

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHRIS A. MILLER

APPELLANT

V.

FILED
AUG 28 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

NO.2007-KA-00798-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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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. Chris Miller
3. Doug Evans and the Winston County District Attorneys Office
4. Honorable Joseph H. Loper, Jr.

THIS 28th day of August 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Chris Miller, Appellant

By:



Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE ISSUE

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Winston County, Mississippi, and a judgment of conviction for the crime of sale of cocaine against Chris Miller and resulting in a twenty (20) year sentence with a fine of five thousand dollars (\$5,000.00), court costs and assessments. Tr. 100, C.P. 31, R.E. 13. Miller's driver's license was also suspended for six (6) months. C.P. 31, R.E. 13. This sentence followed a jury trial on April 25, 2007, Honorable Joseph H. Loper, Jr., Circuit Judge, presiding. Chris Miller is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According the trial testimony, on June 13, 2005, Mississippi Bureau of Narcotics Agents Wes Stapp and Barry McWhirter, searched both the person and the vehicle of a confidential informant by the name of Bobby Wayne Goodin. Tr. 41. However, it should be noted that agents did not make him remove his pants or check his underwear. Tr. 50-51, 61. Agents also equipped Goodin with audio and video recording devices for the agents to monitor him. Tr. 41-42. Goodin was issued sixty dollars (\$60.00) in official state funds and set off toward Miller Avenue in Louisville, Mississippi for a controlled buy. Tr. 43.

Goodin testified that at the time of the buy, he only knew the target as "Chris." He testified he pulled up the suspect's trailer and asked if he could "double up." He then paid

the suspect sixty dollars (\$60.00) and left. He then identified the appellant as the person who sold him the cocaine. Tr. 54. Goodin went on to testify that he put the drugs he purchased into a bag and sealed it, giving it to the agents at a post-buy meeting. Tr. 54-55. Agents then search him and his vehicle again. Tr. 55. He identified the video presented to him as the video of the sale, and it was admitted into evidence, and the jury was allowed to view it. Tr. 55-56, Ex. 2.

Goodin claimed he only became an informant because he wanted to “get this stuff off the streets.” When asked if he used drugs, he told trial defense counsel that he did not think that was any of his concern. He then denied using narcotics. When specifically asked if he had ever used narcotics, he the admitted using them in the past. Tr. 58. Goodin had a bit of problem remembering past charges against him, actually causing the courtroom audience to laugh at one point. Tr. 58-61, R.E. 7-10.

The substance Goodin handed to agents was later tested and determined to be 0.52 grams of crack cocaine. Tr. 70. Gerald Hayes, investigator with Louisville Police Department, identified the suspect in the video as Chris Miller. Tr. 73-74. More detailed facts will be discussed in the argument below.

SUMMARY OF THE ARGUMENT

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented failed to establish beyond a reasonable doubt the charge of sale of cocaine, as the evidence did not show a clear exchange of money for drugs. The State alleged in its indictment that money was paid, but failed to prove this. The confidential

informant's testimony was that this occurred was therefore crucial. However, the confidential informant's credibility was nonexistent, as he conveniently forgot several prior charges against him. Allowing the verdict to stand on this evidence would manifest an extreme injustice.

ARGUMENT

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for New Trial or in the Alternative JNOV, trial counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 34, R.E. 14. The trial judge denied this motion. C.P. 37, R.E. 16. The trial judge erred in refusing to grant this motion.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id.* See also *Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

In the case at bar, the confidential informant's testimony was the only evidence that money was exchanged. The video did not show any money being transferred to Miller. Ex.

2. Accordingly, the informant's trustworthiness was absolutely essential to the case. As the record reflects, Goodin was absolutely incredible. To illustrate just how unbelievable Goodin's testimony was, it is necessary to review a significant portion of his cross-examination.

Q. Well, just how did you begin serving as an informant for MBN?

A. I contacted Barry.

Q. You contacted Barry McWhirter.

A. Um-hum.

Q. Well, tell me what that – what did you say to Barry when you contacted him?

A. That I'd like to get this stuff off the streets.

Q. Well, now, do you use narcotics?

A. Actually, I, I really don't see whether that is any concern of yours, whether I use narcotics.

Q. Well, would you please answer my question, Mr. Goodin? Do you use narcotics?

A. No.

Q. Did you use narcotics?

A. I have in the past.

Q. Okay. Have you been charged with the use of narcotics?

A. No. Let me think a minute. Here in the state – let me think. Let me think.

Q. Mr. Goodin, my question is have you ever been charged with a narcotics offense in this state or any other state.

A. Yes, I have.

Q. Okay. Would you please tell the jury where you were charged and what you were charged with?

A. I'm trying to remember back.

Q. Can you remember back to 2003?

A. Yes, I can.

Q. Okay. Well, were you charged in 2003 with possession?

A. Yes.

Q. Okay. All right. Where was that?

A. State of Florida.

Q. Okay. Now, what other charges have you had against you, Mr. Goodin?

A. Charges. Actually any conviction. That's, that's – I was charged with violation of probation, because I was on probation. But that has all been resolved in another state.

Q. Probation from what offense, Mr. Goodin?

A. For that charge you are talking about. The possession charge.

Q. And what was the nature of your probation violation?

A. Well, I just – I left. But I did go back and turn myself in and get it all resolved.

Q. Well, like, I gathered by your previous – have you been charged for other offenses for which you weren't convicted?

A. No.

Q. What about New Mexico?

A. New Mexico.

Q. Um-hum.

A. On what?

Q. Were you in New Mexico on the eighth month, 14th day, 1985?

A. Not that I recall.

Q. Are you sure about that?

A. I'm not – not that I recall. 1985?

Q. Yes, sir. Eight month, 14th day, '85. That's what, August 14, '85? Charged with breaking and entering. Is that correct?

A. Oh, my, yes. Would you like to know this?

(LAUGHTER FROM THE COURTROOM AUDIENCE.)

THE COURT: I don't want any comments or reaction from the courtroom. If you can't control yourself, get out of here.

A. Yes sir. Yes, sir. I apologize. It slipped my mind. Would you like to hear about that?

Q. You can tell me if you wish to.

A. I certainly will. I broke into a motel room. The wife I was married with was in there with two guys. Yes, sir. I was charged with breaking and entering. That was dropped.

Q. What about '94 in Starkville?

A. '94 in Starkville. '94 in Starkville, Mississippi, I was put on probation, State of Mississippi. Now, what – refresh my memory on the charge.

Q. I'm just asking you, Mr. Goodin.

A. Okay.

Q. I'll let you tell the jury what you were on probation for in Mississippi.

A. It's been awhile. I don't recall. I can't remember.

Tr. 58-61, R.E. 7-10.

Clearly, it would sanction an unconscionable injustice to allow the Appellant to be convicted on the word of this informant. No reasonable jury could put any faith into his testimony.

As set forth in the indictment, the State was required to show that Miller (1) unlawfully transferred or sold cocaine to the confidential informant, Goodin, and (2) received a sum of money. C.P. 2, R.E. 6. Besides the testimony of Goodin, the State presented no evidence that Miller received any money for the cocaine. By alleging in the indictment that Miller received a sum of money for the cocaine, the State took on the burden of proving that Miller received money. *Gray v. State*, 728 So.2d 36 (¶176-77) (Miss. 1998). The jury was also instructed that it to find Miller received money beyond a reasonable doubt. C.P. 19, R.E. 11.

Clearly, given the evidence presented, Chris Miller should be entitled to a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State* 883 So.2d 86 (¶13) (Miss. 2004).

CONCLUSION

Given the facts presented in the trial below, the verdict was contrary to the overwhelming weight of the evidence. Chris Miller is entitled to have his sale of cocaine conviction reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Chris Miller, Appellant

By:



Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 28th day of August, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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