IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00607-COA

DEXTER LIPSEY — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI

REPLY BY APPELLANT

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REPLY

COMES NOW Dexter Lipsey, Appellant herein, and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 31 makes this his *Reply* to the *Brief of the Appellee.* In so doing, Mr. Lipsey reiterates all claims of error and legal authority recited in support thereof as contained in his *Brief of Appellant on the Merits*, incorporated herein by reference.

For the convenience of the Court, Mr. Lipsey repeats here the statement of errors that violated his fundamental right to a fair trial with due process of law, including:

I. Deprivation of a "meaningful opportunity to present a complete defense" by

A. Barring him from presenting the testimony of an alibi witness; T. 175; RE 21

B. Granting *Motion in Limine* by the state to prohibit testimony about cocaine in the blood of Ray, Rankin and Gilbert or to refer to 3520 Cromwell as a "crack house;" CP 26-27; T. 35; RE 19

C. Refusing to permit Mr. Lipsey to make a proffer, and T. 404-407; RE 23-26

D. Denying Mr. Lipsey the right to re-cross examine Steven Hayne; T. 403; RE 22

II. Failing to use the correct legal standard to admit autopsy photographs submitted primarily to inflame and prejudice the jury against Mr. Lipsey, and CP 57; T. 174; 218; 261; 373 (Ray) 380; (Rankin) 386 (Gilbert). RE 20;27-31

III. Denying the *Motion to Dismiss* for failure to grant Mr. Lipsey a speedy trial as guaranteed by both state and federal constitutions. T. 24; RE 18; CP 33

I. Deprivation of a "meaningful opportunity to present a complete defense" by

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One may not fit a square peg into a round hole, although learned counsel for the state earnestly and elaborately attempts to so do. Most unfortunately for the state, the facts of this record render the arguments and authority of counsel inapplicable and thus inappropriate.

A. Arbitrary application of Uniform Rule of Circuit and County Court Practice 9.05 denied Mr. Lipsey the right to present testimony by a recently discovered alibi witness

The unrebutted facts show that counsel for Mr. Lipsey notified the prosecutor almost as soon as she learned from her client of the existence of Vanessa Sims and the substance of Sims' testimony. T. 30. In fact, counsel for Mr. Lipsey relayed the information to the prosecutor before her investigator had even located Sims. T. 27; 30.

Sandefur v. State, 952 So.2d 281, 293 (¶¶ 31-32) (Miss.Ct.App. 2007) is dispositive of this issue. Despite efforts by esteemed counsel for the state, there is absolutely no evidence that defense counsel sought to conceal the existence of Vanessa Simms in order to gain an improper tactical advantage. This is an inference counsel for the state conjured literally out of thin air and not the facts of

this record. To the contrary, the record reflects defense counsel acted promptly to notify defense counsel *before she even talked to the witness.* T.27; 30.

Counsel for the state also confuses the *consequences* of an objection with the actual objection and again attempts to manufacture where none exists a procedural bar. Defense counsel objected to exclusion by the trial court of testimony by Vanessa Simms who, according to Mr. Lipsey, would have corroborated his presence elsewhere when the crime occurred. T 175 ; RE 21.The *consequence* of the objectionable trial court ruling is, as it was in *Sandefur,* violation of his fundamental fair trial and due process rights under the Fifth, Sixth and Fourteenth amendments to the U.S. Constitution.

B. Grant of the Motion in Limine to bar mention of the presence of cocaine in the blood of Ray, Gilbert and Rankin CP 26-27; T. 35; RE 19.

The defense of Mr. Lipsey is that he was elsewhere when these crimes occurred and that another party was responsible. The fact that cocaine was found in the blood stream of Mssrs. Gilbert and Rankin and Louise Ray is a fact that is a link in a chain of inferences to show that another could have committed the crime. "Evidence to prove a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue in the case." *Comment,* Mississippi Rule of Evidence (Miss.R. Evid.) 401.

In *Haddox v. State,* 636 So.2d 1229, 1238 (Miss.1994), the Mississippi Supreme Court affirmed the admission into evidence on the basis of relevance some $2,700 seized after Scotty Haddox and Terry Powell were arrested for possession of more than one kilo of marijuana with intent to sell. The admission of the evidence made it more likely than not that the duo were involved in drug dealing. Here, the

evidence was not intended to denigrate or otherwise stain the character of Ray, Gilbert and Rankin and counsel opposite has no factual basis upon which to presume such intent. Nevertheless, the fact that all three had cocaine in their bloodstream and that the structure at 3520 Cromwell was known locally as a "crack" house certainly made it more likely than not that someone *other than* Mr. Lipsey could have committed the crimes.

C; D. Refusal to permit re-cross examination and proffer was impermissible T. 403; 404-407; RE 22; 23-26.

Again, Mr. Lipsey refers to the trial record, in which the trial court refused the right of re-cross examination when new matter was elicited. RE 22; T. 403.

MS. STAMPS: Your Honor, may I recross based on what he said?

THE COURT: No, you may not. Dr. Hayne you'll be excused. Thank you.

A. [Steven Hayne]: Thank you, Your Honor.

THE COURT: Okay.

MS. STAMPS: Your Honor, may we put it on for a proffer?

T. 403; RE 22.

Ultimately, the trial court impermissibly restricted the proffer as the personal effects found with Gilbert, Rankin and Ray, as demonstrated at page 405-407 of the transcript and pages 25 -27 of the *Record Excerpts by Appellant.* Mr. Lipsey invites this honorable Court to also examine *Exhibit 39 for Identification,* a composite exhibit of autopsy reports for Gilbert, Rankin and Ray. Therefore, despite protestations by esteemed counsel to the contrary, *Cooper v. State,* 628 So.2d 1371

(Miss. 1993) is almost completely on point with the facts of the case at bar. In that case, the Mississippi Supreme Court reversed the conviction for sale of cocaine due to the impermissible restriction of a proffer by counsel for Cooper. The proffer there concerned responses of a law enforcement officer regarding the reputation for truthfulness of a confidential informant, upon whose testimony the bulk of the case for the state rested.

Furthermore, counsel for Mr. Lipsey stated quite clearly why she did not ask about time of death on cross-examination. Counsel for Mr. Lipsey expected, quite naturally, that she would be allowed to question Hayne regarding the personal effects found with the three as well as question Hayne on his findings regarding the time of death of the Gilbert, Rankin and Ray, all within his autopsy report and findings. Counsel tells the trial court quite plainly she was "blind-sided" earlier by the refusal of the trial court to permit her to cross-examine Hayne about his autopsy reports and corresponding findings. T. 406; RE 25. Clearly then, requirements as to the "claim of oversight" and "reason why the matter was not inquired into on the cross-examination proper" are satisfied. *Brief of Appellee*, pg. 11; *Howell v. State*, 860 So.2d 704, 737 (Miss. 2003) [additional citations omitted].

Given that Mr. Lipsey was denied the right of full examination of Steven Hayne and to make a proffer as permitted by law, he would humbly ask this Court to reverse his conviction and remand this cause for a new trial.

II. Failing to use the correct legal standard to admit autopsy photographs submitted primarily to inflame and prejudice the jury against Mr. Lipsey, and CP 57; T. 174; 218; 261; 373 (Ray) 380; (Rankin) 386 (Gilbert). RE 20;27-31

Mr. Lipsey acknowledges counsel for the state is correct; with three autopsies, one could expect more photographs.

Counsel for the state, however, ignores two important facts. First, *Welch v. State,* 566 So.2d 680, 685 (Miss.1990) also reversed in part on the admission of needlessly gruesome autopsy and crime scene photographs. *McNeal v. State* is not an anomaly, it sets a standard. Second, counsel for the state ignores the proper legal standard by which trial judges are to consider request for admission of such photographs and the *fact* that the prosecutors here made an ostentatious show of inviting the judge to excuse respective family members, clearly theatrics designed to inflame and prejudice the jury. With such a show, the jury was already primed to be shocked, dismayed and prejudiced, and further determined to convict whoever stood accused of committing the act. Discretion over admission of such photographs is *not* unlimited as both *Welch* and *McNeal* make clear. "The trial judge must *specifically consider whether the proof is absolute or in doubt as to the identity of the guilty party, as well as whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury. Hewlett v. State,* 607 So.2d 1097, 1103, (Miss. 1992) citing *McNeal,* 551 So.2d at 159.[emphasis added].

Therefore, it was prejudicial error to deny the objections of Mr. Lipsey to Exhibits 2-A, B and C and admit into evidence admitting so many autopsy photographs during the testimony of Steven Hayne, which were clearly more prejudicial than probative. MISS.R. EVID. 403. CP 57; T.174; 261; 373; 380; 386; RE 20; 27-31; Trial Exhibits 24-38. 7-8; 10-16; 18-19; 21-24. Prosecutors in the case at bar introduced into evidence *seventeen* autopsy photographs in color and further distorted because the pictures were blown up far beyond life size, displayed in vivid gruesomeness from a large projection screen.

The trial court had available alternatives far less prejudicial to Mr. Lipsey with little if any detraction from evidentiary value. The court could have ordered the use of black and white photographs of ordinary photographic size or ordered the prosecutor to question Hayne with the anatomical line drawing contained within his autopsy report. Use of either or both of these alternatives would have limited the prejudicial effect considerably yet permitted the jury to examine what was necessary.

There was no argument as to the manner of death suffered by Louise Ray, J.W. Gilbert and Bruce Rankin; Mr. Lipsey denied he shot the three and kidnapped Rebecca Virden. There was no question of identification of the three. *McNeal v. State,* 551 So.2d 15, 159 (Miss.1989)

Was the overabundance of photographs "*a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury?" Hewlett v. State,* 607 So.2d 1097, 1103, (Miss. 1992) citing *McNeal,* 551 So.2d at 159. Mr. Lipsey contends it was just such a ploy and coupled with other errors committed herein, necessitates reversal.

III. Denying the *Motion to Dismiss* for failure to grant Mr. Lipsey a speedy trial as guaranteed by both state and federal constitutions. T. 24; RE 18; CP 33

Respectfully, Mr. Lipsey suggests the state once again confuses the facts on this issue. For the convenience of the Court, Mr. Lipsey reproduces a chronology of relevant events.

- Nov. 19, 2005 – Arrest. [amend. VI, U.S. Const. right attaches]
- Apr. 11, 2006 – Indictment filed;
- July 3, 2006 – Arraignment [Miss. Code Ann. §99-17-1 (1972)
- Aug. 24, 2007 – Demand for a Speedy Trial filed CP 33.
- Sept. 4, 2007 – Trial begins, 421 days after arraignment. T. 6.

The state makes a generalized and flippant reference to alleged statements by counsel for Mr. Lipsey. *Brief of the Appellee*, Pg. 17.

First of all, counsel for the state confuses statements by counsel for Mr. Lipsey; as reiterated in prior claims of error. (Issue I.). The statement to which the state refers in its brief regards the fact that memories of witnesses fade as time passes as case law so acknowledges. Due to the passage of time, Mr. Lipsey was unable to recall the surnames of neighbors or others who could vouch for his whereabouts some three years' distant. Prejudice to the accused in the form of impairment to his ability to mount a defense is a paramount consideration under the *Barker* balancing test. "...[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. *If witnesses die or disappear during a delay, the prejudice is obvious.*" *Barker,* at 532.

Second, the state in its argument ignores the unrebutted fact that the office of the District Attorney, not the trial court, schedules priority cases for the criminal trial docket. T. 23

Third, the state in its argument ignores the fact that case law does not necessarily place great weight on the timing of a filing of a demand for a speedy trial or motion to dismiss for failure to provide a speedy trial. *Vickery v. State*, 535 So.2d 1371 (Miss. 1988) clearly declares, a violation of the substantial right to a speedy trial may be found even if the accused made *no* assertion.

Fourth, the state in its argument ignores the fact that no case law places the burden on the defendant to demonstrate the exculpatory nature of the information the missing witness might provide. Mr. Lipsey argues that *State v. Ferguson*, 576 So.2d 1252 (Miss. 1991) speaks directly to this issue, completely in line with the policy pronouncements of *Barker v. Wingo* and its progeny. The Mississippi Supreme Court affirmed dismissal by the trial court of an attempted burglary indictment against Ferguson for violation of his constitutional right to a speedy trial on retrial. Ferguson made only an oral demand for a speedy trial; his sole evidence of prejudice was an unserved subpoena for Joseph Favre. Ferguson asserted Farve was necessary to his defense, but did not identify how Favre was indispensable to his defense. *Id.*, at 1254.

In short, the burden to bring an individual to trial in a timely manner rests on the government, not the accused. Mr. Lipsey has demonstrated prejudice due to inability to recall and procure the names of individuals who could relate exculpatory information regarding events three years earlier.

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BY APPELLANT to the following:

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So certified, this the 23rd day of September, 2009.

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