IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DECARLOS JENKINS — APPELLANT

V. — NO.2007-KA-00399-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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In its brief, the State makes several conclusions and assertions of fact that are not supported by the record. Although most are minor, the Appellant is compelled to respond to make sure the record is clear.

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

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

The State claims in its brief that there is nothing in the record to support the claim that Ex. S-11 was substituted or tampered with, but then goes on to restate the evidence Appellant cited in support of the claim. The Appellant did not argue that every person who handled the evidence was required to testify. Clearly, that is not the law. *Butler v. State*, 592 So.2d 983, 985 (Miss. 1991), citing *Doby v. State*, 532 So.2d 584, 588 (Miss. 1988). However, it was not mere speculation in this case that the evidence was tampered with or substituted. Jenkins

testified under oath that Ex. S-11 was not the shirt he was wearing. Accordingly, it becomes crucial for the State to produce Officer Hite, the officer who actually booked Jenkins into the jail. Tr. 123. Although the State feels it was not necessary to have Officer Hite testify, it most certainly goes toward the weight and sufficiency of the evidence.

The State also asserts that there was no evidence that anyone other than Officers Bridges and Wide had access to the shirt once it was placed in bin 95. Appellee brief at 8. On the contrary, Sergeant Austin also testified he had no idea who may have accessed the bin while Officer Hite was on duty. Tr. 126-27. A total of four sergeants have access to the room where the bins are kept. He also stated that an inventory is not taken of what property is placed in the bins. Tr. 127.

In claiming that no one else had access to the bin, the State again cites the testimony of Sergeant Austin. Appellee brief at 13. However, Sergeant Austin could only testify Investigators Wide and Bridges were the only ones to access the bin "[a]t that particular time." Tr. 126. Such testimony is a far car from proving beyond a reasonable doubt that no other officer accessed the bin at any time between Jenkins's and Marcus McCollough's[1] arrest, and the time the evidence was retrieved for trial. McCollough's involvement is far from irrelevant, as he could very well have been the person, not Jenkins, that officers saw wearing a grey shirt with a pocket.

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[1] Again, there is nothing in the record to indicate whether or not McCollough was arrested, and if so, was he booked at the same time as Jenkins.

The break in the chain of custody is sufficient enough to create grave doubts as to Jenkins' guilt. As pointed out in our original brief, Jenkins was convicted on a felony charge he was not even indicted for, namely possession of between 2 and 10 grams of cocaine. C.P. 2-3, R.E. 9-10. To send someone to jail for life without the possibility of parole on this evidence is clearly an unconscionable injustice.

ISSUE NO. 3 THE TRIAL JUDGE ERRED IN ADMITTING STATE'S EXHIBIT 11 WITHOUT A SUFFICIENT CHAIN OF CUSTODY.

In our original brief, Jenkins argued the trial court erred in admitting Ex. S-11 into evidence. The State argues in its brief that Jenkins "believes that there was insufficient evidence for doing so because there was supposedly evidence of a possible break in the chain of custody." Appellee brief at 18. Again, there can be no doubt it was not speculation that the chain of custody was broken. It clearly was, as Officer Hite did not testify. The question then becomes whether the trial judge erred in admitting the evidence despite the break in the chain.

The State claims there was no reason for Officer Hite to testify because the jail used "standard operating procedures." Appellee brief at 19. However, the standard operating procedures apparently do not address access to the bin by other officers. There is nothing on Ex. 13 to note when an officer accesses a bin. There was only a hand-written note by Sergeant Austin acknowledging Investigators Wide and Bridges picked up "property" in bin 95 on January 30, 2007. The sheet did not even note what the investigators removed.

Apparently there was nothing written on the shirt, no evidence tag of any manner, describing it as belonging to Jenkins. As argued above, Jenkins gave sworn testimony this Ex. S-11 was not the shirt he was wearing. The State cites *Wilburn v. State*, 856 So.2d 686 (Miss.App. 2003), for the proposition that the burden of proof for tampering is on the defendant. However the defendant in *Wilburn* only argued it was possible an audiotape was tampered with, making its authenticity doubtful. *Id.* at ¶8. Jenkins did not speculate that the evidence was substituted, he testified under oath that he was wearing a tank top, not Ex. S-11. Tr. 148. Accordingly, *Wilburn* is not on point. Jenkins did present evidence the shirt was tampered with.

The State also cites *Ormond v. State*, 599 So.2d 951 (Miss. 1992), to again point out that every handler of the evidence need not testify in order for the trial judge to find the evidence admissible under M.R.E. 901(a). But once again, the defendant in *Ormond* had no personal knowledge that the results of medical testing was tampered with or substituted. In the case at bar, the Appellant did have personal knowledge that Ex. S-11 was not his shirt. Accordingly, the trial court abused its discretion in admitting the shirt without Officer's Hite's testimony.

ISSUE NO. 4 TRIAL COURT IMPROPERLY SENTENCED APPELLANT IN ABSENTIA.

The State asserts in its brief that the trial judge based his findings that Appellant intentionally absented himself from sentencing by escaping upon sworn affidavits by law enforcement officers. Appellee brief at 24. However, none of these affidavits were admitted

into evidence. In the Appellee's Statement of the Facts, it is alleged that both the trial court and the district attorney stated for the record that Jenkins has escaped from the custody of the sheriff's office. Appellee brief at 4. However, no evidence or testimony was ever offered on this issue. The district attorney was very clear at the hearing that his information was hearsay, and he had no personal knowledge of Jenkins's escape. Trial counsel properly objected.

> **BY MR. KIRKHAM:** *Well, you Honor, everything that I would offer would be essentially hearsay from the Sheriff's Department,* but it's my understanding of the Rules of Evidence that it would be allowable during this proceeding, to offer hearsay evidence and the – what I know of it is that the – Mr. Jenkins, the defendant, was in the custody of the Coahoma County Sheriff's Department after the adjudication of guilty in his trial, and that sometime after that, he escaped custody, and that a search is still ongoing for him, but that his current whereabouts are not known.
>
> **BY MR. SHACKELFORD:** And I presume I may object – my objection to the testimony or the representation of the District Attorney since it is – that is the hearsay that I would object to because unless he can tell us that he has personal knowledge of it, of course, we certainly – if the Sheriff's records were here that would reveal that, hearsay would be admissible, but the District Attorney's statement of it I do not think is admissible. There's nothing under oath.

Supplemental Volume 1, Tr. 5-6 [emphasis added].

Furthermore, in a gross mischaracterization, the State claims that trial counsel also corroborated the court and the district attorney by his comment that he did not know Jenkins's whereabouts. "Jenkins' counsel was present and also admitted that he did not know where Jenkins was located at the time." Appellee Brief at 5. Trial counsel, in fact, stated he assumed Jenkins was in custody.

BY MR. SHACKELFORD: Yes, your Honor. I take no issue with the notice that I received. I received that just before lunch today. *However, I have only been advised by the District Attorney, the Office of the District Attorney, that my client is not in custody.* I would object to any further proceedings until and unless: No. 1, he is present, or in the alternative that sworn proof be had that he is – he is not in custody since, I think, the Court has found that he was – the Court remanded the defendant to the custody of the Sheriff immediately following the jury verdict.

BY THE COURT: I don't recall – Mr. Jenkins wasn't on bond, was he or was he?

BY MR. SHACKELFORD: No, sir, he was already, but I mean by order of the Court right now, he was remanded to the custody of the Sheriff, awaiting sentencing, and again, I would – I object to his – any proceedings out of his presence, and I certainly – in the second place, alternatively, I would object to his – to proceeding without sworn testimony concerning why he was not produced at this hearing by the Sheriff. Thank you.

BY THE COURT: Let me just inquire, Mr. Shackelford. I won't ask you where the defendant might be at this time, but do you happen to know the whereabouts of Mr. Jenkins?

BY MR. SHACKELFORD: No, I do not. I have not had occasion to seek – to confer with him since the day of the verdict.

BY THE COURT: Do you have any information –

BY MR. SHACKELFORD: I did not go to – I have not been to the jail. I have not tried to contact him in any way nor has he contacted me.

Supplemental Volume 1 at 4-5 [emphasis added].

The trial judge, apparently relying on affidavits for search warrants law enforcement officers presented to him, outside the record, determined Jenkins had escaped. Supplemental Volume 1, Tr. 6-7. The Court improperly relied on representations of law enforcement

officers outside the record to essentially take judicial notice that Jenkins had intentionally absented himself from his sentencing by escaping.

Judicial notice may be taken of facts which are "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." M.R.E. 201(b). The comments to M.R.E. 201(b) provide that if the fact is dubious or in controversy, judicial notice may not be taken. Whether Jenkins had escaped was a fact in dispute. The trial judge should have required the prosecution to produce some evidence to show Jenkins had wilfully absented himself from the hearing.

A criminal defendant has the right to be present at all "critical stages" of trial. *United States v. Gagnon*, 470 U.S. 522, 526 (1985), and *Ludgood v. State*, 710 So.2d 1222 (¶10) (Miss.App. 1998). This is unquestionably a fundamental right. *Rushen v. Spain*, 464 U.S. 114, 117 (1983). Jenkins had a right to contest the fact that he was a violent habitual offender. His prior "violent" offense amounted to a purse snatching. This was an essential fact the trial judge needed to know prior to sentencing him to life without parole.

> This Court in *Chase v. State*, 699 So.2d 521, 534 (Miss.1997) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987)) held that "a criminal defendant 'is guaranteed the right to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure.'

Hughes v. State, 807 So.2d 426 (¶10) (Miss. 2001).

The prosecution represented to the court that hearsay was allowable in this type of proceeding. Supplemental Volume 1 at 5. While it is true that M.R.E. 1101(b)(3) states that the rules of evidence do not apply at sentencing, that rule is generally applied to pre-sentencing reports and the like. This hearsay went to the heart of whether or not Jenkins wilfully and deliberately absented himself from his sentencing. It would be inappropriate to hold that hearsay alone is sufficient to determine a waiver of a fundamental right. In fact, it is a violation of Jenkins's right to confrontation.

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI; Miss. Const. art. 3, § 26. This right applies to in-court testimony as well as out-of-court statements. *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The right to confront and cross-examine a witness is a fundamental right, which is not waived for failure to object. *Hobgood v. State*, 926 So.2d 847, 852(¶ 11) (Miss.2006).

Turner v. State, 945 So.2d 992 (¶ 21) (Miss.App. 2007).

Accordingly, even in a sentencing context, Jenkins had a constitutional right to confront the witnesses against him. Hearsay was insufficient to prove he intentionally absented himself.

The State cites *Jefferson v. State*, 807 So.2d 1222 (Miss. 2002), for the proposition that a defendant can be tried in absentia if he voluntarily absents himself. However, there was evidence in *Jefferson* to show the defendant knew he was required to be in court, yet wilfully absented himself. *Id.* at ¶14. In fact, there was actual testimony that it was Jefferson's intent to flee. *Id.* Although the State claimed in its brief that the court had the benefit of "testimony of both the prosecution and defense that Mr. Jenkins had escaped form

custody could not be located,"[2] the record clearly shows otherwise. The trial court took no testimony or evidence, but relied solely on statements made outside the record and hearsay from the district attorney. This was error.

This Court has held that a trial in absentia is only appropriate if the defendant acted wilfully, voluntarily, and deliberately to avoid trial. *Ali v. State*, 928 So.2d 237 (¶14) (Miss. App. 2006), citing *Jefferson*, *supra*. The prosecution presented absolutely no evidence Jenkins had wilfully, voluntarily, and deliberately absented himself from his sentencing.

Finally, the State asserts that Jenkins suffered no prejudice by being sentenced in absentia. Appellee Brief at 27. It is crucial to remember that Jenkins was found guilty of a lesser-included offense of possession of cocaine in an amount of eight hundreds (.08) of a gram over what could be charged as a misdemeanor. His sentence is life without parole. Being sentenced without any evidence to explain his absence or present any mitigation is certainly a violation of his due process rights under the Fourteenth Amendment to the United States Constitution. At the very least, Jenkins is entitled to a new sentencing hearing.

ISSUE NO. 5. JENKINS'S SENTENCE OF LIFE WITHOUT PAROLE AS AN HABITUAL OFFENDER FOR POSSESSION OF ESSENTIALLY A MISDEMEANOR AMOUNT OF COCAINE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

In Appellant's original brief, it was argued that Jenkins's sentence violated the United States Constitution. However, the State failed to address any of the federal authorities cited in our brief. The facts of each case are crucial when determining whether or not a trial court

[2] Appellee brief at 26-27.

abused its discretion in refusing to conduct a proportionality review. In the present case, Jenkins was convicted of possession of a small amount of cocaine. Although *Clowers v. State*, 522 So.2d 762 (Miss.1988), appears to be the exception and not the rule, the facts in Jenkins cry out for a proportionality review.

ISSUE NO. 6: THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR GRANTING AN ABSTRACT INSTRUCTION ON EXAMPLES OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

The State contends that this issue is procedurally barred for failing to make a specific objection at trial. Appellee Brief at 30. Trial counsel properly objected to the instruction, arguing "it goes beyond the law." Tr. 191. Apparently, it is the State's contention that this objection is not good enough to preserve the issue for appeal. The State has failed in its burden to show a procedural bar is appropriate in this instance. The State admits trial counsel objected to the instruction, but asserts that counsel's objection that the instruction "goes beyond the law," is not the same as claiming the instruction was abstract.

Generally, when the specific ground for an objection at trial is apparent from the context, the issue is preserved for appeal. M.R.E. 103(a)(1). See also *Kolberg v. State*, 829 So.2d 29 (¶89-90)(Miss. 2002), *Barnette v. State*, 478 So.2d 800, 803 (Miss. 1985), and *Carter v. State*, 722 So.2d 1258, 1261-62 (Miss. 1998). This issue was clearly preserved, as the instruction did go beyond the law. It was abstract and confusing. The trial judge committed reversible error in granting it over objection.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, Decarlos Jenkins, is entitled to have his convictions reversed and remanded for a new trial. Jenkins is serving a life without parole sentence for possession of less than a gram of cocaine.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Decarlos Jenkins, Appellant

By: 
Leslie S. Lee

CERTIFICATE OF SERVICE

I, Leslie S. Lee, do hereby certify that I have this, the 6th day of February, 2008, mailed a true and correct copy of the above and foregoing **Reply Brief Of Appellant**, by United States mail, postage paid, to the following:

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