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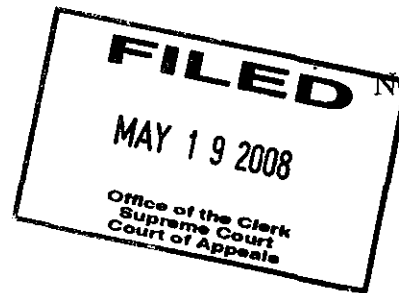
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CALVIN JEFFERSON

APPELLANT

V.

STATE OF MISSISSIPPI



NO. 2008-KA-0239-COA

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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.

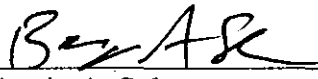
1. State of Mississippi
2. Calvin Jefferson, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Robert W. Elliot, Circuit Court Judge

This the 19 day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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STATEMENT OF THE ISSUE

THE TRIAL COURT ERRED IN DENYING JEFFERSON'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Calhoun County, Mississippi, and a judgment of conviction of sale of cocaine. Calvin Jefferson was sentenced to twenty (20) years in the custody of the Department of Corrections, with four (4) years suspended, leaving sixteen (16) years to serve, and a fine of two thousand five hundred dollars (\$2500.00), following a jury trial on January 23-24, 2008, Honorable Robert William Elliot, presiding. Jefferson is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According the trial testimony, on December 8, 2005, Mississippi Bureau of Narcotics Agent Tim Hamilton and Calhoun County Sheriff's Deputy Amory "Bubba" Willard, used a

confidential informant by the name of Daniel Hardin to purchase contraband. Tr. 99,131, 135. The officers searched Hardin and his vehicle at night with a flashlight. Tr. 96-98. Hardin only emptied his pockets and billfold. Tr. 96. However, it should be noted that agents did not make him remove his pants, look inside his ear, check his belly button, look inside his socks, or check his underwear. Tr. 96-97. Officers also equipped Hardin with audio and video recording devices for the officers to monitor the transaction. Tr. 99, 131. Hardin was issued forty dollars (\$40.00) in official state funds and after brief instructions on operations was sent off toward the car wash on Highway 9 on the south end of Bruce. Tr. 131

Hardin testified that he got in touch with Jefferson to set up a buy. Tr. 79. Hardin told Jefferson that he wanted forty (\$40) worth of cocaine and to meet him at a location in town. Tr. 80. Hardin states that when he gets to the car wash, he gives Jefferson the money. *Id.* Then, according to Hardin, Jefferson said he would go get the cocaine and bring it back. *Id.* When Jefferson gets back, he places the drugs on the hood of Hardin's vehicle. Tr. 81. Jefferson then asks for some of the drugs because he went and got it for Hardin. *Id.* Hardin stated that Jefferson wanted to go with him to smoke the cocaine. Tr. 82. Hardin kept telling him no. *Id.* However, due to Jefferson's persistence, Hardin gave Jefferson some cocaine. *Id.* Hardin then left to return the drugs into the officers. *Id.*

Hardin admitted that because of his previous crimes that he was worried about being sent to prison and wanted to work as a confidential informant. Tr. 115. Hardin continued to state that he and Officer Willard had discussed making buys, and that if Hardin helped Officer Willard, he would help Hardin with his tickets. *Id.*

Hardin also testified that had used cocaine with Jefferson prior to this incident. Tr. 117. He admitted that he was a cocaine addict. Tr. 82. He even acknowledged to using drugs since working for law enforcement. Tr. 116.

Jefferson had a different version of the events that took place on December 8, 2005. Jefferson testified that he did not sell Hardin any drugs. Tr. 140. Jefferson stated that he was riding around when Hardin called him and said that he had a forty (40) and that he wanted to smoke it. *Id.* Hardin told Jefferson to meet him at the car wash. *Id.* Jefferson was not surprised that Hardin had called him because they have smoked cocaine together many times. *Id.*

Jefferson said that Hardin pulled up to the car wash and told him what he had to smoke. Tr. 141. Jefferson told Hardin that he did not have his pipe, so Jefferson left to go get his pipe. Tr. 141-42. When Jefferson got back, he tried to get in the truck with Hardin and Hardin told him no. Tr. 142. Jefferson kept asking him to smoke and finally Hardin just gave him a piece of cocaine to smoke. *Id.*

A forensic scientist from the Mississippi Crime Lab determined that the substance that was returned to the officers, by Hardin, was cocaine with a weight of 0.22 grams.

SUMMARY OF THE ARGUMENT

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented failed to establish beyond a reasonable doubt the charge of sale of cocaine, as the evidence did not show a clear exchange of money for drugs. The State alleged in its indictment that money was paid, but failed to prove this. The confidential informant's testimony was that this occurred was therefore crucial. However, the confidential informant's credibility was nonexistent, as he conveniently forgot several prior charges against him. Allowing the verdict to stand on this evidence would manifest an extreme injustice.

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DENYING JEFFERSON'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for Judgment Notwithstanding the verdict or in the alternative a New Trial, trial counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 57, R.E. 10. The trial judge denied this motion. C.P. 60, R.E. 12. The trial judge erred in refusing to grant this motion.

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Jefferson is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. The confidential informant's testimony was the only evidence that money was exchanged or that the crack cocaine was exchanged. Tr.

80-81. The video did not show any money being transferred to Jefferson. Ex. 1. The video also did not show Jefferson giving any crack cocaine to Hardin. Ex.1.

Consequently, the confidential informant's trustworthiness was absolutely essential to this case. The record reflects that Hardin's story changed and was not creditable. For example, Hardin testified when asked during direct testimony that he did not have any pending criminal cases during this time of December 2005. Tr. 76. Also, when asked if he had been in trouble with the law before, Hardin said that was back in 1996. Tr. 76-77.

However, Hardin had been arrested for possession of cocaine six weeks prior to the alleged incident in this case. Tr. 93. Hardin stated during cross-examination that he did not remember the charge and as of the date of trial, that charge had not been pursued. Tr. 93-95. Also during cross-examination defense counsel brought out that Hardin had numerous charges for felony bad checks and uttering forgery. Tr. 101-111. Hardin did claim that he did not forge a check, however, he was charged with uttering forgery in December 1998. Tr. 102, Ex. D-1. Hardin also pled guilty to the charges for felony bad check. Tr. 105-108.

Hardin also stated three weeks prior to the alleged incident in this case that he was charged with driving while license suspended by Officer Willard. Tr. 111. This charge was conveniently dismissed by Officer Willard. Tr. 112.

Hardin knew that with his criminal background and checkered past that any other charges or convictions could lead him to prison. For this reason, Hardin knew that he needed to do something to keep himself out of prison, i.e. work as a confidential informant. Tr. 114-15. When Hardin was asked on cross-examination that he was scared that he might go to prison because of his past criminal record, he responded yes it had crossed his mind. Tr. 114. He then said that was not the reason that he decided to work as a confidential informant for the county law

enforcement. *Id.* However, later in his testimony, Hardin stated that he did go out and make buys for the police because he was scared about the possibility of going to prison for the possession of cocaine charge. Tr. 115.

Hardin continued to testify that he had discussed working as a confidential informant with Officer Willard. *Id.* Officer Willard told Hardin that if he went and made buys for the police, that he would help Hardin with his tickets. *Id.* The relevant testimony from the trial is as follows:

Q. Okay. So you are telling us even though you had this possession charge and you were afraid they were going to send you the pen this time after being relatively lenient on you for your past mistakes that that didn't have anything to do with you wanting to go out and make alleged drug buys from alleged drug dealers in the county?

A. You could say that it had a little to do with it, yes, sir.

Q. Thank you. Let me ask you this now: When you agreed to do that, was it your understanding that if you didn't go out and actually make buys, that you wouldn't get any help on your charges or any consideration for the work you tried to do?

A. No, sir.

Q. It wasn't except that you actually go make buys and charges against people?

A. We had discussed it.

Q. What did you discuss?

A. Making buys.

Q. And what was discussed about if you made buys?

A. That he would help me, Bubba Willard would help me with my tickets.

...

Q. So you are going to get the same treatment regardless of whether up made buys or whether you didn't?

A. Like I said, he told me that he would help me with my tickets that he had given me if I would help him make some buys.

Q. So the implication there is that if you didn't make buys that you weren't going to get any help from him?

A. Yes, sir.

Tr. 115, R.E. 14

Clearly, it would sanction an unconscionable injustice to allow the Appellant to be convicted on the word of this unbelievable informant. No reasonable jury could put any faith into his testimony.

As set forth in the indictment, the State was required to show that Jefferson (1) unlawfully transferred or sold cocaine to the confidential informant, Hardin, and (2) received forty (\$40) dollars. C.P. 1, R.E. 7. Besides the testimony of Hardin, the State presented no evidence that Hardin received any money for the cocaine. By alleging in the indictment that Hardin received a sum of money for the cocaine, the State took on the burden of proving that Hardin received money. *Gray v. State*, 728 So.2d 36 (¶176-77) (Miss. 1998). The jury was also instructed that it to find Hardin received money beyond a reasonable doubt. C.P. 79, R.E. 13.

No money was exchanged on the video and it was unclear whether drugs were transferred. Ex. 1. Jefferson testified that he did not sell drugs to Hardin, but he did testify that he was there to smoke the crack cocaine with Hardin. Tr. 140. As witnessed by the video, Jefferson was trying to get in the truck with Hardin to “make a block” or go smoke some of the crack cocaine. Tr. 142. Jefferson stated that he had smoked with Hardin many times. Tr. 141.

The verdict was clearly against the overwhelming weight of the evidence. Jefferson therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).

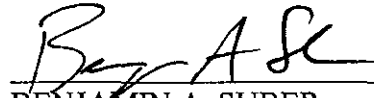
CONCLUSION

Given the facts presented in the trial below, the verdict was contrary to the overwhelming weight of the evidence. Calvin Jefferson is entitled to have his sale of cocaine conviction reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Calvin Jefferson, Appellant

BY:



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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Calvin Jefferson, 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:

Honorable Robert W. Elliot
Circuit Court Judge
388 CR 490
Ripley, MS 38663

Honorable Ben Creekmore
District Attorney, District 3
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Honorable Jim Hood
Attorney General
Post Office Box 220
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This the 19 day of May, 2008.



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