

2006-KA-01966-COA

Courtney Hill vs. State of Mississippi

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

**T ON THE
MERITS**

Antwayn Patrick, Esq.
Attorney and Counselor at Law
104 West China Street
P. O. Box 27
Lexington, MS 39095

Honorable James H. Powell, III.
Holmes County District Attorney
Post Office Box 311
Durant, MS 39063

Honorable Jim Hood
Attorney General
State of Mississippi
450 High Street
P. O. Box 220
Jackson, MS 39205-0220

Honorable Jannie M. Lewis
Circuit Court Judge, District 21
P. O. Box 149
Lexington, MS 39095

Mr. Courtney Hill
CCA WCCF
2999 Highway 61 N.
Woodville, MS 39669

So certified, this the 12th day of January, 2007.

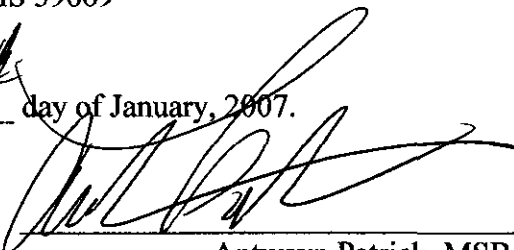


Antwayn Patrick, MSB 
Certifying Attorney

TABLE OF CONTENTS

Certificate of Interested Persons	.....	i
Table of Contents	.....	ii
List of Authorities	.....	iii
Statement of the Issues	.....	1
Statement of the Case	.....	2
Statement of the Facts	.....	2
Summary of the Argument	.....	5
Argument	.....	8
Conclusion	.....	16
Exhibit Index	.....	17
Certificate of Service	.....	18

LIST OF AUTHORITIES

CASES

Hickson v. State, 707 So.2d 536 (Miss. 1997)

Adams v. State, 72 So.2d 211 (1954)

Irvin v. Dowd, 366 U.S. 717

Estes v. Texas, 381 U.S. 532 (1965)

In re Oliver, 333 U.S. 257

Tumey v. Ohio, 273 U.S. 510

Seals v. State, 44 So.2d 61 (1950)

Reed v. State, 764 So.2d 496 (Miss.App. 2000)

Burroughs v. State, 767 So.2d 246 (Miss. Ct. App. 2000).

Odom v. State, 355 So.2d 1381 (Miss. 1978)

Bougon v. State, 2004 WL 422610 (Miss. App. 2004)

Randall v. State, 806 So. 2d 185 (Miss. 2001)

Houston v. State, 531 So. 2d 598 (Miss. 1988)

Rose v. State, 556 So. 2d 728 (Miss. 1990)

Box v. State, 437 So. 2d 19 (Miss. 1983)

Morris v. State, 777 So. 2d 16 (Miss. 2001)

Darghty v. State, 530 So. 2d 27 (Miss. 1988)

Inman v. State, 515 So. 2d 1150 (Miss. 1987)

Foster v. State, 484 So. 2d 1009 (Miss.1986)

Nixon v. State, 533 So. 2d 1078, 1090 (Miss. 1987).

Jenkins v. State, 607 So. 2d 1171, 1183-84 (Miss. 1992)

Hansen v. State, 592 So.2d 114, 142 (Miss. 1991)

STATUTES

U.S. Constitution Amendment VI.

Miss. Const. Art.3 § 26.

OTHER AUTHORITIES

Rule 404 of the Mississippi Rules of Evidence

URCCC 9.04(1)

STATEMENT OF THE ISSUES

- 1. THERE WAS JURY MISCONDUCT SO AS TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.**
- 2. THE MENTIONING OF THE APPELLANT PRIOR BAD ACTS OF THE APPELLANT BY THE STATE WAS SO PREJUDICE TO THE APPELLANT AS TO REQUIRE REVERSAL**
- 3. THE TRIAL COURT SHOULD HAVE SUSTAINED THE DEFENSE ATTORNEY'S MOTION FOR A CONTINUANCE WHEN HE WAS GIVEN NEW EVIDENCE ON THE DAY OF TRIAL.**
- 4. WHETHER THE CUMULATIVE ERRORS IN THIS CASE DENIED APPELLANT HILL A RIGHT TO A FAIR TRIAL?**

STATEMENT OF THE CASE

The Appellant, Courtney Hill, was indicted on September 5, 2006, by a grand jury in Montgomery County, Mississippi. He was indicted under Mississippi Code Annotated, Section 41-29-115 (A)(a)(4) in connection with the March 8, 2006, sale of crack cocaine. On the 3rd day of October, 2007, Courtney Hill was tried for this crime and on the same day, he was found guilty of the Sale of Cocaine and sentenced to twenty years. After the Verdict, Appellant Hill timely filed and perfected his appeal to this, the Supreme Court of the State of Mississippi.

STATEMENT OF THE FACTS

1. Appellant's Account

On October 3, 2007, the Appellant, Courtney Hill, was on trial for the Sale of Cocaine in Montgomery County, Mississippi. The Appellant was indicted forknowingly sell, transfer, distribute or deliver to Kendrick Shelton, a human being, approximately 0.1 grams of a controlled substance, to wit: Cocaine....

On the morning of trial, the State moved to amend the indictment because the State mistakenly indicted the defendant using a different crack cocaine. The State indicted the Appellant on crack cocaine that weighed 0.1 grams instead of the crack cocaine that weighed 0.19. The defense counsel for the Appellant appropriately and timely objected to the amendment arguing that he just received the new lab report five minutes prior to court. The appellant's counsel sought a continuance in this matter to investigate a potential evidentiary problem. Irrespective of the Appellant's counsel's objection, the trial court allowed the amendment and denied the defense counsel's motion for continuance. The trial court's reasoning for sustaining the state's motion to amend

the indictment was that "the changing of the weight is form not substance."

2. Jury Voir Dire

During jury voir dire, Lou Ann Irvin failed to notify the Court that she was the fiancée and had children by a brother of Kendrick Shelton, the star witness in the state's case.

3. Testimony of Deputy David Johnson

David Johnson was the chief deputy in the Montgomery County Sheriff's Department. (T. 45) On direct examination, Deputy Johnson testified that in his investigation from the street, he believed that Courtney Hill was involved in dealing crack. Deputy Johnson used Kenny Shelton as an informant. Deputy Johnson testified that Shelton called the Appellant Hill to make a buy. Appellant Hill later drove up and sold Shelton the rock of crack cocaine and Shelton gave Appellant Hill twenty dollars. Deputy Johnson carried the contraband home and the next morning, place the crack cocaine in the evidence room. (T. 49) Deputy Johnson carried the evidence to the crime lab. Deputy Johnson paid Shelton for his service rendered. (T. 51)

On cross examination, Deputy Johnson was asked how he knew Shelton. (T. 60) Deputy Johnson stated that he has known Shelton for a long time. When asked whether Shelton was a crackhead, Deputy Johnson stated that Shelton is not a crackhead, but an alcoholic.

4. Kendrick Shelton

Kendrick Shelton had known Courtney Hill for 10 to 12 years. (T. 87) The Assistant District Attorney asked Shelton how Shelton knew what Appellant Hill telephone number was and Shelton stated "Because I had purchased crack cocaine from

him before.” (T. 87) The defense attorney appropriately objected to the introduction of this very prejudicial testimony. The defense attorney moved for a mistrial. The trial judge attempted to remedy the statement by questioning the jury individually and advise them to disregard the statement. Id. The defense attorney argued that “there is absolutely no way that whatever you say to this jury can ever erase it from their minds that he purchased a crack cocaine from him before.” (T. 87-88) The trial judge overruled the defense attorney and questioned the jury individually and all the jurors stated that they can disregard the prejudicial statement. The trial judge told the Assistant District attorney to proceed.

Shelton stated that he called the Appellant and Shelton stated that Appellant Hill sold him a crack cocaine. On cross examination Shelton stated that Deputy Johnson thought that Shelton could help him with the drug trade because Deputy Johnson knew that he (Shelton) used crack before. (T. 93)

Appellant Hill did not testify.

SUMMARY OF THE ARGUMENT

1. **THERE WAS JURY MISCONDUCT SO AS TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.**

One of the fundamental hallmarks of our legal system is an accused's right to a fair trial before an impartial jury." Hickson v. State, 707 So.2d 536, 541 (Miss. 1997). It is a right guaranteed by both the federal and the state constitutions. Adams v. State, 72 So.2d 211, 214 (1954). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State,..." U.S. Constitution Amendment VI. "In all criminal prosecutions the accused shall have a right to...a speedy and public trial by an impartial jury,..." Miss. Const. Art.3 § 26.

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U.S. 257, 266; Tumey v. Ohio, 273 U.S. 510, 514.

This Court in Seals v. State, 44 So.2d 61 (1950), stated "Under the Constitution of the United States and of this State, accused persons are entitled to a fair and impartial trial. Therefore, a juror cannot under any circumstances serve on a jury where he will not be impartial and will be biased toward one party or the other. Reed v. State, 764 So.2d 496 (Miss.App. 2000). The effect of undisclosed information, such as a prior personal relationship between juror and defendant can be as destructive to a fair trial when it is realized only after the jury is seated as it would be were it to be purposely concealed during voir dire. Burroughs v. State, 767 So.2d 246, 253 (Miss. Ct. App. 2000).

In our present case, one of the jurors, Lou Ann Ervin, is believed to be related to the State's key witness Kenny Shelton. Juror Ervin was the fiancée and had children by

the brother of Kenny Shelton, Kendrick Shelton and this information was withheld from the Court and the appellant. This fact alone should be sufficient to warrant a reversal.

2. THE MENTIONING OF THE APPELLANT PRIOR BAD ACTS OF THE APPELLANT BY THE STATE WAS SO PREJUDICE TO THE APPELLANT AS TO REQUIRE REVERSAL

While it is well settled that the admission of evidence is within the discretion of the trial judge, her decision may be reversible when there has been an abuse of discretion which results in prejudice to the accused. Bougon v. State, 2004 WL 422610 (Miss. App. 2004). When the natural and probable effect of the improper effect of the improper statement is to create an unjust prejudice against the accused, a reversal is appropriate. Randall v. State, 806 So. 2d 185, 212 (Miss. 2001) Pursuant to M.R.E. 404, this Court has repeatedly held that the admission of evidence of unrelated crimes is reversible error, most recently in Houston v. State, 531 So. 2d 598, 605 (Miss. 1988); Rose v. State, 556 So. 2d 728, 731 (Miss. 1990)

In this present case, the trial court should have sustained the defense attorney Motion for a Mistrial. The prejudicial effect of the mentioning of the Appellant's previous drug sale was so tantamount that dissolve the State's burden of innocent until proven guilty standard. Thus, this Court should reversed and remand for a new trial.

3. THE TRIAL COURT SHOULD HAVE SUSTAINED THE DEFENSE ATTORNEY'S MOTION FOR A CONTINUANCE WHEN HE WAS GIVEN NEW EVIDENCE ON THE DAY OF TRIAL.

Where the State is tardy in furnishing discovery which it was obligated to disclose and after an initial objection is made by the defense, the defendant is entitled upon

request to a continuance postponement of the proceedings reasonable under the circumstances. Inman v. State, 515 So. 2d 1150, 1153 (Miss. 1987).

In this present case, the Appellant was given new evidence five minutes before trial. This new evidence is a central issue in this case, the crack cocaine that was allegedly was sold. Under the Box standard, the Appellant should have been granted a continuance to investigate fully the reason why there was a mix up of the crack cocaine that was introduced at trial and the crack cocaine that was given during discovery. Since this issue is so essential to this case, a continuance should have been granted. Therefore, since the trial court failed to grant a continuance, this Court should reverse and remand for a new trial.

4. WHETHER THE CUMULATIVE ERRORS IN THIS CASE DENIED APPELLANT HILL A RIGHT TO A FAIR TRIAL?

When viewed in its entirety, the prejudicial impact of the errors set forth above, Appellant Hill contends that the Court should find that he was denied his right to a fair trial. While “[i]t is true that not one of these errors, when considered separately and apart from the other, is sufficient to justify a reversal of the case, but when they are considered as a whole, it is our view that they resulted in the appellant being denied a fair trial. Hansen v. State, 592 So.2d 114, 142 (Miss. 1991). Given the numerous errors set forth above, this Court should find that the cumulative effect of the trial court’s errors resulted in the denial of a fair trial to Appellant Hill.

ARGUMENT

THERE WAS JURY MISCONDUCT SO AS TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

One of the fundamental hallmarks of our legal system is an accused's right to a fair trial before an impartial jury." Hickson v. State, 707 So.2d 536, 541 (Miss. 1997). The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and the state constitutions. Adams v. State, 72 So.2d 211, 214 (1954). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State..." U.S. Constitution Amendment VI. "In all criminal prosecutions the accused shall have a right to...a speedy and public trial by an impartial jury,..." Miss. Const. Art.3 § 26.

The right to a trial by an impartial jury lies at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-722, "Our common-law heritage, our Constitution, and our experience in applying that Constitution has committed us irrevocably to the position that the criminal trial has one well-defined purpose--to provide a fair and reliable determination of guilt." Estes v. Texas, 381 U.S. 532, 565, (1965). That purpose simply cannot be achieved if the jury's deliberations are tainted by bias or prejudice. Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial. Thus, time and time again, in a broad variety of contexts, the Court has adopted strong measures to protect the right to trial by an impartial jury. Irwin, 366 U.S. at 721.

In Irvin v. Dowd, the Court stated: "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The

failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U.S. 257, 266; Tumey v. Ohio, 273 U.S. 510, 514.

This Court in Seals v. State, 44 So.2d 61 (1950), stated “Under the Constitution of the United States and of this State, accused persons are entitled to a fair and impartial trial. That means fair, unprejudiced, unbiased individual jurors, who are willing to be guided by the testimony given by the witnesses and the law as announced by the Court. Seals, 44 So.2d at 64.

A juror cannot under any circumstances serve on a jury where he will not be impartial and will be biased toward one party or the other. Reed v. State, 764 So.2d 496 (Miss.App. 2000). The effect of undisclosed information, such as a prior personal relationship between juror and defendant can be as destructive to a fair trial when it is realized only after the jury is seated as it would be were it to be purposely concealed during voir dire. Burroughs v. State, 767 So.2d 246, 253 (Miss. Ct. App. 2000).

This Court has held that prejudice to the defendant is presumed in situations such as the one sub judice: following a jury’s verdict, where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause. This Court will presume prejudice when these situations occur. Hickson, 707 So.2d at 542.

In Odom v. State, 355 So.2d 1381 (Miss. 1978), this Court set out the proper matters to be considered when a defendant claims that he has been denied a fair trial because a juror failed to reveal pertinent information during voir dire. These issues include an analysis of whether (a) the inquiry was relevant, (b) whether it was plain and

unambiguous, and (c) whether the unresponsive juror had substantial knowledge of the information. Id. at 1383; Bell v. State, 835 So.2d 953 (Miss. App. 2003).

In this present case like all other cases, a jury has to be unbiased and the appearance of anything other than a fair jury demands a reversal. The juror in this case failed to notify the Court that she was a close kinship of the State's key witness, Kenny Shelton. Here, Kenny Shelton's brother is name Kendrick Shelton. Kendrick had children by Lou Ann Irvin. Lou Ann Irvin was one of the jurors in this present case.

Just as in Burrough where the Court stated that the effect of undisclosed information can be destructive to a fair trial, this undisclosed information was equally destructive. This Court should presume prejudice. As long held by this Court, it is presumed prejudice when a juror withholds material information from the court. As in this case, the appellant contends, deprived him of a fair and impartial jury, and consequently, he was deprived of the right to a fair trial. Just as in Seales and Reed where this Court stated that a biased juror cannot seat on a jury, it is no doubt that if the information was disclosed, Irvin would not have been on this jury. Irvin sitting on the jury creates an appearance of unfairness which is exactly what this Court sought to prevent. Following precedent and dicta, if there is any belief in the sanctity of the judicial process, it would be destroyed by this Court affirming the verdict. Every accused has a right to a fair trial and an unbiased juror. Based upon the foregoing facts, this Court should reverse and remand the verdict of the trial court. Moreover, at a minimum, this Court should remand and request that the trial court conduct a hearing to determine whether the juror is related to the defense counsel and the nature of their relationship.

**THE MENTIONING OF THE APPELLANT PRIOR BAD ACTS OF THE
APPELLANT BY THE STATE WAS SO PREJUDICE TO THE
APPELLANT AS TO REQUIRE REVERSAL**

While it is well settled that the admission of evidence is within the discretion of the trial judge, her decision may be reversible when there has been an abuse of discretion which results in prejudice to the accused. Bougon v. State, 2004 WL 422610 (Miss. App. 2004). When the natural and probable effect of the improper effect of the improper statement is to create an unjust prejudice against the accused, a reversal is appropriate. Randall v. State, 806 So. 2d 185, 212 (Miss. 2001) Pursuant to M.R.E. 404, this Court has repeatedly held that the admission of evidence of unrelated crimes is reversible error, most recently in Houston v. State, 531 So. 2d 598, 605 (Miss. 1988); Rose v. State, 556 So. 2d 728, 731 (Miss. 1990)

In this present case, it is not a question that the statement made by Shelton that Appellant Hill sold him crack before was prejudicial. The trial court did not cure the prejudice by asking the jury to disregard or ask them would it prejudice them. Just as in Bourgon and Randall, the improper statement unjustly prejudiced the defendant and this Court ruled a reversal was appropriate. Therefore, since the prior bad acts stated was so prejudicial, this Court should reverse and remand for a new trial.

should follow the following procedure, as set out in Box, Box, 437 So. 2d at 23-24.

Failure to follow the Box guidelines is prejudicial error. Darghty v. State, 530 So. 2d 27, 32 (Miss. 1988)

In Inman v. State, the Mississippi Supreme Court noted that there is no hard and fast rule determining how much time is a reasonable time for the defense to assimilate unexpected and previously undisclosed evidence offered by the State. Inman v. State, 515 So. 2d 1150, 1153 (Miss. 1987) Where the State is tardy in furnishing discovery which it was obligated to disclose and after an initial objection is made by the defense, the defendant is entitled upon request to a continuance or postponement of the proceedings reasonable under the circumstances. Inman, 515 So.2d at 1153 (quoting Foster v. State, 484 So. 2d 1009 (Miss.1986) Before this procedure can be followed, it is incumbent upon the defendant to make a timely objection. Nixon v. State, 533 So. 2d 1078, 1090 (Miss. 1987).

In this case, the State produced to the defense attorney the crack cocaine that was allegedly sold to Shelton by Appellant Hill. The defense attorney appropriately objected to the introduction of such evidence or sought a continuance. (T. 2-29). The trial court asked the defense attorney how his defense would change if the trial court amends the indictment. The defense attorney said he did not know since he was given the evidence five minutes before the trial and he has not had time to evaluate the evidence. The trial court failed to follow the Box standards. Just as in Inman and Foster, the Appellant was entitled to a continuance.

Failure to follow the Box standard is prejudicial error. There is a difference between amending the indictment to change the weight of the crack cocaine and

amending the indictment to add a different piece of evidence. The Appellant was entitled to a postponement of the proceedings. Justice so requires. The Appellant was in essence facing thirty years in prison. The Appellant's defense attorney stated on the record that he was not ready to proceed on the new evidence. The justice system does not require the expedition of cases at the expense of the defendant. When in doubt, the continuance should weigh in favor of the defendant and failure to do so should be considered a reversible error. Therefore, since the trial court failed to follow the Box standard, and the failure unjustly prejudiced the Appellant, this case should be reversed and remanded for a new trial.

WHETHER THE CUMULATIVE ERRORS IN THIS CASE DENIED APPELLANT HILL A RIGHT TO A FAIR TRIAL?

The Court has often ruled that errors in the lower court that do not require reversal standing alone may nonetheless taken cumulative require reversal. Jenkins v. State, 607 So. 2d 1171, 1183-84 (Miss. 1992) When viewed in its entirety, the prejudicial impact of the errors set forth above, it is clear that Appellant Amos was denied his right to a fair trial. While "[i]t is true that not one of these errors, when considered separately and apart from the other, is sufficient to justify a reversal of the case, but when they are considered as a whole, it is our view that they resulted in the appellant being denied a fair trial. Hansen v. State, 592 So.2d 114, 142 (Miss. 1991). Given the numerous errors set forth above, this Court should find that the cumulative effect of the trial court's errors resulted in the denial of a fair trial to Appellant Amos.

CONCLUSION

Numerous errors have been made in this case. First, the trial court should have granted the Appellant's Motion for Continuance when the defense counsel received new evidence five minutes before trial. Second, the jury was biased. One of the jurors was a fiancée and had children by the State's key witness, Kenny Shelton. Next, the trial court should have granted a mistrial when Kenny Shelton, the State's key witness, mentioned prior bad acts of the Appellant. Finally, the cumulative errors in this case denied the Appellant of a fair trial.

For all of the foregoing reasons, the findings of the lower court should be reversed and the case should be remanded for a new trial before an unbiased jury in the Circuit Court of Montgomery County, Mississippi.

Respectfully submitted,

COURTNEY HILL

BY:

ANTWAYN PATRICK, MSB# [REDACTED]
Attorney and Counselor at Law
104 West China Street
P. O. Box 27
Lexington, MS 39095
(662) 834-1116
(662) 834-1196-Fax

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COURTNEY HILL
Appellant

V.DOCKET NO. 2006-KA -01966-COA

STATE OF MISSISSIPPI
Appellee

APPELLANT'S EXHIBIT INDEX

APT -1	DEATH CERTIFICATE	P. 1
APT-2	JURY VENIRE	P. 2

CERTIFICATE OF SERVICE

I, ANTWAYN PATRICK, do hereby certify that I have this day via
U.S. mail, postage pre-paid, a true and correct copy of the foregoing Appellant's
Brief on the Merits on the following:

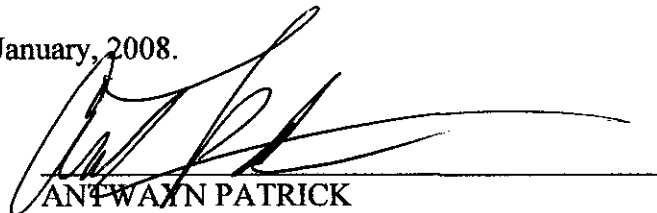
James H. Powell, III.
Holmes County District Attorney
Post Office Box 311
Durant, MS 39063

Jim Hood
Attorney General
State of Mississippi
450 High Street
P. O. Box 220
Jackson, MS 39205-0220

Honorable Jannie M. Lewis
Circuit Court Judge, District 21
P. O. Box 149
Lexington, MS 39095

Courtney Hill
CCA WCCF
2999 Highway 61 N.
Woodville, MS 39669

This the 19th day of January, 2008.


ANTWAYN PATRICK