

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2007-KA-00814-COA**

ROTUNDO JENKINS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLANT

**APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI**

(Oral Argument Requested)

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or refusal.

Honorable Robert W. Bailey
Lauderdale County Circuit Court Judge

Mr. Rotundo Jenkins
208 3rd Avenue South
Meridian, Mississippi 39301

E.J. Bilbo Mitchell, Esquire
District Attorney-Lauderdale County, Mississippi
P.O. Box 5163
Meridian, Mississippi 39302-5163

This the ____ day of December, 2007

Eric J. Hessler, Attorney for Appellant

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STATEMENT OF ISSUES

The Circuit Court erred in failing to grant Appellants Oral Motion in Limine, requesting that the prosecutor refrain from referring to or eliciting specific information allegedly obtained from an unknown, unidentified source. The statement referred to was made to a Meridian Police Officer by an unknown person who flagged the officer down.

The unknown person told the officer that he had witnessed a drug deal. The unknown subject further stated that he saw the black male hand a white female crack cocaine. Additionally the subject stated that the black male drug dealer was on a mini-bike.

Appellant's attorney believed this information to be hearsay, and, out of an abundance of caution, requested, via a Pretrial Motion, that this information be excluded. The basis of the Motion was that it was inadmissible hearsay and that the statement was more prejudice than probative, in that such information would strongly imply that the Appellant was distributing crack cocaine.

The prosecutor, in response to the Oral Motion in Limine, responded that she did not believe the state's witness would say that, and that she would instruct them not to make any type of inference in that way.

The Judge denied this Oral Motion in Limine, stating that it was in writing, that it was not timely raised and that it could be ruled on at trial, should such an objection be warranted.

The Circuit Court again erred when it denied the Appellant contemporaneous objection, based on hearsay, to the statement. In improperly over ruling the hearsay objection, the witness went on to testify regarding the hearsay statement. The testimony from the State's witness included the hearsay statement indicating that the black male on a mini-bike was observed distributing crack cocaine to the white female. The person who allegedly made this statement to the officer was unknown and unavailable to be cross examined was vague and unreliable and was not relevant. The denial of the above Motion and subsequent objection resulted in unjust prejudice to the Appellant and denied him his right to a fair and impartial trial.

Additionally, the Appellant objected to the states jury instructions, labeled as S-2 and S-3, respectfully. The basis for the objection was that the instructions included the weight of the cocaine. The Appellant was charged with Possession of Cocaine only. The weight, therefore, was irrelevant to the jury, as the weight only applied to sentencing, which is only under the authority of the Judge. The inclusion of the irrelevant weight of cocaine in this matter combined with the inadmissible hearsay testimony essential identifying the appellant as a dealer of crack cocaine, improperly and unfairly prejudiced the Appellant. In doing so, the appellant was denied due process and denied the right to a fair and impartial trial.

STATEMENT OF THE CASE

Rotundo Jenkins, Appellant, was arrested on August 18, 2006 and charged with Possession of Cocaine. Mr. Jenkins entered a plea of not guilty to the charge and elected to be tried by jury. On March 19, 2007, a jury of twelve men and women were duly sworn to try this matter.

Prior to the trial, during the discovery phase, the Appellant received the Meridian Police Report, authored by Police Officer Kevin Boyd, which documented the allegations surrounding the arrest.

The report, in pertinent part, stated that he, Officer Boyd, was "dispatched" to the area of 5th Street in reference to a white female soliciting people and possibly on drugs. Officers checked the area and was unable to find the female. Officer Sanders and Boyd ended up on 1st Street. Officer Boyd was flagged down by a black SUV. A white male inside of the vehicle, in the back seat, advised Officer Boyd that there was a black male on a mini bike selling crack further down on the 1st Street closed to Airport Boulevard. The male subject advised Officer Boyd that he had seen the black male hand crack cocaine to a white female.

At no time did Officer Boyd receive any other information. There was no clothing description, physical description, age or name given of the subject who was allegedly selling the crack. At no time was it ever confirmed that the black male allegedly riding a mini bike and selling crack cocaine was in fact selling anything. More specifically, at no time was it ever confirmed that the Appellant, Rotundo Jenkins, in fact was that same black male on a mini bike as the one alleged to be selling crack. At no time was the unknown white male declarant ever identified or alleged to be identifiable.

Furthermore, the officer indicated that the reason for the stop of Mr. Jenkins was a traffic violation, and not the information given to him by the white male.

During jury selection, out of an abundance of caution, attorney for the Appellant, requested the Court grant an oral Motion in Limine to prevent such unreliable, irrelevant, uncorroborated and prejudicial hearsay testimony from being elicited or offered at trial. In support of this Motion, the Appellant argued the above, and pointed out that such prejudicial testimony would strongly and incorrectly suggest to the jury that the Appellant was not only a drug dealer, but also the person who had just been involved in a drug transaction.

The Prosecutor responded that the statement was not offered for the truth of the matter asserted, just for the reason they (the police) were in the area. The Prosecutor also admitted that the stop of the Appellant was made for traffic reasons. Furthermore, the prosecutor informed the Judge that she would instruct them (the police witnesses) not to say that the Appellant was selling drugs.

The trial commenced, and the state called their first witness, Officer Kevin Boyd. During his testimony. Boyd's testimony regarding the statement of the unknown white male declarant was timely objected to as inadmissible hearsay. This objection was overruled and the statement was admitted and repeated to the jury.

Furthermore, during the states direct examination of Officer Boyd, despite the states assertion that they would instruct their witnesses to not infer that the appellant was selling drugs; This is exactly what they did. Officer Boyd testified, over objection, that the white male subject told him the "black male on the mini-bike on 1st street (was) handing a white female crack cocaine".

Lastly, the Appellant objected to the states jury instructions, labeled as S-2 and S-3, respectfully. The basis for the objection was that the instructions included the weight of the cocaine. The Appellant was charged with Possession of Cocaine only. The weight, therefore, was irrelevant to the jury, as the weight only applied to sentencing, which is only under the authority of the Judge. The inclusion of the irrelevant weight of cocaine in this matter combined with the inadmissible hearsay testimony essential identifying the appellant as a dealer of crack cocaine, improperly and unfairly prejudiced the Appellant. In doing so, the appellant was denied due process and denied the right to a fair and impartial trial.

SUMMARY OF ARGUMENT

The Defendant, Rotundo Jenkins was arrested on August 18, 2006 and charged with Possession of Cocaine. The police report compiled of the event reflects that Police Officer Keven Boyd was flagged down by an unknown white male who told him (the officer) that a black male on a mini bike had just distributed crack cocaine to a white female. The statement is clearly hearsay. The unidentified white male otherwise gave no clothing description, physical description, age, height, weight or any other distinguishing characteristics of the black male subject. While searching the area, Officer Boyd observed Appellant Jenkins (who is a black male) on a mini bike in an area further away. Officer Boyd indicated that he decided to conduct a traffic stop on the Appellant for observed traffic violations. He did so and the Appellant was subsequently arrested, charged and tried and convicted.

Prior to, and during the trial, attorney for the Appellant lodged an oral Motion in Limine regarding the above hearsay statement. It was argued that in addition to being inadmissible hearsay, it was irrelevant, unreliable and more prejudicial than probative. Both the Motion In Limine and the contemporaneous objections were overruled.

By allowing the hearsay statement of the unknown white male (which contained no other description other than a black make on a mini-bike selling crack cocaine). The jury was certainly led to believe that the Appellant was in fact the same black male who was selling crack cocaine. Although certainly prejudicial, the probative value of this statement was minimal, at best.

The Appellant was not charged with Sale of Crack Cocaine, nor was there any corroborative evidence that he had in fact sold crack cocaine additionally, according to the

**ARGUMENT OF APPELLANT WITH
SUPPORTING AUTHORITIES**

The well founded standard of review for the admission or exclusion of evidence in Mississippi is abuse of discretion *Troupe v. McAuley*, 955 So.2d 848, 855 (MISS. 2007) citing *Poole v. Avara*, 908 So.2d 716 (Miss. 2005). A trial Judge, therefore, “enjoys a great deal of discretion as to the relevancy and admissibility of evidence unless the Judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling.” *Shaw v. State*, 915 So.2d 442, 445 (Miss 2005) (citing *Jefferson v. State*, 818 So.2d 1099, 1104 (Miss. 2002)).

Mississippi Rules of evidence 801(C) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

Although the state indicated that the hearsay statement identifying the black male on the mini-bike selling drugs was not offered to “prove the truth of the matter asserted”, there was no other relevancy regarding this statement. The state argued that it was only offered to show why the Officer stopped the accused. (RE p. 36-37, ll. 27-4)

The Appellant submits that the hearsay statement was inadmissible for several reasons; it was vague and unreliable; it was more prejudicial than probative; it prohibited the accused from confronting the witness against him; and it was not relevant.

The statement was vague and unreliable in that it did not provide any other description of a black male on a mini-bike selling narcotics. It did not provide a name, physical description, clothing description, height, weight or age, nor did it provide the witness basis for the knowledge.

The statement was more prejudicial than probative in that the statement, as provided in court, clearly implied that the accused was selling cocaine (which was never alleged or charged) but which inference the jury could not avoid. This statement was given despite the states assertion that it's witnesses would be instructed not to make such statements or inferences. (RE p.38, ll. 9-12.)

Lastly and equally important, the statement has no relevance, whatsoever, in this matter. The Police Officer clearly stated that the basis leading to the arrest of the Appellant was based on a traffic stop (RE p. 52, ll. 15-18) Considering the above, the Appellant submits that the trial Judge did in fact abuse his discretion in allowing this hearsay statement into evidence, and in doing so created great prejudice to the accused.

The Appellant would further submit that the Judge abused his discretion in admitting evidence, over counsel's timely objection, of the weight of the cocaine at issue. RE p. 145, ll. 18-29) The Appellant was charged and tried for Possession of Cocaine. The weight of the cocaine is irrelevant for purposes of the jury, and for purposes of the matter at issue. The weight, especially under the given facts and circumstances, may only bring further prejudice against the Appellant, given the hearsay allegations that he was selling crack cocaine.

Although relevant evidence to the Judge, for sentencing purposes, it is not relevant to the jury in their determination of guilt. The Judge, therefore, abused his discretion when admitting such evidence, which abuse caused great prejudice to the Appellant.

CONCLUSION


It is clear that the statement made by the unidentified white male, alleging that the Appellant was a drug dealer, is hearsay, is irrelevant, and does not legitimately fall under any exception to the rules of hearsay. Under the facts and circumstances supporting the Appellants arrest and conviction such hearsay was inadmissible in that the jury could be left with only one possible inference; That the Appellant had just dealt drugs, and thus possessed drugs.

The State submitted that the statement was offered to show only the reason for the stop, and further indicated that it would instruct it's witnesses not to make mention of drug dealing. Timely objections were made and overruled. The witness testified to the hearsay statement, including the allegation of drug dealing. This was done despite the fact that the Officer testified the reason for the stop and investigation of the Appellant was based solely on observed traffic violations. Clearly such statements were not necessary, or relevant under the circumstances.

Similarly, the admission into evidence of the weight of the cocaine, under the given facts and circumstances was not relevant evidence as to the guilt or innocence of the accused, and thus should not have been included in the jury instructions. The trial Judge, by admitting such evidence, clearly abused his discretion and in doing so created great prejudice to the Appellant.

For these reasons and in consideration of the foregoing argument, the conviction of the Appellant, Rotundo Jenkins, should be reversed and the case be remanded to Circuit Court for proceedings consistent with this appeal.

Respectfully submitted this the 19th day of December, 2007.



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CERTIFICATE OF SERVICE



I, Eric J. Hessler, Attorney for Appellant, do hereby certify that I have delivered by placing a copy of the Brief for the Appellant to the United States Mail, postage prepaid, addressed to the following individuals:

Honorable Robert W. Bailey
Lauderdale County Circuit Court Judge
Lauderdale County Courthouse
Meridian, Mississippi 39301

E.J. Bilbo Mitchell, Esquire
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So certified, this the 19th day of December, 2007

BY:


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