

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CORA ANN TURNER

APPELLANT

V.

NO. 2007-KA-1539-SCT

STATE OF MISSISSIPPI



APPELLEE

BRIEF OF THE APPELLANT

NO ORAL ARGUMENT 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.

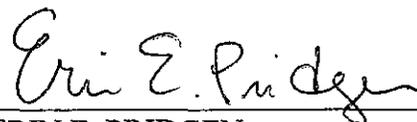
1. State of Mississippi
2. Cora Ann Turner, Appellant
3. Honorable G. Gilmore Martin, District Attorney
4. Honorable Frank G. Vollar, Circuit Court Judge

This the 19th day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUE 1

STATEMENT OF THE CASE 1

FACTS 1

SUMMARY OF THE CASE 3

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE COCAINE

WAS ADMISSIBLE EVIDENCE AS THE STATE FAILED TO

ESTABLISH A PROPER CHAIN OF CUSTODY. 4

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

CASES

Chambers v. State, 878 So.2d 153, 158 (Miss. Ct. App. 2004) 4

Johnson v. State, 816 So. 2d 436, 442 (Miss. Ct. App. 2002) 4

Lee v. State, 755 So. 2d 1096, 1098 (Miss. Ct. App. 1999) 6

Nix v. State, 276 So. 2d 652, 653 (Miss. 1973) 6

Pratt v. State, 870 So. 2d 1241, 1247 (Miss. Ct. App. 2004) 6

STATEMENT OF ISSUE

THE TRIAL COURT ERRED IN FINDING THE COCAINE WAS ADMISSIBLE EVIDENCE AS THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi, where Cora Ann Turner was convicted of the sale of cocaine. The Honorable Frank G. Vollar, Circuit Court Judge, presided over the jury trial that began on July 16, 2007. Following the trial, Turner was sentenced to serve thirty years under the supervision of the Mississippi Department of Corrections. Turner is currently incarcerated with the Mississippi Department of Corrections.

FACTS

On September 15, 2005, Detective Mike Traxler of the Warren County Sheriff's Department met with confidential informant, Joseph Anthony "Tony" Kirkley, to conduct controlled drug buys in the southern portion of Warren County, Mississippi. [T. 146, 148, 246] Kirkley, a recovering drug addict, contacted Traxler about participating in the drug buys. [T. 148] Kirkley had only been clean of drugs for a month and a half prior to starting the undercover drug operations. [T. 268]

Detective Traxler testified that on September 15th, he met with Kirkley at a pre-buy meeting location to discuss the plan for Kirkley to make drug purchases at two different locations. [T. 148] Kirkley was instructed to attempt to purchase drugs from Joe Joe Turner, Will Callahan, or Cora Turner [T. 151] Kirkley was told to visit the home of Ruby Callahan and Joe Joe Turner on Halls Ferry Road in Warren County, as well as the trailer of Cora Turner on Buchan Drive, in order to contact the individuals. [T.148].

During this pre-buy meeting with Kirkley, Detective Traxler testified that he equipped Kirkley with an audio-visual/ digital recording system that allowed Kirkley to record the transactions

through a button-hole camera [T. 148-149] Detective Traxler was not able to listen to the audio or view the video feed as the recording took place [T.150]. At trial, Traxler acknowledged that, during the alleged transactions, Kirkley was unsupervised, unmonitored and alone [T.150, 179, 199] Furthermore, Detective Traxler testified that there were no established policies or procedures that the sheriff's department used to conduct the controlled drug buys with the confidential informants. [T. 199]

Detective Traxler testified that, during the pre-buy meeting with Kirkley, he searched Kirkley and Kirkley's automobile for the presence of narcotics but he found none. [R. E. 20] Later during the trial, however, Detective Traxler admitted that he did not check Kirkley's Marlboro cigarette box, the same cigarette box Kirkley used to deliver the cocaine evidence to Detective Traxler following the drug buy.[T. 201]

After leaving Detective Traxler, Kirkley testified that he went to the Callahan/ Turner residence, looking to purchase drugs from Will Callahan. [T. 252] Later, he decided to go to Cora Turner's home. [T. 255] Kirkley testified that at Cora Turner's house, he purchased \$50 worth of cocaine.[T. 256] On the video surveillance, however, there is no mention of any drugs when Kirkley meets with Cora. [T. 181] Likewise, when Kirkley returns to his car, he testified that he placed the substance he received from Cora into a Marlboro cigarette box but he was not sure whether he placed the box inside or in front of his car console. [T. 264]

According to Kirkley, he then returned to Ruby Callahan and Joe Joe Turner's house and "hung around for a while". [T. 269, 273]. After leaving the Callahan/ Turner residence a second time, Kirkley said he then went back to meet with Detective Traxler to hand him the substance that was in the Marlboro cigarette box. [T. 270] Detective Traxler took custody of the substance and the Mississippi Crime Lab determined that the substance was 0.3 grams of cocaine. [T. 274, R. E. 17,

SUMMARY OF THE CASE

The trial court committed reversible error in finding that the drug evidence was admissible because the State failed to establish a proper chain of custody over the cocaine. Although the Mississippi Crime Lab report showed that the substance tested was cocaine, there was not a sufficient chain of custody established to prove that Cora Turner was the source of the cocaine.

First, the Warren County Sheriff's Department did not fully check the confidential informant for the presence of narcotics prior to the informant going to Cora Turner's residence to make a drug purchase.

Second, while the confidential informant testified that he bought cocaine from Turner, he did not immediately return the substance to the sheriff's department following the purchase. The informant, instead, went to "hang out" at the home of a known drug dealer, waiting for the opportunity to purchase drugs. At trial, the video recording played for the jury cuts off after the informant returns to the home of the drug dealer and there is no recording of the informant returning the substance to the sheriff's department.

Finally, during the alleged drug transactions, the confidential informant was not monitored or supervised by the sheriff's department. The informant was a recovering drug addict and, at the very least, the sheriff's department should have monitored the transactions through audio or visual feed as the transaction occurred. All of these instances create a reasonable inference that the evidence was either tampered with or substituted and the State did not sufficiently establish the chain of custody.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE COCAINE WAS ADMISSIBLE EVIDENCE AS THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY.

The cocaine and the lab report from the Mississippi Crime Lab should not have been admitted into evidence as the State failed to establish a proper chain of custody over the substance. The issue in this appeal is not whether the evidence that the Mississippi Crime Lab tested was a controlled substance or not. The Crime Lab reported that the substance that was submitted by Detective Traxler on September 16, 2005, contained cocaine in the amount of 0.3 grams. [R.E. , T]. The Court erred in admitting the cocaine into evidence, over the objection of defense counsel, as the State failed to prove that the cocaine that was tested by the Mississippi Crime Lab was the same drug purchased from Turner. Without this proof, the introduction on the lab report was highly prejudicial and should have been excluded.

Mississippi Rule of Evidence 901(a) requires sufficient evidence to “support a finding that the matter in question is what its proponent claims.” MRE 901(a). In applying Rule 901 (a), the Court has announced that the ‘test for the continuous possession [i.e. “chain of custody”] of evidence is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence.” *Anderson v. State*, 904 So. 2d at 973, 979 (¶19) (Miss. 2004) (citing *Thomas v. State*, 828 So. 2d 1270, 1272 (¶7) (Miss. Ct. App. 2001)). The trial court exercises sound discretion in issues involving the chain of custody of evidence. *Chambers v. State*, 878 So. 2d at 153, 158 (¶ 23) (Miss. Ct. App. 2004). This Court should reverse the trial court’s ruling when the trial court’s decision amounts to an abuse of discretion that has so prejudiced the defendant. *Johnson v. State*, 816 So. 2d 436, 442 (¶28) (Miss. Ct. App. 2002).

One can draw several, reasonable inferences that the cocaine that was tested may not have been the same substance that the State purports was sold by Turner. First, Kirkley was not fully searched for the presence of narcotics prior to arriving at Turner's house. Second, Kirkley did not immediately return to Detective Traxler for a post-buy meeting after leaving Turner's house. Kirkley instead went back to the house of a known drug dealer to make a drug transaction. Finally, the sheriff's department did not monitor Kirkley during this undercover operation. Although Kirkley was equipped with audio and visual recording equipment, the sheriff's department could not simultaneously view the transactions so Kirkley was unsupervised during the alleged transactions.

Failure to Fully Search Confidential Informant

According to Detective Traxler's testimony, there were no drugs found on Kirkley's body or vehicle when Detective Traxler searched him during the pre-buy meeting. [T. 175] According to Kirkley's testimony, when he left Turner's house after the drug buy, he placed the drugs inside of his Marlboro cigarette box that was in his car.[T. 257] At trial, Detective Traxler admitted that he **did not** search the Marlboro cigarette box for the presence of drugs prior to Kirkley going to Turner's residence. [T. 201]

Failure to Monitor Confidential Informant

Detective Traxler was unable to hear audio feedback or see Kirkley through any video feedback during undercover operation. Detective Traxler acknowledged that Kirkley was "out there on his own." Kirkley admitted that once he left Cora Turner's residence, he went back to the Callahan/Turner residence. This was a known drug house and Kirkley went back to the house in hopes of securing another drug deal.

The video surveillance that was recorded by the confidential informant cut off abruptly once Kirkley arrived back at the Callahan/ Turner residence. At trial, Detective Traxler testified that he

deleted the rest of the video in order to make room for other drug buys. He stated that nothing else occurred in the video. This future raises questions about the reliability of the informant, as well as the detective. The detective simply failed to produce to a copy of the entire video to account for the time the confidential informant was away from the detective. The same confidential informant that was a former drug addict and who was completely unmonitored during his drug buys.

In reviewing challenges to the chain of custody, the Court considers whether there exists an indication of probable tampering with the evidence. *Nix v. State*, 276 So. 2d 652, 653 (Miss. 1973). Without any standard procedures governing the confidential informant controlled buys, there is strong indication that the drugs will be compromised.

In many cases, the police at least have some visual or audio contact with the informant throughout the transaction. See *Lee v. State*, 755 So. 2d 1096, 1098 (¶2) (Miss. Ct. App. 1999) (surveillance team listens to confidential informant's conversations through body wire); *Pratt v. State*, 870 So. 2d 1241, 1247 (¶17) (Miss. Ct. App. 2004) (law enforcement listened to confidential informant's drug sale over audio monitor).

The evidence presented at trial was not sufficient to prove that the cocaine positively tested by the Mississippi Crime Lab was the same substance that was allegedly bought from the defendant, Cora Turner.

CONCLUSION

The trial court erred in admitting the evidence of the cocaine because the State failed to sufficiently establish the chain of custody over the drugs. Turner was prejudiced by the trial court's abuse of discretion regarding this evidence. As a result, Turner's conviction is unjust and Turner respectfully requests that this Court grant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

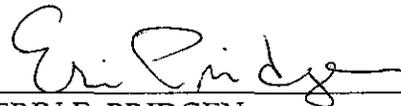
I, Erin E. Pridgen, Counsel for Cora Ann Turner, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Frank G. Vollar
Circuit Court Judge
1120 Jackson Street
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Honorable G. Gilmore Martin
District Attorney, District 9
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This the 19TH day of May, 2008.



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