IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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MURIEL PENNY — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2008-CP-0544-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-CP-0544-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Muriel Penny was found guilty of fondling by the Circuit Court of Tate County on July 25, 2005. He then filed a pro se Motion for Post Collateral Relief on September 12, 2007. Thereafter, Jeffrey Klingfuss, on behalf of the Attorney General's Office, filed the State's response. On December 6, 2007, Mississippi Supreme Court Justice Jess. H. Dickinson, writing for the Court, ordered that Penny's argument newly discovered evidence provided cause for an evidentiary hearing, and that Penny's Application for Post Conviction Relief be granted as to that issue.

Penny was granted an order by the Supreme Court of Mississippi granting the Application for Leave to Proceed in the Trial Court and granting an Evidentiary Hearing. Subsequent to the evidentiary hearing, relief was denied.

Penny, now by way of counsel, files a brief of appeal from the Circuit Court of Tate County to which the State now responds.

STATEMENT OF FACTS

Muriel Penny, defendant, was indicted on December 15, 2004 with two counts of Sexual Battery in violation of *Miss Code Ann.* § 97-3-95(1)(d). After a trial by jury, Judge Andrew C. Baker, presiding, defendant was found not guilty on one count and guilty of the lesser offense of fondling on the second count. Defendant was sentenced to fifteen years, (nine suspended), court costs and assessments.

The direct appeal affirmed the verdict of the lower court. *Penny v. State*, 960 So.2d 533 (Miss.App. 2006). Further it would appear that defendant filed a petition for certiorari in the Mississippi Supreme Court which was also denied. 959 So2d 1051 (Miss. 2007).

SUMMARY OF THE ARGUMENT

Issue 1.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT APPELLANT'S WITNESS TO TESTIFY AT EVIDENTIARY HEARING.

Issue II.

THE TRIAL COURT DID NOT ERR IN CONCLUDING APPELLANT PROVIDED NO DOCUMENTATION TO SUPPORT HIS CONTENTIONS.

Issue III.

THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING DID NOT CONSTITUTE HEARSAY TESTIMONY.

ARGUMENT

Issue 1.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT APPELLANT'S WITNESS TO TESTIFY AT EVIDENTIARY HEARING.

Defense contends that the court committed a reversible error when it did not permit Ms. Lakesha Porter to testify at the Evidentiary Hearing. We disagree.

The said witness, Lakesha Porter, was not allowed to testify because her testimony would have been hearsay and thereby inadmissible. The trial judge properly exercised his discretion.

"Hearsay" is a statement, other than one by declarant while testifying in trial, offered to prove the truth of the matter asserted. *Eselin-Bullock & Associates Ins. Agency, Inc. v. National General Ins. Co.*, 604 So.2d 236 (Miss. 1992); M.R.E. 801(c). Out-of-court statements offered in criminal prosecution for purpose of proving the truth of the matter asserted are hearsay and inadmissible. *Gates v. State*, 484 So.2d 1002 (Miss. 1986).

Although defense asserts an exception to the hearsay rule, they have produced no evidence of an attempt to produce the actual witness, Sydatrine (Shay) Futrell. This fact would prohibit anyone, including Lakesha Porter, from testifying as to what she said because she (Futrell) was not unavailable as prescribed by the Mississippi Rules of Evidence.

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:
> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
> (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
> (3) Testifies to a lack of memory of the subject matter of his statement; or
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means; or

> (6) In the case of a child, because of the substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused. M.R.E. 804. Defendant has established the missing party, Shay Futrell, as neither.

Defense only offered Porter as 3rd party as a witness at the evidentiary hearing, not the person in question: Shay Futrell. Defendant submits that Porter is not related to the defendant as his sole means of establishing the trustworthiness of her statements. That fact alone is not enough to establish the trustworthiness of her statements and the defendant has failed to meet an exception to the hearsay rule and therefore, this issue is without merit.

A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the [Supreme] Court will not reverse this ruling. *Shaw v. State*, 915 So.2d 442, 445 (Miss. 2005) (citing *Jefferson v. State*, 818 So.2d 1099, 1104 (Miss. 2002) (quoting *Fisher v. State*, 690 So.2d 268, 274 (Miss. 1996))); M.R.E. 103(a).

As stated, the standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion. *Poole v. Avara*, 908 So.2d 716, 721 (Miss. 2005); *Miss. Trans. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003). Any error in the admission or exclusion of evidence is not grounds for reversal unless the error adversely affected a substantial right of a party. *Lynch v. State*, 877 So.2d 1254, 1281 (Miss. 2004).

Further, "[t]his Court must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact." *Johns v. State*, 926 So.2d 188, 194 (¶ 29) (Miss. 2006) (quoting *Mullins v. Ratcliff*, 515 So.2d 1183,1189 (Miss. 1987)).

Whereas upon a thorough examination of the entire record of the proceedings below, and the absence

of an abuse of discretion, we find no error in the lower court's evidentiary rulings. This issue is without merit.

Issue II.

THE TRIAL COURT DID NOT ERR IN CONCLUDING APPELLANT PROVIDED NO DOCUMENTATION TO SUPPORT HIS CONTENTIONS.

The standard of review after an evidentiary hearing in post-conviction relief cases is well settled: "We will not set aside such a finding unless it is clearly erroneous." *Reynolds v. State*, 521 So.2d 914, 918 (Miss. 1988). We find no error.

The trial court properly concluded that the defendant did not provide any documentation to support his contentions in the evidentiary hearing. This alleged new evidence was unmeritorious hearsay.[1]

> To succeed on a motion for a new trial based on newly discovered evidence, the petitioner for post-conviction relief must prove that new evidence has been discovered since the close of trial, that it could not have been discovered through due diligence before the trial began, and that the newly discovered evidence will probably produce a different result or induce a different verdict if a new trial is granted. *Crawford v. State*, 867 So.2d 196 (Miss. 2003).

These produced documents provide information that was available at the time of trial and were not brought up. They are therefore barred from being brought to the court's attention upon appeal. At the evidentiary hearing, these same items were not properly marked into the record as exhibits.

Further, these items, marked one through nine, are of no consequence in proving anything. These items lack relevancy and proof of authenticity. In light of this procedural and substantive error on behalf of the defense, we ask that any future reference to these items be barred and their existence be stricken from the record.

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[1]The new evidence consisted of a computer printout of Comcast services, a statement of services rendered by a doctor, a computer printout of the television listings for Dora the Explorer, a 2004 calendar for the months of July, August and September, and a 2004 football schedule for Coldwater High School.

Issue III.

THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING CONSTITUTED HEARSAY TESTIMONY AND IS THEREFORE INADMISSIBLE.

As heavily supported herein, we hold steadfast to our assertion that the proffered testimony was hearsay and thereby inadmissible. As previously stated, the Mississippi Supreme Court has held that "out-of-court statements offered in criminal prosecution for purpose of proving the truth of the matter asserted are hearsay and inadmissible". *Gates*, 484 So.2d 1002. The proffered testimony of Lakesha Porter was hearsay. Also, we have noted that the other evidence, in the form of unofficial documentations, held no weight and were not admitted into evidence. Accordingly, this issue is without merit.

CONCLUSION

Whereas there was no error on behalf of the lower court, nor abuse of discretion, no relief should be granted. The State would ask this reviewing court to affirm the verdict of the jury and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, 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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This the 24th day of July, 2008.

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