IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHNNY W. LADD

V.

STATE OF MISSISSIPPI

NO. 2006-KA-00429-COA

Appeal from Circuit Court of Neshoba County, Mississippi

BRIEF FOR APPELLANT

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Oral argument not requested.

CERTIFICATE OF INTERESTED PERSONS

JOHNNY W. LADD

v.

STATE OF MISSISSIPPI

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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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

JOHNNY W. LADD
Appellant

Hon. Jim Hood,
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney

Edmund J. Phillips, Jr.
Attorney of record for Appellant

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STATEMENT OF THE CASE

The Appellant, Johnny W. Ladd, appeals his conviction by the Circuit Court of Neshoba County, Mississippi, of the charge of statutory rape and a sentence of twenty (20) years confinement in the custody of the Mississippi Department of Corrections, with five (5) years suspended, and Appellant placed on probation for five (5) years.

The primary evident against Appellant was:

(a) the testimony of the alleged victim, Ashton Leigh Sanders, that while she was a guest in the home of her aunt Kim Sanders, she woke from a sound sleep to find she was engaging in sexual intercourse with another houseguest, the Appellant, (T-44) at a time when she was fifteen (15) years old and he was and adult, and

(b) the testimony of Reliagene Technologies DNA analyst Huma Nasir (T-156) that Appellant's DNA had been found in vaginal swabs reported to her as obtained from Ashton Leigh Sanders (T-163).

She further testified (T-164):

> A. Okay. Once we obtain our profile, we take it one step further to give us some way to see exactly wheat the changes that somebody else may have contributed to this DNA, and that chance that somebody else may have contribute to this DNA sample, other that Johnny Ladd, is one in fifty-four-point-three quintillion people of Caucasian population.
> Q. So that myself and the jury might get an idea of how much is a quintillion, what is the population of the entire earth?
> A. The population of the earth is about six billion.
> Q. That includes men and women?
> A. Yes
> Q. And how may zeroes are in a billion?
> A. Nine.
> Q. And a quintillion and this is one in fifty-four-point-three quintillions if a person, the chance that somebody else could have been the sperm donor on those swabs, how many zeros are in a quintillion?
> A. Quintillion had eighteen zeroes.
> Q. One quintillion is two times a billion?
> A. Yes.

SUMMARY OF ARGUMENT

1) If evidence has any probative value it is relevant. The phrase "any tendency" in MRE 401 is a permissive call for admissibility of evidence. Background facts with no tendency to prove or disprove a proposition at issue maybe admissible because they amplify the evidence and thus assist the trier of fact.

2) When any indigent accused is confronted with scientific evidence against him, he has a constitutional right to expert assistance in preparing and presenting his defense.

3) An accused has the right to impeach a witness against him by introducing evidence that that witness has made a prior statement inconsistent with a statement he or she has made on the witness stand, whether or not either of the statements is relevant.

ARGUMENT

I

THE COURT ERRED IN SUSTAINING THE STATE'S OBJECTION OF APPELLANT'S TESIMONY ABOUT SANDY TULLOS LADD STEALING HIS INCOME TAX REFUND.

The alleged sexual intercourse between Appellant and Ashton Leigh Sanders occurred at the home of Kim Sanders, aunt of Ashton Leigh Sanders and a close friend of Appellant's then wife, Sandy Tullos Ladd.

Then present in Kim Sander's house had been Ashton Leigh Sanders, Sandy Ladd, Appellant, his two (2) children, and Kim Sanders' four (4) children (T-63). Kim Sanders testified for the prosecution, that she had been told of the intercourse by Ashton Leigh Sanders and had taken her to Neshoba General Hospital.

During the direct examination of Appellant, Johnny W. Ladd, the following colloquy occurred (T-189,190):

> Q. Where was the hayride Halloween night, 2003?
> A. It was in east Neshoba out towards Ford Brothers Store.
> Q. And on that particular night, did you have any conversation or talk with Kim Sanders?
> A. Yes, I did.
> Q. What was the nature of the conversation? Tell me whether or not there was any plans for you and your wife and your family to be at her house the next day? Was there such a plan?
> A. Yes, it was.
> Q. And whose idea was that?
> A. It was Kim's.
> Q. Okay. Would you tell me whether or not you had any other conversation with her regarding the next night?
> A. We just got together, me and my wife and Kim, as far as they wanted the girls to come over and have a sleep over the next night, and later on that night, me and Kim got together by ourselves, a and she wanted to know if we wanted to fool around again.
> Q. This is something that she brought up to you?

A. Yes
Q. And were you receptive to that?
A. Yes.
Q. Did you then have a plan for the next day?
A. Not really a plan.
Q. Tell me whether or not you had a condom with you when you went to her house the next day?
A. Yes, I did.
Q. Why did you carry a condom?
A. Because we talked that night of the hayride, she wanted to have sex.
Q. Kim did?
A. Kim did, and, I mean, I had a condom in my billfold.

Later in his direct testimony came the following (T-193-195):

Q. Did you get up at any time during the night?
A. I did.
Q. Okay. About how long was it before you got up?
A. About an hour, and hour and---I don't really know. About an hour. I would say an hour.
Q. When you got up, tell us whether or not your wife, to your knowledge, was awake.
A. She was asleep.
Q. When you got up, where did you go?
A. I went to Kim Sanders' room, her bedroom.
Q. Do you agree with prior testimony that there were not doors on those bedrooms?
A. No doors.
Q. And what did you do when you go to Kim Sanders' room?
A. Me and her talked about a minute or two.
Q. And what did you do?
A. We went to her bathroom.
Q. Now, the bathroom, according to this drawing, is the only room in the house that does have a door; is that right?
A. Besides the living room door, the front door, that's the only---
Q. To get in the house?
A. Right.
Q. This door here is the only interior, inside the house, door?
A. Right.
Q. You and her went in the bathroom?
A. Yes.
Q. Did you close the door?
A. Yes.
Q. What happened in the bathroom?
A. We had sex that night.
Q. I want to know did you wear a condom when you had sex with Kim Sanders?

A. Yes, I did.
Q. After you had sex with Kim Sanders, what did you do with the condom?
A. I threw it in the trash.
Q. Would that be in the bathroom?
A. Yes it would.
Q. Was Kim Sanders present when you took the condom and threw it in the trash?
A. Yes, she was.
Q. Who left the bathroom first?
A. She did.
Q. What did you do?
A. I left behind her.
Q. And where did you go?
A. I went back and got in the bed with my wife.

That morning Kim Sanders had talked to Ashton Leigh Sanders and had taken her to Neshoba General Hospital (T-65). Appellant had been immediately arrested at Kim Sanders' home and taken to jail.

Appellant further testified (T-197-198):

Q. Were you incarcerated for a period of time from you being picked up there on November the 2nd, that morning? Were you incarcerated for a period of time?
A. Until February the 12th, were you then able to make a bond and get out?
Q. Around February the 12th, were you then able to make a bond and get out?
A. Yes, sir.
Q. Tell me whether or not at that time, your then wife, Sandy Tullos Ladd, did she come to the detention center to see you?
A. She----it was tax time. She wanted my W-2 from my previous job.
Q. Tell us whether or not you are saying you had to give some authorization and consent from that to happen?
A. Yes.
Q. And you did give that?
A. No, I didn't.
Q. How much income tax were you due to receive?
A. It was over five thousand dollars.
Q. When you got out of jail on February the 12th, were you able then to get your income tax return?
A. No, she got them out of the mailbox.
Q. Who is she?
A. Sandy got them out of our mailbox and forged my name to the W-2's and got the income tax money.
BY MR. THAMES: Your Honor, I am going to object. This is irrelevant.

BY THE COURT: Sustained.
Q. (Collins) When you were released from custody, since that time have you ever seen Sandy Tullos Ladd?
A. No.
Q. Did you shortly thereafter initiate a divorce proceeding?
A. Yes.
Q. Who do your children live with?
A. They live with me and my wife.
Q. Your present wife, Wendy Ladd?
A. Yes.

The act of sexual intercourse between Appellant and Kim Sanders showed that, had Kim desired to help Sandy in a possible divorce action, she had had the opportunity to empty the condom into Ashton's vagina and thus implicate Appellant in a serious crime.

The incident described above was relevant because it was an illustration of the strained relationship between Appellant and his then wife Sandy.

MRE 401 reads as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ferreira, Miss. Evidence (4th Ed.), Rule 401, pg. 42 explains:

> The threshold for determining relevancy pursuant to the rule is minimal. The rule's broad phrase "any tendency" is considered to be a permissive call for admissibility of evidence. Background facts which per se have no tendency to prove or disprove a proposition at issue may, nonetheless, be admissible under Rule 401 simply on the theory that, by amplifying the evidence, they assist the trier of fact.

Whitten v. Cox, 799 So. 2d. 1 (Miss. 2000).

The testimony, objected to, easily met this minimal standard and was unquestionably relevant. The Court's ruling was therefore error and abuse of discretion.

ARGUMENT

II

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR EXPERT ASSISTANCE

Appellant was found indigent by the trial court and was appointed trial counsel in forma pauperis (T-3). He moved (C.P. 8, 10) for appointment of medical and scientific forensic experts to help him prepare and present a defense to DNA evidence disclosed during discovery. The Court held a pretrial motion hearing during which Appellant's counsel produced no evidence and argued (T-4):

> Your Honor, from the records that have been provided, there is a statement in the medical records that there's a possible contamination of the specimen. I'm no forensic scientist. I'm not trained in DNA. Your Honor, I know that there are procedures to prevent contamination, and the very idea that in the medical records that have been provided there's a suggestion of contamination, recognizing micro bacterial growth in the specimen.

The Court denied the motions (T-9; C.P. 12, 13) on the ground that Appellant did not present any evidence of his inability to pay the cost of securing experts (T-9). Appellant's trial counsel had relied on the Court's earlier finding that Appellant was indigent (T-3). The Court's denial of the motions follows (T-9);

> So, I am going to deny your motions, and largely my ruling will be based upon there's no evidence of his resources, whether or not he has resources at all. You can't rely on the fact that he has had a Court-appointed attorney.

The ruling contains the Court's statement that Appellant had been provided a court appointed attorney. Implicit in such appointment was the ground for the understanding that Appellant was indigent. Appellant was likewise subsequently appointed appellate counsel (C.P. 32) in forma pauperis.

In *Ake v. Oklahoma* 470 U.S. 68, 1055. Ct. 1087, 84 L. Ed. 2d 53 (1985), the United States Supreme Court first recognized the viability of an indigent defendant's constitutional claim to expert assistance. Because of its compelling rationale, *Ake* has become a landmark decision. Before the decision in *Ake,* other courts had reached the same conclusion. *Lee v. Habib,* 137 U.S. App. D.C. 403,424 F 2d 891 (1970); *United States v. Germany,* 32 FRD 343 (D. Ala. 1963); *Williams v. Martin,* 618 F 2d 1021 (4th Cir S.C. 1980); *State v. Madison,* 345 So. 2d 485, 490 (La. 1977):

> **Furnishing counsel to the indigent defendant is not enough if counsel cannot secure information on which to construct a defense.... It is a fundamental principle that the kind of trial a man gets cannot be made to depend on the amount of money he has....Therefore when an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the State ought to supply funds.**

Substantive due process requires that the Court recognize indigence where it is apparent from the whole of the record. That Appellant's trial counsel did not present evidence of a fact already determined by the Court should not be held against his client.

Both counsel for Appellant and the prosecutor had presumed indigence in their arguments. The Court had a duty to recognize the likelihood that Appellant was indigent and to inquire further into this issue if the Court was in doubt.

The failure to do this was error and resulted in Appellant's being denied fundamental due process.

If Appellant's motion had been granted, the mathematical error by the prosecutor and DNA analyst Huma Nasir (T-164) would certainly have been explored on cross examination.

ARGUMENT

III

THE COURT ERRED IN SUSTAINING THE PROSECUTION'S OBJECTION TO APPELLANT'S CROSS EXAMINATION OF PROSECUTION WITNESS TRACY BEASLEY ABOUT A STATEMENT ASHTON LEIGH SANDERS MADE TO HER THAT ASHTON LEIGH SANDERS HAD ENGAGED IN SEXUAL INTERCOURSE BEFORE THIS INCIDENT BEFORE THE COURT, CONTRADICTING SANDERS' PRIOR TESTIMONY.

Emergency room nurse, Tracy Beasley testified for the State, that she interviewed and examined Ashton Leigh Sanders at Neshoba General Hospital in Philadelphia, MS (T-10). On cross-examination the following colloquy occurred (T-76,77,78):

> Q. There's already been some questioning of you about statements that you took from the Defendant. I particularly want to direct your attention and ask you did this Defendant make a statement—I'm sorry, this individual, Ashton Sanders, did she make a statement to you, that statement being---
> BY MR.BROOKS: Your Honor, we are going to object to this. It's not relevant to the case.
> BY THE COURT: Approach the Bench
> (OFF RECORD CONVERSATION AT THE BENCH)
> BY THE COURT: I am going to let this jury step out in the room for just a moment.
> **WHEREUPON, THE JURY WAS RETIRED TO THE JURY ROOM AND THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE PRESENCE OF THE JURY;**
> BY THE COURT: All right. The jury has been retired to the room. Mr. Brooks, make your statement for the record.
> BY MR BROOKS: Your Honor, as Your Honor well knows, the issue of whether or not the victim in this case was chaste or whether or not she had sexual intercourse before is not an issue under the law. We would be entitled to an instruction to that effect. What he is attempting to do by this question is to show the jury that she made a statement to this witness that she had had sexual intercourse before. Your Honor, we contend that that would prejudice our case.
> BY THE COURT: Mr. Collins, I will hear from you.
> BY MR. COLLINS: Your Honor, he is absolutely right. It prejudices his case. But it goes to the issue of the truthfulness of the witness. As said on the witness

stand, she told me she had never had intercourse before this night, but she's given another statement to this lady saying that she had. Your Honor, that's a lie any way that you slice it.

BY THE COURT: Well, of course, I think Mr. Brooks has stated the real purpose of the rule, in that this Defendant is charged with statutory rape, making whether she was chaste or not, whether she had had previous sexual activity or not, as being irrelevant. You are getting around that by showing it would be for the purpose of impeachment. Well, I don't feel it is for the purpose of impeachment. So, the objection is sustained. Bring in the jury

This ruling was later reconsidered by the Court at a hearing outside the presence of the jury (T-81,82):

BY MR. COLLINS: Your Honor, through the witness Tracey Beasley on cross-examination, I attempted to introduce evidence that the alleged victim in this case, Ashton Sanders, made a statement to Tracey Beasley, the RN at the hospital, that she had had sexual intercourse in her past. Your Honor had a hearing and ruled this was inadmissible evidence. The statement the Court made was I was attempting to introduce evidence that was for a purpose other than the veracity of the witness.

Your Honor, the witness admitted when I had her on cross-examination, Ashton Sanders admitted that she told me that she had never had sex before. The medical records introduced in discovery indicate she did say to Tracey Beasley that she had had sex in the past.

Judge, this goes to the heart of the witness's credibility, veracity, her character, truthfulness. It's obviously the Defendant's right to cross-examine someone in that regard, and, certainly, it's their Constitutional right to impeach their testimony.

Your Honor, I cite to the Court the case that is styled Hunt vs. State of Mississippi. This is a decision from the Court of Appeals, 2002-CA-1302-COA. In this case the Court found the defense was entitled to cross-examine the victim on whether prior to the date that she told authorities that she had been raped, she had told Pitts of a rape in her apartment. Such question would have been proper impeachment by use of a prior inconsistent statement. This is under MRE 613 (a). There is sufficient consistency to justify its use.

BY THE COURT: Isn't the Hunt case a denial of a relevant subject matter, whereas in this case, it's irrelevant?

BY MR. COLLINS: Your, Honor, I did try to be very succinct in the way I presented the facts. This witness had made two different statements is what had happened. She made one statement to police authorities, she made another statement to her roommate, about her sexual history. Your Honor, Obviously, what I investigated in this case was the sex act, and the subject matter just happens to be sex, but the reality of what I'm asking is the opportunity to impeach this witness's credibility.

BY THE COURT: She told you she had not, and she told someone else that she had.
BY MR. COLLINS: She told them before she told me.
BY THE COURT: What's your position?
BY MR. BROOKS: Your Honor, we still object to it. That particular case is I assume a regular rape case involving an adult victim?
BY MR. COLLINS: It does.
BY MR. Brooks: So, it's not the same as this statutory rape situation. Your Honor, we feel it would be highly prejudicial if this is admitted.
BY THE COURT: You have made your record. Overruled.

Hunt v. State, 878 So. 2d 66 (Miss. 2004), Court of Appeals, 2002-CA holds that a prior inconsistent statement may be used in impeachment per MRE 613 (a).

The right of an accused to impeach a hearsay declarant was confirmed under MRE 806 in *Nalls V. State,* 651 So 2d 1074 (Miss. 1995). Although holding the error harmless, the Court did hold that exclusion of the impeaching evidence was error.

CONCLUSION

Appellant was unable to afford the cost of obtaining expert assistance in analyzing and rebutting the DNA evidence against him. The trial court's denying Appellant's motion that the State pay for expert assistance in preparing and presenting the defense to the DNA evidence against him prevented Appellant from defending himself against this evidence because Appellant was indigent, Per *Ake v. Oklahoma* 470 U.S. 68, 1055. Ct. 1087, 84 L. Ed. 2d 53 (1985), this denial was error in that it denied Appellant equal protection of the law.

The verdict should be overturned and Appellant should be granted a new trial.

RESPECTFULLY SUBMITTED,

JOHNNY W. LADD, APPELLANT

BY: Edmund J. Phillips Jr.

EDMUND J. PHILLIPS, JR

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, EDMUND J. PHILLIPS, JR., Attorney for Appellant, Johnny W. Ladd, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to:

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Johnny W. Ladd
Appellant

DATED, this the 19th day of November, 2006.

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