IN THE SUPREME COURT OF MISSISSIPPI

2008-KA-531-COA

NO. ~~2008-CR-0003-NS-C~~

KENDALL WAYNE PILGRIM

VS.

STATE OF MISSISSIPPI

Appeal from Circuit Court of Neshoba County, Mississippi

REPLY BRIEF TO APPELLEE'S BRIEF

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ARGUMENT

I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE

Appellant's appointed counsel came to court on the day set for trial, totally unprepared, he having not even discussed the case meaningfully with Appellant (T-45). He gave as a reason for his lack of preparation the fact that he thought Appellant had secured private counsel in the person of Hon. Mitch Moran, an attorney known to the Court, the prosecutor and Appellant's appointed counsel:

> But when I arrived at Court this morning, I believed him to be the defense lawyer for Kendall Wayne Pilgrim.

The Court, the prosecutor and Appellant's appointed counsel had understood that Moran might be representing Appellant and all three made an effort to telephone Moran to verify this, but only the prosecutor was able to talk to him; the prosecutor stated in conference (T-50, 51):

> MR. BROOKS: No, Your Honor. I would like to respond to two things. Number one, if the Defendant had been doing his job, which was getting his attorney, then what he's claiming prejudiced about today would not have happened. I did call last week, on Friday, after Mr. Collins had mentioned to me that Mitch Moran may be representing him. I called last Friday. Mitch says as of last Friday, he was not representing him. I said, Mitch, will you call me if you are hired over the weekend. He did not call me.
> I called him yesterday, before we announced to the Court that we were going to trial today, and Mitch Moran says he does not positively represent him. That was the worst - - last word I had on that.
> I called Mr. Collins. I left a message on his answering service saying that Mitch had said he didn't represent him.
> So that's why we were ready to go today, Your Honor, and we don't believe there's any prejudice whatsoever to the Defendant. If there is any, it's all his own fault.

It seemed likely that Appellant's family was unable to raise sufficient funds to employ Moran.

The prosecutor's statement that Moran said that he did "not positively" represent Appellant was in fact not a denial of representation, as the State asserts, but a noncommittal response to the prosecutor's inquiry. The difference between the meanings of "I do not positively represent him" and "I positively do not represent him" are obvious, and Moran's choice of words appears deliberate. It is likely that had Appellant been able to pay Moran's fee, Moran would have appeared in Court to defend him.

Appellant's appointed counsel was unprepared; his delinquency was not manufactured for dilatory purposes, and the Court had an obligation to assure that Appellant was represented by competent and prepared counsel. McMann v. Richardson, 397 U.S. 771, 90 S. Ct. 1441 (1970) "the right to counsel is the right to effective assistance of counsel".

Here, the Court was presented the opportunity to avoid the effect of subjecting an accused to trial with completely unprepared counsel and chose to subject him to such a trial. The proper remedy was to grant the motion for a continuance and sanction the counsel. The Court's denial of the motion was a denial of Appellant's Fifth and Sixth Amendment right to counsel and Fourteenth Amendment right to due process. Where counsel is delinquent, "sanctions must be taken against counsel, not the defendant." State v. Wisenbaker, 428 So. 2d. 790 (La. 1983).

In Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932), the trial judge first appointed all members of the local bar to serve as counsel for the accused charged with multiple rape. Until the morning of the trial no lawyer had been further designated to represent the accused when two of the appointed lawyers volunteered. The Court held that the "defendants were not accorded the right to counsel in any substantial sense" and the convictions were reversed.

In the case before the Court, the result was the same as if Appellant had been put to trial on the day he was appointed counsel. The appointed counsel had made no preparation and had not had sufficient opportunity to consult with Appellant. An accused has been denied his constitutional right to counsel, if he does not have sufficient opportunity to confer and consult with counsel or if counsel does not have adequate preparation opportunity. Myers v. State, 296 So 2d 695 (Miss. 1974); Windom v. Cook, 423 F.2d. 721 (Fifth Cir. Miss. 1970); Hintz v. Beto, 379 F.2d 937 (Fifth Cir. Tex. 1967).

The discovery violation also asserted as a ground for continuous was the State providing Appellant on the morning of trial the results of forensic discovery request. The information then provided did not include the result of the requested fingerprint analysis on the bags containing the contraband (T-45).

The prosecutor responded that he had only that morning leaned that the bags had been submitted for fingerprint analysis T-46), that the results had apparently been in the hands

of law enforcement authorities but not furnished to the prosecutor's office, that the result of the fingerprint analysis request was (T-47) "basically" that there were "no latent prints of value."

The comment that there were "no latent prints of value" was not a denial that there were latent prints. The words "of value" would have been omitted if there had been no latent prints. The addition of the words "of value" meant either that the prints on the bag were unclear or that they were of person or persons unknown to the fingerprint technician.

Had the Court granted the motion for a continuance, Appellant's counsel would have had time to inquire of the technician about this, to determine which databases, if any, were consulted to try to identify any readable fingerprints, and to submit any readable fingerprints to such bases as may be available to identify the person whose fingerprints were on the bag.

The need for the delay was caused by the State's tardy disclosure of forensic information (on the morning of trial) and that only after the Appellant called the Court's attention to the fact that the discovery had not been provided.

U.R.C.C.C. 9.04 provides that continuances are an appropriate method of dealing with discovery violations. Indeed the violation is waived if there is no request for a continuance. Cole v. State, 525 So.2d. 365 (Miss. 1987). In the case before the Court,

the fingerprint technician was not made available by the State for interview or cross-examination. Continuance was the proper avenue for the Court to follow, because the State must disclose all exculpatory evidence (U.R.C.C.C.9.04), and it is the prerogative of a defendant, not the State, to determine which evidence is exculpatory. Foster v. State, 493 So.2d 1304, 1308 (Miss. 1986).

> "prosecuting attorneys should make available to attorneys for defendants all such material in their files and let the defense attorney determine whether or not the material is useful in the defense of the case.
>
> Hentz v. State, 489 So.2d 1386, 1388 (Miss. 1986).

II.

THE COURT ERRED IN REFUSING PROPOSED JURY INSTRUCTION D-6

Appellant elects not to respond to argument II of the Appellee's brief but does not concede the issue.

III.

THE COURT ERRED IN OVERRULING APPELLANT'S HEARSAY OBJECTION TO TESTIMONY OF WILL PETERSON

After Appellant's objection was overruled, Mississippi Bureau of Narcotics agent Will Peterson testified on redirect examination as follows (T-101):

> Q. (By Mr. Brooks) Agent Peterson, before Mr. Collins' objection, I asked you what was the result of the fingerprint examination that you submitted to the Crime Lab?
> A. According to their report, there was no prints of value found on the baggies, on the submission.

Appellee asserts that this statement was not hearsay, but not that it is encompassed in an exception to the hearsay rule.

Hearsay (MRE 801):

> is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Appellee (p.15, Appellee's brief) asserts that the statement was offered to prove something other than the truth of the matter asserted in the statement that there were "no fingerprints of value" on the baggie. It is obvious that the primary purpose of introducing this statement was to show that there was no evidence that any person other than Appellant touched the baggie. (A juror would likely misinterpret the statement as meaning that there were no fingerprints on the baggie (see argument I). But there can be no doubt that the statement was introduced to prove the truth of the matter asserted. A party's claim that it is using an out-of-court statement for some purpose other than proving the truth of the matter asserted should be closely scrutinized by the court. Temple Construction v. Naylor, 351 So.2d 1350 (Miss. 1970).

In the case before the Court, the State made no such claim at trial, and the trial court held the statement admissible, not because it was nonhearsay, but because Appellant had opened the door to its admission by bringing up the topic first. Appellee's claim that the State offered the out-of-court statement for a purpose other than giving evidence of the truth of the matter asserted first appeared in its brief and is not found in the record.

The court's overruling the hearsay objection was error because one cannot open the door to hearsay testimony. Murphy v. State, 453 So.2d. 1290 (Miss. 1984).

The verdict should be overturned.

RESPECTFULLY SUBMITTED,

KENDALL WAYNE PILGRIM,
APPELLANT

BY: Edmund J. Phillips Jr.
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CERTIFICATE OF SERVICE

I, EDMUND J. PHILLIPS, JR., Attorney for Kendall Wayne Pilgrim, Appellant, do hereby certify that on this date a true and exact copy of the Reply Brief to Appellee's Brief was mailed to:

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KENDALL WAYNE PILGRIM
APPELLANT

DATED, this the 24th day of February, 2009.

EDMUND J. PHILLIPS, JR.
Attorney for Appellant