

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STACY HICKS

APPELLANT

FILED

V.

OCT 10 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO. 2007-KA-0696-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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V.

NO. 2007-KA-0696-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.

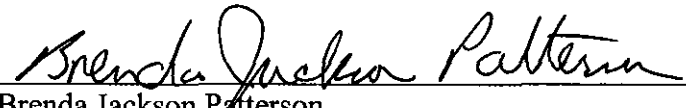
1. State of Mississippi
2. Stacy Hicks, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Robert W. Bailey, Circuit Court Judge

This the 10th day of October, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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STATEMENT OF THE CASE

During the February Term, 2007 grand jury, Stacy Jerome Hicks was indicted for knowingly or purposely attempting to cause serious bodily injury to Villa Hicks, by hitting her with an ironing board at a time when Villa Hicks was residing with him and was a family or household member, and if not the greater crime of aggravated assault, then the lesser crime of simple assault. The state sought sentencing pursuant to Miss. Code Ann. § 99-19-83 (1972), in violation of Miss. Code Ann. § 97-3-7(4) (1972) in that the defendant, eighteen (18) years of age or over or having been certified as an adult, had previously been convicted of at least two (2) felony offenses arising out of separate transactions and separate occurrences, and one of the crimes being a crime of violence, and having been sentenced to serve and did serve separate terms of one (1) or more years with a state or federal penal institution. After a jury trial and a sentencing hearing, Mr. Hicks was sentenced to serve life imprisonment without such sentence being reduced or suspended and without the possibility of parole or probation.

STATEMENT OF FACTS

Villa Hicks is the mother of Stacy Jerome Hicks. On October 28, 2005, Stacy had been back at home living with Ms. Hicks for one week after returning from jail. He always lived with his mother, having never married. Stacy was thirty-five (35) years old and his mother was seventy-two (72) years old on the above date. According to Ms. Hicks, she was sitting drinking coffee, after having gotten her two great-grandchildren off to school. Stacy awoken and began ironing some clothing. Ms. Hicks told him that the outfit he was ironing belonged to one of her great grandchildren. Stacy's reply was that, "he sold it to me". Ms. Hicks stated that he had a bad attitude that morning. Ms. Hicks also said she was telling Stacy about some bills they owed and about a girl named Eloise who

said he would be a nice person if he just wouldn't act up. All of a sudden, Stacy put the ironing board back together and starting beating Ms. Hicks with the ironing board. She was sitting in her chair when he started beating her and after he hit her three(3) or four (4) times she fell on the floor and he hit her three (3) or four (4) more times. She asked him to call 911 for her. However, he left her there for dead. Once he left, she tried to call for help, but the telephone did not work. She walked to her neighbor, Ann Terrie Follins' house and Ms. Follins called the police and ambulance. She was taken to Watkins Hospital where she stayed for two days. Ms. Hicks testified that her son knocked a hole in her neck, chest and head. Her eye was knocked out. She said she can not see out of her eye and if she sees anything her vision is triple. T. 66-69.

Officer J. G. Kufel was the criminal Investigator with the Clarke County Sheriff's Department. He along with Officer Jay Ivy arrested Stacy. During his arrest, Stacy informed them that he had to defend himself because Villa came after him with a knife. As a result of Stacy's self-defense claim, Officer Kufel took photos of Stacy's injuries. He also went to 32 County Road 1661, which is the home of Ms. Hicks to take photos of the ironing board and the scene of the incident. He then went to Watkins Hospital Emergency Room to take photos of Ms. Hicks' injuries. T. 100-103.

Stacy's version of what happened on the morning of October 28, 2005, was that he was ironing clothing that his mother said belonged to her great grandchild and Stacy's brother. The disagreement over the clothing lead to her coming after him with a steak knife. He said that his mother grabbed the steak knife she keeps on the table where she drinks coffee and started coming towards him. In order to defend himself, he swung the ironing board at her. T. 127-128. In response to the question, "Why does she keep a steak knife"?, His response was, "That is Villa Hicks. She got a reputation of fighting and cutting". T. 134 He discussed the photos in Exhibit 9 and 10 and said they were cuts to his hands and leg from the knife inflicted by his mother. T. 129-130. He said even though

she is his mama, he had to do something to get her off of him because she wouldn't stop cutting him with the knife. T. 132.

Stacy further testified that he wanted to file charges on his mother, however, Officer Kufel would not allow him to. T. 131.

STATEMENT OF THE ISSUES

ISSUE NO. 1

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING OFFICER J. G. KUFEL TO PROVIDE EXPERT TESTIMONY WHEN THE STATE DID NOT QUALIFY HIM AS AN EXPERT WITNESS.

SUMMARY OF THE ARGUMENT

I. OFFICER J. G. KUFEL WAS NOT QUALIFIED TO GIVE EXPERT TESTIMONY

Mr. Hicks contends that Officer J. G. Kufel was not qualified as an expert witness and allowing him to give an expert opinion is reversible error. The following testimony is offered in support of Mr. Hicks' position.

T. 105-107.

Q. Okay. And you photographed those because Mr. Hicks pointed them out to you?

A. Actually, when he told me that Ms. Hicks had attacked him, then I wanted to see if Mr. Hicks had any injuries on him, and we asked Stacy at the jail about any injuries he had. And at that time, I told him I wanted to photograph them, and he allowed us to photograph them.

Q. Okay. Now, with 18 years of law enforcement experience, someone that got the injuries that are associated with photograph Page 4, 5, and 6, would that - - would Photographs 9 and 10, the photos depicted there, would that correlate to defensive wounds to a struggle that is depicted in 4, 5, and 6?

BY MR. FALGOUT: judge, we are going to object to the definition of what she is calling defensive wounds in relation - - I don't think that is a clear question. I didn't understand it, anyway.

BY THE COURT: Sustained. I don't know if he is going to be - - I think it probably would require expert testimony.

Q. Can you compare the wounds from Exhibits 9 and 10 as compared to the wounds that were inflicted on Photograph Pages 4, 5, and 6?

A. The wounds on 5 and 6 - -

BY MR. FALGOUT: Object as to compare. What is her question? Can you compare them? What is the question?

BY MS. HOWELL: Severity, Your Honor. I mean, these are photographs, but he was actually there to see the wounds. I think his - - although the photographs are good evidence, he was actually there to actually see the wounds on the person, and I want him to compare the severity of the injuries to Ms. Villa Hicks as compared to Mr. Stacy Hicks.

BY MR. FALGOUT: To which gets back to the question of severity, and he is not qualified.

BY THE COURT: I am not sure I understand the question. Rephrase your question.

Q. Officer Kufel, if someone was defending themselves from a knife wound, would you expect to see the kind of wounds associated with the - -

MR. FALGOUT: Same objection.

MS. HOWELL: I haven't finished my question.

THE COURT: Let her finish.

Q. Would you expect to see the type of injuries that are depicted on pages 9 and 10, or would you expect to see injuries that are much worse than that, with a knife - - if you are defending yourself in a knife altercation?

MR. FALGOUT: Renew my objection.

THE COURT: Overruled. I will let him answer that question, if he can.

A. If I understand it correct, the injuries in 9 and 10 appear to be very minor injuries compared to the Exhibit 4, 5 and 6 which are a lot more severe-type injuries.

Q. All right. But let me ask you this: If someone was defending themselves in a knife fight from someone with a knife, defending themselves, would you expect to see the kinds of wounds that are associated with the pictures on Pages 9 and 10 or something worse than that? T. 106-107

MR. FALGOUT: Same objection, Your Honor.

Court: Overruled. I will let him answer. The photos speak for themselves. He will be subject to cross-examination.

A. If they were defending themselves from a knife wound, I would expect to see a lot more severe injury.

Q. Okay. And in 18 years, have you been associated with cases where people were defending themselves from a knife attacks?

A. Yes, ma'am.

Q. Okay. Now, the person that you are talking to the jury about as being Stacy Hicks, is he in the courtroom today?

Mr. Hicks contends that all of the above statements in reference to someone defending themselves in a knife fight and the kinds of wounds associated with a knife fight were based on Officer Kufel's training and experience as a criminal investigator and therefore should have been classified as expert opinion and subjected to the foundational requirements of Miss. R. Evid. 702 and the discovery rules of Unif. Crim. R. Cir. Ct. Prac. 9. 04(A)(4).

Mr. Hicks' contention is the same as the defendant in Ramos v. State, 710 So.2d 380 (Miss. 1998). In Ramos, the Supreme Court reversed the trial court and the appeals court because the trial court admitted expert testimony from a police officer in the form of lay opinion. The officer testified as to the street value of marijuana; that based on his "experience and training as a law enforcement officer" the hidden compartments in Ramos' vehicle were sealed with fresh tar, which is used by drug smugglers to mask the smell of marijuana and blend with the under body of the car; the marijuana was pressed into hard bricks and wrapped in duct tape, which is the normal method used by drug smugglers to smuggle; and when the packages were cut open, the marijuana was fresh. Id. at 387.

The Supreme Court found that an expert opinion is subjected to the foundational requirements of Miss. R. Evid. 702 and the discovery rules of Unif. Crim. R. Cir. Ct. Prac. 4.06(a)(4). FN5.¹

FN5, Rule 4.06(a)(4) states in pertinent part that the prosecution must disclose to each defendant any reports or statements of experts, written, recorded or otherwise preserved, made in connection with the particular case and the substance of any oral statement made by any such expert. Ramos v. State, 710 So.2d at 387.

The Court in Ramos cited Sample v. State, 643 So.2d 524 (Miss. 1994), where the Supreme Court stated that there is a very thin line between fact and opinion. The Supreme Court stated that the problem with the police officer's "expert" testimony is that it runs afoul of our stated policy requiring that expert witnesses be first tendered as such before being allowed to express expert opinions. Ramos v. State, 710 So.2d at 387 citing Roberson v. State, 569 So.2d 691, 696 (Miss. 1990). To sanction this testimony attempts to circumvent this policy by the familiar retreat to Miss. R. Evid. 701, which some attorneys would use to justify all transgressions of our discovery and evidentiary policies concerning expert opinion. Ramos v. State, 710 So.2d at 387.

The Court in Sample further held that it is important that we not blur the distinction between Rules 701 and 702, not so much for admissibility, as for notice and an opportunity to prepare rebuttal. Expert testimony and opinions are subject to special discovery rules in both the civil and criminal arenas. Miss. R. Civ. P. 26(b)(4); Unif. Crim. R. Cir. Ct. 4.06(a)(4). This Court has also adopted a policy which dictates that Rule 702 witnesses be offered as such before offering Rule 702

¹ Unif. Crim. R. Cir. Ct. Prac. 4.06(a)(4) is now cited Unif. Crim. R. Cir. Ct. Prac. 9.04 (A)(4).

testimony. Sample v. State, 643 So.2d at 529 citing Roberson v. State, 569, So.2d at 696.

The Court stated that the police officer was allowed to express his opinions concerning the value, normal street usage and customary packaging of marijuana based upon training and experience as a narcotics officer. He was therefore, a Rule 702 expert. Ramos v. State, 710 So.2d at 387 citing Wells v. State, 604 So.2d at 271, 279 (Miss. 1992).

In Frierson v. State, 606 So.2d 604 (Miss. 1992), the circuit court admitted into evidence a note for which the state failed to establish who wrote the note and when it was written. There was a reference in the note to a package and the court allowed Lieutenant Randy Corbin to interpret the meaning of the term “package” as used in the note as being a reference to cocaine and left the impression with the jury that the defendant was a drug dealer. The Supreme Court reversed holding this testimony was improper and should have been stricken from the record. The Supreme Court further held that Lieutenant Corbin was not qualified as an expert witness and his testimony amounted to an inadmissible opinion by a lay witness.

In the present case, Officer Kufel was not qualified as an expert witness, however, his testimony in the form of an opinion as to the type of injuries that Mr. Hicks should have received if he had been defending himself in a knife fight amounted to an inadmissible opinion by a lay witness. Further, the prosecutor based Officer Kufel’s testimony on his 18 years of law enforcement experience where people were defending themselves from knife attacks. T. 105-107. Officer Kufel’s testimony left the jury with the impression that Mr. Hicks could not have been defending himself from a knife attack by his mother, as he testified.

CONCLUSION

Because the testimony of Officer Kufel should be characterized as expert, not lay testimony, it should have been subjected to the foundational requirements of Miss. R. Evid. 702 and the discovery rules of Unif. Crim. R. Cir. Ct. Prac. 9.04(A)(4). Therefore, this case should be reversed and remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Stacy Hicks, 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 10th day of October, 2007.


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