

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY FORRESTER

APPELLANT

VERSUS

CASE NO. 2006-KA-00748-COA

STATE OF MISSISSIPPI

APPELLEE

APPEAL FROM

THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

JEFFREY J. HOSFORD
PUBLIC DEFENDER, CLAY COUNTY
Mississippi Bar # [REDACTED]
115-A South Lafayette St
Starkville, MS 39759
Telephone: 662-323-0844
Facsimile: 662-323-5560
Attorney for Ricky Forrester

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY FORRESTER

APPELLANT

VERSUS

CASE NO. 2006-KA-07488-COA

STATE OF MISSISSIPPI

APPELLEE

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Ricky Forster, Appellant

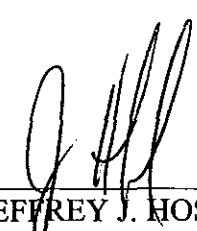
Jeffrey J. Hosford, Attorney for Appellant

Forrest Allgood, District Attorney

Charles C. Hedgepeth, Assistant District Attorney

James M. Hood III, Attorney General

Honorable James T. Kitchens, Jr. Trial Judge



JEFFREY J. HOSFORD
Mississippi Bar # 100788
Attorney for Appellant

TABLE OF CONTENTS

PAGE

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issue	1
Statement of the Case	2
Summary of the Argument	4
Argument	5
Factual Background	5
First Assignment of Error	7
Conclusion	17
Certificate of Service	18
Certificate of Mailing	19

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Avery v. State , 548 So.2d 385 (Miss. 1989)	15
Gill v. State , 924 So.2d 554 (Miss.Ct.App. 2005)	7, 15
King v. State , 530 So.2d 1356 (Miss. 1988)	7, 14
McCollum v. State , 757 So.2d 982 (Miss. 2000)	7, 14, 15
Phillips v. State , 493 So.2d 350 (Miss.1986)	7
Walls v. State , 672 So.2d 1227 (Miss. 1996)	16

<u>OTHER AUTHORITIES</u>	<u>PAGE</u>
None	

STATEMENT OF THE ISSUE

- I. WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT JURY INSTRUCTIONS D-6 AND D-7 AS TO THE DEFENSE OF ENTRAPMENT?

STATEMENT OF THE CASE

This is a criminal appeal from the Clay County Circuit Court where Ricky Forrester was convicted of one count of sale of cocaine (R.E.7). He was sentenced to eighteen (18) years to serve in the Mississippi Department of Corrections on the charge (R.E. 7). He was acquitted of the additional charges of sale of cocaine and possession of cocaine. The trial court denied Ricky Forrester's Motion for a New Trial and/or JNOV (R.E. 24). Aggrieved, he files this appeal.

Brenda Huffman Weaver was ordered by another court on separate narcotics charges to participate and cooperate with law enforcement concerning drug activity as a condition of probation (T. 110). She was transferred to the supervision of Johnny Hancock, a Mississippi Department of Corrections probation officer (T. 277). He informed the Tri-County Narcotics Task Force of the availability of Ms. Weaver for use as an informant (T. 279). On January 5, 2005, Ms. Weaver was transferred from the Oktibbeha County Jail to a room at the Southern Inn in West Point, Mississippi (T. 131, 132).

The room at the Southern Inn was wired to record the activities going on in the room (T. 132). Ms. Weaver was instructed to contact persons from whom she could purchase narcotics (T. 132). She contacted Ricky Forrester by telephone to bring her a 20, meaning a \$20 dollar rock of crack cocaine (T. 113). Ricky Forrester was not a mere acquaintance, but a person that Ms. Weaver was involved in an intimate sexual relationship for over one year preceding the drug transaction (T. 251). She and Mr. Forrester testified that they were both drug addicts and often shared in the use of drugs (T. 251-252). Further, sexual activity often accompanied the drug use (T. 289) Mr. Forrester brought Ms. Weaver a rock of cocaine (T. 289).

Mr. Forrester testified he had had no intention of selling drugs that day until Ms. Weaver called him (T. 288). She was probably the one person he would go get crack cocaine for (T. 288).

He further testified he had not sold drugs in the last five years, though he had been convicted of sale of marijuana more than twenty years prior to the events before the court (T. 293-4, T. 285). Mr. Forrester testified that he loved Ms. Weaver. Ms. Weaver further testified that despite very frequent drug use and contact with Mr. Forrester, she had never seen him sell drugs before January 5, 2005 (T. 274-5).

Trial was held on January 12 and January 13, 2006, in the Clay County Circuit Court (T. 1). On January 13, 2006, Ricky Forrester was convicted on the charge of sale of cocaine (R.E.7).

On January 13, 2006, Ricky Forrester was sentenced to serve eighteen (18) years in the Mississippi Department of Corrections on the charge of sale of cocaine (R.E.7).

On March 31, 2006, the Court entered its Order denying Ricky Forrester's motion for a new trial or a judgment notwithstanding the verdict (R.E. 24). From this Order, Ricky Forrester appeals.

SUMMARY OF THE ARGUMENT

I. Brenda Weaver, who, unbeknownst to Ricky Forrester, had been incarcerated on separate drug charges, was established in the Southern Inn motel in West Point, Mississippi by law enforcement agents in order to arrange narcotics transactions. Ms. Weaver contacted Mr. Forrester to ask him to bring her some drugs, specifically, the quantity of which she stated by the denomination required to purchase the amount. Mr. Forrester and Ms. Weaver had had at least one year long sexual relationship as well as a history of using cocaine together. Mr. Forrester testified he would not have purchased and brought the cocaine in question but for Ms. Weaver's telephone requests and their prior relationship. The activity at the motel room was recorded. Ricky Forrester requested that the jury be instructed as to the defense of entrapment to the charge. The trial court denied granting the instruction.

ARGUMENT

I. Factual Background

This is a criminal appeal from the Clay County Circuit Court where Ricky Forrester was convicted of one count of sale of cocaine (R.E.7). He was sentenced to eighteen (18) years to serve in the Mississippi Department of Corrections on the charge (R.E. 7). He was acquitted of the additional charges of sale of cocaine and possession of cocaine. The trial court denied Ricky Forrester's Motion for a New Trial and/or JNOV (R.E. 24). Aggrieved, he files this appeal.

Brenda Huffman Weaver was ordered by another court on separate narcotics charges to participate and cooperate with law enforcement concerning drug activity as a condition of probation (T. 110). She was transferred to the supervision of Johnny Hancock, a Mississippi Department of Corrections probation officer (T. 277). He informed the Tri-County Narcotics Task Force of the availability of Ms. Weaver for use as an informant (T. 279). On January 5, 2005, Ms. Weaver was transferred from the Oktibbeha County Jail to a room at the Southern Inn in West Point, Mississippi (T. 131, 132).

The room at the Southern Inn was wired to record the activities going on in the room (T. 132). Ms. Weaver was instructed to contact persons from whom she could purchase narcotics (T. 132). She contacted Ricky Forrester by telephone to bring her a 20, meaning a \$20 dollar rock of crack cocaine (T. 113). Ricky Forrester was not a mere acquaintance, but a person that Ms. Weaver was involved in an intimate sexual relationship for over one year preceding the drug transaction (T. 251). She and Mr. Forrester testified that they were both drug addicts and often shared in the use

of drugs (T. 251-252). Further, sexual activity often accompanied the drug use (T. 289) Mr. Forrester brought Ms. Weaver a rock of cocaine (T. 289).

Mr. Forrester testified he had had no intention of selling drugs that day until Ms. Weaver called him (T. 288). She was probably the one person he would go get crack cocaine for (T. 288). He further testified he had not sold drugs in the last five years, though he had been convicted of sale of marijuana more than twenty years prior to the events before the court (T. 293-4, T. 285). Mr. Forrester testified that he loved Ms. Weaver. Ms. Weaver further testified that despite very frequent drug use and contact with Mr. Forrester, she had never seen him sell drugs before January 5, 2005 (T. 274-5).

Trial was held on January 12 and January 13, 2006, in the Clay County Circuit Court (T. 1). On January 13, 2006, Ricky Forrester was convicted on the charge of sale of cocaine (R.E.7)..

II. Argument

I. WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT JURY INSTRUCTIONS D-6 AND D-7 AS TO THE DEFENSE OF ENTRAPMENT?

The Clay County Circuit Court denied Ricky Forrester (R.E. 18-19) proposed jury instructions D-6 and D-7 (R.E. 5,6) concerning the defense of entrapment applying the precedents established in *Gill v. State*, 924 So.2d 554 (Miss.Ct.App. 2005), *McCollum v. State*, 757 So.2d 982 (Miss. 2000), *Walls v. State*, 672 So.2d 1227 (Miss. 1996) and *King v. State*, 530 So.2d 1356 (Miss. 1988). *McCollum v. State*, 757 So.2d 982, at 984 (Miss. 2000), citing *King v. State*, 530 So.2d 1356, 1358-1360 (Miss. 1988), citing *Phillips v. State*, 493 So.2d 350, at 353-354 (Miss.1986), stated that:

Phillips claims on this appeal merely that he had presented sufficient evidence so that he was entitled to have the entrapment issue submitted to the jury. Our familiar rule, of course, provides that whether an issue should be submitted to the jury is determined by whether there is evidence which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction. Conversely, only where the evidence is so one-sided that no reasonable juror could find the requesting party on the issue at hand may the trial court deny an instruction on a material issue.

The *McCollum* court, returning to *King* at 985, stated, “Our question then is there was sufficient evidence in the record that a rational jury might have found for King on the entrapment issue.” Further citing *King*, the *McCollum* court found:

The State’s brief emphasizes evidence before the Circuit Court that King was “predisposed” and was not entrapped. No doubt there is such evidence, but that is of no moment. King is not here arguing that the evidence is legally insufficient to support a verdict against him, only that he was denied the right to have the jury pass on his sole defense. Put otherwise, that the record contains evidence adequate to undergird a jury’s rejection of an entrapment defense is wholly irrelevant to the question whether the accused was entitled to have the issue submitted via an entrapment instruction.

Appellant Forrester contends that, at trial, he produced, through his own testimony and the testimony of the confidential informant, sufficient evidence that a reasonable juror could have found for the appellant Forrester the defense of entrapment. Ricky Forrester testified in part as follows:

(T. 285, L. 14)

Q: (Defense Counsel Hosford): You heard the testimony of everybody that came in this courtroom, haven't you?

A: (Ricky Forrester): I have.

Q: And one of those people that came in this courtroom was Ms. Brenda Weaver. What kind of relationship did you and her have?

A: Personal relationship.

Q: How personal?

A: Sexual, using drugs together, hanging out together.

Q: In fact, didn't you tell each other that you actually loved each other?

A: Oh, yes.

Q: So it was more than just a sexual relationship, it was a physical and mental and the whole nine yards, right?

A: Yes.

Q: Okay. You stated a second ago that you used drugs with her. How often did y'all use drugs?

A: Once or twice a week.

Q: And y'all would do that together?

A: Yes.

Q: And how would y'all go about getting those drugs?

A: Well, sometimes I would get them and sometimes she would.

Q: And then y'all would share?

A: Oh, yeah.

Q: Okay. And on those occasions, this was -- on these occasions, it was common practice for one of you to get them and then both of y'all to use them; is that correct?

A: Yes.

Q: You're here for particularly on two dates, January 5th and January 6th. You understand that, correct?

A: Correct.

Q: On those two dates, did you receive a phone call?

A: Yes.

Q: During that time period prior to that phone call, were you selling any drugs?

A: No.

(Series of questions disallowed by the trial judge) then continuing at T. 287, L.20:

Q: What was your typical day?

A: I got up that morning and went to work, and as soon as I got home, the phone was ringing, which I'm on a party line. Anybody could answer the phone.

Actually as soon as I walked in the door, somebody told me that a girl had been calling for me. And when I got to my room, the phone was ringing, and I answered, and it was Brenda Weaver.

Q: And what did Brenda want?

A: Drugs.

Q: What did she want you to do?

A: Get her a 20.

Q: And the 20 means what, for the jury? They may not understand what that means.

A: A \$20 crack rock.

Q: Okay. Did you have any intention of purchasing that 20 prior to her phone call?

A: No. (State objected, but no ruling on record)

Q: What was your intentions about drugs that day prior to her phone call?

A: Nothing at the moment, at that time, because I had just got off of work, and I was dirty, and I wanted to rest.

Q: Okay. So she called, and what happened next?

A: She asked me if I would get her some cocaine, and I told her -- she told me where she was, and I told her I'd be there. And I hung the phone up and left the room.

Q: And why would you do that?

A: Because she called me and asked me.

Q: Would you normally do that?

A: No.

Q: What caused you to do it for her?

A: Because I had strong feelings for her.

Q: And what were those strong feelings?

A: I was in love with her.

Q: After you hung up the phone and left, what did you do?

A: I went and purchased a \$20 crack rock and went to the motel.

Q: And what were your intentions when you got to the motel?

A: The usual thing. We sat around and get high and just whatever – whatever we did, you know. Just usual things.

Q: Was it your intention – would you normally share with her on these occasions?

A: Yes.

Q: And was that your intention on that day?

A: Yes.

... (T. 291, L. 24)

Q: Did she call you more than once on those days?

A: Yes.

... (T. 292, L. 4)

Q: Okay. Now, why did you bring these drugs to Ms. Huffman, or Ms. Weaver?

A: Because I was in love with her, and we were both addicted to cocaine. We were users. And we were having sexual relations, and just – anything – anything somebody would do that was in love with somebody.

Q: Were you having sexual relations during this time period?

A: On that particular day?

Q: Yes, sir.

A: No.

Q: But you had recently, or in the –

A: Yes.

Q: You talk about your drug problem. How serious a drug problem is it?

A: It's serious.

Q: How often would you use drugs?

A: Two, three times a week. Four, maybe.

Q: And during those time periods, who would you use with?

A: Brenda. Weaver.

(Intervening objection)

(T. 293, L. 3)

Q: What was your intention on this day?

A: My intention was to do the same thing we always did when we came together, was to use drugs and maybe watch some TV, maybe sit around, maybe eat some supper, maybe have sex later. Just a common personal relationship.

Q: Yes, Sir. Would you have ever gone to this hotel room if Brenda didn't call you?

A: No.

(Intervening objection)

(T. 293, L. 18)

Q: What would you have done that day if Brenda hadn't called you?

A: Stayed home, watched TV, ate supper.

(Intervening objection)

Q: How many times have you sold drugs in the past five years?

A: None. Zero.

Brenda Huffman Weaver was called to testify by the Defendant. At the time of the events of the sale of cocaine, she was on probation. She was ordered to aid law enforcement. She was being housed at the Oktibbeha County Jail and taken to the Southern Inn in West Point, Mississippi to make narcotics purchases. She admitted that she had a sexual relationship and friendship with Ricky Forrester. She admitted having a drug problem and often sharing drugs with Ricky Forrester. She was asked the following questions by Mr. Hosford, trial counsel for Ricky Forrester:

T. 253, L. 22.

Q. Now, you have know Mr. Forrester for quite some time, and he's not in the habit of selling drugs, is he?

A: No.

Q: But you knew he would get you drugs, because of that personal relationship, didn't you?

A: Yes.

Q: So when Tri-County called you that day to come and get somebody, you said, I got a buddy named Ricky Forrester, and I can get him to get me some drugs, didn't you?

A: Yes.

Q. But you knew he wasn't selling those drugs unless you called him, right?

A: Right.

... T. 275, L.9 (upon redirect examination by Mr. Hosford).

Q: Have you ever seen my client deal drugs before?

A: No.

Q: No. Never.

A.: (Witness shakes head negatively).

Q: Not once?

A: No.

McCollum v. State, 757 So.2d 982, at 984 (Miss. 2000), citing *King v. State*, 530 So.2d

1356, 1358-1360 (Miss. 1988) states:

Entrapment is an affirmative defense. Once the defendant makes out a prima facie case that he was entrapped, two consequences follow. First, the burdens of production and proof shift to the prosecution (citations omitted). Second, the accused becomes entitled to have the issue of entrapment submitted to the jury on proper instructions. The defense of entrapment is available where criminal intent did not originate in the mind of the accused, or stated differently, where the accused was not predisposed to commit the crime (citations omitted). Where however, the intent to commit the crime already existed in the mind of the accused so that the inducement merely served to give him an opportunity to commit that to which he was already disposed, the entrapment defense does not lie.

Ricky Forrester testified that he went to work that day and was intending to stay at home, eat, and watch television on January 5, 2005, and had no intention of selling cocaine. He was addicted to cocaine and used it several times a week. He testified he had not sold drugs in the past five years. He had shared drugs and been shared drugs with by Brenda Weaver. Brenda Weaver was also addicted to cocaine and had shared with Ricky Forrester. Brenda Weaver and Ricky Forrester had been involved in a deep personal ongoing sexual relationship. Ricky Forrester loved Brenda Weaver. The drug transaction was set up at a motel. Brenda Weaver, having been around Ricky Forrester on countless occasions never saw him deal drugs. A reasonable juror could have found

that Ricky Forrester, but for the inducement of Brenda Weaver, acting as an agent for the state, would not have sold cocaine on January 5th, 2005 and did not have the predisposition to sell cocaine. This is all that is required to be granted the jury instruction concerning entrapment. As this was Ricky Forester's sole defense, just as the Defendant in *McCollum*, despite ample evidence that would support a refutation of the claim of entrapment, the conviction must be reversed.

Ricky Forrester's trial court in denying the entrapment instruction placed great emphasis on *Gill v. State*, 924 So.2d 554 (Miss.Ct.App. 2005) (R.E. 14). The *Gill* court upheld the denial of the entrapment instruction because Gill had provided insufficient evidence of importuning. The informant in *Gill* told the defendant that a third person wanted to purchase cocaine and that the informant knew Gill needed money and had not repeatedly harassed Gill. *Gill*, in effect, was simply shown a seller who wanted to buy drugs. There are superficial similarities to this case before the court. Ms. Weaver did call only once or twice and Mr. Forrester brought drugs to her. While this bears some resemblance to the Gill defendant, it is not the same. Ms. Weaver was placed in a motel. She called her lover and co-user of over one year, Ricky Forrester, to bring her drugs to a motel. Mr. Forrester was in love with Ms. Weaver. He testified he had not sold drugs in five years. He had been to work that day. He did not have drugs on his person and had to go purchase them to furnish them to Ms. Weaver.

Finally, Ms. Weaver testified despite all the drugs the two had consumed together, she had never seen Mr. Forrester sell drugs. Improper importuning for a stranger or acquaintance might be 15-20 requests such as in *Avery v. State*, 548 So.2d 385, 387 (Miss. 1989) or an agent following a defendant around a store and repeatedly asking him as in *McCollum v. State*, 757 So.2d 982 (Miss. 2000). In this case, the State placing a drug-addicted woman in a motel desperately making one or two calls to her lover who knew of her addiction for an amount of cocaine needed for no more than

one or two doses. This could reasonably be seen by a juror as importuning the Defendant to commit the act he would not have otherwise done. This was not the Defendant in *Walls v. State*, 672 So.2d 1227, 1229-30 (Miss 1996) who when asked what he could get for \$60 dollars handed over four crack rocks to a stranger and claimed entrapment because he did not ask the agent to buy first. A reasonable juror could have found that Ricky Forrester was not predisposed to sell and only sold because of the importuning of the State's agent. Therefore, as this was Ricky Forrester's sole defense, and the jury was not instructed as to that defense, the conviction must be set aside and the case remanded for a new trial.

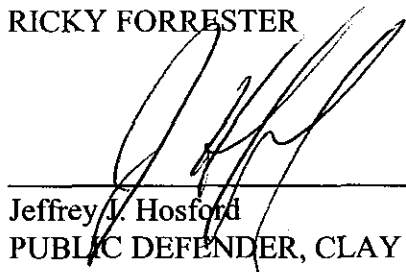
CONCLUSION

The Appellant, Ricky Forrester, submits to this Court that the Circuit Court of Clay County erred by denying his request that the jury be instructed as to the defense of entrapment. The denial of the instruction impaired the Defendant's right to a fair trial because the jury was not instructed as to a possible lawful defense the Defendant has to the charge. Therefore, this Court should vacate the conviction and remand the case for a new trial.

Dated: 12 4, 2007.

Respectfully Submitted,

RICKY FORRESTER



Jeffrey J. Hosford
PUBLIC DEFENDER, CLAY COUNTY
ROSS KELLEY & HOSFORD, PLLC
Attorneys at Law
115-A South Lafayette St
Starkville, MS 39759
(662) 323-0844
MSB # 100788

CERTIFICATE OF SERVICE

I, Jeffrey J. Hosford, attorney for the Appellant, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's

Brief to the following:

Honorable Forrest Allgood
District Attorney
P.O. Box 1044
Columbus, MS 39703

Honorable James M. Hood III
Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Honorable James T. Kitchens
Circuit Court Judge
P.O. Box 1387
Columbus, MS 39703

This the 4th day of May, 2007.



JEFFREY J. HOSFORD

CERTIFICATE OF MAILING

I, Jeffrey J. Hosford, attorney for the Appellant, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief and Record Excerpts in the matter of *Ricky Forrester (Appellant) versus State of Mississippi (Appellee)*, case number 2006-KA-00748-COA, for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 4th day of May, 2007.



JEFFREY J. HOSFORD