IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PERRY ARMSTEAD — APPELLANT

V. — NO. 2007-KA-0238-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

ISSUE 1. WHETHER MR. ARMSTEAD MADE A KNOWING INTELLIGENT AND VOLUNTARY WAIVER OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

ISSUE 2. WHETHER COUNT A SHOULD BE DISMISSED FOR PREJUDICE.

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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. Perry Armstead, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 26th day of July, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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STATEMENT OF THE CASE

During the January Term, 2006 grand jury, Perry Armstead was indicted on a nine (9) count indictment. During the hearing on a motion to sever, the state agreed to sever all of the counts contained in the indictment with the exception of counts 7 and 8. The trial court found that both counts 7 and 8 were based on two or more acts or transactions connected together or they constituted parts of a common scheme or plan. The motion to sever those two counts was overruled and on January 23, 2007, Mr. Armstead was tried on both counts 7 and 8 which were styled for trial as counts A and B. After a jury trial, Mr. Armstead was found guilty and sentenced to serve fourteen (14) years in the Mississippi Department of Corrections for sale of cocaine in count A and to pay a fine of $5000.00. In count B, possession of cocaine conviction, he was sentenced to serve three (3) years in the Mississippi Department of Corrections. These causes were run consecutive to each other and consecutive to Cause No. 2005-008-CR.

STATEMENT OF FACTS

Cynthia Hamilton, a 52 year old crack addict, became a confidential informant after using crack cocaine for ten years. She testified that crack cocaine destroyed her life and therefore, she decided to become a confidential informant to help get crack cocaine off the street. On March 16, 2006, she was working with the Starkville Police as a confidential informant, when Officer Maurice Johnson, narcotics division, with the Starkville Police and Agent Tretis Anderson, agent with Mississippi Bureau of Narcotics solicited her to buy cocaine from a suspected drug dealer, Perry Armstead. Once they arrived at Cynthia's house, Agent Anderson searched her to make sure she did not have any drugs on her person and Officer Johnson searched her house to make sure there were no drugs or contraband in her home. Afterwards, Officer Johnson wired her up with a camera and a tape recorder. Agent Anderson gave her forty dollars to buy cocaine. She thinks the money was divided into a twenty dollar bill, two five dollar bills and ten one dollar bills. Then she called Perry Armstead telling him she wanted forty dollars worth of crack cocaine. T. 102-104. She knows Perry Armstead's voice because she had dealt with him several times before and was sure it was he she was talking to on the telephone. T.116 Once she made the telephone call to Perry Armstead, she and Agent Anderson and Officer Johnson got in the car and they dropped her off at the end of her street and she went behind several houses to get to Perry's house. T. 105-106. She testified while watching the video, that Jacquette Miller is the person seen on the video who came to the door and handed her the cocaine. Cynthia further testified that Jacquette Miller is one of Perry's runners and she had not talked to him that day and the only way Jacquette knew she wanted forty dollars worth of cocaine is Perry had to tell him. T. 107-108. From the video, after Cynthia arrived back to her home, she called Perry and he did not answer. He immediately called her back on telephone number 418-1780, the number she had just tried to reach him prior to his calling her back. While speaking

to Perry on the telephone, she told him, "that's how I like being served," and she testified that statement meant that's how she likes the crack cocaine to look. T. 109.

During cross-examination, defense played the video and questioned Cynthia as to what she meant when she told the officers once she arrived back to the vehicle, Perry wasn't there yet. T. 115. Cynthia stated, "I meant that he didn't serve me."

Agent Anderson, testified that they made a list of all of the bills and the serial numbers of the bills they gave Cynthia. The purpose was to check to see if their money is at the residence when they search the residence. T. 133. Once Cynthia got back in the car she handed Agent Anderson what she had purchased from Jaquette Miller. After the buy was completed, they executed a search warrant at Perry Armstead's residence. Twenty-three dollars of the buy money was found at Perry's residence. Agent Anderson testified that this money matched serial numbers of the buy money.

Officer Maurice Johnson, testified that the buy occurred around 10:00a.m. T. 213. He testified the voice on the video arranging the buy to Cynthia was Perry Armstead. He said he had talked to Perry on several occasions in person and on the telephone and there is no doubt in his mind Mr. Armstead was the person on the other end of the telephone talking to Cynthia. T. 290. He further testified that even though Cynthia said Perry was not there yet, he knew for a fact he was the person on the telephone and on the intercom in the video. T. 292 and 296. He further testified that he was the Affiant on the search warrant for Perry's residence and executed it at 7:25 or 7:30 that evening of that same day of the buy. T. 298-299. He stated that during the search of the residence, cocaine was found in a medication box and when he questioned Perry, he confessed that the cocaine was his. T. 211.

Eddie Hawkins, field agent with Mississippi Bureau of Narcotics went with Agent Anderson and the Starkville Police Department on the execution of the search warrant at Perry Armstead's

residence. He said they all went to the residence and secured the residence. He says they placed Perry Armstead in the garage or carport area. He testified he read Perry his rights and made sure that he fully understood his rights. He was in the area maintaining security over the people that were handcuffed, making sure they didn't leave. He further testified that Officer Maurice Johnson came to the carport and told he and another agent what drugs had been found in the residence, and Mr.Armstead made a confession at that time. Agent Hawkins testified that he does not remember Agent Johnson interrogating or asking Mr. Armstead any questions. He remembers when Agent Johnson made the statement to he and another agent about the drugs found in his residence, Mr. Armstead spontaneously admitted that the drugs belonged to him. P. 243.

Brian Ely, Agent with Mississippi Bureau of Narcotics testified that his role was just to help execute the search warrant and search the residence. He testified that when they arrived, he and Agent Kevin Gregory went all the way to the back of the house to the master bedroom and they saw Perry entering the master bedroom. He said it appeared he was just coming out of the bathroom. Agent Ely stated that, "if they have dope, they are going to flush it." He further testified that he checked the top of the commode and there was a wad of money he believed to have been placed there less than two minutes because it was half dry. Agent Ely turned the money over to Agent Johnson. Agent Ely also found a flu or sinus medication box out of a cabinet and it had what appeared to be a small amount of cocaine. Agent Ely left this evidence with Officer Johnson also. T. 249-258.

Brandi Goodman, a forensic scientist specializing in drug identification, testified that the substance found in the flu or sinus medication box was cocaine residue. T. 185.

Perry Armstead was arrested and indicted on a nine (9) count indictment. He proceeded to trial on Count 7, one count of sale of cocaine and Count 8, one count of possession of cocaine.

SUMMARY OF THE ARGUMENT

I. WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION

In determining whether a confession was freely and voluntarily given the circuit court sits as the fact finder. The trial judge first must determine whether the accused has been adequately warned. And, under the totality of circumstances, the court then must determine if the accused voluntarily and intelligently waived his privilege against self-incrimination. McCarty v. State, 554 So.2d 909, 911 (Miss. 1989) citing Layne v. State, 542 So.2d 237, 239 (Miss. 1989); Pinkney v. State, 538 So.2d 329, 342 (Miss. 1988); and Gavin v. State, 473 So.2d 952, 954 (Miss. 1985) and Edwards v. Arizona, 451 U.S. 477, 486 (1981).

Mr. Armstead filed a motion to suppress statements alleging that he was not given his Miranda warnings/rights, and if the court determined that he was given his Miranda warnings/rights then he would show unto the court that he did not waive his rights and therefore any statements made by him were not voluntary. RE. 10.

After the hearing on the motion to suppress, the trial judge failed to make a specific finding and only made a general finding. The trial judge stated, "The Court finds beyond a reasonable doubt that the evidence, that is the statement of the defendant made to the officer, is admissible but only as to that particular bit of evidence; that is the residue amount of cocaine found in the canister that's marked for identification purposes already in the evidence." T. 237.

"When the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, this Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made." McCarty v. State, 554 So.2d at 912 citing Jones v. State, 461 So.2d 686,700 (Miss. 1984).

So long as the trial court applies the correct legal standards, we will not overturn a finding of fact made by a trial judge unless it be clearly erroneous. Neal v. State, 451 So.2d 743, 753 (Miss.1984) citing Ratliff v. State, 317 So.2d 403, 405 (Miss. 1975); Hall v. State, 427 So.2d 957, 960 (Miss. 1983).

The mere giving of the Miranda warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused. The rights of which the accused is Miranda-warned must thereafter be waived-intelligently, knowingly and voluntarily. Whether there has been an intelligent, knowing and voluntary waiver is essentially a factual inquiry to be determined by the trial judge from the totality of the circumstances. Neal v. State, 451 So.2d at 753, citing Edwards v. Arizona, 451 U.S. at 486 n.9.

The inquiry on appeal, is twofold: Did the trial judge apply the correct legal standards in his evaluation of the facts? If the answer here is affirmative, then the inquiry is whether there is substantial evidence to support the finding made by the trial judge. Neal v. State, 451 So.2d at 753.

To determine whether the trial judge applied the correct legal standards a determination as to whether he applied the correct burden of proof must be ascertained first. The State has the burden of proving voluntariness beyond a reasonable doubt. Id. citing Dover v. State, 227 So.2d 296 (Miss. 1969); Harvey v. State, 207 So.2d 108 (Miss. 1968); Stevens v. State, 228 So. 2d 888, 889 (Miss. 1969).

When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver. Neal v. State, 451 So.2d at 753 citing Fare v. Michael C., 442 U.S. 707 (1979); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Abston v. State, 361 So.2d 1384, 1391 (Miss. 1978).

In McCarty v. State, 554 So.2d 909 (Miss. 1989), the Supreme Court reversed the trial court, finding that the failure to give defendant who was under arrest Miranda warnings prior to his interrogation violated defendant's right against self-incrimination. Mr. McCarty was given Miranda warnings by the sheriff after he was brought to the police department and placed under arrest. Mr. McCarty neither requested an attorney nor did he choose to talk other than saying that he knew nothing about the burglary and that he was in Laurel. The sheriff approached Mr. McCarty a second time inquiring about the burglary. As the sheriff was explaining his rights to him the second time, Mr. McCarty abruptly interjected saying that he knew his rights. He again denied having any knowledge of the burglary.

The sheriff and a deputy testified at the suppression hearing as well as at the trial. Their testimony differed only as to the exact location where the Miranda warnings were given, however, their testimonies otherwise were substantially the same. Mr. McCarty maintained that he was not informed of his rights and he made no confession or admission. The third time the sheriff interrogated Mr. McCarty, the sheriff admits to failing to give the Miranda warnings/rights. There were no threats, coercion, or promises of leniency found in the McCarty case. The Court stated "the Miranda warnings should be given prior to any subsequent interrogation session with the person in custody even though the warnings were given in the prior interrogation." Id, citing Johnson v. State, 475 So.2d 1136, 1145 (Miss. 1985).

The Court found it beyond doubt that McCarty was not adequately warned of his rights against self-incrimination, and the trial judge should have excluded any statement that McCarty may have made. In addition, the Court stated, we can not overemphasize the obligation of our trial judges to make specific findings of fact when determining the admissibility of evidence, particularly confessions made by an accused. McCarty v. State, 554 So.2d at 913.

The failure of law enforcement to give Miranda warnings prior to questioning Mr. Armstead mirrors the facts in McCarty. Agent Eddie Hawkins testified that he gave Miranda warnings to Mr. Armstead. He testified that he asked Mr. Armstead did he have any questions about his rights and Mr. Armstead told him no. He also testified that after giving the Miranda warnings, he did not question Mr. Armstead. The record is silent as to Mr. Armstead specifically stating he did not wish to talk. However, an inference that he exercised his Fifth Amendment right against self incrimination clearly is drawn after he told Agent Hawkins he understood his rights and no questions were asked. T. 195 and 203.

In Abston v. State, 361 So.2d at 1391, the Court stated the words of Mr. Justice Frankfurter that questions of waiver require " ' application of constitutional principles to the facts as found . . . ' "and went on to hold the standard to be applied in determining waiver as a matter of constitutional law that it was incumbent upon the state to prove" 'an intentional relinquishment or abandonment of a known right or privilege' " and "courts indulge in every reasonable presumption against waiver." Id. citing Brewer v. Williams, 430 U.S. 387 (1977). "No magic language must be used by an accused wishing to invoke his right to stop the interrogation. Miranda uses the phrase "in any manner at any time." Jones v. State, 461 So.2d at 699 citing Miranda v. Arizona, 384 U.S. at 474.

Agent Hawkins and Officer Johnson gave totally inconsistent versions of how the confession was obtained from Mr. Armstead. Agent Hawkins testified that Officer Johnson came to the carport where he was with Mr. Armstead. He said Officer Johnson starting talking to he and other agents telling them what drugs he found in the house. Agent Hawkins said Officer Johnson was not talking to Mr. Armstead when Mr. Armstead made the statement that everything belongs to me; they didn't have nothing to do with it. T. 202-203. He also testified that no officers coerced, pressured or intimidated Mr. Armstead into making the statement that the drugs belonged to him. T. 198.

The testimony of Officer Johnson completely contradicts the testimony of Agent Hawkins in reference to how Mr. Armstead came to confess that the drugs belonged to him. (The record is silent as to the time in between after Agent Hawkins gave Mr. Armstead the Miranda warnings/rights and the time Officer Johnson questioned him. It could have been ten minutes to ten hours). Officer Maurice Johnson testified that at some point, he came out to the carport and sat down beside Mr. Armstead and started making conversation with him. Officer Johnson says he asked Mr. Armstead if his wife had anything to do with the drugs, and that's when Mr. Armstead made the comment that the drugs belonged to him. He says he did not make any threats about arresting Mr. Armstead's wife. T.211

There is absolutely no evidence in the record to show a knowing and intelligent waiver. When Officer Johnson sat down and started making conversation with Mr. Armstead, he was not even sure if Miranda warnings were given to Mr. Armstead. It is clear from the record that Officer Johnson is relying on Agent Hawkins' past procedure for reading of the Miranda rights. When questioned on cross-examination about his knowledge of Mr. Armstead being given Miranda warnings/rights Officer Johnson first said he witnessed Agent Hawkins read Mr. Armstead his rights. Next, he names several locations in the house where the rights could have been read. Then he says he knows from dealing with Eddie Hawkins that he always advise a person of their rights once they're in custody. Finally, he says he knows for a fact he read him his rights because he overheard him. T. 216.

The State clearly failed to meet its burden of proving beyond a reasonable doubt Mr. Armstead's statement was voluntary. In fact, there is not any evidence in the record to prove beyond a reasonable doubt that Mr. Armstead voluntarily and knowingly waived his privilege against self-incrimination.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise". Miranda v. Arizona, 384 U.S. at 474.

The following testimony of Officer Johnson is pertinent to show Mr. Armstead's confession was the product of compulsion.

T. 211

> Q. Now, when you inquired of Mr. Armstead about the drugs, how did you approach Mr. Armstead? Did you make any threats, anything of that nature to Mr. Armstead?
>
> A. No, ma'am. I went outside, sat down beside him, and started making conversation with him. I asked him whether or not his wife had anything to do with anything inside the house, and that's when he made the comment about the house being in his name and that it was his house and everything in the house belonged to him.

Mr. Armstead would argue that he had exercised his Fifth Amendment rights and he was not given new Miranda warnings. The above statement of Officer Johnson mentioning Mr. Armstead's wife was clever, showing his training and skills for getting a confession. That statement is tantamount to compulsion.

The second inquiry is whether there is substantial evidence to support the finding of the trial judge that the state proved beyond a reasonable doubt the statement was admissible. Mr. Armstead asserts that the argument above supports his position that there is not any evidence in the record that supports the state having proved beyond a reasonable doubt the statement was voluntary.

II. COUNT A SHOULD BE DISMISSED FOR PREJUDICE

Mr. Armstead argues that because the confession in count B violated his Fifth Amendment right against self-incrimination, count A should be dismissed as the evidence of the possession of the residue amount of cocaine materially prejudiced his right to a fair trial.

It is the function of the jury, especially in criminal cases, to pass upon the weight and worth of the evidence and the credibility and veracity of the witnesses, and Supreme Court cannot set aside a verdict of guilty unless it is clear that such a verdict is the result of prejudice, bias, or fraud, or is manifestly against the weight of the credible evidence. Ivey v. State, 40 So.2d 609 (Miss. 1949).

The testimony of Agent Hawkins and Officer Johnson that Mr. Armstead confessed that the residue amount of cocaine found in his home belonged to him, would have been inadmissible in the trial of sale of cocaine alone. This testimony materially prejudiced Mr. Armstead's right to a fair trial in count A.

In Bennet v. State, 451 So.2d 727 (Miss 1984), Mr. Bennett was tried on a two-count indictment. The Supreme Court found the indictment was defective as it was a multi-count indictment, but did not reverse his conviction for armed robbery because all the proof adduced by the state at trial was admissible and relevant to show armed robbery. However, Mr. Bennett's conviction for aggravated assault was vacated because some of the evidence which proved the armed robbery would have been inadmissible on a trial for aggravated assault alone.

Because the possession of the residue amount of cocaine evidence would have been inadmissible at a trial for sale of cocaine alone, count A should be dismissed because this evidence materially prejudiced Mr. Armstead's right to a fair trial.

CONCLUSION

The trial judge found beyond a reasonable doubt that the statement of Mr. Armstead in reference to the residue amount of cocaine was admissible. The trial judge applied the correct legal standard which was beyond a reasonable doubt however, failed to make specific findings as to the admissibility of the evidence. The failure of the trial court to make specific findings based on the totality of the circumstances broaden's this Court's scope of review considerably. The state failed to prove beyond a reasonable doubt knowing, intelligent and voluntary waiver of Mr. Armstead's privilege against self-incrimination. The record is void of substantial evidence to support the trial judge finding the state proved beyond a reasonable doubt the statement of Mr. Armstead was admissible. Therefore, the failure to give Mr. Armstead, who was under arrest, Miranda warnings prior to Officer Johnson's interrogation, violated Mr. Armstead's Fifth Amendment privilege against self-incrimination. Therefore, Count B should be reversed.

As some of the evidence which proved the possession of the residue amount of cocaine in Count B would be inadmissible on the trial of sale of cocaine alone, this Court must reverse the conviction in Count A also because it materially prejudiced Mr. Armstead.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

BRENDA JACKSON PATTERSON, STAFF ATTORNEY
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Perry Armstead, 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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This the 26th day of July, 2007.

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