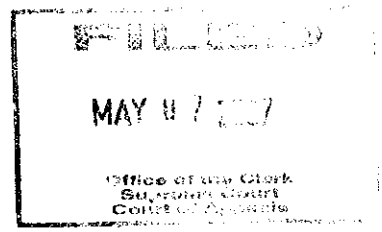
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI



DESMOND D. WALTON — APPELLANT

VS. — NO. 2006-KA-1065

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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DESMOND D. WALTON **APPELLANT**

VS. **NO. 2006-KA-1065**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Forrest County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MURDER**.

STATEMENT OF FACTS

There is no claim presented on this appeal that the verdict of the jury is not supported by the evidence or contrary to the great weight of the evidence. Consequently, it will not be necessary to set out the facts of the case in any great detail.

The Appellant was one of a group of young men who traveled Hattiesburg from Lucedale to meet women. When this group got to Hattiesburg, they stopped at an apartment house. Two of the group went into an apartment; when they departed, they seemed to be in a difficulty of some kind. The group then drove around, specifically around some place known to the record as Rawl's Springs. Some of them were apparently looking for a person. Finally, at some point the victim in this case, one Patrick Anderson, also known to the record as "PoBill" was seen driving

a truck. The group turned about and followed PoBill.

PoBill pulled into a yard. PoBill got out of his truck and walked toward the group. The Appellant got out of the car that followed PoBill, grabbed PoBill and shot PoBill. The rest of the group in the car began to leave, but they decided to stop and let the Appellant get back into the car for fear that the Appellant might shoot them. The Appellant was wearing a mask of some kind that had the appearance of a skull. The group then returned to Lucedale, the Appellant throwing the mask out of the car as they drove there. The gun he kept with him.

The group ultimately made their way to some place known as Frog's house. The Appellant and his compadres apparently made an agreement to keep quiet about the shooting. (R. Vol. 4, pp. 181 - 215; Vol. 5, pp. 275 - 277; 285 - 286)

The Appellant admitted shooting PoBill, saying that he had to do it. (R. Vol. 5, pg. 241). He also gave a statement to a Mobile police officer to the effect that he had shot PoBill. (R. Vol. 6, pp. 391 - 392).

The Appellant did not testify. No witnesses were presented on behalf of the defense.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS A STATEMENT MADE BY THE APPELLANT?

2. WAS COUNSEL FOR THE APPELLANT INEFFECTIVE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS A STATEMENT MADE BY THE APPELLANT

2. THAT COUNSEL FOR THE APPELLANT WAS NOT INEFFECTIVE FOR NOT HAVING SOUGHT A MANSLAUGHTER INSTRUCTION

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS A STATEMENT MADE BY THE APPELLANT

In the First Assignment of Error, the Appellant alleges that the trial court erred in refusing to suppress his statement to Mobile Police officers. The record concerning the Appellant's confession is a convoluted one. We do not find it necessary to go into great detail concerning it, for reasons that will be apparent below.

The standard of review applicable to this kind of claim is well known. Where on an appeal an appellant assigns error in a court's admission of his confession to evidence, this Court will affirm that decision unless an incorrect legal standard was availed of, manifest error was committed, or if the decision was contrary to the overwhelming weight of the evidence. *Powell v. State*, 928 So.2d 974 (Miss. Ct. App. 2006).

After the Appellant's arrest, he was taken to a Mobile police station. The Appellant was questioned by a DEA agent concerning some issue about narcotics, but at some point the Appellant said he did not want to talk. The Appellant was given his *Miranda* rights in the course of this first interview. Questioning ceased when the Appellant said he did not want to talk. In the course of the suppression hearing, the trial court suppressed this taped interview.

About ten or fifteen minutes after the Appellant ended the first interview, a Mobile law enforcement officer told the Appellant that if he wanted to talk it was the time to do it. The Appellant told this officer that he would speak with a Mobile police department detective. The detective interrogated the Appellant and in due course the Appellant admitted having killed the victim. It does not appear, however, that the Appellant was given his *Miranda* rights before the second interview. (R. Vol. 3, pp. 5 - 11; 15; 28).

The Appellant alleges that the trial court erred in admitting the confession on account of the facts that (1) contact with the Appellant was re-initiated by law enforcement after the Appellant indicated that he did not wish to speak; and (2) that law enforcement failed to give him his *Miranda* rights at the beginning of the second interview. We concede that the trial court erred in admitting the confession, on account of the fact that the Appellant was not given the *Miranda* warnings at the beginning of the second interview. *Barnes v. State*, 854 So.2d 1 (Miss. Ct. App. 2003). In light of this concession, it will be unnecessary to address whether there was a sufficient "cooling off" time, or whether the Appellant or the law enforcement officer instigated the second interview. However, under the facts of this case, that error should be considered harmless error. As we have pointed out above, there is no question of the Appellant's guilt. There was eyewitness testimony concerning his actions, and he admitted to one of his compadres that he killed the victim, saying that he "had to do it". (R. Vol. 5, pg. 241). Indeed, there is no claim here that the evidence of guilt was insufficient. The confession the Appellant made to the Mobile Police Department was simply redundant of the statement the Appellant made to the witness Love.

It is well established in Mississippi law that a harmless error analysis is available where a statement or confession has been admitted in violation of *Miranda*. *Smith v. State*, 907 So.2d 389 (Miss. Ct. App. 2005). Since there was a statement made by the Appellant to the witness Love in which the Appellant admitted his guilt, the Court should regard the error as being harmless. *Balfour v. State*, 580 So.2d 1203 (Miss. 1991). In the case at bar, the confession made to the police is not the only confession in the case. The one made prior to arrest was not said to be tainted somehow. While the Appellant claims that the witnesses were unreliable, we think their testimony was quite probative. It may be that some were reluctant witnesses, but this hardly

demonstrates that they were unreliable witnesses.

The Appellant then says that his statement to the police was coerced. It seems that the DEA agent mentioned the death penalty to the Appellant in the course of the first interview. That interview, though, does not appear to have concerned the felony here. The Mobile detective denied having threatened the Appellant with the death penalty. (R. Vol. 3, pp. 39 - 42).

The Mobile officers testified that they did not threaten the Appellant in any way. (R. Vol. 3, pp. 6 - 7; 10 - 11; 23; 29). One Mobile officer did not recall any threats made by the DEA agent to the effect that the Appellant was going to get the death penalty, (R. Vol. 3, pp. 18 - 19). The other implied that the DEA agent might have told the Appellant at one point that he would get the death penalty if he did not help himself. However, the Mobile detective testified that the Appellant was facing the death penalty, that being his understanding of the potential penalty in this State for murder. (R. Vol. 3, pg. 40). He denied having threatened the Appellant with the death penalty. (R. Vol. 3, pg. 44). It is unclear from the record, though, whether the arrest warrant charged capital murder or murder. (R. Vol. 3, pg. 40).

It is perhaps unfortunate that the Mobile Police Department allowed the federal agent to interview the Appellant. This agent appears to have been something of a nuisance with respect to the investigation of this murder. Regardless of what this interloper did, the fact remains that the Mobile officers did not threaten the Appellant. The federal agent was acting on his own authority and was in no way a part of the arrest and investigation involved here. There were no threats made to the Appellant during the second interview.

The Appellant claims that the Mobile officers availed themselves of the federal agents threats. However, we do not find this to be so after viewing the videotape. We do not find anywhere in this record that the Appellant was told that things would go better for him if he

confessed.

The Appellant does not say that he was threatened with the death penalty if he did not confess, or that he would gain some benefit if he confessed. Instead, he would have this Court infer such a thing from the fact that he was told that he might be or was facing the death penalty. The trouble with this argument, though, is that the Appellant cites no authority to the effect that it is improper to merely inform an accused of the potential penalty imposable for the crime he is accused of having committed. To inform an accused of the potential sentence for a felony he is accused of having committed, of itself, is not much more significant than informing him of what crime he is accused of having committed.

The Appellant cites, among other cases, *Abram v. State*, 606 So.2d 1015 (Miss. 1992), and asserts that some of the comments made by the Mobile detective were the same or substantially the same as some of those made there. Yet, this is not so. The videotape here does not show the detective telling the Appellant that by confessing he would avoid the death penalty or that some other boon might inure to him.

It is true that the death penalty is not an imposable sentence for "mere" murder. If in fact that arrest warrant charged malice aforethought murder, the federal and Mobile law enforcement officers were incorrect. That they might have been mistaken about the law in Mississippi does not mean the confession was coerced.

The Appellant did not testify that he confessed because of some promise of lenity or assistance. (R. Vol. 3, pg. 68; 71). He simply testified that he was scared because of the mention of the death penalty. (R. Vol. 3, pg. 72). We assert that this was an insufficient reason to find that the confession was coerced.

The Mobile police officers testified that they did not threaten the Appellant with the

infliction of the death penalty. The Appellant testified that he was frightened that he might get the death penalty. It was for the trial court to determine the facts. Since the trial court's decision to admit the confession was based upon substantial evidence, its decision should not be disturbed here.

Finally, the Appellant suggests that the non-appearance of the DEA agent at the suppression hearing amounted to a failure on the part of the State to prove the voluntariness of the confession. But that agent was not present in the second interview. Consequently, he had no evidence to give concerning it. The interview he did participate in was suppressed. Secondly, since the federal government refused to permit the agent to appear, the agent was simply unavailable. There was nothing the State could do about this.

2. THAT COUNSEL FOR THE APPELLANT WAS NOT INEFFECTIVE FOR NOT HAVING SOUGHT A MANSLAUGHTER INSTRUCTION

The Appellant asserts that his attorney was ineffective for having failed to seek a manslaughter instruction. He claims that in his taped statement he said that he shot the victim in a drug transaction gone awry, that he shot the victim because the victim pulled a gun.

We do not stipulate that the record is sufficient to permit this Court to pass upon the issue. The Court does not have the benefit of knowledge of the attorney's reasons for his actions. The decision to seek or forego a jury instruction is a matter of trial strategy. *Maxwell v. State*, 856 So.2d 513 (Miss. Ct. App. 2003). As such, an appellate record cannot allow for a determination of whether the decision was reasonable.

On direct appeal, this Court will not find ineffective assistance of counsel unless the alleged instances of ineffectiveness were so egregious as to have required the trial court to declare a mistrial *sua sponte*. *Colenburg v. State*, 735 So.2d 1099 (Miss. Ct. App. 1999). Given

the testimony in the State's case, it is not possible to say here that the trial court should have declared a mistrial because the Appellant did not seek a manslaughter instruction.

Assuming the Second Assignment of Error is before the Court, there is no merit in it. In considering it, we bear in mind the analysis applicable to claims of this sort. *E.g. McNeal v. State*, 951 So.2d 615 (Miss. Ct. App. 2007).

First of all, there was no testimony sounding in manslaughter by the defense. Indeed, there was no defense case in chief. This being so, there was no evidentiary predicate for a manslaughter instruction. Instructions may be given only if an evidentiary predicate exists for them. *Humphrey v. State*, 759 So.2d 368 (Miss. 2000).

Secondly, if the idea was that the Appellant killed the victim in self - defense, then, in addition to producing a case in self - defense, the instruction to have been requested would have been a self - defense instruction, not a manslaughter instruction.

The testimony and evidence presented in the case did not suggest manslaughter. The evidence showed murder. Since there was no evidentiary predicate for manslaughter, counsel did not render defective representation by failing to seek an instruction on the felony.

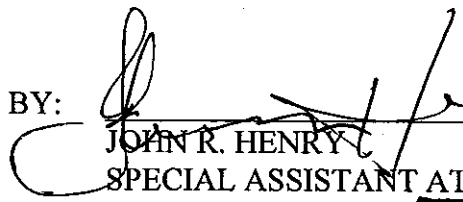
The Second Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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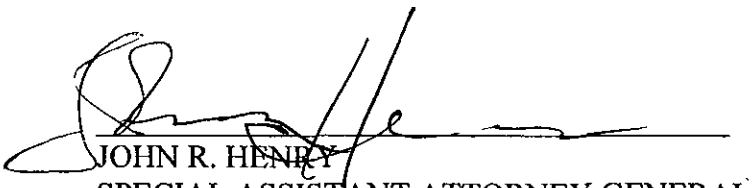
This the 7th day of May, 2007.



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