IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY ALLEN RICHARDSON	APPELLANT
V.	DOCKET NO.: 2007-KA-00767-COA
STATE OF MISSISSIPPI	APPELLEE

APPELLANT'S BRIEF

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I. CERTIFICATE OF INTERESTED PERSONS

I, David L. Walker, counsel for the Appellant, hereby certify that the following persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Jeffrey R. Richardson, Southaven, Ms.
2. Caribbean "Sissy" Wright, Byhalia, Ms.
3. David L. Walker, Southaven, Ms.
4. Steven Jubera, Hernando, Ms.

Respectfully submitted,

This the 12th day of September 2007.

David L. Walker
Counsel for Appellant

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V. STATEMENT OF THE CASE

A. SUMMARY

The Appellant, Jeffrey Richardson, was indicted by a Desoto County, Ms. grand jury on November 8th, 2006 for fondling of Caribbean "Sissy" Wright in violation of section 97-5-23 MCA. Clerk's record at 5. He waived arraignment on December 13th, 2006 and proceeded to trial before a petit jury on April 25th, 2007. Clerk's record at 3.

The petit jury returned a verdict of guilty. Id. The Appellant filed a motion for new trial and in the alternative for a judgment notwithstanding the verdict. Clerk's record at 6-8. The trial court denied the aforesaid motion. Id. at 8. The Appellant then filed a notice of appeal. Clerk's record at 14-15.

B. APPELLEE'S TRIAL WITNESS

CARIBBEAN "SISSY" WRIGHT

Caribbean "Sissy" Wright was born on November 28th, 1995 and in the fifth grade. R. at 6. She receives As and Bs. Id. She understood the importance of telling the truth. R. at 7.

She had been in the courtroom prior to the trial to practice for the day that she was to come to court. R. at 8-9. The trial court determined that she was competent to testify. R. at 9. On the day in question, she was in her room when a popping sound woke her up. R. at 13. She then went back to sleep. R. at 14. Later she felt something on her personal spot (a place covered by underwear). Id. This occurred in the middle of her panties. R. at 15. She was covered by a blanket. R. at 16. She was half awake and half asleep when this occurred. Id. She flew up in the air. She saw a head in the dark run to the bathroom. Id. She then went and told her mother about the event that took place. R. at 18. The Appellant later came into her mother's room and told her "Goodbye." and that he was going to work. Id. She went her dad's house later that day. R. at 19.

On cross-examination Ms. Wright admitted that she wrote that "I was sleeping. Then I felt a poke in the backside. Then I woke up." R. at 22. The Appellant did not rub on her. Id. He just

poked her. Id. She denied that he was trying to wake her up. Id. The Appellant never rubbed her private area in the front. R. at 23. She was covered up with a blanket when the events occurred. R. at 24. He put his hands under the cover and poked her bottom, Id.

Ms. Wright had never liked the Appellant, even before this event happened. R. at 25. She wanted to live with natural father. Id. The statement that she wrote was written in a room with a detective. R. at 31. This statement indicated that she felt a poke in the backside. R. at 32.

TAMMY MCNIELL

Caribbean Renee Wright is one of the three children of Tammy McNeil. She was born on November 28th, 1995. R. at 34. She lived with the Appellant on August 18th, 2006. Id. Sissy lived with them. On the day in question, the child woke her up and told her that she needed to leave the Appellant. Id. She advised her mother that she felt a poke. R. at 36. At first, she did not know who poked her. R. at 36. This was in her middle. R.

at 43. The child later told her mother that she was poked in the "butt". Id. Ms. McNiell told Detective Logan that the child was poked between the legs. R. at 47. Her daughter went to school that day. Id.

JEFF LOGAN

At the time of trial, Jeff Logan was a detective/investigator with the city of Southaven, Ms. R. at 50. He interviewed the Appellant at the police department. R. at 51. This interview was not tape-recorded. The Appellant wrote a statement on August 25th. R. at 52. He also gave another statement that Detective Logan wrote out and he signed. R. at 55. According to the detective, the Appellant advised him that rubbed his finger down the crack of her ass and that he accidentally may have touched her vagina. R. at 57. The Appellant was permitted to leave the police department after the second statement. R. at 61. He was taken into custody at a later time. Id.

Detective Logan admitted that the version of events as remembered by the child and the Appellant were quite different.

She never told him that the Appellant touched her on the vagina. R. at 66. Her poked her on the bottom, in the middle. Id. He touched her while she was under the cover. Skin did not touch skin. R. at 68.

The Appellee rested its case in chief after redirect examination of Detective Logan. R. at 69. The Appellant's motion for a directed verdict was denied by the trial court. R. at 73.

C. APPELLANT'S TRIAL WITNESSES

JEFF LOGAN

According to a supplemental report prepared by Detective Logan the child's mother advised him that told him that her child was poked between the legs. R. at 79.

JEFFREY RICHARDSON

At the time of the trial, the Appellant was forty seven years old and had a high school education. R. at 80. He worked as a steel rule die maker. R. at 81. He shared the same residence with Ms. McNiell and her daughter, Sissy. R. at 82. He thought that he

got along with Sissy fairly well. She sometimes acted like she did not like him very much. R. at 82.

His memory of August 18th, 2006 was that he got up at approximately 6:30 a.m. to go to the bathroom. He saw Sissy moving around in the bed quite a bit and he wondered what was wrong. He walked to the end of her bed and called her name. She did not respond and he reached across the end of the bed touched her on what he thought was her thigh area and she jumped a little bit. She did not give him a response. He then turned and went to the bathroom. R. at 83. When he came out of the bathroom, he walked back to check on her and she was being quite and still. He then went to the computer room. Id.

The Appellant did not have any sexual desires toward Sissy. R. at 84. He never put either of his hands under the cover that was on top of her. R. at 84. She was under the cover. Id. Detective Logan asked him to describe the physique of Sissy. R. at 87. He wanted to know whether she was cute. Id. He never gave him the opportunity to change his statement. Id.

On cross examination the Appellant testified that he thought that he touched Sissy on the hip area. R. at 91. She was laying on her belly. Id. After he touched her, she kicked one of her legs and her heel hit the wall. R. at 93.

During the interview with Detective Logan the Appellant was attempting to convince him that this was an accident. R. at 95. He told the detective that he thought that he could get away with touching Sissy because he was touching her on top of the blanket. R. at 98. He did not think that he was doing anything illegal. Id.

The Appellant rested his case in chief. R. at 103.

VI. SUMMARY OF ARGUMENT

I. The trial court erred in granting the Appellee's motion to close the courtroom to the public before and during the testimony of Sissy Wright. The basis for the Appellee's motion was the age of the child, eleven years old. The Appellee conceded that the Mississippi Constitution of 1890 did not specifically permit the public courtroom to be closed for fondling. R. at 3. The Mississippi Constitution should have been strictly construed by the trial court, thus compelling the courtroom to remain open to the public.

II. The trial court erred in denying the Appellant's motion for a new trial and in the alternative for a judgment notwithstanding the verdict.

VII. ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO CLOSE THE COURTROOM TO THE PUBLIC DURING THE TESTIMONY OF SISSY WRIGHT

The Appellee moved the trial court to clear the courtroom of all nonessential personnel prior to the testimony of Sissy Wright. R. at 3. The assistant district attorney argued to the trial court that she was only eleven years old and fell under numerous protections, including the tender years protections. Id.

The Appellant responded that the Mississippi Constitution of 1890 specifically indicated when a trial court may exclude the public from the courtroom and this was not one of them. Id. See Article III, Section 26.

The assistant district attorney acknowledged that this was not a rape case, which would have been within the language of Article III, Section 26. However, this was within the same "ballpark" and the Appellee believed that the Appellant would

not be prejudiced in any way, shape or form. R. at 4.

The trial court granted the Appellee's motion. Id. It noted that there were four persons in the courtroom in addition to Circuit Judge Ann Lamar, who had came in with a couple. Id. It then ordered the public courtroom cleared of all nonessential personnel. Id.

The Appellant included this issue in his motion for a new trial and in the alternative for a judgment notwithstanding the verdict. Clerk's record at 7. Thus, this issue is properly before the reviewing court and no procedural bar exists to preclude a review of it. **Fears v. State**, 779 So. 2d 1125, 1127 (Miss. 2000).

At the hearing on this motion the Appellant cited the trial court to **Tillman v. State**, 947 So. 2d 993 (Miss. App. 2006) cert. denied January 18th, 2007 and **Waller v. Georgia** 467 U.S. 39, 45 (1984). These cases require a trial court to determine if the party seeking to close the public courtroom to the public must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to

protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. **Waller** 467 U.S. at 48.

The Appellant noted to the trial court that he did not recall any testimony to the effect that there were close family connections between Sissy Wright and the Appellant. In **Tillman** the families of the defendant and the alleged victim were intertwined as members of the families were related to the defendant and the alleged victim. The assistant district attorney presented no testimony to the trial court this of connection in this case. Moreover, he presented no testimony of the child going to a psychiatric doctor or a psychologist for any kind of emotional illness that resulted from the acts of the Appellant. Again, in **Tillman** the trial court and court of appeals were concerned about the alleged victims emotional state due to sexual abuse.

Additionally, the assistant district attorney presented no testimony to the trial court that the child would suffer any

embarrassment or emotional disturbance by being a witness with public present. **Lee v. State**, 529 So.2d 181, 183 (Miss. 1988). Moreover, the Appellee presented the trial court with no proposed reasonable alternatives for it to consider. R. at 128. For example, could members of the public who supported the Appellant be permitted to remain in the courtroom with the other members of the public excluded. Id.

The assistant district attorney responded to the Appellant's argument at the motion hearing by arguing that the request of the Appellee to close the courtroom to the public was very limited in scope as it only to the child's testimony, not the entire proceedings. R. at 131. As to the argument with respect to a reasonable alternative, he argued that was no reasonable alternative to having the courtroom cleared. Id. Finally, he argued that the Appellee had an overriding interest in protecting children in Mississippi. R. at 132.

The trial court was asked by the Appellant to strictly construe the Mississippi Constitution of 1890 and find that

fondling was not one of the exceptions of Article III, Section 26. The trial court agreed that **Tillman** was the controlling case law on the issue of closing the courtroom to the public. R. at 133. It found that its actions in closing the courtroom were similar to those of the trial judge in **Tillman**. Everyone but necessary court personnel were removed from the courtroom during the testimony of the minor child, who was the first witness called by Appellee. R. at 133-134. After her testimony, the public was permitted to reenter the courtroom. Id. Approximately ten persons were excluded from the courtroom. Id. The trial court conceded that the testimony of the child was certainly extremely important to the parties. R. at 134. However, it felt that the exclusion was certainly no broader than necessary to protect the interest in question. Id. It was of the opinion that no reasonable alternative existed to closing the courtroom to the public. Finally, it found that there was an overriding interest to close the trial to the public for the testimony of the child. R. at 135. It was of the opinion that it was

bound by the construction of Article III, Section 26 as rendered by the Court of Appeals and thus could not render a stricter construction of Article III, Section 26 than that rendered by the Court of Appeals . R. at 137.

In general, a criminal defendant has a constitutional right to a public trial. However, that right is not absolute, but instead must be balanced against other interests essential to the administration of justice. **Tillman ,** at 995 citing **Bailey v. State** 729 So. 2d 1255, 1260 (Miss. 1999)

Apparently, an abuse of discretion standard of review is to be applied to this issue. In **Tillman** the Court noted that Article III, Section 26 of the Mississippi Constitution gives a trial judge discretion to close a trial to the public in certain instances. **Tillman** at 996. If a trial court abuses its discretion, then a reviewing court may reverse the trial court's ruling. **Jefferson v. State**, 818 So. 2d 1099, 1104 (Miss. 2002). The Appellant would argue that the trial court did in fact abuse its discretion by granting the Appellant's motion to close the courtroom to the

public. The facts of this case are very different from **Tillman** as noted herein. Moreover, this case did not involve oral sex and digital penetration as in **Tillman**. In fact, there was no skin on skin contact in this case. Is rubbing a blanket covering the minor child classified as potentially embarrassing or emotionally disturbing facts of a very sensitive and personal nature to justify the closing of a public courtroom? If the answer is yes, then one could apply **Tillman** to the facts of this case. If the answer is no, then a reversal of the trial court's decision is appropriate.

An attempt by a court to construe a constitution as evolving is an attempt by the court to justify imposing its view of what the law should be, rather than what it is. **A Matter of Interpretation: Federal Courts and the Law** by Antonin Scalia (1997). Article III, Section 26 simply does not include fondling in its text. If fondling is to be included, then the legislature, not the judiciary, should be the entity to amend this provision of the constitution via the appropriate amendment process.

The construction of a constitutional section is ascertained from The plain meaning of the words and terms used within it. **Stidham v. State,** 750 So. 2d 1238 (Miss. 1999). If there is no ambiguity, there exists no reason for legislative nor judicial construction of a constitutional section. Id. No ambiguity existed with respect to the constitutional issue before the trial court nor this court.

II. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

The Appellant filed a motion for a new trial and in the alternative for a judgment notwithstanding standing the verdict. Clerk's record at 6-8. The trial court denied this motion. Clerk's record at 9. Issues based upon a denial of a motion for a JNOV challenge the sufficiency of the evidence. **Boose v. State**, 851 So. 2d 391, 394 (Miss. Ct. App. 2003). An appellate court reviewing an assignment of error that the evidence presented at trial was insufficient to support the verdict is to accept as true all evidence tending to support the verdict, including the inferences derived therefrom, and consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Dilworth v. State**, 909 So. 2d 731, 736 (Miss. 2005).

When a criminal defendant challenges the trial court's denial of a motion for a new trial, the weight, not t he sufficiency of the evidence is before the reviewing court. A new trial will not be ordered unless the reviewing court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would be to sanction an unconscionable injustice. **Bradley v. State** 921 So. 2d 385, 389 (Miss. Ct. App. 2005).

The Appellant would concede that the existence of conflicting testimony makes the petit jury the judge of the credibility of the witnesses. **Besset v. State**, 808 So. 2d 979 (Miss. Ct. App. 2001). Moreover, the Appellant acknowledges that the testimony of a single uncorroborated witness can sustain a conviction even though there may be more than one witness testifying to contrary. **Verner v. State**, 812 So. 2d 1147 (Miss. Ct. App. 2002).

The Appellant would argue that the Appellee presented insufficient evidence to prove beyond a reasonable doubt that

the Appellant for the purpose of gratifying his lust or indulging his depraved licentious sexual desires handled, touched or rubbed with his hands or any part of his body or any member thereof the minor child. See section 97-5-23 MCA. Clerk's record at 5. The mother of the minor child testified that her child told her that the Appellant poked her in the "butt." R. at 47. The child wrote out a statement that indicated that she felt a poke in the backside. R. at 32. The Appellant did not have any sexual desires toward the child. R. at 84. He never put his hands under the cover that was on top of her. These facts should compel the Court to find that the trial court abused its discretion in denying the Appellant's motion for a JNOV.

Moreover, the Court should vacate the judgment of the trial court and grant the Appellant a new trial at which the public will free to attend the testimony of all witnesses who testify. The weigh of the testimony as noted herein was in favor of the Appellant and the trial court abused its discretion in overruling motion for a new trial. **Smith v. State**, 868 So. 2d 1048 (Miss. Ct.

App. 2004).

VIII. CONCLUSION

Based upon the foregoing case authorities and argument the Appellant urges the Court to reverse the trial court's decision to close the courtroom to the public during the testimony of the minor child on the basis that a strict construction of Article III Section 26 of the Mississippi Constitution of 1890 precludes the action of the trial court. In alternative, an applicable of **Tillman** would not require the courtroom to be closed to the public. Finally, the trial court abused its discretion in denying the Appellant's motion for a new trial and in alternative for a JNOV.

Respectfully submitted,

This the 12th day of September 2007.

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Counsel for Appellant
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IX. CERTIFICATE OF SERVICE

I, David L. Walker, counsel for the Appellant, hereby Certify that I have this day either mailed or hand-delivered a Copy of the Appellant's Brief to Hon. Jim Hood, attorney general, Hon. Robert P. Chamberlin, circuit judge and S.P. Jubera, assistant District attorney, at their usual business addresses.

This the 12th day of September 2007.

David L. Walker