IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FELIX PERKINS — APPELLANT

V. — NO. 2008-KA-01387-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. Felix Perkins
4 Laurence Y. Mellen, and the Coahoma County District Attorney's Office
5. Honorable Charles E. Webster

THIS 3rd day of February, 2009.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Felix Perkins, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma Count, Mississippi and a judgment of conviction for the crime of sale, transfer or delivery of a controlled substance (cocaine) within 1500 feet of a church against the appellant, Felix Perkins. Tr. 139, C.P. 28-29, R.E. 15. Perkins was subsequently sentenced to serve thirty (30) years without the possibility of parole as an habitual offender under Miss. Code Ann. §99-19-81 in the custody of the Mississippi Department of Corrections[1]. Tr. 152-53, C.P. 30-32, R.E. 17. This sentence followed a jury trial on July 24, 2008, Honorable Charles E. Webster, presiding. Perkins is currently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on August 31, 2006, James Hollingsworth, a confidential informant for the Clarksdale Police Department, was on an undercover "buy-bust" operation for the police department. Tr. 55-56. Hollingsworth's car was outfitted with audio and video surveillance equipment. Tr. 58.

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[1]The trial judge elected not to impose any additional sentence based on the enhancement allowed in Miss. Code Ann. §41-29-142 for the sale occurring near a church. Tr. 152.

After driving in Clarksdale for fifteen to twenty minutes, Hollingsworth approached an African-American male, whom he identified as the appellant, Felix Perkins, who approached his car and asked what he wanted. Hollingsworth asked for "40 hard" of crack cocaine and Perkins requested that he drive around the block. Hollingsworth drove around the block and when he returned the appellant approached his window and asked if he was a confidential informant. Tr. 92. Hollingsworth denied being an informant, and asked to see the substance to confirm that it was indeed cocaine. He then purchased it from Perkins for $40. Tr. 93.

Hollingsworth then returned to the Clarksdale-Coahoma County Airport with the alleged crack cocaine and turned it over to Sergeant Ricky Bridges and Corporal Joseph Wide of the Clarksdale Police Department. Tr. 60, 76. Following a search of Hollingsworth and his car, the substance was placed in the Clarksdale Police Department's evidence locker. Tr. 61. Following placement in the evidence locker, the substance was sent to the Mississippi Crime Laboratory for testing on September 25, 2006, almost one month after the substance was purchased. Tr. 78. Teresia Hickmon, a forensic scientist at the Mississippi Crime Laboratory, tested the substance and found that it did indeed contain .55 grams of cocaine base. Tr. 85.

Perkins took the stand in his own defense and testified that he did not sell Hollingsworth cocaine but, in fact, sold him sheetrock in an attempt to get a free $40. Tr. 107. That is why he asked Hollingsworth to make the block, as he knew the man would not buy something he saw Perkins pick up off the ground. Tr. 104. Perkins explained that he

knew it was a crime to sell a counterfeit drug, so inquired if Hollingsworth was an informant. Tr. 107. Perkins testified that he was a former crack addict and was not sure the man would believe the sheetrock was cocaine, but the man paid him $40 and drove off. Tr. 104-05.

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 Perkins actually sold cocaine to a violent prior convicted felon within 1500 feet of a church. There were numerous factual discrepancies present in the evidence admitted which did not support the jury's verdict, and Perkins is therefore entitled to a new trial. Finally, in the alternative, Perkins was clearly deprived of effective assistance of counsel. Although counsel presented a theory of defense that Perkins sold counterfeit drugs the informant, counsel failed to present any jury instructions to allow the jury to find Perkins guilty of that lesser offense. Perkins should be granted a new trial with competent counsel.

ARGUMENT

ISSUE NO. 1: WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Perkins first asserts that the verdict of guilty to selling cocaine was clearly against the overwhelming weight of the evidence. Trial counsel raised a claim regarding the weight of the evidence in his Motion for J.N.O.V. or in the Alternative, Motion for a New Trial. C.P. 33., R.E. 20. The trial court denied this motion. C.P. 35, R.E. 22. This was error.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss. 1989), citing *Groseclose v. State*, 440 So.2d 297, 300 (Miss. 1983); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

In the case sub judice, there were several holes in the evidence which conveys serious doubt on the jury's verdict. For example, the exact location of the sale was never sufficiently established. Sergeant Bridges testified the buy occurred on the corner of Sixth and Barnes. Tr. 70. This is crucial, as Bridges calculated the distance to a nearby church from this location. However, Bridges admitted he did not actually witness the transaction. Tr. 72. Therefore, he could not accurately know the location to the church. This was a material element of the offense the jury was required to find existed beyond a reasonable doubt or find the defendant not guilty. C.P. 51. The jury was not given the option of finding Perkins guilty of simply selling cocaine without reference to his location.

The actual informant, Hollingworth, testified the buy occurred on the intersection of Sixth and Page. Tr. 97. There was no testimony on how far the church was from this location. Furthermore, Perkins testified the incident occurred on Prince Street. Tr. 105. To further complicate the proof on this element, Corporal Wide testified in rebuttal that he

believed the sale occurred on the corner of Sixth and Grant. He was not sure, but only knew it was somewhere on Grant Street. He also did not witness the exact location of the sale. Tr. 112.

The verdict is clearly against the weight of the evidence on this element. The State chose to allege this in the indictment as an element of the offense. C.P. 3, R.E. 9. The jury was also instructed that finding the buy was within 1500 feet of a church was an element of the offense. C.P. 51, R.E. 12. The State was therefore required to prove this beyond a reasonable doubt. *Gray v. State*, 728 So.2d 36 (¶176-77) (Miss. 1998). It is immaterial that the court did not sentence Perkins based on this enhancement. Tr. 152. No reasonable jury could put any faith into the evidence presented detailing where this transaction occurred. Perkins is entitled to a new trial.

In addition to the location of the transaction, there were also other problems with the evidence. The informant, Hollingworth, was a paid,[2] violent, prior convicted felon, having served 20 years for armed robbery. Tr. 56-57, 72, 96. His credibility was questionable, as he was compensated only if the video was good, not if the target was eventually convicted. It did not matter what substance he purchased as long as the video was of good quality. Tr. 71. The search of Hollingsworth was not captured on tape, nor was the transfer of the substance to the officers. Tr. 64, 114. Neither of the two officers monitoring the informant personally saw the transaction. Tr. 59, 112.

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[2] However, it should be noted that Sergeant Bridges could not actually remember how much Hollingsworth was paid. Tr. 71.

Sergeant Bridges admitted no field test of the substance was conducted at the post-buy meeting. Tr. 77. The substance sat in a police safe for almost a month before it was sent for testing. Tr. 78. Corporal Wide testified fake or counterfeit drugs that are recovered are also taken to the police station and placed in property, although in a "different place." Tr. 113. It is clear that sheetrock is not a controlled substance. Tr. 90. Hollingworth could not even testify with any degree of certainty that substance was actually crack cocaine. Tr. 97. He admitted it looked like cocaine, but he was not sure and was no expert. Tr. 98. Even Sergeant Bridges testified Hollingsworth simply gave him the substance, which he labeled and placed in the evidence locker. Tr. 60-61.

Although in rebuttal Corporal Wide testified he knew the difference between the texture of sheetrook and cocaine (Tr. 111), when asked if he ever handled the substance, Wide testified he looked at it.

> A. Yes, I saw it when he brought it back.
> Q. And who did he give it to?
> A. He gave it to Sergeant Bridges.
> Q. Did you ever handle it?
> A. Yes, I looked at it. I just looked at it when he had it; I looked at it when he returned it back to the location.

Tr. 113.

Finally, Perkins himself took the stand to explain that he was simply trying to make a quick $40 by selling sheetrock to an unsuspecting crack user. Tr. 107. He explained that he needed to send the buyer around the block so that he would not see Perkins pick up the sheetrock from the ground. Tr. 104. This testimony, combined with the weak evidence

presented by the State, was simply not enough to convict Perkins. The Crime Lab may have tested a piece of crack cocaine, but the weight of the evidence does not suggest Perkins delivered or sold crack cocaine to Hollingsworth. Perkins is entitled to a new trial.

ISSUE NO. 2: IN THE ALTERNATIVE, WHETHER THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

In the alternative, Perkins would also assert that he was deprived of a fair trial due to ineffective assistance of counsel. Counsel presented a theory of defense based on Perkins's testimony that he sold sheetrock to the CI, not cocaine. However, counsel failed to submit any type of jury instruction to support this theory of defense. Counsel did not object to the form of the verdict instruction (S-2), which gave the jury only the option of finding Perkins guilty of selling cocaine next to a church, or finding him not guilty of any crime. Tr. 120, R.E. 13.

Strategy

Even if appropriate, instructions must be requested by counsel. *Poole v. State*, 94 So.2d 239, 240 (Miss. 1957). It is not usually a trial court's duty to prepare instructions for either party. *Samuels v. State*, 371 So.2d 394, 396 (Miss. 1979), and *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss. 1995). Since counsel did not request an instruction on the theory of the case, the issue should probably be reviewed on a plain error standard which requires an error that results in "a manifest miscarriage of justice" or an adversely affected fundamental or substantive right. *Gray v. State*, 487 So.2d 1304, 1312 (Miss. 1986), *Gray v. State*, 549 So.2d 1316, 1321 (Miss. 1989), and *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991).

Failure to seek proper jury instructions deprives a criminal defendant of the fundamental constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Chinn v. State*, 958 So.2d 1223 (¶13) (Miss. 2007). It is clear from the testimony that Perkins knew that selling sheetrock as cocaine would be a crime. Perkins provided a basis for the instruction when he explained that is why he asked Hollingsworth if he were an informant.

> A. ... It was sheetrook and, um, I just asked him for me if he was an informer because I know for a fact that if I sold him sheetrock I'm still breaking the law because I would be selling a counterfeit substance.
> Q. You admit you were breaking the law that day?
> A. Yes, yes, I definitely admit that I sold sheetrock.

Tr. 107.

Miss. Code Ann. §41-29-146 (Supp. 1982), makes it a crime to sell any substance falsely represented to be a controlled substance. Subsection (3) of the statute states that anyone convicted of selling a counterfeit drug is guilty of a misdemeanor. Perkins was indicted for selling cocaine as an habitual offender which an enhancement of conducting the transaction within 1500 feet of a church. Perkins was facing a possible sentence of 60 years without parole. Under §41-29-149(c), the maximum penalty Perkins faced under conviction was up to one year in the county jail and/or a $1,000 fine. Under this circumstance, it can not be considered reasonable trial strategy to go for a straight acquittal, and not submit this lesser offense instruction.

The Mississippi Supreme Court held it was reversible error to deny a lesser non-included offense instruction of selling a counterfeit drug when there was evidence to support

the instruction submitted at trial. In *Green v. State*, 884 So.2d 733 (¶11-15) (Miss. 2004), the Court acknowledged that selling a counterfeit drug was not a lesser-included offense to sale of cocaine, but was a lesser offense. Since the defendant testified he sold "bunk" and not cocaine, and the undercover agent is even heard suggesting he thought it was fake, there was sufficient evidence to grant the instruction. *Id.* In the case at bar, Perkins testified the substance was sheetrock, not cocaine. Since there was no definitive testimony from the informant or the other officers present that the substance was in fact cocaine[3], Perkins would have certainly been entitled to the instruction had his counsel requested it.

The benchmark for judging any claim ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Madison v. State*, 923 So. 2d 252 (¶10) (Miss. App. 2006), this Court reiterated that *Strickland* is the standard, as the Mississippi Supreme Court

> applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court must examine the totality of the circumstances in determining whether counsel was effective. *Id.*

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[3]No field test was conducted at the post-buy meeting. Tr. 77.

If the issue of ineffective assistance of counsel is raised on direct appeal, the Court will look to whether: "(a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed." *Madison*, 923 So.2d at ¶11, citing *Read v. State*, 430 So.2d 832, 841 (Miss. 1983).

The appellant stipulates through present counsel that the record is adequate for this Court to determine this issue and that a finding of fact by the trial judge is not needed. "When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." *Roach v. State*, 938 So.2d 863, 870 (Miss.App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. App. 1999). Under the facts of this case, the trial judge had a duty to make sure the jury was instructed on the defense theory of the case, even if counsel failed to do so. The ineffectiveness was apparent from the record and the trial judge should have taken some action to protect Perkins's constitutional rights.

If this Court finds, however, that the record does not affirmatively show ineffective assistance of counsel, Perkins respectfully requests the issue be dismissed without prejudice to allow appellant to supplement the record with additional evidence on post-conviction. See *Walton v. State*, No. 2006-KA-01065-COA (¶15) (Miss. App. November 13, 2007), *aff'd*, *Walton v. State*, No. 2006-CT-01065-SCT (Miss. November 13, 2008).

Perkins's jury was not given the opportunity to find him guilty of the offense he admitted to committing on the stand. Unlike *Enlow v. State*, 878 So.2d 1111 (¶14) (Miss.App. 2004), there was an evidentiary basis for the instruction. This Court has held that even the "flimsiest of evidence" is sufficient to grant an instruction on a defendant's theory of the case. *Miller v. State*, 733 So.2d 846 (¶7) (Miss.App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss.App. 2000).

The jury faced the option of finding him guilty of selling cocaine next to a church, or letting him go home. A properly instructed jury is a fundamental right, and counsel's failure to seek the same, unless strategy clearly indicated otherwise, would infringe on a defendant's constitutional right to a fair trial. *Green*, *supra*, at ¶11-15, Sixth and Fourteenth Amendments to the United States Constitution, and Article 2 §26 of the Mississippi Constitution.

Counsel's deficiency leaves no doubt that Perkins was denied his Sixth Amendment right to effective assistance of counsel, as well his rights under Article 3 Section 26 of the Mississippi Constitution. Perkins was clearly prejudiced by counsel's actions, as the jury had no means to find him guilty of the lesser offense.

Given the unique situation Perkins was facing, as well as the defense he provided to the jury, failure to submit a lesser offense instruction in this case can not reasonably be considered trial strategy. Given the nature of the offense and the fact that the substance sat in a evidence locker for a month before even being sent off for testing, there is a reasonable probability that but for counsel's performance, the result of this trial would have been

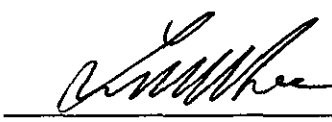
different. *Colenburg*, 735 So.2d at ¶27. Under the totality of the circumstances, Perkins is entitled to a new trial. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995).

CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Felix Perkins is entitled to have his conviction for sale of cocaine within 1500 feet of a church reversed and remanded. Perkins is entitled to a new trial with new counsel with the jury properly instructed.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Felix Perkins, Appellant

By: 

Leslie S. Lee

CERTIFICATE

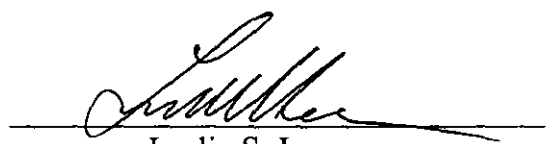
I, Leslie S. Lee, do hereby certify that I have this the 3rd day of February, 2009, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

Honorable Charles E. Webster
Circuit Court Judge
P.O. Drawer 998
Clarksdale, MS 38614

Honorable Laurence Y. Mellen
District Attorney
115 First Street, Suite 130
Clarksdale, MS 38614

Honorable Charlie Maris
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

Mr. Felix Perkins, MDOC# 57209
Central Mississippi Correctional Facility
P.O. Box 88550
Pearl, MS 39208



Leslie S. Lee

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Leslie S. Lee, Miss. Bar No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200