

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COPY

NO. 2008-KA-01540-COA

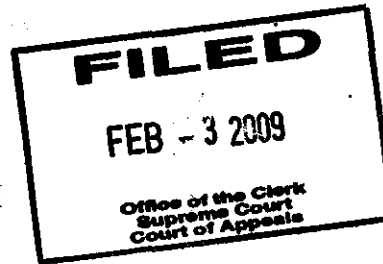
SCOTT M. TANNER

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE



Appeal from the Circuit Court of
Jackson County, Mississippi
Criminal Action No. CI-2004-10857(2)

BRIEF OF APPELLANT

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

CIRCUIT JUDGE PRESIDING:

The Honorable Kathy King Jackson
Circuit Court Judge
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GEORGE S. SHADDOCK

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STATEMENT OF THE ISSUES

1. Whether the substitution of dates of the alleged crime by the State in the Indictment was prejudicial to the Defendant.
2. Whether the trial court erred in overruling the Defendant's Motion to Suppress the previously recorded telephone conversations between the Defendant and the alleged victim.
3. Whether the Verdict of the Jury is contrary to the evidence adduced at trial and the law of this State.

STATEMENT OF THE CASE

1. Procedural history and disposition in the lower court.

The procedural history of the case of the State of Mississippi versus Scott McKinley Tanner, Jackson County Criminal Action No. CI-2004-10857(2), though long in time, is fairly direct and simple to follow. The time length can be attributed to many continuances requested both by the State and the defense, and the fact that Scott Tanner chose to change counsel in 2005.

After his arrest in May 2004, Scott Tanner was indicted by the Jackson County Grand Jury on October 26, 2004, (CP-7), for the alleged sexual battery of Angel Lane, ("AL"), in March and April of 2004, in violation of **Miss.Code 1972, Ann, Sec. 97-3-95(1)(d) (Amend. 1998)**. These events allegedly occurred at AL's home in Vancleve, Mississippi, and at the time of the alleged crimes, Scott Tanner also resided in this home. AL was 11 then 12 years of age in this period, and Scott Tanner was 29 years old.

Pleading "Not Guilty" at his arraignment on November 30, 2004, (CP-12),

Scott Tanner was released on bond and his defense commenced with D. Neil Harris as Scott's counsel. The general Motion for Discovery from the State, (CP-14) was filed on December 6, 2004, and excepting the various continuances, the record is silent until February 13, 2007, when the State filed its Motion in Limine, (CP-48), concerning any discussion of sentencing questions at trial.

At this point leading to trial, the record completed itself. On May 7, 2008, Scott Tanner filed his Motion to Suppress, (CP-77), the audio recordings as made by the Land family of telephone conversations between Scott and AL shortly after the discovery of the alleged trysts between the two and after Scott's banishment from the Land home. The State responded immediately on May 9th, (CP-79), and this Motion was denied. The State then filed its Witness List, (CP-84), also on May 9, 2008, with Tanner filing his Witness List on May 13, 2008. (CP-86). The case then went to trial.

The trial of Scott Tanner commenced on May 12, 2008 with Motion hearings and the case-in-chief commenced on May 13, 2008, lasting three (3) days. At trial, the State called six (6) witnesses, including expert witnesses Dr. Eric Lucas, the emergency physician who performed the physical examination of AL, and Sara Caruthers, the forensic examiner and counselor of the Department of Human Services who handled AL's case. Scott Tanner called three (3) witnesses, including himself, and after all appropriate motions were made and the Jury instructed, the Jury returned a Verdict. (CP-107) of Guilty of Sexual Battery, with the sentencing deferred. (CP-112).

The Sentencing Hearing in this case was held On July 28, 2008, with Scott Tanner calling his mother, Ruby Tanner as his only witness. Numerous medical and

peer reviewed concerning his dwarfism were also introduced. At the conclusion of the hearing the trial court sentenced Tanner to a twenty (20) year term, with fourteen (14) years to serve and six (6) years probation. The court also assessed a fine of \$2,500.00 and court costs together with the requirement of Tanner to register as a sexual offender. (CP-118).

Scott Tanner then files his Motion for New Trial, (CP-123), on August 19, 2008, alleging three (3) errors for the trial court's review, his Motion being denied, (CP-125), by the trial court without comment on September 5, 2008. (CP-125) From these adverse decisions, Scott Tanner timely perfected his appeal to this Court. (CP-126, 128 and 132)

Scott Tanner has been incarcerated from July 28, 2008 to the present date.

2. Factual history of the case.

At the time of the alleged crime in late April, 2004, Scott Tanner was a twenty-nine (29) year old young man, who had been affected with achondroplastic dwarfism since birth. Also at this time, Scott was considered a god friend by the Land family who lived in the same neighborhood near Vancleve, and for a period of over four (4) years had lived in the Land household. Scott, in addition to his work, would at times baby sit the Land children, including AL, and take them to school and sport affairs when their parents could not. In short, excepting his extremely small size, 4'4", 89 lbs at the time of trial, and minor sight and hearing defects, Scott Tanner was a fairly normal person.

This changed when AL made her allegations against Scott to her parents at the end of April, 2004. However, the record in the case shows that the initial report of this

alleged crime did not come from the Lands, but from a third-party on May 10, 2004, to Tamara Mimms, a member of the Jackson County Sheriff's criminal investigation unit. (T-58) Officer Mimms then referred the case to the Department of Human Services who did the initial workup on the case, Mimms become more involved during the interviewing and testing process and the field examination. Once complete and probable cause being determined by the Officer, Scott Tanner was then arrested and charged with the sexual battery of AL. After the full prosecution of the case, Scott Tanner was convicted of sexual battery on May 15, 2008, and sentenced on July 28, 2008 for his crime.

Scott Tanner now appeals these suspect determinations.

SUMMARY OF THE ARGUMENT

The argument in this case is very direct, the charges against Scoot Tanner were basically manufactured by the Land family and their eldest daughter, AL, to cover what may have been a sexual indiscretion by AL with another party. It is instructive that the State for all its witnesses, did not establish anyone with personal, scientific knowledge of the alleged penetration of AL. Just the statements of AL.

This, standing by itself, is just not enough. Also, the “tender years” exception was not available to justify the amount of hearsay in this trial. Finally, AL’s parents, TL and IL, for all their scripting over four years, at trial had an extremely difficult time of keeping dates, actions and people straight. No amount of rehabilitation on the part of the State could cure this.

Speculation, possible opportunity and far reaching assumptions do not equal proof beyond a reasonable doubt. The Verdict and Sentence in Scott Tanner’s case require reversal.

ARGUMENT AND CITATION OF AUTHORITIES

1. Whether the substitution of the dates of the alleged crime by the State in the Indictment was prejudicial to the Defendant.

This issue is fairly direct. During the presentation of the State's case-in-chief, there was both confusion and inexactitude in the various dates of the alleged trysts between Scott Tanner and AL. AL was fairly consistent in stating that her alleged assaults by Scott began on March 21, 2004 and ended in late April. (T-115) Her parents were only sure of April 29, 2004, the "discovery date". In Dr. Eric Lucas' testimony, he speculated that the last occurrence could have been in early May, 2004. It seemed as if Scott Tanner was faced with a moving target.

In an apparent compromise, at the close of its case-in-chief, it settled on the time period of April 28 to 30, 2004. As will be shown below, there are extreme contradictions to this time frame raised in Scott's defense. The point here is that both the uncertainty as to time, and the exposure of Scott to alleged, uncharged crimes, was distinctly prejudicial to his defense.

STANDARD OF REVIEW

To anticipate the State's argument on this issue, the permitted amendment was one of form, not substance. *Brown v. State*, 934 So.2d 1039 (Miss.App. 2006). It has also been generally held that even if an indictment is amended as to dates or time of an occurrence, as long as the defendant is fully and fairly advised of the charges against him. *Frei v. State*, 934 So.2d 318 (Miss.App. 2006) Considering the general rule, one could conclude the State's amendment was proper. But in Scott Tanner's case, there are some distinguishing factors that rebut this presumption.

LEGAL PRINCIPLES

It is to be remembered here that the State made its motion to amend after the full presentation of its case-in-chief. (T-155) This is after four (4) State witnesses had testified to alleged assaults occurring over a five week period. Thus the Jury was exposed to other, uncharged acts against Scott that would be nothing less than prejudicial. *Hoops v. State*, 681 So.2d 521 (Miss. 1996); see also *Sumrall v. State*, 257 So.2d 853, appeal after remand, 272 So.2d 917 (Miss. 1972)

Another factor that weighs in on this issue is was the defendant aware of the State's intention prior to the amendment, or its possibility, *Forkner v. State*, 902 So.2d 615 (Miss.App. 2004), to allow preparation for his defense. As this was Scott Tanner's first collision with the Mississippi criminal justice system, the usual habitual offender justifications for the State's late amendment in his case do not apply.

What is critical to Scott Tanner on this point is the prejudice this last minute amendment to substance caused to his defense. He was just before submitting his case-in-chief, and the landscape was changed. Though perhaps certain defenses were still available to him, when one looks at the standards of *Spears v. State*, 942 So.2d 772 (Miss. 2006), one element sticks out. It is the question whether the defense under the amendment would be available as it was contemplated under the original indictment? The answer Scott would give is no, as his defense strategy was truncated by the State's amendment. When the revised charge went to the Jury in his case, he was defending an alleged specific crime, and several inchoate and uncharged crimes at the same time. This is reversible.

2. Whether the trial court erred in overruling the Defendant's Motion to Suppress the previously recorded telephone conversations between the Defendant and the alleged victim.

The audio tapes at issue in this question underscore a fundamental theory of the defense of Scott Tanner: the case of AL was a "manufactured" case by her parents to get rid of Scott. This can only explain to delay of the reporting of the allegations, and then, through a surrogate. (T-58) When Scott originally called AL after he was asked to leave the Land home to find out "why", the tapes went on the phones. At the hearing on the suppression motion, the State argued: (1) the tapes were made by a private citizen and not law enforcement, thus admissible; and, (2) Scott Tanner, at the time of the tapings was not in custody, or accused of a crime. (T-8 and 9) In fact, the alleged crime had not been reported. To add insult to injury, when finally submitted to the Jury, only a redacted version of the tapes was submitted. (T-82) What "sanitation" of these tapes that occurred will never be known. The Lands had their case ready to go.

STANDARD OF REVIEW

The standard of review of this issue is well-established and well-taken: The admissibility of evidence rests within the trial court's discretion. *Bell v. State*, 963 So.2d 1124 (Miss. 2007); see also *Burrows v. State*, 961 So.2d 701 (Miss. 2007). However, this discretion should be tempered by the question, is the evidence as presented so structured to secure a conviction without full disclosure of the facts and circumstances of its existence to the court and the defendant. *United States v. Vaccaro*, 115 F.3d 1211 (5th Cir., Miss. 1997).

LEGAL PRINCIPLES

The audio tapes we are dealing with here could easily be classified as non-tangible evidence that can be suppressed if found suspect. *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967) In the case of this “manufactured” evidence, Scott Tanner submits it was so suggestive, that it should have been suppressed pretrial, and certainly after objection at trial. (T-84) *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967) In denying Scott’s Motion to Suppress, error occurred.

3. Whether the Verdict of the Jury is contrary to the evidence adduced at trial and the law of this State.

There are two overriding issues in this case that speak to this question. First, AL’s case is not one of the “tender years” exception to hearsay. The Court found this was not the case with AL. (T-145 to 149) Quite frankly, excepting only the obvious mistakes in dates, that led to a Motion for Mistrial by the Defendant, (T-135 to 137), which was denied, the State in its examinations of the Land family, spent an untowed amount of time, rehabilitating the scripted times and dates of their stories.

Secondly, there is the impossibility factor on the part of Scott Tanner. There is no question that AL’s mother, IL took Scott to the emergency room at Ocean Springs Hospital, admitting him just before 10:00 am on April 27, 2004, for a severe onset of kidney stones that had been building up to an acute nature for two or three days previous to Scott’s admission. (Def.Ex – 2) At the hospital, IL was met by Scott’s mother, Ruby Tanner and his sister, Carla Waltman. After being referred to Dr. Charles Holeman, Scott’s regular urologist for April 28th, Mrs. Tanner and Scott returned to the Tanner

fusion could not effectively rebut his defense.

LEGAL PRINCIPLES

Other than the fact there was alleged sexual penetration of AL, though not conclusively submitted by Dr. Eric Lucas, (T-101), the State's case was largely built upon two suspect areas of evidence: (1) the questioned and redacted telephone conversations between Scott and AL, and, (2) largely non-testimonial conversations between AL and her family and the therapist. The State relied upon the justification that Scott Tanner, though accused, had not been charged or arrested, and most of this was done by non-governmental individuals. Yet even this justification does not pass the muster of *Bishop v. State*, 982 So.2d 371 (Miss. 2008)

Over and above the impossibility factor addressed above, there was no showing by the State or its witnesses of any nature of predisposition on the part of Scott to assault his friend AL. *West v. State*, 437 So.2d 1212 (Miss. 1983); Accord: *Pruitt v. State*, 528 So.2d 828 (Miss. 1988) Other than a fantasy in the minds of the Land family, there was no direct, scientific proof submitted as to Scott's culpability.

This demonstration of bias was also supported by the denial of Scott Tanner's requested Jury Instruction D-5, (CP-104), or the expanded presumption of innocence instruction, denied for the reason it was allegedly covered in the Court's General Instruction C-1, (CP-90). Though elements were covered in C-1, Tanner submits in a case as close as this one, the Jury had a right to see the more specific outline of the presumption of innocence. *Edwards v. State*, 755 So.2d 443 (Miss.App. 1999)

The result in this case can only be described as a verdict based upon conjecture and speculation in spite of uncontradicted evidence to the contrary. Being guided only by these elements, an incorrect Verdict was reached. *Ross v. State*, 954 So.2d 968 (Miss. 2007) The Verdict requires reversal.

CONCLUSION


For the reasons, facts and authorities as set out in the argument above, Scott Tanner submits he has presented abundant grounds for this Court's reversal and rendering of the Verdict and Sentence of the Circuit Court of Jackson County, Mississippi. In the alternative, Scott Tanner requests this Court's reversal and remand of said Sentence and Verdict.

Respectfully submitted this, the 1st day of February, 2009.

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CERTIFICATE OF SERVICE

I, GEORGE S. SHADDOCK, Attorney of Record for the Appellant, Scott M. Tanner, do hereby certify that I have this day filed the original and three (3) true and correct copies of the above and foregoing Brief of Appellant with the Honorable Betty W. Sephton, Clerk of the Supreme Court and Court of Appeals of the State of Mississippi at Jackson, Mississippi.


I further certify that I have delivered a true and correct copy thereof to the following listed persons:

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CERTIFIED this, the 1st of February, 2009.


GEORGE S. SHADDOCK