IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-00059 COA

KENIVEL SMITH — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE



**BRIEF OF APPELLANT**

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Kenivel Smith

THIS 24th day of October 2007.

George T. Holmes

GEORGE T. HOLMES
Mississippi Office of Indigent Appeals
Counsel for Kenivel Smith

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**ISSUE NO. 2:** **WAS THE VERDICT SUPPORTED BY THE EVIDENCE?**

## STATEMENT OF THE CASE

This appeal proceeds from a judgment of conviction for the crime of aggravated assault against Kenivel Smith from the Circuit Court of Tunica County, Mississippi, following a trial held September 25-28, 2006, Honorable Albert B. Smith, III , Circuit Judge, presiding. The sentence was twenty (20) years, and Kenivel Smith is presently incarcerated with the Mississippi Department of Corrections.

## STATEMENT OF THE FACTS

The testimony in this case reveals only one certainty, between 5:00 p. m and midnight, on December 28, 2004, at 1137 Cumberland Street, in Tunica County, Mississippi, Andre Davis, a convicted felon, was shot in the right hip, probably with a 9mm projectile. [T. 18-20, 43-46, 85-86, 113; Ex. 2 a-b]. Investigators found spent 9mm cartridges in Cumberland Street a distance of approximately fifteen (15) feet away from Davis' trailer. [Ex. S-3 a-d, S-4; T. 22-23, 113, 143, 146]. No spent cartridges were

found in the yard or nearer to Davis' trailer. [T. 146, 149-50].

The day after the incident, Davis informed Tunica County Sheriff's Deputies investigating the matter that the shooting was done by the appellant Kenivel Smith. [ 48-49, 119, Ex S-5c1]. Davis' interview with the investigators was recorded and a written statement was obtained as well. *Id.* In these statements, Davis said Smith shot while on or near the front porch of the mobile home where Davis was. [T 48, 88 -89, 149-53, Ex. S-5a, S-5c1].

In his trial testimony, Davis said he did not see Kenivel Smith on the day of the shooting at all. [T. 43-44]. Davis recalled in his testimony that the shots came from "across the street", not from the porch or yard. [T. 46].

The state asked to have Davis declared unavailable and to be allowed to introduce Davis' out of court statements under Miss. R. Evid. 803 (24) and 804(a)(3) and (b)(5). [T. 48-52, 55-56, 60, 69, 74-75, 79]. This was allowed even though Davis told the court, after its ruling, but before the actual admission of the statements into evidence, that the statements about Smith were based on pure hearsay. [T. 74-75]. The court asked Davis directly why did he tell police that Smith shot him, and Davis told the court that his nephews said they saw Smith drive by. *Id.* When the trial judge told Davis to speak up, Davis repeated, "Your Honor, the car – my nephew said a car rode by. They said Kenivel was in it. ...said Kenivel was the one guy that shot [me]." *[Id.* at 75 ]. The trial court ruled again that its prior ruling would stand. [T. 79].

The audio-tape of Davis interview was played for the jury and a transcript, which was not admitted into evidence, was given to the jury for following along only, and the written statement was admitted into evidence. [T. 79, 82-83; Ex. S-5 a-b-c]. These introductions of Davis' out of court statements became the sole factual basis of the conviction in this case.

Subsequently, after leading everyone to believe he had no memory of the events, Davis swore to the jury that all was a lie. [T. 90-98 ]. Davis indicated he indeed recalled the events that evening and said clearly that he did not even see Kenivel Smith on the day of the shooting and the statement to the sheriff's deputies about the shooter was fabricated and that the shooter was in the street, not near the house, and that he could not identify the shooter. [T. 43-46, 48, 88-89, 90-98].

Davis confirmed on cross-examination what he stated in direct, that the shots came from the street, where the spent casings were found, and that Kenivel Smith was not on the porch as claimed in the statement to the investigators, nor anywhere in sight. [T. 46, 90, 90-98]. The following is a portion of that testimony:

> Q. [defense counsel] ...The truth is, you didn't see Kenivel Smith, did you?
> A. [Davis] No, Sir.
> Q. Have you ever seen Kenivel Smith –
> A. Not till today.
> Q. – shooting? Did you ever see him shoot at you?
> A. No, sir.
> Q. Did you see him shoot at you that night?
> A. No, sir.
> Q. Was he standing on the porch?

A. No, sir.
Q. Shots came across the street?
A. Yes, sir
[T. 92].

The reason Kenivel Smith was initially blamed, as Davis said, was:

A. "'Cause my nephew - they ...you know how you hear on the street that Kenivel shot you, and such and such.
Q. So, you heard on the street that Kenivel Smith shot you?
A. Yes, sir.
[T. 93].

The defense presented testimony from an eyewitness Richard J. Jackson who said he saw the shooting, and that Kenivel Smith was not anywhere around and that the shooter was in the street in front of Davis' house. [T. 179-87].

## SUMMARY OF THE ARGUMENT

The appellant was irreparably prejudiced by the admission of incompetent hearsay evidence to which no exception applied. More importantly and in all fairness, the evidence simply does not support the guilty verdict

## ARGUMENT

**ISSUE NO. 1: DID THE TRIAL COURT ERR BY ALLOWING THE INTRODUCTION OF THE VICTIM'S RECORDED STATEMENT?**

When the prosecutor asked Davis about his written statement to investigators, Davis acknowledged making and signing the statement, but said he did not remember the contents. [T. 48-49, 73-74] Davis confirmed during his direct testimony that he had told the investigators that Smith shot him over drugs. [T. 51-52].

When the state asked the court to declare Davis unavailable under Miss. R. Evid. 804 (a)(3), the trial court found that the requirements of the rule had been met, that Davis "indicates lack of memory after the review of the statement", and the defense had notice of the state's intent to use the recorded statements, because a motion in limine to exclude the statement had been filed. [T. 53, 55-56]. The trial court found under Miss. R. Evid. 804 (b)(5) and ostensibly under 803 (24), that there were "circumstantial guarantees of trustworthiness", because the witness acknowledged that the statements were given to police, the statements were about material matters, and that the statements were more probative than anything else on the point at issue and the interests of justice would be served by admission. *Id.*

Next, even though there was no sponsoring witness for Davis' statement being accurately transcribed in Exhibit S-5a, and no sponsoring witness for a recording of the

statement, Exhibit S5c1, and even though Davis advised the court that the content of the purported statement was based on things that his nephew and told him, (i. e. admittedly double hearsay) the trial court found that the statement constituted a trustworthy exception to the hearsay rule under Miss. R. Evid 804 (b) (5) and 803 (24), and allowed the state to introduce Davis' out-of-court recorded interview and written statement. [T. 48-52, , 55-56, 60, 66-70, 74-75, 79; Ex. S-5a and S-5c1].

Davis told the court, after its ruling, but before the actual admission of the statements into evidence, that the statements about Smith were based on pure hearsay. [T 74-75]. The court asked Davis directly why did he tell police that Smith shot him, and Davis told the court that his nephews said they saw Smith drive by. *Id.* When the trial judge told Davis to speak up, Davis repeated, "Your Honor, the car – my nephew said a car rode by. They said Kenivel was in it. ... said Kenivel was the one guy that shot [me]." [*Id.* at 75 ]. There were numerous objections and a motion in limine regarding the state using this statement. [T. 52][1].

The first problem with admission of Davis' statement in writing as Exhibit S-5 and as recorded Exhibit S-51c, is that there was no evidentiary foundation established prior to the statements' admission into evidence for either one. There was no sponsoring witness for their admission into evidence, especially the recorded statement as the court's ruling

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This motion is referenced during the trial and is listed on the docket, but neither the clerk nor trial counsel is can provide appellate counsel with a copy upon diligent search.

was based on representations of the prosecutor, not testimony as required by Miss. R. Evid. Rule 901. [T. 60, 66-70]. As for the written statement S-5a, the only thing close to a sponsoring witness was that Mr. Davis looked at it, acknowledged that he signed a statement but could not recall what he said. [T. 48].

Miss. R. Evid. Rule 901(a) requires "authentication or identification" by a witness or by stipulation that the thing is what its proponent claims as a definite "condition precedent" to its admission into evidence. Otherwise, the offered evidence is irrelevant according to the comments to the rule. See particularly *Middlebrook v. State*, 555 So.2d 1009, 1012 (Miss. 1990). The fact that no chain of custody was shown should not be overlooked either. *Brown v. State*, 682 So.2d 340, 350-51 (Miss.1996).

Secondly, the underlying reason for attempting to refresh Davis' memory was not valid. The state did not seek merely to impeach it's own witness, it presented the double hearsay as substantive proof of the charges in the indictment. This of course resulted in Smith's inability to cross-examine the nephews who made the accusation against him, a Sixth Amendment violation under authorities too numerous to list, but which include *Crawford v. Washington*, 124 S. Ct 1354, 1359-65, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and *Young v. State*, 731 So. 2nd 1145, 1150 (Miss. 1999). See also, Article 3, § 26, of the Mississippi Constitution.

In *Flowers v. State*, 842 So.2d 531, 551-52 (Miss.2003), the court said once a predicate is laid that an inconsistent statement was made at a particular time, "the witness

may be impeached by showing prior statements inconsistent with the in-court testimony, so long as the statement made in court is one relevant to the issue in the case and therefore not collateral." *Id.* There must be "a good faith basis" for the cross-examination and, "counsel may not use prior inconsistent statements as a 'guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.' *Id.* (citing *Harrison v. State*, 534 So.2d 175, 178 (Miss.1988) and *Foster v. State*, 508 So.2d 1111, 1115 (Miss.1987)).

In *U.S. v. Hogan*, 763 F.2d 697, 702-03(5th Cir.1985), the Hogan brothers were convicted of smuggling marijuana out of Mexico. Their pilot who was flying the dope into the United States was arrested and gave a statement to police. When the trial rolled around, the pilot did not want to testify. As the state did in the case at bar, the government put the pilot on the witness stand and impeached him with his out of court statement. The *Hogan* court reversed and explained:

> The rule in this Circuit, however, is that "the prosecutor may not use such a statement under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible." [*United States v. Miller*, 664 F.2d 94, 97 (5th Cir.1981), cert. denied, 459 U.S. 854, 103 S.Ct. 121, 74 L.Ed.2d 106 (1982)](emphasis in original); *Whitehurst v. Wright*, 592 F.2d 834, 839-40 (5th Cir.1979); *United States v. Dobbs*, 448 F.2d 1262 (5th Cir.1971). Every circuit to consider this question has ruled similarly. See, e.g., *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir.1984); *United States v. Fay*, 668 F.2d 375, 379 (8th Cir.1981); *United States v. DeLillo*,, 946 (2d Cir. 1980), cert. denied, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980); *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir.1975); *United States v. Coppola*, 479 F.2d 1153, 1156-58 (10th Cir.1973); *United States v.*

*Michener*, 152 F.2d 880, 883 n. 3 (3d Cir.1945); *Kuhn v. United States*, 24 F.2d 910, 913 (9th Cir.), cert. denied, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928).

* * *

The danger in this procedure is obvious. The jury will hear the impeachment evidence, which is not otherwise admissible and is not substantive proof of guilt, but is likely to be received as such proof. The defendant thus risks being convicted on the basis of hearsay evidence that should bear only on a witness's credibility. *Morlang*, 531 F.2d at 190. See also FRE 403, 404. Limiting instructions can ameliorate a jury's confusion. Because none were requested or given in this trial, we review whether the introduction of [the pilot's] testimony and the subsequent impeachment evidence constituted plain error. [Citations omitted ]. We find that it did.

* * *

This request for affirmative use of impeachment testimony as substantive evidence unfairly prejudiced the Hogans. See also *United States v. Hernandez*, 750 F.2d 1256, 1257-58 (5th Cir.1985).

The Mississippi Supreme Court has applied the exact same rule in *Moffett v. State*, 456 So.2d 714, 719 (Miss.1984) (...it was error for the trial judge to have allowed the district attorney, first, to cross-examine the State's own witness and, second, to impeach his credibility regarding his direct testimony of what did and did not happen...), and also in *Cooper v. State Farm Fire & Cas. Co.* 568 So.2d 687, (Miss. 1990) and in *Harrison v. State*, 534 So.2d 175, 178 (Miss.1988) . See also, *Jones v. State,* 763 So. 2d 210 (Miss. Ct. App. 2000).

The present case is distinguishable from *Harrison v. State*, 534 So. 175, 178-79 (Miss. 1988) in that in *Harrison,* even though there was a violation of the rule, because there was other evidence of guilt and since the impeachment evidence was not really

substantive evidence, the error was harmless, and no limiting instruction was necessarily required. In the present case, there was no independent evidence of Smith's guilt whatsoever, and here there was no limiting instruction give, even though defense counsel requested one. More on this last point *infra.*

Thirdly, Davis' statements to police were not trustworthy under Miss. R. Evid. 803(24) and 804(a) and (b)(5). In *Quimby v. State*, 604 So.2d 741, 746-47 (Miss. 1992), a police detective was allowed to repeat what a forgetful child victim recounted about her alleged abuse. The *Quimby* court said "[o]ur hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law. The prohibition is loud and clear. 'Hearsay is incompetent evidence.'"

Two exceptions to Rule 802 are the Rule 803 (24) "catch-all" and its paternal twin, Rule 804(b)(5) coming into play when a witness in unavailable under 804(a). The *Quimby* court reviewed a similar 804(a)(3) situation as at issue now, and said: " 'Unavailability as a witness' includes situations in which the declarant ... (3) Testifies to a lack of memory of the subject matter of his statement; ... " and a ruling on this "should be specifically made ... on the record." The case law most often speaks to the five requirements of Rules 803(24) and 804(b)(5), and first and foremost is the trustworthiness aspect of any offered statement which must have "equivalent circumstantial guarantees of trustworthiness", in other words, the trustworthiness should be as reliable as the first twenty-three exceptions to Rule 803 and that is a fairly tall order. The *Quimby* court

reversed because the trial court did not make findings on the record.

The trial court here made such findings, first "the Court finds that the requirements of 804(a), unavailable as a witness, have been met. The – Mr. Davis indicates lack of memory after the review of the statement." [T 55-56]. The error came when the trial court confirmed this initial ruling after having been told by Davis that he was just repeating what his nephews told him. [T. 74-75, 79]. It should have been apparent that Davis' statement was incompetent untrustworthy hearsay-within-hearsay under Rule 805.

Fifthly, prior to the actual presentation of the statement to the jury, the circumstances which made Davis "unavailable" changed so that he was not unavailable. The trial court and the parties, and ultimately the jury, were all tricked and misled by Davis. He was not forgetful, and he was willing to testify. Davis advised the court that he did remember what happened and that his nephews told him about Kenivel Smith. [T. 74-78].

There is a second reason Davis was not unavailable under the Rules. Not only was Davis' statement double hearsay, it was coerced. On cross, Davis admitted that he was "under pressure" and finally admitted that the apparent conflict between his statement and his testimony was not due to failure of memory, rather his initial statement to police was a complete falsehood and was coerced by law enforcement. [T. 90-95].

Miss. R. Evid. 804 is abundantly clear that:

> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or

> wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

This portion of Rule 804 was recognized as valid in *Hennington v. State,* 702 So. 403, 409 (Miss. 1997); but, ultimately that portion did not apply in *Hennington* as there was a failure of proof of the allegations. The trial court here in Smith's case was given three additional chances to correct the error and should have sustained the defendant's motion for directed verdict or sustained defense counsel's renewed motion to exclude Davis' statements or should have granted the requested peremptory instruction D-1. [T. 173, 222-23, 225; R-66].

What the record shows is that the ruling that Davis was unavailable was based on an admitted sham. In fact, the so called unavailability was the product of and procured by agents of the state, according to Davis. Since he was really available, the audio recording should never have been played nor the written statement admitted into evidence. The end product of this ruse was that Smith was irreparably prejudiced and convicted by hearsay.

Sixthly, even if the evidence was properly admitted, there occurred yet one final plain reversible error, and that was when the trial court refused a requested limiting instruction.

As was shown in *Long v. State* 934 So. 2d 313, 316 (Miss. Ct. App. 2006), there has to be an instruction to the jury that this type of evidence is not to be considered evidence of guilt, it's only to be used to determine the credibility of the witness. Failure

to give the instruction is plain error. *Moore v. State,* 755 So. 2d 1276, 1279-80 (Miss. 2000), ("With no limiting instruction, ...the jury was improperly allowed to consider the witnesses' prior statements as evidence of Moore's participation in the crimes charged. Consequently, the jury instructions were inadequate to render a fundamentally fair trial.") *U.S. v. Hogan*, 763 F.2d 697, 702-03(5th Cir.1985).

The Mississippi Supreme Court stated succinctly, in *Parker v. State* 691 So.2d 409, 414 (Miss.,1997), that allowing the state to impeach someone with a statement and use the statement as substantive evidence, "is a bad practice and when this Court sees it, **we are required to reverse**. Such a blatant violation of our rules of evidence constitutes reversible error." [Emphasis added] See also *Bailey v. State,* 952 So.2d 225, 238 (Miss. App.2006).

In the present case, Smith offered D-3[2] to comply with this requirement. [R. 65; T. 225-26] The trial court refused the instruction. *Id.* It could not be any clearer that Smith's conviction should be reversed and rendered or he should be afforded another trial.

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[2] D-3 which was refused, read:

You have heard evidence that a non-party witness made any [sic] statements prior to the trial that may be inconsistent with the witness' testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the witness' testimony. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement. [R. 65].

**ISSUE NO. 2: WAS THE VERDICT SUPPORTED BY THE EVIDENCE.?**

Smith was convicted on the content of an unsworn out-of-court statement. If a trial is a search for truth, the sojourners in this case never reached a destination, because reasonable doubt lurks in every nook and cranny. All material factual issues remain unresolved. The state's case was constructed on shifting sand.

Davis said the reason he told so many lies was that he was being threatened by police to be prosecuted for drug possession. [T. 95]. At first glance this claim sounds dubious.

However, when one considers the bizarre position taken by Det. Harold Harris that the shooter in this case could have been standing on or near the porch of the house and the spent casings could have been ejected some fifteen (15) feet away into the street, it is clear that Inv. Harris was trying to cover something up. [T. 143]. Harris even had the nerve to say, under oath, that it was not probable that the shooter was in the street where the spent casings were found. [T. 144]. So, the state's two main witnesses admitted lying and testified to physically impossible phenomena.

Based on the testimony of Davis, the investigating law enforcement and Richard J. Jackson , the overwhelming weight of the evidence, viewed in the best possible light for the state, is that Kenivel Smith did not shoot Andre' Davis.

In *Clemons v. State*, 473 So.2d 943, 945 (Miss. 1985), a murder victim died as a result of being stabbed in a barroom brawl. The court was confounded by conflicting

inconclusive testimony and said:

> This Court has difficulty understanding how the jury was able to extrapolate enough competent facts from the many versions of the story to sufficiently support the finding of murder. From the record there is more than enough conflicting evidence to cast at least a reasonable doubt, as to murder.

Citing to a similar decision, *Wells v. State*, 305 So.2d 333 (Miss.1974), the *Clemons* court reversed and remanded the case for a manslaughter sentence. 473 So.2d 945.

Normally, conflicting testimony is relegated to the jury for resolution. This is as it should be, in most cases where different witnesses tell different versions of events or where a victim might not remember all of the minutia of details. However, there is a dividing line, as in the present case, when what the court is faced with is not discrepancies or even mere conflicting testimony, rather, admitted falsehoods which render the state's entire case so unreliable that the evidence does not soundly support a criminal conviction.

The court in *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985), said

> If the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting [a motion for directed verdict] is required

See also *Carr v. State*, 208 So. 2d 889, 889 (Miss. 1968), *Foster v. State*, 919 So. 2d 12, 15 (Miss. 2005) *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994).

It is the appellant's position that the conviction in this case cannot, in the interest

of justice, be supported by Davis' out of court hearsay statements. In *v. State*, 8 So. 2d 459, 460 (Miss. 1942), the court recognized

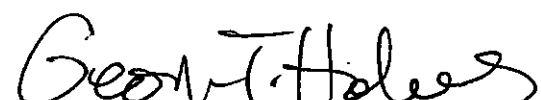
> the rule that where, upon the entire record, it is manifest that sound and reasonable men engaged in a search for the truth, uninfluenced by bias or other improper motives or considerations, could not safely accept and act upon the evidence in support of an issue as true, a jury will not be permitted to consider it.

In *Lyle*, the Supreme Court reversed and rendered an arson conviction based on weak improbable testimony and the intoxication of the state's key witness. *Id.* In the case at bar, Smith is entitled the same relief, or alternatively, a new trial; because, reasonable jurors could not "safely accept and act upon" the testimony of the state's witnesses as presented in the trial of this case, and the case should never have gone to the jury.

## CONCLUSION

Kenivel Smith is entitled to have the conviction in this case reversed and rendered back to the Circuit Court or at a minimum remanded for a new trial.

Respectfully submitted,
KENIVEL SMITH

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 24th day of October, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Albert B. Smith, III, Circuit Judge, P. O. Box 478, Cleveland MS 38732, and to Hon. Larry G. Baker, Dist. Atty. , 115 First St., Ste. 200, Clarksdale MS 38614, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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