

COPY

IN THE PANOLA CIRCUIT OF THE STATE OF MISSISSIPPI

JAMES LEWIS FILLYAW

APPELLANT

FILED

V.

AUG 14 2008

NO. 2008-KA-00542-COA

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

W. Daniel Hinchcliff, MS Bar No. [REDACTED]

301 North Lamar Street, Suite 210

Jackson, Mississippi 39201

Telephone: 601-576-4200

Counsel for James Lewis Fillyaw

IN THE PANOLA CIRCUIT OF THE STATE OF MISSISSIPPI

JAMES LEWIS FILLYAW

APPELLANT

V.

NO. 2008-KA-00542-COA

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.

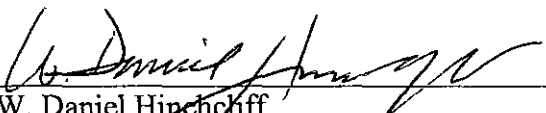
1. State of Mississippi
2. James Lewis Fillyaw, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Jimmy McClure, Circuit Court Judge

This the 14th day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


W. Daniel Hinchcliff
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
STATEMENT OF COUNSEL	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES

<i>Lindsey v. State</i> , 939 So. 2d 743 (Miss. 2005)	5
---	---

IN THE PANOLA CIRCUIT OF THE STATE OF MISSISSIPPI

JAMES LEWIS FILLYAW

APPELLANT

V.

NO. 2008-KA-00542-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

None

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Panola County, 2nd District, Mississippi, and a judgement of conviction for the crime of possession of precursors used in the manufacture of a controlled substance against James Lewis Fillyaw following a jury trial commenced on March 11, 2008, Honorable James McClure III, Circuit Judge, presiding. Mr. Fillyaw was sentenced to a term of ten (10) years, with five (5) years suspended after serving five (5). Mr. Fillyaw is currently incarcerated with the Mississippi Department of Corrections.

FACTS

Testimony at trial began with Craig Sheley [“Sheley”], a certified police officer, currently serving as a drug court administrator. Sheley was at the WalMart in Batesville, Mississippi buying dog-food when he observed two men he believed to be purchasing precursors used to make methamphetamine. (T. 23-24) As he got to checkout he saw only one of the men, which he felt was strange. After he left, he saw one of the men get into the passenger side of a Yukon suv. He called

the sheriff, "Shot" Bright.(T. 25-26) Sheley then went to the Murphy USA to buy gas and again saw the vehicle with both men. At this point police arrived.

He thought it was the other man, Shannon Looney ["Looney"], that bought the precursors. Looney was the passenger.

Hugh "Shot" Bright got the call from Sheley. He went to the Murphy USA, where he saw the two men and the arrival of a police unit. He talked to Fillyaw at the scene.

The next witness Brandon Moses, a patrolman with the Panola Police Department, testified to responding to a dispatch advising two men purchasing precursors. (T. 37-39) When he arrived the vehicle contained only the driver. The passenger was at the bathroom. Fillyaw gave permission to search the vehicle, whereupon a number of items were taken into evidence. The items included two WalMart receipts, both that day and both for pills containing pseudoephedrine. Police also found a bottle of "Heat", hydrogen peroxide, lithium batteries, zip-lock bags, and plastic tubing. (T. 40-47)

Cross examination revealed two .22 rifles in the Yukon. The receipts were at different times, 5:09 p.m. and 5:54 p.m. Cross examination also brought out that Looney said that he and Fillyaw planned to cook meth. (T. 51-52) He knew the lithium batteries were found in the glove box, but not where the other items were located. He claimed that "they [Looney] later stated" that they intended to make methamphetamine.(T. 52)

Jason Chrestman ["Chrestman"], commanded the Panola County narcotics task Force. He made the list of items taken as evidence. The plastic hose, the lithium batteries and the "Equate" pseudoephedrine were found in the glove box where Looney was seated. (T. 61-64) The "Sudafed" and hydrogen peroxide were found in the console. (T. 63) The "Drain-Out" was in the back seat behind the driver. (T. 63) The location of the two receipts was not recalled. He submitted three

items to the crime lab.

He testified, without objection, that pseudoephedrine and lithium are precursors, and that the tubing could be used in the manufacturing process. (T. 67) Later, he added that “Drain-Out was also a precursor. (T. 77)

Chrestman agreed , in response to questions by defense counsel, that all of the items have common and lawful uses. (T. 69-70) He acknowledged that no methamphetamine was found. The items locations was iterated.

Redirect elicited that these items when found together usually are associated with manufacture. (T. 79) The evidence was found throughout the vehicle “owned” by Fillyaw.

Teresa Hickman, a forensic scientist was qualified as an expert in the identification of controlled substances. (T.85) She then identified the pseudoephedrine and sodium hydroxide, the precursors found in the indictment. (T. 88-89) She told the jury that these items were precursors and explained the ir use in manufacture of methamphetamine. (T. 90-91)

On cross examination she concurred that the items had lawful every day uses. (T. 92-93)

Zabe Davis, an agent with the “Narcotics Task Force” told the jury he had training in methamphetamine labs. Although not qualified as an expert, he testified to the use of sodium hydroxide and hydrogen peroxide in the cooking process and the purpose of pseudoephedrine. (T. 97-103)

On cross and then redirect he stated no methamphetamine was found, but then said is normal to find precursors before the process is begun. (T. 111-112)

Shannon Looney, the co-indictee, identified Fillyaw as his cousin. He went to Fillyaws home that day and they “decided to do a cook.” (T. 115) They went to the Batesville WalMart. Fillyaw was to acquire the pseudoephedrine. (T. 116) Looney was to purchase the drain crystals and

hydrogen peroxide. (T. 117) They were caught at the gas station. Loney conceded he had two prior crimes. (T.1230

Cross examination attempted to impeach Looney with his plea in drug court, thereby potentially obviating the significant time he was faced with. (T. 124-128) redirect pointed out that if he fails to complete drug court, he has to do his full sentence. Thereupon, the State rested. (T. 139)

After the usual motion, Fillyaw took the stand in his own defense. He was planning on going hunting when Looney came by. He was “sniffing and draining” and thus went, together with Looney, to WalMart (T. 146-147) He purchase Sudafed, peroxide and baby powder. (T. 147) The other items were in his truck when he got back. While getting gas the police came up. As he had nothing to hide, he consented to a search. (T. 151) He specifically denied any intent to cook. (T. 152)

The State elicited that Fillyaw professed to have no knowledge of the other items, except the tubing, which Looney pulled out of his “britches.” (T. 153) He admitted prior use of meth, but denied ever cooking. However, he also acknowledged he paid Looney to purchase the “heat.” (T. 156) He confirmed he was purchasing the Yukon.

Both sides rested. The case was then sent to the jury, after a conference on the jury instructions. The verdict was guilty.

SUMMARY OF THE ARGUMENT

None

ARGUMENT

None

STATEMENT OF COUNSEL

1. Counsel for the Appellant does hereby represent to the Court pursuant to *Lindsey v. State*, 939 So. 2d 743 (Miss. 2005), that counsel diligently searched the procedural and factual history of this criminal action and scoured the record¹ searching for any arguable issues which could be presented, in good faith, to the Court on Mr. Fillyaw's behalf, and upon conclusion, has found none.

2. The matters considered, reviewed and included in counsel's search were: (a) the reason for the arrest and the circumstances surrounding the arrest of James Lewis Fillyaw; (b) any possible violations of Mr. Fillyaw's right to counsel; (c) the entire trial transcript and content of the record; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; (h) possible misapplication of the law in sentencing; (i) the indictment and all the pleadings in the record; and any possible ineffective assistance of counsel issues.

3. Counsel further confirms that he has, as of the date of the filing of this brief, mailed by first class mail, postage prepaid, a copy of this brief and correspondence informing Mr. Fillyaw that counsel finds no arguable issues in the record and that Mr. Fillyaw has a right to file a *pro se* brief.

4. Counsel for appellant request, both herein and by separate filing, moves this Court to grant Mr. Fillyaw an additional 40 days of additional time in which to prepare and file a *pro se* brief, should he desire to do so.

5. Counsel stands ready to prepare supplemental memoranda of law on any issues requested by the Court.

¹The transcript of the voir dire proceedings were not included in the record. This writer consulted with the trial counsel, who averred that he did not request transcription of voir dire as he saw no errors, made no objections and did not raise or believe there existed any reason to raise *Batson*.

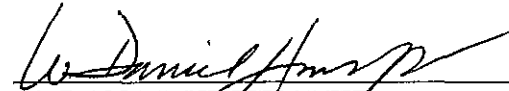
CONCLUSION

There are no issues that counsel can in good faith present to the Court in this appeal.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [REDACTED]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

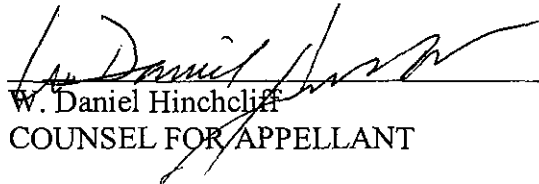
I, W. Daniel Hinchcliff, Counsel for James Lewis Fillyaw, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Jimmy McClure
Circuit Court Judge
Post Office Box 523
Senatobia, MS 38668

Honorable John W. Champion
District Attorney, District 17
365 Loshier Street, Suite 210
Hernando, MS 38632

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 14th day of August, 2008.


W. Daniel Hinchcliff
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200