

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2008-KA-01573-COA

LEANDER SMITH  
a/k/a Lee Andrew Smith  
a/k/a Tiger

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**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 this court may evaluate possible disqualifications or recusal.

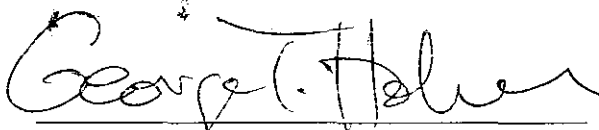
1. State of Mississippi
2. Leander Smith

THIS 11th day of May, 2009.

Respectfully submitted,

LEANDER SMITH

By:

A handwritten signature in cursive script, appearing to read "George T. Holmes", written over a horizontal line.

George T. Holmes,  
Mississippi Office of Indigent Appeals

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## **STATEMENT OF THE ISSUES**

**ISSUE NO. 1:      WHETHER THE TRIAL COURT ERRED BY ALLOWING  
TESTIMONY IN VIOLATION OF URCCCP 9.04?**

## **STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Quitman County, Mississippi, where Leander Smith was convicted of business burglary and sentenced to seven (7) years incarceration as an habitual offender under MCA §99-19-81 (1972). A jury trial was conducted September 2-4, 2008, with Honorable Kenneth L. Thomas, Circuit Judge, presiding. Smith is presently incarcerated with the Mississippi Department of Corrections.

## **FACTS**

The Family Dollar Store in Marks, Mississippi, was burglarized January 24, 2008, between 1:30 and 1:45 a. m. with entry through a broken window. [T. 69-74, 106]. Two women who lived across the street from the store heard knocking, saw someone around the shopping baskets outside the store, and then later saw someone moving around inside the store, at which time they called police. [T. 21-24, 26-27, 29-30, 33, 42-44, 49-50, 58]. Both women said the person outside and inside the store had on dark clothing, described as overalls. *Id.*

Police arrived in a few minutes and the women pointed to a man crossing the street whom they said was the burglar. [T. 32, 96, 118, 132 ]. Police arrested Leander Smith. [T. 97, 99-100].

Smith was reportedly wearing dark coveralls which had broken pieces of glass on them. [T. 51, 57, 103, 112, 134]. Smith was drunk. [T. 104, 136]. Smith had two “doo-rags” in his pocket which the Family Dollar Store manager said were products missing from the store, but which he could not say whether they had been sold or stolen. [T. 73-74, 76, 80-81, 99].

The two women, who knew Leander Smith, “couldn’t tell” if it was Leander in the Family Dollar Store or not; but, it could have been. [T. 31, 37, 40]. One of the women said she never looked at the face of the man arrested and could not say that the person who was in the store was the same person that the police arrested. [T. 61, 63].

Leander Smith, denied involvement in the burglary and said the police put the glass on his coveralls after they arrested him [T. 147, 153, 157]. Smith testified he bought the doo-rags from a particular employee of the Family Dollar Store the night before. [T. 163-64]. The store employee testified in rebuttal that she did not sell Smith anything the evening before the burglary. [T. 169-71, 173].

## **SUMMARY OF THE ARGUMENT**

Smith was irreparably prejudiced by testimony admitted in violation of the rules of discovery.

## **ARGUMENT**

### **ISSUE NO. 1:      WHETHER THE TRIAL COURT ERRED BY ALLOWING TESTIMONY IN VIOLATION OF URCCCP 9.04?**

After the trial had commenced and two witnesses testified, it was disclosed to the trial court that there was a surveillance video which had not been disclosed to the defense. [T. 68-69]. The surveillance recording could not be readily duplicated. *Id.* The prosecutor assured the court there would be no testimony about the recording. *Id.* The parties stipulated that no reference would be made to the tape evidence during the trial. *Id.*

After Leander Smith testified that he had purchased items from a particular employee at the Family Dollar Store, the state called that employee in rebuttal. [T. 168]. During cross examination, the employee stated that she did not sell Smith anything during the time period in question, and that she knew for certain that Leander Smith broke into the store. [T. 174].

When asked how she knew, she said she saw it on a surveillance video tape. *Id.* This was a reference to the video which was stipulated previously to be inadmissible. The

defendant moved for mistrial, which was denied because the court ruled the state was just as surprised by the testimony as the defense. [T. 176-77].

It is the appellant's position that under URCCCP 9.04, non-disclosure of the surveillance evidence required its exclusion, or a continuance, and since the parties had stipulated that there would be no testimony about the video, the trial court should have granted a mistrial. <sup>1</sup> See *Box v. State*, 437 So.2d 19 (Miss.1983), and *Scott v. State*, 831 So.2d 576, (Miss. Ct. App. 2002).

In *Williams v. State*, 991 So.2d 593, 600-03 [¶22-23] (Miss. 2008), a similar situation developed as that confronting the Court now. On the second day of trial in

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Pertinent parts of Rule 9.04:

(A.) Subject to the exceptions of subsection "B," below, the prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution: ... (5) Any physical evidence and photographs relevant to the case or which may be offered in evidence; ... (I.) If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.



*Williams*, the trial court admitted an audiotape of a 911 telephone call not provided to the defense in discovery which the prosecution stated had just been given to them the day before. *Id.* The trial court granted Williams 40 minutes to review the audio tape and consult with witnesses. *Id.*

The *Williams* court pointed out that Rule 9.04 “is designed to avoid ‘ambush’ or unfair surprise to either party at trial.” [Citing *McCaine v. State*, 591 So.2d 833, 836 (Miss.1991)] . Ultimately the *Williams* court ruled that, since the 911 tape duplicated other evidence and since *Box v. State, supra* and Rule 9.04 were followed, there was “no unfair surprise”. *Id.*

In Leander Smith’s case, the *Box* procedure was not followed and Smith was totally disadvantaged by the witnesses’ unauthorized testimony. Smith’s counsel had never reviewed the video as in *Williams*, and was ultimately not able to effectively cross-examine the witness about a recording only she and employees of Family Dollar Store had seen.

The trial court should have granted a mistrial as required by the rule. Not only was the tape not disclosed, introduction of its contents was not properly authenticated either under Miss. R. Evid. 901.

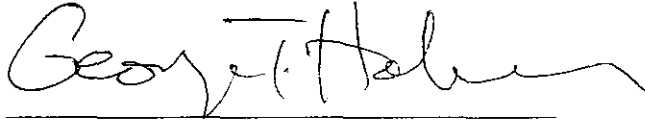
In *Box v. State*, 437 So.2d 19, 21 (Miss.1983), the Supreme Court reversed and remanded because the trial court allowed evidence after the state failed to disclose a material witness until the evening before trial. Smith respectfully suggests this case

requires the same result.

**CONCLUSION**

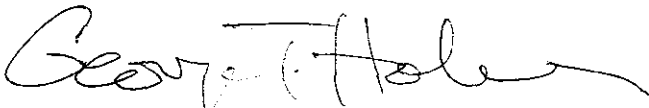
Leander Smith is entitled to have his conviction reversed with remand for a new trial.

Respectfully submitted,  
LEANDER SMITH

By:   
George T. Holmes,  
Mississippi Office of Indigent Appeals

**CERTIFICATE**

I, George T. Holmes, do hereby certify that I have this the 11th day of May, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Kenneth L. Thomas, Circuit Judge, P. O. Box 548 Cleveland, MS 38732, and to Hon. Leslie Flint, Asst. Dist. Atty. , P. O. Box 848, Cleveland MS 38732, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

  
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