

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES BROWNLEE

APPELLANT

VERSUS

FILED

NO. 2006-KA-01399-COA

STATE OF MISSISSIPPI

JUL 02 2007

APPELLEE

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

**REPLY BRIEF OF APPELLANT
JAMES BROWNLEE**

**APPEALED FROM
THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI
ELEVENTH JUDICIAL DISTRICT
CAUSE NO. 2006-0007**

**RICHARD B. LEWIS
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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. Their representations are made in order that the Justice of this Court may evaluate possible disqualification or refusal:

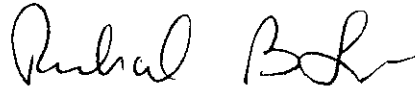
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Mr. James Brownlee
115 North 5th Street
West Helena, AR 72390

This the 2nd day of July, 2007.



RICHARD B. LEWIS

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES BROWNLEE

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VERSUS

NO. 2006-KA-01399-COA

STATE OF MISSISSIPPI

APPELLEE

ARGUMENT

I. APPELLANT CONTENDS THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

The Attorney General, the Appellee in this case, argues in its brief that “Brownlee waived - forfeited, if you please - his motion for a directed verdict made at the close of the State’s case-in-chief when he introduced evidence in his own behalf.”(Brief of the Appellee at 12) The Appellant asserts he did not waive any right for the Court to consider his request for a directed verdict. In **Holland v. State**, this court stated that this argument only applies if Appellant’s trial counsel had failed to renew his motion for a directed verdict at the close of Defendant’s case. **Holland v. State**, 656 So.2d 1192, 1197 (Miss. 1995) In the present case Appellant’s trial counsel renewed his motion for a directed verdict at the close of Appellant’s case by submitting a Jury Instruction (D-1) (R. 164) (See Exhibit “A” attached), a peremptory jury instruction, which was refused. Such a request is equivalent to a renewal of motion for directed verdict.

**II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL
THROUGHOUT THE PRE-TRIAL AND TRIAL STAGES OF THIS CASE.**

The Attorney General’s argument as to the issue of ineffective assistance of counsel in this

case is that the Appellant failed to meet the two prong test set forth in Strickland v. Washington, 466 U.S. 688, 687, 104, S.Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-695 (1984) and adopted by this Court in Stringer v. State, 454 So.2d 468, 476-477, (Miss. 1984). That is Appellant must prove: (1) That his counsel's performance was deficient and, (2) that this supposed deficient performance prejudiced his defense. The Attorney General in rebuttal of this issue merely argues that the Appellant alleged prejudice and failed to prove any prejudice.

The Appellant contends under Strickland v. Washington, 466 U.S. 688, 104, S.Ct. 2052, 80 L. Ed. 2d 674 (1984) that his attorney committed substantial errors and or deficiencies in his representation which prejudiced his case and caused the Appellant to be convicted and therefore the Appellant's conviction should be overturned and/or he be granted a new trial. Appellant did more than allege prejudice.

Appellant would show that Appellant's trial counsel was ineffective and prejudiced the outcome of this case in the following respects:

1. Appellant's trial attorney failed to investigate and determine the witnesses to establish the Appellant's alibi and by failing to subpoena and/or call to testify four alibi witnesses to testify at trial that said Appellant Brownlee was at Champ's Health and Fitness Club on 953 Highway 49 West Helena, AR, assisting his quadriplegic cousin in exercises during the time of the robbery at 3:30 p.m. on March 2, 2006. (See R.E. 6-14, Motion for a New Trial; Exhibit D-1 Collective Exhibit of Affidavits, pg 11-14) (R. 213-218). The witnesses that Appellant was prepared to call at his Motion for a New Trial hearing to establish that he was at another place at the time of the alleged robbery were:

(1) Richardo Hervey, (2) Demetrius Tate, (3) Adrian Horteson and (4) Ashante Hart. (See

R.E. 6-14 Motion for a New Trial; Exhibit D-1, pg 11-14) Appellant proffered their testimony by Affidavit at the hearing on the Motion for New Trial and J.N.O.V. (R. 213-218).

2. Appellant's trial attorney failed in not filing a pretrial motion to suppress the out of court photo lineup identification of the defendant as the robber due to its suggestiveness of said lineup which led to the jury's verdict based on a suggestive photo lineup. Appellant was obviously the only person in the six (6) man pretrial photo lineup with dreadlocks. (See R.E. 33 Photo Lineup, Exhibit D-1).

In making an ineffective assistance of counsel argument, the claim is judged by the standard set out in **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). The two inquiries under that standard are (1) whether counsel's performance was deficient, and if so (2) whether the deficient performance was prejudicial to the defendant in this sense. Our court has adopted this standard set out by our U.S. Supreme Court. As pointed out in several cases, the court has to make a determination as to whether the defendant has shown that an attorney's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Graves v. State**, 872 So.2d 760, (Miss. App. 2004). Second, the defendant must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. **Id** at 763. The Appellant must make both showings to show the result was unreliable. **Finley v. State**, 739 So.2d 425, (Miss. App. 1999) The attorney's performance must be defective and the deficiency must deprive the defendant of a fair trial. **Richardson v. State**, 769 So.2d 230, (Miss. App. 2000) Appellant's trial counsel's

performance was deficient and that the said Appellant was clearly prejudiced by trial counsel's performance in failing to investigate and call said alibi witnesses at trial. That but for the Appellant's trial attorneys failing to call said four alibi witnesses to testify at trial and establish the Appellant's alibi combined with the inaccurate description of the robber given by the witness and the suggestive photo lineup, the verdict would have resulted in a not guilty verdict. Failure to investigate and call said alibi witnesses at trial is error and in this case error that prejudiced the Appellant's defense thus meeting the two prong test of **Strickland**. This type prejudicial error when considering its cumulative effect, meets the test of **Strickland**.

The Attorney General's also argues that these failures by the Appellant's trial attorney are simply trial strategies. These cumulative errors or omissions are more than "trial strategy". The burden of proof has been met by Appellant and these deficiencies should be measured within the totality of the circumstances. (See **Hiter v. State**, 660 So.2d 961, 965 (1995).

This court in **McNeal v. State**, 951 So.2d 615 (Miss. App. 2007), has adopted the reasoning set out by the Fifth Circuit in Texas. In **Bryant v. Scott**, the court found that an Attorney must engage in a reasonable amount of pretrial investigation and, at a minimum, interview potential witnesses and make an independent investigation of relevant facts and circumstances; failure to interview eyewitnesses to a crime may strongly support a claim of ineffective assistance of counsel, and when alibi witnesses are involved, it is unreasonable for counsel not to try to contact witnesses and ascertain whether their testimony would aid defense. **Id** 28 F.3d 1411, C.A.5 (Tex.1994).

Further, counsel's failure to investigate and interview potential alibi witnesses constituted ineffective assistance of counsel, though witnesses' names were not made available to counsel until a pretrial hearing three days before the trial; counsel was aware early in proceedings that robbery

defendant wished to pursue alibi defense, counsel had time to contact witnesses and could have made a record with the trial court, and counsel should have attempted to make investigation in light of seriousness of offense and gravity of punishment. **Bryant** at 1411.

Counsel's failure to interview eyewitnesses to a robbery with which defendant was charged constituted ineffective assistance of counsel, notwithstanding counsel's vigorous cross-examination of those witnesses; because there was no physical evidence, eyewitness identification was crucial to state's case, and a reasonable lawyer, prior to trial, would not have regarded interviews as unnecessary. **Bryant** at 1411.

In **Johns v. State**, trial counsel's deficient performance in failing to interview alibi witnesses resulted in prejudice to defendant in an aggravated assault prosecution, and thus constituted ineffective assistance; a reasonable probability existed that but for counsel's failure, the outcome of the proceeding would have been different, as each of the alibi witnesses could remember the date and the times they saw defendant, each of the alibi witnesses put defendant in his neighborhood with his young daughter during time crime was committed, and testimony of alibi witnesses was not rebutted by the prosecution, as the State presented no physical evidence to convict defendant. **Id** 926 So.2d 188 (Miss. 2006)

In the present case, Appellant's trial attorney performance was deficient and constituted as ineffective assistance of counsel by failing to investigate and determine the witnesses to establish the Appellant's alibi and by failing to subpoena and/or call to testify four alibi witnesses to testify at trial that said Appellant Brownlee was at Champ's Health and Fitness Club on 953 Highway 49 West Helena, AR, assisting his quadriplegic cousin in exercises during the time of the robbery at 3:30 p.m. on March 2, 2006. (See R.E. 6-14, Motion for a New Trial; Exhibit D-1 Collective

Exhibit of Affidavits, pg 11-14) (R. 213-218). The witnesses that Appellant was prepared to call at his Motion for a New Trial hearing to establish that he was at another place at the time of the alleged robbery were:

(1) Richardo Hervey, (2) Demetrius Tate, (3) Adrian Horteson and (4) Ashante Hart. (See R.E. 6-14 Motion for a New Trial; Exhibit D-1, pg 11-14) Appellant proffered their testimony by Affidavit at the hearing on the Motion for New Trial and J.N.O.V. (R. 213-218).

The failure to call these witnesses as pointed out in **Johns v. State**, 926 So. 2d 188 (Miss. 2006), was not trial strategy but in fact was ineffective assistance of counsel.

CERTIFICATE OF SERVICE

I, Richard B. Lewis, Attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following persons:

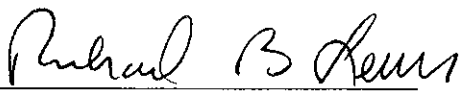
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Jackson, MS 39205

Mr. James Brownlee
115 North 5th Street
West Helena, AR 72390

This the 2nd day of July, 2007.



RICHARD B. LEWIS

Jury Instruction # _____

The Court instructs the Jury to find the Defendant James Brownlee not guilty.

2006-0007-D-1

REFUSED BY THE COURT
FILED 7-25-06
Charles P. [Signature] CIRCUIT CLERK
BY: [Signature]

Musand
ABS

