IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY M. MOORE — APPELLANT

V. — NO. 2006-KA-2159-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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LARRY M. MOORE **APPELLANT**

V. **NO. 2006-KA-2159-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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Larry M. Moore, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable C.E. Morgan, III, Circuit Court Judge

This the 22nd day of March, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not request oral argument in this case. The issues lend themselves to thorough briefing on the record before the Court, and the oral argument would not likely aid the Court in its disposition of this case.

STATEMENT OF THE ISSUES

I. **THE COURT ERRED IN DENYING JURY INSTRUCTION D-1.**

II. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

Larry Moore was convicted of the sale of cocaine and sentenced to twelve years in the custody of the Mississippi Department of Corrections, with four of those years suspended. (C.P. 27-28; R.E. 5-8). Aggrieved, the Appellant filed a Notice of Appeal. (C.P. 34; R.E. 10-11). Larry Moore is presently incarcerated with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The Court erred in denying jury instruction D-1 which would have informed the jury that the fact the Defendant was indicted is not evidence in the case and that the indictment was not evidence of the Defendant's guilt or innocence. The trial court denied the instruction stating that it was covered in the Court's other instructions; however a review of the records shows that it was not covered elsewhere. The denial of such an instruction has been held to be reversible error. ***Rainer v. State***, 438 So.2d 290, 293 (Miss. 1983).

The verdict was against the overwhelming weight of the evidence. Here, the confidential informant who made the purchase admitted on the witness stand that he did not know the name of the person from whom he bought the cocaine even though he had gone to school with the Appellant.

It is very important to note that the confidential informant was paid $100 for every drug case that he made.

The Appellant testified that it was not him who sold cocaine to the confidential informant, and that he did not wear "doo rags" or gold jewelry like the individual in the video was wearing. Additionally, the Appellant's mother testified that the person in the video absolutely was not her son. She further testified that her son did not wear or own "doo rags."

Based on the foregoing, the Appellant asserts that the Court should reverse his conviction and remand this case to the Winston County Circuit Court for a new trial.

FACTS

On or about March 10, 2005, two officers with the Mississippi Bureau of Narcotics set up an undercover buy of crack cocaine. (Tr. 31-32). The buy was conducted using a confidential informant. (Tr. 31-32). A hidden video camera was placed in the confidential informant's vehicle, and he was wired with a body microphone. (Tr. 31-32). The police officers searched the confidential informant and his vehicle for any contraband before the confidential informant was sent out to make the buy. He was also given $40 in government funds in order to make the buy. (Tr. 31-32).

The confidential informant testified that he then went to Winston Street in Louisville, Mississippi and spoke with a man regarding purchasing $40 worth of crack cocaine. (Tr. 38-39). The individual took the $40 and instructed the confidential informant to come back for the drugs after making the block. (Tr. 39-40). After he made the block, the confidential informant went back to Winston Street and the same individual gave him a rock-like substance which later tested positive for cocaine. (Tr. 39-40, 56). After he received the cocaine, the confidential informant returned to the location where the police officers were waiting for him. (Tr. 33). He turned over the cocaine, and his body and vehicle were again searched for contraband. (Tr. 33, 40).

At trial, the confidential informant testified that he did not immediately recognize the Appellant. (Tr. 46). He said it was only a couple of weeks later did he realize that he had gone to school for twelve years with the Appellant. (Tr. 46). In spite of allegedly recognizing the Appellant a couple of weeks later, the confidential informant never reported that fact to the police officers. (Tr. 47). Also, in spite of the fact that it took him some two weeks to allegedly realize he knew the Appellant, he testified at trial that there was no doubt in his mind that the Appellant was the one who sold him the cocaine on that particular day. (Tr. 40, 42, 45, 50).

Several months after the buy took place, the MBN agents showed the video tape of the transaction to a police officer with the Louisville, Mississippi Police Department who testified that he recognized the individual on the video tape as the Appellant. (Tr. 35-36, 51). He further testified that he did not know why his fellow police officers waited several months before showing him the video tape to see if he could identify the seller of the cocaine. (Tr. 51-52).

The Appellant took the witness stand and testified that it was not him who sold the cocaine, and that it was not him on the video tape. (Tr. 63, 64, 66). He further testified that he does not wear or own any "doo rags," and that he does not own or wear any gold jewelry as the person who sold the cocaine was wearing in the video. (Tr. 67).

The Appellant's mother also testified at trial. She testified that it was not her son on the video tape. (Tr. 61-62). She also testified that the Appellant does not wear or own "doo rags." (Tr. 61-62).

The Appellant was found guilty of the sale of cocaine, and he was sentenced to twelve years in the custody of the Mississippi Department of Corrections, with four of those years suspended. (C.P. 27-28; R.E. 5-8). Aggrieved, the Appellant filed a Notice of Appeal. (C.P. 34; R.E. 10-11).

The Court Erred in Denying Jury Instruction D-1.

A. Standard of Review

The Mississippi Supreme Court has set forth the standard of review for the trial court's refusal of a jury instruction as follows:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Poole v. State, 802 So.2d 82, 88 (Miss. 2002)(citing ***Smith v. State***, 802 So.2d 82, 88 (Miss.2001)). *See also,* ***Austin v. State,*** 784 So.2d 186, 192 (Miss.2001); ***Humphrey v. State***, 759 So.2d 368, 380 (Miss.2000).

B. Refusal of D-1.

At trial, the Appellant submitted jury instruction D-1 which stated as follows, "The Court instructs the Jury that the fact that the Defendant was indicted is not evidence in this case, and the indictment itself is not evidence of Defendant's guilt or innocence." (C.P. 18; R.E. 4). The Court denied the instruction stating, "Okay. Okay. D-1 is covered by C-1 or by instruction number one. And therefore, it is refused." (Tr. 69; C.P. 18; R.E. 4).

In ***Rainer v. State***, 438 So.2d 290, 293 (Miss. 1983), the Court held that the failure of the Court to instruct the jury that the indictment is not evidence was reversible error. In ***Williams v. State***, the Mississippi Supreme Court pointed out that in ***Rainer***, "the Court reversed and remanded the appellant's conviction because the trial court failed to instruct the jury that the indictment was not evidence of facts alleged in the indictment or to be considered as evidence of guilt." ***Williams v. State***, 761 So.2d 149, 152 (Miss. 2000). Williams also reminded that "[a]n indictment is a mere

charging instrument and provides not the slightest evidence of actual guilt of the charges contained in the indictment." ***Williams v. State***, 761 So.2d 149, 154 (Miss. 2000)(citing ***Rainer v. State***, 438 So.2d 290, 293 (Miss.1983)).

In the present case, the instruction was offered but refused by the Court on the basis that it was covered in the Court's instruction to the jury. (Tr. 69). However, a review of the Court's instruction yields absolutely no mention of the indictment. (C.P. 13-16). The instruction does mention that the Defendant is presumed innocent, and that evidence consists of "testimony and statements of witnesses and exhibits offered and received." (C.P. 14-15).

The ***Rainer*** Court found that such instructions does not cure the error. ***Rainer*** at 293. Indeed, the State in ***Rainer*** made an argument that because similar instructions were given in that case, there was no error. ***Id.*** However, the Court disagreed, and found, "That instruction fails to instruct the jury that the indictment was not evidence, in fact, it mentions that arguments, statements and remarks of counsel are not evidence, but nowhere does it mention the indictment. The jury received no instruction concerning the indictment whatsoever." ***Rainer v. State***, 438 So.2d 290, 293 (Miss. 1983).

The ***Rainer*** Court observed, "This Court has previously held that when the jury is permitted to take the indictment into the jury room it should be instructed that the fact that the defendant has been indicted is not evidence of the facts charged in the indictment and that the indictment should not be considered as evidence of guilt." ***Rainer v. State***, 438 So.2d 290, 293 (Miss. 1983)(citing ***Wood v. State***, 275 So.2d 87 (Miss.1973)). The Court went on to hold:

> While the record does not reveal whether the jury was given a copy of the indictment, they were certainly reminded of it through Instruction S-2. Recalling that Instruction S-2 referred to the indictment in a manner which assumed as true material facts which were within the province of the jury to decide, that instruction was equivalent to handing the jury a copy of the indictment. The granting of Instruction S-2 coupled

with the denial of Instruction D-2 require that we reverse.

Rainer v. State, 438 So.2d 290, 293 (Miss. 1983).

In the present case, the first sentence of S-1 is nearly identical to the introductory sentence of the jury instruction S-2 in ***Rainer***. There, the instruction stated:

> The defendant, KEN RAINER, has been charged by an indictment with the crime of receiving stolen property for having bought or received 350 cases of type AF542 Prestone II antifreeze which had been feloniously taken from Gibsons Products Company of Laurel, Inc., knowing that the property had been so taken.

Rainer at 292.

Here, the first sentence of the instruction provides:

> The defendant, LARRY MOORE, has been charged by indictment in this case with the crime of sale, delivery or distribution of a Schedule II controlled substance, Cocaine.

(C.P. 17).

In ***Rainer***, the Court held that the jury instruction, and specifically the first sentence of the instruction was tantamount to taking the indictment into the jury room. ***Rainer*** at 293. Because the first sentence of the jury instruction in question here is nearly identical to the one in ***Rainer***, it was tantamount to taking the indictment back into the jury room. As such, it was error to deny jury instruction D-1, and the Court should reverse and remand for a new trial on this issue.

The Verdict Was Against the Overwhelming Weight of the Evidence.

A. Standard of Review

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be

> exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. ***Id.*** This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. ***Id.*** Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005)(footnotes omitted).

B. The Weight of the Evidence.

Here, the confidential informant who made the purchase admitted on the witness stand that he did not know the name of the person from whom he bought the cocaine. (Tr. 46). He further admitted that even though he had gone to school with the Appellant, he did not recognize him at the time. (Tr. 46). Indeed, he testified that the identity of the Appellant suddenly came to him about two weeks later. (Tr. 46). Also of importance to note is that the confidential informant was paid $100 for every drug case that he made. (Tr. 45).

A police officer testified that he recognized the Appellant from reviewing the video tape. However, he was not asked to review the video tape until months after the alleged sale. (Tr. 51). Furthermore, a review of the video shows that it would be very difficult to identify who it was that sold the cocaine to the confidential informant. (Exhibit 2). The video is shaky and blurry, and the individual only appears on the video for a moment, and he is wearing a "doo rag" on his head.

Conversely, the Appellant testified that it was not him who sold cocaine to the confidential informant. (Tr. 64). He further testified that he did not wear "doo rags," and in fact does not even own one. (Tr. 63, 64, 66 67). He also testified that he does not own any gold jewelry like the gold chain that the individual in the video is wearing. (Tr. 67).

The Appellant's mother testified that the person in the video absolutely was not her son. She further testified that her son did not wear or own "doo rags." (Tr. 61-62). Who would know better to recognize an individual than one's own mother?

The Appellant submits that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant contends that the Court erred in denying Jury Instruction D-1. Additionally the Appellant contends that the verdict was against the overwhelming weight of the evidence. Accordingly, the Court should reverse and remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, Counsel for Larry M. Moore, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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Honorable Doug Evans
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Honorable Jim Hood
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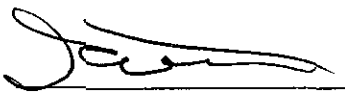
This the 22nd day of March, 2007.



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