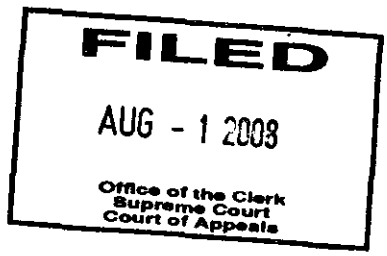
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRENDA LIDDELL — APPELLANT



VS. — NO. 2008-KA-0021-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

JAMIEL WIGGINS
ATTORNEY GENERAL LEGAL INTERN

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRENDA LIDDELL **APPELLANT**

VS. **NO. 2008-KA-0021-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Brenda Liddell was convicted on 2 counts of sale of a controlled substance. (C.P. 6) After trial, she was acquitted on one of those counts and sentenced regarding the other. Feeling aggrieved, the defendant now appeals in a brief to the Supreme Court of Mississippi to which the State now responds.

STATEMENT OF THE FACTS

On February 5, 2005 Confidential Informant, Dustin Purser, cooperated with Luis Hawkins, a Mississippi Bureau of Narcotics officer in arranging a monitored purchase of cocaine from Brenda Liddell. Officer Chris Smith, a Tunica police officer also assisted with the operation.

Purser was availed with audio and video technology to record the transaction. Purser went to the residence of Brenda Liddell and requested to purchase cocaine. Defendant then replied that she did not have any cocaine at the time, but she would have some later that day.

Purser then left the house to return later where he purchased $70.00 worth of Xanax pills. He then drove back to the meeting place with the law enforcement officers where he relinquished the Xanax. While with the officers, Purser received a phone call from Liddell informing him that she was now in possession of cocaine.

Purser then returned to the house where he purchased an ounce of cocaine from Liddell. He was instructed to place the money on the counter, and pick the cocaine up from a bowl on the counter. Liddell then came from the back room and put the money in her pocket. Purser then left the house again and returned to the location of the officers and prepared a statement of what happened.

Liddell was indicted on two counts of the sale of a controlled substance. At trial, she was acquitted of the charge for the sale of Xanax, but the charge for the sale of cocaine was found guilty. She was sentenced to 10 years in the custody of the Mississippi Department of Corrections with 5 years of that sentence suspended.

SUMMARY OF THE ARGUMENT

Issue I.

THE TRIAL COURT DID NOT ERR IN DENYING A SUA SPONETE MOTION FOR A MISTRIAL BECAUSE THE DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL

ARGUMENT

Issue I.
DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL

The standard of review for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which was adopted by the Mississippi Supreme Court in *Gilliard v. State*, 462 So.2d 710, 714 (Miss. 1985). The test to be applied is: (1) whether counsel's overall performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. *Taylor v. State*, 682 So.2d 359, 363 (Miss. 1996); *Cole v. State*, 666 So.2d 767, 775 (Miss. 1995). The defendant has the burden of proving both prongs of the test. *Id.* The record fails to show any deficiency or prejudice on behalf of the trial attorney and this claim should be dismissed.

In such instances as with the case at bar where an attorney has used his discretion in choosing the best alternatives for his client, there is a strong, yet rebuttable, presumption that the actions by the defense counsel are reasonable and strategic. *Veilee v. State*, 653 So.2d 920 (Miss. 1995). Neither party has extrinsic evidence that would negate this presumption. Therefore, we are to yield to the discretion of the acting attorney and give deference to his decisions as counsel for his client at the time in question. Trial counsel undoubtedly had his own trial strategy to protect his client that cannot be determined from mere assumption. For these reasons, the State fails to find any deficiency on behalf of the defendant's trial attorney in regards to the first prong of *Strickland.*

Under the second prong of *Strickland*, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mohr v. State*, 584 So.2d 426 (Miss. 1991). There was overwhelming evidence by which the defendant was

convicted and the performance of trial counsel would not have made any of the evidence disappear. Accordingly, the defendant has failed to pass the second prong of *Strickland* also.

This is merely another case in which the defendant, aggrieved by the guilty verdict, is making an attempt to dispose of her transgressions at the expense of her attorney. Defense points to several instances in which trial counsel was allegedly deficient in conducting himself at trial. We find no such error by trial counsel.

Defense first gripes with the testimony of the Confidential Informant. They allude to the C.I., Dustin Purser, being detestable. However, this "character analysis" is of no consequence in regards to Purser's testimony or the events that led to the defendant's conviction.

> Although potential for miscarriage of justice is obvious where informant, an ex-drug offender, was paid on contingency fee basis, Supreme Court would not disturb guilty verdict where informant was subject to cross-examination and full facts and circumstances of State's "bounty hunter witness" were disclosed to jury. *Williams v. State*, 463 So.2d 1064 (Miss. 1985) (citing Miss. Code Ann. § 41-29-160). Where, as here, the full facts and circumstances of the State's arrangement with its bounty hunter witness are disclosed to the jury and where that witness is subject to cross-examination we will not disturb on this account a subsequent guilty verdict. The conduct of the Bureau of Narcotics will have to reach a level of outrageousness not present here before we will consider and take further action. *Id.*

Purser was exposed to cross examination. (T.R. 2/87-108). Although he was an "ex-drug offender," that fact does not negate his testimony as to what transpired on the day in question. The video and audio surveillance media were quite conclusive. Purser repeatedly referred to the defendant as "Brenda" to which she clearly responded to.

Next, the defense attempts to dispute the testimony of Agent Hawkins in regards to his identifying the defendant's voice.

> Rule 901(a) of the Mississippi Rules of Evidence states that authentication of a piece of evidence is sufficient for admission when it "support[s] a finding that the matter in question is what the proponent claims." ... Rule 901(b)(5) says the following would be sufficient for authentication of a voice identification:

"Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." *Broadhead v. State*, 981 So.2d 320 (Miss. Ct. App. 2007).

The rule then goes on to state that authentication of a telephone conversation is sufficient when there is "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called...." M.R.E. 901(b)(6). *Id.*

Rule 901(b)(9) gives an example of sufficient authentication for a system or process: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." *Id.*

The overwhelming weight of the evidence against the defendant operated to satisfy the condition precedent of authentication. There was video and audio surveillance of the defendant, expert testimony that verified the substances as Xanax and cocaine, and sworn testimony from a confidential informant and two law enforcement officers that all pointed to the defendant as guilty.[1]

Finally, the defense attacks the stipulation of evidence of the conviction of accomplice, Catherine "Doll" Bogan, who was convicted for the same crime. The State moved to stipulate the sentencing judgment and proof of conviction of Catherine Bogan in cause number 2007-0144, as State's Exhibit 8. (T.R. 2/1243-124). No objection was made by trial counsel for defense at the time and the evidence was admitted. (T.R. 2/124). Following the Fifth Circuit's reasoning in *Stephens*, 609 F.2d at 232-33, we must next determine whether [Liddell's] attorney's decision to stipulate to the admission of evidence was part of a legitimate trial strategy or tactic. *Waldon v. State*, 749 So.2d 262 (Miss. Ct. App. 1999) (citing *U. S. v. Stephens*, 609 F.2d 230 (5th Cir. 1980)) . The court in *Waldon* held, "we recognize that Waldon's attorney's decision to stipulate to this evidence was a legitimate trial tactic intended to assist his client. *Waldon*, 749 So.2d 262. According to *Waldon*, the

---

[1] *Video and audio surveillance*: State's exhibits A and B (S-3, S-4); *Expert Testimony*: (T.R. 2/113-121); *Informant testimony*: (T.R. 2/74-108); *Officer Testimony*: (T.R. 2/36-66; 2/66-74).

lack of an objection by trial counsel can be viewed as a legitimate trial tactic; as was the case here.

A [t]rial court's decision on whether evidence presented satisfies relevancy and authentication requirements will be upheld unless it can be shown that court abused its discretion. *Stromas v. State*, 618 So.2d 116 (Miss. 1993); M.R.E. 104(a), 401, 901. We fail to recognize any abuse of discretion by the trial court, or any argument to the contrary from defense.

For these given reasons, the State believes that the defendant did receive effective assistance of counsel and has failed to meet any required burden to establish otherwise. The State requests that no relief be granted in regards to this issue.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the verdict of the jury and the sentence of the lower court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

_____

JAMIEL WIGGINS
ATTORNEY GENERAL LEGAL INTERN

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

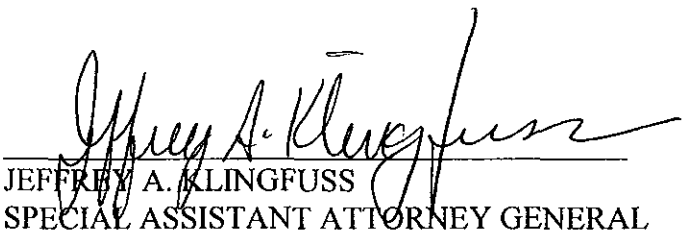
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge
Post Office Drawer 478
Cleveland, MS 38732

Honorable Laurence Y, Mellen
District Attorney
Post Office Box 848
Cleveland, MS 38732

W. Daniel Hinchcliff, Esquire
Attorney At Law
301 North Lamar St., Ste. 210
Jackson, MS 39201

This the 1st day of August, 2008.



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680