IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRENDA LIDDELL — APPELLANT

V. — NO. 2008-KA-0021-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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BRENDA LIDDELL **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

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. Brenda Liddell, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 10th day of July, 2008.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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STATEMENT OF THE ISSUES

ISSUE NO.1:WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A MISTRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Tunica County, Mississippi, and a judgement of conviction for the crime of sale of cocaine against Brenda Liddell following a jury trial on October 17, 2007, Honorable Albert Smith, III, Circuit Judge, presiding. Ms. Liddell was acquitted on count one of the indictment, sale of a schedule IV controlled substance. Ms. Liddell was subsequently sentenced to a term of ten (10) years, with five (5) years suspended. She is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

According to the trial testimony, Luis Hawkins, with the Mississippi Bureau of Narcotics, working with Chris Smith, a Tunica police officer, and a confidential informant (C.I.) named Dustin

Purser, set up a typical drug buy. (T. 36-39, 66-67) The C.I. was equipped with camera and microphone and sent to the home of Brenda Liddell, ["Liddell"], to buy an ounce of cocaine. (T. 38) The C.I. was unable to buy cocaine but was able to purchase an anti-anxiety pill. He was told to return later. Agent Hawkins recognized Liddell's voice. (T. 40-41)

After the C.I. received a call on his cell phone, from Liddell's number, he returned for the cocaine. He returned and bought cocaine. (T. 41-42) The jury then heard and saw two CD-R's of these events. (T. 44-46) Agent Hawkins testified, without objection and without authentication or predicate as to how he knew, that the voice was the voice of Liddell. (T. 39-46)

Cross examination provided the missing predicate of how Agent Hawkins and officer Smith knew and identified Liddell's voice.(T. 48-49, 69-71) He knew her from prior drug investigations.

Dustin Purser, ["Purser"], explained his participation in the set up to buy drugs from Brenda Liddell. After , reviewing the pre-buy procedures, he told of first buying Xanax, then cocaine. He talked to Liddell about the Xanax, but a woman called "Doll" handled the transaction. (T. 74-79) On direct examination, without objection, Purser explained he knew Liddell, from numerous prior drug transactions. (T. 78-79)

Proofs showed that Liddell never put any controlled substances into Purser's hands. Doll had handed him the Xanax, while he retrieved the cocaine from a bowl. Liddell did not even direct Purser to the bowl. (T. 79-82) The disc was of poor quality in the portion occurring within the house, jerkily made in a house that was darkly lit. (T. 82) The deal itself, according to testimony, was not on the tape. (T. 69)

Cross examination revealed that Purser had been to Liddell's house multiple times, to meet Liddell and, on one occasion, to buy drugs from her husband (T.88-89, 96) Cross examination elicited the description of Liddell's house as a dope house. (T. 89-90) Cross examination explained

how Liddell was too smart to let the drugs actually pass through her hands, but instead used a runner.(T. 90-99) No objection by the defense was entered when a non-responsive answer from the C.I. suggested he could get killed ! (T. 105)

Teresa Hickmon, of the Mississippi Crime Lab, confirmed previous testimony that the substances were cocaine and Xanax.(T. 109-121)

A stipulation was entered that the co-defendant, "Doll" had already been convicted of the same crime.(T. 123-124)

After the jury had retired, the came back to the courtroom, where the trial court cleared the courtroom, except for an individual identified as "J.J." who remained with the jury and played the two CDs.(T.153-154)

The jury returned a verdict of guilty for count II .

SUMMARY OF THE ARGUMENT

The State's case was not overwhelming, as presented by the State. Liddell, never actually personally delivered any contraband. The disc was dark, making it hard to identify anyone seen on it. Identification was provided by informant who would only be paid if he delivered Liddell. The only other identification was "voice identification", made without any predicate by the State. However, defense counsel in cross examination, showed the jury how the police easily recognized Liddell's voice, by numerous prior drug deals where the officers had been involved. In this trial, multiple sins of omission by the defense became inexcusable when cross examination actually buttressed the State's case. Evidence of co-defendant's conviction, otherwise inadmissible, was even stipulated by the defense. This defense fell below the minimum standard and was harmful to the defendant.

ARGUMENT

ISSUE NO.1:WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A MISTRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

The standard to measure whether trial counsel's performance was deficient was established in *Strickland v. Washington*,466 U.S. 668, 104 S.Ct. 2052 (1984). The Mississippi Supreme Court expressed the standard as follows:

> A convicted defendant's claims that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, the trial whose result is reliable.

Yarbrough v. State, 529 So.2d 659, 661 (Miss.1988) When the issue is raised in a direct appeal requires that the claim of ineffectiveness be found affirmatively within the four corners of the record , and be of constitutional dimensions. *Porter v. State,* 885 So. 2d 92, 95 (Miss. App. 2004)

As with many drug cases, the State's proofs were wholly dependant on the testimony of a paid informant, buttressed by audio/visual recordings. And is often the case, the quality of the visual evidence was very poor. The room was dark. The camera was in motion. Thus, the proof's boiled down to the informant's testimony, bolstered by the dubious "voice identification" of the agent.

Paid informants, historically have been viewed as untrustworthy. "[W]e recognize that a paid informant is in some ways comparable to a 'bounty hunter,' having an interest in the outcome of the case." *Cooper v. State,* 628 So.2d 1371, 1374 (Miss.1993). "We find also that the United States Court of Appeals for the Fifth Circuit has traditionally taken the position that contingency fee confidential informants are almost as detestable as the drug offenders they would ferret out."

Williams v. State, 463 So.2d 1064, 1068 -1069 (Miss. 1985) In the case at bar, The C.I. was being paid to get Liddell, a contingent fee arrangement. (T. 92-93) The suspicious nature of a C.I. for pay is amply demonstrated in this vey case, where the jury chose to acquit on Count I of the indictment, despite the testimony of the C.I..

Accordingly, for the defense to first allow Agent Hawkins to affirmatively testify that the voice on the recordings was that of Liddell, (T. 39) without authentication and proper predicate was deficient. MRE 901 (5) requires authentication of voice identification. Until the State laid the predicate that Hawkins was familiar with Liddell's voice, it was error to admit the testimony that Liddell was speaking or that it was her voice on the recordings. "The requirement of personal knowledge as a prerequisite to lay opinion testimony is absolute." *Wells v. State,* 604 So.2d 271, 279 (Miss.,1992)

The failure to object waived this error. *Copeland v. Copeland,* 904 So.2d 1066, 1073 (Miss. 2004) As later testimony revealed, Hawkins would have been able to authenticate the tapes, but, it was the defense counsel that provided the authentication. In cross examination of Agent Hawkins, the following inexplicable exchange transpired:

Q. You had heard her voice before ?

A. I have.

Q. How did you - - on the telephone or in person?

A. Are you asking me specifically how I - -

Q. How you heard her voice ?

A. Did you just open the door for me to step through?

Q. Uh, I asked you a question.

A. Okay. Well, the - - I recognized her voice from previous sale cases.

Q. So, you heard her voice ?

A. That is correct.

Q. So, you were familiar with her voice.

A. So, when you heard her voice on the tape that's been admitted into evidence, that's her voice correct ?

Q. That's correct.

A. And you know it when you heard it ?

Q. Yes. (T. 48-49)

Prior to this exchange the case against Liddell rested upon a C.I.'s word, which was not supported by other evidence. Viewing the CD's doesn't show Liddell (at least identifiably) and the sound in the house is quite indistinct. But in one short exchange Hawkin's voice identification is affirmed and amplified by the admission of other sales of drugs by Liddell. Had the State sought to introduce such evidence without first obtaining a judicial ruling on the balance of prejudice versus probative value, there can be little doubt a mistrial would have been required. MRE 403, MRE 404 (b). "We say for the future, however, that wherever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to MRE 403 balancing analysis and a limiting instruction. The court shall conduct an MRE analysis and, if the evidence passes that hurdle, give a limiting instruction unless the party objecting to the evidence objects to giving the limiting instruction." *Smith v. State*, 656 So.2d 95, 100 (Miss.1995)[1]

Later, during the continuing cross examination of Hawkins, Counsel asks for opinion evidence, both legal and factual, to who actually sold the Xanax to the C.I.. Agent Hawkins was asked if he " was able to determine... who transferred the drugs?" (T. 61) After Hawkins testified

[1]*Smith* has since been overruled insofar as requiring the trial court to *sua sponte* give a limiting instruction to the jury. *Brown v. State*, 890 So. 2d 91 (Miss. 2004)

that both Bogan and Liddell were responsible "selling the drugs." Counsel then asked the witness to explain his conclusion. It seems impossible to classify this as either trial strategy nor as harmless.

The defense cross examination of the C.I. put before the jury that the C.I. had been to Liddell's house before. More than five times. Once to buy drugs from Her husband. (T. 88-89) As the cross examination continued, defense counsel elicited the fact that Liddell had conducted multiple prior sale of drugs to the C.I.

Q. And how many times had you heard her voice at that time ?

A. I bought dope over there every day for several months.

Q. What type of dope did you buy for several months?

A. Crack cocaine, pills. (T. 96)

Use of drugs in Liddell's home added to the evidence, again as part of the defense, with cross of the C.I. bringing out that people on the video were smoking crack, that her house was a "dope house." (T. 96) The informant was even induced to call "Clark Cove", the location of Liddell's home, "a major drug area." (T. 102)

Although the transcript reveals numerous other harmful evidence that could have been objected to, or was in fact brought out by the defense, the final reversible/prejudicial evidence was made by way of a stipulation, whereby it was agreed among the parties that the co- defendant, "Doll"Bogan, was already convicted for her part in these two sales. (T. 123-124) Generally, the conviction of the co-defendant is inadmissible and generally understood as highly prejudicial evidence with no probative value.

> The Mississippi Supreme Court has held that it is improper to introduce an accomplice's conviction of the same crime for which the defendant is being tried. See, e.g., Johns v. State, 592 So.2d 86, 89 (Miss.1991); Henderson v. State, 403 So.2d 139, 141 (Miss.1981). These cases stood for the proposition that:

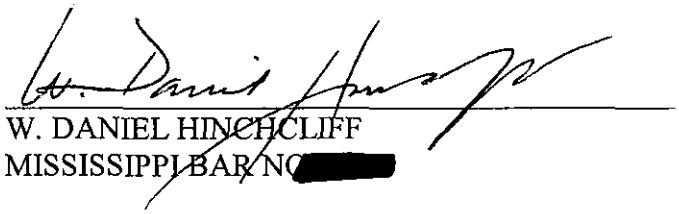
> where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such [a]... conviction is no evidence of the guilt of the party being tried.
>
> Johns v. State, 592 So.2d 86, 90 (Miss.1991) (quoting Buckley v. State, 223 So.2d 524, 528 (Miss.1969)).

McDonald v. State, 881 So.2d 895, 901 (Miss. App. 2004) If this is trial strategy, it is a strategy designed to convict.

CONCLUSION

A reading of this record, leaves a clear impression that defense counsel made errors so serious that it is not arguable that counsel was "not functioning as the 'counsel' guaranteed...by the Sixth Amendment."[2] Nor is it arguable that this Appellant's defense was thereby prejudiced. It is therefore respectfully urged that this cause be reversed and remanded.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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[2] *Yarbrough, Id.* at 661

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Brenda Liddell, 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:

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