

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01985-COA

COPY

KEEHAN ANDRE HOYE

FILED

APPELLANT

VS.

MAY 20 2008
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

Appeal from Circuit Court of Scott County, Mississippi

BRIEF FOR APPELLANT

Edmund J. Phillips, Jr.
Attorney at Law
P. O. Box 178
Newton, MS 39345
Telephone 601-683-3387
Facsimile 601-683-3110
MS Bar No. [REDACTED]

COUNSEL FOR APPELLANT

Oral Argument Not Requested.

CERTIFICATE OF SERVICE OF INTERESTED PERSONS

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01985-COA**

KEEHAN ANDRE HOYE

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

**Honorable Mark Duncan
District Attorney
P.O. Box 603
Philadelphia, MS 39350**

**Honorable Vernon R. Cotton
Circuit Court Judge
205 Main Street
Carthage, MS 39051**

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

**Keehan Andre Hoyer
APPELLANT**

DATED, this the 20th day of May, 2008.

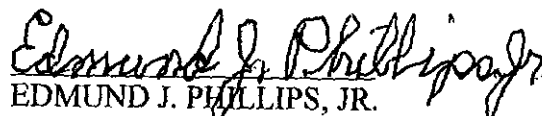

EDMUND J. PHILLIPS, JR.
Attorney for Appellant

TABLE OF CONTENTS

	<u>Page No.:</u>
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2-8
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Rules

(MRE 1002)	Page 2
(MRE 1003)	Page 1 & 2

Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970);	Page 5 & 7
Jones v. State, 798 So. 2d 1241 (Miss. 2001);	Page 5
Love v. State, 211 Miss. 606, 611, 52 So. 2d 470, 472 (Miss. 1951)	Page 5 & 6
McBeth v. State, 50 Miss. 81 (1874);	Page 7
Miller v. State, 22 So. 2d, 164 (Miss. 1945)	Page 5
Peterson v. State, 671 So. 2d 647, 653 (Miss. 1996)	Page 5
Reed v. State, 506 So. 2d 277 (Miss. 1987);	Page 7

STATEMENT OF THE ISSUES

1. The Court erred in overruling Appellant's objection to admissibility of the videotape.
2. The verdict was against the overwhelming weight of the evidence.
3. The Court erred in denying Appellant a motion for a directed verdict, request for a peremptory instruction and motion for a new trial.

STATEMENT OF THE CASE

Keehan Andre Hoye appeals his conviction from the Circuit Court of Scott County, Mississippi of selling and delivering of Mississippi Bureau of Narcotics confidential informant, a Schedule II controlled substance, cocaine and was sentenced to 30 years confinement in the custody of the Mississippi Department of Corrections.

Pertinent facts will be referred to in the argument.

SUMMARY OF THE ARGUMENT

1. Admissibility of duplicates under MRE 1003 instead of originals does not extend to duplicates of combinations of originals because no original has been duplicated.
2. Failure of a prosecutor to prove an essential element of an offense charged in an indictment is a fatal insufficiency of proof requiring reversal upon review.
3. A criminal defendant is required to elicit only a reasonable doubt as to any element of an offense in order to disprove the prosecution's case.

ARGUMENT

I.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO ADMISSIBILITY OF THE VIDEOTAPE

Over objection overruled (T-55) the Court allowed into evidence a purported videotape of part of the purported drug transaction for which Appellant was convicted. No evidence of the method by which the recording was produced or converted to videotape was introduced into evidence. It was introduced by a confidential informant whose participation was obtained by a promise of leniency or dismissal in pending check forgery charges if Appellant was convicted (T-58, 59) or if the informant produced a successful drug case against Appellant.

The videotape was produced from and was a composite of two separate video recordings of the purported drug transaction, one on the person of Gina Lewis, the informant, and one on her vehicle (T-49, 50). What was shown the jury was a small and allegedly relevant portion of the composite.

Doesn't say anything about it being a combination of the two

Although duplicates may be admitted (MRE 1003), this was apparently a ? duplicate of the composite, not of a particular original video recording. The prosecution did not identify, specify or produce evidence showing which parts of the finished product shown the jury came from which separate original video recording. Thus the videotape should have been excluded per MRE 1002.

The verdict should be overturned.

II.

THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The principal witness against Appellant was Gina Lewis, described as a “confidential informant” by Mississippi Bureau of Narcotics agent, Will Peterson (T-35). Ms. Lewis testified that when Appellant was sitting in his car with the door open and his dog, Sunflower in his lap, she walked up to the vehicle to consummate a previously agreed transaction for her to buy cocaine from him for \$40.00 (T-58). She testified the drug was in his lap on his left leg:

- Q. Where was the dog sitting?
- A. In his lap.
- Q. So he put the cocaine in the same lap that the dog was sitting in?
- A. Uh-huh, that’s correct.

She testified that she gave Appellant the money at the same time she picked up the cocaine. She further testified (T-58-59):

- Q. What - - you were in trouble with the Morton Police Department for uttering forgery on some bad checks, were you not?
- A. That’s correct.
- Q. You had taken somebody else’s checks and put your name on them and passed em - -
- A. That’s correct.
- Q. Received the money, right? And your comeback, I guess, well, for lack of a better word, what you were to receive in exchange for working as a confidential informant was a good recommendation from the police regarding these charges, right?
- A. Correct.
- Q. And that your’re not - - ideally, you’re not going to be indicted, as long as you produce for them, right?
- A. Ideally.

Q. Well, producing for them doesn't mean you go out and come back with nothing, right? You have to come back - - you have to come back with something. You have to come back with something. You have to have something they can use against individuals, right?

A. That would make sense.

She testified that she had a hidden video camera on her person and on the vehicle she was driving and (T-55):

Q. Does that video tape accurately and correctly show the transaction as it took place?

A. Yes, it does.

The two video recordings were apparently combined, introduced into evidence and shown to the jury.

The video did not in fact show the transfer of the contraband or the money (T-85, 83) or the presence of the contraband on Appellant's leg, on Appellant's person or in his vehicle.

The tale told by Gina Lewis is unlikely because (1) the apparent danger of loss of cocaine sharing a lap with a dog would have kept the Appellant from putting the drugs on his leg or in his lap; (2) had Gina Lewis been unable to purchase the cocaine from Appellant there was an increased likelihood that she would face several forgery charges and consequent imprisonment, and thus she had a pressing need to succeed in her effort to consummate or create a drug purchase and thus a motive to manufacture or falsify one; (3) the fact that no contraband was seen on Appellant's person on the videotape was evidence that the cocaine came from a different source.

An accused is presumed innocent and must be proven guilty beyond a reasonable doubt for a conviction to withstand review. *Miller v. State*, 22 So. 2d, 164 (Miss. 1945). To succeed on appeal a criminal Appellant must elicit only a reasonable doubt as to any element of an offense. *Jones v. State*, 798 So. 2d 1241 (Miss. 2001); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970).

The three reasons given above that Gina Lewis' story is unlikely combine to provide reasonable doubt of Appellant's guilt. Reasonable persons (jurors) could not have found beyond a reasonable doubt that Appellant was guilty.

Gina Lewis' testimony is the only evidence that Appellant sold her the drugs. As a check forger she was innately dishonest. She had a compelling motive to create, falsify and give evidence supporting a contraband drug transfer case against Appellant.

The verdict should be overturned.

III.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT, REQUEST FOR A PEREMPTORY INSTRUCTION AND MOTION FOR A NEW TRIAL

In *Peterson v. State*, 671 So. 2d 647, 653 (Miss. 1996), quoting with approval from *Love v. State*, 211 Miss. 606, 611, 52 So. 2d 470, 472 (Miss. 1951), held as follows:

it is fundamental . . . that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts allege may all be true and yet constitute no offense,

the indictment is insufficient . . . Every material fact and essential ingredient of the offense every essential element of the offense must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment. See *ibid*, secs. 51-63, 79; 42 C.J.S., Indictments and Informations, Sections 130-137-138. (Emphasis added). Love v. State, 211 Miss. at 611, 52 So.2d. at 472. This court has yet to stray away from these fundamental requirements for the sufficiency of an indictment.

The indictment in the case before the Court reads as follows:

Did willfully, unlawfully, feloniously and knowingly sell and deliver to Mississippi Bureau of Narcotics Confidential Informant #96-2006, a Schedule II controlled substance, namely cocaine, in Scott County, Mississippi, contrary to and in violation of Section 41-29-139(a)(1), Miss. Code Ann. (1972), and he, the said Keehan Andre Hoyer a/k/a Kenny Hoyer, then and there having been convicted once previously of the felony crime of Sale of Cocaine, an offense under Section 41-29-139(a)(1), Miss. Code Ann., (1972), the Mississippi Uniform Controlled Substances Law, said previous conviction having occurred on the 15th day of October, 2001, in Cause No. 01-CR-0085-SC in the Circuit Court of Scott County, Mississippi, and from said conviction Keehan Andre Hoyer a/k/a Kenya Hoyer a/k/a Kenny Hoyer was sentenced to serve a term of seven (7) years in the Mississippi Department of Corrections; he, the said Keehan Andre Hoyer a/k/a Kenya Hoyer a/k/a Kenny Hoyer, therefore being a second offender pursuant to Section 41-29-147, Miss. Code Ann. (1972).

The evidence presented was that Appellant sold contraband drugs to Gina Lewis and that Gina Lewis was a confidential informant. No evidence was introduced that Appellant sold such contraband to Mississippi Bureau of Narcotics Confidential Informant # 096-2006 or that Gina Lewis was Mississippi Bureau of Narcotics Confidential Information # 096-2006.

In *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970) the United States Supreme Court held that:

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Thus the State has the obligation to prove every material element of the charge and in Mississippi that charge is encompassed in the indictment. The identity of victims or other persons, not the accused, but integral to the charge, must be proved as alleged in the indictment. *McBeth v. State*, 50 Miss. 81 (1874); *Reed v. State*, 506 So. 2d 277 (Miss. 1987). There having been no evidence in the trial of the case before the Court that Appellant sold or transferred contraband narcotics to Mississippi Bureau of Narcotics Confidential Informant 096-2006, the proof was deficient in a material particular and the verdict should be overturned.

Admittedly there is a need to protect the identity of genuinely confidential informants in order that they not be subject to violent harmful retribution, but, where, as in the case before the Court, the “confidential informant” testifies in open court, and is then identified by name, the pretrial confidentiality does not contribute to the physical


safety of the informant. In the case before the Court there is no overriding excuse for failure to prove the identity of the purchaser of drugs alleged in the indictment. The proof did not identify the purchaser of the contraband as the purchaser named in the indictment.

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.


RESPECTFULLY SUBMITTED,


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Vernon R. Cotton, 205 Main Street, Carthage, MS 39051, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: May 20th, 2008.


EDMUND J. PHILLIPS, JR.
Attorney for Appellant