IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CR-0003-NS-C

2008-KA-531-COA

KENDALL WAYNE PILGRIM

VS.

STATE OF MISSISSIPPI

Appeal from Circuit Court of Neshoba County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument IS requested

CERTIFICATE OF INTERESTED PERSON

KENDALL WAYNE PILGRIM

v.

STATE OF MISSISSIPPI

NO. 2008-CR-0003-NS-C

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 the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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APPELLANT

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STATEMENT OF THE CASE

Kendall Wayne Pilgrim appeals his conviction from the Circuit Court of Neshoba County, Mississippi, of unlawfully and feloniously having in his possession and under his conscious control a Schedule II controlled substance, namely methamphetamine, in an amount of at least .10 grams but less than 2 grams, in Neshoba County, Mississippi, contrary to and in violation of Section 41.29-139(c)(1)(A), Miss. Code Ann. (1972), and sentenced as a second offender, he having previously been convicted of a felony crime of Possession of Methamphetamine, to serve a term of sixteen (16) years with the Mississippi Department of Corrections.

Mississippi Highway Patrolman Harbert Johnson testified that he and two other patrolmen were conducting a roadblock at an intersection when Appellant approached in a van, that he saw something black come from the driver's side window of the van, that he secured Appellant and drove to the point where he saw the black object come out of the window and found what he believed to be contraband narcotics on the ground.

Other witnesses testified as to the chain of custody of the narcotics and the identification of the drug as a small amount of methamphetamine.

SUMMARY OF THE ARGUMENT

1. A court should grant a continuance to prevent denial of a fair trial.

2. An accused is entitled to a jury instruction which gives his theory of the case.

3. A witness, in broaching a subject, does not "open the door" to hearsay testimony on that subject.

ARGUMENT

I.

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

On the day set for trial, Appellant's counsel asked the Court for a continuance. A conference on the motion was held prior to jury selection, out of the presence of the jury venire (T-44 et seq.):

> MR. COLLINS: Your Honor, early in the week last week, it was my understanding that Mr. Pilgrim had retained Mitch Moran to represent him in the case that is now before the Court, and I began to try to reach Mr. Moran to verify that. I was unsuccessful. Some others, apparently, were successful in reaching him.
> But when I arrived at Court this morning, I believed him to be the defense lawyer for Kendall Wayne Pilgrim.
> Your Honor, I am here in the posture as an appointee public defender, and if the Court, which it apparently already has ruled we're going forward, I'm going to defend Mr. Pilgrim to the best of my ability.
> But, Your Honor, we have not conferred in a meaningful way that I normally would have with somebody that I thought I was going to trial with this morning.

I do have one other issue that I consider to be salient I need to bring up. And when I read the discovery this morning prior to trial, I noticed that there was some evidence submitted and some results requested from the Crime Lab that were, to my reading of the discovery during the voir dire process, I didn't see any results on fingerprint analysis request.
Your Honor, that would be an objection we would have in going forward to trial. That we have not been furnished discovery on that particular forensic request.

Mr. Brooks: Your Honor, first, I'd like to point out that on Wednesday, March 5th, Your Honor's plea and motion day, when the criminal docket was called, Mr. Collins, on behalf of the public defender's office, announced that this case would be for trial.
So he didn't announce that Mitch Moran represented the Defendant or anything, he just announced this case would be for trial, and it was then set for today.
As to the request for discovery, Your Honor, I just this morning myself learned that the plastic bags were submitted that contained the alleged methamphetamine were submitted for fingerprints. I just got a glimpse of the report myself. I will show it to - - have the officer show it to him. And never furnished it to our office, but it was basically no latent prints of value.
THE COURT: All right.
MR. BROOKS: If you want to show - - to see that - - Will Peterson has it, Chris.
THE COURT: All right. Mr. Collins, any further response? And then I'll rule.
MR. COLLINS: Yes, sir. I've got a client that apparently has the resources to privately retain a lawyer and while, obviously, we haven't had a chance to discuss it, it may be his desire to retain his own expert on the issue of fingerprints also. I don't know, but, Your Honor, he would be prejudiced to not having the opportunity to pursue that.

The Court denied the motion (T-49-51):

The Court has had some information about employment of other counsel and that's rally of no consequence now, I believe. The jury is out there. They've been brought here for trial, and Mr. Collins, I understand your situation and Ms. Branning, but I believe that on putting this on all fours, that nobody has been prejudiced as far as announcement. So the case will go forward.
As far as the discovery, any violations, it's really academic's of no moment. Mr. Brooks said that no prints, not latent prints were lifted.

As whether there be a violation. I'll certainly give you opportunity this morning to confer with those officials and glean whatever information you thought would be probative.
MR. COLLINS: Well, Your Honor, I didn't know - - is there - - is the Crime Lab person here that conducted the examination? They're not subpoenaed, are they?
THE COURT: What about it, Mr. Brooks?
MR. BROOKS: No, like I say, we wasn't aware of them until this morning ourselves.
THE COURT: Okay. So I'll let you state any further objection, but with that announcement, I don't see that there's any prejudice. I'll let you make any further motion right now that you wish.
MR. COLLINS: Thank you, Judge. I'm not a fingerprint expert at all. But in the event that Mr. Pilgrim hired an expert and that expert found fingerprints, we might find out who this, who this bag really belonged to.
THE COURT: All right. The question would be whether there's anything that would be exculpatory. So if someone wants to tell me that there might be something there. The State have anything that would show any exculpatory evidence?
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.
THE COURT: Okay. And likewise the Court under girded this information that Mr. Mitch Moran might be presenting the Defendant by my calling him yesterday and not getting him, but talking to his wife, and just telling her that if he represented him that the case would be going forward today, and to let me know. And I heard no further information from him. Okay, anything further from the Defendant?

The trial consisted of testimony by four prosecution witnesses. The defense offered no evidence.

Appellant requested a continuance for two reasons - - (1) his counsel was unprepared for trial because he reasonably believed that appellant had employed private counsel: and, (2) a discovery violation by the prosecution.

A request for a continuance may be grounded on the idea that it's required to provide an accused a fair and impartial trial. In such a circumstance the failure to grant the request is reverse error. Martin v. State, 312 So. 2d. 5 (Miss. 1975); Barnes v. State, 249 So. 2d 383, 385 (Miss. 1971); Coker v. State, 82 Fla. 5, 89 So. 222 (1921). The Mississippi cases cited above hold that Section 26 of the Mississippi Constitution entitles an accused to a fair and impartial trial and that this entitlement includes a reasonably well prepared defense attorney.

In the case before the Court, the defense counsel had been appointed in forma pauperis by the trial court because the Appellant was indigent and could not afford to employ counsel to defend him. That attorney declared to the court that he had not prepared for trial and had not even conferred with Appellant in a meaningful way about the case (T-45), because he believed that Appellant had employed private counsel. That this belief was not falsely asserted is shown by the fact that the trial court and the prosecutor had likewise been so informed.

The right to counsel of the Fourth and Fourteenth Amendments of the United States Constitution includes the right to confer and consult with counsel; Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321 (1940); and the opportunity for counsel to prepare for the matter in controversy. Lankford v. Idaho, 500 U.S. 110, 114, 111 S. Ct. 1723 (1991); Hintz v. Beto, 379 F. 2d. 937 (5th Cir. Tex. 1967).

In the case before the Court, the trial court elected to put Appellant to trial with unprepared trial counsel. If the court believed the trial counsel to be dilatory or lackadaisical in preparation, the Court had the option of imposing sanctions on the counsel. The effect of this choice was to deny Appellant a fair trial.

The discovery violation was the State providing Appellant on the morning of trial the results of forensic discovery request. In addition the information then provided did not include the result of the requested fingerprint analysis on the bags containing the contraband (T045). The prosecutor responded that he had only that morning learned 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."

This was inadequate. It did disclose only that Appellant's prints were not on the bag, but did not disclose whether other persons' prints were on it, and if so whether they had been submitted to various fingerprint databases for identification. The timing of the

disclosure (during the motion argument) prevented Appellant from inquiring of the reporting scientist or technician about these matters and from issuing a subpoena to him for the trial.

Appellant was entitled to this information prior to trial, and failure to grant the motion for continuance was error. Box v. State, 437 So. 2d 19 (Miss. 1983).

For both reasons, the denial of a continuance was error and the verdict should be overturned.

II.

THE COURT ERRED IN REFUSING PROPOSED JURY INSTRUCTION D-6

The trial court refused jury instruction D-6, which read as follows:

> The Defendant is charged by indictment with the crime of possession of methamphetamine. To constitute a possession, there must be sufficient facts to warrant a finding beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, that a defendant was aware of the presence and character of the methamphetamine, and was intentionally and consciously in possession of same. Where the particular chemicals are not in the actual physical possession of a defendant, there must be sufficient facts to establish beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence, that the particular substance involved was subject to the defendant's dominion or control.

This instruction is not duplicative of other instructions and is supported by the evidence. A defendant is entitled to a jury instruction which gives his or her theory of the case. Young v. State, 451 So. 2d 208 (Miss. 1984); De Silva v. State, 91 Miss. 776, 45 So. 611 (1908). Indeed, where there is serious doubt whether a requested jury instruction

should be given, the doubt should be resolved in favor of the accused. Lenard v. State, 552 So. 2d. 93 (Miss. 1989); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980).

Refusal to grant such instructions is reversible error. The verdict in the case before the Court should be overturned

III.

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

Mississippi Bureau of Narcotics agent Will Peterson, chain of custody witness for the State, testified on cross-examination and then on redirect examination as follows (T-95):

> Q. In this instant, when you took possession of the exhibit from Trooper Johnson, did you put on latex gloves before you handled it?
> A. I did.
> Q. And the reason you did that is because when you submitted this evidence for analysis, you requested both drug analysis and also fingerprint analysis?
> A. That's correct.
> MR. COLLINS: No further questions.
> THE COURT: Redirect?
> REDIRECT EXAMINATION BY MR. BROOKS:
> Q. Agent Petterson, what was the result of that fingerprint request?
> A. The Crime Lab did not find any - - -
> MR. COLLINS: Your Honor, I object to hearsay testimony here.
> MR. BROOKS: Your Honor, he opened the - -
> THE COURT: I'll overrule the objection.

After further argument outside the presence of the jury (T-98):

> Judge, talk about highly prejudicial, it would be highly prejudicial to allow someone who has not been demonstrated as an expert, to offer hearsay testimony.

the trial court reiterated the overruling of the objection (T-98):

When you open the door, there's an invitation that it's something like you're not inviting to go across the threshold. And I think Mr. Brooks is correct, as far as the door being opened about the existence of fingerprints and what was done on the scene with the latex gloves.

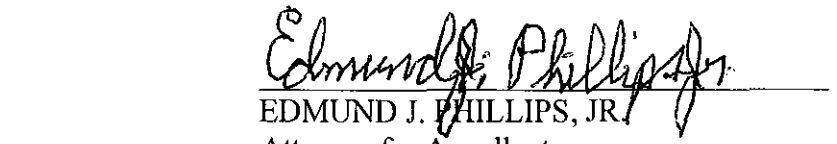
The Court's ruling was error because one cannot open a door to hearsay testimony. Murphy v. State, 453 So. 2d 1290 (Miss. 1984).

The verdict should be overturned.

CONCLUSION

The verdict must be overturned.

RESPECTFULLY SUBMITTED,

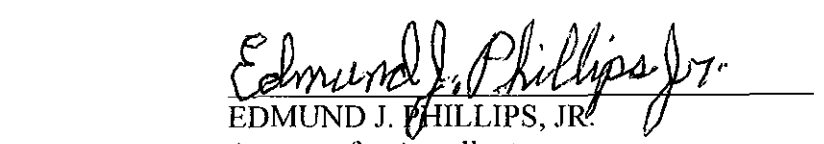


EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Vernon R. Cotton, 205 Main Street, Carthage, Mississippi 39051, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: December 17, 2008.



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