IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES BRIAN BUCKLEY — APPELLANT

VS. — NO. 2007-KA-1244

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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III. Buckley did not receive ineffective assistance of counsel due to his counsel's failure to use a peremptory strike to strike the wife of the county sheriff from the jury as the use of peremptory strikes is strategic.

STATEMENT OF THE CASE

On or about April 6, 2006, the Grand Jury of Neshoba County indicted James Brian Buckley for willfully, unlawfully, feloniously and knowingly selling and delivering to a Philadelphia Police Department Confidential Informant for the sum of $25.00, a Schedule II controlled substance, namely cocaine, in Neshoba County, Mississippi, contrary to and in violation of Section 41-29-139(a)(1), Miss. Code Ann. (1972). (C.P. 3) Buckley plead not guilty and was released on bond. (C.P. 5) On or about March 7, 2007, Buckley's bond was revoked for the felony crimes of DUI 3rd and Taking Away a Motor Vehicle. (C.P. 6) On March 8, 2007, Buckley filed his Notice of Intention to Offer Defense of Insanity and the trial court ordered a psychiatric examination. (C.P. 7, 9) On July 9, 2007, Buckley was tried in the Circuit Court of Neshoba County and was found guilty of sale of cocaine. (C.P. 24) Buckley was sentenced to twenty (20) years in the custody of the Mississippi Department of Corrections and a fine of $5000.00. (C.P. 27) Buckley filed his Motion for New Trial on July 18, 2007 and said motion was denied by the trial court on the same date. (C.P. 29-31) The instant appeal ensued.

STATEMENT OF THE FACTS

Neal Higgason testified that in 2006, at the time of Buckley's arrest, he was a drug enforcement officer with the Philadelphia Police Department. (Tr. 34) Higgason testified that on about April 6, 2006, at 1:40 p.m., he and his partner, Officer Josh Burt, met with a confidential information, James McKinney. (Tr. 36) They searched McKinney and his vehicle to ensure that he did not have any drugs. (Tr. 38) The officers equipped McKinney with a body wire, a concealed video camera, twenty-five dollars ($25.00) in cash and an evidence bag in which to place the drugs after he purchased them. (Tr. 38) Officer Burt searched the car and installed a repeater system to allow the officers to hear conversation when McKinney made the buy. (Tr. 75) McKinney drove his car to Lewis Avenue to a place known as Miller Hill to purchase crack cocaine. (Tr. 39)

Higgason and Burt followed McKinny for surveillance. Through McKinney's body wire, they heard gravel crunching and a knock on the door. They heard someone say "Come in" and some brief conversation. (Tr. 41) They heard McKinney ask for "twenty-five dollars worth" and another boy said "I'll be right back." (Tr. 41) McKinney then got in his vehicle and returned to Higgason and Burt at approximately 2:11 p.m. (Tr. 41) McKinney gave Higgason the evidence bag which contained a small, white rock that appeared to be crack cocaine. (Tr. 42) McKinney initialed the bag and Higgason sealed the bag and initialed and dated the seal. (Tr. 42) He placed the bag into evidence to be turned over to the chief investigator, Jimmy Reid, to be turned over the crime lab. (Tr. 42)

James McKinney testified that he was a warehouse worker in Neshoba County. (Tr. 50) McKinney testified that his girlfriend was pregnant and he did not want her around drugs. (Tr.

51) He testified that after the officers equipped him with the camera and body wire he went straight to Miller Hill. (Tr. 52) He expected to find a man named Buckwheat at the house, but instead found a young man (Buckley). (Tr. 53) Buckley appeared to be the only person at the house. He was inside. McKinney testified that he got out his vehicle and went in the house. McKinney testified that once he was inside the house he asked Buckley if he would give him twenty five dollars ($25.00) worth of crack cocaine. He gave Buckley the money and Buckley left and came back with the crack cocaine. (Tr. 54) McKinney identified the evidence bag containing the crack cocaine and his initials on the bag. (Tr. 54) McKinney also identified the videotape he made during the sale. (Tr. 56) He identified the person in the video as Buckley. He testified that he gave the money to Buckley and that Buckley then brought hem the crack cocaine. (Tr. 58) The substance in the evidence bag was tested at the state crime lab and was found to be contain a cocaine base with a total weight of 0.15 grams. (Tr. 70)

SUMMARY OF THE ARGUMENT

The trial court did not err when it denied Buckley's Motion for Directed Verdict. From the evidence presented, the jury found McKinney's testimony convincing and the video tape evidence along with the officers' testimony was sufficient to show that Buckley did indeed sell crack cocaine to McKinney. Viewing this evidence favorably to the State, fair-minded jurors had sufficient evidence to find Buckley guilty of the sale of crack cocaine. Buckley did not receive ineffective assistance of counsel due to his counsel's failure to assert an insanity defense as there is nothing in the record to show that the psychiatric exam showed that Buckley was M'Naghten insane or that the psychiatric exam showed that an insanity defense was warranted. The record reflects that Buckley's neurology appointment prior to trial was a scheduled appointment that he

had missed the previous month and that was rescheduled just prior to trial. There is nothing in the record to suggest that Buckley had a psychiatric emergency. There is further nothing to show that the report of the court ordered psychiatric exam indicated that Buckley was M'Naghten insane at the time of his offense. Buckley's counsel's failure to use a peremptory strike to strike the wife of the county sheriff from the jury as the use of peremptory strikes is strategic. Buckley cannot overcome the strong presumption that his counsel was competent.

ARGUMENT

I. The trial court did not err when it denied Buckley's Motion for Directed Verdict.

In a criminal proceeding, motions for a directed verdict and judgment notwithstanding the verdict (JNOV) challenge the legal sufficiency of the evidence supporting the guilty verdict. *Randolph v. State*, 852 So.2d 547, 554 (Miss.2002) (citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). The standards of review for a denial of directed verdict and JNOV are identical. *Coleman v. State*, 697 So.2d 777, 787 (Miss.1997). Reversal can occur only when, after viewing all the evidence in the light most favorable to the verdict, one or more of the elements of the charged offense is such that "reasonable and fair-minded jurors could only find the accused not guilty." *Wetz v. State*, 503 So.2d 803, 808 (Miss.1987) (citing *Harveston v. State*, 493 So.2d 365, 370 (Miss.1986); *Fisher v. State*, 481 So.2d 203, 212 (Miss.1985)).

When reviewing a motion for directed verdict, the appellate courts look to the sufficiency of the evidence. *Gleeton v. State*, 716 So.2d 1083, 1087 (Miss.1998). All of the evidence must be construed in a light most favorable to the verdict. *Id.* "We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Id.* (quoting *Wetz v.*

State, 503 So.2d 803, 808 (Miss.1987)).

Buckley claims that the trial court committed reversible error in not directing a verdict in his favor. Specifically, Buckley contends that James McKinney's motives for acting as a confidential informant are suspect and render him unreliable and that the video of the sale is "dubious."

The standard of review concerning directed verdicts requires that when reviewing a denial of a motion for directed verdict, "the court must review the evidence in the light most favorable to the [S]tate, accept as true all the evidence supporting the guilty verdict, and give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence." McClain v. State, 625 So.2d 774, 778 (Miss.1993). The court will reverse only when reasonable and fair-minded jurors could find the accused not guilty. *Wetz v. State*, 503 So.2d 803, 808 (Miss.1987). Furthermore, it is within the discretion of the jury to accept or reject testimony by a witness, and the jury "may give consideration to all inferences flowing from the testimony." *Mangum v. State*, 762 So.2d 337(Miss.2000) (quoting *Grooms v. State*, 357 So.2d 292, 295 (Miss.1978)).

There was clearly sufficient evidence to deny Buckley's motion for a directed verdict. The jury was allowed to see a videotape of Buckley selling crack cocaine to a confidential informant. A two police officers testified that they prepared the confidential informant, James McKinney for the buy. They searched McKinney and the truck he was driving, placed the body wire on him, listened to the transaction as it occurred, and received the crack directly after the buy. An expert testified that the substance consisted of .15 grams of crack cocaine.

From the evidence presented, the jury found McKinney's testimony convincing and the

video tape evidence along with the officers' testimony was sufficient to show that Buckley did indeed sell crack cocaine to McKinney. Viewing this evidence favorably to the State, fair-minded jurors had sufficient evidence to find Buckley guilty of the sale of crack cocaine.

II. Buckley did not receive ineffective assistance of counsel due to his counsel's failure to assert an insanity defense as there is nothing in the record to show that Buckley was M'Naghten insane or that the psychiatric exam showed that an insanity defense was warranted.

Constitutional issues are reviewed de novo. *Thoms v. Thoms*, 928 So.2d 852, 855 (Miss.2006). To prove ineffective assistance of counsel, Buckley must demonstrate that his counsels' performance was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with Buckley. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990).

To evaluate the deficiency prong of the *Strickland* analysis:

> a court ... must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.
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> *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

There is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Id.* at 694, 104 S.Ct. 2052. This Court will not second guess counsel's reasonable trial strategy. *Hall v. State*, 906 So.2d 34, 38 (Miss.Ct.App.2004).

To evaluate prejudice, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ross v. State*, 954 So.2d 968, 1004 (Miss.2007).

Buckley's trial counsel filed a Notice of Intent to Offer Defense of Insanity and listed Bennie Buckley, Brenda M. Buckley, Dr. Thomas E. Welch, III, and Dr. August P. Soriano as potential witnesses to prove insanity. (C.P. 7) The trial court ordered that Buckley undergo a psychiatric examination to be performed by Dr. Mark C. Webb. Webb was to determine Buckley's present ability to stand trial and to assist his attorney in his defense and to further examine Buckley to determine his ability to know the difference between right and wrong and to understand the nature and quality of his actions at the time of the alleged offense. (C.P. 10) Dr. Webb was ordered to make a written report of his findings and to provide copies to the trial judge. (C.P. 11) Dr. Webb was subsequently paid for his services. (C.P. 12) On June 25, 2007, Buckley filed a Motion to Allow Medical Treatment stating that he had an appointment with the Neurology Department at the University Medical Center scheduled for June 8, 2007, and that he had rescheduled the appointment for July 6, 2007. He motioned the court to allow the medical treatment at his own expense and for transportation to his appointment. (C.P. 14, 15) On July 3, 2007, the trial court granted Buckley's motion. (C.P. 16)

On appeal, Buckley argues that he had a history of documented mental illness. However, this is not a part of the record. He further argues that "Buckley was operating under such a severe psychiatric and mental disability, that he was in urgent need [of] medical treatment before he be [sic] competent to stand trial. (Appellant's Brief at p. 4) However, the record does not bear

this out. There is no indication in the Motion to Allow Medical Treatment of any emergency or failure of competence. Rather, the record reflects that Buckley missed a scheduled appointment in June and rescheduled that appointment a month later in July. There is simply no evidence in the record to support Buckley's claim that he was suffering from insanity at the time of his crime. Further, Buckley's counsel clearly pursued the insanity defense by filing a Notice of Intent and obtaining a psychiatric examination for his client. There is no deficiency in his counsel's performance.

Buckley argues that by not raising the defense at trial he counsel was deficient. However, Buckley cannot overcome the presumption of competence. There is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland* at 694, 104 S.Ct. 2052. Appellate courts will not second guess counsel's reasonable trial strategy. *Hall v. State*, 906 So.2d 34, 38 (Miss.Ct.App.2004) Buckley's counsel is presumed to have provided reasonable professional assistance and whether or not to use an insanity defense after a psychiatric report has been provided to the court and to the attorneys is clearly a matter of strategy.

Buckley must also prove that his attorneys' actions prejudiced his defense. In regard to counsel's failure to offer an insanity defense, the Mississippi Court of Appeals has held that "in order to reverse, this Court would have to be reasonably satisfied that, had defense counsel pursued an insanity defense, it would have resulted in [the defendant] being found not guilty by reason of insanity." *McLaughlin v. State*, 789 So.2d 113, 115 (Miss.Ct.App.2001). Mississippi uses the M'Naghten Rule "to define those instances where a defendant may escape punishment based on his mental incapacity." *Id.* Under M'Naghten, the defense must show that at the time of

the crime "the defendant because of diminished or impaired mental functioning was either (a) unable to understand the difference between right and wrong, or (b) was unable to appreciate and comprehend the consequences of his actions." *Id.* It is well established in Mississippi law that just because a criminal defendant is considered medically insane does not mean that he is M'Naghten insane. *Laney v. State*, 486 So.2d 1242, 1245 (Miss.1986) (finding that a diagnosis of schizophrenia does not automatically make a defendant M'Naghten insane). There is no evidence in the record that Buckley's alleged mental illness rendered him M'Naghten insane.

Buckley is unable to show any deficiency on the part of his counsel since counsel's decision to forgo offering an insanity defense after receiving the report of his client's psychiatric examination is a strategic decision. Further, Buckley cannot any show prejudice due to the lack of an insanity defense at trial, since he cannot show that he was M'Naghten insane at the time of his offense and therefor he cannot show that such a defense could have been successful. Buckley is unable to meet either prong of the *Strickland* test is this issue is therefore without merit.

III. Buckley did not receive ineffective assistance of counsel due to his counsel's failure to use a peremptory strike to strike the wife of the county sheriff from the jury as the use of peremptory strikes is strategic.

Constitutional issues are reviewed de novo. *Thoms v. Thoms*, 928 So.2d 852, 855 (Miss.2006). To prove ineffective assistance of counsel, Buckley must demonstrate that his counsels' performance was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden of proof rests with Buckley. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990).

To evaluate the deficiency prong of the Strickland analysis:

> a court ... must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.
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To evaluate prejudice, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ross v. State*, 954 So.2d 968, 1004 (Miss.2007).

Buckley argues that by not using a peremptory strike against Juror Alesia Myers his counsel was constitutionally deficient. Myers stated in voir dire that she was the wife of the Neshoba County Sheriff and that due to that relationship she knew many of the law enforcement officers in the county. (Tr. 22) Myers stated that she did know Officer Josh Burt because they had attended the same church in the past. She stated that she know who Officer Neal Higgason was when she saw him. She stated that her knowledge of the two officers would not affect her decision making if she sat as a juror in the case. (Tr. 22) At the close of voir dire, Buckley's attorney challenged Myers for cause stating that her husband was the Sheriff and that he was running for office. The Trial Court denied the challenge, holding that her husband's political

profession did not give rise to a presumption that she could not be fair. (Tr. 27) There was no indication anywhere in the record that Myers could not be fair. Buckley's counsel exercised five of his six challenges and upon being presented with Myers, determined that he would not strike her, and used his remaining strike against Janice Bridges who knew officer Josh Burt and had worked at Citizen's Bank with his wife. (Tr. 21) Buckley's counsel had previously moved to have Bridges stricken for cause. (Tr. 28) The decision to strike Bridges instead of Myers was clearly strategic. Buckley cannot overcome the strong presumption that counsel's performance falls within the range of reasonable professional assistance. *Strickland* at 694, 104 S.Ct. 2052. Appellate courts will not second guess counsel's reasonable trial strategy. *Hall v. State*, 906 So.2d 34, 38 (Miss.Ct.App.2004) Buckley's counsel is presumed to have provided reasonable professional assistance and whether or not to use one of his peremptory strikes against Myers was a purely strategic decision.

In *Conner v. State*, 684 So.2d 608, 612 (Miss.1996), which involved a *Batson* challenge, the Mississippi Supreme Court stated that "for counsel's performance to be deemed ineffective, [the defendant] must demonstrate that his case was prejudiced by the failure to raise any challenges pursuant to Batson." Generally, the Fifth Circuit considers an "attorney's actions during voir dire to be a matter of trial strategy, which 'cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness.' " *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995)).

Buckley is unable to show that his counsel's decision to forgo using one of his six peremptory strikes on Myers constituted ineffective assistance of counsel. Further, he is unable

to show that Myers presence on the jury prejudiced him in any way. This issue is without merit and Buckley's conviction should be upheld.

CONCLUSION

Buckley's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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