IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES DWIGHT VICKERS, SR. APPELLANT

V. NO.2006-KA-01711-COA

STATE OF MISSISSIPPI APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Statutory Authority:

Rules:

REPLY ARGUMENT OF THE APPELLANT

ISSUE NO. 1 THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON EACH COUNT.

In its brief, regarding Counts I and II, the State argues that Spencer and Woodruff testified that Vickers told them that he had found someone else to commit the murder, Jerome Booth. Appellee Brief at 9. However, it is crucial to note that neither Woodruff nor Spencer testified they knew the identity of this individual. In fact, Spencer testified Vickers never gave them a name. Tr. 870. As argued in appellant's original brief, the State failed to show Vickers actually hired Booth to do anything. There was never any direct evidence, much less circumstantial evidence, presented to show Booth and Vickers entered into any type of agreement to commit capital murder. "Each person involved in the conspiracy must know that 'they are entering into a common plan and knowingly intend to further its common purpose.'" *Harrington v. State*, 859 So.2d 1054 (¶ 9) (Miss.App.2003), citing *Mitchell v. State*, 572 So.2d 865, 867 (Miss.1990).

Regarding Counts III and IV, the State cites the post-conviction case of *Taylor v. State*, 682 So.2d 359, 362 (Miss. 1996), for the proposition that a conspirator cannot remove himself from a conspiracy unless he fully discloses to law enforcement that he was involved and now wishes to withdraw from it. However, *Taylor* goes on to state that that one can also withdraw by communicating his abandonment in a manner reasonably expected to reach his co-conspirators. *Id.* Therefore, even if there was a meeting of the minds at one point, which the appellant vigorously disputes, both Spencer and Woodruff withdrew from that conspiracy

when they made it known to Vickers that they could not complete the job. According to Woodruff, Vickers told him that he guessed he was never going to get the job done. Tr. 932. Spencer and Woodruff clearly communicated their intent not to commit the murder to Vickers. As argued in appellant's original brief, the evidence was insufficient to show any real conspiracy ever existed. A directed verdict should have been granted.

In Count VI, the State simply points to the testimony of Spencer and Woodruff to prove Vickers illegally possessed a firearm. No independent witnesses ever connected appellant to the any of the weapons the State alleged Vickers, at one time or another, possessed. The only pistols actually recovered were found in this girlfriend's. Tr. 1006-07. The guns legally belonged to her. Tr. 1023.

As argued in appellant's brief, which the State did not address, was that Vickers was indicted for possessing "a pistol" between the dates of July 2001 and January 2002. Neither Spencer or Woodruff could point to a specific day when they allegedly received any weapon from Vickers. Jury Instruction No. 22 allowed the jury to convict Vickers if they found he possessed a .38 caliber pistol, or a .22 caliber pistol, or a 9mm pistol. C.P. 390. Without more specificity, this charge should never have been given to the jury.

ISSUE NO. 2. THE VERDICTS WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In appellant's original brief, the lack of credible evidence connecting Vickers to the murder was set forth in detail. The State's theory was that Vickers, an accomplished businessman, decided to hire a succession of incompetent yard men to kill his brother and

his brother's wife. To allow this verdict to stand would clearly sanction an unconscionable injustice. Verdicts based on such weak evidence should not be allowed to stand. *Hawthorne v. State*, 883 So.2d 86 (¶13)(Miss. 2004). Vickers should be granted a new trial on all charges.

ISSUE NO. 3 VICKERS WAS IMPROPERLY PROSECUTED FOR BOTH MURDER FOR HIRE CAPITAL MURDER AND CONSPIRACY TO COMMIT CAPITAL MURDER IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

The State argues in its brief that Vickers hired Booth to commit the murder of his brother only when Spencer and Woodruff refused to complete the job. Appellee's brief at 13-14. The State submits *Stewart v. State*, 662 So.2d 552 (Mis. 1995), would only apply if Vickers was charged with murder for hire along with a separate conspiracy count with Booth. The State can not have it both ways. Either the alleged conspiracies between Spencer and Woodruff were complete and then abandoned, or this was one large continuing conspiracy which Booth was later brought into by Vickers.

At trial, the prosecution represented that Spencer and Woodruff were engaged in a continuing conspiracy with Vickers to kill his brother and his brother's wife. The prosecution alleged Spencer and Woodruff were supposed to kill Booth after the murders were completed. Tr. 829-40. Under *Stewart*, the jury should not have been allowed to consider Vickers's guilt as to capital murder in Count I, as well as conspiracy to commit capital murder in both Count III and IV.

In fact, the conspiracy count in *Stewart* did not even mention the name of who Stewart was alleged to have conspired with to kill the victim. *Id.* at 560. Under Miss. Code Ann. § 97-3-19 (2)(d), Spencer and Woodruff were clearly principals to David and Brenda Vickers' murder. Spencer and Woodruff admitted they were in constant touch with Vickers up to and after the murders. Vickers allegedly provided them with the murder weapon, which they left for Booth. Tr. 863. They provided the getaway car for the shooter and even attempted to dispose of it. Tr. 938-39, 955. They should have been charged with capital murder. The fact that they were not charged as such is of no consequence to the resolution fo this issue. Count III and IV were subsumed by the actual capital murder charge in Count I.

Furthermore, the appellant submits that reversing and rendering Counts III and IV is not enough. Count I should also be reversed and remanded. It is impossible to know whether or not the jury would have convicted Vickers in Count I if Count III and IV had not been submitted to the jury. Additionally, the jury may have concluded a conspiracy existed between Spencer and Woodruff, but that there was insufficient evidence that Vickers hired Booth to complete the job in Count I. Since Vickers's rights against double jeopardy were violated, a new jury should be allowed to consider if the evidence was sufficient on any of the counts alleged in the indictment.

ISSUE NO. 4 THE TRIAL JUDGE ERRED IN NOT ALLOWING A STATE'S WITNESS TO BE IMPEACHED WITH A PRIOR CONVICTION.

In its brief, the State simply states that M.R.E. 609(b) precludes impeachment of a witness with a conviction that is over ten years old. The State did not address the fact that

Vickers was attempting to attack the credibility of the witness under M.R.E 607 and M.R.E. 616. The State also failed to respond to appellant's argument that *White v. State*, 785 So.2d 1059 (Miss.2001), and *Young v. State*, 731 So.2d 1145 (¶38-40) (Miss.1999), are controlling in this instance since the witness was a non-party. Any prejudice to Allen stemming from his arrest record and 1977 conviction was irrelevant, as he was not a party in this case. A balancing test regarding the probative value versus prejudicial effect is simply unnecessary with a non-party. *Jefferson v. State*, 818 So.2d 1099 (¶27) (Miss. 2002).

Vickers was never given the opportunity to question Allen about his continued connection with the police. Tr. 668-72. Vickers's case should be remanded for a new trial allowing the defense to properly confront and cross-examine the prosecution witnesses.

ISSUE NO. 5 THE TRIAL JUDGE ERRED IN FAILING TO GRANT A NEW TRIAL BASED ON JUROR MISCONDUCT

In the State's brief, it is alleged that the test in *Odom v. State*, 355 So.2d 1381 (Miss. 1978), comes into play only when a juror fails to respond to a relevant, direct, and unambiguous question. Appellee brief at 17-18. However, as pointed out in appellant's original brief, the trial judge did not make specific findings as required by *Odom*, but simply concluded Jurors Bixler and Clark did not withhold substantial information or misrepresent any material fact. Supplemental Volume 1, pages 1-2, R.E. 32-33.

Odom requires that the court determine whether the question propounded to the juror was (1) relevant to the voir dire examination, (2) whether it was unambiguous, and (3) whether the juror had substantial knowledge of the information sought to be elicited. If the

answer is yes to any of these inquiries, then the court goes on to determine if it can be inferred that the defendant suffered any prejudice in selecting the jury. *Id.* at 1383.

The trial court's order does not make any specific findings as to whether the questions were relevant and unambiguous, nor whether or not the jurors had substantial knowledge of the questions. The court only found the jurors did not misrepresent anything. Accordingly, Vickers should be granted a new trial with a fair and impartial jury.

ISSUE NO. 6 THE TRIAL JUDGE ERRED IN FAILING TO ALLOW VICKERS TO PRESENT A DEFENSE.

ISSUE NO. 7 CUMULATIVE ERROR DEMANDS VICKERS BE PROVIDED A NEW TRIAL.

The appellant would stand on his original brief in support of both of these claims.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, James Dwight Vickers, Sr., contends that he is entitled to a new trial on all counts, with the exception of Count III and IV, which should be reversed and rendered.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Dwight Vickers, Sr., Appellant

By: 

Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 27th day of November, 2007, mailed a true and correct copy of the above and foregoing Reply Brief Of Appellant, by United States mail, postage paid, to the following:

Honorable Richard A. Smith
Circuit Judge
P.O. Box 1953
Greenwood, MS 38935

Honorable Joyce I. Chiles
District Attorney
P. O. Box 426
Greenville, MS 38702

Honorable Charlie Maris
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

James Dwight Vickers, Sr., MDOC #L5696
Mississippi State Penitentiary
P.O. Box 1057
Parchman, MS 38738

Leslie S. Lee

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No. 7765
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200