

2007 - KA - 928 COA - T

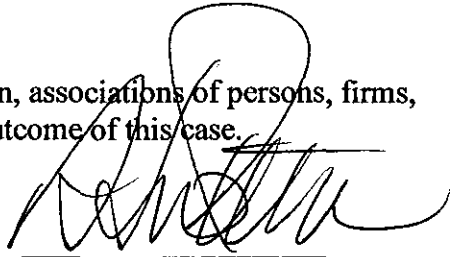
CERTIFICATE OF INTERESTED PARTIES

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 recusal.

1. James Earl Jones, Appellant
2. Helen Bagwell Kelly, Counsel for Appellant
3. Adam A. Pittman, Counsel for Appellant
4. T.R. Trout, Assistant District Attorney
5. Honorable Andrew Howorth, Circuit Court Judge
Lafayette County

Appellant certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case.

By:



Attorney of record for
James Earl Jones

TABLE OF CONTENTS

PAGE NUMBERS

CERTIFICATE OF INTERSTED PARTIES	1
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
I. STATEMENT OF THE ISSUES	4
II. STATEMENT OF THE CASE	
1. COURSE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	5
2. STATEMENT OF RELEVANT SUBSTANTIVE FACTS.....	6
III. SUMMARY OF THE ARGUMENT	10
IV. ARGUMENT	
A. The Court erred in failing to grant a motion for judgment notwithstanding the verdict or in the alternative a new trial because the verdict was against the overwhelming weight of the evidence.....	11
B. The Court erred in refusing to grant a motion for continuance to allow Jones an opportunity to hire counsel and prepare for trial	15
V. CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

CASES

PAGE NUMBERS

<u>Byrd v. State</u> , 522 So.2d 756, 759 (Miss. 1988).....	16
<u>Clark v. Procunier</u> , 755 F.2d 394 (5th Cir.1985).....	11
<u>Cochran v. State</u> , 244 So.2d 22 (Miss. 1972)	16
<u>Deloach v. State</u> , 658 So.2d 875 (Miss.1995).....	11
<u>Ferguson v. State</u> , 507 So.2d 94, 96 (Miss. 1987).....	16
<u>Hatcher v. Fleeman</u> , 617 So.2d 634 (Miss.1993)	16
<u>Hughes v. State</u> , 589 So.2d 112 (Miss. 1991).....	16
<u>Johnson v. State</u> , 631 So.2d 185, 187 (Miss.1994).....	15
<u>Lambert v. State</u> , 654 So.2d 17 (Miss 1995)	16, 17
<u>Plummer v. State</u> , 472 So.2d 358 (Miss 1985)	16
<u>Shields v. State</u> , 702 So.2d 380 (Miss. 1997)	11, 12

STATUTES, RULES, and OTHER AUTHORITIES

Mississippi Code § 9-3-9	5
Mississippi Code § 99-15-29	16, 17
Mississippi Code § 97-17-23	11
Mississippi Code § 99-19-83	5, 6
Mississippi Code § 99-35-101	5

I.

STATEMENT OF THE ISSUES

- A. THE COURT ERRED IN FAILING TO GRANT A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE
- B. THE COURT ERRED IN REFUSING TO GRANT A MOTION FOR CONTINUANCE TO ALLOW JONES AN OPPORTUNITY TO HIRE COUNSEL AND PREPARE FOR TRIAL

II.

STATEMENT OF THE CASE

James Earl Jones was convicted of burglary of a dwelling in the Circuit Court of Lafayette County, Mississippi. Appellant now appeals this decision.

James Earl Jones takes this Appeal of Right pursuant to § 99-35-101, Mississippi Code 1972 Annotated, as amended, which provides: "Any person convicted of an offense in a circuit court may appeal to the Supreme Court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty." Jurisdiction is proper pursuant to § 9-3-9 Miss. Code Ann. (2005).

1. COURSE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

James Earl Jones was indicted by a Lafayette County Grand Jury in February of 2006 on the charge of burglary as a habitual criminal under Mississippi Code § 99-19-83. At the time of his indictment, Jones was already incarcerated on an unrelated conviction at the State Penitentiary at Parchman, Mississippi. Mr. Jones was never served with the indictment but was formally arraigned on the indictment on April 24, 2006, to which he pled not guilty. He was also appointed counsel on that day. Shortly after the formal arraignment, appointed defense counsel represented to the Court that he was requesting on behalf of Jones a speedy trial and advised the Court that he was prepared to try the case within the next two days. (R. 3-4) Following defense counsel's announcement a motion was made by Jones for a continuance to allow him time to hire a lawyer which was denied. Jones indicated that he wished to request that the Circuit Court of Lafayette County consider the criminal charge pending before it from the bench and not empanel a jury. The Trial Judge, after inquiring of Jones and requiring him to sign and file a Waiver of

Jury Trial, accepted that election and beginning April 25th, 2006, proceeded to consider the matter from the bench. The Trial Judge, after considering the evidence and argument of counsel, found on April 28, 2006 that the State had met its burden, found Jones to be guilty of burglary of a dwelling and entered an Order commensurate with that verdict. Jones made a timely motion for Judgment of Acquittal following the close of State's evidence which was then renewed timely following the close of all evidence, both of which the Court denied.

The Court considered the sentencing of Jones on July 7, 2006, and after hearing evidence with regard to Jones' prior convictions found that the State had met its burden as provided by Mississippi Code § 99-19-83 and sentenced Jones to suffer life imprisonment in the Mississippi State Penitentiary, said sentence not to be reduced or suspended nor would Jones be eligible for probation or parole. A Motion for New Trial was timely filed and a hearing was held on said Motion on February 2, 2007. The Motion was denied and an Order was entered on May 10, 2007 reflecting the denial. Thereafter, in a timely fashion, counsel for Jones filed their Notice of Appeal in this matter.

2. STATEMENT OF RELEVANT SUBSTANTIVE FACTS

Eaver Moss and her husband live in Corinth, Mississippi, but during November of 2005 they also owned and occasionally occupied a trailer home located on two and one-half acres that was situated along Highway 30 in Lafayette County, Mississippi. The reason for their occasional occupancy of the Lafayette County trailer home was because, during this time their daughter was undergoing medical procedures at the North Mississippi Regional Medical Center in Oxford Mississippi.

On or about November 6, 2005, Mrs. Moss left the Lafayette County trailer to return to

her home in Corinth, Mississippi. The trailer remained vacant from November 6 until November 14, 2005. (R. 34-35, 90) When she returned to her Lafayette County trailer home on November 14, 2005, Mrs. Moss found the window in the door broken, the dead bolt unlocked and virtually everything in the trailer home gone. (R 35-36)

After calling her husband and the Lafayette County Sheriff's department, Mrs. Moss set out with her husband to find a replacement glass for their trailer home door. During their travels they passed a used furniture store and noticed that the chairs for their dining room table were displayed out front of the store. (R. 37) The Mosses then began to search the surrounding area and at another used furniture store found a recliner and "bathtub surround" kit. (R. 39)

Rayford Cathy, the owner of the store where the dining room chairs were discovered indicated that Jones came to his store on or about Saturday, November 12. (R. 47) Mr. Cathy recalled that Mr. Jones was driving a Chevrolet pickup truck that contained various items of furniture and that he sold Mr. Cathy the dining table and chairs that had previously been identified as belonging to the Mosses. (R. 44-46) Mr. Cathy recalled that Mr. Jones had stated to him that Jones had received the property from a lady at a trailer home down Highway 30. (R. 48-49) Mr. Harold Judan, the owner of the furniture store where the recliner and "bathtub surround" kit were located testified that he purchased the items from Jones on Saturday, November 12. (R. 93) Mr. Judan indicated that on the Saturday morning that Jones brought the items, Jones was driving either a blue or a black truck. Mr. Judan indicated that he was not sure whether or not Jones was alone when he came to the store, because no one else came in the store with him on that day. Mr. Judan indicated that there is also another individual who works at the store, Ms. Karen Vanwinkle who is usually at the store with him every day. Deputy Leslie Scott

Mills, an investigator with the Lafayette County Sheriff's Department, admitted that there were neither physical evidence nor eyewitness statements that placed Jones at the sight of the burglary at any time. (R. 104-105) Investigator Mills did state that a witness indicated to him that sometime during the eight day period that the house was unoccupied, there was a white Dodge car seen at the scene of the crime.

Ms. Stella Jones, the wife of the defendant testimony that during November of 2005, Jones was driving a red 1988 Chevy pickup truck and at no time during November of 2005 did she know him to drive a white Chevy pickup truck or a white Dodge automobile. (R 113)

Jones took the stand in his own defense and indicated firstly that during the time period in question, he did not own or drive a white Chevy pickup truck, a blue or black Chevy pickup truck, or a white Dodge automobile. (R. 117) Jones testified that at the time of the burglary, he owned a small detailing business and as such, put flyers around Oxford with his numbers on it to generate business. (R. 117-118) Apparently in response to those flyers, Ms. Nora Mosby called him on Friday, November 11, 2005, and indicated to him that she had some items of furniture that she needed moved and asked if he could assist her. She further indicated that she eventually wanted the items sold because she needed to pay some bills and inquired as to whether he could help her out with that. Jones stated to Ms. Mosby that he would assist her. On Saturday, November 12, at the direction of Ms. Mosby, Jones proceeded to a home located off Highway 30 in Lafayette County which he believed was owned by Charles Mosley (R. 120) where he, Ms. Mosley and her brother loaded certain pieces of furniture. Jones then proceeded to take them to the two establishments owned by Mr. Judan and Mr. Cathy. Mr. Jones indicated that Ms. Mosby accompanied him to the store and actually handled the transaction of the sales at both of the

stores for the furnishings. Jones stated that he did not either break in or otherwise burglarize the home of the Mosses.

III.

SUMMARY OF THE ARGUMENT

A. THE COURT ERRED IN FAILING TO GRANT A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The case against Jones is purely circumstantial and the evidence presented against him is not sufficient to exclude all reasonable hypothesis of Jones' innocence.

B. THE COURT ERRED IN REFUSING TO GRANT A MOTION FOR CONTINUANCE TO ALLOW JONES AN OPPORTUNITY TO HIRE COUNSEL AND PREPARE FOR TRIAL.

Because Jones was tried within two and one-half months of his indictment and within one day of his arraignment and appointment of his trial counsel, the Court's denial of Jones' request for continuance was an abuse of discretion in that the denial substantially curtailed his ability to properly prepare to mount a defense to the charges.

IV.

ARGUMENT

A. THE COURT ERRED IN FAILING TO GRANT A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

Jones was indicted under Mississippi Code Section 97-17-23 for the crime of burglary, which has two essential elements, the unlawful breaking and entering of a dwelling house and the intent to commit some crime once entry has been gained. According to the indictment presented against Jones the state had the burden of proving that Jones unlawfully broke into the dwelling of Mr. and Mrs. Moss on November 12th, 2005 and either stole their property or had the intent to steal it.

In presenting their case against Jones the state failed to present any direct evidence of Jones' involvement in the burglary of the Moss home, relying instead solely upon the inference raised by Jones' possession of some of the burgled items. As such, this is a circumstantial evidence case and it follows that the test to be applied in considering the sufficiency of the proof is whether a rational fact finder might reasonably conclude that the evidence excludes every reasonable hypothesis inconsistent with guilt of the crime charged. Deloach v. State, 658 So.2d 875, 876 (Miss.1995). Put another way, "[i]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." Clark v. Procunier, 755 F.2d 394, 396 (5th Cir.1985)

In Shields v. State, 702 So.2d 380 (Miss. 1997) the Mississippi Supreme Court addressed

the question of whether, in reviewing the sufficiency of the evidence in a circumstantial conviction for burglary, proof of possession of the fruits of the burglary, without more, was sufficient to convict. In concluding that possession alone was sufficient to meet the State's burden of proof, given that sufficiently probative circumstances of possession exists, the Supreme court listed four factors to be considered in determining the sufficiency of the probative circumstances:

1. The temporal proximity of the possession to the crime to be inferred;
2. The number or percentage of the fruits of the crime possessed;
3. The nature of the possession in terms of whether there is an attempt at concealment or any other evidence of guilty knowledge;
4. Whether an explanation is given and whether that explanation is plausible or demonstrably false.

Id. at 383. Here, as in Shields, the inference must gain or lose strength from the circumstances of possession as there exists no other corroborating evidence.

The first factor, the temporal proximity of possession, has it's own inherent problem. The state wholly and completely failed to provide any evidence that the burglary occurred on November 12th, as had been charged in the indictment. Instead the state presented evidence that the dwelling was unoccupied from November 6th until November 14th (R. 87) and that the burglary wasn't discovered until lunchtime on November 14th. Furthermore Jones possession of the three burgled items occurred on the Saturday before the burglary was discovered.

While it can certainly be inferred from this vague timeframe that Jones possessed some of the stolen items on the same day as the burglary (if we believe the burglary occurred on

November 12th), it can just as easily be inferred that Jones' possessed the items almost a week after the burglary (if we believe that the burglary occurred on the 6th) or before the burglary was even completed (if we believe that the burglary began prior to the 12th but that all property was not finally removed from the home until the 14th). Because the state failed to present evidence as to when, specifically the burglary occurred it is impossible to say that this factor lends any strength to the inference that Jones committed the burglary.

The second and third factors begin to erode the inference that Jones committed the burglary. During her testimony Mrs. Moss listed a large number items that had been stolen from her home during the burglary.¹ However Jones was shown to be in possession of only a small percentage (six out of more than twenty-two) of the stolen items.² And Jones made no effort to conceal the items, but instead took the items in his possession to people who knew him (and therefore could readily identify him) at businesses where he knew they would be displayed to the public for resale. Jones' behavior as to the nature of his possession of the burgled items did not exhibit any evidence of "guilty knowledge".

Finally the fourth factor weighs heavily in favor of Jones and against the inference because Jones provides a plausible explanation for his possession of the stolen items. Jones testified that, on the Friday before the burglary was discovered, he was contacted by Ms. Nora Mosby who stated that she had some furniture that she needed to sell and requested that he assist her in hauling and possibly selling it. (R – 118) The following day Ms. Mosby directed him to a home that is located off of Highway 30 (which he believes belongs to Mr. Charles Mosby) where

¹ A bakers rack, a television, a little stereo system of her daughters, a microwave, a recliner, the four chairs to the dining room table set, a kit that goes around the bathtub, a sewing machine, a microwave, a coffeepot, an antique percolator, an undisclosed number of tools including saws, drill and wrenches, an instamatic camera, a wedding band set, Mrs. Moss' mother's ring, a 410 shotgun and a pistol. (R. 35)

Jones, Ms. Mosby and her brother loaded his truck with the furniture. (R- 119 – 120) Jones then transported Ms. Mosby and the furniture to the two used furniture stores run by Mr. Cathey and Mr. Judon respectively, both of whom he knew, and allowed Ms. Mosby to consummate the sales of the items.

Jones' explanation is plausible and, although there are some conflicts with other testimony, the conflicts effect non-essential parts of the explanation and therefore do not render it to be "demonstrably false." One of the conflicts surrounds that fact that Mr. Cathey testified that Jones was alone when he came to sell the furniture, and therefore not accompanied by Ms. Mosby. Mr. Cathey's testimony was later contradicted however by the testimony of Mr. James Brassel who stated during the hearing on Jones' Motion for New Trial that he helped Cathey at his furniture store during November of 2005, that he was present when Jones brought the furniture to Cathey, and that Jones was accompanied by a lady when he possessed the furniture at Cathey's store. (R- 199) It should also be noted that Mr. Cathey's testimony itself was riddled with inconsistencies apparently because Mr. Cathey mind was, admittedly, not on the case but was instead with his father who had just had a stroke. Mr. Cathey stated as much saying under cross-examination "I can't pinpoint and tell you everything that conversation wise from word to word. You know what I'm saying. I mean right now this ain't on my mind. My dad just had a stroke and for you to sit here and ask me date for dates about all this stuff I don't know." (R- 55)

Considering all of the indicia of strength of the inference together, it must be concluded that under the circumstances of this case the inference is insufficient to support the conviction of

² the four chairs to the dining room table set, a kit that goes around the bathtub and a recliner.

burglary. In other words, the evidence presented failed to exclude every reasonable hypothesis consistent with innocence and was therefore insufficient to sustain the conviction in this case.

B. THE COURT ERRED IN REFUSING TO GRANT A MOTION FOR CONTINUANCE TO ALLOW JONES AN OPPORTUNITY TO HIRE COUNSEL AND PREPARE FOR TRIAL.

Before exploring this issue some background is necessary. The indictment against Jones was rendered on February 16, 2006, filed with the Lafayette County Circuit Court Clerk on February 17th, 2006, but never served on Jones. Jones, who was in the custody of the Mississippi Department of Corrections at the time of the indictment, became aware of a detainer being lodged against him when he was denied certain program classifications with the Department that would have benefited him. In an effort to have the detainer removed Jones procured the services of a "writ writer" who wrote a document on Jones' behalf which, although not filed with the Court, was apparently received and considered by the Trial Judge as a request for speedy trial. (for reference to the document see Trial Judge's comments at R- 8 and 11) As a result of this document, on April 24, 2006 Jones was appointed a public defender, was formally arraigned, and trial was set to begin the following day. After meeting with his attorney on the 24th Jones indicates to his trial counsel, and eventually to the Court, that he desires a continuance for the purpose of hiring private counsel, stating that his appointed counsel had made it clear that he did not want to represent Jones, would not discuss possible witnesses with Jones and would not go over the State's discovery responses with Jones. (R – 8-9) Jones' request for a continuance was denied and the trial began April 25th.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. Johnson v. State, 631 So.2d 185, 187 (Miss.1994). Unless manifest injustice appears to

have resulted from the denial of the continuance, this Court should not reverse. Hatcher v. Fleeman, 617 So.2d 634, 639 (Miss.1993). Miss.Code Ann. § 99-15-29 states: "A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted there from." However there have been cases justifying reversal for refusing to grant the Defendant a continuance to allow additional time to prepare for trial. See Lambert v. State, 654 So.2d 17 (Miss 1995), Hughes v. State, 589 So.2d 112 (Miss. 1991), Plummer v. State, 472 So.2d 358 (Miss 1985), Cochran v. State, 244 So.2d 22 (Miss. 1972). And while the Supreme Court has stated "that when an accused appears on the morning of trial with a new lawyer and asks for a continuance, the trial court does not abuse its discretion in denying the continuance"³, the lateness in Jones' hiring of counsel was not due to procrastination, but was the result of the short period of time between arraignment and trial similar with the case in Lambert v. State, 654 So.2d 17 (Miss 1995). And like Lambert, this case does not involve just a single reason for the continuance but several. While standing alone, Jones' desire to hire a different attorney may not have warranted a continuance, but when combined with other reasons an abuse of discretion was clearly demonstrated, and that abuse resulted in Jones not being afforded a properly prepared defense

As the Court is well aware, the defense counsel appointed to represent Jones owed him, at a minimum, "a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." Ferguson v. State, 507 So.2d 94, 96 (Miss. 1987) And yet, because of the extremely short period of time between the appointment of defense counsel and the trial, the Trial Court's denial of Jones' continuance resulted in an extremely short period

³ Byrd v. State, 522 So.2d 756, 759 (Miss. 1988)

of time for Defense Counsel to prepare for trial. The effect of this became apparent during trial from Defense Counsel's lack of knowledge about the facts and necessary witnesses in the case⁴.

And while there may be no demonstrative affidavit from Jones of evidence and prejudice against him and while there may be no proof as is required under Miss.Code Ann. § 99-15-29 (Supp.1972), it staggers the imagination that in the circumstances outlined above that any competent counsel could be expected to proceed to trial and provide a competent defense for any defendant.

As summed up by the Court in Lambert, even if upon remand (Jones) is again convicted and offers no different testimony than was offered in the trial that have already taken place, at least both the defense and the State of Mississippi can have confidence in the outcome of the trial and a sense of certitude about its basic fairness. Lambert at 23.

⁴ During a hearing on a Motion for acquittal based upon prosecutorial misconduct, Defense Counsel states "He (the Prosecutor) came to me when we sequestered these (defense) witnesses said I still don't know what the substance of the testimony of these witnesses is and I said to him I'm not sure I do either, the biggest part of me is have contact of these people was because my client insisted on it." (R-81) See also the testimony of James Brassel who was not called during the trial, but gave testimony during Jones' Motion for New Trial which corroborated Jones' explanation for why he possessed the stolen property, and indicated that, although he was present at the courthouse all day during the trial, Defense Counsel never talked to him nor called him as a witness for the Defense. (R-200)

V.

CONCLUSION

Although the evidence presented against Jones may establish a probability of guilt, proof of Jones' possession of few of the burgled items alone does not satisfy the "beyond a reasonable doubt and exclusion of every reasonable hypothesis consistent with innocence" burden of proof, especially in light of Jones' plausible explanation for having the items in his possession. As such, Jones' conviction for burglary should be REVERSED and a Judgment of Acquittal should be RENDERED.

Alternatively the denial of Jones' request for a continuance should be found to be an abuse of discretion, and based thereupon his conviction for burglary should be REVERSED and the matter be REMANDED for a new trial.


CERTIFICATE OF SERVICE

I, Adam A. Pittman, counsel for Appellant, hereby certify that I have this day mailed with postage prepaid a true and accurate copy of the Appellant's Brief to the following persons:

Honorable Andrew Howorth
Lafayette County Circuit Court Judge
P.O. Drawer 368
Charleston, MS 38921

Honorable Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205

This the 20 day of November, 2007.

A handwritten signature in black ink, appearing to read 'Adam A. Pittman', written over a horizontal line.

Adam A. Pittman
Attorney for Appellant