

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01573-COA

VIRTY LEE THAMES

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**Appeal from the Circuit Court of
Newton County, Mississippi
Criminal Action No. 07-CR-018-NW-G**

BRIEF OF APPELLANT

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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 disqualification or recusal.

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THOMAS Q. BRAME, JR.

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STATEMENT OF THE ISSUES

1. Whether the conflict of interest of Thames' trial counsel in his dual representation of both Defendants was prejudicial in Thames' case.
2. Whether the Jury Verdict in this case was the result of bias and passion on the part of the Jury, and is contrary to the credible evidence adduced at trial and the law of this State.
3. Whether trial counsel's performance represents ineffective assistance of counsel.
4. Whether the cumulative errors in the investigation of this case, and at trial, resulted in a basically unfair trial of the Defendant in this case.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND DISPOSITION IN THE COURT BELOW

The record history of State of Mississippi versus Virty Lee Thames, Newton County Circuit Court Docket No. 07-CR-018-NWG, though abbreviated is very direct. According to the State, at the request of co-defendant, Otha J. Wheaton, ("Wheaton"), on or about February 15, 2006, Virty Lee Thames, ("Thames"), sold \$100.00 worth of crack cocaine to Donna Keel, ("Keel"), at her home located at 921 West Church Street in Newton. Keel was working as a confidential informant for the State at this time.

After his arrest, Thames was indicted by the Newton County Grand Jury on January 30, 2007 for the crime of sale of cocaine, (CP-3), in violation of **Miss. Code 1972, Ann., Sec. 41-29-139(a)(1) (Amend.)**. Retaining counsel and free on bond, Thames then filed his Motion for Discovery, (CP-5), consisting of only two paragraphs, on or about March 5, 2007. The record is devoid of any other pre-trial motions. Trial commenced on August 8, 2007.

At trial, the State called five witnesses, including Keel. Thames took the stand as the only witness for the defense. After the Jury announced that it was deadlocked, the trial court gave an oral instruction that represented the Model Instruction 1:20 of the Mississippi Criminal Jury Instructions, (T-113), and the Jury then shortly returned its verdict of "Guilty as charged.". (CP-15, T-115).

At the sentencing hearing on August 10, 2007, and after preparation of a Pre-Sentence Investigation, (CP-22), despite Thames' trial counsel's plea for mercy, the trial court sentenced Thames to a term of fifteen (15) years to serve. (CP-16) At the same hearing Thames' non-specific Motion for Judgment Notwithstanding the Verdict or for a New Trial, (CP-18), was overruled by the trial court. (CP-21)

From these adverse decisions, Thames timely perfected his appeal to this Court. (CP-30, 31 and 36) Thames further, on or about September 20, 2007, filed his Motion for Bail Pending Appeal, (CP-35), which was granted by the trial court on October 4, 2007, (CP-37 and 39). Thames has remained free on this bond, with no adverse actions.

FACTUAL STATEMENT OF THE CASE

Virly Lee Thames was a long time substance abuser (CP-28), and, at all times relevant to this matter, worked as a mechanic at the garage owned by Otha J. Wheaton. (CP-27) The record also reflects that Thames and Wheaton had known Donna Keel for a period of time as she was a regular customer of the garage. Wheaton was well known to the Mississippi Bureau of Narcotics. (RE - 54 and 55).

It is little wonder then that on February 15, 2005, with Keel as an informant, the Bureau has focused on the Wheaton Garage "business". Perhaps the fact that Keel and Thames had smoked together a number of times prompted the sending of Thames to Keel's home on that day. Both smoked a cigarette, and Thames left. Then in late July, 2006, Thames was arrested, and his prosecution in this case began.

SUMMARY OF THE ARGUMENT

This is a case of multiple small errors and several professional lapses. The cumulative effect of these errors and lapses resulted in an inherently unfair prosecution and trial of the Appellant, Virty Lee Thames.

Thames was an admitted substance abuser. Other than this flaw, he had led an unremarkable and productive life for 44 years. In his first major collision with the criminal justice system, he was represented by private counsel, who allowed the direction of his defense to be turned over to, and/or greatly influenced by, others with interests directly adverse to Thames rights, namely, Co-indictee, Otha Wheaton, who paid the bulk of the trial counsel's fees.

This Brief will discuss conflict of interest in representation by counsel, a suspect verdict and the reasons for same, what is ineffective assistance of counsel and the ultimate result of all of this, a travesty of justice resulting in Thames' conviction.

Virty Lee Thames requests this Court's reversal of his conviction for the sale of cocaine in Newton County, Mississippi. It is the only proper remedy for this terribly unfair trial.

ARGUMENT AND CITATION OF AUTHORITIES

I

Whether the conflict of interest of Thames' trial counsel in his dual representation of both Defendants was prejudicial in Thames' case.

This is very much a considered judgment on the part of this Court. To be sure, Thames and his family knew of the dual representation. (RE-50) It is also true that the Thames family could only pay a portion of trial counsel's quoted fee (RE-50); Co-Defendant Wheaton paid the bulk of this fee. And, in all objective view, trial counsel at times did make valid points and argument in his representation of Thames. However, the name of Otha J. Wheaton was never mentioned during this trial, other than as a garage owner.

STANDARD OF REVIEW

The standard for examination of a conflict of interest question in this State has been long established. **Rule 1.7, Rules of Professional Conduct** states that:

- (a) A lawyer shall not represent a client if this representation of that client will be directly adverse to another client, ..., and,
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person,

LEGAL PRINCIPLES

The general rule for interpretation of this above rule was well stated in *Gwin v. Fountain, et al*, 126 So. 18 (Miss. 1930), when our Court said:

“All dealings between attorney and client must be characterized by utmost fairness and good faith on the part of the attorney.” At Page 22

The above was more specifically stated in *Shah v. Mississippi Bar*, 919 So.2d 59 (Miss. 2006), when our Court outlined the following ethical duties on the part of attorneys:

- (1) The duty of loyalty, including preserving the client’s property, maintaining confidentiality, and avoiding conflicts;
- (2) The duty of diligence;
- (3) The duty of competence; and,
- (4) The duty of candor.

Shah, supra, at Page 65; **Rules of Prof. Conduct, Rules 1.1, 1.3, 1.4, 1.5, 1.7, 8.4.**

This is not a question of refund of fees or misappropriation of funds. It is simply a question of whether this dual representation, of Thames and co-Defendant Wheaton, prejudiced Thames’ fullest defense. Was Thames misled? *Liebling v. The Mississippi Bar*, 929 So.2d 911 (Miss. 2006). Was he denied a full, uncompromised defense, or rather was there “hedging” in order to avoid incriminating the fee payor, Wheaton? Were witnesses who were available and beneficial to Thames defense not called at trial because they were detrimental to the man who paid the fees, Wheaton? He requests this Court’s determination.

II

Whether the Jury Verdict in this case was the result of bias and passion on the part of the Jury and is contrary to the credible evidence adduced at trial and the law of this State.

There is no question here that drug offenses are horrific and a cancer on society.

Further, there is no question that Thames, at the time of this alleged sale was a substance abuser and possessed the contraband. (T-92, 93, 94). There is no question that he knew Keel and they often smoked together. (T-53, 93). With these facts in mind, the question now is, was this a sale or just another smoking session?

Having reviewed certain undisputed facts the Jury considered, let's turn now to areas of question to consider. Initially, was there in fact an intention on Thames' part to participate in a sale? From his testimony, Thames certainly exhibited no real idea this was a sale. (T-93, 94) Even Keel admitted she had made the buy from Wheaton, Thames, as in the past, just wanted a hit of the crack. (T-57) Secondly, there is the question of the jury instructions in this case. Though perhaps Thames' Instruction D-4, (CP-13), might be considered a lesser included offense instruction, the elements instructions, S-1, (CP-8), and (CP-9), and the form of the verdict instruction, D-5, (CP-14), gave no real guidance on the lesser included nature of possession.

Finally, was the right person before the trial court? Not the real drug seller, but merely the scape-goat? Merely the errand runner? Wheaton, to this point has yet to face trial, while Thames was quickly tried and severely sentenced.

STANDARD OF REVIEW

It is well established that matters regarding the weight and credibility accorded to evidence are to be resolved by the jury. *McIntosh v. State*, 917 So.2d 78 (Miss. 2005). Further, when considering a questioned jury verdict, the appellate court will not reverse a jury verdict unless failure to do so would sanction an unconscionable injustice. *Swan v. State*, 806 So.2d 1111 (Miss. 2002). Finally, when the legal sufficiency of the evidence is

challenged on appeal, the appellate court's review authority is limited. *Manning v. State*, 765 So.2d 516 (Miss. 1999), other citations omitted.

LEGAL PRINCIPLES

In this highly orchestrated scene at 921 Church Street, Newton, Mississippi on or about February 15, 2006, irrespective of their comments, what the MBN Agents witnessed was two junkies having a cigarette together, the alleged crack belonged to someone else. (T-57) *Brashier v. State*, 269 So.2d 336 (Miss. 1972). Proof of possession of a controlled substance cannot be based solely upon surmise or suspicion, there must be an evidentiary basis of the defendant's intent. *Stringfield v. State*, 588 So.2d 438 (Miss. 1992).

One glaring deficiency is the fact that Thames' trial attorney did not present the defense that Thames was merely the "go-between", "errand runner", or "conduit" in this transaction. *Minor v. State*, 482 So.2d 1107 (Miss. 1986). Even when the State's evidence is given all reasonable inferences that may be reasonably drawn consistent with the verdict, if the facts and inferences so considered in favor of the accused are of such sufficient force that reasonable men could find reasonable doubt of guilt, the verdict must be reversed. *Taylor v. State*, 656 So.2d 104 (Miss. 1995).

Thames submits here that what occurred in this trial is that he was made out to be a "bad" person by the State; that even in spite of his lack of culpability, the prejudicial aspects of his life as a drug user and the people he associated and partied with were of such character, that to this prejudiced jury, he must be guilty. *Sumrall v. State*, 257 So.2d 853, appeal after remand, 272 So.2d 917 (Miss. 1973). What results then is a jury, poorly instructed as to all elements of a charged offense guided only by its own bias, prejudice and

passion. *Edwards v. State*, 755 So.2d 443 (Miss.App. 1999). This injustice calls for reversal of the guilty verdict rendered.

III

Whether trial counsel's performance represents ineffective assistance of counsel.

Thames recognizes that this issue is also highly subjective and requires more than just allegations of same. Elements of conflict of interest in his representation have been discussed above. Certain other errors, such as lack of credible testimony and evidence have also been discussed. This was not an aggressive, full bore defense. Defendant submits that this defense was not effective representation of counsel.

Thames trial Counsel conducted a very weak and ineffective voir dire examination of the jury venire.

Thames trial counsel allowed the state to overtly lead its witness, Coleman, throughout his testimony, over and over, without objection; allowed the state to extract hearsay from Coleman on several points also without objection; and allowed the state to extract speculation testimony from Coleman, without objection.

Thames trial counsel likewise let the state lead its witness, Keel, time and time again, without objection; let the state have Keel identify and authenticate a DVD of the alleged drug transaction without laying the proper predicate (T-59); let that video into evidence without objection (T-61); made no voir dire inquiry into the authenticity nor necessary predicate into evidence, of that video (T-62); and allowed Keel to provide very damaging hearsay testimony of threats against her, by persons other than your Defendant Thames, without any objection. Defense counsel never even asked Keel about her own criminal history; he never asked Keel

about any compensation she received from the state for her cooperation; and most importantly, he never asked Keel to tell the jury what sort of deal she had made with the state, apparently for forgiveness of her own drug crimes, in exchange for her cooperation as a confidential informant against Thames.

Defense Counsel allowed state's witness Peterson, to be led on numerous material points without objection (T-76). Again he declined to make any voir dire examination of the state's proffered expert witness, Grady Downey (T-79). Trial defense counsel did not make a motion for a directed verdict at the close of the state's case in chief, but rather only moved to dismiss.

On another point, defense counsel's effectiveness is called into issue. Though defense counsel sought, and received, a jury instruction on the lesser included offense of simple "possession" of the controlled substance, still he did not insure that the jury was properly instructed as to the form of the verdict given the alternatives with which the jury was confronted. He did not object to the state's "form of the verdict" instruction which simply told the jury that if they chose to convict Thames, the form of the verdict would be that they find Thames "guilty as charged", defense counsel did not require a clarification on that verdict form as to whether they were finding Thames guilty of the "sale" or merely of the "possession". Defense counsel did not offer any instruction with the proper form of the verdict. Defense counsel did not object when the jury returned a verdict of simple "... guilty as charged" without clarification as to whether the conviction was of the "sale" or of the "possession". Defense counsel did not object when the Defendant was sentenced on the court's obvious assumption that the conviction was for a "sale", and not the lesser offense

of "possession".

This became particularly acute at the sentencing phase of his trial. Though trial counsel made a sincere plea for mercy, (T-117-18), the real credible witnesses were not allowed. On their own initiative, the Thames family was prepared to present four witnesses in favor of mitigation for Thames. (RE-50) This was refused. And, Wheaton was still off limits. (RE-51).

STANDARD OF REVIEW

In order to succeed on any ineffective assistance of counsel claim, a defendant must satisfy the two-part test as set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), as adopted by our Supreme Court in *Stringer v. State*, 454 So.2d 468, 477 (Miss. 1984). The test is very simple: (1) was counsel's performance deficient; and, (2) did the deficiency prejudice the Defendant. As will be discussed in the argument below, Thames will submit that though at times his counsel's performance was competent, still at multiple critical points in his trial preparation and at trial, counsel's deficiencies were indeed fundamentally prejudicial to Thames.

LEGAL PRINCIPLES

It is important to remember that at the time of trial, Thames was 44 years old, husband in a long time marriage, with three outstanding children, and, with the exception of misdemeanor drug and alcohol violations, had no other charges, and led an unremarkable but stable and productive life as a mechanic, husband and father. (T-91,92)

But Thames did have a substance abuse problem, and his employer, Wheaton, was apparently a significant source of illicit drugs in Newton County, as a side line to his garage

business. It was inevitable that doing a favor for Wheaton and one of his party pals, or complying with the directive of his employer - would crater Thames. This is what happened on February 15, 2006, and Thames arrest in late July, 2006.

This prompted a drastic change in Thames. After bonding out, and rehabilitation, Thames no longer worked for Wheaton, but the City of Newton and its police department as a mechanic. (T-95) Small steps at first, but in the time elapsed since the arrest, he "came back up." (T-95) If ever there was a candidate for mitigation, it was Thames.

But this did not happen. Though four disinterested individuals were ready to testify at sentencing, (RE-50), counsel said no. Refusal to even interview credible, beneficial witnesses constitutes ineffective assistance. *Johns v. State*, 926 So.2d 188 (Miss. 2006). Anything less than a full and complete investigation of all available potential witnesses, even co-defendants, represents a denial of effective assistance. *Triplett v. State*, 666 So.2d 1356 (Miss. 1995).

The entire record in this case, particularly considering the gravity of exposure faced by Thames, demonstrates critical short cuts on the part of trial counsel. In apparently taking a trial strategy of beating up Keel, the informant, other exculpatory or mitigating witnesses were overlooked, including Wheaton. *Payton v. State*, 708 So.2d 559 (Miss. 1998). This, together with the other deficiencies herein discussed, collectively are akin to going into a boxing match with one hand tied behind your back. The outcome would be severe, just as the outcome in Thames' case resulted in a grossly disproportionate sentence.

Thames still faces 15 years, Wheaton is still in business.

IV

Whether the cumulative errors in the investigation of this case, and at trial, resulted in a basically unfair trial of the Defendant in this case.

This is a judgment call, and one of perception. As a rule, if it appears to a reasonable person that the accused at trial did not have benefit of an effective defense effort at trial and the conduct of the trial was such to demonstrate this, the question of fairness is raised.

In Thames' case, this was definitely started by Wheaton and his recommendation of trial counsel. Thames, being unfamiliar with the workings and consequences of the criminal justice system, apparently though it was a good idea, particularly when he got some "help" with the fee, unbeknownst to Thames, that "help" put limits on its generosity. These limits doomed his defense.

STANDARD OF REVIEW

A Defendant cannot expect a perfect trial, but he is guaranteed a fair and impartial trial. This guarantee has long been established. The trial requires fair, impartial and unbiased jurors who are willing to be guided by the testimony and other evidence as presented at trial, together with the law announced by the court. It also requires that the Defendant be tried in an atmosphere that is free from bias, hatred or prejudice against the Defendant and his theory of defense, if reasonable. *Seals v. State*, 44 So.2d 61 (Miss. 1950); *U.S.C., Const. Amend. 6; Const. 1890; Sec. 26*. Further, the plain error doctrine requires that there be an error, or errors, and that these resulted in manifest miscarriage of justice. *Garlotte v. State*, 915 So.2d 450 (Miss.App. 2005).

LEGAL PRINCIPLES

Thames' case presents a classic example of how not to prosecute or defend a criminal case. *Kelly v. State*, 735 So.2e 1071 (Miss.App. 1999). There were just too many defense errors and too many key players absent. To be sure, it is hard to rebut a DVD, State's Ex. 1 (T-60). But what does it show? Two "crippled" people having a smoke. There was cocaine and money but both came from someone else and belonged to someone else. (T-57). It makes for a nice TV show, but as proof beyond a reasonable doubt, this fails.

Though seemingly adequate, when examined as a whole, the jury instructions in this case did not give the full law to the jury, particularly as to each element of the alleged crime of sale. *Reddix v. State*, 731 So.2d 591 (Miss. 1999). When this occurs, with the approval of the court, in addition to limiting the guidance to the jury, it also lowers the burden of proof on the part of the State. This is grounds for reversal. *United States v. Young*, 464 F.2d 160 (5th Cir. Miss. 1972). It is also unfair.

What occurred here is a rush to judgment of a weakened person. *McGee v. State*, 820 So.2d 700 (Miss.App. 2000). The outside influences that governed Thames' trial preparation and presentation unknown to Thames crippled any chance of fairness to him, and resulted in a travesty of justice. The cumulative effect of these errors basically denied Thames a fair and impartial trial requiring a reversal and remand of the Jury Verdict and Sentence in this case. *Ross v. State*, 954 So.2d 968 (Miss. 2007).

CONCLUSION

Virty Lee Thames was a man with problems, and these problems finally caught up with him. The outcome at trial was grossly disproportionate to his culpability, and was controlled by others who had much more to lose. There were numerous lapses and absence in the effectiveness of his defense counsel. Collectively, this trial was totally unfair to your Defendant.

Thames respectfully submits that a review of the entire record in his case will demonstrate that this is precisely what occurred. He further submits that he has presented abundant facts, reasons and authorities for reversal of his conviction. Virty Lee Thames respectfully requests this Court's reversal of the Jury Verdict and Sentence of the Circuit Court of Newton County, Mississippi.

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CERTIFICATE OF SERVICE

I, Thomas Q. Brame, Jr., attorney of record for the Appellant, Virty Lee Thames, do hereby certify that I have this day filed the original and three (3) true and correct copies of the above and foregoing Brief of Appellant with the Honorable Betty W. Sephton, Clerk of the Supreme Court and Court of Appeals of the State of Mississippi at Jackson, Mississippi.

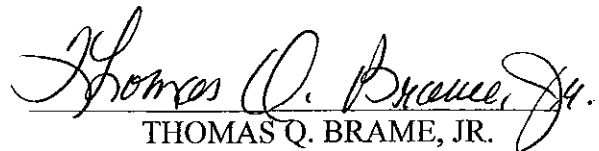
I further certify that I have delivered a true and correct copy thereof by United States Mail, postage prepaid, to the following listed persons:

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CERTIFIED this, the 13th day of March, 2008.


THOMAS Q. BRAME, JR.