen (19) questions. [R. 48-50]. At no time during the cross-examination did Attorney Fernald even challenge the credibility or weight of Cpt. Warren's opinion that Dupuis was in the house.

Also in the second trial, the prosecution next called Asst. Chief Jones to the stand. Attorney Fernald's cross-examination of Asst. Chief Jones consisted of approximately eighteen (18) questions. [R. 65-68]. In Attorney Fernald's cross-examination of Asst. Chief Jones, the following exchange occurred between Attorney Fernald and Asst. Chief Jones, to wit:

> Q. And he asked you an interesting question.
> Didn't he ask you what can I get for this? Didn't

---

1 The record shows that the prosecutor did in fact bring up the fact the Camaro's hood was hot in direct examination of the state's next witness, Cpt. Warren. [R.].

he ask you?
A. Yes, he did.
Q. That's sort of an unusual question for someone to ask when they don't know what is going on, isn't it?
A. I don't have a lot of people ask me that.
Q. Well, then is it your testimony then that you find that to be some kind of question that is elicits a specific finding on your part? Do you want me to ask it different?
A. I found it's kind of a strange question to - - for him to ask me something like that.
Q. I want to make sure I understand that. He's been told he's been charged with something in jail and you tell him the charge and he asks you, what can I get for that, and you find that to be an usual question for someone to request?
A. I sure did, with the experience I've had with them.
Q. In other words, most people that you would ask probably would know what they were going to get, right?
A. I don' t know.
MR. FERNALD: That's all I have.

[R. 67-68].

The entire re-direct examination of Asst. Chief Jones is set forth below:

REDIRECT EXAMINATION
BY MS. JONES:
Q. Assistant Chief Jones, how many other innocent people that you have questioned have asked

you how much they could get for a charge?
MR. FERNALD: Objection, Your Honor. That calls for a conclusion as to the innocence. It's improper redirect. When he questions them at that point, they're all presumed to be innocent. So I object to the form of the question and the question.
THE COURT: Overruled. You may answer. I think that question was a number. Go ahead and answer.
THE WITNESS: Would you repeat it, please?
BY MS . JONES:
Q. How many innocent people have you questioned who asked you how much they could get for the charge?
A. I don't ever remember one.
Q. You don't ever remember one?
A. No.
Q. In your whole career?
A. Yes.
MS . JONES: No further questions
THE COURT: You may step down.
[R. 68-69].

Hearing on Motion for Post-Conviction Relief

An evidentiary hearing was held July 24, 2006, on Dupuis' Motion for Post-Conviction Relief. At the hearing Dupuis called Attorney Fernald and himself as witnesses. The State called former Circuit Court Judge, Mike Smith, and Deputy District

Attorney Diane Jones, as witnesses.

The record shows Attorney Fernald knew that Asst. Chief Jones filed the initial criminal complaint against Dupuis. [R.E. 3, tr. 21]. Attorney Fernald testified that on September 5, 2001, he met with Dupuis and told him that the Brookhaven Police were not really involved in the case. [R.E. 3, tr. 8]. Attorney Fernald also testified that no actual conflict of interest existed. [R.E. 3, tr. 38]. Attorney Fernald then changed his answer and testified that an actual conflict of interest *did* exist. [R.E. 3, tr. 39].

Attorney Fernald also testified that Dupuis did not make any statement or admission to the police department that would be admitted into evidence as to his guilt or innocence. [R.E. 3, tr. 9]. When Attorney Fernald was asked in direct examination whether he had told Dupuis prior to trial that he would object to Asst. Chief Jones' testimony, Attorney Fernald stated that he didn't tell Dupuis that he would object and he didn't tell Dupuis that he wouldn't object to the testimony of Asst. Chief Jones. [R.E. 3, tr. 13]. However, Attorney Fernald's own transcribed tape recordings contradicts his testimony and shows that he in fact told Dupuis on September 5, 2001, that he would object to Asst. Chief Jones opinion testimony and would impeach his opinion at trial. [R. 97.]

Attorney Fernald denied that he told Dupuis that he would impeach the police officers' testimony. [R.E. 3, tr.15]. Attorney Fernald also stated that he didn't impeach any of the officers because they did not testify to any statements made by alleged victim. [R.E.3, tr. 15]. However, the police report contains the hearsay statements of the alleged victim and her mother. [R. 80].

Judge Smith testified as follows:

> Q. With regard to participating in the waiver process, would you describe for the Court exactly what you did as the judicial officer to insure that Mr. Dupuis, as you allege, made a knowing and intelligent waiver of the conflict?
>
> A. Mr. Fernald went over from A to Z with him.
>
> Q. Let's --
>
> A. Allow me explain my answer, please, sir. I had to ask very little, except to make sure that he knew what he was doing. Which, if I had thought he didn't know what he was doing, I'd have stopped it right then.

[R.E 3, tr. 88].

STANDARD OF REVIEW

Our standard of reviewing a trial court's denial of post-conviction relief is well-stated. "When reviewing a lower court's decision to deny a petition for post-conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is de novo." *Terry v. State*, 755 So. 2d 41 (P4) (Miss. Ct. App. 1999) (quoting *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999)).

The standard of review after an evidentiary hearing in post-conviction relief cases is well-settled: "We will not set aside such a finding unless it is clearly erroneous. Put otherwise, we will not vacate such a finding unless, although there is evidence to support it, we are on the entire evidence left with the definite and firm conviction that a mistake

has been made." *Rochell v. State*, 748 So.2d 103, 109, (Miss.1999), citing *Reynolds v. State*, 521 So.2d 914, 917-18 (Miss.1988).

Where findings of fact are fairly implicit in a trial court's ruling, we will credit those and grant them deference. *Riddle v. State*, 580 So.2d 1195, 1200 (Miss. 1991), citing *Saucier v. State,* 562 So.2d 1238, 1244 (Miss.1990); *Schmitt v. State,* 560 So.2d 148, 151 (Miss.1990); *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss.1983). This rule has limits, legal and logical. We may not credit unspoken findings not fairly inferrable from the trial court's action. *Schmitt v. State,* 560 So.2d at 151; *Tricon Metals & Services, Inc. v. Topp,* 516 So.2d 236, 238 (Miss.1987); *Pace v. Owens,* 511 So.2d 489, 492 (Miss.1987). We do not make up findings just to save a conviction.

SUMMARY OF ARGUMENT

Dupuis claims he did not receive a fair trial. Dupuis denies that he waived the conflict of interest. However, the trial court specifically found that Dupuis did in fact waive the conflict of interest. The trial court did not however find the waiver was "knowing and intelligent." The trial court's finding of waiver is clearly erroneous because it implies the waiver was knowing and intelligent without any evidence to support such an implied finding in the record. Therefore, the appellate court should be left with a definite and firm conviction that the trial court made a mistake when it specifically found that there was in fact a waiver, without determining whether such waiver was knowingly and intelligently given.

The trial court also incorrectly applied the law in this case. The trial court

erroneously concluded that because Dupuis' first criminal trial ended in a hung jury, and because he was convicted of a lesser offense after the second criminal trial, Dupuis received effective assistance of counsel. The trial court conclusion is patently invalid.

ARGUMENT

There Is No Evidentiary Basis For The Implicit Finding That Dupuis Made A Knowing and Intelligent Waiver

The United States Supreme Court has determined "[t]hat the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Holloway v. State of Arkansas,* 435 U.S. 475, 98 S.Ct. 1173 (1978), 435 U.S. at 489, citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967).

In *Littlejohn v. State*, 593 So.2d 20, (Miss. 1992), the Mississippi Supreme Court stated:

"The Court noted that while an accused might "waive his right to conflict-free counsel, ..." "such waivers are not to be lightly or casually inferred and must be knowingly and intelligently made." 580 F.2d at 1259. The Court then held that where a trial judge had notice of an actual conflict of interest:

> [T]he trial judge is under a duty to advise the defendant of his right to separate, independent counsel. *United States v. Boudreaux,* 502 F.2d 557 (5th Cir.1974). In order for a defendant effectively to waive his right to conflict-free counsel, the trial judge should affirmatively participate in the waiver decision by eliciting a statement in narrative form from the defendant in indicating that he fully understands the nature of the situation and has knowingly and intelligently made the decision to proceed with the challenged counsel. *United States v. Garcia,* 517 F.2d 272 (5th Cir.1975); *see also Gray v. Estelle,* 574 F.2d 209, 213 (5th Cir.1978); *United*

States v. Mahar, 550 F.2d 1005 (5th Cir.1977).

593 So.2d at 25.

In the case *sub judice*, the trial court found that Dupuis waived a fundamental and constitutional right, the right to conflict-free counsel. In order for a waiver of the right to be effective, the waiver must be knowing and intelligent. Whether a waiver was made is a question of fact, but whether the waiver is legally effective is a question of law. The trial court made a specific finding of fact that Dupuis waived the conflict of interest. However, the trial court did not make any explicit finding that the waiver was "knowing and intelligent."

There is simply no credible evidence in the record suggesting that Judge Smith complied with the requirements of *Littlejohn v. State*, *supra.*, to secure a narrative from Dupuis indicating that he fully understood the nature of the situation and knowingly and intelligently made the decision to proceed with Attorney Fernald representing him. The trial court did not make any specific finding that the waiver was "knowing and intelligent," and such an unspoken finding is not fairly inferrable from the trial court's ruling denying the Motion for Post-Conviction Relief.

However, Dupuis presented ample evidence proving that Attorney Fernald promised Dupuis that he would at least attempt to object to, and impeach, the police officers' testimony at trial. Attorney Fernald did not do so. Instead, he led the police officers on cross-examination with leading questions, the answers to which suggested Dupuis was not only evading the police, but also that he was guilty because he asked the

question "what can I get for this?"

The Trial Incorrectly Applied the Law in this Case

The trial court erroneously concluded that Dupuis received effective assistance of counsel based on the facts that the first trial ended in a hung jury and the second trial resulted in Dupuis being convicted of a lesser offense. From this, the trial court surmised:

> "The other thing is, ultimately, for all the allegations of ineffective assistance or demonstrations of prejudice that are offered by Defense, Mr. Dupuis wound up being convicted of a lesser offense, not the offense for which he was indicted. It doesn't simply – the end result doesn't bear out that Mr. Fernald was prejudiced and was conflicted -- that he was conflicted and that Mr. Dupuis' rights were prejudiced. Certainly, if -- one would expect a different result had Mr. Fernald at this point been not exerting his full efforts on behalf of Mr. Dupuis."
>
> [R.E. tr. 132]

Dupuis was convicted. It does not necessarily follow that Dupuis received effective assistance of counsel because he was convicted of a lesser offense. A competent defense attorney at a minium would have attempted to attack the credibility of the police investigation and the police officers who were testifying against his client. Attorney Fernald did not do so. Instead, Attorney Fernald asked the police officers leading questions suggesting that his own client was evading the police. Moreover, Attorney Fernald bolstered the credibility of the police officers by telling the jury that the Brookhaven Police Department "did their job." [R. trial transcript p. 314].

The applicable law is *Stringer v. State,* 485 So.2d 274, (Miss. 1986), wherein the Mississippi Supreme Court set out a two prong test for establishing whether a violation of the defendant's Sixth Amendment right to effective assistance of counsel has occurred, to

wit: "a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance." 485 So.2d at 275. In the case *sub judice* the trial court incorrectly applied the second prong of *Stringer v. State.*

At the second trial, in direct examination of Asst. Chief Jones, the prosecutor did not ask Asst. Chief Jones whether Dupuis had made any statements to the police. However, on cross-examination, Attorney Fernald brought up for the first time that Dupuis had asked Asst. Chief Jones a question, which was, "what can I get for this?" [Exhibit No. 5, trial transcript p. 161]. Attorney Fernald unduly and unfairly prejudiced Dupuis when he brought this up because it opened the door for the prosecution to ask Asst. Chief Jones the question: "How many innocent people have you questioned who asked you how much they could get for the charge?" Asst. Chief Jones replied, that in his entire career, he did not remember even one innocent person asking that question. [Exhibit No. 5, trial transcript p. 182]. The jury was clearly left with the impression that only a guilty person would ask that question. Again, Attorney Fernald opened the door on cross-examination and asked leading questions which suggested his own client was guilty.

CONCLUSION

Attorney Fernald had an actual conflict of interest. Dupuis had an interest in discrediting the testimony of the police officers testifying against him. The City of Brookhaven has an interest in seeing that its police officers are not discredited. This conflict of interest adversely affected Attorney Fernald's performance at trial and as a

result, Dupuis did not receive a fair trial.

The trial court correctly found that an actual conflict of interest existed, however, the trial court committed clear error finding that Dupuis waived the conflict of interest without making a specific finding that the waiver was knowingly and intelligently made. Moreover, the trial court incorrectly applied the second prong of the *Stringer* test. The trial court erroneously concluded that because the first trial ended with a hung jury, and because Dupuis was convicted of a lesser offense following the second trial, then Attorney Fernald's performance could not have been adversely affected by the conflict of interest.

WHEREFORE, Timothy Dupuis, by counsel, prays for post-conviction relief, for the Appellate Court to enter an order reversing the trial court's Order Denying Motion for Post-Conviction Relief, and for such other and further relief as may be deemed just and proper in the premises.

Respectfully Submitted.

BY: _____

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Certificate of Service

The undersigned hereby certifies that the foregoing together with any attachments, has been served upon the persons listed below by first-class pre-paid United States mail on this 13 day of Feb, 2007.

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